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PATRICK A. RANDOLPH, JR.
PROFESSOR OF LAW
UMKC SCHOOL OF LAW
EDITOR

DECISIONS COMMITTEE
SECTION OF REAL PROPERTY
PROBATE & TRUST LAW
AMERICAN BAR ASSOCIATION

AMERICAN COLLEGE
OF MORTGAGE ATTORNEYS

Quarterly Report on Current Developments in Real Estate Law

July 1, 2005 to September 30, 2005

Prepared by: Patrick A. Randolph, Jr.

Co-Sponsors - ABA Section on Real Property, Probate & Trust Law
Committee on Decision and the American College of Mortgage Attorneys

Editor: Patrick A. Randolph, Jr.

Elmer F. Pierson Professor of Law
UMKC School of Law

Of Counsel: Blackwell Sanders Peper Martin
Kansas City, Missouri

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This publication is intended to provide experienced real estate practitioners with information on recent decisions and writings affecting real estate practice. Although there are occasional reports of administrative or legislative decisions or related matters, the primary focus of the Report is on appellate court decisions. Contributing lawyers, affiliated with either the ABA RPPT Section or ACMA, are assigned to review all reported decisions in standard reporting services received in their libraries prior to the close of the stated reporting period. They forward their summaries those cases that they deem to be of interest to a nationwide audience. They forward their summaries and copies of the cases to the editor, who substantially edits the summaries and frequently adds comments.

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The editor of the Report alone controls the content of the Report and, for the most part, prepares the comments and criticisms added to the case summaries. The views expressed in the Report have not been approved by the House of Delegates or the Board of Governors of the American Bar Association or by the American College of Mortgage Attorneys and, accordingly, should not be construed as representing the policy those groups. Similarly, they are not the view of the Section of Real Property, Probate & Trust Law.

Highlights in this Report

Bankruptcy: Can court reset effective time for rejection of lease to time of filing? 6

Bankruptcy: Is default interest a "reasonable charge?" 9

Condominiums: Can Association charge transfer fee when unit is sold? 15

Equity: Laches, an equitable defense, not available against legal declaratory relief claim. 22

Elderlaw: Law on transferring property to establish Medicaid qualification discussed. 21

Forebearance: What's the difference between "extension" and "novation." 40

Landlord/Tenant: Does duty to repair mean duty to replace? 30

Landlord/Tenant: Effect of late option renewal is still left in doubt. 33

Landlord/Tenant: Tenant can waive T's duty to mitigate. 36

Mortgages: Relationship between statute of limitations and right to foreclose. 38

Mortgage Prepayment: When is an acceleration for default "voluntary prepayment?" 43

Substantive Consolidation: Delaware Court narrows defense. 10

Trespass: Errant golf balls enjoinable as trespass, not balanced, as in "pure nuisance." 55

Vendor/Purchaser: How many tries are "reasonable" attempt to satisfy loan condition? 56

Vendor/Purchaser: Post closing escrows and merger doctrine – a new analysis. 58

Words and Phrases: A driveway is a "structure." 50

Contributors* to this Report

NAME	TITLE**
LeeAnn W. Aldridge Hunter, Maclean, Exley & Dunn, P.C. Savannah, Georgia	Atlantic (Co-Reporter)
Nancy Appleby Rodey Law Firm Albuquerque, NM	Pacific (Co-Reporter)
Jessica Berets Debevoise & Plimpton New York, NY	N.Y. Supp. Co-Reporter
Jack Burton Rodey Law Firm Albuquerque, NM	Pacific (Co-Reporter)
Virginia A. Davis Katten, Muchin, Zavis & Rosenman Washington, D.C.	DC
Edward C. Dawda Dawda, Mann, Mulcahy & Sadler, P.L.C. Bloomfield Hills, MI	Sixth Circuit
Pamela DeAngelis Palmer & Dodge, L.L.P. Boston, MA	Third Circuit (Co- Reporter)
Pam Dempsey Rodey Law Firm Albuquerque, NM	Pacific (Co-Reporter)
Bindi Dharia Debevoise & Plimpton New York, NY	N.Y. Supp. (Co-Reporter)
Rebecca Fischer Sherman & Howard Denver, CO	Interstate Land Sale Regulation Act Tenth Circuit
Morton Fisher Ballard, Spahr, Andrews & Ingersoll Baltimore, MD	Atlantic Reporter (Co-Reporter)
Robert Freedman Carlton, Fields, Ward, Emmanuel, Smith, Cutler, P.A. Tampa, FL	Eleventh Circuit
Catherine Goldberg Rodey, Dickason, Sloan, Akin & Robb, P.A. Albuquerque, NM	Pacific (Co-Reporter)
Frank J. Hammond, III Watkins & Eager The Emporium Building Jackson, MS	Southern Reporter Probate Cases
Minta Kay Goodwin, Procter & Hoar Boston, MA	Northeastern
Robert Krapf Richards, Layton & Finger, P.A. Wilmington, DE	Atlantic (Co-Reporter)
Nicholas Madden Palmer & Dodge, L.L.P. Boston, MA	Third Circuit (Co-Reporter)
Bruce B. May Jennings, Strouss & Salmon, P.L.C. Phoenix, AZ	Pacific (Co-Reporter)

NAME	*TITLE***
Andrew M. McCullough, J.D. Wishart, Norris, Henninger & Pittman P.A. Charlotte, North Carolina	Southeastern (Co-Reporter)
Paul J. McNamara Masterman, Culbert & Tully Boston, MA	First Circuit
Ira Meislik Meislik & Levavy Montclair, NJ	Atlantic (Co-Reporter)
Janet K. O'Bannon Lewis, Rice & Fingersh, L.C. Kansas City, MO	Southwestern Reporter
Professor John Orth University of North Carolina School of Law Chapel Hill, NC	North Carolina
Julie C. Panaro, Esq. Young, Conaway, Stargatt & Taylor Wilmington, DE	Atlantic (Co-reporter)
Beverly K. Prickett Hunter, Maclean, Exley & Dunn, P.C. Savannah, Georgia	Georgia Reporter

NAME	*TITLE***
Professor Patrick A. Randolph, Jr. University of Missouri at Kansas City School of Law Kansas City, MO	Editor
Howard A. Roston Malkerson Gilliland Martin, LLP Minneapolis, MN	Northwestern (Co-Reporter)
Patrick T. Sharkey Jackson Walker L.L.P. Houston, TX	Fifth Circuit
Kevin Shepherd Venable, LLP Baltimore, MD	Section Chair
Jory P. Shoell Kummer Kaempfer Bonner & Renshaw Las Vegas, NV	Pacific (Co-Reporter)
Will Steadman Rodey Law Firm Albuquerque, NM	Pacific (Co-Reporter)
James R. Stillman Ellman, Burke, Hoffman & Johnson San Francisco, CA	Bankruptcy Reporter

*The editor frequently revises reports and occasionally adds comments not submitted by a contributor. Time constraints do not permit contributors to review and ratify such changes. Therefore, inaccuracies in the reports and the content of many comments are the responsibility of the editor, and not necessarily of the identified contributor.

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ADVERSE POSSESSION; REQUIREMENT OF PAYMENT OF TAXES: Indiana statute requiring payment of taxes to establish adverse possession claim is satisfied by "substantial compliance" with the statute by payment of taxes on adjacent land in belief that taxes are paid on the land in question, but twenty years of cases suggesting that payment of taxes is just a notice requirement, and would not apply at all where there is other notice of possession, are disapproved.. ***Fraley v. Minger, 829 N.E.2d 476 (Ind. 2005).*** , discussed under the heading: "Adverse Possession; Requirements in General."

ADVERSE POSSESSION; REQUIREMENTS IN GENERAL: The common law elements that establish adverse possession are hereby rephrased for clarity and must be proven by clear and convincing evidence, while substantial compliance with the adverse possession tax statute was held sufficient. ***Fraley v. Minger, 829 N.E.2d 476 (Ind. 2005).***

Fraley appealed a judgment at trial awarding Mingers, the adverse possessor title to approximately 2.5 acres of undeveloped rural land. Both parties agreed that the claimant must prove possession was actual, visible, open and notorious, exclusive, under claim of ownership, hostile, and continuous for the statutory period. Fraley contend that the Mingers did not meet the heightened burden of proving the elements by strict, clear, positive, and unequivocal evidence.

On appeal, the Supreme Court of Indiana agreed that a heightened degree of proof was necessary, and applied the clear and convincing evidence nomenclature. Rephrasing the numerous terms used to describe the elements of adverse possession, the Court held that a person without title may obtain ownership through adverse possession upon clear and convincing proof of control, intent, notice, and duration.

To establish control, the claimant must exercise a degree of use and control over the property, which is normal and customary. Claimant must show intent to claim full ownership rights superior to all others. To establish notice, claimant's actions must sufficiently give actual or constructive notice to the legal owner of the property. Finally, each element must be satisfied for the required duration of time.

Here, the Court found that each element had been satisfied by clear and convincing evidence based on the record at trial.

The court then turned to the statutory requirement in Indiana that an adverse claimant have paid taxes on the land claims. For many years, the Court's interpretation

of the adverse possession tax statute required the adverse claimant only to show "substantial compliance, but not exact compliance with this requirement. So, in a case of boundary overlap, the fact that the claimant did not pay taxes on the overlapped portion, but, due to uncertainty in the tax records, believed that he was doing so when he paid taxes on his own adjacent land, would be sufficient.

In more recent years, however, Indiana courts of appeal had expanded upon this somewhat narrow exception to the tax payment requirement. Some courts had said that where there was clear notice to the owner that adverse possession was occurring they would do away with the tax requirement, as it was essentially another form of establishing that there was notice to the owner that someone was on his land.

The court here considered whether it was appropriate ton conclude that, after almost 20 years of this broad interpretation, the legislature had acquiesced in it.. The Court applied a restrained view of legislative acquiescence to its interpretation of the statute. "Substantial compliance" does satisfy the adverse possession tax statute where the adverse claimant has a reasonable and good faith belief that the claimant is paying taxes during the period of adverse possession. But still there is a tax payment requirement. The Court declined to disregard completely the tax statute simply because the title holder had some other clear notice of adverse possession.

In this case, there was no evidence of tax payments or substantial compliance with the tax statute. The Court found that the trial court could not have properly concluded that the tax statute had been complied with. The Supreme Court reversed the trial judge and remanded in favor of Fraley.

ATTORNEY'S FEES; APPEAL: When court denies attorney fees to prevailing party in tort claim, opponent is not entitled to fees for successfully defending against appeal of fee denial, even when alleged tort arose in course of contractual relationship and the contract had an attorney's fee clause. ***Hasler v Howard 130 CA4th 1168, 30 Cal. Rptr. 3d 714 (2005)***

Hasler listed his home for sale with broker Howard. Hasler believed the home was worth $4.5 million, but Howard convinced him to accept an offer of $3.7 million from buyers she also represented. Claiming that Howard did not disclose the dual representation, Hasler sued for fraud, breach of fiduciary duty, and breach of the duty to disclose.

Hasler voluntarily dismissed his complaint prior to trial and without a settlement. Howard moved for attorney fees as the prevailing party, basing her request on a provision in the listing agreement providing for attorney fees in disputes over broker compensation. The trial court awarded Howard costs, but denied her motion for attorney fees.

The court of appeal affirmed the trial court's denial of Howard's motion for attorney fees, finding that the listing agreement provision was not broad enough to cover Hasler's action.

Hasler then moved for an award of attorney fees incurred in successfully defending against Howard's appeal. The trial court awarded Hasler his fees, reasoning that had Howard prevailed on appeal, she would have been entitled to fees under the listing agreement. The court of appeal reversed, holding that a prevailing party is not entitled to fees simply because the opposing party requested them. In fact, in the present case, neither party was entitled to attorney fees under the narrow provision in the listing agreement, no matter who prevailed.

Reporter's Comment: The California Supreme Court's statement in *Hsu v Abbara* 9 C4th 863, 39 CR2d 824 (1995) – that a party can recover contractual attorney fees even when its (successful) defense was that there was no contract, as long as its adversary could have gotten fees had the case gone the other way-seems so odd on its face that it had to lead to interpretative problems despite its intrinsic fairness.

However, the particular situation in Hasler was not that difficult to predict. Since the attorney fees clause applied only to contract claims and the seller's lawsuit against the broker sounded only in tort, the broker could not claim attorney fees even though she successfully defended herself. That also meant that the plaintiff vendor could not claim his fees after the broker's unsuccessful appeal of the denial of her fees, since nobody could have gotten fees in this tort action, regardless of who won-at trial or on appeal.

Had the clause been "better" drafted, i.e., had it given fees to the victor in any litigation, then the fees could

have been awarded to the broker (at the trial court level), just as the seller would have recovered them had there been a contrary outcome.

The Reporter for this item was Roger Bernhardt of the Golden Gate Law School, writing in the California Real Property Reporter.

ASSOCIATIONS; ASSESSMENTS; TAX SALE: Tax sale purchaser is bound to pay homeowners' association fees, even before purchaser has completed the running of the redemption period by sending redemption notice. ***Croft v. Fairfield Plantation Property Owners Association, Inc., 2005 WL 2787474 (Ga.App., October 27, 2005).***

A purchaser of properties at a tax sale brought suit against a homeowners' association after it filed liens against the properties for failure to pay the association's annual fee. The trial court entered summary judgment for the association. The owner appealed. The Georgia court of appeals affirmed summary judgment.

The court stated that a contrary holding would result in a situation in which a tax deed purchaser could, by inaction, keep the redemption period alive indefinitely, reap the benefit of property value increases, and avoid the obligation to pay maintenance expenses which increase the value of the property. It would be inequitable to allow a tax deed holder to obtain the benefit of restrictive covenants that require the homeowners association to maintain the surrounding amenities such as roads and common areas, all of which increase the value of the property purchased at the sale, without having to pay a proportion share of the cost of these benefits for an indefinite time.

ASSOCIATIONS; DIRECTORS; ELECTIONS; DEFAMATION: A candidate for a condominium's board of directors is considered a limited public official with respect to defamatory statements about her or him. ***Gulrajaney v. Petricha, 381 N.J. Super. 241, 885 A.2d 496 (App. Div. 2005)***

During the course of an election for directors of a condominium association, a prospective purchaser of a unit from one of the candidates erroneously believed that the candidate-seller was not abiding by the contract. That prospective buyer sent an email message to the candidate-seller's opponent and the content of the email message was circulated in the context of the election. The candidate-seller, although elected, claimed that "in his profession as a real estate broker, 'he lost real estate commissions and listings as a result of the E-mail.'" Consequently, he sued the buyer, alleging defamation.

The lower court concluded: "while E-mail was defamatory, [the candidate-seller] was, in light of his participation in the election, a limited public figure in the condominium community. Therefore, he [was] required, but failed, to produce substantial evidence that [the person who wrote the E-mail message, his opponent, or anyone else] were motivated by actual malice or that they abused a conditional privilege that protected them from liability for publishing information under the reasonable belief that persons with a common interest in the subject matter were entitled to know the information published."

On appeal, the candidate-seller argued "(1) that he was not a limited public figure with respect to the defamatory statements about him; (2) there was sufficient evidence of actual malice with respect to [the buyer] to have allowed the defamation claim against her to proceed to trial; and (3) [his opponent and the other individuals] abused whatever qualified privileges they may have had by over publishing the defamatory information."

The Appellate Division rejected each of those arguments even though it agreed that the statements in the E-mail message were defamatory. Under the law, "[p]ublic figures are those who 'have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.' ... The basis of this definition [is] the notion that such persons 'usually enjoy significantly greater access to the channels of effective communication' and, therefore, are able to more easily defend themselves. ... Thus, they may be justly burdened with the actual malice standard [as articulated in *New York Times Co. v. Sullivan*]."

Deciding whether a person is a public or private figure is a question of law. To the Court, it didn't matter that the condominium project was "a private development with a [private governing body] or that, as a candidate for [the association's] Board, [the defamed candidate was] a private figure." Earlier cases had held that "a candidate for a planned unit development association's board of directors was a limited public figure, because '[a]s a candidate for election to the association's board of directors, [he had] thrust himself into a spotlight which

justified viewing him as a public figure for the limited purpose of his candidacy." The Court believed that the same rationale applied in this case even though "the services provided in a planned unit development may be different than those provided in a condominium." Nonetheless, according to the Court, "the significance of board of director elections to members of both communities is very much the same." Here, the record indicated that this particular association's "election was hotly contested and that owners and residents had a keen interest over its outcome and that the individuals who would exercise control over the community as a result." In viewing the facts, the Court agreed with the lower court that the actual malice standard had not been met.

ATTORNEY/.CLIENT; BROKERS: Attorney who is licensed real estate broker can receive real estate commission in lieu of hourly fee for representing seller in real estate transaction. ***Ops Cal Atty Gen 04-1201 (Nov. 21, 2005)***

A partner in a law firm who holds a California real estate broker's license may represent the seller of real property in a transaction in which the seller agrees to pay the law firm a real estate brokerage commission in lieu of an hourly fee for legal services rendered in connection with the sales transaction, provided that no one in the firm who does not hold a real estate broker's license performs any act for which a license is required.

Reporter's Comment: : Just because a lawyer who also holds a broker's license can get paid for performing both types of activities does not mean that it is automatically a smart way to do business. Because real estate selling activities are so law-related, the State Bar has opined that an attorney must comply with the bar's ethical standards as well as with those imposed on real estate brokers. *California State Bar Formal Opinion No. 82-69.*

Brokers have disclosure obligations, especially in residential sales, that are often quite inconsistent with attorneys' duties to preserve client confidences. Worse, brokers may engage in dual agency, whereas an attorney who tries it could get thrown out of the profession. So, think twice before you burn this candle at both ends.

Editor's Comment 1: This is not only a California problem. An attorney acting as an attorney universally has the ethical duties of an attorney. Often it is very hard for an attorney functioning as a broker to prove that everyone dealing with him knew that he was not functioning as an attorney at that moment. Even if one uses a different phone and different stationery, the fact is that the community, especially present and former clients, may be accustomed to treating the attorney as an attorney and expecting him to behave accordingly.

Duties of loyalty and confidentiality come into play in many contexts. The expectations that parties have of lawyers are quite different than those that they have of brokers on these questions. We're not saying "better" or "worse," but just different. And, in fact, these days its more than expectations, since many states have statutes imposing on brokers disclosure responsibilities that are antithetical to the ethical responsibilities of lawyers.

Editor's Comment 2: It's not just a one way street, either. People who become used to dealing with someone as a broker, and relying upon disclosures by that party consistent with brokerage responsibilities, may then get fooled if in a subsequent transaction the person whom they thought was a broker suddenly starts behaving like a lawyer. Third parties may be entitled to rely upon the appearance that the party is a broker based upon past experiences with the party. It only takes one phone call to gin up pretty big financial responsibility in all of this.

The Reporter for this item was Professor Roger Bernhardt of the Golden Gate Law School in San Francisco.

BANKRUPTCY; HOMESTEAD; JUDGMENT LIENS; DISCHARGE: Under Wisconsin statute, which is not preempted in bankruptcy, debtor can obtain a post-discharge state court order satisfying a pre-petition judgment lien, even though the debtor's property interest exceeded the exemption claim to which debtor was entitled in bankruptcy. ***Megal Development Corp. v. Shadof, 2005 WI 151 (2005)***

Homeowners filed Chapter 7 petition for bankruptcy and listed in debtors' schedule of unsecured creditors a creditor that obtained a judgment in the amount of $52,714. During the bankruptcy proceeding, the judgment creditor filed an objection to debtors' claim for exempt homestead property, but the bankruptcy court set aside the objection as premature, because debtors had not sought to avoid any portion of the judgment lien. After discharge, debtor filed application with state court pursuant to a Wisconsin statute, Sec. 806.19(4), Wis.

Stats., seeking an order satisfying the judgment. Creditor objected on the ground that the net equity in the property exceeded the maximum homestead exemption of $40,000.

The state court held that the debtors were not entitled to an order satisfying the judgment, where the property's value exceeded the applicable exemption. Wisconsin Court of Appeals certified the matter to the Wisconsin Supreme Court.

The Supreme Court reversed, upholding the complete release of the judgment lien claim.

The court determined that the Wisconsin statute provided a post-discharge mechanism through operation of state law for a debtor to obtain, where the judgment creditor's claim was discharged in bankruptcy, satisfaction of a judgment and a judgment lien that had, by operative statute, attached to debtor's real estate. The language of the statute, regardless of any state or bankruptcy exemption limits, mandates that the clerk shall satisfy each judgment described in the applicable, upon which the judgment shall cease to be a lien on any real estate owns or later acquires.

The Wisconsin Supreme Court then examined the state statute in the context of federal bankruptcy law. It held that the Wisconsin statute is not preempted by the Supremacy Clause of the United States Constitution, because a state statute that permits a state court to satisfy post-discharge a judgment and extinguish a judgment lien reflects policy decisions of the legislature to provide additional protections to Wisconsin residents at the conclusion of bankruptcy, and does not interfere with the Bankruptcy Code. The state statute does not create an exemption, nor does it limit the powers of the bankruptcy trustee during bankruptcy. The statute simply does not operate during bankruptcy at all, but is dormant until the conclusion of the federal bankruptcy proceeding, and thus does not conflict with the Code. For states that do not, like Wisconsin, have such a statute, 11 U.S.C. Sec. 522(f) provides a similar mechanism to avoid liens through the federal bankruptcy code. Finally, the Wisconsin statute does not deprive judgment creditors of a property right without due process of law. The judgment lien, which is nothing more than a mechanism for the enforcement of an in personam money judgment, does not constitute or create an estate interest or right of property

Comment: I asked bankruptcy expert Paul Hoffman, of the Stinson, Morrison firm here, to comment. He responded in some length as follows. Note that Paul assumes that the Wisconsin statute is a rarity. Is this really true? DIRT would like to know.
Here are Paul's comments:

Hypothetical 1: Debtor has home worth $160,000, subject to first and second mortgages in the aggregate amount of $100,000 and a judgment lien for $50,000. The relevant state law homestead exemption is $40,000. Debtor files Chapter 7 and gets a discharge. Under 522(f) of the Bankruptcy Code, the debtor has $60,000 in "equity" (above the mortgages) and is entitled to "avoid" $30,000 of the $50,000 judgment as "impairing" her entitlement to a homestead exemption of $40,000. However, the $20,000 balance of the judgment lien "survives" and should be enforceable against the homestead after the automatic stay is terminated. As noted in the Dewsnup case, the discharge only affects the debtor's personal liability for the judgment, not the in rem lien created by the judgment.

522(f) exists to "avoid" the in rem lien "to the extent" that it impairs an exemption. There is no need for 522(f) if the discharge otherwise eliminates the in rem lien.

Hypothetical 2: Same facts, except home is worth $250,000. Debtor has $150,000 in equity above the mortgages, and is entitled to a $40,000 exemption.

The debtor cannot avoid any part of the judgment lien because it does not "impair" her exemption. Accordingly, the lien "survives" the discharge and can be foreclosed if not satisfied (most debtors in this circumstance will arrange to sell or refinance the home to eliminate the judgment lien). Moreover, the trustee sees "equity" above all the liens and the exemption in the amount of $60,000 and will arrange to sell the home (or negotiate with the debtor about refinancing or selling the home to pay this estimated equity to the trustee) to capture that non-exempt equity in the bankruptcy case. This is a highly unusual situation because most debtors with this much equity in their home do not need to file bankruptcy.

3. Now consider the above examples under this Wisconsin case:

In hypothetical 1, above, the debtor gets to deem the judgment "satisfied" under Wisconsin law upon getting

a discharge. This means the debtor will then get to keep $60,000 in equity in the homestead instead of the $40,000 permitted under the homestead statute and the Bankruptcy Code. Under the Bankruptcy Code, this $20,000 should have gone to the judgment creditor, as argued in the case. Query whether the trustee can now argue that this $20,000 should go to the estate based on this interpretation of the Wisconsin statute.

Wisconsin law applied to hypothetical 2, above, results in an even more egregious consequence. The debtor gets to deem the entire $50,000 judgment lien "satisfied" and keep $90,000 in equity above the mortgages.

BANKRUPTCY; "LOAN SECURED BY PRINCIPAL RESIDENCE:" In bankruptcy action, the date of the loan agreement is the date from which to assess the Debtor's principal residency in the home, and thus the creditor is afforded protection under 11 U.S.C. § 1322(b)(2) if the home is the Debtor's principal residency at the time at which the loan agreement is executed. ***United States Dept. of Agr. v. Jackson, 2005 WL 1563529 (M.D.Ga., July 1, 2005).***

Debtor applied to the Creditor for a loan to purchase a residence. In the application the Debtor wrote that she would be the sole occupant of the residence. She received the loan from Creditor. Debtor executed a promissory note and a deed to secure debt giving Creditor a lien against the residence. The Debtor holds title to the residence, but has not resided there for some years. Her stepfather lives there.

Debtor filed a petition under Chapter 13 of the Bankruptcy Code. The Bankruptcy Court found that Creditor did not use the home as her principal residence at the time she filed her bankruptcy petition. Creditor filed a proof of claim asserting a secured claim for a specific monetary value in this proceeding. Creditor's deed to secure debt is the only lien against the residence and its claim is secured only by the residence.

Debtor filed a Complaint to determine the extent of Creditor's secured claim on the residence. Debtor has offered to pay Creditor for the secured portion through her proposed Chapter 13 plan and treat the remainder of Creditor's claim as unsecured. Creditor contended that any modification of its claim is prohibited by § 1322(b)(2) of the Bankruptcy Code. This section of the Bankruptcy Code provides that a debtor's bankruptcy plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence. ..."

Creditor filed a Motion for Summary Judgment to which Debtor responded. The Bankruptcy Court denied Creditor's Motion. In its order, the Bankruptcy Court held that the critical date for § 1322(b)(2) protection is the date that the bankruptcy petition is filed, and because it found that Debtor was not using the home as her principal residence when she filed her petition, the Bankruptcy Court found that the Creditor is not entitled to protection under this section. The United States District Court for the Middle District of Georgia, Macon reversed the Bankruptcy Court's decision finding that the Creditor is afforded protection under § 1322(b)(2) and that Debtor cannot modify Creditor's secured claim on the home, as it was Debtor's principal residence at the time she entered the loan agreement.

BANKRUPTCY; LEASES; ASSUMPTION OR REJECTION; TIMING OF REJECTION: Bankruptcy court may make its approval of rejection of an unexpired nonresidential lease retroactive to the date the debtor-lessee moved for approval of rejection, in light of the debtor's lack of delay, the amount of rent involved, and the lessor's "improper motives." ***Pacific. Shores Development LLC v. At Home Corp. (In re At Home Corp.), 392 F.3d 1064 (9th Cir. 2004), cert. denied, 2005 U.S. LEXIS 5547 (U.S., Oct. 3, 2005)***

The lessor here objected not to the rejection of its leases, but to retroactive application of the order approving the rejection to the date the motion was filed. A later effective date (*i.e.,* the date of entry of a court order approving the rejection) would mean that the debtor would have owed the lessor an additional $ 1 million in administrative rent. The Ninth Circuit ruled that the bankruptcy court had equitable authority under § 105(a) and § 365(d)(3) of the Bankruptcy Code to approve retroactively the rejection of the debtor's unexpired nonresidential leases.

The Ninth Circuit also ruled that the bankruptcy court did not abuse its discretion by granting retroactive approval, even where the effective date was prior to the lessor's resumption of possession of the leased premises. The Ninth Circuit reasoned that the equities favored the debtor because it promptly moved for authorization to reject the leases and there was no appreciable delay between the filing of, and the actual hearing on, the

motion to reject; furthermore, the bankruptcy court could consider, when deciding whether to make its approval retroactive, the amount of rent owed under the lease, that the lessor appeared only to be attempting to obtain administrative rent and not to enforce its right to re-let the premises quickly, and the fact that the debtor had never occupied the leased premises (which would make it easier for the lessor to re-let the property).

The court referred to the recent so-called Shopping Center Amendments contained in the Bankruptcy Amendments and Federal Judgeship Act of 1984, which were intended to protect the interests of commercial landlords who, compared to other creditors, were deemed to be unfairly disadvantaged because they were forced to continue extending credit, in the form of rent, during the pendency of bankruptcy reorganization proceedings. These Amendments were designed to ensure that a commercial tenant that seeks protection under Chapter 11 continues to perform its obligations under the lease—including the obligation to pay the full amount of rent — until the lease is rejected. By requiring the tenant to pay administrative rent until it rejects the lease, and by providing for automatic rejection of the lease after 60 days, the Amendments ensure that the tenant determines promptly whether to assume or reject the lease, rather than taking advantage of the automatic stay. The effective date of rejection of a lease determines when a debtor's obligation to pay rent ceases.

The Ninth Circuit acknowledged that under the "majority view," the rejection of a lease becomes effective upon entry of a court order approving a trustee's or debtor's motion to reject an unexpired nonresidential lease, and that this view regards court approval as a "condition precedent" to the rejection of a lease. In most cases a lease will be considered rejected as of the date of entry of the order approving the rejection, and the Ninth Circuit noted that "only in exceptional circumstances will the court adopt a retroactive date."

Nonetheless, the Ninth Circuit ruled that under the equitable powers granted to a bankruptcy court under § 105(a) and § 365(d)(3) of the Bankruptcy Code, "in appropriate cases, retroactive lease rejection may be 'necessary or appropriate to carry out' this provision of Title 11." Id. at 1070; although "[t]hose powers are limited and do not amount to a 'roving commission to do equity.'" Id. The Ninth Circuit reasoned that nothing in § 365(d)(3) or the applicable case precedents, "or in logic," prohibited a bankruptcy court from considering the practical effect of a tenant's lack of possession when balancing the equities. The court further reasoned that neither consideration of the landlord's conduct and motives, nor the amount of rent at stake, were necessarily irrelevant to the bankruptcy court's equitable deliberations.

Reporter's Comment: This case should make shopping center landlords shake in their boots (at least in the Ninth Circuit). The Ninth Circuit ignored the overwhelming "majority view" that rejection should not be effective until the court enters an order so providing. The view adopted here eviscerates the "Shopping Center Amendments" that provide special protections to shopping center landlords under § 365(d)(3), and which were adopted for the very purpose of avoiding results such as that in the Pacific Shores case. As the Ninth Circuit noted, "Previously, a debtor could file a Chapter 11 bankruptcy petition and then maintain control of the leased property for the entire duration of the bankruptcy proceedings, even if the debtor had ceased operations and had vacated the premises. The automatic stay prevented the landlord from evicting the debtor or regaining possession of the leased space. The landlord lost money, and the extended vacancy hurt other tenants in the same shopping center a s the bankrupt tenant because of decreased customer traffic." Id. at 1068.

The Ninth Circuit also noted that under § 503(b)(1)(A), the landlord eventually received only the "actual, necessary costs and expenses of preserving the estate," rather than the rent that would have been due under the terms of the lease. Therefore, "landlords could not rent the unused space until the proceedings terminated, and they received only 'an amount equal to the reasonable value of the debtor's actual use and occupation of the property' during those proceedings." As the Ninth Circuit correctly noted, "The Shopping Center Amendments solved those two problems by ensuring that a commercial tenant who seeks protection under Chapter 11 continues to perform its obligations under the lease—including the obligation to pay the full amount of rent 'notwithstanding section 503(b)(1)' — until the lease is rejected. By requiring the tenant to pay administrative rent until it rejects the lease, and by providing for automatic rejection of the lease after 60 days, the Amendments apparently ensured that the tenant [would] determines promptly whether to assume or reject the lease, rather than taking advantage of the automatic stay."

Reporter's Comment 2: There was a substantial sum of money at stake — $1 million — that the landlord now could not collect based on the Ninth Circuit's ruling. The Ninth Circuit attributes a nefarious, selfish motive to the landlord's actions in this case, *i.e.,* that (according to the bankruptcy court) it was solely concerned with "running the administrative rent ... [rather than by] a concern to get this indisputable right to start re-letting the premises as quickly as possible." The Ninth Circuit approves this finding of the bankruptcy court without discussion, stating merely that "A landlord's conduct and motives are relevant to a bankruptcy court's equitable deliberations." Id. But the landlord was justifiably concerned and certainly within its rights, both statutory and equitable, to contest the possible loss of $1 million in rent otherwise due under the lease, regardless of whether the premises were vacant or occupied. It is not surprising that the landlord appealed this case all the way to the U.S. Supreme Court (which recently denied certiorari, on October 3, 2005).

Reporter's Comment 3: Perhaps the most frustrating aspect of this case is the failure of the Ninth Circuit to set forth any "bright line" guidelines that might be of benefit to shopping center landlords to address this problem in the future. According to the Ninth Circuit:

> "[W]e eschew any attempt to spell out the range of circumstances that might justify the use of a bankruptcy court's equitable powers in this fashion" [citation omitted]. We likewise eschew any attempt to limit the factors a bankruptcy court may consider when balancing the equities in a particular case. We need not and do not decide whether any one of the factors on which the bankruptcy court relied, standing alone, would justify an exercise of discretion. But in combination those factors supported the court's equitable decision."

So much for the effectiveness of the "Shopping Center Amendments."

Editor's Comment 1: The editor certainly endorses the comment that the Bankruptcy Act should not be regarded as a roving commission to do equity for Bankruptcy judges. Would that the Bankruptcy judges agreed. It's expensive to take every inappropriate ruling up on appeal. Every time a court of appeals opens up a new discretionary opportunity, bankruptcy judges are empowered to eviscerate legitimate contract expectations (even expectations based upon the Bankruptcy Act) in order to bring about what the individual judge views as an "appropriate" outcome in an individual case.

As bankruptcy is the tactic *de jour* for many failing businesses, this makes it difficult for the marketplace to limit concerns about the impact of bankruptcy upon business expectations, thus leading to lots more hard and expensive bargaining and anti-bankruptcy barriers and safeguards. This all costs money. Is helping the bankrupt debtor really worth overburdening those still in the marketplace with fear-driven bargaining tactics?

Editor's Comment 2: That being said about the general state of the bankruptcy law, the editor is more patient with the court's particular ruling on the stated facts. The tenant never took possession. The landlord knew that the debtor was not going to assume, and, according to the court, the landlord just sat on the property instead of initiating efforts to relet. If this characterization of the situation is correct, perhaps there are some equitable considerations here, in light of the strong tilt favoring mitigation duties throughout the Act.

The reporter for this DD was Jack Murray of First American Title Insurance, Chicago office.

BANKRUPTCY; LIENS; DISCHARGE: Under Wisconsin statute, which is not preempted in bankruptcy, debtor can obtain a post-discharge state court order satisfying a pre-petition judgment lien, even though the debtor's property interest exceeded the exemption claim to which debtor was entitled in bankruptcy. ***Megal Development Corp. v. Shadof, 2005 WI 151 (2005)***: discussed under the heading: "Bankruptcy; Homestead; Judgment Liens; Discharge."

BANKRUPTCY; PREFERENCES; PREPETITION RENT: When a Chapter 11 debtor-in- possession brings an adversary proceeding to set aside its prepetition rental payment as a preference, the exchange between creditor and debtor is "substantially contemporaneous" if the wire transfer for the rental payment occurs within the same month that the rental payment becomes due, even if is late. ***In re General Time Corporation, GTC, 328 B.R. 243 (Bankr.N.D.Ga., August 9, 2005).***

A Chapter 11 debtor-in-possession brought an adversary proceeding to set aside its prepetition rental payment as

preference, and creditor asserted "ordinary course of business" and "contemporaneous exchange for new value" defenses.

The Court found that the right to possess leased premises, which the debtor's landlord accorded to debtor in exchange for the prepetition rent payment that debtor sought to recover as preferential, was in nature of "new value"; the exchange of possession for rent was intended by parties as a contemporaneous exchange; and the exchange was in fact substantially contemporaneous, even thought the rental payment was twenty-eight (28) days late.

BANKRUPTCY; "REASONABLE CHARGES;" DEFAULT INTEREST: Oversecured creditor in bankruptcy may collect default interest notwithstanding that Debtor is insolvent and that such charges will reduce funds available for other secured and unsecured creditors if interest does not amount to a penalty for nonpayment and is otherwise permitted under nonbankruptcy law. ***In re Holmes, 330 B.R. 317 (Bankr.M.D.Ga., July 1, 2005).***

An oversecured creditor filed proof of claim, seeking, *inter alia*, payment of post-default interest, a prepayment premium and interest on attorney fees. Chapter 11 debtor objected.

Debtor had executed two promissory notes secured by two deeds of trust. The promissory notes provided for, in relevant part, (1) an 18 percent per annum default rate of interest; (2) prepayment premiums should the obligations be prepaid; and (3) payment of reasonable attorney's fees, costs, and expenses if the obligations were referred to an attorney for collection.

In its analysis of whether the oversecured creditor was entitled to pre- and post- default interest, a prepayment premium, attorney fees, and interest on attorney fees, the Court of Appeals stated that "some courts have concluded that a default rate of interest may be denied as an unreasonable charge, rather than as part of the creditor's allowable interest entitlement." The Court of Appeals found that in general, a default rate of interest is properly a form of interest and that recharacterization of the rate as a "charge" or "penalty" should turn in most instances on nonbankruptcy law.

The Court of Appeals stated that courts have allowed the compounding of interest — so called "interest on interest" — if provided for in the underlying contract and under applicable nonbankruptcy law and have allowed prepayment charges as a form of interest, as well as late charges that serve the function of additional interest. Its concern is that these, as well as any other form of interest, should not be allowed to the extent that they are invalid under relevant nonbankruptcy law. Moreover, if an obligation denoted as a form of supplemental interest does not serve the function of providing additional interest and may be recharacterized as a "charge" under applicable nonbankruptcy law, it may be reviewed for reasonableness under federal law as a "charge" under applicable nonbankruptcy law and it may be reviewed for reasonableness under federal law a "charge" under 11 U.S.C.A §506(b).

The general rule is that a senior secured creditor is entitled to recover postpetition interest, fees, costs and charges even if the allowance of these expenses is to the detriment of a junior secured creditor by reducing the value of the junior creditor's interest. The Court of Appeals is persuaded that the creditor is entitled to the 18 percent default rate of interest as provided for in the promissory notes because the Court of Appeals had previously held that a creditor is entitled to postpetition interest if its claim is oversecured and the agreement provides for the interest. The Court of Appeals stated that when a creditor is oversecured, the estate need not be solvent for the creditor to be entitled to postpetition interest. The Court of Appeals held that payment of reasonable attorney fees was acceptable since it was provided for in the notes, but payment of interest on the attorney fees was not since it was not provided for in the notes.

BANKRUPTCY; "REASONABLE CHARGES;" PREPAYMENT PREMIUM: A creditor fails to show that its requested prepayment premium is reasonable when the two methods that are provided in the promissory notes require complex calculations and respondent offers no further evidence that the prepayment premium charged under either method is reasonable. ***In re Holmes, 330 B.R. 317 (Bankr.M.D.Ga., July 1, 2005).***

Regarding the pre-payment premium, the Court stated that the general law is that a prepayment premium is a "charge" and must be "reasonable" to be allowable under 11 U.S.C.A §506(b).

In its analysis the Court stated that some courts, in determining whether a prepayment is reasonable, limit

the recovery to actual costs, charges and fees incurred by the creditor because of the prepayment, other courts allow the creditor to recover the difference between the market rate of interest on the prepayment date and the contract rate for the remaining term of the loan, and some courts view a prepayment premium as liquidated damages. These courts consider whether the charge is so large as to be a penalty rather than damages.

The Court found the calculation in the notes regarding the prepayment premium were unduly complex. Since no additional evidence was presented showing that the prepayment premiums were reasonable, the Court held that creditor was not entitled to said prepayment premiums.

Unfortunately, the court does not indicate what the calculations in question were. It is difficult to know what problems it found, because it already had indicated that, in principle, the notion of a "yield maintenance" prepayment arrangement is acceptable, and, of course, such clauses do require some complex calculation.

BANKRUPTCY; SUBSTANTIVE CONSOLIDATION: Third Circuit narrows scope of substantive consolidation remedy. ***In re Owens Corning, 419 F. 3d 195 (3rd Cir. 2005) (cert pet pending)***

This case, acknowledged by the court to an important one in a difficult area of law, deals with an issue that appears to be of central importance to many large financings (real estate and otherwise) today: whether separate corporate structures can be established so as to render them remote from economic difficulties, including bankruptcies, affecting related corporate entities. In short, under what circumstances will a bankruptcy court or other court "consolidate" a group of related corporate entities into one entity for purposes of creditor's claims or other issues?

The case is rendered all the more significant because it arises out of Delaware, the location of choice for many corporate entities and the jurisdiction selected in many choice of law clauses.

It is further rendered significant by the fact that in this case the Federal District Court judge had ordered consolidation of corporate entities related to the bankrupt Owens Corning Corporation and thus put into jeopardy almost a billion dollars in guarantees provided to a consortium of banks (organized by Credit Suisse First Boston) that provided $2 billion to finance Owens Corning's acquisition of Fiberboard Corporation in 1997.

The court described Owens Corning, at the time of the financing, as a parent with subsidiaries consisting of a group of corporations and limited liability companies which compromised "a multinational corporate group. Different entities within the group [had] different purposes. Some for example, exist to limit liability concerns (such as those related to asbestos), others to gain tax benefits, and others have regulatory reasons for their formation." The court emphasized that, with a few exceptions which it dismissed as minor, the various subsidiaries had a separate corporate formality and existence, with separate boards of directors (with some overlapping members), payrolls, accounting, and functions.

In connection with the financing, the Banks required guarantees from corporate entities that were part of the Owens Corning and Fibreboard business operations that had assets with a book value in excess of $30 million. The subsidiaries agreed to maintain themselves as separate entities and not to merge into Owens Corning and to maintain separate financial records. (Apparently, after that time, and even after the bankruptcy, there were some cash transfers among the subsidiaries for which no interest was paid and perhaps some other transfers of assets. But the court indicated that these individual issues could be separately resolved, possibly through a fraudulent transfer approach, and did not impugn the overall separate character of the corporate organization.)

Three years later, Owens Corning and seventeen of its subsidiaries filed for bankruptcy in response to "mounting asbestos litigation."

The creditor's committee, perhaps dominated by tort plaintiff representatives, proposed a plan that would involved a "deemed consolidation" of all the Owens Corning entities into one financial entity for purposes of dealing with creditor's claims. This would eliminate the guarantees and leave the Banks as ordinary creditors competing with all the other creditors nipping at the consolidated assets for a share of their claims. It would sweep into the bankruptcy assets of non-bankrupt entities. This was the worst nightmare for the guaranteed banks, and they opposed vigorously. The list of counsel on this matter takes up more than a page.

The District Court granted consolidation and this appeal ensued.

Held: Reversed: The court concluded that substantive consolidation ought not to be used as a remedy here.

There were a number of procedural issues addressed by the court, that undoubtedly were important to the outcome. This includes the argument that substantive consolidation ought not to be used in bankruptcy, at least without the unanimous consent of creditors. But the focus of this note will be the discussion of the substantive consolidation issue itself.

> "Substantive consolidation, a construct of federal common law, emanates from equity. It 'treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities (save for inter-entity liabilities, which are erased). The result is that claims of creditors against separate debtors morph to claims against the consolidated survivor.'. Consolidation restructures (and thus revalues) rights of creditors and for certain creditors this may result in significantly less recovery.

The court relied heavily on an article by Mary Elisabeth Kors, entitled Altered Egos: Deciphering Substantive Consolidation, 59 U. Pitt. L. Rev. 381, 383 (1998), which it described as "comprehensive and well-organized." It cited that article for the "commonsense deduction" that "corporate disregard s a fault may lead to corporate disregard as a remedy."

The court emphasized, however, that substantive consolidation is only one remedy to remedy the misuse of the entity form – what the court calls "corporate disregard." Other less draconian remedies, such as piercing of the corporate veil for individual purposes or transactions, declaring certain transactions to be fraudulent transfers in order to restore assets to a target entity, or the use of equitable subordination to set aside formal priorities in favor of a priority scheme deemed more equitable by a court.

The court noted that substantive consolidation, which involves a wholesale disregard of the entity structure of a set of business organizations, is a severe remedy that should be used only when other less invasive remedies are inadequate to achieve equity.

> "Each of these remedies has subtle differences. "Piercing the corporate veil" makes shareholders liable for corporate wrongs. Equitable subordination places bad-acting creditors behind other creditors when distributions are made. Turnover and fraudulent transfer bring back to the transferor debtor assets improperly transferred to another (often an affiliate). Substantive consolidation goes in a direction different (and in most cases further) than any of these remedies; it is not limited to shareholders, it affects distribution to innocent creditors, and it mandates more than the return of specific assets to the predecessor owner. It brings all the assets of a group of entities into a single survivor. Indeed, it merges liabilities as well. "The result," to repeat, "is that claims of creditors against separate debtors morph to claims against the consolidated survivor." [citation omitted]. The bad news for certain creditors is that, instead of looking to assets of the subsidiary with whom they dealt, they now must share those assets with all creditors of all consolidated entities, raising the specter for some of a significant distribution diminution."

Later:

> "No court has held that substantive consolidation is not authorized, though there appears nearly unanimous consensus that it is a remedy to be used "sparingly." [citations and lengthy footnote omitted.]

The court reiterated that there is no "modern trend" toward increased use of the remedy. The court also rejected the notion that there should be a series of tests or prerequisites to be satisfied. Rather, courts should look at the overall picture. In any event, it concluded, substantive consolidation ought not to be used only when it is convenient or leads to a desired remedy. There must be the existence of the inappropriate disregard of business entity structure.

The court identified certain guiding principles in deciding whether to use substantive consolidation. First: "The general expectation of state law and of the Bankruptcy Code, and thus of commercial markets, is that courts respect entity separateness absent compelling circumstances calling equity (and even then only possible

substantive consolidation) into play." The court stated as a second guiding principle that "the harms substantive consolidation addresses are nearly always those caused by debtors (and entities that they control) who disregard separateness. Harms caused by creditors typically are remedy by provisions found in the Bankruptcy Code, such as equitable subrogation and fraudulent transfer.

The third principle stated by the court is that "mere benefit to the administration of the case ... is hardly a harm calling substantive consolidation into play." As a fourth principle, because substantive consolidation is "rough justice" and so extreme, it should be used sparingly and only as a last resort. Finally, it may only be used defensively, and not offensively "(for example, having a primary purpose to disadvantage tactically a group of creditors in the plan process or to alter creditor rights.)"

Once the court cited these principles, it was easy to predict what the outcome would be in this case.

> "The upshot is this. In our Court what must be proven (absent consent) concerning the entities for whom substantive consolidation is sought is that (1) prepetition they disregarded separateness so significantly that creditors relied on the breakdown of entity borders and treated them as one legal entity, or (ii) postpetition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors."

Of course, the creditor Banks in fact relied strongly on the preservation of corporate distinctions. And, as with most tort claimants, it would be difficult for these claimants to show that asbestos plaintiffs relied upon a different corporate structure in becoming tort victims. Nevertheless, the proponents of consolidation argued that the Banks themselves ignored the entity structure in the Owens Corning business structure because they did not require independent financial statements from each entity that served as a guarantor, did not monitor the entities, and did not obtain a non- consolidation legal opinion before making the loan.

The court turned around the argument that the Banks did not separately examine the entities. In fact, the court noted that the Banks knew a great deal about each entity, and how they developed their understanding and made their decisions was up to them. More importantly, it is abundantly clear that the Banks relied significantly upon the entity structure and the preservation of these structures in the deal. Indeed, it was the heart of the deal. The fact that they did not require legal opinions, the court says, is meaningless. (But it says this because the entities were not formed expressly for the financing, but were already in existence – leaving open the possibility – a happy one for Delaware lawyers – that demanding an opinion may be a significant factor in the analysis of whether a creditor relied upon separateness of entities in making a loan to a newly formed entity such as a "bankruptcy remote" borrower.)

As noted earlier, the court further concluded that whatever confusion existed in the transfer of assets among various entities postpetition could easily be remedied by approaches less severe than substantive consolidation.

The court reserved its strongest statement until the end: It decried the approach of a "deemed consolidation" proposed here.

> "But perhaps the flaw most fatal to the Plan Proponents' proposal is that the consolidation sought was "deemed" (i.e., a pretend consolidation for all but the Banks). If Debtors' corporate and financial structure was such a sham before the filing of the motion to consolidate, then how is it that post the Plan's effective date this structure stays largely undisturbed, with the Debtors reaping all the liability-limiting, tax and regulatory benefits achieved by forming subsidiaries in the first place? In effect, the Plan Proponents seek to remake substantive consolidation not as a remedy, but rather a stratagem to "deem" separate resources reallocated to [Owens Corning] to strip the Banks of rights under the Bankruptcy Code, favor other creditors, and yet trump possible Plan objections by the Banks. Such "deemed" schemes we deem not Hoyle."

Comment 1: A petition for *certiorari* has been filed but not yet acted upon. If the U.S. Supreme Court should come down anywhere near where this opinion takes us, the dangers of substantive consolidation will largely disappear as an initial concern in financing transactions. Lawyers and financiers will be able to structure entities

that will carry debt and establish rules for separate identity that, if followed, will render them largely immune from consolidation. Only subsequent carelessness (happily beyond the scope of the lawyer's opinions at time of financing) will cause difficulties, and then only in the rarest of cases.

Comment 2: But bankruptcy cases may not arise exclusively in the Third Circuit, and the court does not appear to be applying exclusively Delaware law in reaching its equitable conclusions. It appears we're talking about general equity in bankruptcy, and, as we all know, this subject has many varied interpretations around the country. In short, those relying on nonconsolidation as a precept in their financing plans have established an early lead in obtaining full legal recognition of their objectives. The race is not yet fully run.

BROKERS; ATTORNEY/CLIENT: Attorney who is licensed real estate broker can receive real estate commission in lieu of hourly fee for representing seller in real estate transaction.
Ops Cal Atty Gen 04-1201 (Nov. 21, 2005) , discussed under the heading: "Attorney/Client; Brokers."

BROKERS; ATTORNEY'S FEES: When court denies seller attorney fees to prevailing party in tort claim for fraud and misrepresentation, opponent is not entitled to fees for successfully defending against appeal of fee denial, even when alleged tort arose in course of contractual relationship and the contract had an attorney's fee clause. ***Hasler v Howard 130 CA4th 1168, 30 CR3d 714 (2005)***, reported under the heading: "Attorneys Fees; Appeal."

BROKERS; COMMISSION; CONFLICTS: Broker-buyer acting as principal in real property purchase was not entitled to commission when seller breached purchase contract. ***Horning v Shilberg (2005) 130 CA4th 197, 29 CR3d 717***

In 2001, Shilberg contracted to sell Horning, a licensed real estate broker representing himself, a multi-unit property for $715,000, and to pay Horning a 3-percent commission on the sale. Under the contract, Shilberg could cancel the contract within five days after Horning's failure to produce a loan pre-approval letter, which was due on December 24, 2001. The contract provided that Shilberg could cancel within five days of the date the letter was required if Horning didn't provide the letter. Apparently, over a week after the due date, when there was still no letter, Shilberg canceled the contract. It's not clear what Horning's position was – but it likely was that time was not of the essence or that the right to cancel was waived in some way. The court doesn't really tell us.

Horning sued Shilberg, seeking either specific performance or damages, and recorded a *lis pendens*, which Shilberg had expunged before selling the property to another party in 2003 for $920,000. As damages, Horning requested the difference between the 2003 and 2001 sales prices and the 3-percent commission he would have earned on the sale. He also sought damages for expenses associated with a blown 1031 exchange he had contemplated with the sale, but his attorney abandoned that claim at trial, when it appeared that the 1031 exchange may have been invalidated by Horning's selection of four properties for exchange, rather than the maximum of three. (Experts for Shilberg provided uncontradicted testimony on this point, which both trial and appeals courts accepted.).

The trial court ruled that Horning had not actually been damaged because, as a broker acting as the principal in the transaction, he was not entitled to the commission by law. Further, because Horning had not been damaged, Shilberg was entitled to over $80,000 in attorney fees and over $5000 in costs.

Undone by the court's ruling, which was contrary to a preliminary ruling made at close of evidence, Horning tried to reopen the case to admit evidence that he'd incurred a few hundred dollars in inspection fees and $275 for a preliminary title report. Had he been able to get this small amount awarded to him, apparently, he hoped that he could be the prevailing party and at least dodge the fee award to Shilberg and possible collect his own. But the court refused to reopen.

The court of appeal affirmed.

Business and Professions Code §10131 defines "real estate broker," in part, as one who acts on behalf of someone else. Because Horning was representing himself as the principal, and not acting on behalf of someone else, in the defunct transaction, the court held, he was not entitled to a commission in the first place. As such, he could not recover for a lost commission when the transaction did not close. Further, because the contract expressly stated that brokers were not parties to the

transaction, Shilberg's agreement to pay Horning a 3-percent commission was, in effect, an agreement to reduce the purchase price by paying Horning a 3-percent rebate if escrow closed.

The court did find that Shilberg did breach, and that Horning was entitled to damages owing to Shilberg's breach. But these damages would be measured by the difference between the agreed-upon sales price and the fair market value as of the date of the breach, plus consequential damages. Note that the court viewed the agreed upon price as 3 percent lower than $715,000, because of the "discount." Consequently, if $715,000 represented fair market value, Horning had a chance to claim a loss. But Horning had failed to produce evidence as to any market price differential, and because lost resale profits have long been refused as consequential damages under California law, Horning was not entitled to breach of contract damages.

After finding that the trial court's award of attorney fees to Shilberg was not an abuse of discretion, the court affirmed the trial court's judgment in its entirety.

Reporter's Comments: Everybody appears to have been blundering all over the place in this litigation. The contract was clear enough in requiring the buyer to produce a prequalification letter by December 24, but what did it mean when it then added "If buyer fails to provide such letter within that time, seller may cancel this agreement in writing within 5 days After [*sic*] the time to provide the letter expires"? Does that mean the buyer really had five extra days or that the seller had to give him five days notice of cancellation? If it meant five extra days, then the seller's cancellation on January 2 was not premature, but it apparently was taken by the court to mean a five-day notice that probably was not sent.

Sellers are often eager to get out of their contracts with delinquent buyers once they get a better offer, but they make the mistake of not paying attention to the fine print. Just because the contract specifies certain dates for performance, and adds that time is of the essence, does not mean that the seller can just walk away the day after the buyer didn't perform. Notice is almost always required, either by the contract or by the law, and overeager sellers who fail to notify act at their peril. See Bernhardt, On Making and Breaking Contracts, 27 CEB RPLR 12 (Jan. 2004).

But in *Horning*, the seller's hasty conduct seems more than offset by the buyer's bizarre trial strategy. If the seller was the breaching party, the buyer was entitled to specific performance or damages. Why the *lis pendens* was expunged is not explained, but while that ended the prospect of a successful specific performance claim, the damage count clearly still survived.

Damages under CC §3306 for breach of contract by a real estate seller are pretty clear: the difference between the contract price and the value of the property on the date of the breach, together with out-of-pocket expenses, consequential losses, and interest. (It used to be worse-limiting a buyer to out-of-pocket expenses unless it could show bad faith by the seller. That restriction was lifted in 1982.) Under the current measure, this buyer had to offer into the evidence the contract-showing the "price agreed to be paid" and some opinion testimony as to the value of the property on January 2 (and perhaps being careful to explain away why the owner was selling property to his broker for perhaps $200,000 less than it was worth).

Instead of putting in evidence of value (it probably would have been sufficient for the buyer merely to testify that that is how much he thought the property was worth), he showed how much the seller resold the property for later. The difference between the original sale price and a resale price may be a proper measure of loss for breach of contract to sell personal property (see Com C §2706 and CC §3353), but it has nothing to do with real property contracts. The resale price might provide some evidence of value at the breach date, if the two events are close enough in time, but here the seller repudiated in January 2002 and resold in February 2003-far too late to say very much about values in the frantic California housing market of recent years. So, that was not respectable substitute evidence.

This buyer, as a broker, also sought to recover a broker's commission instead of his difference value damages. This he could not properly claim, since he had acted as a principal rather than an agent in the transaction. This $21,500 item might have constituted *ipso facto* proof that there was a benefit of the bargain to the buyer in the same amount, to provide some indirect proof of value under §3306, or maybe it could have qualified as known consequential damages had the contract characterized it differently, but brokers should know enough not to claim straight-out commissions on sales to themselves.

This buyer should also have known that he couldn't get *Starker* damages if he hadn't complied with the tax rules requiring him to designate three, not four, candidates for exchange. (Indeed, he probably wouldn't have gotten his tax deferment either, even if the deal had closed in time.) Finally, and perhaps saddest to note, the buyer's most legitimate consequential damages-his $275 preliminary title report (clearly fitting within the statutory description as "expenses properly incurred in examining the title" (CC §3306))-weren't recoverable because they weren't offered in evidence the first time around.

The effect of all of these blunders was to make the buyer a successful but undamaged plaintiff, which meant that the breaching seller could recover $80,000 in attorney fees. Even this is peculiar, because 20 percent of that fee was contingent. Just how does an attorney ordinarily expect to recover a contingent fee for representing a seller who is being sued rather than suing anyway?

Editor's Comment 1: The court really owes us an explanation as to why there was a breach by the seller. Even where time is not stated as the essence, usually specific time periods phrased as stated in the contract are taken seriously. If the contract says that seller can avoid the contract five days after a set date if no letter is produced, then this likely should have been taken seriously. Why wasn't it?

We weren't riding around in anyone's pocket through this trial, and maybe there were good explanations for some of the apparent blunders. Perhaps preliminary indications by the judge led the broker's counsel to conclude he had a winner, and he elected not to press things by throwing in the penny ante claims for the title report, etc. Or, as the editor suspects, those costs were not "real" costs in that the title company and inspection company might not have demanded them if the broker lost his deal, based upon the desire for further referrals. Therefore, until there was a pinch, the broker's lawyer didn't want to put them forward.

Editor's Comment 2: What was the broker doing by demanding a commission on his own deal? Was he kicking that fee over to his agency – perhaps qualifying for some commission threshold or year end bonus arrangement? (Note that this was a year end deal.) In any event, the court does not say that the broker was unethical in demanding that there be a 3% reduction in the price as a "commission." It just says that the reduction should not be regarded as a commission, but simply a break in the price. Interesting.

What if the contract had said that there were brokers in the deal, and that the buyer was one. Would this have mattered? Probably not. The court simply says that a broker buying in his own behalf is not functioning as a broker and cannot claim a commission. But what if there was a preexisting "exclusive listing," by which the broker earned a commission no matter who would buy? In such cases, the idea is that the broker earns the commission not so much by providing a buyer, but by doing spadework and diligently trying to sell the property during the listing period. If this were the case, and the seller agreed that the exclusive commission was payable, would there be any ethical issue here?

CONDOMINIUMS; ASSESSMENTS; TRANSFER FEES: Transfer fee of "working capital contribution" assessed upon resale of condominium unit void is an unequal assessment, but association may charge $125 as a "one time processing fee." ***Micheve, L.L. C. v. Wyndham Place at Freehold Condo Assoc., 2005 WL 2877732 (November 3, 2005)***

Both payment requirements were imposed through an amendment to the condominium policies adopted by the Board of Directors. Less than a year after they were adopted, they were challenged by a unit purchaser, who paid the impositions and then sued for refund of the capital contribution.
The court cited the New Jersey Condominium Act:.

> "The common expenses shall be charged to unit owners according to the percentage of their respective undivided interests in the common elements as set forth in the master deed and amendments thereto, or in such other proportions as may be provided in the master deed or by-laws."

The Association's own by-laws also required that common expenses should be allocated according to percentage of interest and specifically stated that any special assessment for capital expenses should be made on the same basis.

The court appeared to somewhat amazed that the Association would believe that it would get away with

specially allocating this admitted capital contribution to new purchasers without having the proportionate distribution required by the by-laws and statute.

Because the assessment was beyond the powers of the Association and its board, the court ruled that the decision to impose it could not be sheltered by the business judgment rule.

Comment 1: What the editor finds somewhat more interesting is the fact that the court, and prior cases, apparently took the view that the $175 processing fee was a permitted special charge if it was proportionate to the services that the association undertook in dealing with the change in ownership. In another case, a New Jersey court had reviewed a fee charged on renting a condominium unit, and had struck down only that part of the fee that exceeded the cost of reviewing lease documents and inspecting common elements.

Comment 2: But aren't the association's functions in reviewing documents and looking after the common elements part of its general duties to all the homeowners? And therefore shouldn't the costs of such activities be passed proportionately to all homeowners, and not allocated specially on those involved in the individual event? What if the roof leaked? Would the association be able to charge the cost of repair to the unit owner whose unit law below the leak? Or would it have to pass along the cost generally? Where is the difference?

Of course, if a unit owner should cause damage to the common areas through reckless or negligent conduct, the association likely could charge the cost of repair to that owner. But what if the unit owner does nothing except that which it has every right to do – live in and use the facilities? Then, one would assume, that it is immune from special assessment, even though that owner's unit causes specially high expenses to the community.

Comment 3: There appears to be here, and in other cases, an unstated but nevertheless clear continuum. The cost of certain association activities may be passed on to those triggering the cost, even if the "trigger" is not an act of negligence. For instance, usually associations can charge users of amenities such as swimming pools, tennis courts, and meeting halls a fee based upon their special use of those facilities, even though the basic cost is born by the community. Other costs cannot be passed on. Is there somewhere a clear statement of where the distinctions lie, or do judges (and condominium association counsel) "know it when they see it?"

CONDOMINIUMS; ASSOCIATIONS; LIABILITY: A condominium association has a sufficient relationship to its unit owners such that if it is aware of a condition that could cause damage to a unit owner, even if the condition is within a neighboring unit and not within the common elements, the association may be found liable for damage to unit owners' property if it fails to warn them of the problem. ***Siddons v. Cook, 2005 WL 3440703 (N.J. Super. App. Div. 2005); December 16, 2005.***

The owner of a downstairs condominium unit sued the condominium association and the upstairs unit owners after a broken dishwasher hose in the upstairs condominium flooded the downstairs unit. The association "was aware that similar hoses had previously broken in other condominium units." According to both the lower court and the Appellate Division, the upstairs unit owner was "neither strictly liable nor liable in negligence for the damages to [the lower floor unit]." On the other hand, the Appellate Division, unlike the lower court, believed that the condominium association may have been liable.

Three prior units experienced similar problems and each time, the affected unit owner or occupier had notified the association as to what occurred. Each time the association responded "that the broken hoses were not the Condominium Association's responsibility."

As background, the Court addressed the damaged unit owner's "claim that the Condominium Association had a duty to warn the unit owners of the potential problem with the dishwasher hoses." Clearly, the dishwasher was not a common element and therefore the association's by-laws placed the "responsibility for their inspection and maintenance on the unit owners." This, however, is not the same as relieving the association of a duty to warn "unit owners of the potential defect in the dishwasher hoses after it was put on notice of the defect." Under current law, to determine the existence of such a duty, "a court considers fairness and public policy. ... Forseeability of injury to others from a defendant's conduct is important, but not dispositive ... whether a duty is owed turns on whether the imposition of the duty 'satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy.'"

Because the issue was one of first impression, the Court looked "first to cases that imposed a duty to warn in similar, but not identical, contexts." Among other things, it concluded "[t]hat [the] duty to warn, which in some instances is independent of a duty to inspect, repair or maintain, [had] been imposed in a variety of non-landowner contexts." The Court gleaned "from the case law that under some circumstances the knowledge of a dangerous condition, regardless of control for that condition, may impose upon a person a duty to warn their parties of the danger." It concluded that those circumstances existed in this case. Although "[t]he Condominium Association had no duty to either inspect or maintain the personal property located in the [upper floor] condominium unit, [n]onetheless, because it knew of the potentially dangerous condition, and that condition was not open and obvious to the unit owners, it had a duty to act reasonably to warn the unit owners of the potential danger."

The Court also pointed out that a condominium association has a fiduciary obligation to its unit owners. Indeed, "its very existence is for the benefit of the unit owners." Further, the Condominium Act "give a condominium association the power to protect property of the unit owners," allowing the association to access each unit to make emergency repairs. The close relationship between an association and its unit owners weighed in favor of finding that the association "had a duty to warn the unit owners of the potential for flooding under the circumstances as presented." Further, the association was aware of the nature of the risk and, because the risk was not known to the majority of the unit owners, the association "was in the best position to notify the unit owners of the potentially dangerous condition." According to the Court, it would not have been unduly burdensome for it to do so."

Lastly, the Court pointed out that "a flood in a condominium unit could damage not only other units, but also the common elements. The interest of the unit owners in their personal property and the interest of the unit owners as a whole in the common elements, would be safeguarded by requiring the warning." In conclusion, the Court found that the association's conduct could have been corrected relatively easily and the harm sought to be prevented was serious. Therefore, it found to impose the duty on the association "to warn of known defects in personal property located in units that could damage other units or the common elements." "Whether it breached that duty to warn, and, if so, [whether] the breach was a proximate cause of [the lower unit owner's] injuries remain[ed] questions for the jury."

DEEDS; APPURTENANCES; RIPARIAN RIGHTS: Absent express language to the contrary, a deed conveying property automatically transfers all of the grantor's appurtenant property rights, including riparian rights, even when the grantor is unaware of the existence of such rights and therefore had no specific intent to convey them. ***Panetta v. Equity One, Inc., 378 N.J. Super. 298, 875 A.2d 991 (App. Div. 2005); June 15, 2005.***

A mother, along with her son and daughter-in-law, owned a piece of property. The property consisted of two separate lots and a riparian grant for one of the lots. The son applied to a bank for a loan in order to raise capital for his business. To help her son, the mother transferred her interest in the property to her son and daughter-in-law in order for the son to use the property as security. At the time of the transfer, the mother was unaware that her property contained a riparian grant. The deed conveying the mother's interest did not include the riparian grant in the property description.

The son defaulted on the loan and the bank foreclosed on the property. A sheriff's sale took place and the bank was the successful bidder. It then commenced a sealed bidding process for the property. After notifying one party that it was the highest bidder, the bank changed its mind and reopened the bidding process. Three bidders filed actions against the bank. Each bidder contended that it was the highest bidder and therefore should have been awarded the property. The lower court awarded the property to one of the bidders on the basis that the other two bids did not conform to the bank's offer because their offers included the riparian grant in the property description. It held that the riparian grant was not part of the property because the bank was unaware of the grant and therefore did not expressly include the grant in its offer for bids. One of the bidders appealed, and the Appellate Division reversed, remanding the matter to the lower court to determine the owner of the riparian grant.

On remand, the lower court evaluated the intent of the mother when she transferred her interest in the property to her son. It noted that the mother had no actual intent to transfer any right to the riparian grant because she unaware of its existence. It also found that the bank was

equally unaware of the grant when entering into the loan agreement and when soliciting bids for the property. It further held that N.J.S.A. 46:3-16 does not require that a riparian grant be included in the property if it is not expressly included in the deed. Accordingly, the lower court concluded that the property was properly granted to the bidder who did not include the riparian grant in its bid. The unsuccessful bidders appealed again.

The Appellate Division reversed the lower court's ruling. It held that the lower court erred in: 1) interpreting the express language of N.J.S.A. 46:3-16; 2) placing the burden of persuasion on one of the unsuccessful bidders; and 3) assuming that the Appellate Division's prior unpublished opinion precluded the application of N.J.S.A. 46:3-16. The Court reviewed the language of the statute and held that it mandates that all deeds be construed to include all appurtenant property rights, such as riparian rights, unless such rights are expressly excluded. The Court noted that the property at issue consisted of two lots, one of which contained the riparian grant. It held that permitting the bank to convey only one of the lots would have allowed the bank to illegally subdivide the property.

Comment 1: This is probably the majority rule with regard to all appurtenant interests, including easements and other servitudes as well as riparian rights. We've seen a number of prior DD's involving easements that have expressed this views.

Comment 2: The rule facilitates clarity of ownership by putting the burden on those wishing to detract from a transfer of title to specifically reserve their rights. It does create an anomaly when a party isn't even aware that he or she owns certain appurtenant rights, but on the other hand, if there is no awareness, then there is little lost by permitting the rights to pass forward to the next owner.

EASEMENTS; CREATION; IMPLICATION: An implied easement must be affirmatively proven by evidence and the intent to create an easement may be interpreted from circumstances existing at the time deed was created or conveyed. ***Reagan v. Brissey, 832 N.E.2d 659 (Mass. App. Ct. 2005).***

Plaintiffs brought suit seeking determination that they held an implied easement to use four parcels of land as parks. The parcels appeared as parks on an 1872 recorded subdivision map, and there was some evidence that local residents had used them as open space and recreational areas. They were undeveloped. Subsequent deeds of lots on the plat did not reference them. The Town of Oak Bluffs held tax title to the parcels, subject to the individual defendant's unforeclosed right of redemption

The Land Court judge refused to recognize the easement. In looking to the circumstances surrounding the sale of the parcels in the subdivision, the judge found nothing to show that to original subdivider had promoted the existence of parks as an amenity to the subdivision, that no person had ever assumed control over the parcels to provide for their maintenance and use as parks, and that there had been no substantial use of the parcels for recreational or park purposes. For these reasons, the judge concluded the plaintiffs had failed to carry their burden of showing that the disputed parcels were impressed with an easement.

The Appeals Court noted that the Land Court judge had correctly determined that easement rights arose from the parties intention to create them, as evidenced by the language of the deed and surrounding circumstances.

On appeal, plaintiffs contended that the judge erred in concluding that the plan showing the disputed parcels as parks was not used to promote the sale of the lots and that the conduct of the owners and residents failed to convey an understanding that the disputed parcels were subject to an implied easement.

Second, plaintiffs argued that the judge failed to recognize the developers general development scheme for the subdivision as a seaside recreational community.

The court responded that it was settled law in Massachusetts that when land is conveyed with reference to a plan an easement is created only if clearly intended by the parties. When construing the language of a deed, a court may look to the circumstances surrounding the conveyance to determine the parties intent. Additionally, it said, when a park or open space designation is involved, evidence of intent may also be found in conditions existing when the deed was made.

Parties alleging an implied easement have the burden of proving one's existence. The nature and design of a development can give rise to the inference of a reservation of open space, however, such an inference may be outweighed by the failure of the grantor to

acknowledge through word or deed the existence of the easement. Importantly, the court noted that subsequent use of the land sometimes may also be considered:

> "Where the intent is doubtful, the construction of the parties shown by the subsequent use of the land may be resorted to, if such use tends to explain or characterize the deed, or to show its practical construction by the parties, providing the acts relied upon are not so remote in time or so disconnected with the deed 'as to forbid the inference that they had relation to it as parts of the same transaction or were made in explanation or characterization of it.'

The Appeals Court determined that the advertisement provided minimal weight to support the plaintiffs. Furthermore, there was no evidence in the record to establish open and continuous use consistent with the implied easement claim. The Court refused to infer specific easement rights from broadly written instruments purporting to transfer all property interests or from uncertainties in the chain of title. Factors which signal intent can not be examined in isolation, but rather a consideration of all relevant evidence in light of the circumstances is required. The absence of evidence in this case outweighed the evidence presented to show intent. The plaintiffs failed to prove the existence of implied easements to use the land as parks. Accordingly, the Land Court's ruling was affirmed.

Comment: According to the succinct and wonderful treatise: The Law of Easements, by Bruce and Ely, an implied easement can arise from the setting forth of the easement on a subdivision plat even if the plat is never recorded. There appears to be some disagreement as to the exact basis for this recognition. Some view the setting forth of the easement on the plat as, in fact, the description of the easement in such a way as to constitute an outright grant. Others treat it as an express grant, or base their finding of the easement on an estoppel theory. But Bruce and Ely don't really talk much about easements by implication from plat other than easements for roads. We've seen these broader implied easements – for lake access or recreation areas, before though.

What's really unusual about the case is the focus on the post platting behavior of the parties. Although there is some authority to the effect that if the developer later sells off the road before granting any of the lots, the road is not bound by the easement, the editor has seen very little authority basing a refusal to infer a dedication from the plat due to post platting conduct.

As the court notes, however, the plat is only evidence of intent, and if other evidence belies intent, even post platting evidence, its relevant.

EASEMENTS; CREATION; NECESSITY; LOCATION: The creation and location of easements by necessity are controlled by the intent of the parties involved in the partition and the conditions of the property at the time of partition. ***Kitras v. Town of Aquinnah, 833 N.E.2d 157 (Mass. App. Ct. 2005)***.

Kitras and other owners of landlocked lots, seeking access to public ways, filed actions for easements by necessity over neighboring lots, including lots held in trust for the Wampanoag Tribal Council of Gay Head, Inc. ("Tribe"), with the United States as trustee. The Land Court dismissed the claims, holding that because the United States was dismissed from the litigation on sovereign immunity grounds, and the Tribe could not be joined directly on sovereign immunity grounds, an indispensable party could not be joined.

Kitras appealed. The Appeals Court held that for a significant number of the lots in question, easements by necessity could not even be implied, because the Commonwealth of Massachusetts ("Commonwealth"), the presumed common grantor, never owned more than a contingent future interest in those lots. In order for an easement by necessity to arise, a common grantor must have owned all the land in question outright before it was partitioned, creating a landlocked lot.

As for those lots where easements by necessity could potentially be implied, the Appeals Court considered both the creation and location of any such easements. The Appeals Court observed that just because a landlocked parcel is created, an easement is not automatically implied, as there is no public policy demanding such easements to make land accessible or productive. Rather, it is the grantor's and grantee's intent, as well as the circumstances surrounding the execution of the partition, that controls whether an easement by necessity is created. The Appeals Court held that the location and bounds of any easements by necessity are determined in a similar fashion. Such an analysis could result in an easement by necessity not having a physical location upon the actual

partition, just to be determined subsequently as circumstances or the parties dictate.

The Appeals Court also concluded that the Tribe could be joined in the case, because it had waived its sovereign immunity when it entered into various settlements with the Commonwealth and the United States, and so an indispensable party was no longer absent from the case. The Land Court's ruling was reversed, and the case was remanded for further proceedings.

EASEMENTS; DUTIES OF SERVIENT TENANT; MAINTENANCE: The obligation to maintain or repair an easement, such as to remove snow, rests solely with the beneficiaries of the easement; the burdened owner is merely required to refrain from unreasonably interfering with the easement's use. ***Khalil v. Motwani, 376 N.J. Super. 496, 871 A.2d 96 (App. Div. 2005); March 17, 2005.***

A tenant of an apartment building sought damages after clearing snow within an easement over a neighboring landowners' property. The lower court held that the tenant had no standing since he was not the owner of the apartment building benefitting from the easement.

The Appellate Division held that "standing to sue to enforce the use of an easement is commensurate with the right to use the easement, regardless of whether the suitor holds title to the benefitted property." The Court additionally held that ownership of the land "'intended to benefit from enforcement'" of the easement "'is not a prerequisite to enforcement.'" The Court also held that whether the tenant was "entitled to benefit from the easement" turned on the interpretation of the language ... that created the easement" as well as the parties' intent. The Court found no language in the instrument creating the easement which excluded tenants from benefitting from its use.

The Court additionally found that while the tenant had a right to utilize the easement as well as a right to enforce it, "[t]he removal of snow from an easement is a matter of maintenance," which the easement's beneficiary – not the burdened property owner – is generally responsible for. Thus, "the obligation to maintain or repair the easement rests solely with the beneficiaries of the easement," while the burdened landowner is merely required to "refrain from taking any action ... that would 'unreasonably interfere' with the beneficiaries' use of the easement." Since the burdened landowners did nothing to "unreasonably interfere" with the easement's use, they "bore no obligation to remove" snow from it and therefore the tenant had "no cause of action against" the landowners since after he removed the snow on his own volition. Finally, since the tenant did not make such a claim, the Court failed to rule on whether the tenant "would have an actionable, similar claim against his fellow tenants or against the owner" of his apartment.

EASEMENTS; SCOPE; NECESSITY: Landowners with easements by implication or necessity in private ways may install utilities in those ways pursuant to statute permitting installation of such utilities in easements by grant. ***Adams v. Planning Bd. of Westwood, 833 N.E.2d 637 (Mass. App. Ct. 2005)***.

Gobbi proposed a subdivision and was in the process of seeking judicial rulings concerning the proposal. The subdivision proposal contemplated use of a roadway along Gotti's boundary. Neighboring owners, however, whose land a private roadway providing access to Gobbi's proposed subdivision, joined in the judicial review process against Gotti, contending that Gobbi had no right to use the roadway.

The Appeals Court held that, although Gobbi in fact owned only a portion of the roadway, he had easement rights in the entire roadway for the benefit of his land.

While the Appeals Court noted that it could not use extrinsic evidence in its determination of fee ownership of the roadway, it was not so limited in its evaluation of whether and to what extent any easements may exist on the roadway. .

Even had there been no express easement rights, the court noted that as all of the land in question (Gotti's, neighbors' and the road) had at one time been owned by a single grantor, and the conveyance by that grantor that left the grantor's remaining land (which was now Gobbi's land) landlocked. This impliedly resulted in an easement by necessity over the roadway for the benefit of the landlocked land, even though the deed in question did not expressly reserve any such right. Examining the deeds of past conveyances relating to the roadway and abutting land, and the circumstances surrounding these conveyances, the Appeals Court found no intent to extinguish that access right.

The Appeals Court further held that G.L. c. 187, §5, which authorizes abutting landowners to install utilities in a private way if they have access rights over the private way by deed, applies to easements arising by necessity in addition to express easements. Thus, Gobbi held his right to access over the roadway by deed within the meaning of c. 187, §5, and he was entitled to install utilities in the roadway. The Appeals Court found that the board did not exceed its authority in approving the subdivision plan or in imposing conditions, with the exception of one condition that would have improperly allowed the board to retain oversight over the design, location and construction of a retaining wall. The case was remanded for further proceedings before the board on Gobbi's subdivision application.

ELDERLAW; MEDICAID QUALIFICATION: Although property transfers within three years of a person's applying for medicaid may be viewed as suspected efforts to reduce one's estate in order to qualify for public aid, transfers outside that period may be made freely with this intention as a matter of state policy in New Jersey, and the court will look to the time of execution [delivery?] of a deed, not the recording date, if later, to establish whether the three year requirement has been satisfied. ***H.K. v. State of New Jersey, Department of Human Services, 184 N.J. 367, 877 A.2d 1218 (2005)***

A woman was obtained property through her father's will. She moved into the home on the property and a couple of months later, she was diagnosed with Alzheimer's disease. At that time, the estate had not yet formally deeded the property to her.

Due to the woman's deteriorating condition, she decided to convey the property to her three children. Shortly thereafter, advised by a lawyer, she carried out an extensive estate plan, including the execution of a deed conveying the property as a gift to her children. Although the lawyer delivered the executed deed to the daughter a few days later, at that time the estate had not yet delivered an executed deed to the mother. Thereafter, there were additional problems satisfying recorder's office formalities for the recording of a probate deed. In addition, the deed was lost within the leaves of a cookbook for some time. As a consequence, the daughter recorded the deed two years after it was executed.

Almost two years later, the woman applied for Medicaid nursing home assistance. The county department of human services rejected her application based on the "look-back" doctrine which is codified in the New Jersey Administrative Code. This doctrine provides that a person may not be eligible for Medicaid if he or she has disposed of any assets at less than fair market value during the thirty-six month period immediately preceding the individual's application. Deeds executed during that time are presumptive attempts to avoid personal responsibility for medical expenses.

The department of human services determined that the woman was ineligible for Medicaid because she conveyed her home less than thirty-six months before submitting her application. The woman appealed to the New Jersey Division of Medical Assistance and Health Services (DMAHS), who referred the matter to the New Jersey Office of Administrative Law. An administrative law judge (ALJ) issued a decision recommending that the woman's application be approved. DMAHS rejected this recommendation and remanded the matter back to the ALJ. While the matter was pending, the parties entered into a settlement agreement that permitted the woman to become eligible for Medicaid. The ALJ approved the settlement and recommended to DMAHS that the agreement be approved. The acting director of DMAHS once again rejected the ALJ's recommendation and declared the woman ineligible for Medicaid assistance. [Wow!! Ed.]

The woman appealed and the Appellate Division affirmed. The woman then filed a petition for certification which was granted.

The New Jersey Supreme Court reversed DMAHS's determination ruling that the agency had misapplied the law that governs the conveyance of real property. The Court held that case law establishes that the transfer of an interest in property by deed is complete when the deed is executed and delivered by the grantor and accepted by the grantee, and not when the deed is recorded. The Court held that the agency erred in concluding that the woman did not effectively convey the property until the deed was recorded. It determined that the property was conveyed when the deed was executed, which was more than thirty-six months before the woman applied for Medicaid, rendering the woman eligible for assistance.

The Court emphasized its prior ruling in *In re Keri,* 181 N.J. 50 (2004), where it approved the practice of

conveying property within family units in preparation of a family member's application for Medicaid assistance. The Court concluded that the agency erred in finding the woman ineligible for Medicaid on the basis of the "look back" doctrine.

Comment 1: Significantly, the case includes extensive discussion of the appropriateness of divesting oneself of assets in order to qualify for Medicaid benefits in the event of a future illness. The court's view is that, in New Jersey at least, this is a perfectly respectable and honorable undertaking, and in fact it is what the state legislature anticipates that clients will do, so long as they get it done more than three years prior to applying for Medicaid. Three years of penury (with reliance upon one's newly enriched relatives) is the price to pay for government supplied medical support for the balance of one's critical illness.

Comment 2: It should be noted that in these cases the party divesting assets rarely expects ever to get them back. The future is one of medical treatment preceding actual departure from this life. If the divesting party actually attempted to make arrangements to reacquire the divested property if the anticipated illness did not occur, or after it had run its course, then the editor suspects that the law and the court would take a different view of the circumstances. You can't take it with you, and you can't get it back.

EQUITY; LACHES; DECLARATORY RELIEF: An action for declaratory relief is a legal action and consequently a claim of laches, an equitable defense, is not admissible. ***VATACS Group, Inc. v. Homeside Lending, Inc., 2005 WL 2840301 (Ga.App., October 31, 2005).***, discussed under the heading: "Mortgages; Priority; Subordination; Dragnet Clause."

Comment: Here's a report on the above issue from UMKC's Remedies Professor, Barbara Glesner-Fines: The notion that laches (and a few other equitable defenses such as unclean hands and undue hardship) is unavailable outside equity still applies in most jurisdictions but what makes the analysis here unusual I think is the fact that the court was calling the action for declaratory judgment a legal action. Declaratory judgment actions, being creatures of statute, have been variously characterized as equitable or legal for purposes of applying the equitable defenses. *Compare Abbott Labs. v. Gardner, 387* U.S. 136, 155 (1967) (holding that a declaratory judgment suit challenging administrative action is equitable, and that equitable defenses are therefore available) and *Green v. Mansour,* 474 U.S. 64, 72 (1985) ("The propriety of issuing a declaratory judgment may depend upon equitable considerations") with Simler v. Conner, 372 U.S. 221, 223 (1963) (holding that a declaratory judgment suit raising legal issues is legal, and that jury trial is therefore available). So much of mortgage law falls under the equity side that I find it interesting that this court found the declaratory judgment regarding the interpretation of the mortgage to be legal. Certainly, if the plaintiff had asked for some kind of injunctive relief or stay with the declaration of rights, the action would have been equitable and the court would have entertained the laches defense.

EMINENT DOMAIN; LEASES; TERMINATION ON CONDEMNATION: Settlement with condemning authority under threat of condemnation is not a "sale" within meaning of lease clause executed by condemnee providing that lease may be terminated by landlord in the event of a "sale" to a party who does not wish to continue the lease. ***Eller Media Co. v. Mississippi Transportation Commission, 900 So. 2d 1156 (Miss. 2005)***

The lease in question was a billboard lease. Mississippi law provides that owners of personal property on the land are entitled to compensation for such personal property even if they have the right to remove the personal property. The court here cited a prior Mississippi case for the proposition that this statute created a compensable interest in the lessee under a billboard lease, apparently even if the lease itself had no "bonus value."

A 1987 Mississippi case, involving the same billboard company, had found enforceable a lease providing that, upon termination, the rights of the billboard lessee terminate. Likely the present language in the billboard lease was the billboard company's attempt to respond to that case. Instead of the usual language that one finds in leases – "terminate upon condemnation" – the lease provided that it would terminate upon sale of the property. Mississippi precedent did not regard a condemnation proceeding as a "sale."

But, in this case, there was not a condemnation – but rather a settlement of a condemnation suit in which the lessor/condemnee agreed to sell the property to the condemning authority. Nevertheless, said the court, there was no "sale" within the meaning of the lease

termination clause. It noted that the lessor/condemnee had no desire to sell the property, and in fact negotiated to prevent the condemnation altogether. But the opinion goes beyond those special facts, and holds that any negotiated sale with a party holding the power to condemn is not an "arms length" negotiation and (apparently) not a sale.

The court notes that its opinion is directly contrary to a Minnesota precedent involving very similar facts.

Comment: The decision is wrong. First – it is hopelessly overbroad, and would apply to any sale to a public agency with the power to condemn, even one in which the seller initiated and hotly pursued the sale. Second, even in a case such as the one here, where the condemnee initially did not want to be condemned, when it did negotiate the sale, it clearly was interested in selling the property free of the billboard company's interest. And the condemning authority was interested in taking the property without the billboard on it. Thus, the landlord got a higher price if it terminated the lease. This seems completely consistent with the intent of the clause – to leave with the landlord the write to profit by selling its property unencumbered by the lease.

ENVIRONMENTAL LAW; CERCLA; "OPERATOR:" Utility company installing underground conduit in an area containing engineered controls of existing hazardous substance is not liable as an "operator" when its actions trigger a release of such substances if utility is not aware the existence of the controls and they were not registered under state's "one call" system. ***United States v. QWEST Corp., 353 F. Supp. 2d 1048 (D. Minn. 2005)***

QWEST, through subcontractors, carried out a project to install underground communications line in a public "utility corridor" easement running across a Superfund site. The site was listed on the National Priorities List. The EPA had dealt with extensive residual pollution on the property by building a series of containment and prevention facilities, including wells for the extraction of contaminated groundwater and underground forcemains (piping) for the transport of the contaminated water to an on site treatment unit.

QWEST and its subcontractors had no actual knowledge of the pipelines, and contacted the Minnesota "One Call Center" prior to installing the line to locate all underground utilities in the right of way. The EPA had not installed any "tracers" so that its piping could be identified on the surface, and had failed to register the line with the "One Call Center" as required by statute.

It appears that QWEST's subcontractors' activities resulted in a rupture of the pipelines for contaminated water and that the government was forced to conduct a clean up that QWEST, at least, claimed could wind up costing several million dollars.

The government brought suit demanding that QWEST contribute to the cost of clean-up as an "operator of a facility." QWEST opposed this claim on several grounds, most of which appear to be matters of first impression.

> "Operator" has a simple and vague definition in the statute, but the U.S. Supreme Court has defined the term to mean "someone who directs the workings of, manages or conducts the affairs of a facility ... [A]n operator must manage, direct or conduct operations specifically related to pollution. That is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations."

The government argued that demonstrably QWEST directed operations that had to do with leakage or disposal of hazardous waste, as what it did resulted in leakage of such waste. QWEST responded that it had no idea that the pipes were there, and thus couldn't be viewed as engaged in a project that had to do with protection or maintenance of these pipes. Apparently QWEST was implicitly conceding that the situation might have been different had it been on constructive notice of the pipes due to their registration with the "one call" system. But since the government didn't register their presence, QWEST had no reason to know of them, and couldn't be charge with any duties concerning them.

The government cited cases in which a party who was not the original operator of the facility was held liable when it conducted contractor operations at a facility, but QWEST sought to distinguish those cases because the contractor had a direct contractual relationship with an actual operator. In the instant case, QWEST was making use of a dedicated public easement (but query why the grant of the easement to the public was not itself a "contractual relationship?")

Alternatively, QWEST argued that it was not doing any operations in a "facility" because its activities occurred entirely within a utilities corridor, and not within the polluted area itself.

The court stated that there was no clear authority concerning the liability of a public utility under these circumstances, and stated that "the Government is seeking t expand the definitions of operator liability well beyond the plain language of [the statute] and beyond any definition offered by a court... Defendants did not conduct any activities relating to the handling and management of hazardous substances on the Site. Neither did their utility work on the land adjacent to the Site "specifically relate to pollution."

Comment 1: Unfortunately the case is hopelessly ambiguous as to whether the "not an operator" or "not on the Site" arguments prevailed for the defendant, or whether (unlikely) both were critical. Further, it is not clear how important it was that the government failed to register the site with the "one call" system. Should it be relevant that the government in fact negligently caused the discharge by its failure to register?

Comment 2: The two cases cited by the government dealing with releases caused by contractors on land owned by another (both finding "operator" status") are ambiguous themselves on the question of whether the defendant must have knowledge of the dangers pertaining to its activities. In one case, the defendant was an oil driller, and the discharge was a spill resulting from the drilling, so there clearly was awareness. In the other case, however, the defendant was an excavator that spread polluted soil over a 300 acre construction site. There is nothing in the case to indicate it knew that the soil (resulting from an earlier shipbuilding operation) was polluted, but the complaint alleged that the defendant had been negligent, which suggests that at least there was an allegation that it "should have known."

Comment 3: There is also some argument that the defendant here perhaps should have known more than its now admitting. This was, after all, a publicly identified Superfund site. Maybe more "asking around" was appropriate, in addition to checking with the "one call" center, which any utility might do in any case, Superfund site or not.

Comment 4: As to whether the defendant did work on the "facility," wouldn't it be logical to conclude that the "facility" included the pipes that had been built to drain pollution away from the facility, whether or not they were located below a public easement area?

Comment 5: Interestingly, the government's lawsuit here has stirred up a lot of consternation in the utility community about the usefulness and relevance of "one call" statutes. It is somewhat questionable whether such state legislation can eliminate the problem here, but perhaps we'll get more clarity nationwide as to whether environmental clean up structures ought to be reported in "one pass" registries.

ENVIRONMENTAL LAW; HAZARDOUS SUBSTANCES; SOVEREIGN IMMUNITY: Where landowners enter into agreements with the city and grant the city temporary licenses and easements to spread sewage sludge on their land, and landowners later discover sludge contains concentrations of metals high enough to be classified as hazardous waste, landowners' tort claims are not barred by sovereign immunity because the county, which was successor by consolidation to the city, waived sovereign immunity under a Georgia statute by purchasing liability insurance arising from their use or operation of the motor vehicles used to apply the sewage sludge to the landowners' lands. ***McElmurray v. Augusta-Richmond County, 274 Ga.App. 605, 618 S.E.2d 59 (Ga.App., July 11, 2005).***

The Georgia statute provided for a waiver of governmental immunity of a municipality to the extent of liability insurance purchased for tort claims arising out of the alleged negligent use of a motor vehicle.

The Court of Appeals held that landowners did not have inverse condemnation claim; sovereign immunity did not bar landowners' tort claims; and the city's alleged fraudulent concealment of unlawful contents of sewage sludge did not toll limitations period on breach of contract claim.

ESCROWS; POST CLOSING ESCROWS: A post closing escrow, whereby seller deposits a sum that may be forfeited to buyer if seller does not complete certain contractual obligations, does not substitute for the original contract obligation of the seller to perform those activities, as the sale agreement does not "merge" into the escrow agreement. ***Wallace v. Bock, 620 S.E.***

2d 820 (Ga. 2005). discussed under the heading: "Vendor/Purchaser; Merger; Post Closing Escrow:

FAIR HOUSING ACT; DISABILITIES: Although the Fair Housing Act, in certain circumstances, may entitle a handicapped condominium occupant to a reserved parking space adjacent to the tenant's dwelling, such a space is required only where it is necessary for the tenant to use and enjoy his or her dwelling, not where it is simply more convenient; but accommodation nevertheless may be required where the burden on the association is "trivial.". ***United States of America v. Port Liberte Condo I Association, 2005 WL 3500801 (U.S. Dist. Ct. D. N.J. 2005), Unpublished; December 21, 2005.***

A buyer moved into a condominium complex and parked his car in the space assigned to his unit. Four years later, he moved to another unit in a different building with a different assigned parking space. Nonetheless, at the time, he maintained control of the original space because his son still owned the original unit. Using his control of that unit's parking space, he arranged to exchange it with another resident for a particular handicap space that was located directly adjacent to the entrance of the building in which he now lived.

Ten months later, his son sold the original condominium unit. He and his son claimed that the buyer of the "old" unit, by terms of the sale, should use the parking space that was associated with the "new" unit instead of the space that was originally assigned to the "old" unit. Accordingly, under this arrangement, this meant that the man could continue the agreement that allowed him to use the handicap space near his building's entrance in exchange for the space that was originally designated to go with the "old" unit. But apparently they didn't limit the new buyer's parking rights under the sale agreement.

Shortly after the son sold the unit, the new buyer complained to the association and requested use of the originally designated space. The association "responded by ordering all residents to use the parking spaces assigned to the units in which they live[d]." Under this edict, the buyer of the son's unit gained the use of the original space and the son's father had to use the space that was assigned to the unit he owned instead of the handicap space that he had arranged to use.

The man "then formally requested that he be assigned a handicap parking space." When the association "allegedly failed to assign him a handicap space," he filed a complaint with the United States Department of Housing and Urban Development (HUD). The association alleged "that it solicited requests for handicap spaces from all residents and assigned such spaces on the basis of need and seniority." According to the association, "all handicap residents were assigned a handicap space but preference was given to those residents who had lived in the complex for the longest amount of time. Thus, a more senior resident, ..., received [the space that the man wanted to use and had been using prior to this reassignment]" and he was assigned a different space. The man contended that his space was sixty to seventy feet further from the entrance to the building than the one he had been forced to give up.

Under the Fair Housing Act (FHA) it is "unlawful to either: (1) 'discriminate in the sale or rental [of], or to otherwise make unavailable or deny, a dwelling [,]' to a handicapped person ... or (2) 'discriminate against any [handicapped] person in the terms, conditions, or privileges of sale or rental of a dwelling'. ..." Discrimination includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a disabled] person equal opportunity to use and enjoy a dwelling." A "reasonable accommodation inquiry is highly fact-specific, requiring a case-by-case determination." Although "[i]t has been recognized on numerous occasions that the FHA may, in certain cases, entitle a handicapped tenant to a reserved parking space adjacent to the tenant's dwelling. ... However, such a space is required only where it is necessary for the tenant to use and enjoy his dwelling, not where it is simply more convenient. In addition, the requested accommodation must be reasonable in that it must not pose an undue burden on the defendant."

All parties agreed that the man was disabled, but the extent of his disability was unclear. The association alleged that it had a video from a surveillance camera showing the man "walking to and from his car with ease." In response, the man claimed that "his condition varie[d] from day to day and that on some days he [was] severely limited, thereby making the walk from [the association-designated space] very painful."

The Court would not determine the extent of the man's disability or the reasonableness of his request on a motion for summary judgment. Therefore, a hearing was ordered to be held. On the other hand, it pointed out that the association's burden in accommodating the man might be trivial. The association did not show that accommodating the man "would present it with an undue burden." The Court wondered why the association could not "simply repaint the lines in the parking garage, at minimal cost, thereby creating an additional handicap space adjacent" to the man's building, "and shift several other tenants down one space in order to provide [the man] with a space that [was] close to his entrance."

FORECLOSURE; ADJOURNMENTS: Under the New Jersey Fair Foreclosure Act, neither a judge nor a sheriff has the discretion to refuse to adjourn an execution sale of foreclosed property when the adjournment has been requested by or with the consent of the judgment creditor. ***Wells Fargo Home Mortgage, Inc. v. Stull, 378 N.J. Super. 449, 876 A.2d 298 (App. Div. 2005); June 17, 2005.***

A borrower defaulted on a home mortgage loan. The holder of the mortgage commenced a foreclosure action and obtained an uncontested judgment of foreclosure. A writ of execution was then issued and an execution sale was scheduled. The execution sale was postponed at the request of the judgment creditor after the parties entered into a forbearance agreement. The execution sale was then re-scheduled, but the judgment creditor once again requested that the sheriff adjourn the sale. The sheriff refused, and the judgment creditor applied for and obtained an adjournment from the Chancery Division. In granting the request, the lower court's order provided that any further adjournment requests must be considered by the sheriff and that the Foreclosure Unit of the Superior Court was responsible for any further monitoring of the matter. The judgment creditor filed a motion for reconsideration. It was denied. The judgment creditor then appealed the ruling.

The Appellate Division reversed the lower court's ruling. In reaching its decision, it evaluated the legislature's intent in enacting the Fair Disclosure Act. The Court ruled that the clear intent behind the Act was to provide homeowners with every opportunity to pay their home mortgages and keep their homes. It further held that New Jersey's public policy disfavors the rapid judicial sale of homes and that judgment creditors have an unfettered right to adjourn a sheriff's sale to give the creditor an opportunity to work with the debtor to resolve its financial difficulties. As result the Court reasserted the rule set forth in *Banker's Trust Company of California, N.A. v. Delgado*, 346 N.J. Super. 103 (App. Div. 2001), where the Court held that neither a judge nor a sheriff had the discretion to refuse to adjourn an execution sale of foreclosed property when the adjournment has been requested by or with the consent of the judgment creditor under the Fair Foreclosure Act.

FORECLOSURE; SURPLUS: Holder of a judgment lien against real property sold at a tax sale has a superior claim to tax sale surplus over property owner. ***CANA Investments, LLC v. Fansler, 832 N.E.2d 1103 (Ind.App. 2005).***

HOMESTEAD; BANKRUPTCY; LIENS; DISCHARGE: Under Wisconsin statute, which is not preempted in bankruptcy, debtor can obtain a post-discharge state court order satisfying a pre-petition judgment lien, even though the debtor's property interest exceeded the exemption claim to which debtor was entitled in bankruptcy. ***Megal Development Corp. v. Shadof, 2005 WI 151 (2005)***: discussed under the heading: "Bankruptcy; Homestead; Judgment Liens; Discharge."

INSURANCE; ENVIRONMENTAL COVERAGE: The standard pollution exclusion clause in a commercial liability insurance policy does not exclude claims arising out of toxic fumes from a floor sealing operation by a contractor. ***Nav-Its, Inc. v. Selective Insurance Company of America, 183 N.J. 110, 869 A.2d 929 (2005)***

A contractor specializing in tenant "fit-out" work obtained a comprehensive general liability insurance policy to cover work on a shopping center in Pennsylvania. It hired a painting subcontractor to do painting, coating and floor sealing work. A physician with office space in the shopping center "suffered from nausea, vomiting, lightheadedness, loss of equilibrium and headaches allegedly as a result of exposure to fumes released during the work." That doctor sued the contractor and others for personal injuries.

The contractor forwarded the complaint to its insurance carrier, seeking defense and indemnification. The insurer refused to provide coverage based upon the pollution

exclusion provision in the policy. This provision stated that the insurer was not obligated to defend a claim or suit alleging injury or damage arising out of a "pollution hazard," and need not pay damages, settlements, losses, costs or expenses awarded as a result of such a claim. The policy defined pollutants "as including, among others, 'any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.'" Waste included "materials to be recycled, reconditioned or reclaimed." The policy defined "pollution hazard" to mean "an actual exposure or threat of exposure to the corrosive, toxic or other harmful properties of any 'pollutants' arising out the discharge, dispersal, seepage, migration, release or escape of such 'pollutants.'" Finally, the policy contained a limited exception to the pollution exclusion, "stating in part that it did not apply to exposures within a structure resulting from a release of pollutants 'within a single-forty-eight hour period.'"

The physician's case against the contractor was resolved through binding arbitration. The contractor then commenced a declaratory judgment action against its insurer. The lower court found that the insurer had an obligation to defend and indemnify the contractor in accordance with the policy. The insurer appealed, and the Appellate Division reversed the lower court, "finding that pollution exclusion clauses are not necessarily limited to the clean up of traditional environmental damage." It ordered that "a jury must decide whether each of period of time that [the physician] was at work represented a separate exposure of less than forty-eight hours or one continuous exposure period."

On further appeal to the New Jersey Supreme Court, that Court held that the "pollution-exclusion clause in this case [did] not bar coverage for personal injuries arising from exposure to toxic fumes emanating from a floor coating-sealant operation performed by the [contractor]." The Court recognized that "courts should give the words of an insurance policy their plain, ordinary meaning." On the other hand, if a policy is ambiguous, it is to be construed in favor of the insured. This is because policies are "usually prepared by insurance company experts, [and are] a contract of adhesion between parties who are not equally situated."

Further, the Court found "that the purpose of the "pollution-exclusion clause ... was to have broad exclusion for traditional environmentally-related damages, such as remediating hazardous waste under" CERCLA. "Read liberally, the exclusion at issue [in this case] would exclude from coverage essentially all pollution hazards except for those falling within the 'exception' for exposure within a structure resulting from a release of pollutants 'within a single forty-eight hour period.'" The Court rejected that interpretation "as overly broad, unfair, and contrary to the objectively reasonable expectations of the New Jersey and other state regulatory authorities that were presented with an opportunity to disapprove the clause." It also looked at the policy's terms: "discharge, dispersal, release or escape," and held those to be "environmental law terms of art, thereby reflecting the exclusion's historical objective – avoidance of liability for environmental catastrophe related to intentional industrial pollution." As a consequence, it had no reason to address the ramifications of the forty-eight exception because if the pollution exclusion was not applicable, neither was any exception to the pollution exclusion. Finally, the Court believed that "industry-wide determinations to restrict coverage of risks, particularly those that affect the public interest, must be fully and unambiguously disclosed to regulators and to the public."

Comment: It can be acknowledged that the insurer intended to be responsible for some environmentally related injuries, and that the primary purpose of the exclusion was to preclude liability for long term leakage of hazardous substances. It also should be acknowledged, however, was that the way that the insurer chose to deal with this problem was to draw a line between injuries occurring within a short time period and other claims, defining only the "short time period" causation as supporting a claim. Nothing in the policy suggests that the exclusion is limited to "intentional industrial pollution" – whatever the historical origins.

If the policy were advertised or even described as offering any significant protection against liability for release of hazardous substances into the atmosphere, the editor might be of the view that the adhesion character of the contract might justify an interpretation consistent with the legitimate expectations of the insured. But that's very unlikely to be the case. If a line can't be drawn where the policy authors drew it, where will the court draw the line? Negligent versus deliberate releases? The court suggests that, but is that distinction appropriate in general?

This kind of judicial reinterpretation of insurance policies undoubtedly is keeping insurers of Katrina-damaged property in Mississippi and Louisiana up at night. In the editor's view, at least in Louisiana, where judges are popularly elected, the insurers have no chance.

JUDGMENT LIENS; DISCHARGE; BANKRUPTCY: Under Wisconsin statute, which is not preempted in bankruptcy, debtor can obtain a post-discharge state court order satisfying a pre-petition judgment lien, even though the debtor's property interest exceeded the exemption claim to which debtor was entitled in bankruptcy. ***Megal Development Corp. v. Shadof, 2005 WI 151 (2005)***: discussed under the heading: "Bankruptcy; Homestead; Judgment Liens; Discharge."

LANDLORD/TENANT; EXCLUSIVE USE CLAUSES; ENFORCEMENT: A "product exclusivity clause" providing exclusive right to sell "electronic equipment and components" is not an impermissible restraint of trade if the clause is tailored to directly correspond with tenant's business, and court will uphold clause giving tenant right to withhold rent if exclusivity protection is breached. ***Buford-Clairmont Co., Ltd., v. RadioShack Corp., 2005 WL 2374723 (Ga.App., September 28, 2005).***

RadioShack, a shopping center tenant, invoked a "product exclusivity clause" in a lease amendment that permitted it to reduce its rent if the landlord permitted the use of any space in the center for "retail sale or display of electronic equipment and components." The clause permitted tenant to reduce its rent to the lesser of a fixed amount or three percent of gross. Landlord had allowed a third party, a company that sold cell phones, to lease space in the same shopping center.

Landlord brought a dispossessory and declaratory judgment action, arguing that the provision was an unenforceable restraint on alienation. The trial court found as a matter of law that the clause was enforceable if the facts showed that the landlord breached the clause and that the tenant had not waived it. A jury found for the tenant on the factual issues, and the court entered judgment in favor of tenant.

Georgia case law had already concluded that exclusive use clauses are not unenforceable as restraints on alienation because so long as they are reasonable:

> "... subject to the overriding requirements that, as to territoriality and/or duration, they be reasonably necessary to protect the interests of the covenantee, that they not impose greater restrictions upon the covenantor than are necessary for the covenantee's protection, and that they not unduly prejudice the interests of the public."

Landlord claimed the product exclusivity clause imposed greater restrictions than were necessary to protect tenant's legitimate business interests and ultimately restricted the public's interest to shop freely for electronic items.

The total clause read as follows:

> "[Landlord] covenant that during the Lease Term, no space with the shopping Center (other than the Demised Premises) or any adjacent property owned by [Landlord] shall be used for the retail sale or display of electronic equipment and components, including, but not limited to, all types of telecommunication and transmitting equipment, computers and related accessories, and audio/video equipment and accessories."

Although the court and the parties termed the clause in question a "product exclusivity clause," it looks and feels like what the trade calls an "exclusive use clause" with a "radius feature."

The Court of Appeals agreed with tenant, finding the exclusivity clause tailored to correspond with tenant's business. Tenant's manager had testified that all of the items described in the clause were in fact sold at the Radio Shack store.

The landlord also protested that the tenant had withheld its share of the CAM charges, which it claimed were not rent, but an obligation to share in maintenance (this is a reversal of the usual position taken by landlords, who normally are anxious to characterize CAM as rent.) But the court said that it didn't matter whether CAM charges constituted rent, because the remedy clause for breach of the "product exclusivity" provision stated that the reduced rent was "in lieu of the Fixed Minimum Rent *and all additional charges under the lease*." (Whoops)

Comment 1: Maybe the bite was just too big, and landlord was hoping against hope to get a settlement. The landlord

really should have taken up its problems with whoever permitted Radio Shack, usually a relatively small operation, to get such a massive exclusive with such an effective remedy.

Comment 2: Perhaps the remedy is the most interesting part of the case. It gives the tenant a remedy it can invoke without going to court to seek an injunction and doesn't require the tenant to prove damages. It is up to the landlord to initiate the lawsuit and defend its conduct, and all the while the tenant is paying reduced rent. As old Captain Kirk says: "Brilliant!!!" Often tenants draft for themselves effective protections on paper, but fail to consider as a practical matter how they will enforce their rights in a cost efficient way.

Comment 3: Typically lenders are very leery of permitting landlords to give tenants the right to withhold rent in response to landlord breach. Lenders reserve the right to review leases and many in fact do review them. Is it possible that this right slipped through the review of lender because it was buried in the exclusivity clause?

LANDLORD/TENANT; EXCLUSIVE USE CLAUSE; ENFORCEMENT: Order Restored!! Restrictive covenant in commercial lease is unenforceable where tenant has no interest in shopping center other than prohibiting competition. ***Tippecanoe Assocs. II, LLP v. Kimco Lafayette 671, Inc., 829 N.E.2d 512 (Ind. 2005).***

SES leased a store in its Sagamore shopping center to Kroger. Kroger operated a supermarket on the premises the lease for which contained a restrictive covenant preventing SES from leasing any other space in the shopping center to another grocery store. Kroger later closed all of its supermarkets in the area and assigned its lease to Pay Less, which operated grocery stores in the area. Pay Less acknowledged acquiring the Sagamore center lease in order to prevent competition with its other area stores.

Pay Less later subleased the Sagamore space to H.H. Gregg, an appliance dealer. So the former Kroger space was no longer operated as a grocery store. But Pay Less still had other stores in the area that it wished to protect from competition from stores in the Sagamore Center.

Pay Less owned the Tippecanoe Associates II, LLC ("Tippecanoe"). Tippecanoe sought to enforce the restrictive covenant against the current owner of the Sagamore shopping center, Kimco Lafayette 671, Inc. ("Kimco") in order to prevent Kimco from leasing other space in the center to a competitor grocery store.

Kimco filed a complaint to have the restrictive covenant declared unenforceable. The trial court granted Kimco's request on the grounds that the original purpose of the covenant could no longer be achieved. The Court of Appeals reversed, holding that there had not been sufficient changes in circumstances to support invalidating the covenant. Tippecanoe appealed.

The Supreme Court of Indiana noted that restrictive covenants in shopping center leases are generally found consistent with the public interest and found not to restrain competition unreasonably. The Court held that the dispositive fact was that the space was no longer being used as a grocery store; therefore, there was no interest for the covenant to protect. Pay Less voluntarily abandoned grocery store operation in the space, severing the restrictive covenant.

Restrictive covenants in shopping center leases may be used to protect interests of the tenants who maintain a current protectable interest in the center. It is improper to permit enforcement of an anticompetitive covenant by a non-tenant who acquires the right to exclude others from the center without investing in the center. Enforcement of a restrictive covenant in the possession of a non-tenant contradicts the policy behind restrictive covenants unless justified by a balance of the legitimate concerns of the promisee, the public interest, and the detriment to the promisor.

A dissenting opinion focused on the fact that the covenant was freely bargained-for and should not be set aside unless it materially and adversely affects the contract. The dissent also disagreed with the majority's creation of a bright line test, that covenants are unenforceable when severed from the occupancy, because it essentially rewrites commercial leases and restrains parties from freely entering bargained-for agreements. The Court upheld the trial court, finding the restrictive covenant unenforceable.

Comment: The editor danced around the room when he read this one. He was very critical of the court of appeals opinion, which was reported as DD 11/2/04. Here are some of the editor's comments on the court of appeals case:

Comment 1: Wow!! Here's a case where the appeals court actually overrules the judgment of the court below on the equities and overturns a finding of changed circumstances where there seems to be abundant evidence to support it. Further, the only basis on which the covenant can be supported has to do with factors arising after the covenant was entered into and outside the area covered by the lease. How can it be right?

There is no indication in the covenant that the benefit is to run beyond the property that was the subject of the lease. In essence, this would be a finding that the benefit is "in gross." To the contrary, the lease covenant states that the covenant will "run with the land." To say that there was land outside the shopping center benefitted by the assignee/sublandlord, and that the covenant attaches to that land, strikes the editor as dramatic overreading of the intent of the parties here. Basically, the courts holding makes an anticompetition covenant completely merchantable. Here, for instance, the court virtually admits that the assignee's purpose in obtaining the apartment store sublessor's rights was to obtain the enforcement rights of the anticompetition covenant.

Whether this represents good or bad economic theory (the editor is still puzzling that one out), the case is a startling expansion of the traditional notion of the purpose of covenants that run with the land and totally inconsistent with the traditional province of equity in refusing to enforce covenants on the basis of "changed circumstances."

An acceptable interpretation for the editor would have been if the court had acknowledged that the covenant existed and was enforceable if and when the tenant would benefit from its enforcement, because the premises had been converted back to grocery use, but no sooner. Note that in this was there were only ten years left of the 40 years originally controlled by the Kroger lease. The appliance store tenant apparently had leased those years. This covenant should not have been enforced.

Comment 2: The editor is further of the view that the court ought to view the original intent of this covenant to be to protect the property within the center, and that the court therefore ought not to have enforced it by injunction at a time when no such property could be protected, and likely would not be.

But the dissenting judges in this case raise an interesting issue: What if in fact the original parties to the promise in question intended to limit the landlord's use of his property in order to protect off premises activities of the promissee? In the view of the dissent, the majority opinion categorically strikes down any such anticompetitive agreements. The editor isn't convinced that the majority really intended to go that far, but let's assume that it did.

First, both the dissent and the majority deny any intention to invoke federal or state antitrust laws here. They are keeping the discussion purely at the level of the role of state courts in interpreting clear agreements between commercial parties. In that context, is it appropriate to conclude categorically that the parties could never agree that a landowner should restrict the use of his land in order to protect activities conducted outside that land by the promissee? Stated in that way, the dissent definitely has a point. There are plenty of covenants executed by buyers and sellers of real estate that protect one of the parties from competition located on other land. Absent a clear antitrust violation, why not enforce them?

LANDLORD/TENANT; LANDLORD'S DUTIES; REPAIR: Commercial tenant did not breach lease provision requiring "maintenance and repair" by failing to replace old, dilapidated roof with new roof at own expense. ***ASP Props. Group, L.P. v Fard, Inc. 35 Cal. Rep. 3d 343 (Cal. App. 2005)***

In 1997, Tenant entered a 10-year lease for commercial property. In July 2000, the parties amended the Lease, providing Tenant with a $500 reduction in monthly rent, and added paragraph 3, which stated that Tenant agreed to comply with the city's laws and ordinances and to perform any necessary modification, maintenance, or repairs, at Tenant's expense, as required by the city or Landlord within 60 days of written notice. Failure to "make any improvement" in compliance with written notice from the Landlord would result in a contract breach. A new paragraph 4 was substituted into the Lease,

stating that Tenant agreed to keep the Premises, including the roof, in good and safe condition.

In 2003, the original landlord, Lin, sold the Premises to ASP Properties(Landlord). Landlord learned that two building roofs were leaking badly and needed replacement. Landlord sent Tenant a letter demanding that Tenant complete 11 specific "modifications, maintenance or repairs" within 60 days. Several months later, Landlord sent Tenant a three-day notice demanding that Tenant complete the modifications, maintenance, and repairs or quit the Premises.

Landlord filed an unlawful detainer action against Tenant, alleging Tenant did not comply with the three-day notice. During a bench trial, Lin testified that in negotiating the Amendment, he and Tenant never agreed Tenant would make improvements to or increase the value of the Premises. Lin and Tenant did not discuss the need for the roofs to be replaced, but only Tenant's obligation to maintain and repair the roofs. There was testimony by Tenant's apparent president and/or owner stating that at the time he negotiated the Amendment, he never thought Tenant would be expected to install a roof, only to maintain the roofs.

The trial court entered judgment for Tenant, finding in part that the language in paragraph 4 of the Amendment did not require Tenant to replace a roof that had already exceeded its life expectancy at the time Tenant took possession.

On appeal: *held: Affirmed.*

Case law supports a conclusion that, absent an express obligation to replace a roof, a tenant's obligation to maintain or repair the premises (including a roof) does not include an obligation to replace an old, dilapidated roof with a new roof. Generally, a tenant is not required to restore premises to a better condition than existed when the premises were let.

Tenant's duty of maintenance under the Lease and Amendment can only be reasonably construed as requiring Tenant to maintain the roofs in their conditions as of the time those written agreements were executed in 1997 and 2000, in their then-dilapidated conditions. Had the parties intended Tenant to assume the obligation to replace the roofs, one would reasonably expect the Lease and/or Amendment expressly so to state. Although there is evidence both Landlord and Tenant knew, when the Lease and Amendment were executed in 1997 and 2000, the roofs needed to be replaced, that knowledge does not support a reasonable inference they intended, absent express language in the Lease or the Amendment, that Tenant be required to replace the roofs. The only reasonable construction of paragraph 3's use of "improvement," within the context of the entire Amendment, is that it refers to Tenant's other obligations, as expressly stated in the Amendment, to maintain the Premises and correct various code violations found by the city.

Reporter's Comment: I am not so much concerned whether the decision to deny the landlord unlawful detainer relief against its tenant was "correct" as I am interested in speculating about what will happen next.

(As far as the merits of the outcome and opinion are concerned, it is not surprising that a court would refuse to read a covenant in a lease calling for the tenant to maintain the roof of the building to not include a duty to entirely replace the roof if it cannot be otherwise maintained. The language of the original lease was not that clear, there were enough special circumstances involved in how and why it was amended, and there was enough parol evidence to make any construction of the clause justifiable. While the old rule used to be that a tenant's covenant to repair automatically included an obligation to rebuild, unless that burden was specifically excluded (see Egan v Dodd (1917) 32 CA 706, 164 P 17), we have since moved so far away from that formalistic (and harsh) position that it requires quite explicit drafting (or exceptional circumstances) to reach that kind of result today.) But knowing that a tenant cannot be evicted for failing to replace a roof does not answer the many questions that this situation generates. The tenant is hardly likely to volunteer to pay for a new roof itself, and roofs don't replace themselves. So, who is going to do it? The easy answer-the landlord has to do it-is probably wrong.

One of the hardest concepts for me to get across to my students is that saying that a tenant does not have some duty to repair is not the equivalent of saying that the landlord therefore does have that duty. Law students are so imbued with theories of duty (mainly from their torts classes, I think) that they are uncomfortable with the notion that neither landlord nor tenant may have a duty to the other, as far as certain repairs are concerned.

But the principle of mutual nonduty is, indeed, the original rule regarding disrepairs in rented premises, at least when they are commercial. If some part of the building was broken at the commencement of the term, the principle of caveat emptor kept the tenant from demanding that the landlord correct it. And if it broke during the term, the tenant, not the landlord, was the possessor, and the consequences of the injury would be shared between the parties: The tenant would suffer during the balance of its term and the landlord would suffer during its reversion. Thus, either one could fix it, if it wanted to, but neither owed the other any duty to do so. As a background rule, this doctrine provides a useful setting for negotiating the parties' respective repair rights and obligations. However, in this case, the landlord made no promise to fix, and the tenant's promise to maintain did not include a duty to replace, which was apparently the only kind of repair that would work.

Thus, the default rule was not altered by this lease. The landlord cannot evict the tenant for not paying for a new roof-but can the tenant move out because the landlord won't pay for it either?

I think not. These are commercial premises, so there is neither an implied warranty of habitability nor any statutory repair-and-deduct right involved; those tenant perquisites apply only to residential premises and have never been extended to commercial premises.

I do not see any evidence that this is likely to change. Commercial tenants are not favored in the courts and legislature the way residential tenants are. Furthermore, although the facts are not stated too clearly, the structure in this case looks like a single-occupant building, meaning that the roof is not likely to be treated as a common area under the landlord's retained control, generating an independent obligation on the landlord to replace or repair it. Just as the landlord cannot pay for a new roof itself and add the cost to the tenant's rent, I think the tenant cannot pay for a new roof and then subtract the cost from the rent it owes. But this standoff is unlikely to last forever. The roof seems to be leaking badly, and that may matter to each party.

For a tenant, a leaking roof can ruin its business activities inside the building. (Who would want to buy or have their car repaired there?) But if the landlord owes no basic repair obligations to its tenant, as I said above, then its failure to make a repair-even when that inaction leads to untenantable premises-does not entitle the tenant to quit. The theory of constructive eviction requires that some unmet obligation on the part of the landlord cause the untenantability; here, there is no obligation the landlord owes to the tenant on that score. Thus, if the tenant moves out without continuing to pay the rent, it may well be doing so in breach of the lease, thereby making itself liable for damages or future rent (CC §§1951.2, 1951.4).

Conversely, for a landlord, a leaky roof can mean that rain gets inside and warps the floors, damages the electrical system, or does other permanent damage if prompt protective steps are not taken. Because the tenant is the one in possession, it has a duty to avoid waste; under CC §1929, the tenant has an obligation to use ordinary care to preserve the premises against the action of the elements-e.g., it should board up a broken window when it starts to rain. If it does not, it may be held liable for the consequences that ensue, e.g., the buckled floor. (It may also be subject to eviction under CCP §1161(4), which refers to "committing waste ... contrary to the conditions or covenants of the lease.") But, in this case, the fact that the lease's roof clause does not compel the tenant to purchase a new roof does not mean that it also absolves the tenant from any duty to avoid waste, i.e., to patch up the roof so that the floor isn't ruined. The duty to avoid waste is separate and does not depend on the existence of a repair covenant in the lease.

It is a different type of complication if the roof caves in entirely. Now, the tenant may consider terminating the lease (and stop owing rent) under CC §§1932 or 1933, which replaced the old common law rule that destruction of premises had no effect on the tenant's obligation under the leasehold-and replaced it with the more tenant-oriented civil law rule. Under §1932(2), the perishing of a part of the premises that was the tenant's material inducement for entering the lease allows termination, although it might be hard for a tenant, who took over premises that from the start included a dilapidated roof, to prove that a good roof was a material inducement. Under §1933(4), there can be termination following the destruction of the premises, but that might require a court to determine that the roof alone constituted the premises. Additionally, in either case, a court would have to decide what to do about the fact that the lease itself contained clauses that dealt with the condition of the roof. Again, if the tenant is wrong in its opinion that either of these code sections entitles it to quit, then its departure is a wrongful abandonment, subjecting it to rent or damage liability.

Finally, the City of La Mesa may be the one most unhappy about the condition of the roof, under its building code's health and safety mandate, which undoubtedly includes the remedy of revoking any applicable certificate of occupancy and padlocking the premises until the roof is replaced. In the first instance, the burden of code compliance is on the owner of the property, but here the tenant covenanted to keep the premises in compliance with these codes. While those clauses may put a prima facie burden on the tenant to make the repairs, the California Supreme Court has declined to give such clauses a literal, "four corners" interpretation, preferring instead a multifactor analysis that is certain to produce uncertainty. See *Brown v Green* (1994) 8 C4th 812, 35 CR2d 598; *Hadian v Schwartz* (1994) 8 C4th 836, 35 CR2d 589. (As an example, how would you compare the term of the lease-where the tenant first took possession in 1993 but signed the 10-year lease in 1997 and perhaps had renewal rights-against the benefits provided by a 15-year roof that had already been in place for over 20 years at the time of litigation?) Even if one could predict how that analysis would play out in this case, it would only tell us whether the tenant was obliged to pay for the new roof under its covenant to comply with all laws. (I think it quite unlikely that the compliance clause would lead to a result contrary to what the good maintenance clause was held to require.) But on the larger questions of whether the tenant will continue to owe rent after the premises have been shut down by the city, or whether the landlord can evict the tenant in order to work on the roof, we have even fewer answers.

I would not want to be in the uncomfortable position of having to advise either of these parties as to what to do next.

The Reporter for this item was Roger Bernhardt of the Golden Gate Law School, writing in the CEB California Real Property Reporter.

LANDLORD/TENANT; EXTENSIONS AND RENEWALS; TIMELY EXERCISE OF OPTIONS: Tenant's 27 day delay in providing required ninety day advance notice of lease renewal means that tenant loses the right to extend the lease. ***Chesapeake Bank of Maryland v. Monro Muffler/Brake, Inc., No. 2288 (1/31/06)***

Landlord leased property to Kimmel for a twenty year term expiring 10/31/02. There were three extension options of five years each. The option language provided for a 90 day notice by Lessee to exercise the option:

> "... If LESSEE shall elect to exercise one or more of such options it shall do so by giving LESSOR written notice at least ninety days prior to the expiration of the primary term or of the then current extension, and in which notice LESSEE shall state the date to which it elects to extend the term."

In March, 2002, Monro informed Landlord that it was in the process of acquiring all the shares of Kimmel, and send Landlord a "landlord's estoppel certificate," which correctly stated the lease expiration date "unless renewed or extended" and confirmed the existence of the extension options.

In May, 2002, Monro wrote Landlord to tell it that it has finalized the purchase of Kimmel and that concluded: "We look forward to a long and prosperous relationship with you and we welcome any questions or comments you may have relative to this relationship." In August, 2002, Monro wrote Landlord to verify Landlord's contact information. Landlord responded.

On August 29, Monro provided written notice of lease extension for the first five year extension period. A week later, Landlord replied that the final date for exercise of the "right to renew" was "on or about August 2," and, since Monro had not timely filed notice, it would not honor the requested extension. Apparently Monro was late because of an error by Monro's Vice President/Real Estate, who had entered into the computer a 60 day option notice term, rather than 90 days. (Monro had 615 lease locations to watch over.)

Tenant remained in possession without Landlord's express permission following the end of the term and commenced an appraisal process so that it might exercise a purchase option also contained in the lease. But Monro ultimately withdrew this offer because it would have been required to buy also adjacent property owned by Landlord in order to satisfy zoning requirements.

Thus, about a month after the end of the lease term, Landlord sought to evict Monro from the premises. The

trial court found for the tenant, and refused to evict Monro and found that the lease term had been validly extended.

The trial court ruled that the prior contacts from Monro had, in effect, extended the lease and that, in any event, the untimely notice was effective to extend, based upon equitable principles. Landlord appealed.

On appeal, *Held: Reversed.* The appeals court opinion, written by a rarity – an experienced real estate lawyer sitting as an appellate court judge – found that Maryland does not recognize equitable excuses to untimely filing of notices of extension or renewal. Regardless of whether the Landlord suffered injury from the late exercise, Monro had no right to extend, because it's entire extension right was defined and limited by the clause in the lease, including the time deadlines.

Citing *Friedman on Leases* (unfortunately to the old and outdated non-Randolph Edition), the court stated that a landlord need not renew a lease without an express covenant providing for renewal. The timely notice was a condition precedent for the existence of the extension option provided here. (The court uses the word "renewal" to describe the option to "extend." Many courts do not differentiate these concepts. See DD for 1/30/04 for a discussion of this distinction and a Massachusetts case that relies upon it.)

Tenant first argued that its notice was timely because, under the language pertaining to the option to purchase, the lease was extended while the proposed option to purchase was being worked out. Note that the lease language indicated that an option to extend had to be noticed 90 days prior to the end of the"primary term *or the then current extension."* As its possession had been extended while it sought to renew the lease, the landlord argued, the notice was more than 90 days prior to the end of that extension. Obviously, a court inclined to favor tenant in this dispute might have leapt upon this technical distinction to protect the tenant's interest. But we had here a hard-bitten veteran of the negotiation wars writing the majority opinion, and the opinion stated [correctly] that reading the purchase option extension as extending the time set for notice of renewal was inconsistent with the probable intention of the parties.

Although the court admitted that the lease did not address the precise situation of tenant's continued possession in connection with a purchase option, it concluded that the parties' intention was clear that the original term and three five year extensions were the measuring period for the ninety day notice.

The court then turned to the argument that prior communications from Monro had effectively exercised the option to extend. It suggested that one approach to the problem was to reverse the situation and analyze whether the parties' likely would agree that, had the landlord been the one attempting to enforce the "renewal" based upon the prior letters and contacts, whether tenant would have been bound. The trial court had applied the test and concluded that the tenant would have been bound.

The appeals court first indicated that it did not agree that the test applied when the lease set out unequivocally the method of exercise of the extension option. Further, the appeals court noted, it disagreed as to whether the tenant would have bound to the extension under these facts. [The Editor, again, concurs on this latter point.]

Finally, the court turned to the tenant's argument that general principles of equity dictated finding for tenant where, as here, the landlord suffered little detriment from the lateness of the notice and the tenant suffered the loss of a valuable right. First, the court distinguished a prior case in which the question had not been exercise of the option itself, but rather the argument that the exercise did not timely include the tenant's "net worth" analysis as the lease required. The court found an equitable excuse for the late submission of the financial report.

The court, as noticed, distinguished the prior case because it did not deal with the technical requirements for exercise the option itself. It concluded that the requirement of that case for a net worth statement was a "covenant rather than a condition."

On the general case of equities, the court first held that there was no inequity arising from the Bank's failure to inform Monro, in connection with its August 8 response to request to provide notice address, that the option had expired. Since, at that point, the option in fact had expired, there was no inequity. The tenant already had lost its rights.

As to whether Maryland courts should set aside the late renewal as an equitable relief from forfeiture, the court acknowledged that there was precedent in Maryland for

setting aside a lease termination on equitable grounds, but concluded that this analysis was a far cry from the situation where a Tenant does not timely exercise an option to extend. In the first case, the tenant has a right which it would lose inequitable. In the second, the tenant in fact has no right unless it provides timely notice.

Again, the court cited *Friedman* for the principle that “a landlord’s lack of loss or harm by reason of the late notice is immaterial.”) Further, it noted that a number of other states, (citing an ALR entity) had also refused to let equitable principles support setting aside a lease option termination due to untimely notice.)

Comment 1: Although the court is indeed correct when it states that it joining other courts on this point, it should be noted, in fairness, that many courts will provide equitable relief in these cases. The issue is discussed quite thoroughly in a 25 page entry in Friedman on Leases, Randolph Edition, beginning at page 14-43. Some jurisdictions, like Maryland, recognize no equitable excuse for late filing of a notice to extend or renew. Others will be more forgiving, either generally, or at least in the case in which the tenant, in reliance upon the apparent right to extend or renew, has extensively improved the property and would suffer an equitable detriment and the landlord an inequitable windfall if the lease were forfeited prematurely.

Comment 2: The editor likes “hardball law” of course, and is philosophically inclined to side with the majority here. It should be noted that many jurisdictions will view the setting of a specific time deadline, such as 90 days before lease expiration, as, in effect, the statement that “time is of the essence.” .

It would be an interesting exercise to compare, within a single jurisdiction, the courts’ “time of essence” treatment of land contract closings and their view of lease option enforcement. One hopes that they two areas would show parallel treatment.

Comment 3: For a case arising in a state that does permit “equitable excuse” to an untimely lease renewal where tenant would forfeit valuable improvements, but denying such relief because the tenant, when it discovered it had failed to timely renew, attempted to forge such a renewal and thus had “unclean hands,” see *JGT Corp. v. Andrews*, 2000 WL 546347, No.199901395COAR3CV (Tenn. Ct. App., May 5, 2000) (Equitable doctrine of “unclean hands” may bar resort to otherwise available equitable rights to invoke untimely exercise of renewal option).

LANDLORD/TENANT; LANDLORD’S LIABILITY FOR INJURY TO TENANT INVITEES; ASSUMPTION OF RISK: Landlord may be liable for guest’s injuries even though guest was not following designated pathway when she fell. ***Brad Bradford Realty, Inc. v. Callaway, 2005 WL 3046534 (Ga.App., November 15, 2005).***

Guest of tenant filed premises liability action against landlord for injuries tenant received when she stepped in a hole and fell while walking toward his apartment. Following a bench trial, the trial court entered judgment for guest. Landlord appealed and the court of appeals affirmed.

Although, the guest had the choice of using the paved concrete sidewalk located some distance to her right and proceeding toward the front door, she decided to go to the patio door by going around the front of the car. She stepped in a curb cut, which was covered by pine straw. The hole was a cut in the curb, which was added to improve drainage during the construction of the apartment complex The curb cut was covered by straw spread earlier in the day by landlord’s landscaping crew, but not “tidied up as usual.” .

By law, the owner or occupier of premises owes a duty to exercise ordinary care in keeping the approaches and premises safe for invitees. Even so a property owner is not an insure of invitee’s safety. In a premises liability case, proof of a fall, without more, does not give rise to liability on the part of a property owner or proprietor. The true basis of a proprietor’s liability for personal injury to an invitee is the proprietor’s superior knowledge of a condition that may expose the invitees to an unreasonable risk of harm. Recovery is allowed when the proprietor has knowledge and the invitee does not.

The Landlord argued that there was no evidence that the hole, or cut in the curb, was negligently constructed or maintained. The court found that the Landlord negligently caused the hole to be concealed by failing to clean up excessive pine straw that was obscuring the hole from view, which caused a hazardous condition.

The Landlord also argued that the guest assumed the risk by departing from the designated route that it

maintained, namely the sidewalk to the breezeway entrance to the unit. The "voluntary departure" rule in Georgia provides that a claimant who voluntarily departs from designated walkways must exercise a heightened degree of care for his or her safety and assumes the risk of hazards found on his or her route. But the rule comes with an exception that applies when "the owner has notice that the unauthorized route is being regularly used improperly." The court found that evidence was presented to support the conclusion that the landlord was aware that people were regularly and improperly using the path through the bushes to the tenant's patio door and that the landlord had done nothing to stop or discourage the tenants from using paths, such as this one, that led to ground-floor patio doors.

LANDLORD/TENANT; LANDLORD'S REMEDIES; DAMAGES; DUTY TO MITIGATE: Although state law imposes duty to mitigate in absence of lease provision to the contrary, a court will enforce language in the lease stating that landlord has no such duty. ***Sylva Shops, Ltd. v. Hibbard, 623 S.E. 2d 785 (N.C. App. 1/17/06)***

Tenant rented space for a bagel shop on an out parcel in a shopping center development. The lease contained a default clause that expressly stated that landlord had no duty to mitigate on tenant default:

> "In no event shall Landlord's termination of this Lease and/or Tenant's right to possession of the Premises abrogate Tenant's agreement to pay rent and additional charges due hereunder for the full term hereof. Following re-entry of the Demised Premises by Landlord, Tenant shall continue to pay all such rent and additional charges as same become due under the terms of this Lease, together with all other expenses incurred by Landlord in regaining possession until such time, if any, as Landlord relets same and the Demised Premises are occupied by such successor, *it being understood that Landlord shall have no obligations to mitigate Tenant's damages by reletting the Demised Premises.*"

Six months into a five year lease, tenant closed the shop and apparently turned the premises over to landlord without an eviction action. Landlord posted "for lease" signs and retained a leasing agent and, after some difficulties, relet the space.

When landlord sued tenant for the unpaid rent and the difference between the rent on reletting and the contract rent, tenant objected that landlord had not made reasonable efforts to mitigate because it had demanded too much rent from substitute tenants. The trial court denied summary judgment to landlord and ordered a trial on the question of whether landlord had been reasonable in mitigating. The jury found that the landlord might have avoided more than $20,000 of the $35,000 unpaid rent claim by mitigating in a more reasonable fashion.

The court stated that the record was clear that the tenant was knowledgeable (it was advised by a business consultant) and understood what it was signing. The transaction was arms length (at least as "arms length" as a bagel store in a shopping center can get).

The court went on to say that, although freedom of contract is the rule, certain contract provisions, although freely bargained, will not be enforced because they violate public policy. The question, of course, was whether this provision waiving the duty to mitigate is so contrary to the public policy of North Carolina as to be held void, even in a freely negotiated agreement..

On landlord's appeal: *held: Reversed.* The anti-mitigation language in the remedies clause is enforceable under North Carolina law.

The court acknowledged that the North Carolina Supreme Court had already determined that landlords had a duty to mitigate upon tenant default. But it stated that the high court had not addressed the question of whether this result had been altered by contract. It struck an analogy to the rule about waivers of negligence. Although such waivers are not favored in the law, they are permitted, albeit subject to "strict scrutiny." The court saw an analogy to the question of whether parties could contractually avoid the duty to mitigate.

The court indicated that it was not making any determination about residential leases, which involved different considerations, but noted that many states do not impose a duty to mitigate in commercial leases (citing 75 A.L.R. 5th 1, 103-17.) It noted particularly that cases in Arkansas, Ohio and Texas have held that, notwithstanding the general rule requiring landlords to

mitigate, the parties may avoid the requirement by language in the contract. (The Texas holding has been overruled by statute.)

The tenant argued further that the landlord's position was further compromised by the fact that the lease restricted the tenant's ability to sublet or assign without landlord's consent, which landlord could withhold in its sole discretion. The court responded that North Carolina courts had upheld the validity of such anti-assignment clauses, and that it saw no reason to view the presence of the clause as placing the public policy of the anti mitigation clause in doubt.

Comment 1: Before landlords view this case as a Valentine gift from the courts, let's see if there's a further appeal and reaction from the North Carolina Supreme Court. The opinion is very succinct and does not really discuss at any length some important issues.

Comment 2: One issue is the claim that a contract clause rejecting a duty to mitigate might be construed as creating a contractual penalty for breach. The editor rejects this argument, since a lease really is a conveyance as much as a contract, and the landlord's position is different from many parties suffering an ordinary contract breach. But the court really needs to discuss this question and acknowledge the differences. There is no discussion of North Carolina authority outside of the lease context dealing with mitigation duties in other contracts and penalty analysis in such contracts.

Comment 3: As to the relationship between the anti-assignment clause and the anti-mitigation clause, indeed there has been some argument in the literature that these two issues are tied. The editor remembers a Colorado case on this point, but a quick search did not turn it up. Generally speaking, however, most courts do not draw this relationship.

LANDLORD/TENANT; STATUTE OF FRAUDS; PREMISES DESCRIPTION: Though a handwritten agreement between parties is an enforceable lease and the landlord normally would be estopped from denying its validity, if the lease contains no property description, parol evidence may not be considered in determining whether an agreement satisfies the Statute of Frauds, but the parties' partial performance by paying rent and delivering possession of a specific premises may remove the lease from the Statute of Frauds. ***Nacoochee Corp. v. Suwanee Inv. Partners LLC, 2005 WL 2155954 (Ga. App., September 8, 2005).***

Landlord and Tenant executed a handwritten, one-page document titled "Lease Deal" which contained only a payment schedule, a brief liquidated damages provision and an indemnification provision. Landlord later sent tenant a formal lease agreement which would have obligated tenant to pay additional fees. Tenant refused to sign the new agreement. Landlord then brought a possessory action where it argued that the "Lease-Deal" was not enforceable because it did not contain a description of the property, and therefore violated the Statute of Frauds. The Trial Court held that the handwritten agreement was an enforceable lease because the parties executed the agreement on the premises and therefore knew that the agreement applied to those premises. The Trial Court also held that the landlord was estopped from voiding it.

The Court of Appeals reversed the Trial Court's decision, holding that the agreement violated the Statute of Frauds because it contained no property description and that it would not consider parol evidence, such as that relating to the location where the lease was signed, in determining whether the agreement satisfied the Statute. In addition, the Court of Appeals held that the Trial Court's consideration of the tenant's affirmative defense of estoppel was error because tenant had not raised this issue in its pleadings or by motion as an affirmative defense.

Notwithstanding the above holding, the court remanded the case to the Trial Court to determine whether the parties' payment and acceptance of rent constituted partial performance under the lease and therefore removed it from the Statute of Frauds. It noted that Georgia courts have refused to consider simply payment of rent and taking of possession as partial performance when a writing lacks a statement of the term, since such behavior is not necessarily consistent with any specific term, and does not prove the alleged lease. But where the missing element is the description of the premises, the court concluded that possession of a specific premises, coupled with paying the specified rent, is normally uniquely consistent with the alleged lease, and can serve as partial performance to take the agreement out of the Statute.

Comment: The editor has always cautioned his students that the "part performance" doctrine requires more than simply paying rent and taking possession. This probably

remains true when there is no writing at all, since such acts are not uniquely consistent with any particular lease agreement. But where the lease agreement lacks only the description, and otherwise constitutes a valid written expression of the parties' intent, the Georgia courts have wisely reached a different conclusion and have noted that simply paying rent and taking possession could satisfy the "part performance" doctrine.

LANDLORD/TENANT; TERMINATION:" Settlement with condemning authority under threat of condemnation is not a "sale" within meaning of lease clause executed by condemnee providing that lease may be terminated by landlord in the event of a "sale" to a party who does not wish to continue the lease. ***Eller Media Co. v. Mississippi Transportation Commission, 900 So. 2d 1156 (Miss. 2005)***, discussed under the heading: "Eminent Domain; Leases; Termination on Condemnation."

MARITAL PROPERTY; DOMESTIC PARTNERSHIP ACT; DISABLED VETERAN'S EXEMPTION: The New Jersey Domestic Partnership Act requires municipalities to grant same-sex couples the entire disabled veteran's property tax exemption, as if married, if the couple has been joined by a civil union and has registered under the Act. ***Hennefeld v. Township of Montclair, 22 N.J. Tax 166 (2005); March 15, 2005.***

A same-sex couple purchased a home as joint tenants with the right of survivorship. Prior to the purchase, one of the pair had served in the military for fifteen years and shortly after his discharge from the service, he was declared totally disabled by the Veteran Administration. As a result of his disability, the municipality granted the couple a fifty percent disabled veteran's exemption on the jointly owned property. This was because the exemption was limited to the disabled veteran's half interest. Twenty years later, the couple was issued a license and certificate of civil union by the state of Vermont. Three years later, the couple was legally married in Canada. Shortly thereafter, the couple applied to the municipality's tax assessor for a one hundred percent disabled veteran's tax exemption pursuant to the New Jersey Exemption Statute. The tax assessor denied the application on the basis that the couple did not qualify for the exemption because their marriage did not classify as a "traditional marriage" between a man and a woman. The couple appealed the tax assessor's determination to the county board of taxation and re-conveyed the property to themselves as tenants by the entirety. The board of taxation upheld the tax assessor's decision. The couple then filed a complaint in the New Jersey Tax Court seeking the full one hundred percent tax exemption. In support of their action, the couple argued that: 1) the Exemption Statute requires that they receive a one hundred percent exemption since they have always owned the property as joint tenants and as tenants by the entirety; 2) the New Jersey Domestic Partnership Act (DPA) authorizes the recognition of their Vermont civil union entitling them to the full exemption; 3) other New Jersey statutes support them receiving the full exemption as tenants by the entirety; and 4) their legal marriage in Canada should be recognized in New Jersey entitling them to the full exemption. In response, the municipality argued that the DPA should not be applied retroactively because it was enacted a couple of months after the couple's application for full exemption. It also asserted that for the prior twenty years, the Exemption Statute had been interpreted to apply to marriages between a man and a woman only.

The Court ruled that the couple was entitled to the one hundred percent tax exemption as a registered couple under the DPA. It held that the DPA required it to fully recognize the couple's Vermont civil union, which afforded the couple similar property rights as a heterosexual married couple. The Court, however, refused to recognize the couple's Canadian marriage, ruling that it was contrary to New Jersey public policy. Accordingly, the Court ordered the municipality to grant the couple the full tax disabled veteran's exemption pursuant to the DPA and the Exemption Statute.

MORTGAGES; DEEDS OF TRUST; FORECLOSURE; LIMITATIONS: Although debt is barred by limitations, a trustee may still foreclose a deed of trust on a defaulted debt, but California Marketable Title Act imposes a limit of 60 years from date of recorded mortgage or ten years from date final payment is due, if due date is shown in "record." For purposes of this statute, recording of notice of default as statutorily required prelude to foreclosure does not trigger the ten year limitations period if recording occurs after the running of the ten year period. ***Ung v. Koehler, (Cal. App. 12/28/05.)***

The original mortgage debt had a two year term, and had remained unpaid for eleven years after the due date. But the due date of the mortgage was not set forth in the land

records. The court ruled that to treat the statutorily recording of the default notice as a record of the due date sufficient to retroactively establish the ten year statute of limitations would effectively render all deeds of trust unenforceable after ten years, and thus deprive the 60 year statute of any meaning.

The court reserved judgment over whether the recording of the required notice of default within the ten year period would trigger the ten year limitations statute.

The court also ruled that another provision of the marketable title act that stated that when a debt was void, the mortgage was void, did not apply to deeds of trust where the regular statute of limitations had run on the debt itself. Again, to so read the statute would to be to read as meaningless the longer limitations periods set forth for deeds of trust.

MORTGAGES; FORECLOSURE; *RES JUDICATA:* Where mortgagee brings judicial foreclosure action naming original mortgagor as defendant, but neglecting to name the current owner of the property as well, the foreclosure action is void, and consequently *res judicata* does not bar mortgagee from bringing a second action naming both original mortgage (for purposes of obtaining a deficiency) and current owner as defendants. ***English v. Bankers Trust Co. of California, 895 So. 2d 1120 (Fla. 2005)***

Lender was not aware that mortgagor had transferred the property, and carried judicial foreclosure action through to final judgment and setting of a foreclosure sale before it realized that it had not named the current owner of the property as a defendant.

Regrouping, Lender initiated a new foreclosure action, naming both the original mortgagor and the current owner (and a third party – who's function was never disclosed) as parties defendant.

The mortgagor protested that although the first action was void, and did not establish a deficiency claim against her, it nevertheless was sufficient to permit her to raise a *res judicata* claim to bar the second action against her. Not so, answered the court – void is void. Since the first action meant nothing, a second action could be brought. It differentiated a second foreclosure action that might be brought to foreclose away an omitted junior lienholder. Apparently, in such cases, Florida law has not permitted the naming of another party defendant who had not been named in the first foreclosure of the fee interest.

The court held, however, that in the finding of any deficiency from the second sale, defendant mortgagor could be found liable for interest accrued on the debt only to the date of the first attempted foreclosure, and neither accrued interest nor prejudgment interest may be claimed after that date.

Comment: The cases cited by the court in support of its denial of interest appear to depend upon the mortgagee's having control of the property following the first foreclosure. Obviously that did not happen here. Thus, although perhaps the mortgagee deserves to be spanked for its lack of diligence, the editor could not find a clear rationale for the decision on this point.

MORTGAGES; FORM OF MORTGAGE: A deed to secure debt satisfies the statutory requirement that the maturity date of the debt or the last installment be stated or fixed in the record of conveyance when it incorporates by reference the note that specifically states the maturity date of the loan. ***United Bank v. West Central Georgia Bank, 2005 WL 2156025 (Ga. App., September 8, 2005).***

Mortgagee loaned Mortgagor $50,000 pursuant to a note on April 2, 1996. A deed to secure debt was executed in favor of Mortgagee on certain property Mortgagor owned. The deed stated that Mortgagor had borrowed the money, "and has agreed to pay the same, with interest thereon, according to the terms of a certain note (the "Note") given by Grantor to Grantee, bearing even date herewith, the note, being made a part hereof by reference; April 2, 1997." The note was not filed with the deed, but did specifically state that April 2, 1997 was the maturity date of the loan.

On January 25, 1999, a new Mortgagee loaned Mortgagor over $80,000 with the same property as collateral. Although the new Mortgagee made a search of the real estate records, the previous deed to secure debt was overlooked. Mortgagor defaulted on both loans.

OCGA § 44-14-80 requires that in a record of conveyance, the maturity date of debt or last installment be stated or fixed or, if not listed, then title reverts to the grantor seven years from date of conveyance. The new mortgagee argued that the typed "April 2, 1997" in the deed was insufficient to fulfill the requirements of OCGA

§ 44-14-80 and, therefore, title reverted to Mortgagor on April 11, 2003; therefore making their deed the first secured lien on the property.

The Trial Court held, and the Court of Appeals affirmed, that the promissory note was incorporated by reference into the deed and therefore complied with the statute.

MORTGAGES; MODIFICATION; NOVATION: Borrower's claim that parties verbally modified loan agreement will survive impact of contract "integration" clause when allegations of substantial changes in second oral agreement and party conduct consistent with novation intent are present. ***Fanucchi & Limi Farms v United Agri Prods. 414 F3d 1075 (9th Cir 2005)***

In December 1994, United lent money entered into a secured loan agreement with Fanucchi by which Untied funded certain of Fanucchi's farming operations. The agreement was laden with language indicating that it stated the entire agreement of the parties and could be modified only by a writing signed by the parties. Fanucchi's 1995 crops failed and it was unable to repay the loan.

According to Fanucchi, a United representative persuaded Fanucchi not to declare bankruptcy and, in exchange, promised to subordinate the United debt (extended for five years) to other lenders' new loans and to forgive what would remain of the loan debt (amounting to about $300,000 or $400,000) at the end of the five-year period.

For the next two crop years, the parties operated according to the alleged unwritten second agreement. In both cases, United subordinated both to operating loans provided by commercial parties and to loans provided by persons related to the principles of Fanucchi. After the crops came in, these loans were paid prior to any payment in the United loan. The remaining operating proceeds were divided between the United loan (which got 60%) and other Fanucchi creditors.

In Spring 1998, however, United replaced its former field officer with a new one, who refused to subordinate to loans to Fanucchi given by family members of the principles. As a consequence, these family members could not longer provide operating loans and Fanucchi was forced to shut down its operations. In August 2000, Fanucchi sued United for breach of contract and promissory fraud. The district court granted summary judgment to United.

The Ninth Circuit reversed in part, holding that the district court improperly granted summary judgment for United on the issue of novation. Novation is the substitution of a new obligation for an existing one, and courts considering the issue seek to determine the parties' intent. Determining intent is a highly fact-specific inquiry that is not generally suitable for summary judgment disposition. In *Alexander v Angel* (1951) 37 C2d 856, 861, 236 P2d 561, "drastic" changes between old and new obligations were sufficiently substantial to show novation. Here, Fanucchi's evidence alleged changes between the 1994 loan agreement and the new agreement that were more "drastic " than the changes in *Angel*, as United agreed to give up part of its security interest by subordinating its lien and, potentially, to forgive a portion of the debt.

Another important factor in considering novation is the parties' conduct. Here, the parties ' conduct during crop years 1996 and 1997 supported Fanucchi's contention that novation occurred, as United subordinated its lien to the new crop lenders and otherwise complied with the alleged new agreement.

Judge Beezer, concurring, wrote separately that Fanucchi had a substantial burden at trial to demonstrate a novation occurred, because under California law, there is a presumption in favor of finding that a second agreement between parties is an accord (requiring execution of the second contract to extinguish the first one) rather than a novation (entry into the second agreement extinguishes the first agreement).

Reporter's Comment: A creditor agrees with its defaulting debtor to subordinate its existing secured claim to future annual secured loans for five years in return for 60 percent of the debtor's profits after each of the new loans is paid off, and then, four years later, doesn't honor its promise to subordinate. Few contracts or property professors would touch this problem because each would think it belongs in the other's field, but judges don't have that choice-they have to decide whether the lender did commit a breach.

There was a breach only if the new arrangement (to subordinate) was enforceable, and since it was not in writing, it could not be enforced as an oral modification

of a written contract under CC §1698(b), especially when there were integration clauses all over the place. (I will never understand why attorneys are so automatically in love with clauses that put parol evidence so out of the reach of their clients, but no one was listening to me here.) So if the modification failed, the lender's refusal to subordinate was clearly not a breach.

Likewise, if the new agreement was an accord and satisfaction (CC §1521), the lender's behavior was proper, since the original arrangement-priority over later financing-was not extinguished until the new agreement was completely executed. (It isn't quite clear just how an accord would matter at that stage, but clearly the lender had neither received all of the loan payments that were due to it nor done all of the subordinating that it had promised to do.) So, only if the agreement was a novation, rather than an impermissible modification under §1698 or an uncompleted accord under §1521, could the debtor claim that an enforceable new obligation existed, albeit being oral and executory. That required showing that the agreement was intended to entirely extinguish the original agreement and replace it with the new one then and there. As here, that theory may survive a summary judgment motion, but I rather doubt that the debtor is ever going to get much supportive testimony from the lender that it really intended to go that far just to keep the debtor from filing bankruptcy.

The Reporter for this item: Roger Bernhardt of the Golden Gate Law School, writing in the California CEB Real Property Reporter. The Editor has substantially modified Roger's original report.

MORTGAGES; PREPAYMENT; BANKRUPTCY: Bankruptcy courts will accept as 'reasonable" a liquidated damages type yield maintenance clause predicated on borrower default and bankruptcy sale. ***AE Venture v. GMAC Commercial Mortgage Corp., 2006 U.S. Dist. LEXIS 2040 (Jan. 26, 2006)***

AE Hotel Venture ("AE Hotel") owned and operated a suburban Chicago hotel property, and obtained a mortgage loan on the property in 1997 in the amount of $7.6 million from LaSalle National Bank ("LaSalle"). The bankruptcy court held that a prepayment-premium provision in the mortgage-loan documents was enforceable, in connection with a public-auction sale of the property in the mortgagor-debtor's Chapter 11 bankruptcy proceeding, where the contract provision provided that the premium would be due if it occurred after default and prior to a foreclosure sale of the property.

The court held that in order to be deemed "reasonable" under Sec. 506(b) of the Bankruptcy Code, the prepayment-premium provision must pass a two-part test. First, the prepayment premium must be enforceable under applicable state law, and second, the premium must meet the tests under Sec. 506(b), *i.e.,* it must be "provided for under the agreement" and must be "reasonable." In a footnote, the court stated that the bankruptcy courts "appear" to have adopted two different approaches to whether the provision is reasonable: either the prepayment premium must reflect the lender's actual damages or it must meet the criteria of a valid liquidated-damages provision.

The court had no problem finding that the prepayment premium clearly was provided for under the agreement, and noted that"[s]ensibly, AE Hotel does not deny that the Note provides for prepayment."

AE Hotel argued, however, that although the note provided for prepayment, by accelerating the debt GMACCM had waived its right to the prepayment premium. As the court succinctly stated, however, "AE Hotel is mistaken." The court referred to the large body of case law holding that while a lender may lose its right to a prepayment premium if it elects to accelerate the debt, this is not the case where the provision specifically states that the premium is due after acceleration. In this case, the provision did not directly mention "acceleration," but instead stated that payment of the debt after default would be a "voluntary prepayment" as long as the payment occurred "before a foreclosure sale or some other sale resulting from GMACCM's remedies under the mortgage." The court ruled that in this case there was no such sale because the property was sold pursuant to a court-approved auction sale and not pursuant to the foreclosure proceeding instituted in state court by GMAC, which had been halted by AE Hotel's bankruptcy proceeding.

The bankruptcy court also ruled that the prepayment premium was enforceable under state law, noting that "no Illinois decision says prepayment premiums are *per se* unenforceable." *Id.* at 219-220. According to the court, enforceability of such clauses under Illinois law "depends on whether the premium is meant to liquidate damages or impose a penalty." Id. at 220.

The court (while acknowledging that the liquidated-damages analysis was somewhat flawed when the contract is negotiated by sophisticated parties) found that the provision in this case clearly was not a penalty and was enforceable under the criteria for the enforceability of liquidated damages clauses existing under Illinois case law. This was so, the court reasoned, because AE Hotel did not deny that the clause was an attempt by the parties to liquidate damages in the case of prepayment or that the contractual calculation of the premium precisely determined the securitization trust's loss and damages. AE Hotel argued that somehow the fact the mortgage loan was later securitized affected the reasonableness of the prepayment premium under a liquidated-damages analysis, but the court found that this fact was irrelevant to its determination — and, in fact, securitization of the loan made timely payments during the term of the loan essential and "according to GMACCM an unidentified provision of the Internal Revenue Code restricts the trust's reinvestment of prepaid funds to low-yield U.S. Treasury securities."

AE Hotel also alleged that the amount of the prepayment premium calculated pursuant to the contractual formula, $1.8 million, was "quite large" and amounted to more than 18% of the loan balance. The court rejected this argument, holding that the size of the premium is irrelevant under Illinois law; the real issue is the relation between that amount and the lender's projected actual loss. The court again pointed out that in this case GMACCM had permissibly, and correctly, calculated its exact loss in accordance with the contractual provision.

Finally, AE Hotel argued (somewhat half-heartedly) that GMACCM had no compensable loss because it had received an amount in excess of the value of the property from the bankruptcy sale.

The court summarily rejected this argument, stating that "GMACC made the loan, not to gain the benefits from some eventual sale of the property, but to obtain the income stream from AE Hotel's loan payments. The loan documents contemplated payments, they did not contemplate a sale. GMACCM's loss is therefore the loss of the income stream." 30.

The appeals court reasoned that because the foreclosure proceeding was halted by the bankruptcy proceeding and never concluded or reinstated, the prepayment therefore did not result from foreclosure and the sale (via subsequent auction) was therefore "voluntary" and subject to the prepayment provision under the terms of the loan agreement. The Federal District Court also agreed with the bankruptcy court that, when read in its entirety, the loan agreement provided for a prepayment penalty even in the event of acceleration, and ruled that AE Hotel "failed to present evidence supporting the unreasonableness of the prepayment premium, let alone the formula they now take issue with, to the bankruptcy court."

Reporter's Comment: It is amazing that the borrower, AE Hotel, even bothered contesting the validity and enforceability of the prepayment premium provision, given the facts of this case.

It is true that numerous cases, including recent cases such as *Broadway Bank v. Star Hospitality, Inc.*, 2004 Iowa App. LEXIS 1294 (Nov. 24, 2004), (a decision based on Illinois law), have held that a prepayment penalty provision in a mortgage loan agreement is unenforceable when there is a default driven acceleration where the clause does not distinguish between voluntary and involuntary prepayments. In a Seventh Circuit decision, *In re LHD Realty Corp.*, 726 F.2d 327, 329-30 (7th Cir. 1984), cited and referred to by the bankruptcy court in the *AE Hotel* case, the Seventh Circuit refused to permit the lender to collect a prepayment premium after the borrower's default because the prepayment clause did not clearly provide that the premium could be collected upon acceleration after default.

But the *LHD* case was decided by the Seventh Circuit in 1984, and all (rational) institutional lenders quickly learned to include language specifically stating that the lender was entitled to the prepayment premium if it accelerated the loan. case law, both bankruptcy and non-bankruptcy, also has consistently upheld the enforceability of a prepayment provision where the clause clearly states that it applies if the loan is accelerated as the result of the mortgagor's default under any of the terms and conditions of the loan documents. A lender is always well advised, from a drafting standpoint, to state specifically in the prepayment provision in the loan documents that the lender will be entitled to collect the contracted-for prepayment premium if it subsequently accelerates the loan upon default by the borrower.

Editor's comment: As Jack suggests, but is too nice to come out and say, this prepayment premium language

was really awful by modern standards. Possibly the lender apparently was trying to skate around collecting the prepayment premium following prepayment through an acceleration and foreclosure. But, as indicated in the above cited cases, this is really not necessary. It is perfectly all right (most places) to demand a prepayment premium as part of the foreclosure claim following acceleration. The acceleration, in essence, is the prepayment event. That's when it is clear that the lender is no longer being paid at all (much less as originally scheduled) and the lender must face the consequences of the loss of its loan.

Perhaps the odd wording was dictated by bargaining environment of the parties. Perhaps the borrower was insisting that it should not be charged a prepayment premium in the event of an "involuntary" prepayment. If that is the case, then perhaps the borrower didn't get the benefit of its bargain. But one assumes it attempted to present evidence of the true intent of the parties at the trial, and wasn't convincing.

Here is some further commentary from Jack on his report of the original bankruptcy court decision, almost one year ago exactly:

> "The court noted [here] that the prepayment premium provision did not specifically mention acceleration of the debt, but reasoned that the language of the provision made acceleration of the debt "irrelevant," because the provision provided that any tender of payment before a sale or other exercise of GMACCM's remedies under the loan documents (which would exclude a bankruptcy sale), would be deemed a "voluntary prepayment." Nonetheless, it may be a good idea to use specifically the word "acceleration" in a loan prepayment-premium provision, to avoid any issue as to the actual meaning and intent of the language. The following is suggested language excerpted from a current securitized-mortgage-loan note:
>
> > "Additional Charge. If this Note is prepaid on any day other than a Due Date, whether such prepayment is voluntary, involuntary or upon full acceleration of the principal amount of this Note by Lender following a Default, Borrower shall pay to Lender on the prepayment date (in addition to the basic prepayment charge described in Section ___ above and all other sums then due and owing to Lender under this Note and the other Loan Documents) an additional prepayment charge equal to the interest which would otherwise have accrued on the amount prepaid (had such prepayment not occurred) during the period from and including the prepayment date to and including the last day of the month in which the prepayment occurred."

Editor's Comment: Note that, although this case approved a yield maintenance penalty predicated on formula using the federal funds rate as a comparable return, and the debtor contested such a formula as unreasonable, the court refused to consider this argument because it had not been properly raised below. *Compare:* ***In re CP Holdings, Inc., 332 B.R. 380 (W.D. Mo. 2005)*** Prepayment premium provision based upon treasury yields is a reasonable attempt to liquidate damages in the event of a default and acceleration, and satisfies Bankruptcy Code test for a "reasonable charge," even when effect of application of formula is a premium of over $2 million.

The Reporter for this item was Jack Murray of the Chicago office of First American Title Insurance. The editor has edited substantially Jack's submission, and is responsible for any glitches.

MORTGAGES; PREPAYMENT; INVOLUNTARY DEFAULT:. A borrower who knowingly triggers a loan default in order to achieve other financing goals has "voluntarily" caused a prepayment when the lender accelerates in response, and the analysis of whether the prepayment premium is legitimate should focus only on whether the premium is "reasonable," and not whether it meets liquidated damages standards. ***Clean Harbors, Inc. v. John Hancock Life Ins. Co., 833 N.E.2d 611 (Mass. App. Ct. 2005).***

Clean Harbors, Inc. sought a judicial declaration that the "make whole amount" upon prepayment provision in the loan it received from John Hancock Life Insurance Co. was not enforceable. Clean Harbors asserted that its prepayment of the loan was involuntary, compelled by Hancock's acceleration of the loan upon Clean Harbor's default under the loan terms, and that the make whole provision constituted a prohibited penalty under liquidated damages analysis.

Clean Harbors had entered into this relatively short term (seven year) 16% mezzanine financing arrangement due to a downturn in profits as opportunities to sell its services contracted and competition increased. Under the terms of the note, the prepayment premium clearly applied whether the prepayment was voluntary or was brought about through acceleration due to default. The court doesn't describe the premium calculation in great detail, but it appears to be somewhat typical "yield maintenance" computation based upon federal funds plus 250 basis points. But the high initial interest rate led to a very high premium computation – an estimated $17 million on a loan amount of $35 million. In fact, Clean Harbors financial advisor had been warned in advance that the prepayment premium would be that order of magnitude.

Subsequent to that loan, Clean Harbors got an opportunity to acquire a major competitor. It was convinced that if it didn't make the acquisition, another competitor would, and this would lead to the ruination of Clean Harbors' business. But the acquisition required a major financing – $255 million – that would put Clean Harbors in breach of many of the financial covenants in the Hancock loan. The proposed lender would not accept that consequence, and required that Hancock be paid off. Clean Harbors contacted Hancock, explained the situation, and asked that it be permitted to pay off the Hancock loan without premium, and Hancock refused.

Subsequently, Clean Harbors, on advice of counsel, elected to trigger a breach of the Hancock loan, forcing an acceleration, in the hope that this would be regarded by Massachusetts courts as an "involuntary" acceleration, which, under that state's decisions (consistent with those in most states) would require analysis of the premium as liquidated damages.

The Superior Court ruled that the "make whole provision was enforceable, finding that Clean Harbors had voluntarily prepaid the loan and that the make whole amount was not a penalty. Clean Harbors appealed.

The Appeals Court agreed. It also found that liquidated damages analysis, which renders such damages unenforceable if they are grossly disproportionate to a reasonable estimate of actual damages at the time the loan was executed, was not applicable to this loan because it was voluntarily prepaid.

The court's statement as to the test that is applied in to voluntary prepayments is worth scrutiny. It state that, when loans are voluntarily prepaid, a contractual provision providing a premium to the lender for early payment, should be reviewed only to assure that it bore a "rational relation to the lender's actual damages upon prepayment, thus securing the benefit of the bargain for the lender."

When reviewing such contractual premiums in voluntary prepayment cases, the Appeals Court stated that the "first look" approach used in liquidated damages analysis should be used, and so damage estimates at the time the loan was executed are appropriate, as opposed to such estimates at the time of the breach or the time of repayment. Finding that the estimated make whole amount at the time the loan was entered into bore a rational relation to the anticipated losses that John Hancock would incur upon prepayment, the Appeals Court declared the make whole amount provisions enforceable.

The appeals court upheld the ruling below on prepayment but remanded on a related usury claim against other lenders involved in the transaction.

Comment 1: What puzzles the editor is the court's description of the "rational relationship." It sounds to the editor very much like a typical liquidated damages analysis. The trial court had simply held that the premium was a bargained for price to exercise an early repayment option, and left it at that. The trial court's analysis is most consistent with the treatment of the issue in most jurisdictions (outside of bankruptcy courts.)

Some language in the opinion suggested that the appeals court is saying very little more than the traditional test. The emphasis on the notion of "benefit of the bargain" of course is valuable, but what does "rational relation" mean? The court's next statement is very helpful. Describing a precedent case which it was following, it stated that "[w]e considered whether the contractual premium bore a rational relation to the lender's damages only to ensure that the amount was not unconscionable."

This suggestion that simple unconscionability is the test will be more comforting to lenders. When one is talking about a major high risk loan between two sophisticated parties, in which Deutschebank was the loan broker, one in which the lender estimated the potential premium amount

in advance and so informed the broker, it is hard to imagine any number that a court should find unconscionable.

Comment 2: But the court goes on to say that the test it has in mind should look directly at the anticipated losses to be suffered by the lender, looked at as of the time of the initial loan. Although this clearly steered the court away from a "second look" at the lender's actual injury at time of prepayment, a test applied by some courts using true liquidated damages analysis (but only a minority), it nevertheless requires some greater level of justification than that the deal was struck by sophisticated parties with full knowledge of its meaning.

Ultimately in analyzing specifically the prepayment formula used here, the court stated that the index of 250 basis points over prime was "consisted with the anticipated yield on new investments made by John Hancock's Bond Group overall during the preceding two years. The borrower argued that this was not a reasonable estimate of Hancock's loss upon prepayment because the loan in question was a "B" grade loan, not typical of the Hancock portfolio.

The court concluded that the evidence submitted by borrower only served to show that other formulas were possible and could have been used. It stated that "the evidence does not render [the formula used] irrational, particularly given the uncertainties surrounding the availability of high yield reinvestment opportunities at the time of any prepayment."

Fair enough. But what if the index had not satisfied that test? Wasn't it freely and fairly bargained? Why is it different from any other option price? The lender didn't have to permit prepayment at all. Hmmmm.

Comment 3: Note that we're only talking here about voluntary prepayment outside of bankruptcy. Most of the cases are decided in bankruptcy courts, where an independent standard of reasonableness applies.

MORTGAGES; PRIORITY: Holder of a judgment lien against real property sold at a tax sale has a superior claim to tax sale surplus over property owner. ***CANA Investments, LLC v. Fansler, 832 N.E.2d 1103 (Ind.App. 2005).***

Mortgagee obtained a default judgment of foreclosure against mortgagor. Fansler. The mortgage was secured by real property that Fansler subsequently transferred to CANA.

CANA held title to the Property when the county auditor executed a tax sale deed. A dispute arose between CANA and Mortgagee as to who was entitled to the surplus from the tax sale. The Trial Court found for Mortgagee and ordered the tax sale surplus funds released to Mortgagee.

CANA filed a Motion to Correct Error, which was denied, and then filed an appeal with the Court of Appeals. CANA claimed that under Indiana Code Section 6-1.1-24-7 only the owner of real property who is divested of ownership by the execution of a tax deed may make a claim for surplus tax sale funds. The statute sets out an administrative remedy for owners of record, but not for others who may have an interest in real property sold at a tax sale.

The Court of Appeals found that the procedure in Indiana Code Section 6-1.1-24-7 is not the only route for claiming a tax surplus and held that any person with a substantial interest in real property sold at a tax sale has standing to assert a claim in the trial court. The Court of Appeals found that CANA's interest in the Property was subject to Mortgagee's lien and that while Mortgagee's lien against the Property was extinguished by the execution of the tax deed, the lien followed the proceeds of the sale and attached to the surplus.

Comment 1: Most practitioners expect that a mortgagee is entitled to a continuing lien on surplus proceeds from foreclosure of senior liens, but it often is difficult to find a statute saying so. Normally the answer lies in equity, which recognizes a continuing lien on proceeds that become a substitute for the mortgage property itself.

In many deed of trust statutes, for instance, the statute dictates payment of surplus to the mortgagor. Others provide for payment to lienholders, but provide for no process whereby the lienholders can establish that status.

Of course, in this case, we had a judgment lienholder who's claim was already adjudicated. The case indicates, however, that the rights it describes would accrue as well to mortgagees. The editor assumes that some legal action ought to be necessary for a foreclosure trustee to feel comfortable in paying money over to lien claimants other

than judgment lienholders. But is this the way it works in process, or to trustees just pay whoever phones them up and asserts an unpaid lien against the trustor?

Comment 2: This case may prove valuable as precedent because of the fact that it recognizes an equitable interest in the tax foreclosure surplus notwithstanding somewhat limiting language in the statutes. Thus, the significance may go beyond Indiana.

MORTGAGES; PRIORITY; SUBORDINATION: A clause subordinating an identified loan "and all other interests" of subordinating party successfully subordinates all mortgages of the subordinating party in existence at time of subordination. ***VATACS Group, Inc. v. Homeside Lending, Inc., 2005 WL 2840301 (Ga.App., October 31, 2005).***

Homeside's predecessor had a first lien mortgage, dated 1991, on certain residential property. Later, in January, 1993, the mortgagor took out a second mortgage with AG for $6000. In November of the same year, the mortgagor and AG agreed that AG would make a new $9000 loan, which paid replaced the $6000 debt and added additional loaned funds as well. Instead of cancelling the $6000 mortgage, AG obtained a new $3000 mortgage. No explanation was given by the court for this somewhat bizarre behavior. But there were claims by Homeside, as described below, that this was all part of a fraudulent scheme (for $9000???)

Less than a month after the arrangement described above, the mortgagor negotiated a refinancing of the first mortgage, and AG agreed to subordinate to that mortgage. It executed a subordination agreement that specifically stated that it subordinated its November, 1993 mortgage (specifically referenced and described) and all other AG interests in the property, to the refinancing mortgage.

:

> "Grantee does hereby subordinate its all right, title and interest under said outstanding Deed to Secure Debt above set forth, or otherwise in or to the property therein described, as against said loan to be made by [Homestead's predecessor.]"

[Note, the reference to "Deed" is a reference to a Georgia "deed to secure a debt," which is elsewhere here described as a mortgage.]

Four years later, the AG loan was in default, and AG sold its interest for $6000 to Andjar, which commenced foreclosure only on the January, 1993 mortgage) and apparently rapidly built up interest, late charges, and other secured claims against the property. Shortly thereafter, while the foreclosure was in progress, Andjar sold its interest for $42,000 to VATACS, which completed a non judicial foreclosure and rapidly flipped the property (after, the court says "improving the property") to H&I for $95,000. This entire set of transactions took place between March and June of 1997. (Pretty good money in defaulted debt.)

Homestead, holder of the rights of the original first mortgage, brought an action for declaratory relief and fraud, claiming that H&I and the others were asserting that their interests were not subordinate to the rights of Homestead, and desiring a declaration that in fact Homestead still had a first mortgage on the property.

At issue, of course, was whether the subordination agreement subordinated the January, 1993 mortgage, even though it not specifically referenced in the subordination. The court, on summary judgment, held that it did, crediting the language subordinating interests "otherwise in or to the property therein described" as effecting a subordination of the January mortgage.

The court said that the language was unambiguous, but that, even if it were ambiguous, it would interpret the intent of the parties to be to effect a subordination to both interests. It noted that the subordination agreement was recorded and that the subsequent takers of AG's interest had constructive notice of it, as it was executed by AG and modified AG's rights. It swept aside an absurd argument based upon the claim that the successors in interests were BFP's because they relied on the title as set forth in the January 1993 instrument and did not have to look beyond that in the record. (True, in Georgia apparently, as to subsequent recordings of the mortgagor's acts, but not as to recordings of acts by AG, the mortgagee.)

The parties asserting subordination also argued that the senior part was estopped by laches from asserting its position after so much had gone on, and they argued at least that they should be permitted to present evidence on the point. The court stated that in Georgia the equitable doctrine of laches is not available in a legal action for declaratory relief. (That's right, folks!!)

Comment 1: The court characterizes the sweeping characterization of all interests "otherwise held by AG" as a "dragnet clause." In mortgage law, the term is more often used to describe the collecting together of all claims against a borrower to be secured by one lien, rather than to describe a collecting together of all interests in the property held by a third party, such as a subordinating party. This strikes the author as more akin to a "Mother Hubbard Clause," which applies the terms of an agreement to "everything in the cupboard" whether named or not, and (sometimes) whether in the cupboard now or later. Of course, here there is no attempt to include any later claims against the property arising in favor of AG, just to sweep in other, undescribed claims.

Comment 2: Regardless of what we call this kind of clause, other courts might be more reluctant to credit its precise language to include interests that the parties should have known about and didn't describe with the same specificity of certain others described with precision. In fact, the editor likes the idea of leaving the parties with the consequences of their language at least where, as here, we're talking about the rights of commercial parties, and not consumers. But for a very different view as to philosophy, if not as to the precise facts, see *NAB Asset Venture III, L.P. v. Brockton Credit Union,* 815 N.E. 2d 606 (Mass. App. 2004) (The DIRT DD for 3/21/05) (First lienholder's agreement to subordinate its interest to a junior lienholder is not an agreement to subordinate to future advances subsequently made pursuant to a future advance clause in the junior lien, despite the fact that subordination does not exclude the future advance feature of the loan made prior by the agreement.)

Note, however, that lease provisions in which lessees agree to subordinate to all future mortgages placed on the property by landlord are generally enforced with little discussion.

Comment 3: And what about that language continuing the law/equity separation – making equitable defenses such as laches unavailable to legal remedies such as declaratory relief? This certainly provides all kind of tactical challenges and opportunities for litigators, but does it really make any sense in the modern world? Is the consequence that laches will not apply here but that at some other point in the process the court will reinject laches to prevent relief based upon the rights declared? Or does this holding in fact mean that in some actions in Georgia special concerns of fairness reflected in the notion of laches simply don't apply? Hmmmmm.

Comment 4: Here's a report on the above issue from UMKC's Remedies Professor, Barbara Glesner-Fines: The notion that laches (and a few other equitable defenses such as unclean hands and undue hardship) is unavailable outside equity still applies in most jurisdictions but what makes the analysis here unusual I think is the fact that the court was calling the action for declaratory judgment a legal action. Declaratory judgment actions, being creatures of statute, have been variously characterized as equitable or legal for purposes of applying the equitable defenses. *Compare Abbott Labs. v. Gardner, 387* U.S. 136, 155 (1967) (holding that a declaratory judgment suit challenging administrative action is equitable, and that equitable defenses are therefore available) and *Green v. Mansour,* 474 U.S. 64, 72 (1985) ("The propriety of issuing a declaratory judgment may depend upon equitable considerations") with Simler v. Conner, 372 U.S. 221, 223 (1963) (holding that a declaratory judgment suit raising legal issues is legal, and that jury trial is therefore available). So much of mortgage law falls under the equity side that I find it interesting that this court found the declaratory judgment regarding the interpretation of the mortgage to be legal. Certainly, if the plaintiff had asked for some kind of injunctive relief or stay with the declaration of rights, the action would have been equitable and the court would have entertained the laches defense.

NUISANCE; BUSINESS INTERFERENCE: Owner of land may deny use of land to neighboring party, even as a tactic in a separate business dispute, and it not liable for tortious interference with other parties business. ***Sports Page Incproratoin v. Punzo, 900 So. 2d 1193 (Miss. App. 2005)***

The allegation was that contractor, disputing with a customer concerning an unpaid bill, leased the property adjacent to the customer's business premises and fenced it off. The customer's patrons had been using the premises for parking, and now were unable to do so. This in fact placed into jeopardy land use permits that the customer required to operate his restaurant.

The customer was able to get a court injunction requiring the removal of the fence, and the contractor later abandoned the lease. But the trial court later ruled

that the contractor was wholly within his rights in restricting trespass on his property, regardless of his motive in doing so.

NUISANCE; TRESPASS DISTINGUISHED; ERRANT GOLF BALLS: Recurrent entry of golf balls onto homeowners' property constitutes a continuing trespass. ***Amaral v. Cuppels, 831 N.E.2d 915 (Mass. App. Ct. 2005).*** , discussed under the heading: "Trespass; Golf Courses."

PUBLIC TRUST DOCTRINE; BEACH ACCESS: The public's use of dry sand ancillary to its use of the ocean is an implicit right pursuant to the public trust doctrine. ***Raleigh Avenue Beach Association v. Atlantis Beach Club, Inc., 185 N.J. 40, 879 A.2d 112 (2005); July 26, 2005.***

A private beach club owned property that contained the only beach in the municipality that faced the ocean. The property extended to the mean high water line from a bulkhead running north and south along the western boundary of the property. "Persons using the beach for recreational purposes cross[ed] over the bulkhead by walking on a boardwalk pathway that traverse[d] the dunes and curve[d] southward to the beach." The pathway was approved by the New Jersey Department of Environmental Protection (DEP). The dry sand beach was between the dunes and extended to the mean high water line. A high rise condominium stood immediately to the west of the bulkhead. Other residential complexes sat to the south and west and included a six-story hotel and more than five hundred residential units. As a condition of the permit granted to a property owner north of the beach club's property, that development's beach was open to the public. That development sold daily, weekly and seasonable beach passes at rates approved by the DEP. Its property, however, was closed to the public from April 1 through August 15.

Until 1996, the beach club's beach was open to the public free-of-charge. At that time, its owner "established a private beach club which then began to limit public access to its beach by charging substantial fees."

In mid-2002, an individual "was issued a summons for trespassing when he attempted to leave the wet sand area and walk across [the beach club's] beach property to his home." The next month, the beach club sought "an injunction to restrain [that individual] and others from accessing [its] property and a judicial declaration that [it was] not required to provide the public with access to or use any portion of its property or the adjacent beach." Neighboring residents filed a complaint against the beach club, the State of New Jersey, and others, claiming that the beach club was in violation of the public trust doctrine. The residents "sought free public access through the [beach club's] property to the beach and access to a sufficient amount of dry sand above the mean high water line to permit the public to enjoy the beach and beach-related activities."

The lower court "held that the public was entitled to a right of horizontal access to the ocean by means of three-foot-wide strip of dry sand and to limited vertical access to the ocean by way of the path from the bulkhead through the dunes on the property." It ruled that "[The beach club] was prohibited from charging a fee or otherwise restricting the right of the public to horizontal or vertical ocean access." Both the state and the neighbors appealed. "The Appellate Division held that [the beach club] could not limit vertical or horizontal public access to its dry sand beach area nor interfere with the public's right to free use of the dry sand for intermittent recreational purposes. [The beach club] could charge a fee to members of the public who used its beach for an extended period of time. The opinion also added that [the beach club] was required to provide customary lifeguard services for the public." The Appellate Division remanded the matter to the DEP with respect to appropriate fees. The beach club appealed further to the New Jersey Supreme Court, but unsuccessfully.

> "[T]he public trust doctrine derives from the English common law principle that all of the land covered by tidal waters belongs to the sovereign held in trust for the people to use." In 1984, the Supreme Court "articulated the concept already implicit in [prior] case law, that reasonable access to the sea is integral to the public trust doctrine." That left the question for the Court as to "whether use of the dry sand ancillary to use of the ocean for recreation purposes is also implicit in the rights that belong to the public under the doctrine." Pursuant to a 1964 Supreme Court decision, it was unequivocal "that a bather's right in the upland sands is not limited to passage and that reasonable enjoyment of the foreshore and the

> sea cannot be realized unless some enjoyment of the dry sand area is also allowed." To the Court, it followed, then, that "use of the dry sand [had] long been a correlate to use of the ocean and [was] a component part of the rights associated with the public trust doctrine." The four criteria for a case-by-case analysis with respect to the degree of accommodation that a beach owner must afford to the public are: "a) location of the dry sand area in relation to the foreshore, b) extent and availability of publicly-owned upland sand area, c) nature and extent of the public demand, and d) usage of the upland sand land by the owner." Applying those factors to this particular case, the Court held that the beach club's "upland sands must be available for use by the general public under the public trust doctrine." It highlighted the "longstanding public access to and use of the beach," the CAFRA condition imposed on the neighboring property, "the documented public demand, the lack of publicly owned beaches in [the municipality], and the type of use by [the beach club] as a business enterprise."

OIL AND GAS; WASTE DISPOSAL: Use of premises as a waste dump that could be used for a fee by nearby oil drilling operators was not itself an oil drilling use, and ordinary common law nuisance and trespass law, rather than administrative determinations of the State Oil and Gas Board, determines whether the parties responsible for polluting the property through dumping of waste are liable to current owners. ***Howard v. Totalfina, 899 So. 2d 882 (Miss. 2005).***

RESTRAINTS ON ALIENATION; TERM: A forfeiture restriction in a deed prohibiting encumbrance of land during the grantors' lifetimes is not an invalid restraint on alienation. ***Alby v. Banc One Financial, ___ Wn. 2d ___ , 1006 Westlaw 307903 (Wash. 2/9/06).***

Albys owned a farm that had been "handed down" from parents and grandparents.

In 1992, the Albys agreed to sell a portion of the farm to their niece, Lorri Brashler, and her husband, Larry. Although they believed it was worth $100,000 the Albys agreed to sell the land for $15,000, which is what the Brashlers could afford to pay.

Since the land had been in the family for three generations, the Albys wanted to make sure it would not be conveyed to someone outside the family during their lifetimes. So they went to a lawyer who prepared a land sale contract and warranty deed which gave the Albys a right of first refusal in the event of a proposed sale by the Brashlers, and also contained restrictions against any division of the land, any conveyance to Larry should he and Lorri divorce, and any encumbrance against the land. If the Brashlers should attempt any of the restricted actions the property would revert back to the Albys. In part, the contract and deed documents stated:

"RESERVATION in favor of the Grantors, their heirs and assigns, an automatic reverter, should the property conveyed herein ever be mortgaged or encumbered within the life of either Grantor."

The land sale contract was recorded in April 1992 and, after the Brashlers paid the $15,000, the warranty deed was recorded in September 1996.

Later, unbeknownst to the Albys, Lorri and Larry mortgaged the property, twice. Thus, in March 1999 there was recorded a deed of trust from the Brashlers to First Union Mortgage Corporation, securing repayment of $92,000, and in April 1999 there was recorded a second deed of trust from the Brashlers to CIT Group, securing repayment of $17,250.

Meanwhile, Gene Alby died.

The Brashlers defaulted and the first deed of trust was foreclosed. The holder of the second deed of trust (Banc One, by assignment from CIT Group) acquired the property with a bid of $100,822. The trustee's deed was recorded in November 2000.

Susan Alby learned of the foreclosure and filed suit against Banc One to quiet title.

On cross motions for summary judgment, the trial court ruled in favor of Banc One, holding the deed restriction void as against public policy and an unreasonable restraint on alienation. Susan Alby appealed, and the court of appeals reversed. The court of appeals concluded the restriction is not a restraint on alienation and, even if it were, the restraint is reasonable. Banc One appealed, and the Washington Supreme Court agreed to review the case.

In a 5-to-4 decision, the Supreme Court affirmed the court of appeals. The Supremes acknowledged the restriction is a restraint on alienation, but said the inquiry does not stop there. In Washington, the Court said, validity of a restraint on alienation is determined by "the reasonableness approach." In other words, is the restraint "reasonable" in light of the legitimate interests of the parties balanced against potentially harmful consequences to the public and "a free market in land."

Here, the Court concluded, it is reasonable to enforce the restraint in order to preserve "family ownership" of the land "for a limited time period" (i.e., the lifetimes of Gene and Susan Alby). The Court also commented that "the Brashlers' interest in free alienation is limited by the fact that they agreed to the restraint in consideration for the substantially reduced price." As for Banc One, the Court noted it had actual or constructive notice of the restraint by virtue of language in the recorded contract and deed.

A dissenter argued that the restraint was invalid because of the "cherished value that our state places on free alienability outweighs the value to the Alby family of maintaining the property in family ownership."

Another dissenter argued that the condition in the deed operated as a forfeiture should be considered unreasonable as a matter of law. Saying that the law should be "clear" and "predictable," the Justice criticized the "reasonableness" test employed by the majority for its tendency to detract from predictability and promote litigation.

Reporter's Comment: Watching in the wings in this case was Ticor, because (apparently) someone insured a lender without looking at the borrowers' vesting deed. Big mistake!

What is most interesting, seems to me, is how "close" this case was. Once again, we have the spectacle of a court wrestling with private property interests vs. the common good (or, in this case, the "free market in land"). Shades of the recent decision of the U.S. Supreme Court in *Kelo v. City of New London*, 125 S.Ct. 2655 (2005). Which, come to think of it, was another close case.

The Reporter for this item was Burt Rush of First American Title Insurance Company, writing in that Company's internal journal, Landsakes. The Editor has edited substantially the original copy and is responsible for the content.

Editor's Comment: The case is a good law school casebook candidate. The two dissenters clearly articulate the preference for alienability over family dynastic concerns. Further, the second dissenter argued that clarity in the law would best be served by declaring unenforceable all forfeiture restraints. Both of these arguments contain important values relevant to the role of courts in overseeing real estate transactions. Like the Reporter, the Editor doesn't see them as of sufficient concern here, where the restraint is only going to last for a lifetime, and the property clearly was conveyed at a bargain price, even a "gift price" because of personal family concerns of the grantors. The grantors weren't trying to be greedy – they just didn't want to see the land pass out of their family during their lifetimes. Under the circumstances, the court properly honored their desire.

SERVITUDES; ARCHITECTURAL APPROVAL COVENANTS; DEFINITION OF "STRUCTURE;" DRIVEWAY: A "driveway" is a structure within the common meaning of that term as well as the meaning of the covenants even though a driveway was not specifically referenced in the section regarding the construction or alteration of structures. ***Mitchell v. Cambridge Property Owners Ass'n, Inc., 2005 WL 2292367 (Ga.App., September 21, 2005).***

The Court of Appeals held that restrictive covenant required homeowner to seek association's approval before resurfacing his driveway.

SERVITUDES; COVENANTS; USE RESTRICTIONS; FENCES: An artificially created sand dune berm may be a "fence;" therefore, a servitude restricting fences can be applied to a berm even if the berm serves some other primary purpose. ***Bubis v. Kassin, 184 N.J. 612, 878 A.2d 815 (2005); August 10, 2005.***

In 1978, a couple "purchased a property directly across the street from [a] beach." Prior to 1995, the wife, now a widow "could view the beach and ocean from her home." Then, a new owner acquired the beach property. That new owner"erected an eight-foot high sand berm behind the existing six-foot chain link fence. [It] topped the berm with bushes and trees." At the time of suit, the landscaping was approximately fourteen to eighteen feet high. As a result, the berm provided the new owners with

privacy, but prevented the woman "from viewing the beach and ocean from her home."

An 1887 restrictive covenant prohibited the "construction of fences higher than four feet" on the beachfront property. Both neighbors bought their property subject to that covenant. Further, both properties were located in a beach zone designed to "preserve the existing natural beach area and dunes for their unique beauty and recreational assets." In 1964, the municipality "amended its ordinance to require that all fences be made from chain link or similar fencing materials," and established a maximum height of six feet. After some back and forth between the various levels of court in New Jersey, the Chancery Division held that the berm was not a fence and the Appellate Division affirmed. As a consequence, the widow appealed to the New Jersey Supreme Court.

The Court noted that "neither the restrictive covenant nor the zoning ordinance define[d] 'fence.'" Therefore, it looked to other sources, finding that there was "no single construct for the word fence." Reviewing various definitions gave the Court some guidance. It determined that the definitions it reviewed "[did] not limit the type of material from which a fence can be made." Each of the definitions indicated "that the user's intent and the actual function of the structure are dispositive in ascertaining whether a structure is a fence." From the definitions it reviewed, "and as a matter of common sense, [the Court concluded] that as long as the structure marks a boundary or prevents intrusion or escape, then it is a fence, regardless of the material from which it is forged." Consequently, it found that the berm in question satisfied the definition of a fence. It believed that the owners of the beachfront property "essentially constructed a privacy fence made of sand and trees." The New Jersey Supreme Court pointed to decisions that also found "the size and position of trees determinative of whether a structure was a fence." Further, it did not matter to the Court that the New Jersey Department of Environmental Protection (DEP) had issued a permit to the beachfront property owners "to create and maintain a dune." According to the Court, "[r]egardless of whether the structure [was] a dune under [DEP's] definition, it [was] a fence." The fact that it had elements of a dune only subjected the beachfront property owners to an additional set of state regulations.
The Court also considered the height restriction in the 1887 covenant. Although not finding the precise intent within the words, it used common sense to suggest "that the drafters intended that such a limitation would enable nearby residents and passers-by to view both the seascape and the landscape of the beach." The widow relied on that covenant when she and her husband bought the property. She enjoyed the benefit of the covenant for over twenty-five years. Consequently, the Court concluded that the fourteen-foot high violated the covenant. For the same reason, the Court decided that the height of the berm exceeded the eight foot fence height limitation in the municipal zoning ordinance. As a aside, the Court held that even if it had"found that the berm was not a fence, it [was], at least, a wall or hedge – neither or which [were] permitted in the beach zone." Lastly, it determined that the Coastal Area Facility Review Act (CAFRA) did not preempt this type of municipal zoning regulation in a way that "would allow beach-front property owners to avoid reasonable restrictions on fence height." The Court did not "believe that the Legislature intended that landowners could circumvent local zoning ordinances that regulate fences by invoking CAFRA, especially when the so-called dune does not protect the beach from erosion."

SERVITUDES; TRANSFER: Absent express language to the contrary, a deed conveying property automatically transfers all of the grantor's appurtenant property rights, including riparian rights, even when the grantor is unaware of the existence of such rights and therefore had no specific intent to convey them. ***Panetta v. Equity One, Inc., 378 N.J. Super. 298, 875 A.2d 991 (App. Div. 2005); June 15, 2005.*** discussed under the heading: "Deeds; Appurtenances; Riparian Rights."

TAXATION; PROPERTY TAX; ASSESSMENT: A decision to purchase a vacant building instead of making lease payments until such time as a suitable tenant was found, did not constitute economic duress, and therefore, the proper value for tax purposes was the sale price. ***Cobblestone Square Co., Ltd. v. Lorain County Bd. of Revision, 835 N.E.2d 1 (Ohio 2005).***

In May 2001, Appellant, Cobblestone Square Co., Ltd. purchased approximately 8.34 acres and a one-story cement-block building (the "Subject Property"), for $5,800,000. For tax year 2001, the property was valued at $3,417,110. The Board of Education of Elyria City School District ("Elyria") filed a complaint with the Lorain County Board of Revision ("BOR"), contending that the property should be valued at the $5,800,000 sale price.

The BOR determined that the property should be valued at $4,000,000. Elyria filed an appeal with the Board of Tax Appeals (“BTA”), which determined the value of the property to be $5,800,000. This appeal followed:

The facts leading up to the sale were as follows: In 2000, Cobblestone had developed a new shopping center elsewhere and sought to lease a portion of it to Kmart. Kmart was a tenant at the Subject Property. Cobblestone agreed to assume Kmart’s lease at the subject property and in return Kmart agreed to move to the new center. Thus, in 2000 Cobblestone assumed the lease , which ran until February 2009, at payments of $579,000 per year. Cobblestone sought the landlord’s permission to subdivide the Subject Property, but the landlord refused, prompting Cobblestone to purchase the building for $5,800,000.

At the tax valuation hearing, Cobblestone argued that the property should be valued at the value assessed by the auditor, $3,417,110. Cobblestone first contended that the $5,800,000 purchase price reflected not only the value of the property but also the value of being released from the lease that would have run through 2009. Upon review of the record, the Supreme Court of Ohio held that Cobblestone failed to provide any evidence of such a breakdown in purchase price.

Next, Cobblestone contended that the purchase was motivated by economic duress. Though the sale price is the best method of determining the true value in an arm’s length sale, Cobblestone argued that the transaction was not at arm’s length. The court noted that an arm’s length transaction is voluntary, and thus not characterized by duress. The court recognized that there was no contention that Cobblestone entered the lease assumption under duress. The court held that the landlord’s refusal to subdivide the building did not constitute economic duress.

Finally, the court determined that Cobblestone made business decisions that may have been good or bad, but did not demonstrate economic duress. Accordingly, the court affirmed BTA’s decision valuing the property at the sale price of $5,800,00.

Note: The concurring opinion is noteworthy because it found that there was economic duress on the grounds that Cobblestone purchased an empty building at a price which no one else would have paid. However, the concurrence agreed that Cobblestone failed to prove the property’s true value.

Comment 1: The case is interesting in part because of the tale it tells. Note that Cobblestone stole a tenant and then was faced with negotiating with the landlord from which it stole the tenant to alter the terms of the lease to reduce its exposure on the assumption. Needless to say, the landlord, stripped of the Kmart tenant (at the time still a good tenant, one assumes) was not amused, and unwilling to be cooperative. It further was unccooperative in giving Cobblestone a “buy out” price. But why should it be? The situation on the buy out is not unlike a lender charging a yield maintenance prepayment premium.

Comment 2: But was the price Cobblestone paid for the land the “market value” of the land? It would seem that other evidence ought to be accepted by the court to show what a willing buyer now would pay for the land, since Cobblestone was hardly a market player in this part of the transaction. The concurrence seems to have that part of the analysis right. Whether one calls the circumstance “duress” or not, the fact is that the price paid by Cobblestone did not reflect the market value of the property being taxed.

TAXATION; PROPERTY TAX; ASSESSMENTS; FARMLAND ASSESSMENT: Merely allowing the public into a greenhouse to view the plants that would be ultimately purchased is not enough sales activity to disqualify a property from the favorable farmland assessment treatment that would otherwise be accorded the property. ***Township of Monroe v. Gasko, 182 N.J. 613, 868 A.2d 1022 (2005); March 17, 2005.***

Property owners were denied a farmland assessment for temporary greenhouses under the Farmland Assessment Act. The Act was intended to slow the trend of farmland being converted to other uses by assisting farmers who continued to use their land for farming purposes. It provides for reduced real property tax evaluations for single-use facilities, such as greenhouses, as long as the facility did not have a dedicated space for sales activities. These property owners owned several greenhouses. They sold goods from one greenhouse over a twenty-week period during each year. The other greenhouses were used exclusively for growing the flowers and plants. No sales took place in those greenhouses even though customers could enter them to look for plants and

flowers. There were no price lists or advertisements in the other greenhouses, and no special accommodations were made in those greenhouses for sales. Customers were required to choose their plants and flowers and then purchase them in the one greenhouse. The municipality denied farmland treatment to all the greenhouses, finding that each greenhouse contained sales space.

The owners appealed to the Tax Court, which agreed with the municipality. The owners appealed further. The Appellate Division affirmed, holding that because the owners' marketing and sales activities affected all of the greenhouses, not just the one where the sales actually took place, all the greenhouses were disqualified from the farmland tax exemption. A final appeal was taken to the Supreme Court and it reversed holding that the Farmland Assessment Act contemplated sales as a natural consequence of operating a farm. As long as the owners used the greenhouses for growing purposes and no adjustments were made for sales or marketing, for example by using some of the greenhouse space for sales tables and posters, the greenhouses are not regarded as sales space. The Court noted that merely allowing the public into a greenhouse to view the plants that would ultimately be purchased is not enough sales activity to exclude the owners from claiming the favorable tax treatment.

STATE AND LOCAL TAXATION; TAX FORECLOSURE; SURPLUS: Holder of a judgment lien against real property sold at a tax sale has a superior claim to tax sale surplus over property owner. ***CANA Investments, LLC v. Fansler, 832 N.E.2d 1103 (Ind.App. 2005).*** , discussed under the heading: " Mortgages; Priority."

TITLE INSURANCE; ABSTRACTOR'S LIABILITY: Title insurer who issued report in connection with insuring title is not liable for negligence in preparing report after title policy was issued and insured mortgage was repaid. "Economic loss" doctrine precludes claim. ***First Midwest Bank v. Stewart Title Guaranty Company, 2005 Ill. App. LEXIS 23 (2005).***

In 1995, John and Glenda Bergeron contracted to purchase property in Lake County, IL, to be used as a home/office for their business (an architectural and interior design firm). They arranged a purchase money loan for $300,000 from First Midwest Bank, to be secured by a first mortgage. First Midwest was well aware the property would be used for business. The transaction closed, and the mortgage in favor of First Midwest was insured by Stewart Title in the amount of $300,000.

In 1996, the Bergerons borrowed another $300,000 from First Midwest for construction of office space. This loan was secured by a second mortgage given to First Midwest, insured by Intercounty National Title Insurance Co., through its agent Clear Title, Inc.

In 1997, the Bergerons arranged a third loan for $752,000 from First Midwest. First Midwest categorized this as a "wraparound loan," consolidating the first two mortgages with other loans that had been made to the Bergerons and their business. This loan was also secured by a mortgage, insured by Intercounty through Clear Title.

In funding the $752,000 loan, First Midwest issued a payoff demand and release for the first $300,000 mortgage insured by Stewart Title. First Midwest received the amount of the demand, and the Bergerons were told by the servicing agent that the mortgage was satisfied. (Though the Court's decision does not say so, it appears the second $300,000 mortgage was also satisfied and released in the same fashion.) A senior vice president of First Midwest would later testify that he understood the $752,000 wraparound loan "paid off" the first $300,000 mortgage (insured by Stewart Title) and the second $300,000 mortgage (insured by Intercounty).

A few months after closing of the wraparound loan, First Midwest learned the insured property was subject to a restrictive covenant prohibiting business or commercial uses. For reasons unexplained, this restrictive covenant was not disclosed by any of the title policies. In time First Midwest filed suit against Stewart Title, Intercounty and Clear Title, alleging it would not have made the loans had it known of the restrictive covenant. The lawsuit set forth three causes of action Count I to make the title companies liable under the respective title policies; Count II to make the title companies liable for negligent misrepresentation on grounds they negligently sold information when their respective commitments were issued; and Count III to make the title companies liable for fraudulent misrepresentation.

Then, the plot thickened Clear Title and Intercounty filed bankruptcy. Now Stewart Title seemed to be the only "deep pocket" to which First Midwest might have easy access.

But on motions filed by Stewart Title the trial court granted Stewart's motion for summary judgment as to Count I, and dismissed Counts II and III for failure to state a claim on which relief might be granted. First Midwest appealed as to Counts I and II.

The Appellate Court affirmed, with one justice (of three) concurring in part, and dissenting in part.

With respect to Count I, the trial court had concluded Stewart had no liability because its policy was terminated by payoff and release of the insured mortgage before discovery of the title defect. On appeal First Midwest argued this was "error," because the wraparound loan did not extinguish debts created by the first two loans. Instead, First Midwest said the debts were consolidated, and even though common practice requires that "the original smaller loan must be canceled in some manner" the original debts were not liquidated.

But the Court saw through the smokescreen. After describing the steps by which the first $300,000 mortgage was paid off and released of record, the Court held the policy was terminated by operation of paragraph 9©) of the Conditions and Stipulations contained in the policy. Paragraph 9©), as we know, provides that "(p)ayment in full by any person or the voluntary satisfaction or release of the insured mortgage shall terminate all liability of the (insurer) except as provided in section 2(a) of these Conditions and Stipulations." Noting that paragraph 2(a) did not apply, and that the policy insures the mortgage but not the underlying debt, the Court held the policy was terminated and summary judgment was proper.

With respect to Count II, the Court tackled the more troublesome question of whether a title company could be liable for negligent misrepresentation.

The Court began by explaining the "economic loss doctrine" adopted by the Illinois Supreme Court in *Moorman Manufacturing Co. v. National Tank Co.*, 435 N.E.2d 443 (1982). In *Moorman*, the Supreme Court said that when a product or service is defective (i.e., not of expected quality), and the result is economic loss but no personal injury or property damage, then the consumer's sole remedy is a contract action. Thus, the Court explained, "(t)he *Moorman* doctrine bars tort recovery for purely economic losses even when the plaintiff has no contract remedy."

The Court acknowledged an exception to this rule, permitting a tort action, "where one who is in the business of supplying information for the guidance of others in their business transactions makes negligent representations. (Cite.)" But this exception does not apply "when the information supplied is merely ancillary to the sale [of a product or service] or in connection with the sale. (Cite.)."

In this case, First Midwest argued that Stewart was in the business of supplying information, citing *Notaro Homes, Inc. v. Chicago Title Insurance Co.*, 722 N.E.2d 208 (1999). In *Notaro Homes,* an Illinois Appellate Court held plaintiff stated a cause of action by alleging that Chicago Title was in the business of supplying information when it issued a commitment on which the plaintiff relied in entering into a business transaction. Thus, the Court recognized an exception to *Moorman* on the facts of that (*i.e., Notaro Homes*) case.

But the Court in this case would not follow *Notaro Homes* blindly. Instead, this Court relied on another Illinois Appellate Court decision, *University of Chicago Hospitals v. United Parcel Service,* 596 N.E.2d 688 (1992), which held that misinformation supplied by an employee of a health insurer did not create liability in tort because the insurer was "not in the business" of supplying information.

Saying "(a)n insurance policy or commitment is not sold to be relied upon as affirmative statements of fact about the nonexistence of the insured risk," the Court concluded "(a)ny information contained in the commitment Stewart Title issued was merely ancillary to the purchase and sale of a product, namely, title insurance."

In a dissenting opinion, Justice Quinn concurred with the majority decision insofar as summary judgment was proper as to Count I, and that dismissal was proper as to Count II, but disagreed with the majority's reliance on *Moorman* and the economic loss doctrine. Calling the *Moorman* analysis "*dicta*," this Justice said that Count II should be dismissed because the Stewart policy was terminated by payoff of the insured loan (*sic*).

Reporter's Comment :A very interesting decision for its discussion of the economic loss doctrine as applied to issuance of commitments and title policies. You see this discussion frequently in product liability cases, but almost never in title insurance and escrow/closing cases.

What difference does it make? I (for one) remain convinced that providers of any product or service are better off defending an action based on contract rather than tort. First, the duties of parties to a contract are pretty much defined by the terms of their agreement; whereas the duties of a tort defendant may be as broad as the imagination of expert witnesses. Second, recoverable damages in a contract case are typically limited to consideration paid by the parties and foreseeable losses in the event of breach; whereas in a tort case the plaintiff may recover all damages "proximately caused" by the defendant (sometimes called the "but for" test) encouraging plaintiffs to seek damages both remote and speculative.

But what about this dissent? I don't get it. I know what *dicta* is, but don't see how the majority's discussion of economic loss doctrine fits the definition. Seems to me that even if the Stewart policy was terminated, and the contract action was finis, plaintiff might still have an alternative case for negligence—unless stopped by the economic loss doctrine. Which is another reason this decision is important It promotes a rule that would prevent plaintiffs from having two (or more) bites of the apple. Justice Quinn seems to think this plaintiff was limited to a contract action even without *Moorman*, but I (respectfully) don't see it that way.

The Reporter for this item was Burt Rush of the Santa Ana office of First American Title writing in the First American Title internal newsletter: "LandSakes."

TRESPASS; GOLF COURSES: Recurrent entry of golf balls onto homeowners' property constitutes a continuing trespass. ***Amaral v. Cuppels, 831 N.E.2d 915 (Mass. App. Ct. 2005).***

Homeowners filed suit against owners and operators of the Middlebrook Country Club (the "Golf Course"). Shortly after moving into new homes adjacent to the ninth hole of the Golf Course, the Homeowners discovered that golf balls from the Golf Course were hit onto their property at a frequent and alarming rate. Unable to resolve the issue with the Golf Course Operators, the Homeowners sought injunctive relief and damages in the Superior Court.

The Superior Court denied relief and dismissed the complaint, finding that the facts did not support a nuisance claim. The Homeowners appealed and the Appeals Court granted them injunctive relief, finding that the recurrent entry of golf balls onto the Homeowners' property constitutes a continuing trespass. Analogizing the facts to those in *Hennessy v. Boston*, 164 N.E. 470 (involving persistent landing of baseballs from neighboring baseball field onto plaintiff's property) and *Fenton v. Quaboag Country Club, Inc*., 233 N.E.2d 216 (involving an annual average of 250 errant golf balls from neighboring country club landing on plaintiff's property), the Appeals Court found that the regular and frequent non-permissive propulsion of physical objects onto an adjacent property constitutes a continuing trespass.

The Appeals Court rejected the Golf Course Operators' defense that the Homeowners knew of the risk of errant golf balls prior to purchasing their homes, finding that while the notion barring nuisance claims based on a "coming to a nuisance" defense is well accepted, there is no similar notion of "coming to a trespass."

In order to prevent future instances of trespass, the Appeals Court held that the Golf Course Operators must either acquire the land onto which the golf balls are currently landing or acquire the right to use the land for that purpose.

Comment 1: Can one establish a prescriptive right to conduct such a trespass? In Massachusetts, the prescriptive period is twenty years, and the defendants didn't quite make that period for operation of their golf course. Further, the court noted that in the precedent golf course trespass case, where the course had operated for more than twenty years, there had been no discussion of prescriptive rights. The court here says it reaches no conclusion on the point, but it strikes the editor that a prescriptive use could be created. Certainly the activity meets all the requirements, unless one can argue that golf balls landing on vacant land are not an "open and notorious" use.

Comment 2: Some courts will characterize a continuing trespass as a nuisance, but of course it is a special kind of nuisance – one constituting a trespassory, rather than a non trespassory, invasion of use and enjoyment. Lawyers frequently make the mistake of lumping trespasses and nuisances together. Don't do it. A nuisance involves a balancing of two presumptively legitimate uses that just conflict with one another. A trespass involves a non-legitimate invasion of the acknowledged possession of one owner's rights by another party. It doesn't matter that

the trespass is initiated from the invading party's space – it is still an invasion of the plaintiff's space.

TRESPASS; WASTE DISPOSAL: Use of premises as a waste dump that could be used for a fee by nearby oil drilling operators was not itself an oil drilling use, and ordinary common law nuisance and trespass law, rather than administrative determinations of the State Oil and Gas Board, determines whether the parties responsible for polluting the property through dumping of waste are liable to current owners. ***Howard v. Totalfina, 899 So. 2d 882 (Miss. 2005).***

VENDOR/PURCHASER; CLOSINGS; ESCROWS: A post closing escrow, whereby seller deposits a sum that may be forfeited to buyer if seller does not complete certain contractual obligations, does not substitute for the original contract obligation of the seller to perform those activities, as the sale agreement does not "merge" into the escrow agreement. ***Wallace v. Bock, 620 S.E. 2d 820 (Ga. 2005)***. discussed under the heading: "Vendor/Purchaser; Merger; Post Closing Escrow: **"**

VENDOR/PURCHASER; CONTINGENCIES; FINANCING: A mortgage commitment that requires the applicant to sell an existing home is not a "firm" commitment and if a contract's mortgage contingency provision (expressly or implicitly) is based on the buyer's obtaining a "firm," commitment it has not been satisfied. ***Davis v. Strazza, 380 N.J. Super. 476, 882 A.2d 980 (App. Div. 2005); October 4, 2005.***

A residential real estate contract provided, in pertinent part, that: "[t]his agreement is contingent upon the purchaser obtaining a conventional mortgage at a prevailing rate of interest for 30 years with monthly payments based upon a 30 year payment schedule. The purchaser agrees to make immediate written application for such financing and to pay applicable original fees or points. If a written mortgage commitment is not received in thirty (30) days, or any agreed upon extensions, either party may cancel this contract."

The buyer applied for mortgage financing and received a written commitment subject to a number of terms. One required that the buyer verify "the funds available for closing and provide an executed HUD-1, or equivalent closing statement, respecting the sale of any property that is a source of such funds." One of the buyers owned a house, and the other buyer owned another. The sale of both properties was needed to provide the closing funds. Although the court's opinion isn't completely clear on the point, it seems that both properties were in negotiation at the time of the mortgage commitment, but later fell out of contract. About six weeks after the lender issued the commitment, it advised the buyers, by letter, "that the mortgage commitment was cancelled because it was unable to verify account balances [due to the fact that the properties in question had not been sold]. The buyers sought return of their deposit but the seller refused.

A complicating factor was the fact that sellers were not aware of the "sale of home" contingency in the original commitment. Sale of these properties was apparently not a contingency in the sale agreement. Both sides were represented by counsel, but buyer's counsel had faxed to seller's counsel only the first page of the mortgage commitment, referring to conditions in an 'attached rider." The rider had three pages of conditions, including that the buyer's existing properties be sold within a set time. Sellers were unaware of that. They sued buyers' counsel for fraud (later amended to negligence) and sued their own counsel for malpractice (which they settled.)

The trial court awarded summary judgment in favor of the buyers, but the case went to trial on the negligence claim against buyers' attorney. The jury found that buyers' attorney's negligence caused them 10% of their damages and awarded them that amount. Sellers appealed the award of summary judgment to the buyers and the court here affirmed.

According to prior case law, where a buyer "[has] not obtained a firm commitment for a mortgage loan, [it is] entitled to cancel the contract and a return of [its] deposit." The principle is that "if a mortgage commitment includes conditions over which the borrowers have no control, the commitment is less than 'firm.' ... A contract requiring buyers to obtain a "firm commitment 'is one in which the buyers intend to be bound' only if they could secure a mortgage commitment with contingencies they had the power to fulfill.'"

The court, without saying so, apparently concluded that the contingency here required a "firm" commitment, although the word "firm" appeared in the contingency clauses in the authority on which the court relied. The court's conclusion meant that the contract for this particular real estate transaction "was expressly

contingent upon [the buyers] obtaining mortgage financing. The agreement required [the buyers] to immediately apply for the mortgage. It also provided that either the buyers or the sellers could cancel the contract if a written mortgage commitment was not received within 30 days of the signing of the agreement.

The seller noted that the buyers did not exercise their right to withdraw within the thirty days provided for obtaining the commitment. The Appellate Division disagreed that this was a requirement in the clause, finding that "the contract gave the parties the right to terminate in the event the buyers did not obtain their mortgage commitment within 30 days of the date of the agreement. Although [the buyers] received a mortgage commitment within the required time frame, the commitment was subject to a contingency that plainly was beyond their sole ability to fill." Most importantly, "the contract did not expressly require that [the buyer cancel the agreement] within the 30-day period for obtaining a commitment." The Appellate Division was "convinced that such a conclusion accord[ed] with the apparent intention of the parties to [the] agreement."

Comment 1: New Jersey lawyers have been telling DIRT repeatedly that the New Jersey custom of using lawyers to close residential transactions avoids problems and protects the parties. Well, New Jersey lawyers – what the heck happened here??

First, the parties apparently operated under a contract which the court interprets as completely open ended as to when the buyers could withdraw many weeks after they knew of the facts permitting such withdrawal. This is an unsatisfactory outcome and either results from poor interpretation by the courts or poor drafting by the lawyers, or both.

Second, the sellers also had the right to withdraw if the necessary commitment had not been received, but they were not informed of the conditional nature of the commitment. We don't know the terms of their settlement with their own lawyer, nor how much they knew about the buyers' circumstances concerning the sale of their home, but the fact that they got some recovery from buyers' counsel suggests that they didn't know much. The 10% finding is certainly curious. When is it acceptable to transmit only one page of a four page conditional commitment?

If, as may very well be the case, the sellers' lawyer knew that the buyers had to sell their existing home to qualify, and knew as well that the sellers were not willing to accept the sale of the home as a contingency to the contract, sellers' lawyer should have been alert to all the problems that arose here.

If the sellers, and not their counsel, had to bear the cost of this appeal, there's injustice here. Let's hope the settlement protected the sellers from their loss.

Comment 2: But let's leave some blame for the court. The court's interpretation of the contract that the buyers could invoke the financing contingency any time they wanted before closing is nonsensical. Under the facts, however, the buyers actually behaved more rationally than the court would have required, and they withdrew immediately upon being notified by their lender that it was no longer willing to wait for them to sell their other properties. That might be a sensible accommodation of the problem for the parties, given the original commitment, but the sellers never had a chance to make such accommodation – they were apparently left in the dark.

Also see: Meyers v. Kayhoe, 2006 Westlaw 300447 (Md. App. 2/08/06) (Buyer's statement to buyers' own agent that "the loan is in place. We're good to go," is not a waiver of buyers' right to rely upon financing contingency when in fact buyer was lying- their application had been refused and there was no loan. There was no evidence that agent transmitted that statement to sellers. Further, buyers had no obligation apply to another lender, although evidence suggests that they may have qualified with another lender. Contract stated that "Buyer agrees to make written application [for financing] within five days ...]. Such requirement is satisfied by one application, as it is reasonable to read in the article "a" before "written application. Court notes that the language of the contract is dispositive, and cites, but refuses to apply, cases where there is only a good faith obligation to seek financing and buyer was held responsible to make more than one application.

VENDOR/PURCHASER; CONTINGENCIES; FINANCING: Where loan requires that buyers' make "written application" within five days of signing contract for financing to fulfill financing contingency in contract, such duty is satisfied when buyers make only one such application, even though evidence shows that other

lenders might have loaned the money. ***Meyers v. Kayhoe, 2006 Westlaw 300447 (Md. App. 2/08/06)***

The Court noted that the language of the contract was dispositive, and cited, but refused to apply, cases where there was only a good faith obligation to seek financing and buyer was held responsible to make more than one application.

Comment: The case is correct. There were only five days allowed to make a loan application. The buyers made one application in good faith to a lender with which they already were dealing. The lender rejected the appraisal on the property to be purchased. Brokers offered to help by introducing them to a broker related mortgage broker that might have been more generous, but they first rejection did not come until the original five days had expired. This is quite normal. With a five day window, it would be foolish to assume that the parties expected that more than only application would occur. The older cases mentioned by the court likely do not involve the huge application fees and other problem commonly associated with modern loan application.

VENDOR/PURCHASER; CONTINGENCIES; FINANCING: Buyer does not waive financing contingency when, after lender had rejected the loan application, buyer tells buyer's broker that "loan is in place" where there is no evidence that such comment was transmitted to sellers. ***Meyers v. Kayhoe, 2006 Westlaw 300447 (Md. App. 2/08/06)***

Comment: A bizarre state of facts, of course. Why would the buyer lie, especially when, later the buyer elected to stand on the financing clause? But in this case the buyers' were the beneficiaries of the new agency laws, which permitted them to look to the broker with whom they communicated as their own agent. Not long ago, all brokers were agents or subagents of sellers.

VENDOR/PURCHASER; MERGER; POST CLOSING ESCROW: A post closing escrow, whereby seller deposits a sum that may be forfeited to buyer if seller does not complete certain contractual obligations, does not substitute for the original contract obligation of the seller to perform those activities, as the sale agreement does not "merge" into the escrow agreement. ***Wallace v. Bock, 620 S.E. 2d 820 (Ga. 2005)***.

Bock Homes contracted to sell a new home to Wallace. At closing on October 3, 1994, Wallace contended that a number of construction items were not completed, and Bock agreed to leave in escrow $10,000, which would be paid to Bock only if Bock completed these items and submitted a "clear inspection" into escrow by October 14, 1994.

Bock never submitted the clear inspection, but buyers later learned (in early November) that the escrow agent erroneously paid the money over to Bock anyway. They demanded that Bock complete the work, but Bock never did.

Six years and a day follow the original closing (on October 4, 2000) Wallace sued Bock for damages for failure to complete the construction items in question. The applicable statute of limitations was six years.

Bock contended first that the escrow agreement constituted a modification of the sale agreement and that, through the doctrine of merger, replaced the sale agreement with respect to the question of its obligation to complete the construction. Since Bock had no duties under the escrow agreement other than to agree to the deposit of the $10,000, it had not breached the escrow. (There was a separate claim against the escrow agent, not contested on this appeal.) The Court of Appeals liked this argument, and found for Bock.

On Wallace's appeal: *Held: Reversed.*

The Georgia Supreme Court held that the escrow agreement was merely supplemental to the original agreement. It was not a complete agreement, and there was no evidence that the parties intended that it displace the terms of the original agreement.

As to the statute of limitations (the alternate basis for a finding for Bock in the trial court), the Supreme Court held that the statute had not run on the contract breach because the contract had been extended by the escrow agreement until October 14. Bock was not entitled to final payment as required in the contract until that date and, as indicated, the original agreement remained in place except for this extension and the method of supporting final payment.

Comment 1: Talk about a long grudge – six years of waiting and then two appeals to get satisfaction on what

appears to have been a $10,000 claim. It is probable that the contract provided for attorney's fees, so that the buyer, once having sued, elected to keep appealing in order to avoid an attorney's fee judgment for Bock.

Comment 2: Although the editor understands the notion that the escrow did not displace the whole contract, didn't it amount to a liquidation of the damages claim based upon the construction items? If Bock fails to complete, buyers get $10,000 back from the closing. They didn't get the $10,000 back, but that is a matter for them to sue the escrow agent (there was a settlement). Do they really have a right to general damages now? The court doesn't tell us for sure, but it does appear that this is the case. That seems to discredit the parties' actions in creating the escrow agreement as the means of resolving their dispute.

Comment 3: Further, isn't there more to Court of Appeals' opinion than the Supreme Court credits? The Court of Appeals admits that other actions might have been appropriate against Bock, such as conversion of the $10,000, but it concluded that the parties had intentionally created the escrow agreement as a final resolution of the question of Bock's liability for failure to complete. In fact, it is unlikely that Bock would have agreed to close if the buyers were holding out the possibility that they would sue for general damages based on the incomplete items.

Comment 4: Here are the comments of University of Georgia law prof Jim Smith, who is the current author of the Friedman on Contracts and Conveyances of Real Property treatise:

I agree with you (comment 2) that according to the supreme court's opinion the buyers appear to have a right to "general damages" which, as far as we can tell, is not offset by either 10k or the amount the buyers received in settlement from the escrow agent (which may equal 10k but who knows?). The supreme court is wrong here as a general matter — the buyers would be overcompensated. If the escrow agent were still in the litigation as a defendant, its liability and Bock's liability have to be considered together to figure how much the buyers may collect (just like defendants who are jointly and severally liable for a wrong). I know nothing about special rules of procedure/damages that apply when one defendant settles (is this covered by the settlement agreement?), so maybe the court is right due to the fact of settlement.

It's hard to tell whether the parties intended the 10k as the limit to Bock's duty to complete the house (what you describe in comment 2 as "liquidated damages" approach), or whether they intended that the retention of the 10k merely secured Bock's obligation to finish (what the supreme court believes). The parts of the escrow agreement quoted by the Court of Appeals suggests the former (this is your slant), but without the whole agreement to read, it's hard to tell. If I had to justify the supreme court opinion, my argument is that in case of doubt or ambiguity, an escrow agreement for repairs/completion should be interpreted as security and not on a cap. It's too hard for homebuyers to know whether they've picked a realistic sum.

For a complicated transaction, you'd have to hire an independent expert to decide what is will really cost to fix the problems.

VENDOR/PURCHASER; SPECIFIC PERFORMANCE; HARDSHIP: Although normally a land contract purchaser is entitled to specific performance in the event of a seller breach, a court need not enforce a contract in a way that would advance injustice or cause hardship, so it need not order specific performance for the sale of a home where a resident seller has become seriously ill, and will leave the affected buyer with an action for damages. ***Kilarjian v. Vastola, 379 N.J. Super. 277, 877 A.2d 372 (N.J. Super. 2004)***

Homeowners entered into a contract for the sale of their property. The closing date was scheduled for June 15, 2004. On June 14, the seller's attorney wrote the buyer's attorney stating that the seller could not convey title. On June 15, the buyers' attorney sent a time of the essence letter, setting a closing date of June 25. The sellers were still unwilling to close. The contract did not have a liquidated damages clause or any other guide in the event the seller chose not to close. The buyers sued for specific performance. They also sought to be paid damages for financing costs incurred because of the delay.

The sellers argued that they intended to move out of their home, but then the wife's spinal muscular atrophy began to accelerate. They provided the court with a letter from their doctor, describing the illness, which had neither a cure nor an effective treatment. The doctor explained that the wife had become profoundly disabled and required help with all daily activities. The doctor also expressed concern that the proposed move would precipitate

respiratory failure and could lead to the wife's death. That is why the sellers claimed that they could not fulfill the contract. They argued that when they entered into the contract, the wife was able to care for herself and was able to walk with braces, but by the time of the suit, she was confined to her wheelchair or her bed. The sellers also contended that the buyers were aware of the wife's deteriorating condition when the contract was signed and had ample time to find another home. Furthermore, they argued that they should not be responsible for any increase in mortgage rates since they were in fact lower than the rates the buyers had originally committed to pay.

The Court first held that since the buyers had properly made time of the essence and closing did not take place by the date indicated, they may have been entitled to specific performance. It pointed out, however, that a contract's enforcement must not advance injustice or hardship. For that reason, the Court refused to evict the sellers because the wife's health had deteriorated so badly while the contract was pending, and they wished nothing more than to remain in her home during the most difficult days of her illness. Accordingly, the Court found that the sellers would suffer great hardship if the contract was enforced, and specific performance was not the appropriate remedy in this case.

Although the Court denied the buyers' claim for specific performance, it ordered the buyers to submit documentation as to the interest rates on a subsequent mortgage if in fact the buyers went out and bought another property financed at a higher rate so that the Court could award those costs accordingly.

Comment: In addition to the difference in interest rates, the buyers, of course, might have a claim if they had to pay more for an equivalent residence and other incidental costs.

VENDOR/PURCHASER; SPECIFIC PERFORMANCE; LEGAL DESCRIPTION: Where exhibits referenced in a purchase and sales agreement for real property contain a legal description that has different acreage and different land lots than what is referenced in the Agreement, the door is not opened to extrinsic evidence to allow specific performance to be granted because the property is not clearly identified, but an action for promissory estoppel and negligent misrepresentation is not barred. ***Hendon Properties, LLC v. Cinema Development, LLC, 2005 WL 2156597 (Ga. App., September 8, 2005).***

Purchaser entered into an agreement to purchase property from Seller (the "Agreement"). Seller was required to perform certain site work prior to closing under the contract and Purchaser was required to contribute towards the site work costs. Purchaser brought suit for breach of contract for preventing the closing by failing to perform the site work in accordance with the requirements of the Agreement. Purchaser sought specific performance or, alternatively, damages on theories of breach of contract, promissory estoppel, or negligent misrepresentation. The Superior Court granted Seller's motion to dismiss all claims.

The Court held that the Agreement was unenforceable due to its failure to provide an adequate description of the property. To satisfy the Statute of Frauds, a contract for sale of land must contain a description of the land with reasonable definiteness or contain a key by the use of which the description may be applied by extrinsic evidence. However, in this case, the exhibits referenced in the Agreement were different acreage and in different land lots than the one referred to in the Agreement. The Court concluded that the Agreement was not legally enforceable and Purchaser could not maintain a claim for specific performance or breach of contract.

However, the Court held that the claims for promissory estoppel and negligent misrepresentation were not barred by the absence of a legally enforceable agreement between the parties.

WATERS AND WATER RIGHTS; TRANSFER: Absent express language to the contrary, a deed conveying property automatically transfers all of the grantor's appurtenant property rights, including riparian rights, even when the grantor is unaware of the existence of such rights and therefore had no specific intent to convey them. ***Panetta v. Equity One, Inc., 378 N.J. Super. 298, 875 A.2d 991 (App. Div. 2005); June 15, 2005.*** . discussed under the heading: "Deeds; Appurtenances; Riparian Rights."

WORDS AND PHRASES: "FENCE:" An artificially created sand dune berm may be a "fence;" therefore, a servitude restricting fences can be applied to a berm even if the berm serves some other primary purpose. ***Bubis v. Kassin, 184 N.J. 612, 878 A.2d 815 (2005); August 10, 2005.***

WORDS AND PHRASES; "SALE:" Settlement with condemning authority under threat of condemnation is not a "sale" within meaning of lease clause executed by condemnee providing that lease may be terminated by landlord in the event of a "sale" to a party who does not wish to continue the lease. ***Eller Media Co. v. Mississippi Transportation Commission, 900 So. 2d 1156 (Miss. 2005)***, discussed under the heading: "Eminent Domain; Leases; Termination on Condemnation."

WORDS AND PHRASES; "STORIES:" When working with redevelopment of blighted areas, a planning board is entitled to adopt a contrary view of what constitutes a "story" within a building than what is expressed in the municipality's zoning ordinance. ***First Montclair Partner, L.P. v. Herod Redevelopment I, L.L.C., 381 N.J. Super. 298, 885 A.2d 952 (App. Div. 2005); November 15, 2005.*** At issue was an interpretation in of the redevelopment plan, which fixed both a maximum height limitation and a certain number of stories in limiting building size. The redevelopment agency had approved a building with a level of underground parking. Under the municipal building ordinance, underground parking levels were considered to be "stories" within the meaning of that ordinance. But the court here held that the agency apparently did not view the underground parking in the approved structure as a "story" and was not required to do so, even though its own ordinance limited buildings to a certain number of "stories" and did not itself define the term "story."

WORDS AND PHRASES; "STRUCTURE:" A "driveway" is a structure within the common meaning of that term as well as the meaning of the covenants even though a driveway was not specifically referenced in the section regarding the construction or alteration of structures. ***Mitchell v. Cambridge Property Owners Ass'n, Inc., 2005 WL 2292367 (Ga.App., September 21, 2005).***

WORDS AND PHRASES; "STRUCTURE:" A billboard is a "structure" within meaning of statute providing that structures on condemned land are to be separately compensated.. ***Eller Media Co. v. Mississippi Transportation Commission, 900 So. 2d 1156 (Miss. 2005)***, discussed under the heading: "Eminent Domain; Leases; Termination on Condemnation."

ZONING AND LAND USE; PROCEDURE; SUBDIVISIONS; MODIFICATIONS OF APPROVED PLANS: When changes are proposed to a previously approved conservation cluster development, those changes, if substantial, may not be treated as minor amendments to a prior special permit, but rather require analysis under the standard of review given to special permit applications. ***Barlow v. Planning Board of Wayland, 832 N.E. 2d 1161, 64 Mass. App. Ct. 314 (2005).***

In 1992, the Wayland Planning Board approved plaintiffs' plan for a conservation cluster development (CCD). The CCD depicted approximate locations of houses, septic systems, wetlands buffer zones and driveways. The instant case related to one of the lots in the CCD, Lot 20. In its decision, the Planning Board included a provision applicable only to Lot 20 which said that the septic system for this lot would be allowed within the buffer zone of the wetlands only if no other location on the lot proved suitable. In 1999, the Massachusetts Department of Environmental Protection redrew the wetlands boundary on Lot 20, so plaintiffs revised the plan of where the house and septic system for Lot 20 would be located and submitted that revised plan to the Planning Board for approval. The Planning Board rejected two versions of the revised plans and plaintiffs appealed to the Land Court. The Land Court upheld the Planning Board and plaintiffs appealed.

ZONING AND LAND USE; DOWNZONING; VALIDITY: Even though a zoning ordinance is entitled to a presumption of validity, a property owner may overcome this presumption by showing that the ordinance is clearly arbitrary, capricious, unreasonable or plainly contrary to fundamental principles of zoning or the zoning statute, and the ultimate question is whether the ordinance's requirements are reasonable under the circumstances. ***Bailes v. Township of East Brunswick, A-2132-03T5 (N.J. Super. App. Div. 2005); September 22, 2005.***

A number of property owners in a municipality "challenge[d] the validity of zoning ordinances that downzoned the permitted densities in the district in which their properties [were] located from one unit per acre or per two acres to one unit per six acres, with cluster options ranging from one unit per three acres to one unit per three-and-half acres."

The municipality had experienced significant growth since World War II. Most of the municipality, especially where the properties in question were located, was "densely populated and built-out close to full capacity," dominantly with single family residences.

The particular district was designated as a rural preservation zone and was less densely developed than the rest of the municipality. Until 1999, the municipality "permitted residential and other development ... at substantially greater densities" than was permitted under the challenged ordinances. At first, the lower court "granted a preliminary injunction enjoining [the municipality] from enforcing [the 1999] ordinances." In 2001, the municipality adopted two superceding ordinances that "retained the six-acre zoning adopted in 1999 but increased the densities permitted under a number of cluster options." A great deal of testimony was taken over five days and then the lower court concluded "that the 2001 ordinances rezoning the area in which [the complaining owners'] properties [were] located [were] valid" and dismissed the complaints. It did not make any express credibility findings and failed to make "express findings regarding the factual issues addressed by the experts, such as the existence of environmental constraints on development or the economic feasibility of farming on [the complaining property owners'] properties." The property owners appealed dismissal of their complaints.

On appeal, the Court concluded that, as applied to the particular properties, the district's restriction of development to one unit per six acres [was] not required to serve the stated purposes of the ordinances and [did] not reasonably conform with the character of existing development in the area and [was] therefore arbitrary and unreasonable." In reaching its conclusion, the Appellate Division needed to make "such findings of fact as [were] necessary to bring this litigation to a conclusion."

"Under the Municipal Land Use Law (MLUL), ..., a zoning ordinance must be 'drawn with reasonable consideration to the character of each district and its peculiar suitability for particular uses and to encourage the most appropriate use of land.' ... In addition, the zoning must be 'uniform throughout each district for each class or kind of buildings or other structures or uses of land.'" Even though a zoning ordinance is entitled to a "presumption of validity," a property owner may overcome this presumption by showing that the ordinance is clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the [zoning] statute." Ultimately, the question in any challenge to the validity of a zoning ordinance "is whether the requirements of the ordinance are reasonable under the circumstances."

The municipality argued that the 2001 zoning ordinances advanced "various purposes of the MLUL." The Court, however, pointed out that "even if a zoning ordinance advances one or more purposes of the MLUL, the ordinance will be invalidated if the restrictions it imposes on the use of land are not 'reasonably related to those purposes' or 'conflict[] with other purposes of the MLUL." With that in mind, the Court concluded that the municipality had not shown that "the limitation of development to one unit per six acres or, where a cluster option may be utilized, one unit per three or three-and-half acres [was] required to serve the stated purposes of the 2001 zoning ordinance's ... recognition of environmental constraints, retention of farmland and conservation of open space – at least as applied to [these particular] properties. [The Court] also conclude[d] that [the] severe downsizing of [these particular] properties did not reflect 'reasonable consideration [of] the character 'of the areas surrounding [these particular] properties and therefore violate[d] the MLUL.'"

The majority of the properties were "not located in areas served by public sewers," but appeared to be suitable for septic tanks on one- or two-acre lots. Any evidence to the contrary put forth by the municipality during the lower court's trial was insufficient to show that septic systems would not be suitable. Further, even though some of the properties were located "in areas of high aquifer recharge," the record indicated "that the aquifer [could] be adequately protected by development on one-and two-acre lots." The Court proceeded with an extensive analysis of all of the factors, almost on a lot by lot basis, finding, as a matter of fact, that the properties were developable without the downsizing that the ordinance would have called for and that the municipality had not given proper consideration to existing development in the area.

Comment: Note that this was not a "takings" challenge, but rather a challenge to the very validity of the zoning decision itself – certainly a difficult uphill battle for any landowner, especially in land use prone New Jersey. But "too much is too much." And here the city simply overreached.

ZONING AND LAND USE; URBAN RENEWAL; " BLIGHT:" In reviewing a municipality's designation of areas in need of development, the court limits its review to a determination of whether there existed substantial evidence to support a declaration that an area was in need of such redevelopment, but even by that standard, court may reverse the municipality's determination. . ***ERETC, L.L.C. v. City of Perth Amboy, 381 N.J. Super. 268, 885 A.2d 512 (App. Div. 2005)***

A municipal governing body "adopted a resolution directing [its] Planning Board to conduct a preliminary investigation of underutilized areas in designated sections of the [municipality] to determine whether those areas were in need of redevelopment." It further authorized its planning board "to prepare a redevelopment plan for those designated areas."

The owner of a light manufacturing building owned a property in such a designated proposed redevelopment area. It used part of its building for its own business and rented the remainder to commercial tenants. The building was in good condition and was about two-thirds occupied. About 345 people were employed in the building, many of whom lived within a five to eight mile radius. The owner participated in the planning board's hearings, resisting inclusion in the area. When the owner did not prevail at the political stage, the owner filed an action in lieu of prerogative writ challenging its property's inclusion in the proposed zone.

The owner pointed to the building's occupancy, its good condition, its freedom from code violation citations, and the recent capital investments made by it and its tenants to the property. The planning board had relied on an expert's report that "merely recited the criteria [in determining whether an area was blighted] in a conclusionary fashion without tying it to the reasons the property should be included in the redevelopment area." The municipality's planning expert, however, claimed that the information contained in his report was derived from his physical inspection of each site within [the designated area]. He [claimed to have] inspected the buildings from the outside, contacted the tax assessor's office to determine whether there were any outstanding tax liens, and contacted the code enforcement office to determine whether there were any outstanding violations on any buildings in the area. He acknowledged that there were no tax liens or building violations for [this particular] property. He never inspected the interior of the buildings, however, and did not know whether any indoor improvements had been made."

The lower court "commented that '[m]unicipalities, at times, have dreams of grandeur and have high hopes of converting those dreams into reality' but [the court] recognized that 'when that dream encompasses such a large area it takes years, many years, to come to fruition, it all. When the area gets painted with too broad a brush, the impact of such decisions sometimes has the opposite effect. As in this case, an affected property owner may have difficulty in renting its facility because of the declaration of rehabilitation.'" The lower court also noted that "[w]hen the [particular property owner] bought the subject property it was 100% occupied; at the time of trial, occupancy was only 65%." Nonetheless, the lower court held that "if the redevelopment project proceeds, 'the property owner's 'damages can be considered at the time of the eminent domain proceeding. Of course[,] the problem arises when the municipality never elects to bring its dream to fruition.'"

On appeal, the Appellate Division held that the lower court "correctly applied the deferential standard in considering the municipality's actions, limiting judicial review to a determination of 'whether there existed substantial evidence to support a declaration that an area was in need of redevelopment.'" It also pointed out that in such matters, "redevelopment designations, like all municipal actions, are vested with a presumption of validity. ... It has long been recognized that 'community redevelopment is a modern part of municipal government.' ... Thus, judicial review of a redevelopment designation is limited solely to whether the designation is supported by substantial evidence." Under the redevelopment law, an area may be designated "as in need of redevelopment if 'any' of the 'conditions' enumerated therein [were] found." The applicable statute provides that if any of six conditions are found, the area may be designated as one in need of redevelopment. Those factors include: (a) the generality of the buildings being substandard, unsafe, unsanitary, dilapidated, or obsolescent; (b) the discontinuance of the use of buildings previously used for commercial, manufacturing, or industrial purposes, or the abandonment of the same; ©) land owned by a government agency that has remained so for ten years prior to the adoption of the resolution, and "that by reason of its location, remoteness, lack of means of access to developed sections or portions of the municipality, or topography," etc. are not likely to be

developed through private capital; (d) areas generally with dilapidated, obsolete, overcrowded or faulty buildings; (e) "[a] growing lack or total lack of proper utilization of areas"; or (f) areas over five contiguous acres with buildings and improvements that have been destroyed by fire or similar peril.

With that as the criteria Appellate Division found that there was insufficient evidence to sustain a finding that the properties included in the designated area met the criteria set forth in New Jersey's redevelopment law. Consequently, without such substantial evidence, the municipality's decision to designate the area "as in need of redevelopment [did] not enjoy the deference generally accorded such findings." Therefore, the Court reversed and remanded the matter to the planning board for reconsideration in light of the criteria set forth by the Court and the evidence required to satisfy those criteria.

Plaintiffs contend that the revised plan was merely a modification of the prior approved CCD special permit. While plaintiffs viewed the changes as minor, the appeals court found that because the footprint of the building increased in size and because the locations of the dwelling and septic systems changed, the changes were of substance. Substantial changes, then, are not entitled to approval as of right, but rather must undergo discretionary review because "a permit granting authority may not …reserve to itself for future decision, the determination of an issue of substance." *Tebo v. Board of Appeals of Shrewsbury,* 22 Mass. App. Ct. 618, 624 (1986). In other words, the 1992 approval of the CCD that also required review of the building plans for each lot could not be modified without discretionary review if substantial alterations to a lot were proposed. Thus, the Land Court's decision to uphold the Planning Board's use of its discretionary power was upheld.

Plaintiffs also claimed that, were the Planning Board correct to impose special permit review standards on the revised plans, that Board improperly applied those standards and thus its decision was arbitrary, capricious or based on legally untenable grounds. The Appeals court disagreed, holding that even if the record before the Board revealed that the special permit could be lawfully granted, the Board retained discretionary authority to the deny a special permit application as long as the denial is not arbitrary, capricious or based on a legally untenable ground. Here, the Planning Board based its denial of the revised plan on, among others, the fact that the septic system was going to be located in a different location than that depicted on the initial 1992 CCD application plan and the fact that the revised septic system location was going to be located within the wetlands buffer zone. For these reasons, the Appeals court held that Land Court correctly found that the Planning Board's decision was proper and that the correct standard of review had been applied.

ZONING AND LAND USE; VARIANCES; ESTOPPEL: Under the doctrine of judicial estoppel, a person cannot successfully obtain site plan approval for a specific use of a property, and later apply for a use variance based on another use. ***Bray v. Cape May City Zoning Board of Adjustment, 378 N.J. Super. 160, 875 A.2d 254 (App. Div. 2005), June 16, 2005.***

A husband and wife owned property that contained an historic building. The couple applied to the municipal planning board for site plan approval to use the building as a guest house. The proposed guest home was to consist of twenty-three guestrooms, and part of the home would be used as the owner's living quarters. Guest homes were permitted under the applicable zoning ordinance, but hotels were not. The couple repeatedly assured the board that the building would only be used as a guest home and not as a hotel, and based on this representation, the board granted the couple's application.

Shortly thereafter the couple applied to the municipal planning board for approval of revisions to their site plan. The couple sought to revise the plan in order to add a kitchen to the basement. The kitchen would be used by the couple to serve their guests breakfast and lunch. The planning board approved the revised site plan.

The couple then wanted to open their dining facilities to the public as a restaurant. Instead of applying for a use variance, the couple requested that the municipal solicitor issue an opinion stating that a use variance was not required because the couple's business was a hotel, and a restaurant is an accessory use to a hotel. The opinion request was referred to the municipal planning and zoning boards, both of whom rejected the couple's assertion that the facility was a hotel. The municipal zoning officer advised the couple that they were required to obtain a use variance to operate a restaurant. The couple appealed the officer's decision to the zoning board. The zoning board concluded that the couple could

not operate a restaurant on the premises without obtaining a use variance, and the couple filed a complaint in lieu of prerogative writs challenging the board's decision.

The Court affirmed the zoning board's determination based on the doctrine of judicial estoppel. Judicial estoppel bars a party who has successfully asserted a position before a court or other tribunal from asserting an inconsistent position in the same or subsequent proceeding. The court held that although the doctrine is often applied in judicial proceedings, it is also applicable in administrative proceeding such as in the present case. It ruled that the couple was barred from asserting that their facility was a hotel for purposes of operating a restaurant because the they had already successfully asserted that it was a guest house to obtain site plan approval. It further ruled that the couple was estopped from contending that the building was a hotel because such use would be impermissible under the local zoning ordinance. As a result, the Court affirmed the zoning board's decision that the facility was not a hotel which required the couple to apply for a use variance to operate a restaurant on the property.

Comment: Given the relatively short time line, this is an unsurprising result, and the only surprise really is that counsel for the applicants thought that it had a case worth appealing. Perhaps there is more to the issues than was revealed in the case.

But there is a lesson here that those advising applicants for land use permissions need to keep in mind – don't oversell or overpromise. Times change, but promises made in public hearings often are remembered..