FRIDAY, MAY 5 **8:15 a.m. – 9:45 a.m.**

LEGAL EDUCATION AND UNIFORM LAWS GROUP: LAW PROFESSORS' REVIEW OF RECENT DEVELOPMENTS

GROUP CHAIR:
David A. Thomas
J. Reuben Clark Law School, Provo, UT

PROGRAM CHAIR:
Roger Bernhardt
Golden Gate University, San Francisco, CA

SPEAKERS:

Roger Bernhardt
Golden Gate University, San Francisco, CA

Daniel B. Bogart
Chapman University School of Law, Orange, CA

Gregory M. Stein
University of Tennessee, Knoxville, TN

Peter Wendel
Pepperdine University, Malibu, CA

Frederic White
Golden Gate University, San Francisco, CA

THE LAW PROFESSORS' REVIEW OF RECENT DEVELOPMENTS

ABA Section on Real Property, Probate, and Trust Law

San Diego, California

May 5, 2006

Roger Bernhardt
Professor of Law, Golden Gate University

Daniel B. Bogart
Professor of Law, Chapman School of Law

Gregory M. Stein
Woolf, McClane, Bright, Allen & Carpenter Professor of Law, University of Tennessee

Peter Wendel
Professor of Law, Pepperdine School of Law

Frederic White
Dean and Professor of Law, Golden Gate University School of Law

1. Estes v. Thurman, -- S.W. 3d -- , 2005 WL 2046008 (Ky. App. 2005) (only the Westlaw cite is currently available).

The court determined that the purchaser of real property under the terms of an installment land contract is entitle to the proceeds of an insurance policy carried by the vendor even though (1) the policy was purchased by the vendor; and (2) the insurance proceeds exceeded the balance owning on the purchase contract.

Seller (Thurman) entered into a seven-year installment contract of sale with Purchaser (Estes) for a house for a purchase price of $17,000. Although the contract included a covenant for Estes to carry casualty insurance, Estes took possession and made payments on the contract, but did not purchase insurance. Casualty insurance was purchased and paid for by Thurman.

Six months after Estes took possession the house burned down through the fault of neither party. The balance owed on the contract at the time of the accident was approximately $16,000, but the insurance company paid Thurman $34,000.

Thereafter, Thurman filed a suit against Estes to forfeit Estes' rights under the contract because of Estes' failure to purchase insurance in violation of the covenant. Estes counterclaimed for (1) a deed to the property on the ground that the insurance proceeds had paid off the contract balance in full; and (2) the remaining insurance proceeds.

The court held for Estes, indicating that Thurman held the proceeds on "constructive trust" for Estes' benefit. According to the court, it would unjust for Thurman to benefit from the insurance by more than the value of Thurman's security interest, $16,000. Hence, Estes is entitled to the balance.

Noteworthy: Estes' gets a "double windfall"—the house and the excess insurance proceeds. Further, Estes did not (1) obtain or pay for the casualty insurance; and (2) breached the sale contract by failing to obtain insurance.

Query: Was Thurman punished for wanting to have it both ways?

2. Goldman v. Fay, 8 Misc. 3d 959, 797 N.Y.S. 2d 731 (N.Y. City Civ. Ct. 2005).

The court held that the exclusion of condominiums and cooperatives from the definition of "residential real property" in the New York State property disclosure statutes violates the Equal Protection Clause.

After the purchase of a condominium the buyer discovered faulty air conditioning pipes on the property. The buyer sued the seller on the basis that the seller knew of the faulty condition when the property was sold to the seller, but failed to disclose it. Article 14 of the New York Real Property law requires that a Property Condition Disclosure form be completed prior to entering into a contract for the sale of residential real property. The sellers defended the suit on the basis that the statute explicitly excludes the sale of condominiums and cooperatives from the definition of "residential real property."

The acknowledged that while there was no statutory disclosure required, the common law rule requiring the disclosure of latent defects applied. The court concluded that the buyer was not entitled to damages for the defective pipes because under the common law rule the buyer could not prove that the seller had actual or constructive knowledge of the defective condition. Further, even if the buyer could prove that the seller had knowledge, the buyer could not recover because an unlicensed home improvement contactor completed the repairs.

The court requested that the New York legislature either repeal the law, or stay its execution until a disclosure requirement for condominiums and cooperatives was added. The court also stated that the present exclusion violated the Equal Protection Clause of the U.S. Constitution.

Noteworthy: Trial courts seldom invoke constitutional provisions. The court indicates that is no "rational basis" for distinguishing between freestanding homeowners and owners of condominiums and cooperatives. Query: Is it all that clear that no rational basis exists? Why were these two groups left out in the first place?

3. Thomas v. Laustrup, 21 A.D. 3d 688, 800 N.Y.S. 2d 238, (N.Y.App. Div. 3 2005).

An action for specific performance will fail when the buyer does not have the ability to (1) tender the purchase price; or (2) a signed mortgage agreement.

Plaintiffs agreed to purchase a motel from the defendants. One defendant had advanced dementia and Alzheimer's disease; her husband signed the necessary papers pursuant to a power of attorney.

Shortly thereafter, the defendants attempted to cancel the contract on the basis that (1) certain legal terms were missing from the contract and it therefore had no legal effect; and (2) the power of attorney was ineffective due to the defendant wife's lack of requisite mental capacity. They asked for summary judgment on their claim. The plaintiffs sought specific performance of the contract.

Neither party prevailed in this action. The defendants' claim for summary judgment failed because the court found that uncertified and unsworn medical records pertaining to capacity were insufficient. On the other hand, since they could not produce the purchase price or a signed mortgage agreement, the court determined that they were not "ready, willing and able" to perform the contract.

4. Larson v. Safeguard Properties, 317 F. Supp. 2d 1149 (D. N.D. 2005).

In essence, a buyer's express "mold waiver," an identified risk, will not insulate the seller from liability for the failure to disclose a latent defect. In addition, a home repair contractor retained by the sellers to fix up the house prior to a sale had no duty to notify the buyers of known latent defects discovered during the repair process.

Buyers signed a contract to purchase property "as is;" affirming that they would use due diligence to discover mold on the property; and agreeing to an express mold waiver, releasing the seller from any liability resulting from mold. Prior to the sale the seller hired a contractor to repair the house. In turn, the contractor hired a carpet-cleaning subcontractor; the subcontractor discovered and disclosed it to the seller. The seller did not disclose the leak to the buyers and proceeded to close the transaction.

After the transaction closed the buyers inspected the premises and found the leak. One of them fell ill, purportedly as the result of a mold allergy. Thereafter, the buyers sued based on their allegations that the defect made the house uninhabitable. Further, they alleged that the contractors retained by the buyers to fix the house h ad a duty to notify them of the mold defect.

The sellers argued that the "mold waiver" language put the buyers on notice to make a more thorough inspection for mold and moved to dismiss the buyers' suit. According to the court, the deciding factor was whether the buyers could have discovered the defect through a reasonable inspection. The court refused to grant the sellers' motion to discuss, holding that the reasonableness of the inspection created a question of fact. In addition,

With respect to the buyers' claims against the contractor the court held that a duty to disclose could arise outside of contractual relationship. Hence, the absence of privity between the contractor and the buyers did not necessarily preclude a claim of fraud against the contractor. The contractor prevailed, however, because: (1) the buyers had not alleged any other circumstances that would impose a disclosure duty on the contractor; and (2) they had not opposed the contractor's motion for summary judgment.

5. Frostar Corp. v. Malloy, 63 Mass. App. Ct. 96, 823 N.E. 2d 417 (Mass. App. Ct. 2005).

Environmental reports: What is the nature of a "timely" environmental report?

Frostar entered into a lease with Malloy, granting Frostar the right of first refusal to the leased property. After receiving notice of a third party offer, Frostar exercised its right of first refusal. One contract provision provided for Malloy to provide Frostar with an "environmental study." Although the provision specified the maximum amount to expended on the study, it did provide for the scope or nature of the study. In addition, the contract provided that Frostar could terminate the contract if the environmental study was "unsatisfactory."

After the contract was executed an environmental study was produced a month later, revealing that the subject property formerly had been the site of a dry cleaning operation. The study indicated that no tests on subsurface soil or water had been made. Frostar objected, but Malloy's attorney indicated that he considered the study to be complete and that his client was unwilling to extend the closing date for the purpose of further environmental testing.

On the closing date Frostar brought suit for specific performance, damages, and a preliminary injunction against the sale of the property to any third parties. At trial, the jury found that Malloy had breached its obligations under the first of first refusal and the purchase contract. The jury further found that Malloy had breached the state consumer protection statute. Although the trial judge upheld the jury recommendation with respect to the right of first refusal and breach of the purchase contract, but not the consumer protection violation recommendation.

On appeal, Malloy contended that the purchase contract was not breached because the requisite environmental study was provided. Further, Malloy contended that even if Frostar was relieved of its duty to perform, Frostar failed to prove that it was ready, willing and able to perform. The case was remanded on the breach of contract action only because the appellate court while there was sufficient evidence for the jury to have found breach of contract, it should have been given instructions regarding Frostar's ability to perform its obligations under the contract.

6. Oakwood Village LLC v. Albertsons, Inc., 104 P.3d 1226 (Utah 2004).

This commercial leasing case appeared in Pacific Reporter in December of 2004. In *Oakwood Village*, the Utah Supreme Court revisited the issue of whether a retail tenant may "go dark" in the absence of an express covenant of continuous operation.

Albertsons leased a 42,800 square foot "plot" of land for a term of 25 years, with eight five year renewal periods. Albertsons's space was a part of a 123,900 square foot shopping center developed by Oakwood, and Albertsons was the anchor tenant among 26 stores. Albertsons agreed to a simple monthly rental of $1667 with no percentage rent and no escalations of any kind. Albertsons constructed its store in 1980 and operated out of that location for 21 years. Eventually, Albertsons leased space in a competing shopping center only one block away. Albertsons ceased operating its Oakwood Village store and "went dark." It continued to pay its monthly rental.

Albertsons admitted, through its attorney, that the grocery chain "intentionally kept the old building unoccupied in order to restrict competition with its new store." With anchor space now permanently vacant, Oakwood shopping center lost business and tenants.

The trial court dismissed Oakwood's case for failure to state a claim, and required Oakwood to pay Albertsons's attorneys fees. The Utah Supreme Court affirms.

The parties could have included in the lease an express covenant for Albertsons to continuously operate, but failed to do so. Focusing on the terms of the lease agreement, the court refused to infer to Albertsons a covenant of continuous operation. The court noted the absence of lease provisions that typically indicate the parties intended such a covenant. The lease did not include provisions requiring percentage rents (as is most often the case in large retail leases), or forbidding it from razing the structure altogether.

In addition, the lease contained provisions contradicting any intention that tenant would be subject to a covenant to operate its business continuously. For example, the assignment clause permitted Albertsons to assign or sublease without obtaining Oakwood's consent. The only significant exclusive right was granted to Albertsons and not to Oakwood: Albertsons was granted the exclusive right to operate a grocery store. The parties knew how to negotiate and draft an exclusive, but did so for Albertsons's benefit.

The court determined that Albertsons did not act in bad faith by going dark and locking up space at the older shopping center. Parties are required under Utah law to act in good faith, but good faith is measured by the "justified expectations" of the parties. The court found significant the fact that Albertsons was party to a true ground lease. Albertsons did not lease property that had an already existing structure, but built the building entirely at its own expense, suggesting that Albertsons could do what it wanted with the property. The good faith requirement does not require Albertsons to act to its detriment just to benefit Oakwood, nor does it conflict with express terms of the contract.

The court admitted that Albertsons's behavior departed from the "golden rule" and was "not nice." But Albertsons did not violate the terms of the lease by adhering to the letter of the contract.

7. South Road Assocs. LLC v. International Business Machines, 4 N.Y. 3d 272, 826 N.E. 2d 806, 793 N.Y.S. 2d 835 (N.Y. 2005).

Leases typically specify that Tenant return the Premises in good condition (or language to that general effect). Does this include the land exterior to the building leased by the tenant?

IBM leased two buildings in Poughkeepsie, N.Y. in 1981 from South Road Associates for commercial and manufacturing purposes. IBM had used that site pursuant to prior agreements since the 1950s. IBM installed underground chemical storage tanks which contaminated groundwater and soil. IBM attempted to remediate the problem independently. In 1984, during the Term of the lease, IBM and South Road Associates entered a separate agreement concerning the environmental problems. As part of the agreement, IBM admitted complete responsibility for the environmental problem and indemnified South Road Associates. IBM then sought and received a reclassification of the site as "properly closed" by the State Department of Environmental Conservation. South Road Associates entered into an agreement with IBM at the termination of the lease in 1994 providing IBM the right to access the site as needed to monitor the environmental status of the property.

After conclusion of the lease term, South Road Associates sued IBM for breach of the lease agreement, alleging that IBM failed to return the property in good repair and order, as required by the lease. South Road Associates did not allege that the buildings were returned in an unsatisfactory manner. Its claim was limited to the exterior land burdened by environmental contaminants.

The trial court ruled in favor of South Road Associates, holding that the Premises was intended to include the land in addition to the buildings. The Appellate Division reversed, apparently focusing on the language of the lease agreement. The Court of Appeals affirmed the appellate division, vindicating the tenant, IBM.

The IBM lease described the Premises by reference to an exhibit showing the floor plan of the buildings. The exhibit calculated the total square footage of the floor plans alone, with no mention of the land exterior to the buildings. The lease agreement described other areas that were available for tenant use, but described these as "appurtenances." The court therefore considered the definition of "Premises" in the lease to be "clear and unambiguous." Unlike the trial court, the appellate court refused to examine extrinsic evidence, such as IBM's payment of taxes on the land or IBM's willingness to clean up the site. In his review of this case in Probate and Property magazine, Professor James Smith suggests that "this decision underscores the need for real estate lawyers to pay careful attention to the use of defined terms throughout the documents that they draft and review."

8. Tenet Healthsytem Surgical, LLC v. Jefferson Parish Hospital Service District No. 1, 426 F.3d 738 (5th Cir. 2005).

May Landlord refuse consent to Tenant's assignment of the Premises because the proposed Assignee's business competes with that of Landlord?

In 2001, Tenet (the Tenant) leased space in a shopping center for a five year term. The lease provided that Tenet would use the Premises for "out patient surgical procedures and general medical and physician's offices, including related uses and for other purposes reasonably acceptable to Landlord." The lease specified that the Landlord would not unreasonably withhold its consent to Tenet's request to assign the lease or sublease the space.

Prior to expiration of the Term, Landlord sold the shopping center to a local hospital. The hospital sat adjacent to the shopping center. Tenet ceased operating its surgery center in the shopping center in 2003, and requested that the hospital, as Landlord, consent to an assignment of the lease. The proposed Assignee intended to operate an occupational therapy clinic. Hospital denied the request, ostensibly because this use would be in competition with services it provided.

The District Court apparently focused on the impact the Assignee would have on the hospital generally. The District Court indicated that the Assignee intended to use the Premises for a broader array of health services than those provided by Tenet and would be therefore beyond the reasonable expectations of the parties.

The Fifth Circuit Court of Appeals reversed, stating that the "intent [of the parties] is to be determined by the words of the contract when they are clear, explicit and do not lead to absurd consequences." However, in this case, the key words to be interpreted -- that Landlord would not "unreasonably withhold its consent" – had not been the subject of significant discussion in Louisiana opinions. Nevertheless, the court read Louisiana law to permit hospital to withhold consent to a proposed assignment in the event the Assignee was "financially inferior" to the original tenant, if the Assignee's proposed use does not fit within used permitted by the lease, or if the assignment would make leasing space to other tenants difficult. In this case, the hospital did not demonstrate any of the factors necessary to refuse consent. The occupational therapy clinic generally fits the description specified by the lease as "general medical" use. The court did not discuss, and possibly the hospital did not argue, that the Assignee was financially inferior or that Assignee would harm the hospital's ability to lease remaining space in the shopping center.

The hospital's primary argument seems to simply have been that the Assignee would compete with services provided by the hospital. The court rejected this basis for refusing consent, and indicated that the "only factors [that may be considered] relate to the landlord's interest in preserving the Premises or in having the terms of the prime lease performed." In this case, there was every reason to believe that Assignee would preserve the leased property and that it would perform its obligations under the lease, including the payment of rent. Several commentators view this case as important because it directly addresses (and rejects) the right of Landlord to withhold consent to transfer merely because the transferee will compete with Landlord.

9. Eastside Exhibition Corp. v. 210 East 86th Street Corp., 23 A.D. 3d 100, 801 N.Y.S. 2d 568 (N.Y. App. Div. 2005).

Does Landlord's very minor, permanent, and physical intrusion into Tenant's Premises permit Tenant to completely abate rent? Modifying an older rule, a New York appellate court holds that Tenant is entitled only to a *proportionate* abatement.

In *Eastside Exhibition Corp*., Eastside (as Tenant) and East 86th Street (as Landlord) executed a lease for a two story building to be used as a cinema multiplex. The lease commenced in 1998 and was to run until 2016. In 2002, East 86th surprised its Tenant when it began construction of two additional floors onto the building, without giving prior notice to or seeking consent from Eastside. As part of the construction, East 86th installed floor to ceiling cross bracing between existing steel columns. The cross bracing occupied 12 square feet of space near an area that patrons had previously used as "informal seating." The total Premises was comprised of 15,000 square feet.

Tenant responded to Landlord's construction by abating rent altogether for what it termed a partial actual eviction. Eastside also sought an injunction barring East 86th from additional construction that would constitute an invasion of the Premises, as well as damages. The trial court read the lease to permit East 86th reasonable access to the Premises in order to construct additional floors to the building, but not to permit East 86th to permanently deprive Eastside of a portion of the Premises. The trial court granted a permanent injunction prohibiting the East 86th from additional construction that would result in evicting Eastside from the Premises. The trial court fashioned a "de minimis" exception to New York's long standing rule that would otherwise deny East 86th, as Landlord, the right to apportion its wrong.

The Supreme Court, Appellate Division, disagreed with the trial court. The court could find "no decision that recognizes a de minimis exception to the rule." Nevertheless, the court did not deny Eastside a remedy, explaining that it did find authority in earlier opinions for a "more proportionate remedy than total abatement of rent." The court recognized that it was departing from earlier black letter law, but stated that the older rule was harsh and archaic. The court dissolved the permanent injunction barring additional construction that would result in evictions of Eastside. On the one hand, the court may be right to eliminate the Tenant's right to completely abate rent in the face of an insubstantial intrusion. On the other hand, by dissolving the injunction, the court granted Landlord the unilateral right to redefine the boundaries and extent of the Premises, so long as the changes are not too burdensome and so long as the rent is abated in proportion to the loss of space.

10. Rhaney v. University of Maryland East Shore, 388 Md. 585, 880 A.2d 357 (Ct. App. Md. 2005).

When is a Landlord liable for an unrelated third party's criminal attacks on Tenant? This liability can arise from myriad fact patterns, and should be of interest to landlord/owners of both commercial and residential real property.

Rhaney is unusual because the Tenant (Rhaney) was a dormitory student, and the Landlord was a University. The criminal attack took place when Rhaney was accosted by his roommate. The roommate had been previously involved in fights on campus, and at one point had been suspended. The University did not inform Rhaney of his roommate's violent nature or history at the school.

Rhaney sued the University, alleging that the University had a duty to warn him and take measures to protect him. The trial court agreed with Rhaney.

The Maryland Court of Appeals reversed, holding that the University did not have a duty as Landlord to refrain a third person from committing an assault on its "tenants." Rhaney's injuries did not result from defective conditions in the Premises or common areas – for example, his injuries did not result from the University's failure to adequately light the common area. The court explained that University did not have a duty to eliminate criminal activity altogether. Rather, the University, as Landlord, has a duty to take "reasonable measures, in view of existing circumstances, to eliminate those conditions contributing to the criminal activity." The court narrowly viewed "conditions" as "physical ones," rather than the propensity of an individual towards violence.

Finally, exercising extreme generosity, the court held that "even if [the criminally inclined roommate] could be characterized as a "dangerous condition" … [the University] … neither had the knowledge nor could have foreseen" that the roommate would batter Rhaney.

11. Does an express easement that provides access to a landlocked parcel continue to exist after the purposes for which the easement was granted have become obsolete due to the construction of a public road? Wisconsin Court of Appeals says, "No," out of a concern that a contrary rule would allow holders of obsolete easements to "hold out" for excessive settlements before relinquishing their rights, and follows the "changed conditions" test of section 7.10 of Restatement (Third) of Property—Servitudes. *AKG Real Estate, LLC v. Kosterman*, 277 Wis. 2d 509, 691 N.W.2d 711 (Wisc. App. 2004), appeal granted, 693 N.W.2d 75 (Wisc. 2005).

This is a fairly controversial opinion construing an express easement; the facts are complex but necessary to an understanding of the legal issue. The Kostermans are the current owners of a landlocked parcel while AKG is the current holder of the land that locks them in. Their predecessors executed and recorded an express easement in 1961, granting the dominant landlocked estate a right-of-way over a specific 66-foot wide strip of land to a public road. This unusual width for a driveway was selected so that the strip could be dedicated for use as a public road if the parties ever so elected. A slightly different (if ambiguously drafted) formulation of this easement appeared in the deed by which AKG acquired the servient estate in 1998, with the result that both variations of the easement apparently were in effect at the time of this litigation.

Upon acquiring the servient estate, AKG commenced plans to subdivide its entire parcel; it intended to integrate the landlocked Kosterman lot, which it did not own, into the residential subdivision. This plan would provide the Kostermans access through the dedicated subdivision roads to a public road outside the subdivision, but along a route that differed from that of the two original rights-of-way. AKG believed that the express easements would expire by their own terms once it had provided the Kostermans with an alternative access route. The Kostermans objected, arguing that the existing documents required AKG to place a public street along the same path as the original easement.

AKG sought a declaration that it had the right to terminate the original easements after providing the Kostermans with alternative access. Even if the original documents did require AKG to place the new access along the same route, it argued in the alternative, such a plan had become impossible in the intervening years due to more restrictive highway access rules promulgated by the state highway agency. The Kostermans responded that the recorded documents required any new access to follow the path of the old easement, and that their home had been positioned on its lot in reliance on this road placement. The trial court ruled in favor of AKG on the 1998 easement but held that the terms of the original 1961 easement required that AKG leave that right-of-way in place or replace it with a public road along the same route. Both parties appealed.

As for the later deed, the appellate court found that the language unambiguously supported AKG's reading, which would allow AKG to provide access along a different route. Any other reading, the court asserted, would be "substantively preposterous" leading to an "absurd result." Moreover, the court applied the doctrine of changed conditions to both versions of the easement, concluding that the purposes for the easement would no longer exist once the Kostermans' parcel ceased to be landlocked upon completion of the new subdivision's streets. Once it became apparent that the internal parcel would not forever be landlocked and that the access road could not follow the path of the original easement, the assumptions underlying the

creation of the original easement no longer held and the need for a right-of-way along that particular path had ended.

The court stressed that it does not lightly interfere with private contractual arrangements. However, in this case, "the Kostermans[']s insist[ence] upon preserving an obsolete servitude" would "halt the development" of a residential area. "We cannot countenance this grossly inefficient allocation of resources." The court concluded by noting that its reasoning regarding changed conditions is in accord with the standard established in section 7.10 of the Restatement (Third) of Property—Servitudes.

12. If a city owns an easement intended to provide ingress and egress between a public street and another piece of property, may the city use this easement as part of a longer greenway to be used by pedestrians and cyclists? The Idaho Supreme Court says, "No," holding that such a use would benefit property other than the identified dominant parcel, and adopts the test set forth in section 4.11 of the Restatement (Third) of Property—Servitudes. *Christensen v. City of Pocatello*, 142 Idaho 132, 124 P.3d 1008 (Idaho 2005).

The City of Pocatello is the current holder of the dominant estate in an easement that was created in 1974. The easement provides access across lots owned by the Christensens to a separate parcel known as the "Sewer Lagoon." In late 1999 or early 2000, the City announced that it planned to extend an existing greenway along the easement, thereby connecting a public road to the Sewer Lagoon. The Christensens objected on several grounds, with the most significant being that the public's use of the greenway would increase the burden on their servient estate. The trial court ruled in favor of the city, finding that the proposed use of the easement would not impermissibly increase the burden on the servient estate.

On appeal, the Idaho Supreme Court reversed on this issue. If the city were allowed to proceed as it planned, an easement intended to provide ingress and egress between a public street and the Sewer Lagoon would become part of a thoroughfare. This is not merely a change or increase in use of the easement; rather the easement will be used to benefit property other than the identified dominant estate. Because this court had never before addressed this issue, it turned to the test set forth in section 4.11 of the Restatement (Third) of Property—Servitudes, along with an appellate decision from Arizona, and decided to adopt the test set forth in those two sources. Under the Restatement test, "an appurtenant easement . . . may not be used for the benefit of property other than the dominant estate."

The court noted that under the city's plan, parcels along the public road that were not part of the original dominant estate would nonetheless benefit from the use of the greenway. The court also noted that this would constitute a change in the use of the easement, from access to a specific parcel to part of a recreational thoroughfare, although this second point did not seem central to its analysis. The needs of the dominant estate may have evolved, and such evolution in the use of an easement is sometimes permissible, but the central question here is whether the easement must serve parcels other than the original dominant estate, and the court concluded that it need not.

(Note that this decision was not a complete victory for the servient estate holders, as the Idaho court affirmed several other rulings favorable to the city that rested solely on issues of Idaho statutory law.)

13. If a Property Owners Association (POA) Declaration defines the POA parking area as a "common area," may the Board of Directors of the POA, acting under its power to adopt rules and regulations that are not inconsistent with the Declaration, assign specific parking spaces to individual property owners so that each owner may exclude others from their allocated spaces? The Virginia Supreme Court says, "No," states that parking spaces may be assigned only by amendment of the Declaration, and awards attorney fees to the complaining unit owner. *White v. Boundary Association, Inc.,* 624 S.E.2d 5 (Va. 2006).

The nine unit owners in the Boundary, Inc., subdivision in Williamsburg, Virginia, each own their townhouse unit in fee simple and have an interest in common in various common areas, including an 18-space parking lot. The POA Declaration authorizes the POA Board to "adopt such rules and regulations . . . as [it] may deem proper, not inconsistent with these by-laws and the laws of this State." Ostensibly acting under this authority, the POA Board assigned two specific parking spaces to each unit. The Whites objected, arguing that the POA had exceeded its authority and violated the express terms of the Declaration.

The trial court found in favor of the POA, holding that both the applicable state statute and the Declaration itself authorized the POA to promulgate rules governing the common areas and that these regulations had been properly adopted.

On appeal, the Virginia Supreme Court reversed. The court found both the statute and the Declaration to be unambiguous. The Declaration "expressly granted each unit owner an easement of enjoyment in the common area." This right was "indefeasible," and could be changed only under three specifically stated circumstances—not applicable here—or by amendment of the Declaration. Changes to the bylaws could not effectively divest unit owners of property rights, which is what the Board had attempted to do here.

Although the only Virginia precedent that the court cited involved preferential allocation of parking spaces to some owners and not others, the court concluded that in both that case and the instant one, the POAs had attempted to use a regulation to divest owners of access to certain portions of the common area. Boards may adopt rules, but many not contravene rights and privileges expressly set forth in the Declaration.

14. If a landowner does not object to an exaction at the administrative level and complies with the requirements that a city imposes as a condition to partitioning land, but the landowner then brings an action seeking just compensation for a taking, is the city permitted to show rough proportionality for the first time at trial? The Oregon Court of Appeals says, "Yes," concluding that it is the absence of the required "rough proportionality," and not the absence of a *finding* of rough proportionality, that constitutes a taking. *Hammer v. City of Eugene*, 202 Or. App. 189, 121 P.3d 693 (Ore. App. 2005).

In this class action, landowners asserted that they were entitled to just compensation under the Fifth Amendment to the United States Constitution because the city did not make a showing of "rough proportionality" as required by *Dolan v. City of Tigard*. The class representative complied with the city's requirements that it convey title to, or easements on, portions of the property, but then sought just compensation in court, arguing that the city had taken the property because it had not met the *Dolan* threshold before imposing the exaction. The trial court awarded just compensation.

On appeal, the landowner argued that the absence of a finding showing rough proportionality constitutes a taking on its own. The city, by contrast, argued that a taking occurred "only in the absence of rough proportionality itself." Particularly in a case such as this one, in which the landowner had chosen not to appeal administratively, the government believed it should be permitted to introduce the same evidence at trial that it would have presented at the administrative level.

The landowner's argument assumed that the *Dolan* rule is prophylactic, designed to prevent the government from acting without making the necessary showing in advance. The court disagreed, stating that if the Framers had intended for the Takings Clause to include a procedural requirement, they would have said as much, as they did in the Due Process Clause. A takings plaintiff cannot prevail without showing that the government has actually taken property. The presence of prior findings does not prove that they are adequate, while the absence of prior findings does not prove that they will be inadequate when ultimately introduced.

15. If an installment land contract buyer enters into a contract that clearly states that time is of the essence and that a default will lead to forfeiture of the land and all payments previously made, is that contract enforceable? The Tennessee Court of Appeals says "Yes," but its discussion is limited to construing the contract; the buyers did not attempt to argue that such clauses should be unenforceable for policy reasons. *Kafozi v. Windward Cove, LLC*, 2005 WL 2051292 (Tenn. App. 2005)(only the Westlaw citation is currently available).

The Kafozis entered into an installment land sales contract with Windward Cove to purchase a residential lot for $100,000. Under the contract, the Kafozis agreed to pay $25,000 immediately, plus $2,000 per month for 12 months, extendable to 18 months at their option, with the balance due at the end of the 12 or 18 months. The contract also provided for a penalty in the event the contract remained unpaid after 18 months, and the Kafozis committed to begin construction of a home within 12 months with a designated builder. The remedy section of the contract provided that time is of the essence. In addition, upon default and following a ten-day grace period, the Kafozis would forfeit all payments they had made up to that point, along with all rights to the property.

The Kafozis made payments for 12 months, then they extended for six months more, and then extended for six months *more* (by mutual agreement). Finally, Windward Cove sent a 10-day notice to the Kafozis—seemingly not required—and then sold the property on the twelfth day. The Kafozis sued, seeking an order requiring *either* that: (a) Defendant convey the lot to Plaintiffs upon receipt of the balance of the price; *or* (B) Defendant return all money Plaintiffs had paid under the contract, plus interest. The trial court ruled in favor of the Kafozis, on the grounds that the contract did not provide a clear due date for the final payment.

On appeal, the Court of Appeals reversed, examining just the one issue of contract ambiguity. While acknowledging that this is a harsh result that the court might not prefer, the court stated that it is required to enforce the bargain the parties agreed to, and there is no ambiguity here. The court noted that the construction of a contract depends on the intent of the parties to that contract at the time of execution. The initial task of the court is to construe ambiguities, which means language that may fairly be understood in more than one way. But the court found no ambiguities here: There was an original expiration date, there was a pre-arranged six-month extension period, there was a mutually agreed second six-month extension period, and the contract thus expired one years from the initial due date.

16. D'Abbracci v. Shaw-Bastian, 201 Or. App. 108, 117 P.3d 1032 (Or. App. 2005).

As a matter of first impression, the Court of Appeals of Oregon addressed the issue of whether the servient estate owner had a right to relocate a road that was located within the metes and bounds of the express boundaries of an easement. The court held that where the road does not occupy the entire metes and bounds of the easement, the servient owner may unilaterally relocate the road within the boundaries of the easement limits if the change does not unreasonably interfere with the dominant estate holder's reasonably necessary use of the easement.

The Court of Appeals of Oregon found that there are three overarching principles that apply to expressly created easement rights in Oregon: (1) the terms of the granting instrument, if unambiguous, define the location and the intended purpose of the easement; (2) the dominant estate holder's right to use the easement is limited to what is reasonably necessary to accomplish the intended purpose of the easement; and (3) the servient estate holder retains the right to use the burdened property in ways that do not unreasonably interfere with the dominant estate holder's reasonably necessary use of the property. From those principles, the court held that the servient estate owner's right to relocate a road is subordinate to the terms of the granting instrument.

For example, if the situation presented were such that the boundaries of the actual road and the boundaries of the easement coincided, the servient owner may not move the road without the consent of the dominant estate holder.

But in this case, the road did not occupy the entire metes and bounds of the express easement. In such a case, the servient owner may unilaterally relocate the road within the boundaries of the easement unless the change substantially interfered with the dominant estate holders' use of the road for ingress and egress. The court went on to hold that the servient estate owner constructed the new road within the boundaries of the easement in such a way that it did not substantially interfere with the dominant estate owners' use of easement. The court rejected the dominant estate owner's argument that the road was required to remain in its original place on the grounds that no evidence was presented to support the proposition that a safe and stable road could not be constructed elsewhere within the boundaries.

17. Mayer v. BMR Properties, LLC, 830 N.E.2d 971 (Ind. App. 2005).

Thirty-One Investment Realty Company (Thirty-One) acquired a number of acres of land and separated the land into at least 19 different tracts. The tracts varied in size, ranging from 14 acres to less than one acre. Thirty-One developed seventy-five acres of the land into a low-density, estate home community of "mini-farms" that it named Hills 'n Dales. However, Thirty-One did not publish or record a plat, nor did it ever record any supplemental declarations with regard to the property. Also, no homeowner's association was ever formed.

In 1978, Thirty-One recorded a "Declaration of Covenants and Restrictions" in the local county recorder's office. The document provided, in pertinent part, as follows: "Every numbered tract in the Development, unless it is otherwise designated by the Developer, is a residentail [sic] tract and shall be used exclusively for single family residential purposes. No structure shall be erected, placed or permitted to remain upon any of the said residential tracts, except a single family dwelling house and such outbuildings as are usually accessory to a single family dwelling house." The document expressly covered tract ten, and it did not mention any of the other tracts. The document references the Hills 'n Dales subdivision, platted lands, supplementary declarations and a Hills 'n Dales Homeowners' Association, but the "subdivision," platted lands, supplementary declarations, and a Hills 'n Dales Homeowners' Association have never existed.

Thereafter Thirty-One began to convey the other tracts to different individuals and business entities. When the other tracts were sold, some of the deeds recited that the tract was "subject to" the covenants and restrictions on record in the recorder's office (the notice included the date of filing, and the book and page numbers), some did not. Over time, BMR Properties, LLC, came to own tracts 9 and 19. These tracts were included in an original drawing in the form of an unrecorded plat of the land that was planned to be a part of the Hills 'n Dales subdivision. When Thirty-One first conveyed tract 9, the deed in question expressly recited that it was "subject to" the recorded Declaration of Covenants and Restriction. The parties agree that tract 19 was not subject to the restrictions.

After purchasing tracts 9 and 19, BMR combined the two tracts for the purpose of developing a residential subdivision. The project was approved, and BMR recorded a plat, obtained a construction loan, and began the development project. Water and sewer lines were constructed, streets were built and buffering trees were planted along the perimeter of the tracts. Thereafter, a group of neighbors filed a complaint to enforce the restrictions and covenants that purportedly applied to the property. They sought injunctive relief, specific performance and damages. In particular, they requested that the trial court prevent BMR from constructing a fifteen-home neighborhood, purportedly in violation of the plain language of the restrictive covenants of Hills 'n Dales. The lower court denied the neighbors' request for preliminary injunction. The neighbors filed an interlocutory appeal.

On appeal, first the court ruled that the appellants had failed to satisfy their burden of showing that the term "tract" was intended to mean the original nineteen tracts of the Thirty-One property or that Thirty-One intended not to allow any of those tracts to be subdivided. Moreover, there was insufficient evidence of a general plan or scheme. The court noted that (1) the tract in question was part of a nineteen tract subdivision, (2) the property was never developed in an organized manner, (3) no homeowner's association was ever established, and (4)

the only recorded Declaration of Restrictions and Covenants encumbered a different tract than the one in question.

Lastly, the Indiana Court of Appeals addressed the issue of whether the "subject to" language in some of the deeds, tract 9 in particular, were words of contract imposing the restrictions and covenants on the respective tracts of land. The court found that the "subject to" language does not constitute assurances that encumbrances either run with the land or that successors or assigns are bound by them. The court pointed towards the decision in *Smith v Second Church of Christ, Scientist, Phoenix, Arizona*, 87 Ariz. 400 (1960), where the Arizona Supreme Court determined that the "subject to" language was insufficient to bind a piece of real estate. The court reasoned that restrictions on the use of land required greater clarity and explicitness, which was not evidenced in the deeds in question.

18. Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n -- A.2d --, 2005 WL 3739659 (N.J. Super. App. Div. 2006).

Twin Rivers is a planned unit development ("PUD"). It covers about one square mile, has some 2,700 residences (mixed – condos, townhouses, apartments, single family dwellings, and even some commercial buildings) and contains approximately 100,000 residents. It has its own Homeowners Association, of which every property owner is a member. The Association has the sole discretion to make reasonable rules and regulations for the conduct of its members. The Association is governed by a Board of Directors which is elected by all eligible voting members of the Association. Twin Rivers is not, however, a gated community. In addition, the local Township provides various services to the residents of Twin Rivers, including police, firefighting, first aid, road and traffic control, public education, health and welfare provisions, water and sewage systems, and zoning and building codes.

Several residents of Twin Rivers, including a then serving Board member, sued the PUD. Included among the claims was that Twin Rivers should be considered a public actor and was subject to to constitutional limitations that classically apply to public sector actors (and which the New Jersey Constitution applies more broadly). In particular, the plaintiffs asserted that "just as shopping centers that are technically private have replaced downtown business districts, planned developments that are technically private have replaced towns." As applied to the plaintiffs' right to free speech, particularly in light of the New Jersey Constitution's framing of the right, the court ruled that "plaintiffs' rights to engage in expressive exercises-including those relating to public issues in their own community, such as with regard to the election of candidates to the TRHA [Twin River Homeowners Association] Board, or broader issues of governmental and public policy consequence, or matters of general interest-must take precedence over the TRHA's private property interests."

While the court's holding was limited to the issue of the plaintiff's free speech rights, the court intimated that its opinion was broader and at a minimum extended to include other fundamental right. "It follows that fundamental rights exercises, including free speech, must be protected as fully as they always have been, even where modern societal developments have created new relationships or have changed old ones."

19. California 2005 Legislative Service Chapter 422. (A.B.12).

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. (a) The California Law Revision Commission shall study the effect of California's nonprobate transfer provisions and shall study statutes in other states that establish beneficiary deeds as a means of conveying real property through nonprobate transfers. The objective of the study shall be to determine whether legislation establishing beneficiary deeds should be enacted in California. The commission shall report all of its findings to the Legislature on or before January 1, 2007. If the commission recommends that the Legislature adopt a statutory scheme establishing beneficiary deeds as a means of conveying real property, the commission shall recommend the content of the proposed statute.

(b) The commission shall address all of the following in the study described in subdivision (a):

(1) Whether and when a beneficiary deed would be the most appropriate nonprobate transfer mechanism to use, if a beneficiary deed should be recorded or held by the grantor or grantee until the time of death, and, if not recorded, whether a potential for fraud is created.

(2) What effect the recordation of a beneficiary deed would have on the transferor's property rights after recordation.

(3) How a transferor may exert his or her property rights in the event of a dispute with the beneficiary.

(4) Whether it would be more difficult for a person who has transferred a potential interest in the property by beneficiary deed to change his or her mind than if the property were devised by will to the transferee or transferred through a trust or other instrument.

(5) The tax implications of a beneficiary deed for the transferor, the transferee, and the general public as a result of the nonprobate transfer, including whether the property would be reassessed and if tax burdens would shift or decrease

20. Coldwell Banker Whiteside Associates v. Ryan Equity Partners, Ltd., -- S.W.3d --, 2006 WL 40650 (Tex. App. 2006) (only the Westlaw citation is currently available).

Ryan Equity was looking for a quick investment. It wanted to purchase a run-down apartment complex, rehabilitate it, raise the rents, and leverage the properties to purchase more real estate. It secured a broker to find the right building and settled upon a thirty-one unit apartment building.

In 1964, when the apartment building was built, zoning permitted the construction and operation of multifamily housing projects of this size. In 1978, six years after the sellers bought the building, the area was rezoned to single-family housing, but the zoning permitted existing multifamily uses to continue operating. In 1988, the area was rezoned again, making multifamily housing nonconforming. At first this change went unrecognized, but in 1994 the city passed an ordinance requiring buildings with more than six units to obtain a Special Use Permit. Without a Special Use Permit, its nonconforming use would be abated on the application of any citizen. Abatement required the property to become a single-family residence or cease to operate. The sellers' application for a permit was denied in 1995, but no one applied to abate the nonconforming use.

When Ryan Equity's broker proposed the property as a suitable purchase, he improperly advised Ryan Equity about the effect of the zoning regulation. Ryan Equity made no independent investigation of the zoning, nor did it ask the sellers about the zoning or tell them the intended use. The contract for sale stated that the sellers were not aware of any material defects to the property. When Ryan Equity learned about the zoning, they applied for a Special Use Permit. The permit was denied and the property abated. Ryan Equity eventually sold the property for a loss.

Ryan Equity sued both the broker and sellers asserting, among other claims, breach of contract based on the nondisclosure of the status of the zoning and denial of the Special Use Permit as a material defect. The trial court found the broker, but not the sellers, liable for breach of contract. Both Ryan Equity and the broker appealed. The issue of first impression which the Texas court of appeals had to address was whether nonconformance to zoning ordinances constitute "material defects" requiring disclosure.

The court first noted that material defect is not defined in the contract or by statute. The inquiry then turned to the plain meaning of the word and the court held that a defect to the property is a tangible irregularity in the physical appearance or structure of the property. The zoning status of the property, on the other hand, did not relate to the physical condition of the property, but to property's legal status. Because Ryan Equity cited no authority for the proposition that a seller of commercial real estate has a duty to identify the applicable zoning laws or explain their effect to a sophisticated, experienced real estate investor who made no inquiry to the seller or received any express representation regarding the zoning status from the seller, the court held the sellers did not breach the contract for sale. The court used this same reasoning with respect to the material defect provision in the brokerage agreement.

21. Branford v. Santa Barbara, 40 Conn. L. Rptr. 22 (Conn. Super. Ct. 2005) (unpublished opinion, check court rules being citing).

Under Section 52-192a of the Connecticut General Statutes, a plaintiff in civil cases may file an Offer of Judgment offering to settle the claim underlying the action and to stipulate to a judgment for a specific sum. If an amount is stipulated and awarded by the court, interest is to be paid on the entire amount of the judgment.

The Town of Branford condemned Mr. Santa Barbara's property, valuing it at $1,167,800.00. After proceedings commenced, Mr. Santa Barbara filed an Offer of Judgment in the amount of $3,967,800. The Town objected to the offer. The Superior Court of Connecticut struggled with several issues, including, which party is properly designated as the "plaintiff;" and whether an Offer of Judgment could appropriately be brought in eminent domain proceedings.

As to the first issue, the court noted that not only is the plaintiff the only party able to file an Offer of Judgment, they also receive several other advantages including payment of attorney's fees and interest. Reasoning a decree of condemnation is essentially in favor of the condemnor, the court concluded the Town was the proper party to be designated as the "plaintiff." Furthermore, the court noted that Mr. Santa Barbara, as owner of the property, would not have an occasion to be in court but for the decision of the Town to seek condemnation. Accordingly, because Mr. Santa Barbara is not the plaintiff, his Offer of Judgment is improper.

Additionally, the court concluded an Offer of Judgment is never appropriate in eminent domain cases. Connecticut Statutes specifically deal with the payment of interest in eminent domain cases. These statutes provide that interest will only be paid in condemnation cases on the amount that is not deposited with the court clerk at the beginning of the proceeding. Because this conflicts with Offers of Judgment, which allow interest on the entire amount, the Court concluded that Offers of Judgment cannot be made in eminent domain cases. The Court noted that this holding was consistent with the understanding of a majority of the states and federal authorities.

22. Pekelnaya v. Allyn, 21 A.D. 3d 1116, 802 N.Y.S. 2d 698 (N.Y. App. Div. 2005).

Plaintiffs in this case are a father and son who were severely injured walking down a sidewalk when a security fence flew off the roof of a condominium complex and struck them. The fence had been erected on top of the condo complex to prevent access from adjoining buildings. Plaintiffs brought suit against the condo's board of managers, as well as against each individual unit owner. The issue raised in this case is whether the proportionate interest in the common elements of a condominium held by unit owners subjects them to liability for injuries sustained by a third party as the result of a defective condition in a common element.

Each owner holds their respective apartments in fee simple absolute. The condominium declaration further accords each unit approximately a nine-percent leasehold interest in the common elements of the building. While the roof is designated as a common element, it is a limited common element in that its use is restricted to only the two apartments on the fifth floor. Thus, each of these fifth floor apartment owners have a fifty-percent leasehold interest in the roof. Plaintiffs argue because every unit has physical access to the roof, every unit has an ownership interest in the roof.

The New York Supreme Court Appellate Division held there are two reasons why the individual unit holders cannot be held liable for plaintiffs' injuries. First, the concept of a condominium is one created by legislation. In creating the legal structure of a condo complex, the Legislature failed to impose liability to a third party where there is no direct control over maintenance and repair of common elements. Thus, the courts cannot impose liability by statutory or common law implication. Second, the court found control over such common areas is directly and exclusively in the hands of the board of managers and not the unit owners. Because the unit owners lack control, vicarious liability for the board of manager's negligence cannot be imputed. Plaintiffs may only be able to recover from the board of managers.

Because the board of managers carried a reasonable amount of liability insurance, the Court refused to address whether plaintiffs can recover for policy and equity reasons from individual unit holders when there is limited or no insurance.

23. Coleman v. Regions Bank, -- S.W.3d --, 2005 WL 2886481 (Ark. 2006) (only the Westlaw citation is currently available).

Defendant Bank leased land and two separate buildings from different adjacent land owners. Pursuant to each separate lease agreement, the Bank was allowed to make alterations in and to each of the buildings as necessary. Such alterations could not injure the leased premise. In fact, each lease required the Bank return the property to "good condition" upon the expiration of the lease.

In efforts to expand its business, the Bank constructed a two-story building sitting on each of the leasehold interests. After structures were completely integrated and shared electrical systems, plumbing, common elevators and stairwells. Each landlord inspected and approved the plans before construction took place. However, upon the expiration of the lease, the landlords jointly brought suit against the bank claiming the Bank had violated the "good condition" clause of each of the leases but effectively turning two separate structures into a joint structure to be shared among the landlords.

The Arkansas Supreme Court began its analysis of the good condition clauses with basic contract construction and interpretation. It found that the term "good condition" was not ambiguous in either lease and clearly demonstrated the landlords' expectation that the property would be returned in good condition with all permanent improvements remaining upon the land. This was further supported with the well grounded property concept that the lessee is not required to remove improvements made by him with the consent of the landlord. The Court found because the lease here included a right to adapt the premise and such adaptations were made with the landlords' approvals, the Bank was under no obligation to restore the buildings to their original separate condition. Accordingly, the Bank did not violate the good condition clause of either lease.

The lower court had previously determined the alterations to the building created an implied easement, which allowed the individual landlords to continue using the common areas of the building as they have been used under the single tenant. Because the landlords did not challenge this ruling in their opening brief, the Court refused to address their objection and summarily affirmed the ruling on this point.

24. Christensen v. City of Pocatello, 142 Idaho 132, 124 P.3d 1008 (Idaho 2005).

In this case, plaintiff's land served a landlocked parcel behind it by containing an easement appurtenant for egress and ingress purposes. Near these parcels of land was a city road that was designated for public purposes, but had only been opened to pedestrians and bicyclist. The city wished to expand the road. Such expansion included allowing public traffic on plaintiff's easement. As a matter of first impression, the court considered the issue of whether the city could progress with the expansion plans.

Under applicable case law and the Restatement (Third) of Property, the court held that an easement appurtenant may not be used for the benefit of any property other than the dominant estate. Such expansion of service implicitly was not in the original intended purpose of the servitude. Because the city's expansion would force the easement to service neighboring properties beyond the dominant estate, such expansion plans exceed the original purpose of the easement and thus, were not lawful. The city cannot create an impermissible expansion of the use and purpose for which the easement was originally created.

25. Albahary v. City of Bristol, 276 Conn. 426, 886 A.2d 802 (Conn. 2005).

Plaintiffs originally brought several statutory and common law claims as well as an inverse condemnation proceeding in federal court claiming the City's landfill, which abutted plaintiffs' property, had contaminated the groundwater under their property. Under state law, the City condemned part of Plaintiffs' property for an easement that included portions of the contaminated groundwater. The federal courts found in favor of plaintiffs for most of the statutory claims, but denied their inverse condemnation claim.

In the present state case, plaintiffs claimed the proffered compensation award stemming from the federal judgment was not adequate. They argued the valuation of their property interests should be the difference between the contaminated value and the uncontaminated value. Plaintiffs also argued compensation should also reflect the possible future uses of the land. The lower trial court rejected this theory, reasoning that the federal courts had already found against plaintiffs in the condemnation proceedings. The court of appeals disagreed and held that although plaintiffs did have a general compensation claim, they were prohibited from bringing such claim by principles of collateral estoppel.

As a matter of first impression, the Supreme Court of Connecticut considered the issue of whether pre-taking damages cause by a condemnor are recoverable in a condemnation proceeding. The Court reasoned that all damages that are necessary, natural and proximate to the taking should be considered. Thus, plaintiffs may recover pre-taking damages stemming from their inverse condemnation claims, unless otherwise barred.

Unfortunately for plaintiffs in the present action, they were barred from pre-taking compensation under the theory of collateral estoppel. Plaintiffs had received recovery in the form of injunctive relief during federal court proceeding. Because the contamination of the property was due to defendant's negligence, a fact that was litigated and award judgment in the federal court, plaintiffs could not receive additional compensation as the issue was previously litigated.

26. AK. Construction Equip., Inc. v. Star Trucking Inc., -- P.3d --, 2006 WL 205021 (Alaska) (only the Westlaw citation is currently available).

It is well-settled law that loss of use damages are available to a lessor for the reasonable period of time required to make repairs to the property damaged by a lessee. In this case, the Alaska Supreme Court addresses the matter of first impression of whether loss of use damages are available to a lessor with the leased property is completely destroyed beyond repair.

In 2002, AK Construction Equipment, Inc. ("ACE") leased a dump truck to Star Trucking, Inc. ("Star") for $17,500/month. The truck had an overall estimated value of $140,000. The lease provided that Star assumed all repair and maintenance duties and would return the truck in the same condition with reasonable wear and tear. Less than two months into the lease, a Star employee created an accident with the truck that clearly caused the truck to be totaled.

After several rounds a negotiations, Star's insurance company offered to pay $100,000 for the truck, while allowing ACE to keep the salvage, which had an additional estimated value of $45,000. Believing that the $100,000 covered only the property damage to the truck, ACE filed suit against Star for $154,000 loss of use damages based upon the month rent and the remaining amount of the lease.

The Alaska Supreme Court found loss of use damages were reasonable and in fact necessary to fully reflect the expectation interest of the owner. Owners of destroyed property are entitled to loss of use damages for the reasonable replacement time of the property, including any time need to declare the property destroyed. Owners need not prove an actual attempt to replace the destroyed property. To prevent double recovery, however, the Court notes loss of use damages are not available where the owner has already been awarded prejudgment interest on the value of the destroyed property.

27. Holt v. Hegwood, 708 N.W.2d 21, 2005 WI App 257 (Wis. App. 2005).

Plaintiff Holt was visiting his cousin's apartment complex when a tree branch from a neighboring property fell and allegedly injured Plaintiff and caused damage to his car. Plaintiff brought suit against several defendants including the owner of the apartment complex, the owners of the neighboring property and several insurance companies. In preparing for litigation, Plaintiff consulted an arborist, who opined that the tree limb previously had contained cracks before falling. There is no evidence that any defendant knew of the tree cracks. Years after the original incident, Plaintiff filed several amended complaints adding new causes of actions, including public nuisance, private nuisance and violations of the Wisconsin Safe Place statute and other ordinances. Such ordinances made it a public nuisance to plant trees liable to cause damage along any sidewalk, street or building. Finding no evidence to support a public nuisance and violation of the Safe Place Statute, the trial court dismissed these claims.

The Appellate Court agreed with the trial court finding that the Wisconsin ordinances merely made a provision for the general safety and welfare of the public, but did not purport to establish civil liability. Even if civil liability had been created in this case, there is no evidence to suggest the statute was actually violated as the City did not order defendants to remove the allegedly violating tree. Because no orders respecting the tree had been issued, defendants could not have violated the law.

The court further defined a public nuisance as a condition or activity which substantially or unduly interferes with the use of a public place or with the activities of an entire community. Finding that Plaintiff presented no evidence on how the tree effect the use of a private place or community activity, the Court affirmed the trial court's dismissal of Plaintiff's public nuisance claim.

Additionally, because the tree was not located on a place of employment, the application of the Wisconsin Safe Place statute was not appropriate. Thus, the Appellate Court affirmed all trial court rulings dismissing plaintiff's claims.

28. Armstrong g. Ledges Homeowners Association, Inc., 620 S.E.2d 294 (N.C. Ct. App. 2005).

After complete construction of a subdivision, a developer created a restrictive covenant providing for the creation of a homeowners association. The covenant granted all the developer's rights to the association and provided that the covenant may be release or modified by majority vote of the property owners within the subdivision. Almost ten years later, the association adopted an amendment which would place a lien on the lot of any owner who failed to pay the required assessment. Under this new amendment, the association started billing owners for various expenses including lighting repairs and lawn and snow services.

Plaintiffs are owners who purchased their property after the first amendment was adopted. Two years later, the association again sought to amend the covenant to provide for automatic membership in the association and the collection and enforcement of assessments. Plaintiffs filed suit against the association claiming these amendments went beyond the scope of the original purpose of the covenant. The trial court granted summary judgment in favor of the association and denied Plaintiff's request for permanent injunctive relief.

The Appellate Court affirmed the trial court on all rulings. It first found that summary judgment was proper as the parties stipulated that the case concerned a question of law and not fact. Furthermore, injunctive relief against the enforcement of the amended covenant is not proper as the plain language of the original covenant provided for its amendment and modification. As a matter of first impression, the Court held the trial court correctly denied declaratory relief as to the validity of the new amendments because such amendments fulfilled the purpose of the original covenant and Plaintiffs' deeds clearly stated the presence of a restrictive covenant.

29. Breza v. City of Minnetrista, 706 N.W.2d 512 (Mn. App. 2005).

Respondent Breza previously filled 5,737 square feet of wetlands on his property in Minnestrista without obtaining the required city permit. Respondent received a cease and desist order from the City, at which time he filed an application for exemption to prevent removing the entire fill amount. The city did not response to Respondent request until over a year later. Under Minnesota statute, because the city did not respond within sixty days, the Respondent's request was automatically approved. The city then stated only a de minimis exemption of 400 square feet was legal under the circumstances. Respondent sought review of the city's decision, which was affirmed by the city council. Respondent then filed a writ of mandamus with the district court seeking to compel the city to approve the exemption for the entire 5,737 square feet of fill. The district court ultimately granted the writ.

As a matter of first impression, the Minnesota Court of Appeals addressed whether the district court had subject-matter jurisdiction over Respondent's challenge to the city's decision and whether the district court erred in granting Respondent's writ. The court found that because Respondent's exemption request was not answered within sixty days and thus, approved by operation of law, the local governing bodies lost jurisdiction over the exemption application. Accordingly, the district court did properly exercise subject matter jurisdiction to consider Respondent's writ of mandamus.

Respondent, however, was not entitled to a full exemption by writ mandamus. Under Minnesota statute, the city could have only approved a de minimis exemption in Respondent's case. Because the city did not have authority to grant a full exemption, even if it has acted within the required sixty days, its inaction cannot serve as an approval of a full exemption. The Court further found the city fully satisfied its official duties in recognizing Respondent was entitled to a 400 square foot exemption. Thus, while the district court properly exercised subject matter jurisdiction in this case, it erred in granting a full exemption, as a mandamus was not appropriate.

30. Stansbury v. MDR Development, LLC., -- A.2d --, 2006 WL 37035 (Md Ct. App. 2006) (only the Westlaw citation is currently available).

Petitioner Stansbury owned two parcels of land separated by a navigable water channel leading to a nearby lake. A foot bridge was originally constructed on Petitioner's land to allow her and other family members to transverse over the channel and access neighboring properties. Overtime, the footbridge fell into disrepairs. The portion over the channel was eventually dismantled and "No Trespassing" signs were placed at what used to be the entrance of the bridge. Several years later, Respondent bought property neighboring the lake. Respondent asked Petitioner for permission to rebuild the footbridge in order to increase access to their property. Petitioner denied the request. Respondent filed suit asserting entitlement to an easement across Petitioner's land in order to gain access to their own land. While the trial court found Respondent was entitled to an easement and allowed to build a new footbridge, the Court of Special Appeals found Respondent was only entitled to a declaration establishing an easement by necessity for the reasonable use and enjoyment of their land.

Petitioner appealed arguing an easement by necessity is not appropriate because portions of Respondent's land are accessible by public road while the remaining land is accessible by navigable waterway. The Maryland Court of Appeals rejected both of Petitioner's arguments. The Court found that an easement by necessity first arose in the original conveyance of the property. Although the easement was not used by previous owners, non-use along is not sufficient to extinguish such an easement. Only when the necessity ceases to exist will the easement be extinguished. Here, the Court found necessity still existed as the road only provided access to a portion of the property and access by navigable water was not reasonable under the circumstance. Thus, Respondent was entitled to the easement by necessity.

Petitioner also argued Conservation Easement on her land precluded any other easement by necessity and the construction of a new footbridge. The Court held the fact Respondent could not currently build a footbridge did not negate the presence of the easement by necessity. Further, evidence indicated the Conservation Easement would permit such construction upon obtaining the applicable city and state permits. Accordingly, the Court affirmed the Special Court of Appeals on all accounts.

31. Parker Bldg. Services Co., Inc. v. Lightsey ex rel. Lightsey, -- So.2d --, 2005 WL 1415413 (Ala. 2005) (only the Westlaw citation is currently available).

The City of Homewood adopted multiple ordinances relating to the "Standard Building Code" and permit requirements for repair jobs. Just after the ordinances were passed, Parker Building was hired to perform repairs to a facility. Parker Building did not comply with the new ordinances. Parker Building did not get the appropriate permits and did not have an inspector inspect the finished work. Twenty-six months after the repairs had been completed, Kace Lightsey, then five years old, crawled under the guardrail on the observation deck of the facility. The ceiling caved in resulting in permanent damage to the boy. At trial, an inspector testified that the guardrail failed to meet the ordinance's requirements. The trial court charged the jury on negligence per se, as opposed to prima facie negligence, as to Parker Building's alleged violation of the Building Code provisions relating to the permit fee, permit application, and guardrails. The jury returned a verdict in favor of the boy. On appeal, the Alabama Supreme Court reversed and remanded.

The Court found that the violation of a standard building code did not constitute negligence per se. The Court stated that while the doctrine of negligence per se is applicable to a violation of an ordinance, not every violation of an ordinance is negligence per se. In fact, four elements are required: (1) the statute must have been enacted to protect a class of persons, of which the plaintiff is a member, (2) the injury must be of the type contemplated by the statute, (3) the defendant must have violated the statute, and (4) the defendant's statutory violation must have proximately caused the injury. The Court, focusing on the first element, stated that 'a class of persons' is to be distinguished from the general public. In determining the purpose of the Building Code in this case, the Court interpreted it as intending to protect the public generally and not for the benefit of a distinguishable class of persons. Therefore, the first element was not met, and negligence per se was the wrong legal standard to be applied.

32. Shmueli v. Corcoran Group, 9 Misc. 3d 589, 802 N.Y.S. 2d 871 (N.Y. Sup. 2005).

The plaintiff was hired by the defendant as an independent contractor real estate agent. Over the course of her 5 year tenure, the plaintiff maintained computer records of all the real estate deals she had participated in over her 14 year career, including the time prior to her association with the defendant. The plaintiff was terminated by the defendant and when she returned to her office, she was no longer able to access information on her computer as her personal access code had been changed.

Conversion occurs when one who owns or has the right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner. This cause of action has historically exclusively been applied to the physical theft of specific tangible personal property. The court ruled that the "virtual" computer list is convertible property. The court reasoned that although the computerized list was intangible property, it nonetheless fell within the essence of conversion: the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights. The court found that electronically written documents should not be treated with less dignity of ownership for conversion purposes, than ink written documents. The court also noted that their holding was not intended to extend to cases involving employees as it is generally held that an employee's work product is proprietary to the employer.

33. Hanson v. Woolston, 701 N.W.2d 257 (Minn. App. 2005).

After a husband and wife separated, the husband moved out of their home in Todd County. The wife was not able to make the mortgage payments and the property was foreclosed. The wife's brother purchased the home at the foreclosure sale, subject to a 12-month redemption period. Within that period, John Weber (a psychologist) obtained a default judgment against the husband. Weber's statement of claim and summons listed the couple's home, but the husband no longer lived in the home or even within the same County. In the order for default judgment and judgment, the husband's Todd County address was crossed out and replaced with his correct address. Weber assigned the rights to a third-party, Woolston, who in turn transcribed the judgment to the district court. Woolston then obtained a certificate of redemption and the sheriff mailed the ex-wife's brother a redemption check, which was not cashed. The ex-wife, and her brother, then brought an action to quiet title against Woolston.

Among the issues raised on appeal was if the Weber judgment was void, was Woolston nevertheless entitled to the property as a third-party bona fide purchaser? Though the Court of Appeals remanded the issue of if the Weber judgment was void, the court held that Woolston may not obtain title to the land as a third-party bona fide purchaser.

Woolston argues that he had a right to rely on the validity of the Weber judgment at the time he redeemed the property. The court, on the other hand, reasoned that the bona-fide-purchase doctrine should not apply to create title to land when there is a total absence in title in the vendor. As applied in this case, if the Weber judgment is void for lack of jurisdiction (as was argued by the ex-wife and her brother), Woolston's redemption based on that judgment is void. Furthermore, the court held that the good faith alone of a purchaser cannot create title where none exists. The court went on to charge Woolston, as an assignee, with notice of defects in the Weber judgment which were apparent on the face of the record.

34. 401 Fourth Street, Inc. v. Investors Ins. Group, 583 Pa. 445, 879 A.2d 166 (Pa. 2005).

An insured party sought coverage under its insurance policy for repairs made to a structural support wall in order to prevent the collapse of a building. The insurance company denied coverage because the building did not actually collapse.

The Pennsylvania Supreme Court began by construing the collapse coverage common to many policies. That language is as follows: "We will pay for loss or damage caused by or resulting from risks of direct physical loss involving collapse." The court concluded that the language was ambiguous and that the "policy provides coverage for damage caused by the falling down or imminent falling down of a building or part thereof." Under Pennsylvania law, ambiguous language in an insurance policy is construed in favor of the insured. Thus, the court held that if the insurance company wanted to limit coverage to the event of actual collapse only, it could have worded its policy with such specificity.

This appears to be a change in Pennsylvania law. Pennsylvania courts had previously found that collapse coverage in standard policies required the physical falling down of a structure or part of a structure. The Pennsylvania Supreme Court acknowledged that its holding broadens the policy coverage from loss caused by a building's actual collapse to include the threat of loss when facing imminent collapse.

It should also be noted, however, that the court specifically found that it was not adopting the definition of collapse accepted in many other jurisdictions. These jurisdictions hold that collapse occurs when there is "serious impairment of structural integrity." The Pennsylvania Supreme Court specifically rejected this definition concluding that it would possibly convert the insurance policy into a maintenance agreement because, under that definition, substantial damage could occur which does not threaten collapse of the structure. Accordingly, in Pennsylvania, the definition of collapse is not serious impairment of structural integrity, but is instead, actual collapse or imminent collapse.

35. Campbell v. Kildew, 141 Idaho 640, 115 P.3d 731 (Idaho 2005).

Idaho law states that it is unlawful to make a subdivision of property until certain requirements are met. The law also provides for an exception to the subdivision process for when property is subdivided by court order. As a matter of first impression, the Supreme Court of Idaho was faced with the question of whether or not a landowner who was not a party to an arbitration award subdividing property had standing to challenge the arbitration award.

Two developers with property contiguous to each other formed a limited liability corporation and signed deeds conveying their individual properties to the corporation. That same day, the two developers entered into an arbitration agreement subdividing the properties. The arbitration award was then confirmed by the court, thereby meeting the court decree exception.

A landowner who owned property neighboring the properties being subdivided brought this action questioning the legality of the arbitration proceeding. The court held that although the landowner was a non-party to the "sham arbitration award" he in fact had standing to sue. The court reasoned that traditional Idaho law requires both notice and an opportunity for meaningful comment and review prior to the grant of a subdivision permit. Since the landowner did not receive notice or the right to comment, the court found that he and other neighboring landowners suffered an actual injury in the loss of this procedural right.

36. The Metropolitan Government of Nashville and Davison County v. Buchanan, Slip Copy, Slip Copy, 2006 WL 249512 (Tenn. Ct. App. 2006) (only the Westlaw citation is currently available).

A property owner ran a scrap metal business on his property and had done so since the 1950's. In 2000 or 2001, the County passed section 16.24.330(B), a property standards law which made it unlawful for a property owner to utilize his premises for open storage of old cars, appliances, building materials, debris, and so forth. In 2003, the property owner was served with a civil warrant alleging he was in violation of section 16.24.330(B). In his defense, he argued that argued that the open storage law constituted a zoning ordinance and claimed protection under a previous non-conforming use statute.

Municipalities have the authority to enact laws concerning health, safety and welfare pursuant to their police powers. On the other hand, individuals often have legislative protection from newly enacted zoning regulations for previous non-conforming use. The rights of either party could not be resolved without determining whether section 16.24.330(B) in fact regulated health and safety standards or was a slyly disguised zoning regulation.

The Court turned to a new test established by the Tennessee Supreme Court in 2004. The Court's "substantially affects" test turns on whether a regulation or ordinance "substantially affects" the property owners' use of law. Applying the "substantially affects" test, the court held that the open storage law substantially affected the property owner's use of the property as a scrap operation. Consequently, the court found section 16.24.330(B) was a zoning regulation for two reasons. First, the property owner's ability to continue to sell scrap metal from the property would be substantially impaired if he were required to remove the scrap metal from the property. Second, the warrant served upon the property owner, as well as the County's brief, stated that it is the use of the property that violates the code, not the condition of the property. Additionally, the County did not produce any evidence showing that the property owner's property posed a risk to public health, safety, or welfare.

While the defendant was then able to show that his use of the property constituted a previous non-conforming use protected by a Tennessee statute, both the trial and appellate court acknowledged that the County may have had a viable common law or attractive nuisance action. Because the County had not brought such an action, the court left this issue unanswered.

37. Cathedral City Redevelopment Agency v. Stickles, 134 Cal. App. 4th 1406, 36 Cal. Rptr. 3d 833 (Ct. App. 2005).

In "quick take" or "early possession" eminent domain cases, the government is entitled to seek an order for prejudgment possession of the property pending the jury trial on compensation. In exchange, the government must make a deposit of the probable amount of the compensation award so the property owner may withdraw it and reinvest in comparable property. The date-of-valuation in a quick take case is at the time of the deposit to ensure the property owner receives fair market value *at the time of the taking*, that is, at the time the government tenders payment and takes possession. The constitutionality of this valuation date was challenged in *Stickles*, as well as two cases currently under review in the California Supreme Court, *Mt. San Jacinto Community College Dist. v. Superior Court*, 126 Cal. App. 4th 619 (Ct. App. 2005) and *San Diego Metropolitan Transit Development Bd. v. RV Communities*, 127 Cal. App. 4th 1201 (Ct. App. 2005) based on *Saratoga Fire Protection Dist. v. Hackett*, 97 Cal. App. 4th 895 (2002) a straight condemnation case (where the property owner maintains possession) in which the court disregarded statutory valuation requirements to ensure just compensation.

In *Stickles*, the government's original deposit was based on thirteen month old appraisal, but constituted 90 percent of the amount determined by a later appraisal. Additionally, the government timely deposited an additional sum when ordered by the trial court. Agreeing with the trial court's decision, the court held the original deposit date was both the proper, and constitutional, valuation because the property owner received a deposit close to the value of the property of which he was deprived.

The court applied the same reasoning in *Mt. San Jacinto*. However, in *San Diego Metropolitan*, the government's initial deposit was substantially less than the sum it later admitted as the fair market value. The court in that case held that the delayed increase in deposit with no change in the date of valuation would not satisfy the constitutional requirement of just compensation because it would be insufficient to allow the property owner to buy comparable property at the time of the taking. In quick take cases in which the original deposit is less than the probable amount of compensation and the government does not increase the amount in a timely manner, the date-of-deposit rule will not apply and the property will be valued at either the date the proceedings commenced or at the date the trial commences.

38. Spiegelberg v. Wisconsin, Not Reported in N.W.2d, 2005 WL 2994306 (Wis.App. 2005) (only the Westlaw citation is currently available).

This takings case raises the following issue: Where the subject property in a partial taking consists of multiple contiguous tax parcels, is the property to be valued based on: (1) the fair market value of the property as a whole or (2) the sum of the fair market values of each individual tax parcel?

The property owner's property consisted of 150.36 gross acres of agricultural land held as five separate, but contiguous, tax parcels. The Wisconsin Department of Transportation's taking encompassed 11.08 acres from three of the five parcels. In its just compensation analysis, the DOT considered the property as one parcel for valuation purposes and appraised the loss as $18,900. The property owner, on the other hand, determined the value before and after the taking for each of the five parcels separately and arrived at a loss of $84,200. The trial court adopted the property owner's approach and the DOT appealed.

Wisconsin's condemnation statute instructs that the compensation "shall be the great of either the fair market value of the property taken as of the date of evaluation or the sum determined by deducting from the fair market value of the *whole property* immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation." Although the statute uses the term "whole property," the court explained it is to be liberally construed. The court laid out both parties arguments and then requested that the state supreme court provide guidance by resolving the issue. (Certification was granted in November 2005.)

The DOT's argument is that the "unit rule," which required them to show contiguity, unity of use and unity of ownership, applied. According to 4 Nichols on Eminent Domain § 12.02 [1] (rev. 3d ed. 2005), all parcels "that are in substantially identical ownership and are being used, or are reasonably suitable and available for use in the reasonably foreseeable future, for their highest and best use as an integrated economic unit, must be treated as if the entire property constituted a single parcel." With the exception of a residence, the property owner leased the entire property for use as a farm. Additionally, case law and legal treatises have language which supports the view that contiguous undeveloped tax parcels used as a single economic unit must be treated as a single parcel. Finally, raw land, without improvements or preparation for subdivision, should not be valued as if the land were subdivided, but should be valued as a whole.

The property owner's argument is that when the property consists of multiple continuous tax parcels, the statute requires the "whole" property to be valued based on the sum of the individual parcels. As with subdivided property, the parcels have separate legal descriptions, can be freely bought and sold without further subdivision or attachment and are distinct entities to the taxing authorities. According to 4 Nichols on Eminent Domain § 12B.14 [1], subdivided property may be valued individually. Because the parcels are separate legal entities, separate valuation will not lead to speculation, conjecture or uncertainty. Additionally, larger parcels typically sell for less per acre than smaller parcels and following this approach seems more consistent with giving the statute a liberal construction.

39. Seehafer v. Seehafer, 704 N.W. 2d 841, 2005 ND 175 (N.D. 2005).

Brothers Arlo and Lyle held the family farm in joint tenancy. Arlo married Janice and they moved into a trailer home on the property. Six years later, Arlo died unexpectantly. Shortly after Arlo's death, Lyle and Janice's relationship began to deteriorate and Lyle told her that he wanted her to move the trailer home from the property.

Janice moved, but she filed a Declaration of Homestead and a suit ensued. The trial court found Janice was entitled to a homestead allowance and had involuntarily left the property. The court awarded her the value of the homestead, reasonable rental value for land, and moving expenses. Lyle appealed.

North Dakota's provides for a probate homestead "upon the death of a person in whom the title to real property constituting a homestead is vested" and the "homestead estate shall survive…until otherwise disposed of according to law." The purpose of the probate homestead is to protect the family from creditors and improvident devising of the family home. Here, the court had to determine whether a probate homestead may be imposed on land held by the claimant's deceased spouse in joint tenancy with another.

After laying out the statute, the North Dakota Supreme Court noted that Janice's claim was hinged on whether the title to the property had vested in Arlo because Janice had no interest in the property herself. In joint tenancy, a joint tenant's only vested interest is a life estate until he or she is the remaining survivor. The deceased joint tenant's interest divests at death, no interest remains, and the entire interest goes to the survivor. Upon Arlo's death, his interested divested and there was no interest to which a homestead could attach. Rather, conversely, the interest was "otherwise disposed of according to law." Based upon this reasoning, and following the precedent of courts in Florida, South Dakota, and Oklahoma, the Court held that the spouse of a deceased joint tenant cannot claim a probate homestead on her husband's property when his interest in the property terminated on his death and she held no interest of her own.

40. Rausch v. Allstate Insurance Co., 388 Md. 690, 882 A. 2d 801 (Md. Ct. App. 2005).

Rausch, a tenant in a single-family dwelling, left a flammable item on the rear burner of the electric range and left the house. Harkins, a tenant in a multi-unit apartment development, lit scented candles on a nightstand and then left the room to answer the telephone. In both cases, the property caught fire, resulted in costly damage, and the landlords' insurance paid for the damage. Both insurance policies contained subrogation clauses and the companies brought suit as subrogees to recover from the tenants.

Both defendants brought summary judgment motions. In the case against Rausch, the District Court refrained from ruling on the motion and certified the following issues for review: "(1) Does Maryland law recognize the doctrine of 'implied co-insureds' so that a tenant is an implied co-insured of the landlord" and "(2) "If so, is [the insurer] barred from bring the instant subrogation action against tenants of its insured?" On the other hand, the Circuit Court upheld Harkins' motion, relying on *Sutton v. Jondahl*, 532 P.2d 478 (Okla. Ct. App. 1975) to hold that Harkins was an implied co-insured and that the subrogation clause could not be enforced against her. The insurance company appealed.

After examining the principles of law at play in this case, the Maryland Court of Appeals concluded that although the tenants' responsibilities arise out of tort and contract liability principles, the case really turned on subrogation law and framed the issue as follows: "are tenants to be regarded, either as a matter of law or a matter of fact, as co-insureds under the landlords' insurance policies and, if not, is there some other basis, including any paramount equity, favorable to them that precludes the enforcement of an otherwise valid subrogation clause?"

The Court laid out three approaches other courts take with respect to this issue. First, the *Sutton* rule, is a presumption, if not per se rule, that absent an express agreement in the lease to the contrary, the landlord and tenant are co-insureds under a landlord's policy. As a result, the insurer has no right of subrogation against the tenant even if the damage was caused by his negligence. The second approach contradicts *Sutton* and permits an insurer to bring a claim absent an express or implied agreement precluding such a claim. Finally, the "middle approach" adopts the idea that the tenant's liability should be determined by the reasonable expectations of the parties to the lease and examines the lease as a whole to determine those expectations.

The Court then chose the middle approach and presented its general framework, while noting that it also involves a case-by-case analysis. First, the Court held that subrogation clauses are valid, but asserted two caveats: (a) provisions that create or enhance a tenant's liability are subject to general contract law rules and (b) there is no right of subrogation unless there is liability in the first place by the tenant to the landlord. Second, if the lease relieves the tenant of liability, there can be no subrogation claim. Third, if the landlord has communicated to the tenant an express or implied agreement to maintain fire insurance, the tenant's reasonable expectation was that the landlord would look only to the policy. And forth, if the leased premise is a unit within a multi-unit structure, the court may conclude that the parties anticipated, and reasonably expected, that the landlord would have in place adequate insurance for entire building. The Court then remanded the cases to determine the reasonable expectations of the parties.

41. Sleeping Indian Ranch, Inc. v. West Ridge Group, LLC., 119 P.3d 1062 (Colo. 2005).

In 1973, the Ashbys contracted to purchase a 120 acre parcel of land, but a year later, they began having difficulty making the payments. They sought help from two friends, who each agreed to purchase 40 acre parcels through separate installment land contracts. While these parties testified their intent to each own 40 acres, the evidence suggested a potential partnership formation or joint venture for the purpose of possessing all 120 acres. One of these parcels ("Parcel A") and the 40 acres the Ashbys retained ("Parcel B") are at issue in this case.

In 1976, the owners of Parcel A constructed a cabin on what they believed to be their own property. In fact, it encroached on Parcel B by 250 feet. This fact remained unknown until they sold Parcel A to Sleeping Indian Ranch (SIR) in 1996. West Ridge Group (West Ridge) bought Parcel B from the Ashbys in 1999. SIR bought suit to quiet title to that portion of Parcel B on the ground that its predecessor had acquired title by adverse possession. The district court ruled in their favor, but the court of appeals reversed.

Under the vendor-vendee exception to adverse possession, a vendee may not adversely possess against a vendor. The purpose of this exception is to prohibit a vendee from avoiding a contractual obligation to pay for property by adversely possessing it. The court of appeals held that SIR's predecessor-in-interest was not a direct vendee, they were assignees of, or joint venturers with, the Ashbys. The court then imputed a duty of fidelity and a contractual obligation for the benefit of the Ashbys, which would prevent them from adversely possessing against them.

The Supreme Court of Colorado disagreed. The Court followed the rule from other jurisdictions which recognizes a vendee's right to assert ownership by adverse possession over a tract of land not covered by contract. The purchase is not a "vendee in possession" of land not included in the contract, and consequently, the vendor-vendee exception would not apply. The remaining question became whether SIR's predecessors-in-interest contracted to purchase only Parcel A or were implicated in the Ashbys' entire 120 acre contract.

The Court held that although the Ashbys were still making payments on their land installment contract, they were the equitable owners of the 120 acres and had the authority to enter into a conveyance. Because the record supported the trial court's conclusion that the Ashbys and their friends had not entered into a partnership or joint venture, the Court reversed the court of appeals' decision and reinstated the trial court's order quieting title.

42. Thompson v. Higginbotham, -- S.W.3d --, 2006 WL 42228 (Mo. Ct. App.) (This opinion has not been released for publication in the permanent law reports. It may be subject to a motion for rehearing or transfer. It may be modified, superseded or withdrawn. Only the Westlaw citation is currently available.)

Houseguests were injured when a balcony attached to a second-floor apartment collapsed while they were standing on it. It was determined that three screws used to fasten the balcony to its supports had failed and were responsible for the collapse. The houseguests sued the owners of the apartment building and the O'Rileys, the builder/vendor of the apartment building. The O'Rileys moved for summary judgment and the circuit court granted the motion based on a ten-year statute of repose for builders.

The Court of Appeals agreed with the trial court that the statute provided some protection to the O'Rileys, but because they also sold the apartment building to the current owners, other duties outside the scope of the statute were raised. While former owners do not generally owe a duty to injured parties for defective or unsafe conditions to property, the Restatement (Second) of Torts section 353 creates such a duty under certain circumstances:

> (1) A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others upon the land with the consent of the vendee or his subvendee for physical harm caused by the condition after the vendee has taken possession, if (a) the vendee does not know or have reason to know of the condition or the risk involved, and (b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk.

The court chose to recognize this duty because it fosters greater openness and candor in real estate transactions. While aware that it was potentially opening a door to unlimited liability, the court reasoned that each case will be decided on its face and without this duty, plaintiffs face significant hurdles to reach recovery.

Applying this duty to the case-at-bar, the court noted that as sophisticated, knowledgeable and experienced builders, the O'Rileys may have had reason to know that the three screws attaching the balcony to its support would not hold the weight of more than a few people. Furthermore, because they built apartments close to a college campus, they may have had reason to know that the apartments would be rented to students who were likely to entertain large crowds on the balconies. Conversely, the current owners, a college professor and a dentist, may not have been likely to discover the defective condition or realize the risk without disclosure. Because what the parties knew or should have known constituted matters materially in dispute, the court reversed the circuit court's decision to grant summary judgment and remanded for further proceedings.

43. Zografos v. Baltimore, 165 Md. App. 80, 884 A.2d 770 (Md. App. 2005).

This case arose from the circuit court's ruling on a motion in limine in a quick-take condemnation proceeding. The court upheld the City's motion to preclude the property owner from introducing tax assessments for any year except the one in which the taking occurred. The property owner wished to introduce evidence of a diminution in value caused by Ordinance 412, which authorized the City to take the property for a public park.

According to Maryland law, fair market value in a condemnation proceeding is the price at the valuation date which a seller would be willing to accept and a buyer would be willing to pay. However, the fair market value will also include any amount by which the price reflects a diminution in value occurring between the effective date of the legislation authorizing the acquisition and the date of the actual date of the taking if the diminution was proximately caused by the public project for which the property was condemned.

Generally, tax assessments are not admissible in condemnation proceedings because tax authorities do not prepare these assessments for such purposes. However, a property owner may be allowed to present this evidence if the assessed value is greater than the appraised value. The court held that when this rule is read together with the fact that the fair market value includes the price reflecting diminution in value between the date of the legislation and the date of the taking, the property owner should be able counter a condemning authority's appraisal value with evidence that, at a relevant time, the state assessed the property at a higher value.

In this case, Ordinance 412 was passed in 1989. The city did not commence the formal quick-take condemnation proceeding or make its deposit until 2002. In the thirteen years in between, the property's value decreased substantially. In 1988, the City's assessment was $528,810. In 2002, on the other hand, the assessment was only $260,000. The court held the tax assessments were relevant to establish that the enactment of Ordinance 412 proximately caused the diminution. Because the property owner was substantially prejudiced by the exclusion, the court vacated the decision and remanded the case for a new trial.