



Keeping Current Property

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Keeping Current—Property offers a look at selected recent cases, literature, and legislation. The editors of *Probate & Property* welcome suggestions and contributions from readers.

CASES

BROKERS: Broker may enforce arbitration provision in contract of sale, signed only by seller and buyer.

Buyers of a gas station sued the seller and the real estate broker, alleging that they failed to disclose that the tenant who operated the gas station was insolvent and on the verge of bankruptcy at the time of the sale. The broker had represented both parties. The contract of sale contained an arbitration provision, initialed by seller and buyer, stating that “Buyer, Seller and Agent” agreed to binding arbitration. The broker neither signed the contract nor initialed the arbitration clause. The trial court ordered arbitration of the buyers’ claim against the seller, but denied arbitration for their claim against the broker. The appellate court reversed, holding the broker, as both parties’ agent, was entitled to the benefit of the arbitration agreement. A California arbitration statute requires a broker to initial an arbitration provision for it to be binding, Cal. Civ. Proc. Code § 1298, but the court ruled that the federal Arbitration Act preempts this requirement. *Westra v. Marcus & Millichap Real Estate Investment Brokerage Co., Inc.*, 28 Cal. Rptr. 3d 752 (Cal. Ct. App. 2005).

COVENANTS: Racial restriction is severable from minimum lot-size restriction. Between 1937 and 1941, a subdivider conveyed 13 lots with a covenant prohibiting ownership or occupation by nonwhite persons and prohibiting buildings other than a single-family house on a minimum lot size of one-half acre. In 2002, a new purchaser of a lot successfully challenged the covenant, with the trial court ruling that the racial restriction tainted the entire covenant and that public policy, reflected in public land use regulations, favored higher densi-

ty. Reversing, the supreme court upheld the density restriction, ruling it was severable from the illegal racial restriction, because it was “logically distinct” and “textually separate.” Although the court conceded that the city’s comprehensive plan and zoning ordinance sought greater urban density, that norm did not invalidate the covenant’s minimum lot-size. *Viking Properties, Inc. v. Holm*, 118 P.3d 322 (Wash. 2005).

DEEDS: Quitclaim deed from guardian under Uniform Transfers to Minors Act puts subsequent purchasers on notice of minor’s rights. A one-year old received \$700,000 in a wrongful death action brought by her father’s estate. A Kentucky trial court appointed the child’s mother guardian of the estate, prohibiting her from invading or using the principal unless approved by court order. Six years later the family moved to Virginia, where the mother used estate assets to buy real estate, taking title as “Custodian for [the child] under the Kentucky Uniform Transfers to Minors Act.” Later she quitclaimed the property to herself without paying consideration, then granted two mortgages to obtain personal loans, and then contracted to sell it to outsiders. Meanwhile, the Kentucky court had removed the mother as guardian, appointing a substitute guardian who attacked the mortgages and contract. The substitute guardian prevailed on the ground that the quitclaim deed gave the lenders inquiry notice that the guardian’s transfer to herself might reflect self-dealing and breach of fiduciary duty. *Richardson v. AMRESKO Residential Mortgage Corp.*, 592 S.E.2d 65 (Va. 2004).

EASEMENTS: Owner of all-terrain vehicle park must not interfere with underground pipelines. All-terrain vehicles and underground pipelines do not necessarily get along. A landowner opened an all-terrain vehicle park. Part of the property was subject to five pipeline easements. The easement owners noticed erosion and rutting of the soil over the under-

ground pipelines, caused by ATV traffic. The pipelines carried various chemicals and were buried at a general depth of 40 to 60 inches below the surface. The ATV traffic had displaced about half of the dirt cover. The trial court issued a temporary injunction, ordering the landowner to prevent his customers' vehicles from entering the easement rights-of-way in a fashion that causes such erosion and rutting. Testimony indicated that continued traffic posed a significant risk of damage to the pipelines, which could lead to an explosion or other safety concerns. This result follows the general rule that the fee owner may not interfere with an easement holder's reasonable use and enjoyment of that easement. *Still v. Eastman Chemical Co.*, 170 S.W.3d 851 (Tex. App. 2005).

FORECLOSURE: Court imposes Rule 11 sanctions on law firm for mistakes in handling foreclosure. A law firm filed an action to foreclose a home mortgage, with the complaint giving the wrong address for the mortgagor. Attached to the complaint were copies of the note and mortgage, which displayed the correct address and the correct legal description. After service of process failed because of the incorrect address, the firm moved for service by publication, subsequently obtaining a default judgment. The mortgagee bought the property at the foreclosure sale and sought an eviction order, which was sent to the incorrect address. The residents living at that residence objected to the law firm about the eviction order. The firm realized the mistake it had made but pressed ahead, without informing the court, and evicted the mortgagor without prior notice. The mortgagor moved back in to her house the next day, and the firm went to court to seek to re-evict her. Finally, the firm conceded its error and moved to vacate the foreclosure judgment and void the sale. The court issued sanctions against the firm under Fed. R. Civ. P. 11 consisting of reimbursing the mortgagor's legal expenses and requiring that all attorneys in the firm attend or view a 16-hour course in civil procedure. The

firm attempted to excuse its mistakes by explaining that it had a high volume of cases (5,000 foreclosure cases per year), and multiple attorneys had worked on this foreclosure at various times, consistent with the firm's general policy. The court observed that the firm's failure "to have in place a mechanism whereby important information about the foreclosure proceedings was in the possession of the attorney handling the eviction is not mitigating, but rather an aspect of the improper conduct in this case." *U.S. Bank National Ass'n v. Sullivan-Moore*, 406 F.3d 465 (7th Cir. 2005).

LANDLORD-TENANT: Landlord's refusal to consent to tenant's assignment because of increased competition with landlord's business is not reasonable. A health-care provider leased space in a shopping center near a hospital campus. The lease restricted use of the premises "for outpatient surgical procedures and general medical and physician's offices, including related uses and for other purposes reasonably acceptable to Landlord" and allowed the tenant to assign the lease with the landlord's consent, providing that such consent "shall not be unreasonably withheld." Two years later the hospital bought the shopping center, subject to the leases, as a "strategic purchase" with future hospital expansion in mind. Shortly, the tenant closed and sought to assign the lease to an entity planning to open an occupational medicine clinic, which was to provide medical services to employees of corporate clients, rather than to the general public. The hospital, as new landlord, refused to approve the assignment because the assignee would be competing with the hospital. The district court held that the landlord acted reasonably, because the assignee's use would provide greater competition with the hospital than the original tenant's use. The court of appeals reversed, holding that the assignee's use was within the scope of the use clause's reference to "general medical and physician's offices, including related uses." It considered the landlord's refusal of con-

sent unreasonable for two reasons. First, increased competition with the landlord's business is "wholly personal" to the landlord and does not relate in any way to an objective evaluation of the proposed assignee as a tenant. Second, reasonableness must be evaluated based on the parties' expectations as of the inception of the lease, at which time the original landlord was not a competitor in providing medical services. This is a significant decision because very few cases deal with a landlord's denial of consent for anti-competitive purposes or a successor landlord, whose interest diverges from that of the original landlord. See *Freidman on Leases* § 7:3.4 (Patrick A. Randolph ed., 2004). *Tenet HealthSystem Surgical, L.L.C. v. Jefferson Parish Hospital Service District No. 1*, 426 F.3d 738 (5th Cir. 2005).

RECORDING ACTS: Wrongly indexed mortgage provides constructive notice, binding subsequent purchaser. Record title to a parcel of land was in the name of a trustee, with the deed to the trustee naming the benefi-

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ciary of the trust. The trustee mortgaged the property. The recorder's office properly recorded the mortgage, but it wrongly indexed the mortgage by entering the beneficiary's name as mortgagor, rather than the trustee's name. The trustee subsequently sold the property to a buyer, whose title search failed to reveal the mortgage. The trial court held that the buyer took free of the mortgage because the improperly indexed mortgage did not impart constructive notice. The supreme court reversed, interpreting Pennsylvania recording statutes as placing the risk of improper indexing on subsequent purchasers, not on the parties to the recorded instrument. This reflects the law in most states, although a growing minority of states require proper indexing of instruments before they impart constructive notice. *First Citizens National Bank v. Sherwood*, 879 A.2d 178 (Pa. 2005).

SALES CONTRACTS: Buyers can rely on broker's statement that property has no easements, despite "no representations" clause in contract. In a contract for the sale of a house for \$1,208,000, the buyers agreed "to accept property subject to . . . restrictive covenants and easements of record, provided they do not materially affect present use of said property." Added to the merger clause was a nonreliance provision that stated: "Both Buyer and Seller hereby acknowledge that they have not received or relied on any statements or representations by either Broker or their agents which are not expressly stipulated herein." The buyers' title searcher discovered that there was a permanent four-inch sewer easement across the property. The buyers refused to go forward, claiming that, before the contract, the sellers' broker assured them there were no easements on the property. The sellers sued for breach of contract, and the buyers counterclaimed for breach of contract, fraud, and negligent misrepresentation. The trial court granted judgment for sellers, ruling that buyers could not rely on the alleged oral statement, because the easement was a matter of public record and the nonreliance

clause. The Supreme Court reversed, holding it was a question of fact for the jury whether the buyers' reliance was reasonable in light of their ability to conduct an independent investigation by examining the public records. As to the nonreliance clause, the court held that it lacked specificity and therefore did not bar actions for negligent misrepresentation and fraud. The former ruling is sensible, but the latter blatantly disregards the parties' contract, as a dissenting justice noted. The nonreliance clause is written in the plainest English possible, and if the buyers could not understand it, they should have hired an attorney to represent them. For the price of the house they were buying, they should have been able to afford it. The decision represents a misguided attempt at paternalistic consumer protection. Presumably, the nonreliance clause would be sufficiently specific with the three words "including title defects" in the middle of the sentence. *Stack v. James*, 614 S.E.2d 636 (S.C. 2005).

SPECIFIC PERFORMANCE: Home seller's rapidly declining health justifies denial of specific performance to buyer. In March, a husband and wife contracted to sell their home, with closing scheduled for June 15. The day before closing, their attorney notified the buyers' attorney that they would not sell. The sellers' only defense was that the wife had a progressive neurological condition, which causes muscular dystrophy. In March, she was able to care for herself, and the couple planned to move to "their dream home in Virginia." In May her condition became much worse, causing her to become "profoundly disabled." Her physician opined that moving might "precipitate respiratory failure and hasten [her] demise." The court recognized that the buyers were "totally blameless" and "had their heart set on this house," but it denied specific performance, citing the general maxim that specific performance is discretionary and rests on equitable principles. It noted that the buyers had the right to sue for provable damages. Query whether the sellers acted in bad faith by waiting to notify the buyers of

their predicament until the day before closing. Should this change the outcome, or justify heightened damages? *Kilarjian v. Vastola*, 877 A.2d 372 (N.J. Super. Ch. Div. 2005).

WATER: Public has right to walk along all of the Great Lakes, regardless of private ownership of lakefront parcels, under public trust doctrine. Landowners of a tract of land fronting on Lake Huron asserted the right to prevent their neighbor from walking along their lakeshore. The landowners had title, as successors to the original patentee, to land below the ordinary high water mark, where the neighbor walked. The court held that all of the Great Lakes are subject to the public trust doctrine. The part of the shore subject to public trust is all land beneath the ordinary high water mark, defined as the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark. Traditional public trust theory protected rights of fishing, hunting, and navigation. Following the trend to expand public trust to embrace recreational uses, the court sanctioned walking. The ruling does not apply to all lakes. The court emphasized that the Great Lakes are generally considered legally the same as oceans and seas. *Glass v. Goeckel*, 703 N.W.2d 188 (Mich. 2005).

LITERATURE

Adverse Possession; Wild Lands. In his article, *The Uniform Registered State Land and Adverse Possession Reform Act, A Proposal for Reform of the United States Real Property Law*, 12 Buff. Env'tl. L.J. 1 (2004), Professor Todd Barnet displays a genuine disdain for adverse possession law as it has developed in the United States. More importantly, Prof. Barnet worries that adverse possession doctrine runs counter to environmental preservation policy. The author notes that millions of acres of privately held property remain "wild" or undeveloped, and he argues that an important goal of environmental law today is the preservation of much of this land. Unfortunately, using the adverse possession doctrine,

various individuals have “in effect, legally stolen ‘wild’ lands.” For example, courts have held that hikers and hunters have satisfied the elements of the adverse possession doctrine, including the requirement that the trespasser openly and notoriously use the affected property. The author argues that much of the problem lies with the title recordation systems used in the United States. Instead, the author suggests this “archaic” set of laws and processes should be replaced with a system modeled on Britain’s Uniform Registered State Land and Adverse Possession Reform Act. As the author notes, the United States has already witnessed an attempt to replace recordation systems, with the enactment of Torrens registration laws. This system ultimately failed. But, unlike the “one step” registration process that was central to the Torrens law, which provided a certificate of title immediately after a costly title search and title hearing, a certificate of title under the newer system would only be issued after the passage of a statutorily set period of years. (Barnet suggests five to 10 years.) The author details this process and suggests that adverse possession claims would be substantially reduced. Barnet argues that this two-step process is superior and less costly than the Torrens laws that preceded it. Whether this new system will gain traction is subject to doubt, given the inertia associated with something as ponderous as moving from one form of title assurance to another. This newer registration system is, however, apparently operating in England. It is worth watching the results of that experiment.

Eminent Domain; Justices Brandeis and Holmes. Amid the spate of law review articles discussing the most controversial and recent takings case from the Supreme Court, Evan B. Brandeis has written a lively historical article titled *Legal Theory and Property Jurisprudence of Oliver Wendell Holmes, Jr., and Louis D. Brandeis: An Analysis of Pennsylvania Coal Company v. Mahon*, 38 Creighton L. Rev. 1179 (2005). As the author notes, these two giants of American law “often came to similar conclusions” regarding difficult constitutional issues during their time together on the bench. In *Pennsylvania Coal*, the Supreme Court

was asked to determine the constitutionality of the Kohler Act, which “barred the mining of anthracite coal [under habitable structures] if it caused the land at the surface to subside and cave in.” A surface property owner sought to obtain an injunction under the Act against the coal company, and the coal company responded by asserting that the Act had taken its property without just compensation, as required by the Fifth Amendment to the Constitution. The Supreme Court agreed with the coal company (and the trial court) by denying the injunction. Justice Holmes wrote the majority opinion. Although Justice Holmes agreed that there is a place for the police power, he did not find its place in this particular scenario: the Kohler Act, he stated, was not precluding a public nuisance but was instead severely diminishing the value of one party’s property interest. Justice Brandeis dissented: not only did the Act prevent what seemed to him an obvious nuisance, but there was also no actual governmental invasion of company land. Nor, said Justice Brandeis, did the Act wipe out all of the company’s value in the land. Brandeis’s article describes the line of cases that emerged from *Pennsylvania Coal* and the debate between Justices Brandeis and Holmes that persisted in those opinions.

Eminent Domain; Penn Central. Gideon Kanner is professor emeritus of law at Loyola Law School, Los Angeles, an appellate advocate in the area of eminent domain and inverse condemnation with four decades of experience, and, from a reading of his article, a very knowledgeable and articulate curmudgeon. In Professor Kanner’s piece, *Making Laws and Sausages: A Quarter-Century Retrospective on Penn Central Transportation Co. v. City of New York*, 13 Wm. & Mary Bill Rts. J. 653 (2005), the author examines the “polestar” regulatory takings case of *Penn Central Transportation Co. v. City of New York* and asks “how the courts got so important a subject so wrong.” In *Penn Central*, under New York’s Landmarks Preservation Law, the owner of Grand Central Terminal in

Manhattan was denied the right to develop an office tower above the historic train station. The owner had presented two architectural plans to the Historic Preservation Commission, each of which was denied. The inability of the owner to develop upwards obviously meant a huge loss of value, totaling in the many millions of dollars. The Supreme Court held the Landmarks Preservation Law constitutional as it applied to Grand Central Station. Kanner is especially critical of the Supreme Court’s adoption of a case-by-case, ad hoc factual inquiry. According to the author, the Court chose the ad hoc factual inquiry, “pleading judicial inability” to “articulate the elements of a regulatory taking action.” Kanner contrasts this judicial insecurity with the confidence with which federal courts “routinely decide zoning and land-use cases that give rise to constitutional issues other than takings.” There is more to this article, and it is very much worth reading by those lawyers and law professors interested in the development of takings law.

Residential Real Estate; Disclosure Requirements. Much has already been written about the need for sellers to disclose defects in the quality of property before execution of residential real estate contracts. Often, this literature is framed as part of a larger attack on the common law doctrine of caveat emptor. But, in *Temporal Dynamics of Disclosure: The Example of Residential Real Estate Conveyancing*, 2005 Utah L. Rev. 57, Prof. Stephanie Stern examines the *psychology* of disclosure and the effect that the timing of disclosure has on (1) the price ultimately paid by buyers and (2) the degree to which buyers weigh the disclosed defects in their purchase decisions. Stern is not concerned solely with residential real estate; she argues that it is common for individuals to “sub-optimally process information when disclosure occurs mid-stream or late in a transaction.” This is probably not news to practicing attorneys, who may counsel clients to comply with disclosure obligations, but to do so as close to a deadline as possible. Momentum to sign a contract or conclude a transaction is often such that parties are loathe to bring the process to a

halt if there is (what appears to be) an easy fix available to satisfy the concern. Stern's article is unique, however, in reviewing psychology literature to validate this often-observed behavior. For example, the author explains the principle of "anchoring." She states that "anchoring is a pervasive judgment bias, in which the starting point or initial values systematically and disproportionately influence decision makers." Apparently, in the real estate context, "initial offers can function as anchors." Psychological studies demonstrate this as a common human tendency when making value judgments. In addition to the more run-of-the-mill residential sales contract disclosure, the author examines environmental disclosures, disclosures relating to on site conditions and amenities, and condominium and homeowners' association disclosures.

Survey of Recent Case Opinions; Indiana Real Property Law. A number of established law reviews annually publish survey articles devoted to developments in specific areas of state law. The *Indiana Law Review* recently published its annual review, which contained Tanya D. Marsh and Robert G. Solloway's *Let the Buyer Beware: The Slow Demise of Caveat Emptor in Real Property Transactions and Other Recent Developments in Indiana Real Property Law*, 38 Ind. L. Rev. 1317 (2005). The authors devote considerable space to *Verrall v. Machura*, 810 N.E.2d 1159 (Ind. Ct. App. 2004), in which the Indiana Court of Appeals evaluated the Indiana statutory requirement that the seller provide the buyer with a "Residential Real Estate Sales Disclosure Form." The facts of the case are largely typical: a buyer discovered after the fact that a basement was prone to water and sued the seller and broker. But there was one significant and somewhat unexpected fact. Apparently relying on statements in the disclosure form that there is "possible light seepage" in the basement during rain storms, the buyer did *not* conduct an independent inspection. The seepage was not light. Affirming the trial court's denial of seller's motion for summary judgment, the court held

that "there was a material question of fact regarding the level of the [sellers'] knowledge." The authors are critical of the opinion and state, "by ignoring the buyer's conduct in failing to conduct his own inspection, especially in light of the disclosure that was made to him by the sellers, . . . the Court of Appeals has made that which seemed clear to now be debatable." In the remainder of the article, Marsh and Solloway review cases reiterating stringent requirements for the creation of an easement in the absence of written documents and cases resolving disputes over description of property. One of these cases treats an issue that crops up from time to time: whether a disputed contract described the quantity of the property "in gross" or per acre.

LEGISLATION

California allows members of the U.S. Military Reserve and National Guard who are called to active duty as a result of the Iraq or Afghanistan conflicts to defer payments of an obligation secured by a mortgage. The member of the Reserve or National Guard may defer payments for the lesser of 180 days, or the period of active duty, plus 60 calendar days. 2005 Cal. Stat. 291.

California authorizes a person who holds an ownership interest of record in real property that he or she believes is the subject of an unlawful restrictive covenant to remove the restriction unilaterally. Covenants based on race, color, religion, sex, sexual orientation, familial status, marital status, disability, national origin, source of income, or ancestry are unlawful and may be removed by the recordation of a document titled "Restrictive Covenant Modification" that includes a copy of the original document with the illegal language stricken. 2005 Cal. Stat. 297.

California limits revaluation of real property on the transfer between registered domestic partners for purposes of ad valorem property taxation. 2005 Cal. Stat. 416.

Illinois adopts the Military Reservist Business Assistance Program. Low-interest loans, up to \$150,000 and secured by a mortgage, may be made to members of the military who are called to active duty and who suffer substantial economic injury to their small business. 2005 Ill. Laws 485.

Illinois enacts the Military Patriot Plan. Military personnel who are on active duty and whose ability to pay rent is materially affected by the deployment may have an action by the landlord to obtain possession stayed for 90 days. This protection also applies to the service member's family. 2005 Ill. Laws 635.

Illinois permits landlords of nonresidential property to limit their liability for property damage caused by their negligence. 2005 Ill. Laws 601.

New York imposes a penalty on mortgagees that fail to present a certificate of discharge for recording to the mortgagor. After the obligation subject to the mortgage has been paid, the mortgagee must provide the certificate of discharge within 30 days, or the mortgagee is subject to a sliding scale of penalties that start at \$500 and increase to \$1,500 after 90 days. 2005 N.Y. Laws 467.

North Carolina adopts the 2005 Soldier, Sailor, Marine, Airmen, and Guardsmen Support Act. Any member of the armed forces who is deployed for 90 days or more may terminate his or her residential rental agreement. 2005 N.C. Sess. Laws 445.

North Carolina authorizes tenants to terminate a lease early in some situations involving family violence. The landlord may be required to change the locks on the residential unit. The landlord may not retaliate against a victim of domestic violence for exercising his or her rights. 2005 N.C. Sess. Laws 423.

North Carolina enacts the Uniform Real Property Electronic Recording Act. Electronic signatures, filing, recording, and storage are authorized by the Act. 2005 N.C. Sess. Laws 391. ■