

Memorandum 2009-25

**Marketable Record Title: Notice of Option
(Staff Draft Tentative Recommendation)**

Civil Code Sections 880.020 through 886.050, inclusive, were enacted to implement a Commission recommendation on *Marketable Title of Real Property*, 16 Cal. L. Revision Comm'n Reports 401 (1982). See 1982 Cal. Stat. ch 1268.

A general purpose of those provisions is to enhance the marketability of real property by making the status of recorded title determinable, to the extent practicable, from title records alone. See Section 880.020(b). The ability to establish clear title, solely on the basis of information in the title records, facilitates the issuance of title insurance, which is essential to marketability.

The Commission has learned of an apparent gap in the coverage of Section 884.010. That section provides for the expiration, by operation of law, of obsolete record notice of an option to purchase real property:

884.010. If a recorded instrument creates or gives constructive notice of an option to purchase real property, the option expires of record if no conveyance, contract, or other instrument that gives notice of exercise or extends the option is recorded within the following times:

- (a) Six months after the option expires according to its terms.
- (b) If the option provides no expiration date, six months after the date the instrument that creates or gives constructive notice of the option is recorded.

Without such a provision, record notice of an option to purchase real property could remain as a cloud on title long after the ability to exercise the option has lapsed.

The problem with Section 884.010 is that its operation depends on information that may not be included in the recorded instrument giving notice of an option — the expiration date of the option.

If expiration date information is not included in the record notice, a title researcher would not have the information necessary to determine whether the

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notice of the option has expired pursuant to Section 884.010. To make that determination, the researcher would need to look beyond the title records to determine the expiration date of the option. That would defeat the purpose of Section 884.010.

Memorandum 2009-21 presented a possible solution to that problem. Section 884.010 could be amended so that it operates entirely on the basis of information that is ascertainable from the recorded instrument:

Civ. Code § 884.010 (amended). Notice of option to purchase real property

884.010. If a recorded instrument creates or gives constructive notice of an option to purchase real property, the option expires of record if no conveyance, contract, or other instrument that gives notice of exercise or extends the option is recorded within the following times:

(a) ~~Six~~ If the expiration date of the option is ascertainable from the recorded instrument, six months after the option expires according to its terms that expiration date.

(b) If the expiration date of the option is not ascertainable from the recorded instrument or the recorded instrument indicates that the option provides no expiration date, six months after the date the instrument that creates or gives constructive notice of the option is recorded.

The Commission instructed the staff to prepare a draft tentative recommendation implementing that approach, for review by the Commission. A staff draft is attached.

In addition, the Commission requested further discussion of the time periods provided in Section 884.010. That issue is discussed below.

EXPIRATION DATES

Under existing law, if an option has an expiration date, record notice of the option expires six months after that date. If an option has no expiration date, record notice of the option would expire six months after the notice is recorded. The proposed law would add another prong to the rule: If the expiration date of an option is not ascertainable from the record notice, the notice expires six months after recordation.

The three situations described above present different timing considerations, as discussed below.

Option with Expiration Date

If an option has an express expiration date, it makes sense that record notice of the option should remain effective at least as long as the option remains enforceable. Existing law goes one step further, providing an additional six-month grace period, after expiration of the option. See Section 884.010(a).

Prior to enactment of Section 884.010(a), the grace period was one year after expiration of the option. The Commission recommended shortening the period to six months:

The apparent function of the one-year cloud after expiration of an option is to allow the option holder sufficient time to record an exercise or extension of the option that occurs at the end of the term of the option. For this purpose, one year is excessive; six months should be sufficient.

Marketable Title of Real Property, 16 Cal. L. Revision Comm'n Reports 401, 412 (1982) (footnotes omitted). In other words, the grace period should provide a little extra time for an option holder who waits until the last minute to exercise or extend an option.

The staff sees no reason to question that policy and agrees that six months should be sufficient time for the purpose.

“Open-Ended” Option

If an option has no expiration date, it can still become unenforceable through the passage of time. Such an option “must be exercised within a reasonable time, determined by the circumstances.” 1 B. Witkin, *Contracts* § 175, at 210 (10th ed. 2005).

Application of that common law rule would probably require judicial proceedings to determine what is reasonable under the circumstances of a specific case.

To provide a clear and predictable statutory rule, Section 884.010 provides that record notice of an open-ended option expires six months after the notice is recorded. In proposing this approach, the Commission explained:

This will avoid the need for a court determination of the date of expiration and will enable the option holder to be aware of the exact time when notice of exercise or extension of the option must be recorded. The provision will enhance the marketability of property if notice of exercise or extension is not recorded within the statutory period by removing the cloud on title simply by the passage of time without need for resort to judicial proceedings.

Marketable Title of Real Property, 16 Cal. L. Revision Comm'n Reports 401, 412-13 (1982).

That general approach is reasonable. It provides for the clearing of obsolete record notice of an option, based solely on the passage of time and information that is in the title records.

If an option holder believes that the option will remain enforceable for more than six months, the option holder can record a new notice, before the expiration of the first notice. Although that imposes an extra procedural step on the option holder, it does provide a straightforward way to extend the effect of record notice beyond six months, if necessary.

Is six months an appropriate period for this rule? Probably, if the option holder understands the law. On first recording notice of an open-ended option, the option-holder should realize the need to record a new notice within six months, if it is necessary to extend the effect of the notice. Six months should be enough time to prepare for that step.

That said, if the option is exercised or extended at or near the end of the six-month period, there might not be enough time to record notice of the exercise or extension before the original notice expires.

It is also possible that the six-month period is procedurally inefficient. If an option remains enforceable for more than six months, the option holder will need to record new notices, every six months, to extend the effect of record notice. That adds costs and increases the risk of mistake.

Ideally, the effective period for record notice of an open-ended option would be a little longer than the typical effective period of an open-ended option. That would minimize the need to extend notice by recording a new instrument periodically.

The staff is researching the matter, in an attempt to determine whether there is any commonly accepted understanding of what constitutes a reasonable time to enforce an open-ended option to purchase real property. The staff will report the results of its research separately.

Option without Ascertainable Expiration Date

The proposed law would address a third scenario, where the expiration date of the option is not ascertainable from the recorded instrument. *The option might have an expiration date, or it might not.* A title researcher would have no way of knowing.

This scenario raises the same issues discussed above in connection with an open-ended option. The time provided to record notice of exercise or extension of the option might be too short in some cases, and a longer effective period might be more efficient procedurally.

In addition, this scenario presents some risk of confusion and surprise. Suppose that an option has a one-year expiration date. The option-holder records an instrument giving notice of the option and inadvertently omits information about the expiration date. The option-holder might expect, incorrectly, that the record notice would be effective as long as the option remains effective. Instead, it would expire after six months.

It isn't always appropriate to craft the law so as to soften the consequences of error. However, if it seems likely that misunderstanding and error will be common, it might make sense to provide a more relaxed rule.

Discussion

The proposed rule for expiration of record notice of an option with an ascertainable expiration date seems reasonable. Six months after expiration of the option should provide ample time for an option holder who acts at the last minute to record notice of the exercise or extension of the option.

The six-month effective period for record notice of an option that has no ascertainable expiration date might be too short in some cases, for the following reasons:

- (1) It might not provide enough time to record new notice when an option is exercised or extended near the end of the six-month period.
- (2) It might be procedurally inefficient, if most open-ended options remain effective for more than six months (because of the need to record a new instrument every six months).
- (3) It might present a trap for those who inadvertently omit expiration date information from the recorded instrument, causing unexpected expiration of the notice, well before the option itself expires.

On the other hand, the purpose of Section 884.010 is to enhance marketability by clearing obsolete options from the record. If the period of record notice is lengthened, then the period during which there is a cloud on title will also be increased. The issue presents a trade-off between the interests of the property

owner (which are served by a shorter effective period) and the option holder (which are served by a longer effective period).

It is also worth noting that the six-month period for record notice of an open-ended option has been the rule since Section 884.010 was enacted in 1982, without causing any obvious problems. Six months is also the period specified in an equivalent provision of the Uniform Simplification of Land Transfers Act, which provides for expiration of record notice of an option to purchase real property six months after the “recorded expiration date (*or, if there is no recorded expiration date, the date of recording*)....” Unif. Simplification of Land Transfers Act § 3-206 (1976) (emphasis added).

Unless staff research shows that open-ended options typically remain effective for longer than six months, the staff is inclined to continue the existing six-month rule for record notice of an open-ended options, and extend the same rule where the expiration date of an option cannot be ascertained from the recorded instrument.

Another possibility would be to postpone a decision at this point, raise the issue in the tentative recommendation, and invite public comment. That could provide new information or arguments that might be helpful in deciding the issue. That is the approach taken in the attached staff draft of a tentative recommendation. See p. 3.

Respectfully submitted,

Brian Hebert
Executive Secretary

CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT

TENTATIVE RECOMMENDATION

Marketable Record Title: Notice of Option

June 2009

The purpose of this tentative recommendation is to solicit public comment on the Commission's tentative conclusions. A comment submitted to the Commission will be part of the public record. The Commission will consider the comment at a public meeting when the Commission determines what, if any, recommendation it will make to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made to it.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN September 1, 2009.

The Commission will often substantially revise a proposal in response to comment it receives. Thus, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF TENTATIVE RECOMMENDATION

Civil Code Section 884.010 enhances marketability of title to real property by providing for the expiration of record notice of an obsolete option to purchase real property.

Effective operation of that provision requires that the status of record notice of an option be determinable solely by reference to title records.

The Law Revision Commission has learned that, in some circumstances, the application of Section 884.010 may require information that is not included in the title records. That undermines the purpose of Section 884.010.

The Commission recommends that Section 884.010 be revised so that, in all cases, the status of record notice of an option can be determined by reference to title records alone.

This recommendation was prepared pursuant to Resolution Chapter 100 of the Statutes of 2007.

MARKETABLE RECORD TITLE:
NOTICE OF OPTION

1 The Marketable Record Title statute¹ facilitates real property title transactions in
2 two general ways: (1) It provides for the expiration of obsolete interests of record.²
3 (2) It enables a person to rely on title records in determining the status of title.³

4 Section 884.010 is the provision of the Marketable Record Title statute that
5 governs record notice of an option to purchase real property. It provides that such
6 notice expires, by operation of law, six months after the option itself expires
7 pursuant to its terms, or if the option has no fixed expiration date, six months after
8 the notice of the option is recorded.⁴ Once record notice of an obsolete option to
9 purchase real property has expired under Section 884.010, it no longer presents a
10 cloud on title.

11 However, there appears to be a gap in the coverage of Section 884.010. In some
12 circumstances, off-record information may be required to determine whether
13 record notice of an option has expired. If that information is not readily available,
14 record notice of an option may remain as a cloud on title long after the option has
15 become obsolete.

16 The Commission recommends that Section 884.010 be revised so that its
17 operation will depend entirely on information that is ascertainable from the record.
18 In addition, Section 880.020 should be revised to correct a typographical error.

19 OPERATION OF EXISTING LAW

20 Existing law provides for the expiration of record notice of an option to
21 purchase real property, if notice of the exercise or extension of the option is not
22 recorded within a specified period.

23 The period varies, depending on whether the option has an expiration date. If so,
24 the period is six months after expiration of the option. If the option has no
25 expiration date, the period is six months after recordation of notice of the option.⁵

1. Civ. Code §§ 880.020-886.050. The statute was enacted on the recommendation of the Law Revision Commission. See *Marketable Title of Real Property*, 16 Cal. L. Revision Comm'n Reports 401 (1982); 1982 Cal. Stat. ch 1268.

2. See, e.g., Civ. Code § 882.020 (expiration of lien creating security interest of record).

3. See Civ. Code § 880.020 (legislative declaration and purpose).

4. Section 884.010 only affects the legal effect of the recorded notice. See Civ. Code § 884.020 (“Upon the expiration of record of an option to purchase real property, the recorded instrument that creates or gives constructive notice of the option ceases to be notice to any person or to put any person on inquiry with respect to the exercise or existence of the option or of any contract, conveyance, or other writing that may have been executed pursuant to the option.”).

5. Gov't Code § 884.010.

1 Those rules enhance marketability of title by clearing obsolete record notice of
2 an option, by operation of law.

3 In most cases, the status of record notice of an option can be readily determined
4 from the information provided in the notice itself, without any need to consult off-
5 record information. However, there are circumstances in which the status of record
6 notice cannot be determined from the title records alone.

7 That is because the status of record notice of an option depends on the expiration
8 date of the option (if any). That information may not be included in the record, in
9 which case off-record information would be required to determine the status of the
10 record notice. That can make it difficult or impossible for a title researcher to
11 determine whether the record notice is effective, creating a cloud on title that may
12 persist long after the underlying option has become obsolete and may require
13 judicial proceedings to clear.

14 RECOMMENDATION

15 The Commission recommends that Section 884.010 be revised so that it operates
16 solely on the basis of information that is ascertainable from the recorded
17 instrument creating notice of the option.

18 Unless a notice of exercise or extension of the option is recorded first, record
19 notice of an option would expire six months after either of the following events:

- 20 (1) The expiration date of the option, if that date is ascertainable from the
21 recorded instrument.
- 22 (2) The date on which the instrument is recorded, if the expiration date of the
23 option cannot be ascertained from that instrument.

24 That revision would close the existing gap in the coverage of Section 884.010,
25 permitting a title researcher to determine the status of record notice of an option in
26 all cases, regardless of whether the expiration date of the option is included in the
27 recorded instrument.

28 That approach would be consistent with the approach taken in another provision
29 of the Marketable Record Title statute. Section 882.020 provides for expiration of
30 a lien creating a security interest, a specified period of time after the final maturity
31 date or the last date fixed for payment or performance of an obligation, if that date
32 is ascertainable from the record.

33 The proposed revision would also be consistent with the approach taken in the
34 Uniform Simplification of Land Transfers Act, which provides for expiration of
35 record notice of an option to purchase real property six months after the “*recorded*
36 *expiration date* (or, if there is no *recorded* expiration date, the date of
37 *recording*)....”⁶

6. Unif. Simplification of Land Transfers Act § 3-206 (1976) (emphasis added).

1 By making it possible in all circumstances to determine the status of record
2 notice without having to refer to unrecorded information, the proposed revision
3 would further the Legislature’s goal that “[r]eal property title transactions should
4 be possible with economy and expediency.”⁷

5 REQUEST FOR PUBLIC COMMENT

6 Under existing law, record notice of an option that expires by its own terms
7 remains effective for six months after the expiration of the option. If the option
8 does not expire pursuant to its terms, the notice remains effective six months after
9 recordation of the notice. The proposed law would continue those rules, but would
10 also provide that record notice expires six months after recordation if the
11 expiration date of the underlying option cannot be ascertained from the recorded
12 notice.

13 The Commission invites public comment on whether six months is the
14 appropriate time period for each of those circumstances. The Commission also
15 invites comment on any other aspect of this tentative recommendation.

7. Civ. Code § 880.020(a)(4).

PROPOSED LEGISLATION

1 **Civ. Code § 880.020 (amended). Legislative declaration and purpose**

2 880.020. (a) The Legislature declares as public policy that:

3 (1) Real property is a basic resource of the people of the state and should be
4 made freely alienable and marketable to the extent practicable in order to enable
5 and encourage full use and development of the real property, including both
6 surface and subsurface interests.

7 (2) Interests in real property and defects in titles created at remote times,
8 whether or not of record, often constitute unreasonable restraints on alienation and
9 marketability of real property because the interests are no longer valid or have
10 been abandoned or have otherwise become obsolete.

11 (3) Such interests and defects produce litigation to clear and quiet titles, cause
12 delays in real property title transactions, and hinder marketability of real property.

13 (4) Real property title transactions should be possible with economy and
14 expediency. The status and security of recorded real property titles should be
15 determinable to the extent practicable from an examination of recent records only.

16 (b) It is the purpose of the Legislature in enacting this title to simplify and
17 facilitate real property title transactions in ~~furtherance~~ furtherance of public policy
18 by enabling persons to rely on record title to the extent provided in this title, with
19 respect to the property interests specified in this title, subject only to the
20 limitations expressly provided in this title and notwithstanding any provision or
21 implication to the contrary in any other statute or in the common law. This title
22 shall be liberally construed to effect the legislative purpose.

23 **Comment.** Subdivision (b) of Section 880.020 is amended to correct a typographical error.

24 **Civ. Code § 884.010 (amended). Notice of option to purchase real property**

25 884.010. If a recorded instrument creates or gives constructive notice of an
26 option to purchase real property, the option expires of record if no conveyance,
27 contract, or other instrument that gives notice of exercise or extends the option is
28 recorded within the following times:

29 (a) ~~Six~~ If the expiration date of the option is ascertainable from the recorded
30 instrument, six months after the option expires according to its terms that
31 expiration date.

32 (b) If the expiration date of the option is not ascertainable from the recorded
33 instrument or the recorded instrument indicates that the option provides no
34 expiration date, six months after the date the instrument that creates or gives
35 constructive notice of the option is recorded.

36 **Comment.** Section 884.010 is amended to facilitate determination of the status of record notice
37 of an option to purchase real property. Under former law, if the expiration date of an option was
38 not ascertainable from the recorded instrument giving notice of the option, the status of the record
39 notice could not be determined without consulting off-record information.