# THE LAW PROFESSORS' REVIEW OF RECENT DEVELOPMENTS

ABA Section on Real Property, Probate, and Trust Law

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## THE SPEAKERS

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**R. Wilson Freyermuth** is the John D. Lawson Professor at the University of Missouri-Columbia School of Law. He received a B.S. in Business Administration from the University of North Carolina in 1984, and a J.D. with highest honors from Duke University in 1987. He clerked for the Honorable John D. Butzner, Jr. of the United States Court of Appeals for the Fourth Circuit in Richmond, VA, and worked for the Raleigh, NC office of Womble Carlyle Sandridge & Rice in the areas of commercial real estate and bankruptcy. Professor Freyermuth has taught at Missouri since 1992, and has also taught as a visitor at North Carolina, Duke, Washington University in St. Louis, and Denver. He teaches Property, Secured Transactions, Real Estate Transactions and Finance, and Real Estate Leasing. He currently serves as the Executive Director of the Joint Editorial Board for Uniform Real Property Acts, and served as the Reporter for two recent NCCUSL projects — the Uniform Residential Mortgage Satisfaction Act and the Uniform Assignment of Rents Act.

**John V. Orth** is William Rand Kenan, Jr. Professor of Law at the University of North Carolina at Chapel Hill, where he has taught for 29 years. His undergraduate degree is from Oberlin College, and he has a law degree and Ph.D. in history from Harvard University. He contributes the chapters on concurrent estates to *Thompson on Real Property, Thomas Edition,* as well as annual articles in the series Reappraisals in the Law of Property, published in *The Green Bag*. Professor Orth is the author of five books, most recently *How Many Judges Does It Take to Make a Supreme Court? And Other Essays on Law and the Constitution* (2006), and has published numerous law review articles on constitutional law, property law, and legal history. His publications have been cited by federal and state courts, including the United States Supreme Court and the North Carolina Supreme Court.

**David A. Thomas** received B.A. and M.L.S. degrees from BYU in 1967 and 1977, and the J.D. degree from Duke U. Law School in1972. He holds the Rex E. Lee Endowed Chair and Professorship of Law at the J. Reuben Clark School and is the longest continuously serving BYU law school faculty member, having joined the law faculty in April, 1974. He has published over 40 books and several dozen articles on property law, civil procedure, legal education, law librarianship and legal history. He is the principal author and editor-in-chief of Thompson on Real Property, Thomas Edition, a 15-volume national property law treatise that has been cited as a leading authority in hundreds of state and federal cases. He received law school professor of the year awards in 1998, 2000 and 2005. He and his wife Paula are the parents of eight children, including a Rhodes Scholar and two BYU law school graduates (and five other really nice kids), and they currently have fourteen grandchildren.

## THE CASES

**1. Armstrong v. The Ledges Homeowners' Assoc., 633 S.E.2d 78 (N.C. 2006) (Amendments to a declaration of covenants must be reasonable in light of the original intent of the parties and "other objective circumstances").**

The Ledges is a forty-nine lot subdivision accessed by public roads and without common areas or amenities. A declaration of covenants was recorded before any lots were sold, which restricted use to single family residences, and established setback lines, minimum square footage, and architectural controls. To enforce the covenants, the declaration contemplated the formation of a homeowners' association, although it did not make homeowners automatically members thereof. It also provided that "any portion of the restrictive covenants may be released, changed, modified or amended by majority vote of the then property owners." After some lots had been sold, the developer installed a lighted entrance sign and thereafter included in each deed a covenant allowing the developer to assess each lot "an equal pro rata share of the common expense for electrical street lights and electrical subdivision entrance sign lights and any other common utility expense." When the homeowners' association was formed, owners would automatically be members and would be obligated to pay the "pro rata charges and assessments which may be levied."

Some years later, the Ledges Homeowners' Association (HOA) was formed with articles of incorporation that described its purpose as, in addition to enforcement of the covenants, "upkeep, maintenance and beautification of the common amenities" and "other lawful activities." The HOA adopted bylaws concerning assessments for lighting the entrance sign – and for mowing the grass along the roads, for snow removal, and for operating and legal expenses. Amendments to the bylaws later imposed charges for late payment and liens for nonpayment of the assessments. Finally, the homeowners by majority vote amended the declaration of covenants, making all homeowners members and allowing assessments for the "common benefit." Although the annual electrical bill amounted to about $7.20 per lot, the annual assessment was $80 to $100.

Plaintiffs sued the HOA and sought a declaratory judgment that they were not members of the association and that assessments for anything other than the annual electrical bill were not allowable. The trial court dismissed plaintiffs' suit and granted summary judgment in favor of the HOA. The North Carolina Court of Appeals affirmed, finding that the plain meaning of the declaration allowed amendments by majority vote. The North Carolina Supreme Court reversed, holding that an amendment power does not permit amendments of unlimited scope, but that amendments must be reasonable in light of the original intent of the parties and "other objective circumstances…, including the nature and character of the community." It also warned that it would construe covenants strictly "in favor of the *free use of land"* [italics in original]. The case is one of what could be a long series of cases concerning the power of homeowners' associations to develop along lines favored by a majority of lot owners.

**2. Countrywide Home Loans, Inc. v. First Nat'l Bank of Steamboat Springs, 144 P.3d 1224 (Wyo. 2006).**

In 1997, two property owners borrowed $100,000 from America's Wholesale Lender (AWL), and granted AWL a mortgage on land purchased with the loan proceeds. In 2002, the owner granted a second mortgage on the same land to First National Bank as collateral for a business loan. In 2003, the owners obtained another mortgage loan from Countrywide Home Loans, Inc. (with MERS as nominee) and eventually used the loan proceeds to pay off the balance of the AWL mortgage loan. All three mortgages were recorded in the order they were granted, and no satisfaction of the AWL mortgage was recorded.

When the owners failed to make timely monthly payments to First National, First National instituted judicial foreclosure proceedings, joining Countrywide, MERS, and AWL as defendants. First National moved for summary judgment, arguing that the First National mortgage was now first in priority such that its foreclosure would extinguish Countrywide's subordinate interest. Countrywide also moved for summary judgment, arguing that because its mortgage loan refinanced the first priority lien of AWL, Countrywide was equitably subrogated to AWL's first priority position.

The trial court granted summary judgment for First National based upon its interpretation of Wyoming's recording statute, Wyo. Stat. Ann. § 34-1-121, which established mortgage priority solely by recording date. The trial court concluded that equitable subrogation was inappropriate because Countrywide had notice and an opportunity to protect its interest and failed to do so. On appeal, Countrywide and MERS asked the Wyoming Supreme Court to adopt the doctrine of equitable subrogation as reflected in the Restatement (Third) of Property — Mortgages § 7.6 (1997), which provides:

> (a) One who fully performs an obligation of another, secured by a mortgage, becomes by subrogation the owner of the obligation and the mortgage to the extent necessary to prevent unjust enrichment. Even though the performance would otherwise discharge the obligation and the mortgage, they are preserved and the mortgage retains its priority in the hands of the subrogee.
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> (b) By way of illustration, subrogation is appropriate to prevent unjust enrichment if the person seeking subrogation performs the obligation: (1) in order to protect his or her interest; (2) under a legal duty to do so; (3) on account of misrepresentation, mistake, duress, undue influence, deceit, or other similar imposition; or (4) upon a request from the obligor or the obligor's successor to do so, if the person performing was promised repayment and reasonably expected to receive a security interest in the real estate with the priority of the mortgage being discharged, and if subrogation will not materially prejudice the holders of intervening interests in the real estate.

The court refused to adopt the Restatement and instead affirmed the trial court's judgment. The court did note that equitable subrogation was permissible in appropriate cases to prevent "manifest unjustice." However, the court held that a court's equitable power was not appropriately exercised to permit a refinancing mortgagee to step into the shoes of a prior mortgagee. The court suggested that as a refinancing lender, Countrywide resembled "a volunteer or intermeddler in whose favor courts have not been inclined to apply equitable subrogation." The court further suggested that Countrywide would have been unjustly enriched to have its mortgage be subrogated to AWL's first priority when Countrywide had record notice of First National's mortgage at the time of the refinance loan.

**3. CP Holdings, Inc. v. California Public Employees Retirement System (In re CP Holdings, Inc.), 2006 WL 3203751 (8th Cir. 2006).**

The California Public Employees Retirement System (CALPERS) filed a proof of claim in bankruptcy court against CP Holdings, Inc., the obligor on a promissory note held by CALPERS which was in default. CP Holdings objected to the claim because it included a prepayment premium, which CALPERS assessed based upon a provision in the note that specified the premium would become due upon acceleration of the debt (i.e., causing the debt to become due before the originally scheduled maturity date). CP Holdings objected that the prepayment premium was an unenforceable liquidated damages provision, and improper because it did not meet the statutory reasonableness requirement of Bankruptcy Code § 506(b). [The court's opinion did not provide the actual language of the prepayment provision, but the provision was a yield-maintenance feature with a reinvestment rate keyed to U.S. treasury rates, making the provision comparable in type to the provision at issue in the *River East Plaza* case.

The U.S. Bankruptcy Court for the Eastern District of Missouri overruled the debtor's objection, concluding that the prepayment premium was properly included in CALPERS' proof of claim. Both the district court and the Eighth Circuit affirmed. The Eighth Circuit agreed that the language of the prepayment clause was clear, and required the premium payment to be paid upon acceleration of debt, regardless if the debt was actually paid. While the court did characterize the provision as a liquidated damages clause, it concluded that the provision was reasonable because its measure of compensation, as determined at the time of contracting, represented a reasonable forecast of potential harm CALPERS would suffer from prepayment. Further, noting the split of bankruptcy authority regarding the reasonableness of yield maintenance clauses under Bankruptcy Code § 506(b), the court concluded that the bankruptcy judge had not abused his discretion in determining that the prepayment fee due under the agreement was reasonable under the statute.

4. **Department of Natural Resources v. Butler, 147 P.3d 963 (Utah App. 2006).**

A rural road extending from a U.S. highway into a national forest provided access to camping areas, hiking trails and a scenic byway. Portions of the road crossed lands held by private owners, who, in 1996 erected a metal gate, obstructing public access. In 1997 the county gave notice to the owners to remove the gate. When they refused, the county brought action to declare the road a public highway, force removal of the gate and award statutory damages. The private owners averred that the use was not public and was not continuous for the required ten-year period, and both averments were rejected by the trial court. The statutory standard is that the road must be "continuously used as a public thoroughfare for a period of ten years." The appellate court, which does not closely scrutinize the trial court's factual findings on appeal, upheld the findings that the road was a public highway, and therefore ruled that the gate should be removed and statutory damages should be awarded. The private owners should have reacted years earlier to the presence and use of the rural road over their property.

**5. Ellis v. City of Montgomery, 460 F. Supp. 2d 1301 (M.D. Ala. 2006).**

In 2004 a house was partially burned and rendered unsafe. The city determined the owner from tax records, and sent a notice declaring the house unsafe and a public nuisance. Another notice a short time later advised the owner that if the nuisance was not abated in 30 days, the house would be demolished. No owner responded to either notice, nor to a notice five months later renewing the intent to demolish the house. Six weeks before the latter notice, the property had been foreclosed upon and purchased by another party, who duly recorded. The tax records did not yet reflect this change at the time the last notice was sent. When the new owner visited the property five months later, he found the house demolished and brought an action for violation of due process rights under 42 U.S.C. § 1983, alleging the city had failed to provide him notice before demolishing the house. The federal district court ruled that the city should not have relied solely on the property tax records, but could have accurately determined the owner by searching the land title records, and could have also recorded its notice in those same records. This violated the due process standard of "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action."

6. **Gray v. Caldwell, 904 So.2d 212 (Miss. App. 2005) (Tenant in common, when purchasing a co-tenant's interest, has no duty to disclose information concerning developments that would increase the value of the property) <u>and</u> Preciado v. Wilde, 42 Cal. Rptr. 3d 792 (Cal. App. 2006) (To acquire a co-tenant's interest by adverse possession, a tenant in common must produce evidence of ouster that is "stronger than that which would be required to establish a title by adverse possession in a stranger").**

Both of these cases involve co-owners who acquired their interests through inheritance, and in each case one co-owner was in possession and the other was not.

In Gray v. Caldwell, Dr. Gray, who had inherited an interest in real property from his father, conveyed it to Lillian Gray Caldwell, his aunt and co-owner who had resided on the property for many years. After the conveyance, Dr. Gray learned "at a family reunion" that the property was being leased to a telecommunications company for the installation of transmission towers. Because of questions concerning the state of the aunt's title, she and the company brought a quiet title action, in which Dr. Gray intervened, asserting that he had been defrauded by his aunt, who had not revealed the pending lease. (The case is complicated by the fact that the aunt had been trying for twenty years to buy Dr. Gray's interest and that Dr. Gray's father had during his lifetime allegedly agreed to sell the interest that eventually passed to Dr. Gray. There is no allegation that the oral agreement was enforceable. The relevance seems to be that Aunt Lillian's purchase was not immediately motivated by the pending lease.) After reciting hornbook law that while they own the property together, co-owners are in a fiduciary relationship, the court concluded that the relationship does not affect transactions of sale by one to the other; in that situation, they are "adverse parties."

In the second case, Leonard Preciado and his niece, Elizabeth Wilde, were co-heirs. Based on the facts that he had been paying taxes on the property, had demolished a house on it, and had enclosed it with a fence, Uncle Leonard claimed title to the entire lot by adverse possession. The court easily rejected his claim, quoting a prior case that to acquire a co-tenant's interest by adverse possession, a tenant in common must produce evidence of ouster that is "stronger than that which would be required to establish a title by adverse possession in a stranger." Although that alone would have been enough to decide the case, there was also evidence that Uncle Leonard had recently offered to buy his niece's interest and that she had agreed to sell it to him, but that he had never tendered the purchase price.

These cases apply hornbook law. But it is hornbook law with a paradoxical aspect. So long as the co-ownership continues, the co-owners are in a relationship of trust and confidence. The co-owner in possession cannot gain title by adverse possession without an actual ouster and must account to the other for rents and profits from the property, while the co-owner out of possession must contribute to the cost of taxes and necessary maintenance. But the fiduciary duty ends the moment one co-tenant makes an offer to purchase the other's share. Like the scope of prescriptive easements in formerly rural land, difficulties caused by the succession of co-heirs, one or more of whom moves away, are increasing, particularly in the South, as development increases.

7. **Hodges v Sasil Corp, NJ 1/31/07 915 A2d 1, 2007 WL 247812. Summary disposess action that seeks only possession and not damages or rent is nevertheless within the Federal Fair Debt Collection Act.**

A law firm that had filed summary dispossess actions against Section 8 tenants was sued in a class action for damages for violating the Fair Debt Collection Practices Act, 15 USC §§1692e & f on the ground that the complaints it had filed were misleading.

Those complaints accurately stated the total amounts of rent past due, including late charges, attorneys fees, and costs, all of which were defined in the lease agreements as additional rent. However, federal law requires only that delinquent tenants pay statutorily defined rent in order to avoid eviction, an amount that does not include those additional items - and the complaints filed by the law firm did not make that fact clear. Thus these tenants were misled into believing that they must tender the entire amount of arrearages (including those other charges defined as rent in the leases) in order to retain possession. The New Jersey Supreme Court held that this practice and the law firm violated the Debt Collection Act.

The law firm was a debt collector within the meaning of the FDCPA. because unpaid rent constitutes a debt as most cases have felt. A debt collector is one who regularly collects debts due another, which clearly includes attorneys, especially in light of a recent amendment to the Act that eliminated an earlier exemption for them, as well as another recent amendment that declares that pleadings are not communications for purposes of requiring validation notices under the Act.

It is true that monetary relief is not available in a summary dispossess action in New Jersey - which limits relief to a restoration of possession for the landlord. But although expedited possession is the main purpose of the legislation, in practice, the summary disposess action is also a powerful debt collection mechanism. Thus, even in a jurisdiction without monetary recovery in its summary disposess procedure, the reality is that debt collection is being attempted.

Resolution of those questions left open only the question of the regularity of the law firm's participation in such actions, as to which issue see matter was remanded.

The law firm had argued that subjecting summary dispossess litigation to the FDCPA would create procedural conflicts because state law requires a much faster timetable than the federal statute permits. In response, the New Jersey court directed its Civil Part Practice Committee to propose new rules to harmonize these procedures, but added that in the interim complaints should expressly and conspicuously emphasize the amount a tenant is actually required to remit to avoid eviction.

Two justices partially dissented in this 4-2 decision, contending that the summary dispossess action is not a debt collection action, but also approving the requirement that complaints in such actions should precisely identify the amount defendants must pay to avoid eviction.

8. **Keener Properties v. Wilson, 912 So.2d 954 (Miss. 2005) (Owner of prescriptive right of way is permitted to install underground utilities along the route).**

This case began as a fairly routine claim to a prescriptive easement, essentially an easement acquired by adverse use. The "prescriptive" label recalls the older theory of the "lost grant." That theory was rendered necessary by the fact that statutes of limitation concerning actions to recover possession – the basis of title by adverse possession – did not by their terms cover actions concerning adverse use. So, the courts evolved the theory that long continued use gave rise to a presumption – eventually an irrebutable presumption – that the use had been authorized by an express grant, a grant now lost. How long did the use have to continue to raise the presumption? To answer that question, the courts looked to the period in the statute of limitations for acquiring title by adverse possession, in Mississippi ten years. The elements of a claim to a prescriptive easement are analogous to those for title by adverse possession: use that is open and notorious, hostile and exclusive, continuous and uninterrupted, and adverse and under a claim of right. The use in this case had apparently continued since "at least the 1830s," and there was good recent evidence that the burdened landowner had recognized the claimants' right of use. The only question concerned the exclusivity of the use, since members of the general public had also used the route. The trial court held for the claimants and the Mississippi Supreme Court affirmed, holding that the requirement of exclusive use meant use that was exclusive of the right of the burdened landowner to stop it, not necessarily use exclusive of all the world, an obviously correct conclusion since multiple easements can exist in one route.

After winning their claim to a prescriptive easement, the plaintiffs then went on to claim that they were also permitted to install underground utilities along the route. This is where the case gets interesting. The burdened landowner had failed to object to passage over his land – in the nineteenth century by horse-drawn vehicles, later by car and truck. Did that mean that his successor could not now object to the installation of utility lines? If there had really been an express grant of the right "to ingress and egress," then it would have been easier to find that modern access required, in addition to a route for internal combustion engines, facilities for electricity and water. Courts have generally been less generous in expanding the scope of prescriptive easements, but this one plowed ahead and held that "technological advancements" affect prescriptive as well as express easements. In addition, the court held that "the running of underground utilities would not place any additional burdens on the servient estate."

The scope of prescriptive easements is a subject that will be coming up often as formerly rural land, particularly in the South, is developed. Rights of way across pasture and scrub land were sometimes utilized without express permission or obvious objection, situations in which courts might today recognize prescriptive easements. What exactly is the burden on the servient estate? A right of way, whether used intensively, sporadically, or not at all remains a legal burden on title, and a utility easement is generally thought of as a distinct easement. If a utility easement serving the land in question had been acquired by adverse use, would the easement owner necessarily have also acquired an easement of ingress and egress? If underground utilities are allowed, what about aboveground lines? And other "technological advancements" not yet imagined? Finally, are the utilities just part of the right of ingress and egress? Or are they allowable because they impose no additional burden?

**9. Mary Construction Co. Inc. v. Boldridge, 143 P.3d 421 (Kan., 2006).**

When an owner of farmland conveyed the land to a quarry company, the parties orally agreed that the grantor could continue to farm the property as long as one of the grantor's heirs and rock for quarrying remained on the property. Family members of the grantor continued to farm the land and use it for recreational and other purposes for several decades, during which time several successors in interest to the grantee held title. Finally, an heir of the grantor, in occupancy of the land, sought to purchase the land from the then current record owner, and claimed a lifetime farming lease. The grantor's heir sought to quiet title on the ground of adverse possession. The trial and appellate courts denied adverse possession because (1) the originally permissive character of that possession had never changed, and (2) also because that occupancy was carried on in common with occupancy by the owner.

**10. May v. Miller, 941 So. 2d 661 (La. App. 2006)**

Owners of landlocked land invoked their state statutory right to obtain a right of passage over intervening private land. The court granted a 20-foot wide right of passage, extending over about two acres, and $25,000 in taking damages and $25,000 in severance damages. The appellate court reversed the award of severance damages, because no evidence in the record showed that the servient land was any less valuable after the granting of the right of passage.

**11. MERSCORP., Inc. v. Romaine, ___ N.E.2d ___, 8 N.Y.3d 90, 2006 WL 3716017 (N.Y. 2006) (not yet released for publication).**

MERSCORP, Inc. operates a national electronic mortgage registration system which tracks ownership of mortgages through the secondary market. Its members (mortgage lenders) agree that MERS acts as their agent or nominee. When its members originate a mortgage, MERSCORP, Inc. is named as the mortgagee of record on public instruments, but beneficial interest or servicing rights could be transferred internally within MERSCORP, Inc. and not be publicly recorded (thereby saving transaction costs otherwise associated with recording mortgage assignments).

In 2001, the New York Attorney General concluded that this practice violated Property Law § 316, frustrating the intent of New York's recording act. The Suffolk County Clerk then ceased recording MERS instruments, prompting MERSCORP, Inc. to seek mandamus to compel the Clerk to record and index MERS mortgages, assignments and discharges. The trial court granted partial summary judgment to the Clerk; the intermediate appellate court reversed, but granted the Clerk leave to appeal. In a decision joined by 5 judges of the New York Court of Appeals, the court affirmed.

The Clerk argued that MERS had no real interest in the land other than as a nominee, such that MERS could not be viewed as a proper "mortgagee" such that a MERS mortgage was not a proper "conveyance" under New York's recording statute. The Clerk also argued that requiring the Clerk to record MERS discharges and assignments was inconsistent with Real Property Law § 321. This section provides that if it does not appear from the record that a mortgage has been assigned, a certificate of satisfaction must be signed by the mortgagee or its personal representative for the Clerk to mark the record of the mortgage as discharged; by contrast, if it appears from the record that a mortgage has been assigned, a certificate must be signed by "the person who appears from the record to be the last assignee" or its personal representative.

The court rejected these arguments. The court held that the Clerk must record and index MERS mortgages, noting that the Clerk's duty is "ministerial" and that the Clerk "lacks authority to look beyond an instrument that otherwise satisfies the limited requirements of the recording statute." The court also held that since MERS was the nominee for the original mortgagee of record or for the last assignee, MERS acknowledgment of the instrument thus obligated the Clerk to record and index discharges and assignments. The court specifically noted that Real Property Law § 321(3) did not require all unrecorded assignments of a MERS mortgage to be recorded, as its language permits a discharge instrument to note explicitly that an assignment had not been recorded.

In a concurrence, Judge Carmen Ciparick stressed that she viewed the majority's decision as a narrow one that did not resolve whether MERS had standing to institute foreclosure proceedings. She also suggested that ultimately, the legislature should address whether the efficiencies MERS offers outweigh lost recording revenues and external costs suffered by borrowers who cannot readily identify the real owner of their mortgage concurred, as well as whether MERS operations may facilitate predatory lending.

**Note:** On this latter point — MERS standing to institute foreclosure proceedings — MERS won an important victory in a Florida appellate court in *Mortgage Electronic Registration Systems, Inc. v. Azize*, 2007 WL 517842 (Fla. App. 2/21/07). This case involved what appeared to be a relatively straightforward residential mortgage foreclosure, instituted by MERS in its role as nominee. *Sua sponte*, the trial court entered an order dismissing the foreclosure (along with numerous others pending in that court) on the ground that MERS had not proven it was the beneficial owner of the note. The appeals court ruled that a corporate nominee, such as MERS, can bring a foreclosure action on behalf of the corporate beneficial owner of a mortgage note if the nominee is the holder of the note. The court remanded the case for further consideration of whether MERS in fact had possession of the note in question.

12. **River East Plaza, L.L.C. v. Variable Annuity Life Co., 2006 WL 2787483 (N.D. Ill. 2006).**

River East Plaza, L.L.C. is the successor to the MCL Companies, which owned a parcel of commercial land in Chicago for which it sought mortgage financing in November 1999. Eventually, MCL obtained a $12.7 million loan commitment from a corporation related to Variable Annuity Life Company (VALIC), which ultimately placed the loan with VALIC. The VALIC loan documents contained the following prepayment provision:

MCL objected to the provision as punitive and unenforceable, but VALIC responded that the provision was non-negotiable. The loan closed in December 1999.

In 2003, MCL sold the land to Costco, the then-current tenant, which did not assume the mortgage debt. MCL continued to make payments on the mortgage while it attempted unsuccessfully to negotiate a reduction of the prepayment fee with VALIC. Then, MCL (which by this point had changed its name to River East Plaza, L.L.C.) sought a payoff letter for a July 1, 2003 prepayment. When VALIC demanded a prepayment fee of over $4.7 million (approximately 38% of the then-outstanding principal balance), River East sought a declaratory judgment in state court that the prepayment provision was an unenforceable penalty clause. VALIC removed the case to the U.S. District Court for Northern District of Illinois. The prepayment provision read, in pertinent part:

> Prepayment of this Note shall be permitted only in accordance with the following terms and conditions:
>
> (a) [Plaintiff] shall have the right to prepay the entire outstanding unpaid principal balance … of this Note, together with interest on the unpaid principal balance hereof then outstanding, on any regular monthly installment date for the payment of principal and interest hereunder, provided that (i) [Defendant] shall have received at least sixty (60) days' prior written Notice (the *"Notice"*) of such full prepayment, (ii) at the time specified in the Notice for any prepayment there shall be no default under this Note or under any of the other Security Instruments and (iii) such prepayment is accompanied by a prepayment fee in an amount equal to the lesser of (x) an amount which, when added to all the other sums received, charged, or contracted for by [Defendant] which are interest or are deemed to be interest by applicable law, does not exceed the Maximum Lawful Rate or (y) the greater of an amount calculated as set forth in Paragraphs (1) or (2) (as applicable), below:
>
> > (1) at the time of receipt by [Defendant] of the Notice, the difference between (a) the then present value of all unpaid installments of principal and interest due and payable under this Note, calculated from the date of the proposed prepayment to the Maturity Date, discounted at the *"Reinvestment Rate"* (as hereinafter defined) and (b) the outstanding principal balance under this Note on the date of the proposed prepayment; or
> >
> > (2) one percent (1%) of the then outstanding principal balance of this Note.
>
> As used in this Note, *"Reinvestment Rate"* shall be the yield to maturity on a United States Treasury bond or note (the choice of which security to be used for such purposes being in the sole discretion of [Defendant]) having a maturity date of January 2, 2020 (or the maturity date closest thereto if no such bond or note has a maturity date of January 2, 2020).

River East's expert witness testified this provision is known as a yield-maintenance clause, used to make lenders whole when the lender loses expected interest because a loan is paid off early. The rate is often indexed with a base instrument like a Treasury note and spread across similar securities so that it resembles a similar investment. The expert noted this could lead to overcompensation, however, because the risk present in commercial real estate mortgages is not present in a Treasury note. The court also made note of several investments VALIC made immediately after the prepayment by River East, which would have completely replaced the loan with River East.

The court concluded that under Illinois law, the question was whether the prepayment provision was an unenforceable penalty or a valid liquidated damages clause. The court noted that under Illinois law, a prepayment fee would be considered unreasonable if it were clearly disproportionate to the actual damages likely to be suffered in the event of a breach. Citing prior decisions in *In re Kroh Bros. Dev. Corp*., 88 B.R. 997 (W.D. Mo. 1988) and *In re Skyler Ridge*, 80 B.R. 500 (C.D. Cal. 1987), the court held that the reinvestment rate specified by the prepayment provision was unreasonably low because it used only a risk-free rate rather than adjusting that rate to account for the increased risk associated with comparable commercial real estate investments. VALIC argued that the risk-free rate was appropriate to compensate for the risk of interest rate fluctuations between the date the borrower gave notice of its intention to prepay (which fixed the reinvestment rate) and the date VALIC could realistically reinvest the funds in a comparable investment. The court rejected this argument, suggesting that VALIC could have readily modified its prepayment formula to adjust for this risk, and that evidence suggested that VALIC could reinvest the funds within days if it so chose. The court thus concluded that the yield-maintenance fee was unenforceable, and instead enforced the alternate prepayment fee of 1% of the outstanding principal balance.

13. **Ross v. Ticor Title Insurance Co., 143 P.3d 885 (Wash. App. 2006)**

A vendor of land entered into a written agreement for the sale of the land in February. Three years earlier the vendor had granted easements across the land to his son, and in March these were shown on a survey that was recorded. The title examiner prepared a supplemental report noting and excepting the easements. These easement exceptions were also added to the proposed statutory warranty deed, but nothing in that deed noted that it differed, with respect to the easements, from the first deed prepared in connection with the closing documents. The transaction closed in April, and several years later the purchaser became aware of the easements. Claims against the title company and title insurer were arbitrated with an award to the purchaser. The claim against the vendor was denied by the trial court because of the merger doctrine: the signed deed reported the easements. On appeal, the court held that the vendors' failure to disclose that they had already created the easements was actionable misrepresentation that made the merger doctrine inapplicable. Thus the vendor was liable to the purchaser in damages.

14. **In re Estate of Serovy, 711 N.W.2d 290 (Iowa 2006) (Joint tenancy may be severed by operation of law when a joint tenant receives state-supplied Medicare benefits, if necessary for the state to recover the cost of care).**

In 1988 Mother contracted with Son and Daughter-in-Law that in return for their agreeing to improve her house, move in with her, and care for her in her old age, she would deed the property to herself and them as joint tenants with right of survivorship. Both parties performed: she retitled the property and they cared for her, until in 1997 Mother's condition deteriorated to the point that she required nursing home care, which she received until her death, at a cost of about $29,000, paid by Medicaid. After Mother's death, the state "Medicaid recovery officer," acting pursuant to a 1994 state statute subjecting jointly owned property to recovery, petitioned for authority to sell the house in order to realize Mother's one-third interest. Son and Daughter-in-Law alleged that the asset recovery statute impaired the obligation of their contract with Mother, but the probate court concluded that Mother had fully performed when she retitled the property and granted the petition. The state Supreme Court agreed that Mother's interest was recoverable and agreed that she had fully performed her contract, but suggested that even if she owed Son and Daughter-in-Law money for her care, they could recover it only from her estate after the Medicaid debt was paid, but held that the probate court lacked authority to order a sale of the entire property.

As the appellate court acknowledged, interests held in joint tenancy are "not ordinarily subject to the payment of the decedent's debts" because the interest terminates "at the moment of death." But because the statute defined the "estate of a medical assistance recipient" to include "any legal title or interest at the time of the recipient's…death, to the extent of such interests in jointly held property," the court concluded that the legislature intended to sever the joint tenancy. "At the time of death," the court said, did not mean "at the moment of death," otherwise the statute would have no effect; therefore, "the situation is the same as if a judgment creditor had levied on and sold her joint interest in the property during her lifetime." In addition, the court held that since, pursuant to the statute, proceeds from the sale of Mother's interest formed part of her estate the money was consequently available to pay the costs of administration. But because the court found that Mother's interest was severed and held in tenancy in common, only her undivided interest could be sold, not the interests of Son and Daughter-in-Law.

As the federal Deficit Reduction Act of 2006 requires that states implement "asset recovery programs," the frequency of such severances may be expected to increase. In this case, the entire one-third interest seemed to be required to pay the cost of care plus administrative expenses, but if it did not, would any surplus be available to ordinary creditors? Or would it inure by right of survivorship to the other joint tenants? When did the severance occur? Was it at the time of her application for assistance? Or at the time of her death? In any event, didn't she remain liable to her cotenants to contribute to the cost of taxes and upkeep?

15. **Sylva Shops Ltd. P'ship v. Hibbard, 623 S.E.2d 785 (N.C. App. 2006) (Clause in commercial lease that relieves landlord of duty to mitigate damages is not against public policy and is enforceable).**

Defendants leased space in a shopping center owned by plaintiff for five years, for the purpose of operating The Bagel Bin. Despite a promising beginning, "when summer came and the local college students left," the business failed, leaving four and a half years remaining on the lease. Plaintiff made some efforts to find a replacement tenant but refused to reduce the rent below that originally agreed to by the defendants, and months passed before a new tenant was found. Plaintiff sued for unpaid rent and relied on a lease provision that "Landlord shall have no obligations to mitigate Tenants' damages by reletting the Demised Premises." Holding the proviso invalid, the Superior Court judge ordered a trial to determine the amount of damages that plaintiff could have avoided by proper acts in mitigation. On appeal, the North Carolina Court of Appeals reversed, holding the defendants liable for the entire amount, without offset.

The appellate court began its analysis by implicitly recognizing that a lease is a contract, quoting an earlier state Supreme Court opinion that "it is the simple law of contracts that as a man consents to bind himself, so shall he be bound." It then acknowledged that North Carolina has adopted from contract law the requirement of mitigation in all leases, commercial as well as residential. Nonetheless, reverting to the principle of freedom of contract, the court held that it was not contrary to public policy to contract away that duty in commercial leases, analogizing it to a contract exculpating a person from the results of ordinary negligence. Defendants in this case did not argue that the provision against mitigation was the product of unequal bargaining power, but the court clearly would not have been too receptive to that argument in any event, observing that in commercial leases "there is relatively equal bargaining power due to the availability of other space and the fact that neither party is compelled to make a deal." Nor did the court find it relevant that the lease also included a covenant against tenant transfer by assignment or subleasing without prior written consent, which consent could be withheld in the landlord's "sole discretion."

The landlord's duty to mitigate damages in case of tenant abandonment is not universally recognized, although it is more prevalent in residential than commercial leases. Tenants' waiver of the duty by lease provision is relatively recent, and courts' reactions are divided. The North Carolina Court of Appeals cited cases from Arkansas, New York, and Ohio allowing waiver, but recognized that New Jersey by judicial decision and Texas by statute make the duty non-waivable.

The case evidences the ongoing division of the law of landlord and tenant into residential and commercial categories. It also demonstrates that the oft-repeated notion that a lease is "like any other contract" is overly broad. While contract law does allow the general duty to mitigate to be replaced by a stipulation of reasonable liquidated damages – so long as it is not in fact a penalty – it does not allow the total waiver of the duty.

16. **U.S. v. Swan, 467 F.3d 655 (7th Cir. 2006).**

The IRS sought to collect over $329,000 in back taxes owed by Thomas and Joen Towne by asserting a federal tax lien against the suburban Chicago home occupied by the Townes but now owned of record by Peter Swan and Jane Harris. One or both of the Townes had occupied the house continuously since 1976, and Mr. Towne was record owner of the home until 1987, when he lost the home to his mortgagee at a foreclosure sale. In 1988, the mortgagee resold the home to Jack Shull, a friend of Mr. Towne, who leased the home to the Townes until 1999, when Shull sued to evict them for nonpayment of rent. This lawsuit was settled in 2001 when the Mary V. Sams Revocable Trust (controlled by Mrs. Towne's mother) purchased the home from Shull and leased it to the Townes. When the Townes defaulted the next year, the Trust sued to evict them. This suit was settled with the assistance of Swan, who represented the Townes. The settlement gave the Townes four months in which to direct the home's sale to the person of their choice, so long as the Trust was paid $296,000 from the proceeds of the sale (essentially giving them an option to purchase the home for $296,000). If they did not exercise this right within four months, the Trust would be permitted to evict the Townes. Shortly before the end of this four-month period, Swan and Harris agreed to purchase the home from the Trust for $296,000, and also agreed to permit the Townes to live in the home for 24 months (at a below-market rent), with an option to purchase the home from Swan and Harris for $296,000 plus interest and costs. Further, the agreement provided that if the Townes did not repurchase the land within that 24-month period, but Swan and Harris later sold the home for more than $420,000, the Townes would receive all sale proceeds above $420,000. The 24-month period expired without the Townes exercising the option or vacating the home.

The IRS argued that the Townes were the real owners of the home and not mere tenants, and that the Townes thus had an "interest in property" in the home under 26 U.S.C. § 6321, so as to create a tax lien against the home capable of being foreclosed upon by the U.S. government. In a bench trial, the district court awarded judgment to Swan and Harris, and the Seventh Circuit affirmed that judgment following appeal.

The Seventh Circuit, in a curious opinion by Judge Posner, noted that while federal law determines whether a state-law property right creates "the sort of rights to which a [federal tax] lien attaches," citing *U.S. v. Craft*, 535 U.S. 274 (2002), whether the Townes have a property interest is a question of state law. The IRS argued that the Townes had an option to buy the home, or to receive excess appreciation beyond $420,000 on a future sale, and that these were property rights under Illinois law, to which a federal tax lien would attach. Alternatively, the IRS argued that Swan and Harris were merely "nominees" or "alter egos" of the Townes. The Seventh Circuit disagreed, concluding that (1) the option created a contract right, not a property right; (2) even if the option was viewed as a property right, it had not been exercised; and (3) there was not sufficient evidence to conclude that the district court's finding that Swan and Harris were the real owners was clearly erroneous.

**17. Wells Fargo Bank Minnesota, N.A. v. Diamond Point Plaza L.P., 908 A.2d 684 (Md. App. 2006).**

Diamond Point Plaza, L.P. owned and operated a shopping center in Baltimore, Maryland. In 2000, Diamond Point refinanced its existing mortgage, obtaining a $15.3 million refinance loan from Pinnacle Capital Group. Eventually (through assignments and mergers), Wells Fargo became the holder of the mortgage.

In 2002, two of the major stores in the center closed. Ames ended up rejecting its store lease after filing for bankruptcy and ceasing payment of rent, which caused Diamond Point to default on its mortgage payments to Wells Fargo in November 2002. Further, Sam's Club "went dark," eventually sublet its space to a television production company known as The Wire, and for several months operated another store within a 7-mile radius of the center, despite a provision in the lease that prohibited Sam's from owning, operating, managing, or having a financial interest in any store or business within that radius. After defaulting on the lease, Diamond Point paid $633,000 in funds collected from Diamond Point tenants prior to default, and paid these sums to Konover Management Company. Diamond Point also failed to perform maintenance on the center's roofs, causing substantial damage requiring substantial replacement and/or repair.

Because it believed that Diamond Point had misrepresented the status of the Sam's Club lease and other information in its refinancing application, Wells Fargo sued Diamond Point for breach of contract based on loan default, fraud, and misrepresentation, as well as for damages for waste and conversion of rents. Wells Fargo also brought an action against Sam's for breach of the Sam's Club lease agreement. [Numerous other claims were brought, but this summary focuses only upon the facts and claims related to the issues discussed here.] The trial court granted partial summary judgment for Sam's on the issue of whether Sam's had violated the radius restriction. The trial court also concluded that Diamond Point was liable for misrepresentation and awarded damages of over $22 million (the outstanding loan balance, plus interest) to Wells Fargo. The court stated that this damage award was to be reduced by any amount recovered by Wells Fargo in its foreclosure proceeding against the Diamond Point center. The trial court then went on to award Wells Fargo an additional $633,000 in damages for conversion of rents and an additional $1.4 million in damages for waste due to nonexistent roof maintenance. All parties took appeals.

*The Sam's Club Lease and Its Radius Restriction.* The Sam's Club Lease provided as follows:

> 4. (G) Subject to the other provisions of this lease, Tenant shall have the right to determine how any store on the demised premises is to be operated, and to discontinue the operation of any such store, and to operate stores in other locations which are in competition with any such store…. Nothing contained in this Article 4 shall be deemed to express or imply any obligation on the part of Tenant to operate the demised premises in such a manner as to achieve Gross Sales sufficient to generate Percentage Rent.
>
> (H) Tenant agrees that it shall not, during the term of this lease, own, operate, manage or have any financial interest in, any store or business located within a radius of seven (7) miles from the Shopping Center and similar to that then being conducted upon the demised premises….

Sam's argued that it did not violate paragraph 4(H) when it opened another location less than 7 miles away at Golden Ring Mall, because the language "then being conducted upon the demised premises" meant that the radius restriction applied only while Sam's was actually operating at Diamond Point — and Sam's did not open at Golden Ring Mall until after going dark at Diamond Point. By contrast, Wells Fargo asserted that Sam's breached paragraph 4(H) when it opened at Golden Ring Mall during the term of the Diamond Point lease. Wells Fargo argued that the language "then being conducted upon the demised premises" referred to a continuum of time — the "term of this lease" — rather than a specific point in time. Otherwise, according to Wells Fargo, Sam's could avoid the radius restriction simply by closing one store and opening another down the street. Finding both parties' interpretations of the language to be plausible, the court remanded the case to the trial court for consideration of extrinsic evidence that might provide context for a determination of the parties' intent.

*Diamond Point's Collection of Rents*. Prior to its November 22, 2002 default on the Wells Fargo mortgage, Diamond Point collected $633,000 in rents from Diamond Point tenants, which funds it paid after default to Konover Management Company. Wells Fargo argued that by virtue of its "absolute" assignment of rents, the payment of these funds to Konover was a conversion of its property and an avoidable fraudulent transfer. Diamond Point argued that under the Restatement (Third) of Property — Mortgages, Wells Fargo was not entitled to take action to collect rents accruing after default, but did not have any entitlement to rents collected by Diamond Point prior to default. The court concluded that the funds were "rents" as described in the loan documents and affirmed the trial court's judgment for $633,000 in favor of Wells Fargo.

The court's ruling seems somewhat inconsistent with the weight of authority. The new Uniform Assignment of Rents Act provides that upon default, the assignee may collect accrued but unpaid rents and rents that are to accrue in the future, but does not have a right to collect sums already collected by the assignor, unless the assignee has established a security interest in those funds through other law (such as U.C.C. Article 9). Furthermore, because an assignment of rents is a security device, any rents actually collected should not be viewed as belonging to Wells Fargo outright, but should be viewed as security to be applied against the mortgage debt. As a result, the court appears to have erred in awarding Wells Fargo damages based upon the full amount of the mortgage debt, plus an additional $633,000 in damages based upon conversion of rents.

*Diamond Point's Commission of Waste*. Wells Fargo's complaint also sought damages against Diamond Point for waste in the amount of $1.4 million, based upon Diamond Point's failure to maintain and repair roofs at the shopping center. The trial court had concluded that Diamond Point's failure to maintain and repair the roofs constituted permissive waste, and ruled that the actual damages due to Diamond Point's neglect should be the cost to replace the roofs. The trial court established this cost at $1.4 million, and the court of appeals affirmed, concluding that this valuation was a proper exercise of the trial court's discretion. The court noted that Wells Fargo did not have a duty to notify Diamond Point and provide it with opportunity to cure the waste.

It is worth noting that while the court cited with approval the Restatement's definition of waste, the Restatement actually limits the mortgagee's damages for waste to the amount by which the mortgagee's security is impaired. Thus, it bears noting that the trial court's judgment — which awarded Wells Fargo damages based upon the full balance of the mortgage debt, and then additional damages for waste —appears to provide Wells Fargo with a duplicative recovery.

**18. Wenzel v. Richland Township, 2006 U.S. Dist. LEXIS 76843 (E. D. Mich. 2006).**

A landowner leased a parcel to a cellular telephone company that proposed to build a 179-foot cell phone tower on the land, which required a special use permit. The permit was denied because the township planning commission concluded the tower would pose a safety hazard for aircraft landing on adjacent land. The landowner claimed the Telecommunications Act mandated approval of the permit. The federal district court held that the Telecommunications Act required that the planning commissions's decision be supported by substantial evidence, and that such evidence was present in this case. Air traffic safety is a proper basis for restricting the placement of cell phone towers.

## 19. State Laws Adopting More Restrictive Eminent Domain Rules since *Kelo*

Since the United States Supreme Court issued its decision in *Kelo v. City of New London*[1]*,* in June 2005, 34 states have adopted legislation or constitutional amendments intended to make their own eminent domain rules more restrictive than the federal constitutional standard explained in *Kelo.* No U.S. Supreme Court decision has ever generated such a swift and widespread state legislative backlash. The summary of the state action given below is based on information prepared by the Castle Coalition, an arm of the Institute for Justice.[2]

Seventeen of the 34 states increased protections against use of eminent domain power to further private development, and the other 17 narrowed their definitions of blight, generally confining blighted properties to those that affect health or safety. Six states acted by means of constitutional amendments, and four of those six also adopted reform legislation. In four states, citizen initiatives were approved.

Alabama. 2005 legislation prohibits use of eminent domain for private development or to enhance tax revenue. In 2006, the definition of blight was narrowed.

Alaska. Prohibits private transfers for economic development or taking residential property for recreational facilities or projects, unless legislatively approved.

Arizona. Legislation prohibiting use of eminent domain for economic development and increasing the burden of proving a property to be blighted was vetoed; similar provisions in a citizen initiative were approved.

California. Added some more procedural requirements for condemning authorities and nominally narrowed the definition of blight.

Colorado. The standard of evidence to establish blight is now Aclear and convincing.@ Takings for economic development or enhancement of tax revenue are prohibited.

Delaware. Imposes a plan and six-month notice requirements.

Florida. A constitutional amendment requires a 3/5ths majority in both legislative houses for exceptions to a constitutional prohibition on use of eminent domain for private purposes. Legislation prohibits transferring condemned property to private parties for at least ten years after the taking. Use of eminent domain to attack blight is prohibited; municipalities must use their police power to deal with the health and safety issues of such property.

Georgia. Legislation narrows the definition of blight and provides that economic development is not a public use. A new constitutional amendment requires a vote by a body of elected officials to authorize use of eminent domain for redevelopment.

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[1] 545 U.S. 469 (2005).

[2] *See* ALegislative Action since *Kelo,@* prepared by the Castle Coalition of the Institute for Justice, http://www.castlecoalition.org/legislation/passed/index.html, visited Feb. 22, 2007.

Idaho. Legislation tightens restrictions on use of eminent domain for private parties, urban renewal and economic development purposes.

Illinois. Legislation adopted in 2006 prohibits condemning property for private development unless the property is in a blighted area and has been the subject of a regional plan adopted at least five years earlier. The condemning authority bears the burden of proof of blight. Property used for Aproduction agriculture@ may not be taken for private development.

Indiana. Legislation in 2006 redefined Apublic use@ and provided objective criteria for condemning property.

Iowa. Legislation in 2006 required blight designations to be conducted on a property-by-property basis unless a project area is 75% blighted; blight must be shown by clear and convincing evidence. The governor vetoed the law, but the veto was overridden.

Kansas. Under a law becoming effective in 2007, municipalities are prohibited from condemning residences and businesses for the benefit of a private party except in very limited circumstances. Blight designations are to be made parcel-by-parcel.

Kentucky. Redefined Apublic use@ for the state eminent domain law.

Louisiana. By constitutional amendment, municipalities are prohibited from condemning private land solely to generate tax revenue or jobs. Eminent domain may be used to combat blight, but only if the blight threatens health or safety.

Maine. New legislation prohibits use of eminent domain Afor the purposes of private retail, office, commercial, industrial or residential development,@ or for the primary purpose of enhancing tax revenue.

Michigan. A new constitutional amendment prohibits use of eminent domain to transfer property to a private party for economic development or enhancing tax revenues. When eminent domain is used against blighted property, the condemning authority must prove blight by clear and convincing evidence. Several new laws improve condemnation procedure and compensation.

Minnesota. New legislation prohibits use of eminent domain to transfer property to a private owner for private commercial development. New restrictions on condemning blighted property were also enacted.

Missouri. New restrictions on condemning blighted property were enacted, and farmland is excluded from being condemned as blighted. Only elected governmental bodies may exercise condemnation authority. Land may not be condemned Asolely@ for economic development.

Nebraska. New legislation prohibits using eminent domain for a primarily economic development purpose. Agricultural property may not be condemned as blighted.

Nevada. A constitutional amendment in 2006 prohibited use of eminent domain in taking from one private party for the benefit of another private party. Nevada law requires the amendment to be voted on again in 2008 (i.e., in two successive general elections).

New Hampshire. A constitutional amendment prohibits condemnation of property Afor the purpose of private development or other private use of the property.@ New legislation restricts condemnation for redevelopment.

North Carolina. New legislation now prohibits all local condemnation for economic development, and requires blight designations to be made parcel-by-parcel.

North Dakota. A constitutional amendment prohibits all condemnation of private property Afor the use of, or ownership by, any private individual or entity, unless that property is necessary for conducting a common carrier or utility.@

Ohio. A 2005 law imposed until the end of 2006 a moratorium on condemning property for private transfer whose purpose is economic development. The state supreme court ruled in 2006 that economic development alone is not a public use justifying use of eminent domain power.

Oregon. A citizen initiative enacted legislation prohibiting condemnation for transfer to a private party, and authorized taking of only those blighted properties that endanger the health and safety of the community.

Pennsylvania. New legislation prohibits using eminent domain to take private property to be used for private enterprise, and narrows the definition of blight.

South Carolina. A constitutional amendment prohibits use of eminent domain to condemn private property for economic development, Aunless the condemnation is for public use.@ Property may not be designated as blighted unless it threatens health and safety.

South Dakota. New legislation prohibits use of eminent domain Afor transfer to any private person, nongovernmental entity, or other public-private business entity.@

Tennessee. A 2006 law restricts the definition of blight and adds new condemnation notice requirements.

Texas. A 2005 law prohibits most public or private condemnation that confers a private benefit or is for economic development.

Utah. In 2005, before *Kelo,* a new Utah law removed the power of eminent domain from redevelopment agencies. In 2006, a new state law imposes additional approval and notice requirements for condemnation procedures.

Vermont. A 2006 law prohibits use of eminent domain Aprimarily for the purpose of economic development.@

West Virginia. Legislation in 2006 requires increased showings by a condemning authority seeking to take non-blighted property in blighted areas.

Wisconsin. A 2006 law prohibits use of eminent domain to condemn non-blighted property for public use. A property must actually be blighted in order to be taken.