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Sponsoror:
Section of Real Property
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Quarterly Report on Current Developments in Real Estate Law

April 1, 2006 to June 30, 2006

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Probate & Trust Law
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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. Members of the Committee 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.

The editors hope to provide a comprehensive review of significant new developments, but obviously they cannot warrant that every new case is reported. Further, readers should be aware that the editors specifically eliminate from coverage cases that are of interest primarily to lawyers within a given state. Thus, significant interpretations of state statutes or constitutions, even if of critical importance to local practitioners, may not appear in the Report. Readers should rely upon update services provided by state or local sources to stay current on such developments.

The editor of the Report alone controls the content of the case reports section 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 and, accordingly, should not be construed as representing the policy of the American Bar Association. Similarly, they are not the view of the Section of Real Property, Probate & Trust Law.

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ADVERSE POSSESSION/; PUBLIC LANDS: Holding of land by the Boston Redevelopment Authority for urban renewal purposes is a "public purpose" within the meaning of the Massachusetts statute governing the Commonwealth's land recovery rights, and as such, excludes the property from adverse possession claims by private claimants. ***Aaron v. Boston Redevelopment Auth., 850 N.E.2d 1105 (Mass.App.Ct. 2006).***

This case concerns a parcel of land taken by eminent domain and held by the Boston Redevelopment Authority ("BRA") for nearly forty years as part of a plan approved pursuant to the Massachusetts statute governing urban renewal and housing development.

Ultimately, BRA proposed to sell the parcel for construction of a residential building, and a developer was designated. Plaintiff Aaron, the owner of an abutting parcel, sought a judicial declaration that she had established a prescriptive easement over part of the BRA parcel by virtue of her open and adverse use of it as a driveway serving the rear of her parcel. The Land Court granted BRA's motion for summary judgment, and Aaron appealed.

At issue was whether the holding of the land by BRA for urban renewal purposes constituted an "other public purpose" within the meaning of M.G.L. c.260 § 31, the statute governing land recovery actions by the Commonwealth. Under that statute, the Commonwealth may bring an action to recover land within twenty years of the adverse acts necessitating the land recovery action against the party claiming right by adverse possession. In short, there is a twenty year adverse possession period that can run against public land in favor of private adverse users.

The statute, however, provides an exception for land held for "conservation, open space, parks, recreation, water protection, wildlife protection, or other public purposes," which land the Commonwealth has a right to recover at all times. Without reaching the merits of plaintiff's adverse possession claim, the Court held that urban renewal and redevelopment purposes were "other public purposes" within the meaning of the statute, and thus, plaintiff's claim could not be sustained against the Commonwealth's superior right.

In reaching its holding, the Court cited the legislative history of the urban renewal statute as well as prior cases in which the Supreme Judicial Court had recognized urban renewal as an important public purpose. The Court went on to reject plaintiff's contention that, under principles of statutory construction, the term "public

purpose" should be more narrowly construed as applying to only those purposes similar in nature to those enumerated in the statute. Noting that urban renewal concerns "the environment and surroundings in which the people of the Commonwealth live," the Court found that urban renewal is consonant with the other purposes specified in the statute. Accordingly, the Court affirmed.

Comment 1: This case is consistent with the law in many jurisdictions that carves out an exception for adverse possession against public land when that land is held for "governmental" purposes. Although one might dispute whether land held idle for forty years with an ultimate plan to turn it over for private development in fact is "governmental," it is not a bit surprising that the court concluded that it was sufficiently "governmental" to invoke the "public purpose" exception, especially when it was embodied in the statute.

Comment 2: Some jurisdictions, as a matter of common law, protect all publicly owned property. Others, as suggested, will not protect from adverse possession claimants property owned by the public in its proprietary capacity. Quintessential "proprietary" land is property acquired through tax foreclosure or for other debt collection purposes.

ADVERSE POSSESSION; REQUIREMENT OF ACTUAL POSSESSION: Even where the continuity, notoriety, and intensity of activity would have been sufficient to establish a claim of adverse possession on a wild or wooded area, a claim for adverse possession with respect to an individual lot will fail unless such activity is shown to have been conducted specifically on such lot. ***Conte v. Marine Lumber Company, Inc., 848 N.E.2d 1246 (Mass. App. Ct. 2006).***

Marine Lumber filed a complaint for a bill to quiet title to lot 5, a one-half acre lot within a portion of a 17-acre tract of land in the town of Nantucket. Catherine E. Conte, as trustee for the Cassidy Family Trust ("the trust"), filed a separate action requesting a declaratory judgment that the trust, grantee of a quitclaim deed for lot 5 from Blackfin, was the beneficial owner of an undivided one half-interest in lot 5. The two actions were consolidated.

Marine Lumber offered three arguments to substantiate its claim of title. First, Marine Lumber argued that it held a valid claim of title tracing back to an adverse possessor. As to a wild or wooded area, the general rule is that a finding of adverse use will not succeed if the area is unenclosed or uncultivated. Gilbert Burchell, to whose interest Marine Lumber eventually succeeded, had allegedly stripped trees, buried rubbish, and planted rye grass in a seven acre area encompassing lot 5, continually from 1939 to 1961.

The Court of Appeals found insufficient evidence, however, to establish that the activities were conducted on lot 5 specifically, as opposed to other areas of the registration parcel, and it rejected the adverse possession claim. The Massachusetts rule is that, as to wild and unfenced land, claimants must show actual possession of the specific areas claimed. The trial court found that the evidence of Burchell's activities specifically on lot 5 were insufficient.

Marine Lumber based its second argument on the doctrine of estoppel by deed. The opponents countered that Marine Lumber deed (from a successor in interest to the adverse possessor) was a quitclaim deed in lieu of foreclosure. The court acknowledge that the doctrine of estoppel may apply in the context of a quitclaim that contains "quitclaim covenants" which warrant that the grantor will not impair the title granted and will defend that title against those claiming under the grantor. Marine Lumber argued, therefore, that the quitclaim deed it received from William P. Cassidy, Jr., ("W. Cassidy") estopped W. Cassidy (who later, through various conveyances, including from Blackfin, as noted) succeeded to the ownership of lot 5, from raising any claim of actual title to lot 5 that he acquired subsequent to such conveyance.

The Court of Appeals held that the doctrine did not apply in this case because Blackfin, which in fact did represent the interest of the Cassidy family, also by separate conveyance obtained the legal title to lot 5 not from W. Cassidy, or one claiming under him, but from Norwood Farm Trust, the actual record owner. This all happened after the Cassidy quitclaim to Marine. Thus, the court reasoned, the current Cassidy trust had no obligation to confer upon Marine the title that it separately obtained from a third party as a consequence of estoppel through its quitclaim deed covenants. It represented in those covenants only an adverse possession title. Therefore, the doctrine of estoppel by deed offered Marine Lumber no protection, the Court of Appeals rejected the claim.

Finally, Marine Lumber argued that the doctrine of equitable estoppel obligated the trust to convey to it a fifty percent undivided interest in lot 5. Blackfin, Marine Lumber argued, had accepted the entire registration parcel subject to an agreement to reconvey portions of the parcel (including lot 5) back to one Mary Cassidy if the entire parcel was ever successfully registered, and such agreement now required reconveyance of that interest back to Marine Lumber. Based on the court's earlier finding that the failed claim of adverse possession extinguished any claim of interest in lot 5 made by either Marine Lumber or Mary Cassidy, the Court of Appeals rejected this third claim. The Court of Appeals affirmed the two judgments of the Land Court.

Comment: The editor includes the case for Massachusetts title mavens. Each state has different practices with respect to deed forms. The case turns to a certain extent on the meaning of a Massachusetts quitclaim deed, which is really not clear from this case, and on the special and complex series of conveyances, reconveyances, and part conveyances that form the factual background here. It is difficult to sort out a clear precedent lesson outside of Massachusetts, and perhaps outside of Nantucket.

ALTERNATIVE DISPUTE RESOLUTION; ARBITRATION; AGREEMENTS TO ARBITRATE: An arbitration clause in a real estate sales agreement compels arbitration of a contract dispute despite the fact that the contract was negotiated by an unlicensed agent of the buyers. ***Shotkoski v. Denver Investment Group, Inc., 2006 WL 408313 (Colo. App.)***

An incorporated group of investors had an agreement whereby they compensated one of their principles as a representative to negotiate contracts to purchase real estate. This representative was neither an attorney nor a broker. The group of investors and their representative became defendants in this case after purchasing a home in distress from plaintiffs (a married couple). The parties closed under the contract, and defendants acquired title to the home.

After the closing and transfer of title, but before final payment, the sellers divorced, and one of them filed a *lis pendens*. The defendants argued that this created a cloud on title, making the home impossible to sell, and withheld final payment. The sellers sought to rescind the agreement on the ground that it was wholly unenforceable because of the fact that it had been negotiated by an unlicensed representative of the buyers.

The buyers, relying on an arbitration clause in the sale agreement, made a motion to compel arbitration. Sellers claimed that the customer agreement was illegal and unenforceable, including the arbitration clause. The trial court agreed.

The appellate court reversed. It found that the validity of the agreement was separate from the question of defendants' failure to obtain a license. It followed authority in Maine and Florida, reasoning that the fact that an agreement was negotiated by an unlicensed party might be an undisclosed defect in title for subsequent purchases of the property.

The court acknowledged that sellers might nevertheless have the right to rescind the contract as a potential remedy for buyers' breach of contract, but concluded that the issue of whether buyers were in breach was one that first had to be resolved through the arbitration process.

The court also reversed the trial court's secondary finding that the negotiation of the sale contract was an unfair consumer practice under Colorado statute and could be declared void on that basis. It indicated that the statute does not apply to real estate purchases, but rather to the performance of services and the *sale* of real property. It did not make clear what the difference is between a "real estate purchase" and a "sale of property." Presumably Colorado lawyers will delve into the statute to find the answer to this one. The court went on to find that, in any event, questions of whether there was a deceptive trade practice were themselves arbitrable.

Comment 1: The editor has no quarrel with the result on these facts, but the court's reasoning, based upon precedent elsewhere, strikes the editor as a sour note. Normally, any equities that might render a contract unenforceable will not affect the validity of title passing under that contract in the hands of a third party BFP unless the defect is sufficient to render the delivery of the deed itself void, rather than voidable. There is not indication here that any defect with regard to the contract was sufficient to render the completed deed delivery totally void.

Consequently, the reasoning that the fact that the contract could not be avoided because the consequences might be

troublesome for third party BFP's doesn't really make sense. There were no such BFP's here. The buyers, one assumes, knew or should have known that their own representative was not licensed, and did not deserve protection.

Comment 2: If deceptive practices lead one to execute a contract that one might not otherwise have executed, then perhaps such victims also deserve protection from an arbitration clause contained in such a contract. The editor doesn't conclude that one should assume that the presence of an unlicensed agent necessarily renders a contract so fraudulent as to disable the arbitration clause, but he certainly can imagine that circumstances might exist that would be sufficient for such disability, and he'd hate to see this case read to prevent a court from denying arbitration in such cases. Even though many states now have policies favoring arbitration, this does not mean that parties should have it stuffed down their throats as a consequence of fraud or sharp dealing.

ALTERNATIVE DISPUTE RESOLUTION; ARBITRATION; AGREEMENTS TO ARBITRATE; "BODILY INJURY" EXCLUSION: "Bodily injury" exception in arbitration provision in standard form real estate purchase agreement" does not apply to emotional distress damages that have a physical component nor to physical ailments arguably arising as a consequence of the plaintiff's reaction to discovering that recently purchased home had significant undisclosed termite damage. ***Gravillis v. Coldwell Banker Residential Brokerage Co., 49 Cal. Rptr. 3d 531 (Cal. App. 9/29/06)***

The "bodily injury" exclusion, although it appeared in the contract, in fact was mandated by state law. The court dealt with the legislative history of the law and also examined the meaning of "bodily injury" in the context of insurance policies. The plaintiff had alleged that she developed gestational diabetes upon learning that her "dream home" was in fact wholly infested with termites and had to be virtually ripped to the ground in order to be repaired. She and her husband alleged failure to disclose the defect by brokers, among others. The trial court, after some hemming and hawing, ordered the case submitted to arbitration, and the appeals court here affirmed, notwithstanding the "bodily injury" exclusion. It ruled that the physical symptoms suffered by plaintiff were not sufficiently foreseeable as a matter of law to have been caused by the non-disclosure of the termite problems, and consequently were not caused by the non disclosure. Therefore exception did not apply.

ASSOCIATIONS; FREE SPEECH: A Planned Unit Development's governing association is the functional equivalent of a government body and cannot deprive residents of their rights to express their views on matters of public or community concern. ***Committee for a Better Twin Rivers v. Twin Rivers Homeowner's Association, 383 N.J. Super. 22, 890 A.2d 947 (App. Div. 2006),*** discussed under the heading: "Constitutional Law; Free Speech; Community Associations."

ASSOCIATIONS; FORMATION: Where developer establishes a development scheme by which common areas are to be transferred to an owner's association, but does not form such an association, individual owner may form such an association 20 years later and such association shall have ownership of common areas and assessment rights. ***Bordelon v. Homeowners Assoc. Of Lake Ramsey, Inc., 916 So. 2d 179 (La. App. 2005)***

Developer platted a subdivision in 1983, and recorded a set of CC&R's known as the "Intrepid Act." The Intrepid Act, which was stated to bind all subsequent owners of lots in the subdivision, also stated that an owner's association had been formed, "to which will be delegated the powers and duties of owning, operating, maintaining and administering the common areas, facilities and services [within the subdivision.]" The Act gave the association the right to impose charges and assessments to carry out its duties of maintaining the common areas and enforcing other restrictions.

Unfortunately, the developer did not in fact form the association and (presumably), after selling some lots, failed, and the unsold property and, presumably, the common areas, passed to a bank and thus through several other owners before it passed to a new developer in 1995. That developer imposed new CC&R's containing the same language found in the Intrepid Act.

Although some homeowners formed an "association" in 1996, it did not function as the owner's association.

Finally, in 2002, a single lot owner formed the Homeowner's Association of Lake Ramsey, HALRI, the association at issue here, and became the President. The association, as the original Act required, had as members all the owners of the association, and undertook to determine the needs of maintenance of the

common areas. It sent an assessment invoice to all homeowners and 96% of owners paid at least some of the assessment, while 82% made full payment. The association did spend $70,000, alleged to be the receipts from the assessments, on maintenance of common area property.

HALRI then undertook to build a security gate at an entrance to the subdivision, blocking public access to the lake.

Homeowners who objected to HALRI and its activities challenged its authority to act as the "official" association for the subdivision, arguing that an amendment to the Declaration (requiring 80% approval) was necessary. A trial court disagreed with them.

On appeal: *Held:* Affirmed. The association is a proper representative of the homeowners and has the right to control the common areas and levy the assessments.

The appeals court held that the subsequent actions of the new developer in republishing the original provisions of the Act indicated that the developer assented to the formation of an association, and that prior authority had held that subsequent developers themselves had the power to form associations long after the CC&R's authorizing an association had been recorded. It was a short step to conclude that the new developer implicitly authorized the formation of HALRI here.

As to the security gate, the dissidents argued that the streets within the subdivisions had been treated as public roads for twenty years, and that there was no authority in the association to block the road. Again, the court disagreed, saying that the right to maintain and administer the common areas, including the streets, included the right to install such gates.

Comment 1: This is a practical accommodation of a difficult issue. But it fails to address a number of issues that are likely to arise later. For instance: What would happen if there were dueling associations – one formed by the new developer and one formed by the homeowner? How soon after formation of the association should there be a free election, so as to avoid improper control by the parties forming the association? Is the association the "owner" of the common areas – even before any deed from the developer?

Comment 2: As a comparison, look at *Evergreen Highlands Assoc. v. West,* 73 P. 3d 1 (Colo. 2003), where the Colorado Supreme Court upheld the formation of an association that should have been authorized by the CC&R's but wasn't, holding that the existence of the various common amenities implicitly justified the creation of an assessment empowered association, and stating that it would be bound by the provisions of the Colorado version of the Uniform Common

BANKRUPTCY; AUTOMATIC STAY; MORTGAGE ASSIGNMENT: Assignment of a mortgage can be perfected without recording, and its recording thereafter does not violate the automatic stay. ***In re Cook: Rogan v. Bank One, 457 F.3d 561 (6th Cir. 2006)***, discussed under the heading: "Bankruptcy; Avoidance; Perfection."

BANKRUPTCY; AVOIDANCE; PERFECTION: Assignment of a mortgage is perfected without recording, and its recording thereafter does not violate the automatic stay. ***In re Cook: Rogan v. Bank One, 457 F.3d 561 (6th Cir. 2006)***

Cooks gave a mortgage to NCS in 2000, which was promptly recorded. A year later, NCS assigned the loan to First Greenwood, and that assignment also was promptly recorded. The same day, First Greenwood endorsed the note in blank and (apparently) delivered it and the mortgage to Lehman Brothers, who conveyed it and many other loans to Structured Assets Securities, which transferred them to Bank One as trustee as part of a "pass through" certificate – a form of mortgage securitization. Bank One took possession of the note, but no assignment was recorded at that time. Cooks had filed bankruptcy in 2003, and the assignment to Bank One was not recorded until 2004.

Cooks bankruptcy trustee contended that he could "strong arm" Bank One's security interest from his position as a hypothetical judicial lien creditor. He claimed that Bank One's security interest was not perfected because the assignment had not been recorded at the time of the filing. The bankruptcy court and the district court rejected this claim, but the trustee bumbled ahead and appealed to the federal court of appeals (spending who knows how much of the estate' assets that would have been available for creditors).

The Sixth Circuit also rejected the trustee's claim. It noted that the endorsement in blank made the note bearer

paper under the applicable UCC provision. Consequently the note was negotiable by transfer of possession alone. (3-205(2)). A purchaser of an instrument who gives value and takes possession of the instrument in good faith and without knowledge that the purchase violates the right of another secured party has priority over the secured party. (9-330(4)). Consequently, Banc One's interest was perfected.

The court acknowledged that the Trust Agreement under which Lehman Brothers had conveyed the loans to Structured Assets Securities called for the mortgages to be recorded, and that no assignment had been recorded until after the debtor filed. But neither Cooks nor Bank One were parties to the Trust Agreement, and its recordation requirement was immaterial as to their interests. But the recording of the original mortgage was all that was necessary to give constructive notice to hypothetical lien creditors and others interested in Cook's property that there was a mortgage on the property. It was not necessary to record any assignment, much less that made to the trustee, in order to "perfect" the mortgage as against competing interests in Cook's property.

Further, the court, citing *Kapila v. Atlantic Mortgage,* 184 F 3d 1335 (11th Cir. 1999), concluded that the recording of the assignment post bankruptcy did not violate the automatic state. The recording of a mortgage assignment is not a transfer nor an attempt to perfect legal title to the debtor's property; it affected only Bank One's own equitable interest in the mortgage, which was not part of Cook's estate.

Comment 1: As suggested above, the editor views the conclusion in this case as preordained, and the effort to strong arm the mortgage was doomed to failure. Consequently, all those appeals were a waste of money the other creditors of the estate might have liked to have. Of course, there may have been other issues and other authorities that gave the case more weight (the requirement of recordation in the trust agreement is a special fact of interest) so it is difficult to make any final judgment on the wisdom of the trustee's actions as we aren't sitting in his seat. But the basic law outlined by the court on the subject of perfection of mortgage interests is quite clear.

Comment 2: Recordation of the mortgage in the land records is not of critical significance to a debtor. As a practical matter, what a debtor really needs to know is the identity of the servicer. Notice of changes in servicers are required by federal law. In the modern world of mortgage securitization, the mortgage note may change hands many times on its way to a mortgage pool, and the benefits of securitization for borrowers would not be realized if all mortgage assignments had to be recorded. In fact, a striking fact of this record is that the note actually transferred with each assignment until it reached the pool held by the trustee. This is good practice, but doesn't always happen.

Comment 3: Note that perfection of the mortgage against subsequent takers of the mortgagor's property is a different question from perfection of the assignment against competing assignees for security. This can be accomplished either by possession of the note or by recording a "realty paper" filing as a UCC filing.

BANKRUPTCY; LEASES; REJECTION: Is a tenant's bankruptcy rejection a "termination" or a "default," and why does it matter? ***In re CP Holdings, Inc., 349 B.R. 189 (8th Cir. BAP 2006)***

Lender CALPERS held a mortgage on CP's (debtor/landlord's) leased property along with an assignment of rents. The assignment contained an important covenant that precluded the borrower from terminating the lease without the express consent of the lender.

CP leased premises to Kmart, which filed for bankruptcy and rejected the leases. Following the rejection, the landlord re-let the premises in mitigation, but still had a substantial claim for unpaid rent post rejection rent not covered by the mitigation. CALPERS filed lease rejection a claim in the Kmart bankruptcy, relying upon language in the lease assignment that stated that it was appointed as the "true and lawful attorney of assignor" to collect all the rents and other amounts assigned. The court ultimately allowed the claim in the amount of $3.5 million.

CP, the landlord/debtor, then also filed for bankruptcy. The Chapter 7 trustee claimed that the lease rejection claim was property of the Debtor. The argument was that (1) a lease rejection terminates a lease, (b) the resulting rights are only contract rights and not a "rent" claim, and (c) CALPERS did not perfect its security interest on general intangibles.

The BAP here rejected the Debtor's claim, holding that a lease rejection functions only as a breach of the lease, and not a termination. Conceptually, this normally means that the rent obligation continues, and is not converted into a "contract claim," which is not an interest in real property.

The court then held that the fact that Kmart had rejected the lease, and the landlord had re-let, also did not alone indicate that the lease had been terminated. The court apparently accepted the notion that a landlord may re-let a premises in mitigation, collect rent, and then apply the rent to the charges due from the original tenant, with a claim against that original tenant for the balance.
Reporter's Comment 1: The notion that a rejection is not a termination is supported by highly respected scholars, but has not received uniform recognition in bankruptcy courts. It should be noted, however, that the concept that rejection is a termination in commercial cases has been described in at least one case as the "majority rule." *In re Park,* 275 B.R. 253 (Bankr. E.D. Va. 2002). (In fact, the *Park* court elected not to follow the "majority" approach. The *Park* court indicated that the law in residential leases, where the tenant must surrender possession upon rejection, is a termination, and that many courts had followed the same approach in nonresidential leases where the tenant was required to surrender possession. (Including the 4th Circuit in an unpublished opinion.)

Reporter's Comment 2: Several observations seem appropriate. First, mortgage lenders who have an assignment of rents must be mindful that they should seek to file a claim when their borrower's tenants file for bankruptcy. The bankruptcy claim is essentially part of the mortgage lender's collateral. Well drafted security documents will give the lender the right to file such a claim.

Second, since the "rent" claim (a real property interest) may be converted by termination in to a contract claim in some courts, and hence a general intangible, mortgage lenders must be careful to perfect there interest by recording a UCC statement as to any general intangibles that might result from lease termination.

Reporter's Comment 3: The *CP Holdings* case mostly is significant in that it will give added protection to lenders that have taken an assignment of a borrower's long term lease (or to leasehold mortgagees) against the risk that a ground lease tenant may reject a lease in its bankruptcy filing and thereby terminate the estate for both itself and the lender.

Editor's Comment: The editor questions whether the "rejection is termination" rule can really be called the "majority." At the Circuit Court of Appeals level, a 1989 9th Circuit case has followed this approach, as have cases in the 3rd Circuit, and, as stated, an unpublished 4th Circuit opinion. But holding parallel with the reasoning of the instant case are Circuit Court of Appeals panels in the 5th Cir. and a number of recent bankruptcy court decisions, including quite a group in California, notwithstanding the Ninth Circuit. Several of the California cases have been DIRT DD's. See DD's for1 /20/05, 4/13/03 and 6/4/01.

Editor's Comment 2: Note, however, that not all courts will treat the landlord's claim for loss of future rents to be a claim for rents, rather than damages. Further, in many jurisdictions, where the landlord reclaims the property and substantially alters it as part of mitigation efforts, such as expanding or contracting space, demolishing or constructing buildings, or even significantly extending the term of a mitigation lease, the court may conclude that the landlord's actions have terminated the lease and the landlord's claim for rents going forward.

Further, some jurisdictions, including Pennsylvania, Iowa and Florida, permit claims for accelerated rent (with rebates to the tenant if the landlord re-lets). In such cases, can the accelerated rent be considered "rent", or is it "liquidated damages"?

This report is based upon an item in a Sidley Austin update by David Kuney and Bill Sudow of the Chicago office.

BANKRUPTCY; MORTGAGES; PREPAYMENT PREMIUMS: Federal District Court concludes that "sliding percentage scale" prepayment provision should be disallowed because, under liquidated-damage analysis, lender failed to establish that penalties were "reasonable" charges under sec. 506(b) of Bankruptcy Code. ***UPS Capital Business Credit v. Gencarelli, 2006 WL 3198944 (U.S D.C. RI Nov. 3, 2006)***, discussed under the heading: "Mortgages; Prepayment; Prepayment Premium; Bankruptcy; "Penalty" Analysis."

BANKRUPTCY; MORTGAGES; PREPAYMENT PREMIUMS: Eighth Circuit finds that yield

maintenance provision predicated on treasury yields is acceptable as a liquidated damages approach to compute prepayment penalty following default and acceleration. The court holds specifically that the clause is reasonable even under the Bankruptcy Code 506b test for reasonable fees and charges. ***In re CP Holdings (CP Holdings v. Calif. Public Employees Retirement System, 2006 U.S. App. LEXIS 27676 (8th Cir. 11/7/06***), discussed under the heading: "Mortgages; Prepayment; Yield Maintenance: ."

BROKERS; COMMISSION; *QUANTUM MERUIT:* Where a broker has an express commission agreement, he must meet the requirements of that agreement to earn a commission and cannot recover alternatively in *quantum meruit.*. ***Orenstein v. Brum*, *811 N.Y.S.2d 644 (A.D. 1 Dept. 2006)***. In order to show entitlement to a commission on the sale of a building, a real estate broker relied on a writing that contemplated the conversion of a building to a condominium and the subsequent sale of individual apartments, as opposed to the building itself. The Court held that the evidence was insufficient to show that the broker generated the chain of events leading to the sale of the building. Furthermore, the broker may not recover any fees based on a *quantum meruit* claim given the existence of an express contract covering the same matter.

Comment: This case is not the best test of the *quantum meruit* option, as the court apparently concluded that the broker was not responsible for the sale at all. But the notion that *quantum meruit* will not be available if there is an express contract is an important lesson.

BROKERS; COMMISSION; STATUTE OF FRAUDS: Real estate consultant's contract, by which he was to receive an interest in investment property that consultee purchased on consultant's advice, was an employment contract, and not a brokerage agreement, and therefore did not fall within the requirement for a writing for a brokerage agreement. ***Hess v. The Market Investment Co., Inc., 917 So. 2d 140 (Ala. 2005)***

BOUNDARIES; ADJACENT ROADWAYS:. "Derelict fee statute," which states that a deed bounding on a way conveys title to the center of the way if the grantor owns so far applies even though the subject way was not in existence on the ground at the time of the conveyance, as long as it is contemplated and sufficiently designated. ***Hanson v. Caldwell Crossing, LLC, 848 N.E.2d 1240 (Mass. App. Ct. 2005).*** *(dicta)*

Hanson's owned lots 3 and 4 in the Falcon Heights subdivision. The local planning board approved a plan to allow Caldwell to use a narrow strip of land situated between and abutting lots 3 and 4 ("lot A") as a road to connect a new subdivision to the existing roads of Falcon Heights. Hanson's filed suit in the Land Court against both Caldwell and the planning board (collectively, the "Defendants"), claiming ownership of lot A under G.L. c. 183, § 58, the "derelict fee statute" described in the caption above. A judge of the Land Court granted summary judgment for the Defendants, holding that there was no ambiguity in the relevant conveyancing documents, that none of the recorded documents made any reference to lot A as a proposed way, and that therefore the Hanson's did not own lot A.

The Hanson's appealed, relying on the language of the statute. The effect of the derelict fee statute is to strengthen "the common law…presumption that 'a deed bounding on a way conveys title to the centre of the way if the grantor owns so far'". (*Rowley v. Massachusetts Elec. Co.,* 438 Mass. 798, 803, 784 N.E.2d 1085 (2003). In *Rowley*, the Court of Appeals had specifically rejected the necessity of using prescribed words for the statute's application. Therefore, the Hanson's argued, the statute applies to every deed conveying property bounded by a way, "regardless of how it is described in the instrument of its conveyance." (438 Mass. at 805, 784 N.E.2d 1085).

The Appeals Court, however, distinguished *Rowley* from this case on its facts. In *Rowley*, the plaintiff had been able to rely on recorded plans that referenced the specific way at issue. Moreover, the subject way in *Rowley* was visible on the ground. In this case, however, the deeds granting lots 3 and 4 to the Hanson's made no mention of lot A, and the associated plans described lot A merely as fifty feet wide and containing approximately 5,202 square feet, and labeled "Not a Building Lot." The documents gave no indication that lot A was intended as anything other than a small lot retained by the developer for any number of possible purposes, nor that the Hanson's had acquired any interest in it. Finding no ambiguity in the documents to support the need for parole evidence on the issue, the Court of Appeals affirmed the judgment of the Land Court.

BROKERS; LICENSING; UNLICENSED AGENTS: An arbitration clause in a real estate sales agreement compels arbitration of a contract dispute despite the fact that the contract was negotiated by an unlicensed agent of

the buyers. ***Shotkoski v. Denver Investment Group, Inc., 2006 WL 408313 (Colo. App.)***, discussed under the heading: "Alternative Dispute Resolution; Arbitration; Agreements to Arbitrate."

BROKERS; MISREPRESENTATION: A broker making an affirmative misrepresentation affirming a builder's statement that a house was located in a particular neighborhood may be in violation of the New Jersey Consumer Fraud Act. ***Vagias v. Woodmont Properties, L.L.C., 384 N.J. Super. 129, 894 A.2d 68 (App. Div. 2006); March 22, 2006.***

Prospective home buyers told their real estate broker they only wanted to buy a home in a particular section of a municipality, believing that this section had higher property values, a better school system, and was more prestigious than other sections of the municipality. At a meeting with the broker and the builder of a newly constructed home, the builder stated the house was located in that section, and the broker echoed this sentiment. After moving in, the buyers learned that the house was not in the desired section of town. They sued under the Consumer Fraud Act (CFA), contending the builder intentionally misled them, and alleging either the broker was mistaken or misled them. The lower court dismissed the complaint against the builder in favor of binding arbitration. The lower court also held that the broker's conduct was an omission and not an affirmative misstatement, and further held that the broker's statement was more akin to "puffery" and less like fraud. The buyers appealed.

The Appellate Division held that the CFA prohibits both affirmative acts and omissions, including affirmative acts of deception, fraud, the making of false pretenses, and misrepresentations. The CFA further prohibits omissions concerning acts of concealment, suppression or omission of any material fact. In the case of affirmative acts, proof of intent to mislead is not required. However, under the CFA, acts of omission must be done knowingly and with intent to induce reliance thereon.

The Appellate Division agreed that the broker made an affirmative misrepresentation by echoing the builder's sentiment that the house was in the appropriate section of the municipality. Therefore, her intent was not an issue. However, the Appellate Division held that not all erroneous statements give rise to a remedy, but rather only those that are material to the transaction. As a result, the Appellate Division reversed and remanded for consideration of whether the realtor knew her misrepresentation was a critical issue for the buyers in their decision to purchase the house.

Comment: Note that in many states NAR-sponsored disclosure statutes permit the broker to "hide behind" representations made by the seller.

CONSTITUTIONAL LAW; DUE PROCESS; EVICTIONS: Court forms permitting the landlord to demand as "rent" for purposes of the tenant avoiding eviction sums that are not collectible under New Jersey law for such purposes may be a violation of the Due Process Clause. ***Hodges v. Feinstein, Raiss, Kelin & Booker, LLC, 383 N.J. Super. 596, 893 A.2d 21 (App. Div. 2006),*** discussed under the heading: "Landlord/Tenant; Residential; Eviction; Fair Debt Collection Act.."

To prevail on a substantive due process claim that a government official has improperly denied construction permits, a developer must show that the official's actions shocked the conscience, not merely that the official had an improper motive. ***Cherry Hill Towers, L.L.C. v. Township of Cherry Hill, 407 F.Supp.2d 648 (D. N.J., 2006),*** discussed under the heading: "Zoning and Land Use; Building Permits; Review; Substantive Due Process."

CONSTITUTIONAL LAW; DUE PROCESS; RETALIATION: The Fifth Amendment protects a landowner from both the federal government taking land without compensation, and from retaliation for asserting the right to be free of uncompensated takings. ***Robbins v. Wilkie, 433 F.3d 755 (10th Cir. 2006).***

Robbins owned a ranch in Wyoming which he purchased from Nelson. Before that sale, Nelson had granted a non-exclusive access easement to the BLM on a ranch road over the land sold to Robbins. The BLM failed to record its easement, and when Nelson sold the property, Wyoming law allowed Robbins to take the property free of the easement. The BLM tried to obtain a right of way, but Robbins refused. After his refusal, Robbins claimed that employees of the BLM then refused to maintain a road providing access to his property, threatened to cancel, then canceled his right of way across federal land, cancelled his special recreation use permits and grazing privileges, brought unfounded criminal charges against

him, trespassed on his property, and interfered with guest cattle drives.

Robbins sued the BLM employees for claims under the Racketeer Influenced and Corrupt Organizations Act and for violation of his Fifth Amendment rights. The employee defendants moved for summary judgment on the Fifth Amendment claim, arguing there is not a constitutional right to exclude others from one's property and that the Fifth Amendment does not protect a landowner from retaliation. The United States District Court concluded there was a constitutional right to be free from retaliation for exercising his right to exclude others based on the Fifth Amendment.

The employee defendants then appealed that decision, arguing that Robbins had no constitutional right to exclude the government, but instead only the right to compensation if the government took his property. According to the defendants, because there was no taking in the case, Robbins had no Fifth Amendment claim.

The Tenth Circuit found defendants' argument unpersuasive and upheld the district court decision, on the grounds that allowing retaliation by government officials in response to a party exercising his Fifth Amendment rights would tend to chill citizens' exercise of their rights. This would then lead to the government "taking property" without paying just compensation.

Compare: ***Cherry Hill Towers, L.L.C. v. Township of Cherry Hill, 407 F.Supp.2d 648 (D. N.J., 2006)***, where a developer made out a reasonably credible claim that a public official withheld construction permits in order to coerce the developer to award contracts to higher priced union shop contractors rather than non-union contractors, although there was no legal requirement that the developer use the union contractors.

The developer filed a Section 1983 complaint alleging that the delay in issuing the construction permits was: (1) arbitrary, irrational, and tainted by improper motive in violation of 14th Amendment substantive due process rights; (2) in violation of 14th Amendment procedural due process rights; (3) contrary to the equal protection rights of the 14th Amendment; and (4) a tort of interference with contract and prospective economic advantage. The municipality moved for summary judgment.

The court held that to prevail on a substantive due process claim that a government official has improperly denied construction permits, a developer must show that the official's actions shocked the conscience, not merely that the official had an improper motive. In response to the developer's claim that the subcode official withheld issuing the permits to pressure the developer to use unionized labor, the Court refused to decide whether the developer's applications were improperly denied. The Court reasoned it is not a "super zoning tribunal."

For the developer to succeed on its equal protection claim, the Court required a showing that the subcode official acted irrationally or wholly arbitrary. It found no supporting evidence.

Comment: The editor, frankly, is "shocked" that the court in the principle case found a remedy. Perhaps the nature of the conduct, as opposed to the motive, was so overbearing and oppressive that some remedy was necessary. But the editor has seen courts review many examples of clear abuse of power by public officials that have not resulted in any compensation or other relief for the victims.

CONSTITUTIONAL LAW; DUE PROCESS; TAX FORECLOSURE SALES: It is a violation of due process for a municipality to demand payment in excess of the amount stated in a foreclosure complaint and published notice. Consequently due process requires the municipality to include the amount of any subsequently arising liens in its complaint and in the notice so that a person seeking to redeem will have notice of the amount actually required. ***City of East Orange v. Kynor, 383 N.J. Super. 639, 893 A.2d 46 (App. Div., 2006)***, discussed under the heading: "State and Local Taxes; Tax Foreclosure; Constitutional Law".

CONSTITUTIONAL LAW; FREE SPEECH; COMMUNITY ASSOCIATIONS: A Planned Unit Development's governing association is the functional equivalent of a government body and cannot deprive residents of their rights to express their views on matters of public or community concern. ***Committee for a Better Twin Rivers v. Twin Rivers Homeowner's Association, 383 N.J. Super. 22, 890 A.2d 947 (App. Div. 2006)***

The New Jersey Supreme Court granted a petition for *certiorari* to review this decision, but it is an important one to watch, so we're posting the lower court decision.

The Community Associations Institute filed an *amicus* brief in the lower court case, and the editor suspects that others are joining the fray at the New Jersey Supreme Court level.

The Supreme Court likely could decide this case on state constitutional grounds and immunize it from U.S. Supreme Court appeal, but if the court decides it on the basis of the U.S. Constitution, we may see this case "go big". There is, however, a standing issue that may cause problems, and at least at one time before the decision below, the plaintiff's group had shrunk to three people. It's hard to live where you're not wanted.

Several residents of a large planned unit development (PUD) challenged the manner in which the PUD was administered. The community was organized as a planned unit development by deed to a community trust. The trust was responsible for owning, operating, and maintaining the common property. The management of the common property was delegated to a homeowners' association. The PUD was similar to a miniature town and provided parks, pools, ball fields, and other amenities exclusively to its residents. There was a privately owned shopping center and a security force that provided first aid and other services often provided by police departments.

Several residents attempted to change the manner in which the PUD was administered and attempted to publicize their position to the other residents. Those residents challenged the association's policies that restricted their rights to place signs on residents' lawns. They charged that the association charged excessive fees for use of the community room, and denied them access to the financial records and equal coverage in the community newspaper.

The lower court held that the homeowners' association was not subject to the constitutional limitations that are imposed on the public sector. It found that the homeowners' association did not have governmental powers delegated to it and did not perform governmental functions. The lower court agreed with the association's argument that, as a private condominium association, the homeowners' associations decisions were to be upheld under the business judgment rule unless the residents could show that those decisions were fraudulent, self-dealing or unconscionable. Since the residents asserted that they could not demonstrate that the association's restrictions were unconscionable or as a result of self-dealing or fraud, the lower court found those restrictions acceptable.

On appeal, the Appellate Division disagreed and reversed, noting that the New Jersey Supreme Court had adopted a balancing test for resolving the conflict between the protections private property owners are entitled to and the rights of expression on private property. *In State v. Schmid*, 84 N.J. 535, 423 A.2nd 615 (1980), the New Jersey Supreme Court set the following standards to be considered: (a) the nature, purposes, and primary use of the private property; (b) the extent and nature of the public's invitation to use the property; and (c) the purpose of the expressional activity on that property in relation to the private and public use of that property. The Court found that the PUD was a quasi-municipal entity that provided many of the basic services a governmental entity would normally perform for its residents. As such, the association was the functional equivalent of a government body and could not deprive the residents of their rights to express their views on matters of public or community concern.

Comment: New Jersey is far more liberal on issues of this sort than most other states. It is one of the few states that has recognized free speech rights in private shopping centers and also has had a number of decisions involving certain kinds of special protections for political action in community associations. *See, e.g. Guttenberg Taxpayers and Rent Payers Association v. Galaxy Towers Condominium Association*, 688 A.2d 156 (N.J.Super.Ch. 1996) (the DIRT DD for 10/30/97) (Condominium association that had actively endorsed certain political candidates by distributing campaign flyers, effectively dedicated otherwise private property to political and thus public use, and therefore could not deny access to its privately owned property to citizens group that wished to distribute the same type of literature.)

The difference between the shopping center cases and this case, however, is that here the association did not invite the public into its community. The sole question addressed was the rights of the community residents and the power of their own association to regulate them.

The case is different from *Galaxy Towers* because the public voting franchise was not at stake here. The disputes involved internal association disputes.

Comment 2: An interesting side issue was the question of voting rights. The dissidents argued that it was unconstitutional, in light of the "public functions" performed by the association, for voting rights to be weighted in proportion to the value of the units in question. The court disagreed, noting that public corporations are permitted to weight their votes, and noting further that the dissidents still were not arguing for "one person/one vote," but for "one unit/one vote." There was nothing inconsistent, in the court's view, with recognition of free speech rights and upholding the private voting arrangements for control of the association's activities. The New Jersey Supreme Court denied *certiorari* on the cross appeal of this issue.

CONSTITUTIONAL LAW; TAKINGS; REGULATORY TAKINGS; SOVEREIGN IMMUNITY; CONTRACTS CLAUSE: Sovereign immunity does not bar claims made against a state agency pursuant to the Takings Clause of the U.S. Constitution. However, sovereign immunity does bar claims against a state agency under the Contracts Clause. ***Manning v. Mining & Minerals Div. of the Energy, Minerals, & Natural Res. Dep't of N.M., 2006 WL 1787124 (N.M. 2006).***

Plaintiffs, owners of a mining property in southwestern New Mexico, claimed that their land interest had been effectively "taken" from them through application of state mining regulations without the payment of "just compensation." They also argued that two state agencies have impaired their contractual obligations in violation of the Contracts Clause. The district court granted summary judgment in favor of the state agencies on the basis of ripeness. The New Mexico Court of Appeals affirmed the district court's grant of summary judgment, but based its holding solely on sovereign immunity.

On appeal, without addressing the merits of the case, the New Mexico Supreme Court addressed an issue of first impression: whether state constitutional sovereign immunity bars the rights and remedies found in the Takings Clause and the Contracts Clause of the United States Constitution when those rights and remedies are asserted against a state agency. The New Mexico Supreme Court concluded that such claims are barred under the Contracts Clause, but they are not barred under the Takings Clause; therefore, it ultimately affirmed in part, reversed in part, and remanded the case to the New Mexico Court of Appeals to address ripeness issues.
In reaching its conclusion, the New Mexico Supreme Court analyzed several United States Supreme Court cases, including *Alden v. Maine*, 527 U.S. 706 (1999). It determined that the United States Supreme Court has historically and consistently applied the Takings Clause to the states and has recognized the right of a citizen to sue the state under the Takings Clause for just compensation. The New Mexico Supreme Court also concluded that because this case involves a "just compensation" claim arising directly from the text of the Constitution through the Fifth and Fourteenth Amendments, rather than as the result of congressional action under Article I, *Alden* is not applicable.

"*Alden* and its progeny stand for the proposition that state constitutional sovereign immunity bars individual claims for damages that are based on legislation passed by Congress pursuant to its Article I powers. . . . nothing in [*Alden*] permits a state to bar a claim for "just compensation" from its courts."

The court noted that the Takings Clause, at least as applied to the states through the Fourteenth Amendment, is self-executing. This means that congressional action is not necessary to enforce the attendant rights in state courts because the Takings Clauses creates both a right and a remedy. I pointed out that no other jurisdiction, post-*Alden*, federal or state, has held that Takings Clause claims are barred by state constitutional sovereign immunity.

On the other hand, as to the Contracts Clause, the New Mexico Supreme Court concluded that Plaintiffs' Contract Clause claim is barred by sovereign immunity because the Contracts Clause does not provide for claims for monetary damages, relying on *Alden* and *Hans v. Louisiana*, 134 U.S. 1 (1890). The Contracts Clause and the Takings Clause are distinguishable because the Takings Clause contains its own remedy enforceable upon all those who take property without "just compensation."

CONSTRUCTION LAW; INDEMNIFICATION AGREEMENTS; NEGLIGENCE: Limitation of liability clauses are distinguishable from exculpatory clauses and indemnity clauses and may be enforced in construction and construction services contracts even when the latter are not. ***Fort Knox Self Storage, Inc. v. Western Techs., Inc., 142 P.3d 1 (N.M. Ct. App. 2006).***, discussed under the heading: "Contracts; Limitation on Liability Clauses."

CONTRACTS; LIMITATION ON LIABILITY CLAUSES: Limitation of liability clauses are distinguishable from exculpatory clauses and indemnity clauses and may be enforced even when the latter are not. ***Fort Knox Self Storage, Inc. v. Western Techs., Inc., 142 P.3d 1 (N.M. Ct. App. 2006).***

Defendant Western Technologies, Inc. (Defendant) appealed from an order awarding Plaintiff Fort Knox Self Storage, Inc. (Plaintiff) over $110,000 in damages for negligence, plus attorney fees and prejudgment interest. Plaintiff and Defendant were parties to a contract in which Defendant was to provide geotechnical engineering services in evaluating the subsurface conditions of a proposed building site, and Plaintiff was to pay Defendant $1,750 plus tax for its services. The contract included a limitation of liability clause, which limited Defendant's liability to $50,000 – twenty-eight times the amount of remuneration Defendant received under the contract.

The trial court refused to enforce the limitation of liability clause on the ground that it violated the state anti-indemnification statute, which prohibits any party to a construction contract from agreeing to indemnify any entity for its own negligence. NMSA 1978, § 56-7-1 (1971). The primary issue before the New Mexico Court of Appeals was whether the limitation on liability clause was enforceable. The Court of Appeals reviewed the statute at issue, as well as a Third Circuit case applying Pennsylvania's anti-indemnification statute, *see Valhal Corp. v. Sullivan Assocs., Inc.*, 44 F.3d 195 (3d Cir. 1995), and ultimately concluded that the limitation of liability clause was enforceable.

In reaching its conclusion, the Court of Appeals determined that the New Mexico anti-indemnification statute does not prohibit a limitation of liability based on one's own negligence, but instead prohibits the avoidance of all liability for one's own negligence. The Court of Appeals concluded that its view is supported by *Valhal*, which involved similar facts. Both cases involved damages from losses to commercial buildings and involved limitation of liability clauses.

The Court in *Valhal* distinguished limitation of liability clauses from both exculpatory clauses, which entirely immunize a person from the consequences of one's own negligence, and indemnity clauses, which hold the indemnitee entirely harmless by requiring the indemnitor to bear the entire cost of damages for which the indemnitee may be liable. In the present case, the Court of Appeals also recognized the differences between limitation of liability clauses, exculpatory clauses, and indemnity clauses. In addition, the Court of Appeals determined that the cap in this case leaves Defendant exposed to substantial damages, and therefore, does not negate Defendant's liability in its entirety.

The Court of Appeals reversed the trial court's determination that the limitation of liability clause was void and remanded for entry of an order limiting the damages awarded against Defendant to $50,000.

DEEDS; DESCRIPTIONS; MONUMENTS: Description that identifies a course ending at a "sea wall" but also gives an angle and distance to the course that would establish a measurement beyond the sea wall is controlled by the location of the sea wall, as monuments control over courses and distances. ***Manguson v. Cossette, 707 N.W. 2d 738 (Minn. App. 2006)***

Here, the "sea wall" was in fact constructed around a bay adjacent to a lake. None of the sea wall in fact was in contact with the water. A thin strip of ground existed between the sea wall and the edge of the bay. A common grantor had created an inland parcel with a boundary that ended at the sea wall. The grantor transferred the bay to a marina operator. The owner of the inland parcel commenced parking his boat in the bay and claimed littoral rights as an abutting landowner because the deed description, based upon the "called line" would have ended in the bay. But the court ruled that the identification of the seawall as a monument controlled over the angles and distances of the called line.

EASEMENTS; CREATION; IMPLICATION; IMPLIED DEDICATION FROM PLAT: A depiction of an easement of access on a PUD plan is sufficient to establish dedication of the easement under the "implied dedication from plat" doctrine, and such easement may benefit owners of land adjacent to the land depicted on the plan, who were "strangers to the grant" in that they were unrelated to the developers or purchasers of the property subject to the plan. ***Barry Simon Developments, Inc., v. Hale, Cas No. ED87452 (Mo. App. 10/24/06)***

Developers carried out the development of a residential subdivision. Developers obtained an ordinance from the

local city creating a device known locally as a Planned Environmental Unit plan (PEU), described by the court as a procedure that "permits flexibility by adjusting development regulations to particular site conditions." (Sounds very much like what is generally known as PUD.)

The PEU plan showed common areas as part of the subdivision, and across one portion of the common area there was depicted a fifty foot easement terminating in undeveloped land to the south of the subdivision. This easement apparently was accessed from Eagle Bluff Court – a road depicted on the PEU plan and later developed. An attachment to the PEU plan indicated that Eagle Bluff Court would terminate in a "permanent cul-de-sac on this site."

The proposed subdivision was carried out. Homeowners bought lots along the cul-de-sac and established homes. Presumably Eagle Bluff Court became a public street. Then Simon bought the 39 acre adjacent to the south of the subdivision, and announced plans for a new subdivision that would be access through the easement, and, of course, also through Eagle Bluff Court.

The horrified residents of Eagle Bluff Court and their association filed suit to block the easement, alleging: (1) the PEU was not a "plat," and therefore the traditional "dedication by plat" concept was inapplicable. (2) In any event, it was unlawful to establish a public right of way across commonly owned property that is part of a residential subdivision; (3) Simon, a stranger to the prior transaction, has no right to claim the easement under the ancient rule prohibiting the "reservation of easements in strangers;" (4) the language of the PEU plan required that Eagle Bluff Court be a permanent cul-de-sac, and therefore there could not have been an intent to open up this easement opening onto Eagle Bluff Court.

In a brief opinion, the court shot down all the arguments.

The court ruled first that, in Missouri, a PEU plan serves a function similar to a plat when it has sufficient information indicating specific land uses and boundaries, and could be the basis for the implication of an easement. It then concluded that there was no authority prohibiting the creation of an easement across commonly owned property in the original plat, even though, after a subdivision is developed, it might be inappropriate for a homes association to create a new easement without the consent of the common owners. The doctrine of "no reservation in strangers" is generally in disfavor these days (indeed, the Restatement of Servitudes declares it to be dead) .

Finally, the court concluded that the statement that the Eagle Bluff Court would be a permanent cul-de-sac couldn't possible mean what it said because in the same plan there was an express provision for an easement whose obvious purpose was to provide access to the landlocked 39 acre parcel that Simon now wished to develop. Consequently, this language could not express the city's intent (the court's language) as to the working out of the uses of the property.

Comment 1: Although, in some cases, these pronouncements were first impression statements of Missouri law, none of them were particularly surprising. Indeed, the doctrine against reservation in strangers gets batted down every time it is raised. And, since the easement by implied dedication doctrine deals with the probable intent of the grantor, there is no particular reason that the intent be drawn only from a traditional plat map. Also, of course there can be an easement across a common area if it is created in the same document creating the common area. The common owners simply take their interest subject to the easement.

But the editor is bemused by the court's bluff and abrupt treatment of the "permanent cul-de-sac" language. Clearly the opening up of this easement terminates the "cul-de-sac," and consequently there was an express contradiction on the face of the PEU. The court pretends that the language for the permanent cul-de-sac can be reconciled with the recognition of the easement, but how can this be? Perhaps there are other facts explaining this conclusion that the court didn't feel it necessary to put in evidence. Perhaps the court is saying simply that, looked at as a whole, the document's language protecting the permanency of the cul-de-sac was inherently suspect and anyone reading it should have known so.

Comment 2: Perhaps the homeowners should have directed their energy and their lawsuit money against their own developer, who most likely represented that the cul-de-sac would be permanent, and should have known better. This is not a "latent defect," since one assumes the PEU plan was a matter of public record, but the editor suspects a court would find that a specific representation by the developer as to the meaning of the PEU likely

would be actionable, since the developer certainly was aware of the reasons for the easement and the likelihood of its being opened up.

EASEMENTS; CREATION; PRESCRIPTION; REQUIREMENT FOR CONTINUOUS USE: Owner's creation of a berm and ditch to block driveway for a short time is sufficient to interrupt statutory period to obtain prescriptive easement. ***Trask v. Nozisko, 134 P. 3d 544 (Colo. App. 2006).***

This dispute arose between adjacent landowners in a rugged area of Colorado. The adverse claimant's predecessor-in-interest purchased a parcel known as the Maxwell Lode Mining Claim in 1970, and constructed a geodesic dome that served as a seasonal cabin on the parcel. The portion of the Maxwell Claim on which the cabin was located was also the site of several other mining claims. Apparently the legal descriptions of these claims overlapped, and there were no express deeds to any of them.

The adverse claimant purchased the property constituting the Maxwell Claim parcel (apparently by deed) in 1980. In 1984, the adverse possessor constructed improvements to the cabin, which made it extend to the Maxwell property line. The adverse claimant also used a dirt road constructed by her predecessor to access the property and parked cars in an area outside of her described boundaries.

The owners of neighboring parcels became aware that the adverse claimant might seek to obtain title by adverse possession, and one of them erected a dirt berm on land the adverse claimant used as a driveway in 1984. Evidence submitted at trial showed the berm remained in place for a period lasting between three days and three months. The adverse claimant removed the berm using a shovel. Since it was constructed with earth moving equipment, and removed by a hand shovel, it appears that one could conclude that the adverse claimant promptly and assiduously set to work to remove the obstacle.

One of the other owners filed a quiet title action. This dispute eventually evolved into three separate claims to land: one a "typical" adverse possession claim to lands bordering the cabin, the next a prescriptive driveway easement, and the final a prescriptive parking easement.

The trial court found the adverse claimant had obtained title through adverse possession to lands bordering the cabin, and had a prescriptive easement to the dirt driveway and parking area.

The court of appeals held that the evidence of activities conducted on the parcels bordering the cabin by the adverse claimant, which included refuse clean up, removal of trees and brush, the installation of flower gardens, fencing, structures, and pathways did not prove the claimant's rights through adverse possession. The court found that while the activities might have established adverse possession, the adverse claimant could not establish when those activities started.

On the second claim for a prescriptive driveway easement, the court found that the creation of a dirt berm, even though it might not have stood for more than a few weeks, precluded the adverse claimant from receiving a prescriptive easement for driveway access. Finally, the claimant did win rights to the parking easement, located on a different portion of the property, established through uninterrupted use.

The important issue in this case is really the court's discussion of how long a physical obstruction must be in place to interrupt the statutory period regarding adverse use. The court noted that some courts have held that a physical obstacle must be effective in interrupting adverse user in order to bar a prescriptive claim. There is an interesting tale of a North Carolina case in which an owner kept erecting barriers which prescriptive users continuously evaded, so as to confirm adverse user. But other cases, following the reasoning of Oliver Wendell Holmes, have concluded that a "true owner" need only take some concrete action to interrupt an adverse use in order to terminate a prescriptive easement claim. To require more – such as preservation of a barrier for a significant time "invites confrontation, which can be unpleasant, violent, dangerous and in some instances even deadly."

The court quoted Justice (then Judge) Oliver Wendell Holmes in support of the view that only a representative blockage is required:

"A landowner, in order to prevent [the gaining of a prescriptive right of way] is not required to battle successfully for his rights. It is enough if he asserts them to the other party by an over act, which, if the easement existed, would be a cause of action. Such an assertion interrupts the would-be dominant owner's impression of

acquiescence, and the growth in his mind of a fixed association of ideas; or, if the principle of prescription be attributed solely to the acquiescence of the servient owner, it shows that the acquiescence was not a fact."

The court rejected the Restatement of Servitudes approach, requiring an effective blockage, and in fact took pains to analyze whether prior Colorado judicial citations to the Restatement constituted an adoption of the entire section on prescriptive easements. It concluded, of course, that they did not so constitute an adoption.

Comment 1: Frankly, this is news to the Editor, who has been teaching his class lo these many years that an effective interruption is necessary. In fact, he uses as a model a case where a "true owner" verbally chases off a consistent trespasser on one day, only to have the trespasser return consistently to establish (according to the bar examiner's answer) an effective prescriptive claim except in "lost grant" jurisdictions.

This case doesn't go so far as to say that a simple verbal warning is sufficient to interrupt an adverse user, but it doesn't say that's not so either, and some of the cases it cites to discuss such a possibility.

It may be that the uncertainty of the circumstances surrounding a confrontation concerning such trespasses – whether indeed the trespasser is driven away, or simply leaves temporarily to avoid a fistfight – is precisely what led the Restatement authors to conclude that something more than a simply symbolic confrontation is necessary.

Comment 2: This case doesn't necessarily say that a simple warning is enough, but it really doesn't say what beyond that is required. The berm in question was sufficiently effective that the adverse possessor's husband had to park his car and climb over it on the day it was built. But the version of the facts adopted by the trial court suggests that the true owner promptly attacked the berm with a shovel and never truly submitted to its blockage. [The court criticizes the trial court for accepting *verbatim* the adverse possessor's proposed findings, so we don't have a clear factual premise, unfortunately, in this very fact driven analysis.]

EASEMENTS; CREATION; NECESSITY: A Louisiana Civil Code easement by necessity will be declared across neighboring property on the shortest route to a public road, absent showing of extraordinary construction costs, and court should not give preference to an alternative route simply because a paved private road already exists on that route. ***Cash Point Plantation Equestrain Center, Inc. v. Shelton, 920 So. 2d 947 (La. App. 2nd Cir. 2006)***

The Louisiana easement does not normally involve compensation to the servient tenant, and does not arise necessarily across property from which the landlocked property was divided. The shortest route is dictated. For another view, discussing the provisions of the Code in more detail, and holding that water access does not eliminate the right to demand a land easement, see ***Bailey v. McNeely, 918 So. 2d 1124 (La. App. 2005)***

EASEMENTS; TERMINATION; MERGER: Although merger may presumptively terminate an easement, the party in whom the merger has occurred may revive the easement by identifying it in the deed when selling the dominant parcel, at least if the transferee of the servient estate also was aware that the easement was revived. ***Simone v. Heidelberg, 812 N.Y.S.2d 608 (A.D. 2 Dept. 2006).***

An easement between two properties was extinguished when the two properties were bought by the same person. When the properties were subsequently sold separately, the easement was recreated and documented in the deed conveying the dominant estate. The court held that the servient estate owner had actual knowledge of the recreated easement and that the servient estate owner did not demonstrate an "unequivocal intent to abandon the easement" or an overt act that indicated that the dominant estate owner did not have an interest in the easement.

Comment 1: In this typically sketchy "New York style" case report, we aren't really told the sequence of transfers. But it appears that the dominant estate was first sold, with the revived easement in the deed, and then the servient estate was sold. The servient estate deed, apparently, did not mention the easement, but the servient estate purchaser was aware of it.

Comment 2: Although the editor used the term "presumptively merged" to describe the status of the easement at the time that both dominant and servient parcels passed into the same hands, the court says that in

fact the easement was destroyed and then revived. The distinction appears to be entirely semantic.

ENVIRONMENTAL LAW; FILL APPLICATION; "DEEMED APPROVED:" Although a public agency, by statute, is deemed to have approved a wetlands fill application if it fails to act within the specified time, its "constructive approval" is valid only to the extent that it has the lawful power to approve such an application. Hence, where applicant filed an application to fill 5700 square feet and the municipality to which applied for approval had the power to approve only 400 square feet, the permit "deemed approved" by the municipality's inaction was only 400 square feet. ***Breze v. City of Minnetrista, 706 N.W. 2d 512 (Minn. App. 2005)***

FAIR DEBT COLLECTION PRACTICES ACT; EVICTIONS: A summary dispossess action is an attempt to collect a debt and if an attorney is regularly in the business of filing summary possession actions, it must abide by the provisions of the Fair Debt Collection Practices Act, even it that means inserting the required notices in the eviction complaint. ***Hodges v. Feinstein, Raiss, Kelin & Booker, LLC, 383 N.J. Super. 596, 893 A.2d 21 (App. Div. 2006)***, discussed under the heading: "Landlord/tenant; Residential; Eviction; Fair Debt Collection Act"

HOMESTEAD; DEVISE: A Florida homestead may be devised by a specific provision in a will, but if there is no specific devise of homestead property, a cash bequest will not be funded by a the proceeds of the sale of the homestead, and the funds will pass to the residuary clause and creditors. ***McKean v. Warburton, 919 So. 2d 341 (Fla. 2006)***

INTERSTATE LAND SALES FULL DISCLOSURE ACT; SALE OF LOTS TO BUILDER; TWO-YEAR COMPLETION EXEMPTION: Where builder sells a lot that would otherwise fall under the Interstate Land Sales Full Disclosure Act and conditions his obligation to build on the lot on the availability of labor and supplies, builder may have sacrificed his ability to take advantage of the"improved lot exemption" from the Act's requirements. ***Fortunato v. Windjammer Homebuilders, Inc., 2006 U.S. Dist. LEXIS 5216.***

The plaintiffs in this case purchased a home from Windjammer, a home builder who had purchased the lot from a developer. During construction, the plaintiffs observed flooding on one occasion, but defendant Windjammer assured plaintiffs that the flooding was due to a stuck drainage gate, as opposed to a more serious defect in the engineering or construction. After the plaintiffs closed on the purchase of the home, they suffered more than 24 flooding incidents. The plaintiffs sued Windjammer on claims including violations of the Interstate Land Sales Full Disclosure Act.

In a motion for summary judgment, defendant Windjammer claimed the benefit of several exemptions from the Act, including most notably, the improved lot exemption, which applies to the sale of a lot under a specifically enforceable contract obligating the seller to construct a physically habitable building on the lot within two years after the purchaser's execution of the contract.

The federal district court in Tampa rejected the defendants' arguments on all the various exemption claims. Focusing on the completed improvement exemption, the court cited Florida decisions that have construed the exemption and state contract law as requiring the seller to provide its buyer with an unconditional guaranty of completion within two years. In contrast to that requirement, the Windjammer contract stated only that the seller would commence and complete construction "as soon as practicable, subject to availability of labor and supplies." That condition suggested to the court that the contract might fall short of the standard imposed by Florida courts for an "unwavering obligation" on the part of the seller to construct within two years, and so the summary judgment motion failed.

LANDLORD/TENANT; BANKRUPTCY; LEASES; REJECTION: Is a tenant's bankruptcy rejection a "termination" or a "default," and why does it matter? ***In re CP Holdings, Inc., 349 B.R. 189 (8th Cir. BAP 2006)***, discussed under the heading: "Bankruptcy; Leases; Rejection."

LANDLORD/TENANT; LANDLORD'S LIABILITY FOR INJURY TO THIRD PARTIES; TRANSFER OF CONTROL: A landlord who retains some responsibility to maintain leased premises is a landowner under Colorado's Premises Liability Act. ***Nordin v. Madden, 2006 WL 871165 (Colo. App.).***

An elderly couple rented a house from defendant. A carbon monoxide leak, caused by either a furnace or a hot

water heater, killed one tenant and severely injured another. The surviving tenant sued under Colorado's Premises Liability Act. Under the Act, a landowner is an authorized person in possession of real property and a person legally responsible for the property. Defendant claimed that because he transferred complete control of the premises to the tenants, he was not the person in control. The appellate court held that because the landlord had retained some responsibilities, including the right to inspect, to enter to make repairs, and the right to perform maintenance, the landlord was a landowner under the Act.

LANDLORD/TENANT; LANDLORD'S LIABILITY FOR INJURY TO INVITEES: A commercial tenant has sole responsibility to keep the leased premises safe for its employees and invitees if nothing in the lease imposes this duty on the landlord and landlord is not in control of the premises. ***Humphrey v. Byron, 850 N.E.2d 1044 (Mass 2006)***.

Humphrey brought suit against Byron alleging that Byron, the lessor of the premises in which Humphrey worked, was liable for the injuries he sustained after falling down a set of poorly maintained stairs in the leased premises. The Superior Court granted Byron's motion for summary judgment, and the Supreme Judicial Court granted a joint application for direct appellate review.

The premises concerned were leased by Humphrey's employer, Gateway Graphics and Awards, Inc. ("Gateway"), under a one-year lease. The lease provided for Gateway's exclusive control of the leased premises, which consisted of the entire building, and specified that Gateway would be obligated to maintain both the interior and exterior of the same. The lease required Byron's prior approval of Gateway's "additions, repairs, alterations, or structural changes," and further provided that Byron may enter the premises to make "repairs and alterations compatible with the lessee's use of the premises."

At issue was whether Byron was obligated to maintain the leased premises in a safe condition and thus liable for negligently allowing the stairs on which Humphrey was injured to remain in an unsafe state of disrepair. The Court first cited *Young v. Garwacki*, 380 Mass. 162, 402 (1980), in which it held that, absent an express agreement as to the duty to repair the rented premises, the lessor of residential premises has a duty to exercise reasonable care such that those legitimately on the leased premises are not subject to "unreasonable risk of harm".

The court, however, here declined to extend that precedent to commercial leases, finding that there are significant differences between residential and commercial tenants which merit differing policy approaches. The Court cited the typical commercial tenant's greater bargaining power as one consideration underlying a more favorable approach to residential tenants and stated that residential protections have been driven in part by consumer protection laws which are inapplicable to commercial tenants.

Humphrey argued that the Court should at least extend the *Young* precedent to a subset of commercial tenants entering into short-term leases and lacking the resources and experience to address property defects. Finding that the *Young* decision was based on the residential tenant's lack of incentive to make expensive repairs to premises where he expects to reside only temporarily and reasoning that even small commercial tenants have adequate incentive to make repairs relating to the safety of the premises, the Court rejected Humphrey's argument. The Court affirmed the rule that lessors of commercial premises may be liable in tort only if they have explicitly contracted to make repairs or if the defect causing injury was part of a common area over which the lessor had control. Applying the rule to the facts of this case, the Court found that the Byron's reservation of certain approval and repair rights was not sufficient to render Byron liable. Accordingly, the Court affirmed the grant of summary judgment.

Comment 1: The problem in general, of course, is not who will fix the stairs, but who will be required to insure against the risk of negligence. Unlike, possibly a residential tenant, a commercial tenant should understand that it has economic responsibility for injuries to its invitees, and therefore should take steps to protect itself from liability and (in some cases) to protect its invitees from injury.

It might be said that a short term tenant will be less likely to anticipate that it has a duty to make sure premises are safe for its employees and invitees, but still, shouldn't we expect that a commercial tenant, once it takes possession, ought to have such responsibility.

Comment 2: It can also be said that worker's compensation won't pay off to employees for their injuries in the way that tort claims do. But so what? The limitations on recovery against employers is a policy decision by the state.
It might also be said that the potential for liability of the landlord might induce the landlord to be more careful in maintaining the premises or seeing to it that the tenant maintains the premises. Perhaps this is so, but doesn't the same argument suggest that the tenant has the same incentive if the tenant bears the risk? Why should the landlord have responsibility when the tenant bears the responsibility, and the tenant has possession.

Comment 3: Keep in mind that if the landlord – as apparently was its privilege here – undertakes to conduct maintenance, it may assume a duty of care and even a continuing duty to maintain outside of the implied contractual relationship.

Comment 4: There are cases in which the landlord becomes aware of dangerous conditions maintained on the premises by the tenant, such as a vicious dog, and has the ability to do something about it – such as to enforce a rule or even terminate the tenant – and fails to do so, where courts have entertained liability claims against the landlord.

LANDLORD/TENANT; LANDLORD'S REMEDIES; EVICTION: Absent a time of essence clause, landlord may not evict a tenant immediately upon the tenant's failure to pay on the due date, but tenant will be given a reasonable opportunity for tardy performance; failure to pay on time is not a "material breach." ***Ladner v. Pigg, 919 So. 2d 100 (Miss. App. 2005)***

This seems to be an excellent teaching case because the issues are straightforward and the discussion clear. The court makes the case that in Mississippi a leasehold estate may not be terminated for breach at all unless the lease agreement so provides.

LANDLORD/TENANT; RESIDENTIAL; EVICTION; COMPETENCE: An eviction proceeding of a mentally incompetent tenant cannot proceed without participation by a guardian for the tenant even if the tenant is represented by counsel. ***Village Apartments of Cherry Hill, N.J. v. Novack, 383 N.J. Super. 574, 893 A.2d 8 (App. Div. 2006)***

The Court found that without the appearance of the tenant's guardian, the lower court did not have jurisdiction to decide the case. It noted that, by statute and court rule, a person adjudged mentally incompetent must be represented by a guardian as well as by an attorney because an attorney and guardian have different roles and objectives. While the attorney's role is to zealously represent the tenant, the guardian's role is to determine what is in the tenant's best interest. The Court noted that the requirement to have a guardian present is not a matter of form, but is required in order to protect an incompetent person. In this case, since the tenant had been receiving Section 8 housing benefits, a judgment evicting him for cause would have risked his ability to find new Section 8 housing. The Court noted that had the guardian been present, the guardian might have recommended that the attorney not contest the action or seek to have the eviction order vacated to preserve the tenant's Section 8 housing eligibility. For those reasons, the Court held that the presence of the guardian was essential and that the trial should not have proceeded without the tenant's guardian.

LANDLORD/TENANT; RESIDENTIAL; EVICTIONS; DUE PROCESS: Court forms permitting the landlord to demand as "rent" for purposes of the tenant avoiding eviction sums that are not collectible under New Jersey law for such purposes may be a violation of the Due Process Clause. ***Hodges v. Feinstein, Raiss, Kelin & Booker, LLC, 383 N.J. Super. 596, 893 A.2d 21 (App. Div. 2006),*** discussed under the heading: "Landlord/Tenant; Residential; Eviction; Fair Debt Collection Act."

Two tenants receiving Section 8 housing assistance from the U.S. Department of Housing and Urban Development fell behind on their rent payments on multiple occasions. The leases provided that in addition to rent, the tenants were responsible for "additional rent" such as attorneys fees, late charges, and court costs. The landlord, through its attorneys, filed numerous summary dispossess actions to evict the tenants from the apartments. The summary dispossess actions listed all amounts due, including rent and "additional rent". However, the complaints categorized all amounts due simply as "rent". Before final judgment was entered on the eviction actions, the tenants paid the full amounts listed as due. Nothing in the summonses or complaints indicated the tenants only had to pay "rent" and not the "additional rent" to avoid eviction.

It appears that the tenants should not have been required to pay the "additional rent" to avoid eviction, but only the actual space rent, although the court does not make clear whether this was due to the fact that they were federally assisted tenants or whether they were protected by New Jersey law, which is very favorable to residential tenants.

The court reviewed the case primarily on other grounds (see "Landlord/Tenant; Residential; Eviction; Fair Debt Collection Act"). But in doing so, the court suggested that there was a potential violation of the Due Process Clause requirement of notice for a court to use a form summons in a dispossession action that did not differentiate between amounts that had to be paid to avoid eviction and sums that, although owed, were not conditions to continued possession.

The court was quite unclear about whether the alleged violation of Due Process rights was carried out by the attorneys, who harassed the tenants for payment of the whole amount as a condition to avoid eviction, or by the courts. It would be difficult to make out a case that the attorneys' demand was "state action", although arguably an abuse of process claim might be made out. But the court seemed to be of the view that the pleadings themselves constituted unconstitutional state action.

Was the faulty notice in the forms themselves? The court suggested that this was the case. But it appears that the forms merely *permitted* inappropriate demands, rather than *required* them.

"In our view, the complaints served on this plaintiffs do not provide adequate notice because they do not clearly distinguish between the amount the tenant must pay to avoid eviction and the extraneous charges due and owing under the lease. We, therefore, refer this matter to the supreme Court Civil Practice Committee for consideration of possible amendments to the rules of practice and review of the forms currently included in the appendix to the New Jersey Court Rules."

Comment: If, as appears to be the case, the forms approved by the court permitted, but did not require, attorneys to make inappropriate demands in eviction complaints, the editor is hard pressed to understand how a Constitutional Due Process violation can be made out. Surely if the simple filing of a complaint in court would trigger "state action", then all attempts to enforce private rights would be subject to Constitutional scrutiny. Of course, there have been a few cases to suggest that any use of the courts to enforce an objective that would violate constitutional rights if done by a public agency is itself a breach of the Constitution. The leading case is *Shelley v. Kramer.* Some state courts have applied *Shelley* in other contexts, including Equal Protection. But mainstream constitutional theorists, as the editor understands things, still view *Shelley* as *sui generis* on the point, and don't believe that it portends a complete subordination of all judicial enforcement of private rights to the Constitution.

LANDLORD/TENANT; RESIDENTIAL; EVICTION; FAIR DEBT COLLECTION ACT: A summary dispossess action is an attempt to collect a debt and if an attorney is regularly in the business of filing summary possession actions, it must abide by the provisions of the Fair Debt Collection Practices Act, even it that means inserting the required notices in the eviction complaint. ***Hodges v. Feinstein, Raiss, Kelin & Booker, LLC, 383 N.J. Super. 596, 893 A.2d 21 (App. Div. 2006),*** Also discussed under the heading: "Landlord/Tenant; Residential; Evictions; Due Process". A law firm brought eviction actions against tenants in federally subsidized housing.

The tenants filed this action alleging the law firm violated, *inter alia*, the Fair Debt Collection Practices Act (FDCPA.) The law firm moved to dismiss the complaint. The lower court ruled that the FDCPA's definition of "debt collector" applies to law firms who regularly engage in consumer debt collection activity. Finding that this firm was not "regularly" engaged in the collection of debts, the lower court granted the law firm's motion to dismiss. Further, the lower court found that the landlord was seeking possession of the premises, not collection on a debt. In issuing its decision, the lower court did not conclude that an action for non-payment of rent was equivalent to an a action to collect on a debt. Even assuming that an action for possession would be considered an action to recover a debt, the lower court drew a distinction between a landlord, through its attorneys, asserting its own rights, and the purpose of the FDCPA which, according to the lower court, is to prevent contracted third parties from harassing debtors to enforce the rights of creditors. The tenants appealed.

The Appellate Division reasoned that summary dispossess actions, while being actions pertaining to property and not directed against specific persons, have

the same effect as enforcing a lien for outstanding rent. The summary dispossess action forecloses the right of the tenant to possession of the leased premises. Holding there was no difference between actions affecting property and actions directed against people, the Appellate Division held that summary dispossess actions are actions to collect a debt within the FDCPA. The FDCPA applies to attorneys who regularly engage in the practice of filing summary dispossess actions. Therefore, it reversed and remanded the matter to the lower court for a factual finding as to whether this particular law firm "regularly" engaged in the filing of summary dispossess actions, and thus qualified as a "debt collector" under the FDCPA.

The court listed what it viewed to be the consequences of imposition of FDCPA standards to eviction actions in New Jersey:

Landlord's attorney (assuming the attorney is a "debt collector" under the Act} must include FDCPA required information (including the disclosure of the right to contest the debt) in the non-payment Complaint or in a separate notice to be served upon the tenant after the complaint. Trial dates could not be scheduled until the thirty day period for notice to contest the debt has passed.

Comment 1: The court, for some reason, failed to cite a parallel decision based upon New York law in 1999, *Romea v. Heiberger & Assocs.,* 163 F. 2d 111 (2d Cir. 1999). This case was applied by the New York courts at least in *Giaio v. Greco,* QDS:46701058, May 5, 1999, New York Civ. Ct. http://www.nylj.com/decisions/99/05/050599b2.htm. (The DIRT DD for 5/7/99) As *Romeo* was decided seven years ago, undoubtedly there is other authority around the country that the court also didn't bother to pick up.

Comment 2: If you wonder whether you might be a "debt collector" under the Act, you probably are. The standards as to what constitutes "regularly" collecting consumer debts aren't that hard to satisfy.

LANDLORD/TENANT; TENANT REMEDIES; RENT ABATEMENT: A lease provision entitling a tenant to rent abatement if the landlord fails to complete safety and security improvements as specified is a permissible liquidated damages provision and not a penalty unless the challenging party shows that tenant's actual damages were readily ascertainable at the time of contract or that the provision entitles tenant to a benefit grossly disproportionate to its actual damages. ***Bates Adver. USA, Inc. v. 498 Seventh, LLC, 850 N.E.2d 1137 (N.Y. 2006)***.

Plaintiff Bates Advertising USA, Inc. ("Bates") filed suit in the New York Supreme Court in December 1999 against 498 Seventh, LLC ("498"), seeking enforcement of the liquidated damages provision of the commercial lease to which plaintiff and defendant were parties. Bates was leasing about half of a major office building in New York City. The base rent for the 16 year term, the court noted, exceeded $100 million.

Bates, the commercial tenant, alleged that 498, the landlord, had failed to complete certain safety and security improvements as contemplated by the lease and sought a refund of rent pursuant to a provision of the lease entitling tenant to rent abatement for every day beyond the contemplated date on which landlord had failed to complete substantially the specified improvements, with the percentage of rent abating being 50% for most improvements, and 100% for certain improvements the parties had deemed more important. The tenant claimed that such a provision was relatively standard in significant commercial leases in New York.

The trial court dismissed Bates' causes of action, finding that the rent abatement provision constituted an unenforceable penalty rather than permissible liquidated damages, but the Appellate Division reversed and remanded, and on remand, the Supreme Court found that 498 had breached under the lease and awarded Bates rent abatement credits accordingly.

The Appellate Division affirmed. The New York Court of Appeals here affirmed as well.

Declining to revisit the factual findings underpinning the Supreme Court's finding of breach, the Court identified the matter at issue as whether the provision entitling tenant to rent abatement in the event of landlord's breach was an unenforceable penalty. Citing *JMD Holding Corp. v. Congress Fin. Corp.*, 4 N.Y.3d 373 (2005), the Court found that the party challenging a liquidated damages clause must demonstrate either that damages for breach were readily ascertainable at the time of contract or that the liquidated damages provided are conspicuously disproportionate to foreseeable injury in the event of breach.

The Court of Appeals noted that 498 (the landlord) had not attempted to show that damages resulting from its breach were readily foreseeable. Further, citing the Appellate Division, the Court noted that the one-to-one proportionality between the period of breach and the period for which Bates was entitled to rent abatement successfully ensured that Bates would not obtain a benefit grossly disproportionate to its injury. Finally, the Court rejected 498's argument that simply because the abatement provisions were intended to incentivize or pressure 498 to complete the contemplated improvements, the provision constituted a penalty. The Court noted that any prospect of damages for breach could be said to incentivize compliance with a party's contractual obligations, and declined to find a penalty in the absence of damages which were grossly disproportionate to foreseeable losses. Accordingly, the Court affirmed.

Comment: Note that the court didn't absolutely conclude that this provision, described as relatively standard, was in fact enforceable. It concluded simply that, on the record, the landlord had not carried its burden of demonstrating that the provision was a penalty. The landlord had to demonstrate either that the damages of failure to complete the safety improvements on time were foreseeable (a tough job) or that the rent abatement was not a reasonable means of estimating unforeseeable consequences. Again, as the consequence to the tenant might be that it would be left "homeless" without being able to operate in its new space and possibly unable to continue in its old space, the 50% abatement conceivable could be regarded even as a bargain.

LANDLORD/TENANT; TENANT'S LIABILITY FOR INJURY TO THIRD PARTIES; FIXTURES: Tenant that leaves trade fixtures on premises to be used by employees of successor landlord may be liable to plaintiff injured due to defects in the fixtures even if the current tenant has agreed with the landlord that the fixtures are taken "as is". ***Dutchmen Manufacturing, Inc. v. Reynolds, 849 N.E. 2d 516 (Ind. App. 2006)***

Dutchmen leased property from Chapman and operated a manufacturing facility there. As part of this operation, Dutchmen, without Chapman's knowledge or consent, installed scaffolding near the ceiling of the building. The lease provided that any trade fixtures left on the premises after the lease ended became the property of landlord at landlord's option. The landlord also could require the tenant to remove the fixtures. The scaffolding in question was conceded by all parties to constitute a trade fixture.

When the lease ended, Chapman first demanded that Dutchmen remove the scaffolding. Before this occurred, however, it developed that the incoming tenant desired that the scaffolding be left in place. As it would have been expensive for Dutchmen to remove the scaffolding, it eventually reached an agreement that it would simply leave the scaffolding in place for no compensation. The new lease provided that tenant accepted the premises "AS IS" and, further, the president of the new tenant delivered an affidavit to Chapman that his company "accepted and took possession of the scaffolding . . . at its own risk, regardless of whether the scaffolding contained defects or deficiencies".

Good call – landlord!! A short time later, a portion of the scaffolding fell from the ceiling and struck an employee of the new tenant, rendering the employee quadriplegic. The employee sued Dutchmen, alleging that its experts had ascertained that the scaffolding contained negligent welding and lubrication, and that the defect was contained inside a pipe constituting an "outer sleeve" which was capped, and thus effectively invisible to anyone inspecting the scaffolding. The scaffolding had been constructed by Dutchmen employees.

The injured employee sued Dutchmen under Restatement of Torts Section 388, which states that "one who supplies directly or indirectly through a third person a chattel for another to use is subject to liability to [expected users or others injured by expected usage] for physical harm caused by the use of the chattel . . . if the supplier knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied [and the problem is unlikely to be discovered and no warning is given]".

Dutchmen argued that it hadn't "supplied" a chattel because the scaffolding "merged" into the real estate when it was left on the premises following the expiration of the lease, and became the property of the landlord. The court held that the fact that the landlord had in fact originally demanded that the tenant remove the scaffolding indicated that no merger had in fact occurred, and that the scaffolding, which, as a trade fixture, was a "chattel," passed directly from Dutchmen to the new tenant.

But the court went on to say that the question of whether the landlord was an intermediate owner of the scaffolding was irrelevant to its conclusion of Dutchmen's liability here. Once the item is "supplied", then potential liability exists. The court analogized to a contractor supplying faulty wiring that is installed into a building, thus become part of the "real estate". The supplier would still be liable under Restatement 388 if the defect in the wiring led to a foreseeable injury.

Dutchmen then argued that the new tenant contractually assumed the risk of defects in the scaffolding when it accepted the scaffolding "as is". The court first noted that the "as is" agreement was with the landlord, not with Dutchmen, and simply was a waiver of claims, if any, against landlord Chapman. In fact, the language in the lease itself likely didn't apply to the scaffolding at all, since the scaffolding was not part of the leased premises, as ownership of it passed directly from Dutchmen to the new tenant.

In any event, the court held, parties cannot, through an "as is" agreement, transfer risk from themselves to non-parties. Any allocation of responsibility to the new tenant did not absolve Dutchmen of liability for its negligence insofar as plaintiff was concerned. The court cited cases for the proposition that an employer's indemnification of a third party does not limit an employee's claims against that third party. (The court did not decide that the "as is" affidavit constituted such an indemnification, but concluded that it wouldn't have mattered if it did.)

Comment 1: The case is correct, and largely based upon tort principles, rather than upon property concepts. The issue of tenant's duty to remove fixtures is remarkably unresolved. Compare U.P.C., Inc. v. R.O.A. General, Inc., 990 P.2d 945 (Utah App. 1999) (the DIRT DD for 12/7/99) (tenant that installs fixtures or improvements with landlord's knowledge and consent has no duty to remove them at lease end) with S.S. Air v. City of Vidalia, 2006 Westlaw 399749 (Ga. App. 2006) (*contra).*

Comment 2: Of course, the practice lesson for the landlord is a good one. Murphy's law insures that if that scaffolding might be dangerous, it will be dangerous, and therefore if it stays, the landlord wants complete protection. It got it here.

LANDLORD/TENANT; USE; RESIDENTIAL ONLY: Tenant's use of a rent-stabilized apartment as a day care did not violate the provisions of a lease prohibiting non-residential use. ***Marick Real Estate, LLC v. Ramirez, 812 N.Y.S.2d 210 (Supp.App.Term 2005).***

A landlord attempted to recover possession of a rent-stabilized apartment based on violations of material terms of the lease when the tenant used the apartment as a "child care business". The material terms the landlord claimed were violated included (i) restriction of the use of the property for residential purposes, (ii) barring any actions that could increase the landlord's insurance costs and (iii) prohibitions against violations of law. The court held that the state's interest in promoting availability of home child care by restricting government interference and private covenants outweighed landlord's concerns regarding lease violations. The state's interest is articulated in Social Services Law Sec. 390(12), which restricts public agencies from regulating against group care homes.

Comment 1: The issue of whether a covenant against group care homes violates public policy in New York is not exactly judge-made law. The original case establishing the proposition, *Crane Neck Ass'n v. New York City/Long Island County Services. Group, 41 N.Y.S.. 2d 154 (N.Y. 1984)* interpreted a state statute that prohibited state and local government from prohibiting lawfully licensed group care homes in residential neighborhood. The New York Court of Appeals held that the policy of the statute also applied to private restrictions, although the statute did not so state specifically. The U.S. Supreme Court denied *certiorari:* 105 S. Ct. 60.

Since then the same ruling has applied to acts by homes associations interpreting their residential only restrictions so as to preclude group care homes. *Quinnones v. Board of Managers of Regal Walk Condominium I*, 673 N.Y.S. 2d 450 (A.D. 1998).

Comment 2: To the editor, all of this appears to be essentially imposing on private individuals the public burden of providing group care facilities, by restricting the ability of parties to contract privately to restrict such facilities. If the state wants or needs such facilities, it can spread the cost to the public at large through the process of eminent domain.

But the editor's argument is weakened significantly if New York does not regard servitudes as "property" that

are compensable in eminent domain. As the editor understands this issue, it is divided in the state courts and not resolved at the U.S. Supreme Court level.

LANDLORD/TENANT; VALIDITY OF LEASE; INDEFINITE TERMS: A letter agreement granting broad development rights is not enforceable without setting forth certain essential terms. ***Uniland Partnership v. Blue Cross of W.N.Y., 811 N.Y.S.2d 517 (A.D. 4 Dept. 2006)***. A landlord and tenant purported to enter into a letter agreement granting the landlord the exclusive right and option to develop or acquire building facilities for the tenant within the eight counties of Western New York. The Court held that since the letter agreement failed to set forth certain material terms such as the location of the building facilities and the nature and cost of the development, the agreement was merely an indefinite "agreement to agree" and not a binding agreement.

LIS PENDENS*; MORTGAGE FORECLOSURE:** Filing a notice of pendency provides constructive notice of a foreclosure sale to a purchaser of real property and subjects such purchaser's rights to such foreclosure sale. ***Novastar Mort., Inc. v. Mendoza, 811 N.Y.S.2d 411 (A.D. 2 Dept. 2006).

MORTGAGES; ASSIGNMENT; PERFECTION: Assignment of a mortgage can be perfected without recording, and its recording thereafter does not violate the automatic stay. ***In re Cook: Rogan v. Bank One, 457 F.3d 561 (6th Cir. 2006)***, discussed under the heading: "Bankruptcy; Avoidance; Perfection."

MORTGAGES; EQUITABLE SUBROGATION: Another precinct reports – Minnesota finds that institutional lenders have a special duty of care to check records, and denies equitable subrogation where lender failed to double check land records and missed a late recorded mortgage that went unpaid at closing. ***Ripley v. Piehl, 700 N.W. 2d 540 (Minn. App. 2005)(rev. denied 10/18/05)***

Although it seems that we have reported on this issue *ad nauseum*, new cases are always coming down and jurisdictions are taking distinctly different positions on the basic questions of the availability of equitable subrogation to refinancing lenders. So it is useful to note the new decisions.

Here, Hewitt was purchasing property under a contract for deed, had some federal tax liens, and owned Ripley $250,000. Hewitt applied for a loan from Bank to acquire the title to the property from the contract seller. The Bank checked title at the time of the application. Thereafter, Hewitt gave a recorded mortgage to Ripley to secure the $250,000. More than a month later, the bank closed on the refinancing loan without it or its title insurer checking the records again. Hewitt provided an affidavit that there were no other liens that would remain unpaid following the closing and the court commented that there was absolutely no doubt that the lender expect to receive a mortgage on an unencumbered title.

There followed some interesting shenanigans by Ripley that apparently the court concluded had no bearing on the subrogation issue.

Hewitt quickly fell into default on both the Riply mortgage ($255,000) and Bank mortgage ($330,000) and Ripley brought a foreclosure action. Bank responded by asking to be subrogated to the installment land contract and tax liens that its loan proceeds had paid off. The court rejected the claim. It acknowledged that there are three prevailing approaches now being followed on the question of whether subrogation is available: (1) Actual knowledge of prior liens at time of the second mortgage will preclude an subrogation to earlier liens retired from the second mortgage proceeds; (2) actual or constructive knowledge will block subrogation; (3) knowledge is generally irrelevant – all that matters is whether the proceeds were in fact used to retire the prior liens and other equities are appropriate (the Restatement approach).

The court concluded that Minnesota, for reasons that the court seemed to support, followed the second rule – even constructive knowledge will bar subrogation, at least for a junior lender who should have and could have checked the record and discovered the prior liens. The court quoted from Eighth Circuit authority discussing the Minnesota approach, and specifically targeting institutional lenders and their title insurers:

[T[he Eighth Circuit Court of Appeals, applying Minnesota law, held that a title insurer's failure to perform a title search—which would have disclosed the existence of prior federal tax liens against the subject property—was not an excusable mistake of fact warranting application of its subrogation rights as against the government. . . .

The court wrote:

We believe that . . . the Minnesota courts impose stricter standards on professionals than lay persons in assessing whether mistakes are "excusable" for purposes of the doctrine of [equitable] subrogation, especially when the professional relationship arises out of a commercial transaction involving consideration. It is unreasonable to believe that the Minnesota Supreme Court would distinguish a title insurer from a bank; both are professional enterprises experienced in the area of secured transactions involving real property.

The court also stated:

[Appellant title insurer] Universal is a professional enterprise, which is in the business of insuring marketable title to real property. Although Universal contends that it exercised prudent business practices in investigating the title to the ... property, it fails to explain what precautions it took or why it failed to discover the properly recorded federal tax lien. Its claim that it sought and received assurances from the seller that there were no liens, other than those discharged at closing, is patently insufficient.... Universal's inability to explain its failure to find the properly recorded federal tax lien is significant, because Universal had the burden of persuasion at trial of demonstrating its entitlement to subrogation.... Universal's failure to detect the federal tax lien resulted from negligence, and therefore, it is not entitled to be legally subrogated to the rights of the prior senior lienholders. (citations omitted).

Comment 1: The editor has always been of the view that equitable remedies cannot be ordered off a menu. There must be "good equities" to support this special form of relief, and the editor, like the Minnesota courts, has always wondered why a Bank that ought to be in the business of lending money against confirmed value in security, should get a "free pass" when it is negligent in checking the security, as it appears was the case here.

Maybe things would be different where a document is treated as recorded and prior but, as a practical matter, is unindexed and undiscoverable. Then the bank may have an equitable excuse, but it does not appear that was the case here.

As the reporter in the Minnesota current developments report noted: Practice tip: Update title prior to closing. (Well, duh!!!)

Comment 2: As indicated above, there were some shenanigans not mentioned by the court except in the statement of facts. After Hewitt gave the mortgage to Ripley, he gave Ripley a quitclaim deed to the property, which Ripley didn't record until after the Bank mortgage. As the Bank lacked constructive or actual notice of the deed to Ripley, the Bank would have priority over the deed. But that fact is neither here nor there, since Ripley's earlier recorded mortgage was in the record.

But why didn't the deed to Ripley extinguish the mortgage by merger? No comment from the court. Interesting.

MECHANIC'S LIENS; MATERIALMEN; PROOF OF CLAIM:: Direct evidence is not required to establish the required elements for a materialmen's lien. ***Consol. Elec. Distribs., Inc. v. Santa Fe Hotel Group, L.L.C., 126 P.3d 1145 (N.M. Ct. App. 2006).***

Contractor contracted with Landowner to purchase and install lighting in Landowner's parking lot. Contractor completed the job and Landowner paid Contractor; however, Contractor did not pay Materialman. Materialman filed a claim of lien against Landowner's property.

It was undisputed that Contractor ordered lighting fixtures from Materialman for Landowner's project. The only witness to testify for Materialman was its outside salesperson. He testified that the fixtures were delivered to Contractor rather than the job site. The witness also admitted that he did not go to the job site while the lights were being installed. However, when it became clear that Materialman was going to have to file a claim of lien, the salesperson went to Landowner's property and took pictures of the fixtures. These pictures were admitted into evidence. The salesperson testified that he believed that the fixtures on Landowner's property were the same fixtures that Materialman sold to Contractor. There was no evidence introduced indicating that Contractor ordered the type of lights used in Landowner's project for other projects that were in progress at the same time as Landowner's project. Based on circumstantial evidence, the trial court found and concluded that the lighting fixtures that Materialman sold for use in Landowner's project were in fact used in Landowner's project.

On appeal, Landowner argued that New Mexico case law requires either direct evidence that the materials supplied were actually used in Landowner's project or evidence of actual delivery of the materials to Landowner's land, from which an inference of such use may be drawn. The New Mexico Court of Appeals disagreed and concluded that circumstantial evidence is sufficient, and that substantial evidence supported the trial court's decision foreclosing the lien.

Comment: Although obviously the actual holding involves an interpretation of New Mexico state law, practitioners elsewhere will be interested in the approach taken here, as many states have traditions of holding contractors to a high standard in demonstrating that their work actually benefitted the liened property. This sometimes can pose a problem for material suppliers as this case demonstrates, and the latitude that was provided here may prove helpful in other states as well.

MORTGAGES; FORECLOSURE: Filing a notice of pendency provides constructive notice of a foreclosure sale to a purchaser of real property and subjects such purchaser's rights to such foreclosure sale. ***Novastar Mort., Inc. v. Mendoza, 811 N.Y.S.2d 411 (A.D. 2 Dept. 2006)***.

MORTGAGES; FUTURE ADVANCES; SCOPE: Dragnet clause does not incorporate into the lien of the mortgage an unrelated judgment rendered against the mortgagor by a third person when the mortgage containing the dragnet clause is assigned to the third person. ***Money Store Investment Corp. v. Summers, 849 N.E. 2d 544 (Ind. 2006)***

National City Bank held several mortgages on real estate owned by Summers. The mortgages contained "dragnet clauses," providing that the mortgages secured "any and all other notes or obligations of the Mortgagor to the Mortgagee."

Money Store later loaned Summers $879,000 secured by the same real estate. These mortgages were intended to replace National City's previous mortgages and to provide additional capital to Summers. Summers forwarded payoff statements, including daily interest, to the loan escrow, but in the end there remained an unpaid balance on one of the National City mortgages of $375. National City also claimed that it was owed $4,700 due to "overdraws" by Summers. Consequently, although the mortgage balances were paid down substantially, did not release its mortgages. Those dragnet clauses were still out there.

Subsequently, Phillips, a third party, obtained a judgment against summers for $206,000. Summers went into default on the Money Store mortgages, and Money Store instituted a foreclosure.

Phillips, facing wipeout in the Money Store foreclosure, obtained an assignment of the unreleased National City Bank mortgages, and claimed that the $206,000 was now covered by the dragnet clauses under those mortgages. Phillips then filed her own foreclosure complaint, naming Money Store as a party defendant, arguing that she held a lien senior to Money Store by virtue of the dragnet clauses contained in the mortgages that she now held. (Note again the language: "any and all other notes of obligations of the Mortgagor to the Mortgagee".) The trial court and the Court of Appeal held in favor of Phillips.

The best laid plans, however . . . . The Indiana Supreme Court sensibly held that the tradition of strict construction of dragnet clauses drove it to the conclusion that the parties couldn't possibly have intended to create a collection device for any and all future creditors of the mortgagor. Rather, the parties intended to limit the scope of the clause to obligations Summers incurred in the future to National City Bank. The Phillips judgment was for a different claim that had no relationship to the National City loans, and it was not made in reliance on the security. Thus her judgment did not fall under the coverage of the dragnet clauses.

In another Indiana decision, ***Hepburn v. Tri-County Bank, 842 N.E. 2d 378 (Ind. App. 2006),*** the Court of Appeal ruled that a dragnet clause in a mortgage executed by a wife also covered a guaranty that she later executed for an obligation of her husband, thereby making her mortgaged property security for both of the loans. A dissenting opinion argued that her guaranty could have, but did not, fall under the dragnet clause because the guaranty specifically declared that it was unsecured. *Also see: Iuka Guaranty Bank v. Beard*, 658 So.2d 1367 (Miss. 1995) (*dicta*) (The DIRT DD for 10/27/95). (Dragnet clause securing all debts to bank, present or future, owed by husband and wife, or one of them, is valid as drafted, and secures loans known only to one of the parties.)

Comment 1: There is an obvious practice lesson here – get a discharge of loans that you believe that you are refinancing.

Comment 2: This case was a commercial loan case. Because many dragnet clauses bite small businessmen, as was the case here, particularly farmers, we find that the courts basically provide "consumer like" protection for borrowers who sign these things. But for a consumer protection case involving a consumer, see *In re Wollin,* 249 B.R. 555 (Bankr. D. Or. 2000) (The DIRT DD for 7/18/00) (lender may not use a dragnet clause in a personal property security agreement to add to its secured claim future advances made on a credit card; nor may it add unpaid balances on loans made prior to the secured transaction without a specific reference to the prior loans in the subsequent security agreement.) For another example of a narrow reading language dealing with these clauses, see: *NAB Asset Venture III, L.P. v. Brokton 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.) (The editor criticized this decision.) *Compare: VATACS Group, Inc. v. Homeside Lending, Inc.*, 623 S.E.2d 534 (Ga.App. 2005), (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.)

Comment 3: The Supreme Court stated the Indiana test of scope of dragnet clauses has three independent standards: (1) Is the later debt of the same general kind as the original mortgage debt? (2) Does the later debt bear a "close relationship" to the original mortgage debt? Or (3) Is there evidence that lender "specifically relied" on the security in making the subsequent loan?

MORTGAGES; INTEREST; USURY: Mississippi courts define "highest rate of interest then in effect" in terms of local restrictions. ***Dunlap v. Intervest Development Corp., Miss. Court of Appeals No. 2005-CA-01271-COA, 2006 WL 2474318 (August 29, 2006)***.

A promissory note provided in relevant part as follows: "The whole of the principal sum and, to the extent permitted by law, any accrued interest, shall bear after default, interest at the highest lawful rate then in effect pursuant [to] the laws of the State of Mississippi or of the United States of America."

The maker of the note defaulted, and the borrower brought an action against the maker and guarantors. The only issue addressed in the opinion was the amount of interest after default. The maker of the note argued that since the parties did not specify a rate, the highest lawful rate was the legal rate of 8%, as provided in Mississippi Code Ann. § 75-17-1(1). The holder of the note argued that Section 75-17-1(3), which provides that a corporation may contract for a legal rate of up to 15%.

The chancellor held that under the quoted language, the highest lawful rate was the legal rate of 8%. The holder of the note appealed. The Mississippi Court of Appeals, in a 5-4 decision, affirmed. The majority, in an opinion by Justice Irving, focused on the words "rate then in effect". The only rate in effect in Mississippi at the time, reasoned the majority, was the legal rate of 8%. While Section 75-17-1(1) permitted the parties to contract for payment of a higher rate, no higher rate was "in effect" under Mississippi law at the time of the default.

The dissent, written by Justice Griffis, reasoned that the "highest lawful rate" was the 15% rate permitted by Section 75-17-1(3).

Reporter's Comment 1: A quick primer on Mississippi interest rates: while there are special statutes for loans regulated by the Small Loan Regulatory Act, loans secured by manufactured house, credit cards and other special types of loans, the general interest rate statute is Section 75- 17-1 of the Mississippi Code. Subsection (1) provides that the legal rate of interest on notes and contracts is 8%, but the parties can agree on a different rate if permitted by law. Subsection (2) provides that any borrower or lender can agree on a rate of 10%. Subsection (3) provides that a corporation can agree on a rate of 15%. Subsection (4) provides that a borrower can agree on a rate of 10% if the loan is secured by residential real estate. Subsection (5) provides that, notwithstanding any other provision of law, a borrower can agree to pay any interest agreed to in writing by the parties if the principal amount of the loan exceeds $2,000. So for most loans, Subsection (5) will apply, and there is no usury limit.

Reporter's Comment 2: The majority distinguished the language in the note—"the highest lawful rate then in

effect"—from another phrase commonly found in promissory notes, "the maximum amount allowed by law". The Reporter usually sees the phrase "the maximum amount allowed by law" in provisions avoiding usury. For example, "the interest rate shall be the lesser of 6% or the maximum amount allowed by law," or "Borrower shall pay a late payment charge of the lesser of (a) 5% or (b) the maximum amount permitted by law".

The majority noted that if the note in that case had said that interest would be at the maximum amount allowed by law, the parties could agree on an astronomical rate, since Section 75-17-1(5) seems to allow this. So suppose you're looking at note that provides that interest will be "the lesser amount of (a) ten percent or (b) the maximum amount allowed by law". Does the holding of the *Dunlap* case mean the use of the phrase "the maximum amount allowed by law" will be deemed to limit the interest rate to the legal rate of 8% in Section 75-17-1(a)? The Reporter's reading of *Dunlap* is that as long as the loan is in excess of $2,000, the maximum amount allowed by law is whatever the parties agree. Whether a truly astronomical rate would be enforceable is another matter.

Reporter's Comment 3: The decision in this case is a close call, as evidenced by the 5-4 decision. The editor would not be surprised to see the Mississippi Supreme Court take this case up for consideration.

Editor's Comment: In fact, the editor selected this case for distribution precisely because of the fact that the language "highest legal rate" often results in a fatally ambiguous provision, since there is no rate limit. What the editor finds interesting is that, for many loans and many lenders, federal law preempts local usury law and imposes no maximum rate. Again, we have a fatally ambiguous term.

The court here, in the editor's view, was quite generous to the lender in seeking out a rate that arguably did provide a cap, and granting that rate to the lender. In general, it is stupid and possible malpractice to insert this kind of language where the parties are serious about establishing a high default rate. Set a fixed reasonable rate and be prepared to defend it. Even if you get away with a very high rate in state court, you won't cut it in bankruptcy court. And, increasingly, state courts are subjecting default interest to a penalty analysis.

The Reporter for this item was Rod Clement of the Jackson, Mississippi, bar.

MORTGAGES; PREPAYMENT; PREPAYMENT PREMIUM; BANKRUPTCY; "PENALTY" ANALYSIS: Federal District Court concludes that "sliding percentage scale" prepayment provision should be disallowed because, under liquidated-damage analysis, lender failed to establish that penalties were "reasonable" charges under sec. 506(b) of Bankruptcy Code. ***UPS Capital Business Credit v. Gencarelli, 2006 WL 3198944 (U.S D.C. RI Nov. 3, 2006)***

Lender, UPS Capital Business Credit ("UPS"), made two loans to a flour company ("Bess Eaton") and its sole shareholder (collectively, "the debtors"). Instead of utilizing a standard yield-maintenance prepayment provision the lender inserted an unusual (and antiquated) "sliding scale percentage" prepayment premium in the 2002 mortgage loans to the borrower, which provided for a prepayment penalty if outstanding principal payments made during the first five years exceeded a specified amount (the penalty ranged from 5% in the first year to 1% in the fifth year). The debtor filed for Chapter 11 bankruptcy in 2004. UPS included within its claim an additional $202,822 in prepayment penalties. (Interestingly, "the [bankruptcy] estate had several million dollars more than what was needed to pay creditors and the value of the property securing UPS's loan was far in excess of UPS's claim." Id. at *1.)

The bankruptcy court held two evidentiary hearings regarding the issue of the enforceability of UPS's claim for payment of the premium. But Mr. Dahms, the "expert" for UPS, was a terrible witness and came across as confused and uninformed. According to the court, he "was unable to explain how the prepayment penalty had been calculated". *Id.* In fact, the bankruptcy court noted Mr. Dahm's admissions that he was "clueless" as to how the prepayment penalty was calculated and what actual losses UPS may have sustained. Mr. Dahms posited several alternative explanations for the premium, none of which considered what UPS was able to earn by reinvesting the amounts that were prepaid. Mr. Dahms' testimony was so uniformed and irrelevant that the bankruptcy court issued an order striking his testimony and disallowing UPS's claim for a prepayment premium "on the ground that UPS had failed to establish that the penalties were 'reasonable' charges within the meaning of sec. 506(b)".

The District Court began its holding by stating that "[a] prepayment penalty is a form of liquidated damages", making this blanket assertion based primarily on the holdings in *In re A.J. Lane*, 113 B.R. 821, 823 (Bankr. D.Mass. 1990) and *In re Skyler Ridge,* 80 B.R. 500, 506 (Bankr. C.D. Cal. 1987). But these cases have (as noted in other DIRT posts) been heavily criticized and dismissed as not accurate statements of the law in this area, and have not been followed by other courts. Nonetheless, the District Court employed a liquidated-damages analysis, and after reviewing other bankruptcy cases, held that "reasonableness" under sec. 506(b) of the Bankruptcy Code should be determined "as of the time that the loan is made because that approach recognizes the parties' freedom to contract as they see fit, and because it is more consistent with the justification for liquidated damages provisions". The court ruled that in this case UPS had failed to carry its burden under this standard, because it had failed to show that the prepayment premiums amounted to a reasonable estimate of the loss that UPS was likely to sustain in the event of a breach. Finally, the court also stated that "if UPS's actual losses could be proven, there would have been no justification for a prepayment penalty. In addition, UPS has failed to satisfactorily prove what actual damages, if any, it sustained". *Id.*

Reporter's Comment 1: What is unusual in the *U.S. Capital Business Credit* case is the type of prepayment provision involved, *i.e.,* a "sliding scale percentage" clause instead of the various forms of "yield maintenance" and "defeasance" provisions that are commonly inserted in commercial mortgage loans today. It can be argued that yield-maintenance prepayment provisions are much more likely to be judged "reasonable" by a court than sliding-percentage provisions (which were common in the 70s and early 80s), because they are tied to the actual cost of the borrower's funds and are the current standard in the commercial marketplace. See, *e.g., In re Anchor Resolution Corp.*, 221 B.R 330 (Bankr. D. Del. 1998) (the court noted, in ruling in favor of the enforceability of the provision by the creditor, that unlike the cases cited to it by the debtor, in the instant case the prepayment formula "accounts for changes in the Treasury rate, decreases over time, and has no 'minimum charge'". *Id* at 341; the court therefore found that the make-whole premium was not a penalty and was "reasonable" under state law as well as under § 506(b) of the Bankruptcy Code, in terms of both the formula used to calculate the amount of the premium and the amount as a percentage of the principal.)

Reporter's Comment 2: This case also clearly demonstrates the importance of a lender presenting a credible and knowledgeable expert to testify on its behalf, and being able to calculate its damages (or at least a potential range of damages and reasons for the type of clause inserted in the loan documents). Of course, in Mr. Dahms' defense, it is difficult in any event to demonstrate how a "sliding scale percentage" prepayment clause has any relevance to the lender's actual damages.

Reporter's Comment 3: It is still bothersome and disheartening – even in a bankruptcy case – to see a court so readily and unquestioningly adopt a liquidated-damages analysis when discussing the validity of prepayment premiums. It is baffling why such courts continue to rely on such dated and discredited cases as *A.J. Lane, Skyler Ridge*, and *Kroh Bros*. It is even more baffling in this particular case because, unlike the *Skyler Ridge* and *Kroh Bros*. bankruptcy cases, the estate had several million dollars more than was necessary to pay all creditors in full, and the prepayment premium was negotiated in a commercial setting by sophisticated businesspeople and their counsel.

Reporter's Comment 4: The court in the *U.S. Capital Business Credit* case makes a very strange statement, i.e., that "if UPS's actual loss could be proven, there would have been no justification for a prepayment penalty". This is illogical, as actual damages for a prepayment of a mortgage loan are in fact not capable of exact determination at the time of the loan, especially with respect to a yield-maintenance prepayment provision, and because the borrower is not, in any event, "entitled" to prepay the mortgage loan. The vast majority of prepayment cases, even ones that don't allow the premium calculated under a liquidated-damages analysis, have allowed the lender to at least collect its "actual" damages.

Editor's Comment 1: As Jack points out, the only time that a liquidated damages analysis is relevant is if the prepayment is triggered by an acceleration following default. Otherwise, the proper (and majority) approach is to treat prepayment as an borrower's option priced according to the amount of the premium. The court here appears to be of the view that these premiums ought always to be evaluated under a liquidated damages test.

This is not only inconsistent with the precedent, if fails to reflect the realities of the situation.

Editor's Comment 2: Although the "sliding scale percentage" clause indeed was a common market practice in the early days of prepayment penalties, there has always been a significant question as to whether it would pass must under the "penalty" analysis that is commonly applied to prepayment premiums triggered by default/acceleration. There simply is no discrete attempt to tie the premium in these cases to the potential loss suffered by the lender. Anyone testifying in support of the clause would have to show that the lender's potential losses were not only in the range of the penalty, but also show that those losses were potentially higher in the early years (when the premium is higher) than later.

Of course, one can argue that the lender's costs of making the loan properly can be amortized over the first five or ten years of the interest stream, so that the loss of the benefit of those costs can be said to decrease over time. But this presupposes that the method of computation of the prepayment premium bears an original relationship to the cost to the lender of setting the loan up. Where the lender consistently uses a "percentage of the loan amount" as the basis for setting the premium, and doesn't vary the percentage regardless of the amount of the loan, the lender would have to show that higher dollar loans are substantially more costly to originate than lower dollar loans. Maybe this can be done, but it's a tough sell.

The Reporter for this item was Jack Murray of First American Title Insurance Company – Chicago Office.

MORTGAGES; PREPAYMENT; YIELD MAINTENANCE: Eighth Circuit finds that yield maintenance provision predicated on treasury yields is acceptable as a liquidated damages approach to compute prepayment penalty following default and acceleration. The court holds specifically that the clause is reasonable even under the Bankruptcy Code 506b test for reasonable fees and charges. ***In re CP Holdings (CP Holdings v. Calif. Public Employees Retirement System, 2006 U.S. App. LEXIS 27676 (8th Cir. 11/7/06)***

We now have an Eighth Circuit Court of Appeals case standing for the proposition that a yield maintenance clause.

The opinion does not give adequate detail about the issues and facts to permit full analysis. But that information can be obtained from the decision at the federal district court level. This was the DIRT DD for 10/2/06 – on the DIRT website: http://www.umkc.edu/dirt

The case involved a pre-bankruptcy default and acceleration. The prepayment provision itself was poorly drawn, but the court concluded (as affirmed here) that the parties in fact did intend that the prepayment premium was triggered by default. It then found figuring the yield maintenance premium by comparing the note rate to the yield on comparable U.S. treasury yields – which leads to a – high premium in many cases, is an acceptable approach as a liquidated damages computation.

Bankruptcy Code 506b requires that in bankruptcy the court allow only fees and charges that are "reasonable". The lower court did not view this issue as a Bankruptcy Code 506b question, because it found that 506b ought not to apply where the default occurs prior to bankruptcy. It looked at the question only as one of Kansas liquidated damages law. But the Eighth Circuit decision elected to duck the question of whether 506b applied or not to this provision by stating that the prepayment premium was reasonable even if 506b applied.

This is a significant victory, of course, for lenders, especially coming hard on the heels of a less pleasant result in a trial court in Chicago.

The editor was an expert witness for CALPERS in the bankruptcy proceedings on this issue.

MORTGAGES; PRIORITY; SUBROGATION: Wyoming holds that institutional lender is not entitled to benefit of equitable mortgage doctrine where State has explicit "filing date priority" or "first in time" statute and lender has actual and constructive notice of intervening mortgage. ***Countrywide Home Loans, Inc. v. First Nat'l Bank of Steamboat Springs, N.A., 2006 Wyo. 132, 2006 Westlaw 2946869 (Wyo., Oct. 17, 2006).***

Ketcham obtained a mortgage loan from AWL in 1997 in the amount of $100,000, which mortgage was properly recorded. In 1998, AWL assigned its mortgage to Bank of New York, via recorded assignment. In 2002, the Ketcham's executed a mortgage (for a business loan) to First National Bank in the amount of $97,500. In 2003, the Ketcham's executed a third mortgage on the property

to Countrywide, for the purpose of paying off the 1997 AWL mortgage. Prior to closing, Countrywide obtained a title insurance commitment that clearly showed both the 1997 AWL mortgage and the 2002 First National Bank mortgages as prior liens on the property.

The Ketcham's subsequently defaulted under the First National Bank loan and the bank commenced foreclosure proceedings, claiming that its mortgage lien was the first and senior lien against the property. Countrywide and AWL asked the Wyoming District Court to apply the doctrine of equitable subrogation as set forth in the Restatement (Third) of Property (Mortgages), sec. 7.6 (1997) ("Restatement") and hold that the 2003 Countrywide was subrogated to the 1997 AWL mortgage and therefore superior to all subsequent encumbrances.

The District Court declined to apply the doctrine of equitable subrogation, instead ruling that Wyoming's "filing date priority" statute applied to the factual situation presented and therefore First National's 2002 mortgage had priority over all other encumbrances, including the 2003 Countrywide mortgage.

The Wyoming Supreme Court affirmed the decision of the District Court. The Supreme Court refused to follow the Restatement rule, agreeing with the District Court that lien priority in Wyoming is statutorily determined by the date of recording. The Wyoming Supreme Court reasoned that equitable subrogation would not apply where, as noted by the District Court, "a lender has actual and constructive notice of a junior mortgagee and could have taken any one of a number of steps to protect its interests". The court also stated that "We have not applied the doctrine of equitable subrogation as set forth in the Restatement to allow a refinancing mortgagee to step into the shoes of a prior mortgagee for purposes of obtaining lien priority".

The Wyoming Supreme Court noted that, by statute and case decision, Wyoming is a "filing date priority jurisdiction". That is, a mortgage properly recorded in the county clerk's office provides notice to subsequent purchasers and takes precedence over later conveyances. Therefore, according to the court, a subsequent purchaser (or mortgagee) has constructive notice of any burden upon title from the date of recordation. According to the court, "[W]e are not persuaded any manifest injustice results from applying the express language of [The Wyoming filing-priority statute] and adhering to the clear legislative intent that lien priority in Wyoming is to be determined by the date of recording". The court further stated that "[Plaintiff} was charged with knowing Wyoming is a 'first in time' jurisdiction". Id.

The court also reasoned that, "In addition, the primary purpose of our recording statute is to secure certainty of title (citation omitted). This countervailing public policy interest in clarity and certainty in matters of land title arguably outweighs the interests of private lending institutions which can be protected by simple due diligence." Id.

The court was careful to distinguish contractual, or "conventional", subrogation from "legal" subrogation (which the court acknowledged was the same as "equitable subrogation"), which the court said applied in this case. Such a right to legal subrogation is, according to the court, a creation of a court of equity, and is given "when otherwise there would be a manifest failure of justice", and "has come to be one of the great principles of equity of our jurisprudence, and courts incline to extend it rather than restrict it". Id. at P19. But, the court noted, "The mortgagee who refinances a prior mortgage more closely resembles a volunteer or intermeddler in whose favor courts have not been inclined to apply equitable subrogation. In our view equitable subrogation simply has no application [in this case] where a financial institution extends a loan for the purpose of enabling a mortgagor to pay off an existing mortgage, knowing that a subordinate lien exists on the real estate. Other mechanisms are available for a re-financing lender to obtain first priority without invoking equity to achieve that result." Id. at P23.

Reporter's Comment 1: In declining to apply the Restatement's position on equitable subrogation, the District Court, and the Wyoming Supreme Court, relied on Wyo. Stat. § 34-1-121, which provides in relevant part as follows:

§ 34-1-121. Recorded instrument as notice to subsequent purchasers; recordation of instruments issued by United States or state of Wyoming.

(a) Each and every deed, mortgage, instrument or conveyance touching any interest in lands, made and recorded, according to the provisions of this chapter, shall be notice to and take precedence of any subsequent purchaser or purchasers from the time of the delivery of

any instrument at the office of the register of deeds (county clerk), for record.

Reporter's Comment 2: The majority view of equitable subrogation in the United States is that the doctrine is only available if the party paying the prior lien has no actual knowledge of the intervening lien. The Restatement (Third) of Property (Mortgages) purports to expand the right of equitable subrogation, and provides that a refinancing lender is equitably subordinated to the priority of the first mortgage even where it has actual knowledge of the intervening lien:

Under the Restatement, subrogation can be granted even if the payor [the refinancing lender] had actual knowledge of the intervening interest; the payor's notice, actual or constructive, is not necessarily relevant. The question in such cases is whether the payor reasonably expected to obtain security with a priority equal to the mortgage being paid. Ordinarily lenders who provide refinancing desire and expect that result even if they are aware of an intervening lien. A refinancing mortgagee should be found to lack such an expectation only where there is affirmative proof that the mortgagee intended to subrogate its mortgage to the intervening interest.

Restatement (Third) of Property: Mortgages § 7.6 cmt.e (1996).

Reporter's Comment 3: But the more liberal Restatement position is still the minority view. In any event, there are prudent steps that a real-estate practitioner who represents mortgage lenders can take to avoid the loss of priority of a new mortgage, where some or all of the proceeds from the mortgage are intended to be disbursed to pay off a prior recorded mortgage. Obviously, the mortgage loan documents should — and almost always do — clearly state the intention of both the mortgagor and the mortgagee that the mortgagee is to receive a properly perfected first mortgage lien against the property. If the parties are aware of an existing intervening mortgage lien (as in the Countrywide case, supra), it also would be beneficial to state clearly in the loan documents that it is their intention that the refinancing mortgagee is to receive the same priority as the existing mortgage that is being paid off (if it is not to be released). The refinancing mortgagee's attorney should obtain a title commitment to ascertain the status of title and to determine if there are any presently existing mortgage liens or other encumbrances against the property (and whether there are any subsequent liens or encumbrances appearing thereafter), and a title policy should be issued insuring the new mortgagee's security interest as a prior, valid and enforceable first mortgage lien on the property. (The availability, extent and scope of such coverage will depend on the facts and circumstances of each transaction, as well as underwriting considerations based on applicable case law and title insurance regulations.) The refinancing mortgagee's attorney also would find it beneficial to have an existing mortgage lienholder, whose loan is to be paid off from the proceeds of the new loan, assign the existing mortgage to the new mortgagee (in those situations where there are intervening lienholders or encumbrancers) instead of releasing the mortgage from record (or at least leave the existing mortgage of record until the new mortgagee's loan is paid in full). An alternative prudent action would be to require, as a condition to the refinancing mortgage loan, that any known or identified intervening lienholder execute (and agree to have recorded) an intercreditor or subordination agreement, whereby the intervening lienholder would consent to the new mortgage lien and confirm that its lien would be subordinate to the new refinancing mortgage (at least to the extent of the outstanding amount of the prior lien being paid from the proceeds of the new loan). As the Wyoming Supreme Court noted in footnote No. 3 (P25) in the Countrywide case, supra, "The district court mentioned a subrogation agreement or an assignment of the AWL mortgage as two possibilities for achieving a first priority lien". It is simply amazing (at least to me) that a lender as supposedly sophisticated and experienced as Countrywide did not act to protect its interest by one of these methods, especially when it had actual knowledge of the intervening lien.

Reporter's Comment 4: It may seem reasonable (consistent with the Restatement rule) that a court should be able to find a "convention", sufficient to invoke conventional subrogation, whenever a refinancing lender can show that it intended to pay off a senior debt (at least in those situations where it is without actual knowledge of an unpaid junior lien), and that in exchange it intended to receive a first mortgage on the property. On the other hand, the doctrine of equitable subordination tends to foster uncertainty and unpredictability with respect to mortgage priority issues, and "clouds" real property records (and creates headaches for title insurers). Most real estate practitioners would prefer real property priority and recording rules that are clear and consistent.

The only certainty, in many states, may be that there is still some uncertainty as to how state courts (and bankruptcy courts construing applicable state law) will rule on this issue. As the bankruptcy court in *In re Pearce,* 236 B.R. 261, 266-67 (Bankr. S.D. Ill. 1999, correctly noted, "[e]quitable subrogation is, quintessentially, a factual inquiry, and its application is dependent on the facts and circumstances of each case (citations omitted)".

Reporter's Comment 5: As to the issue of the scope of equitable subrogation (and its offspring, "conventional subrogation"), litigation is often necessary to determine whether a mortgage lender who has paid off a prior lien is entitled to the priority of the earlier recorded lien. The goal of the actions such those mentioned above (e.g., requiring a specific assignment of the original mortgage or a subordination agreement with the intervening lienholder) is to avoid, at all costs, a court challenge to the priority of the new mortgage. Decisions in this area of the law are highly fact-specific and uncertain, and mortgage priority disputes can be time-consuming and expensive for mortgage lenders to resolve. The resolution of such litigation often depends on off-record facts that are difficult to determine and prove — and meanwhile, title to the property remains undetermined and "in limbo" until the litigation is concluded. See generally, David H. Cox and Vernon W. Johnson III, State Equity Doctrine Helps Title Insurers, The National Law Journal, p. B17, Feb. 7, 2000.

The Reporter for this item was Jack Murray of First American Title Insurance Company – Chicago Office.

MORTGAGES; VALIDITY; SECURED INDEBTEDNESS: Where a deed of trust from the debtor to the creditor, dated July 28, 1998, said it was given as security for a "Promissory Note of even date herewith", but where the purported actual note that refers to the deed of trust is dated July 29, 1998, the trustee may avoid the creditor's lien on the debtor's real property. ***In re Head Grading Co., Inc. (Beaman v. Head Grading Co.), 2006 WESTLAW 2941939 (9/15/06)***

Summary judgment for the trustee.

The dispute between the parties arises from the granting of a deed of trust from the debtor to the creditor, dated July 28, 1998, in the amount of $180,515.75. This deed of trust would have created a lien on a 33-acre tract of land in Wayne County, N.C. The deed of trust provided that it was given as security for a "Promissory Note of even date herewith". The actual note presented and held by the creditor, which refers to the parties to the deed of trust and to the amount referenced in the deed of trust, was dated July 29, 1998. There was no note dated July 28, 1998 in existence. The deed of trust dated July 28, 1998 did not refer to future advances.

N.C. law requires deeds of trust to identify specifically the debt referenced therein.

While it is likely that the deed of trust was meant to identify the note dated July 29, 1998, it did not properly and specifically identify the obligation secured. The clarity and certainty in lien perfection requirements would be lost if the court were to allow exceptions to the general rule created by the N.C. courts regarding the specificity with which the obligation secured by a deed of trust must be identified. Pursuant to 11 U.S.C. 544, the lien of the creditor under the deed of trust is unenforceable against the trustee, as a hypothetical lien creditor who obtains a perfected lien against the property on the date the petition was filed, and should be avoided on the grounds that the lien was not properly perfected prior to the bankruptcy petition filing.

Reporter's Comment: One would think that only one day's difference in the actual Note date and the date referenced in the Deed of Trust would give rise to equitable relief.

Apparently, however, equitable arguments won't prevail in Bankruptcy Proceeding.

The Reporter for this case was Larry Ford of the North Carolina Bar.

NUISANCE; LATERAL AND SUBJACENT SUPPORT; IMPROVED LAND; NEGLIGENCE: A landowner who negligently removes lateral supports may be held liable for damage to improvements on an adjoining property, but a landowner who hires an independent contractor is generally not liable if the independent contractor negligently removes lateral supports necessary to sustain those improvements unless, by statute or otherwise, the excavating landowner has an absolute duty to provide support for a neighbor's wall. But state statutes in some cases, as here, convert the landowner's liability for such excavations to absolute liability. ***Great Northern Insurance Company v.***

Leontarakis, 387 N.J. Super. 583, 904 A.2d 846 (App. Div. 2006); August 21, 2006.

A property owner sued an adjacent property owner for damages to a brick privacy wall. The damage happened when the adjacent property owner had excavation work performed. The excavating property owner had hired an architect/general contractor who had hired two sub-contractors (one of whom hired a sub-subcontractor) to perform the foundation and basement excavation for a new home. The complaining property owner had a brick privacy wall constructed along the common boundary line separating the two properties. After the adjacent property owner's excavation work was completed, some of the soil supporting the complaining property owner's privacy wall slid down into the basement excavation. The architect and sub-contractor attempted to protect the privacy wall by installing steel sheeting. This did not prevent sections of the privacy wall from collapsing onto the adjacent land.

The lower court entered a directed verdict in favor of the excavating property owner relying on the independent contractor rule, which holds that a landowner who hires an independent contractor is generally not liable at common law if the independent contractor negligently removes lateral support necessary to sustain improvements on an adjoining lot. It concluded that the only legal basis for the claims against the adjacent property owner was negligence, and the complaining property owner failed to establish any negligence on the part of the adjacent property owner. The property owner settled suits against the architect, sub-contractors, and its insurance carrier.

On appeal, the Appellate Division explained that while, under the common law, a landowner who negligently removes lateral supports may be held liable for damage to improvements on an adjoining property, a landowner who hires an independent contractor is generally not liable if the independent contractor negligently removes lateral support necessary to sustain those improvements. When one hires an independent contractor, the hiring party has no right or control over the manner in which the work will be performed. The manner in which the work is to be done is the contractor's own enterprise, and the contractor is the proper party to be charged with the responsibility of preventing the risk. The Court added that in cases involving a significant risk of grave harm, the duty owed to the public may be too important to allow its delegation to an independent contractor. This exception was not implicated here.

A number of states, including New Jersey, have enacted statutes codifying or altering this law of lateral support. The New Jersey statute provides, in sum, that whenever "excavations for buildings or other purposes shall be intended to be carried to a depth of more than eight feet below the curb or grade of the street, and there shall be any party on adjoining land, the person causing the excavations to be made, if afforded the necessary license to enter on the adjoining land, shall, at all times, from the commencement until the completion of such excavations, preserve, at his own expense, such party from injury, and the party should remain as stable as before such excavations were commenced". This duty is absolute. The excavating property owner did not dispute that the excavation conducted was deeper than eight feet below the curb or grade of the street, or that excavating property owner was the person causing the excavation to be made.

The Court held that a reasonable jury could have concluded that the excavating property owner was liable under the statute and did breach the nondelegable duty to provide lateral support to the property, even if the excavation work was performed by an independent contractor. Therefore, the dismissal of the complaining property owner's case was plain error.

The Court also noted that the complaining property owner's settlement with the architect, sub-contractors, and its insurance company did not necessarily release the excavating property owner from liability, even if excavating property owner's liability was wholly vicarious.

In addition, the lower court ordered the excavating property owner to commence construction of a reinforced or better retaining wall meeting municipal specifications. After the wall was rebuilt, the complaining property owner claimed the wall did not meet the specifications of the complaining property owner's experts. However, the complaining property owner had agreed to the specifications that were included as part of the consent order. For this reason, the lower court granted a pretrial motion to limit the complaining property owner's damage claim. The Court saw no reason to intervene.

The Court reversed the order dismissing property owner's case and remanded for further proceedings in accordance

with its decision, and affirmed the pretrial order limiting the complaining property owner's damage claim.

Comment 1: The "independent contractor" doctrine was a new one to the editor, and perhaps news to some readers.

Comment 2: Note that the common law rule imposing only a duty of due care for excavations that affect lateral support applies only when the slippage occurs solely because of the additional weight of the affected improvements on the neighboring property. Under the common law, a landowner has an absolute duty to provide lateral support to neighboring land in its natural state, and this liability would lead to liability for injury to any improvements affected when the land under them slips due to a breach of this absolute duty.

Comment 3: Although the common law rule would have excused the excavating landowner, the court reversed, of course, because of the New Jersey statute, which the court suggests exists in other states as well. Even if there is no state statute, there may well be local zoning ordinances or building codes that set up specific requirements for excavation and, if nothing else, provide a definition of "negligence *per se,*" thus turning a duty of care into an absolute liability if the regulations are not satisfied.

OIL AND GAS; PRODUCTION REQUIREMENTS: Where the *habendum* clause of an oil and gas lease calls for the lease to remain in force "so long as oil or gas, or either of them, is produced", the lease will not terminate if lessee fails to produce oil or gas from only a small portion of the total leased property; when an oil and gas lease is silent as to the number of wells that must be drilled to satisfy the implied covenant of reasonable development, the lessee has the right to determine the number of wells and extent of development, and such determination is conclusive so long as it is made honestly and in good faith upon sound business principles. ***Meisler v. Gull Oil, Inc., 848 N.E.2d 1112 (Ind. App. 2006).***

"Meisler's owned 221 acres of land they leased to Gull Oil under an oil and gas lease. The Meisler's filed suit against Gull Oil seeking cancellation of the Lease, contending that in its failure to diligently develop a certain fifty-acre parcel of the land, Gull Oil had breached both the habendum clause and the implied covenant of reasonable development. The trial court held in favor of Gull Oil on both claims, and the Meisler's appealed.

In the context of oil and gas law, the habendum clause "is designed to measure the duration of the oil and gas lease by its primary objective, the production of oil or gas". (848 N.E.2d, at 1114- 1115 (quoting 3 Williams, Howard R. and Meyers, Charles J., *Oil and Gas Law* § 604 (1985)). In this case, the habendum clause called for the Lease to remain in force so long "as oil or gas, or either of them, is produced from said land". (*Id.* at 1115). The Court of Appeals held that the habendum clause applied to the entire leased premises, that the lease duration it specified was not divisible as to different portions of the property, and that insofar as Gull Oil had undertaken continuous oil production on the land, neither the full Lease nor any part of it had been breached for Gull Oil's failure to produce oil on a small portion of the property.

The court then analyzed Gull Oil's obligations under the implied covenant of reasonable development. The implied covenant of reasonable development imposes an obligation on an oil and gas lessee to diligently explore and develop the leased premises. *Gadbury v. Ohio & Ind. Consol. Natural & Illuminating Gas Co.*, 162 Ind. 9, 67 N.E. 259 262 (1903). When the lease does not fix the number of wells that must be drilled to qualify as reasonable development, the lessee has the right to determine the number of wells or the extent of development, and the lessee's decision is conclusive so long as the lessee acts honestly and in good faith using sound business principles. (*Gilbert v. Bolds*, 62 Ind. App. 595, 113 N.E. 379, 380 (1916).

The Court of Appeals, presented with no evidence that a prudent operator would have undertaken further development under the Lease, rejected the Meisler's claim. The Court of Appeals affirmed the judgment of the trial court.

OIL AND GAS; ROYALTIES: Royalties are personal property, not real property, and therefore the general three year limitation period applies on suits for collection, not the ten year period that applies for claims for recovery of an interest in land: ***Nygaard v. Getty Oil Co., 918 So. 2d 1237 (Miss. 2005)***

OPTIONS; OPTIONEE'S RIGHTS; TREPASS: The holder of an option to purchase does not have standing to

sue for trespass. ***Niagara Falls Redevelopment, LLC v. Cerrone, 814 N.Y.S.2d 427 (A.D. 4 Dept. 2006).***

A holder of an option to purchase brought suit against a company that removed trees and an earthen berm pursuant to a contract with a third party defendant. The court held that the option holder did not have standing to sue the company that removed the trees and the berm. The option holder only had an exclusive right to buy the property but did not yet possess the property, which is an essential element to a trespass action.

OPTIONS; PRIORITY: Where a lessee has a purchase option in property subject to a prior lease, that also contains a purchase option, the second purchase option loses its rights when the first purchase option is exercised. ***Startex v. Aelina Enterprises, 2006 Westlaw 952390 (Ark. App. 4/14/06)***

Startex was the successor in interest to a lessee's interest in a gas station on a lot that also contained a convenience store. The Startex lease contained a right of first refusal that gave the tenant a seven day right to respond to any offer. The right also provided that if the tenant did not exercise its option, its right of first refusal remained intact and any sale would be subject to the lease.

In fact, the landlord's interest transferred several times, and the tenants under the gas station lease did not exercise the right of first refusal. Then the landlord leased the convenience store property to Aelina, giving Aelina a purchase option in the same property covered in the gas station right of refusal. Then the tenant assigned to Startex.

Aelina entered into a purchase agreement with the landlord to acquire the property for less than the option price, and landlord tendered this contract to Startex. Startex elected to purchase the property. Then Aelina notified Startex that it was exercising the option contained in its lease to purchase the property from Startex. Startex refused to sell, and this lawsuit ensued.

Indicating that the dispute here was a matter of first impression, the court of appeals found that Startex exercise of its purchase option (right of refusal) was prior, and terminated the Aelina purchase option. The court didn't say whether the Startex purchase also terminated the Aelina lease. It quoted Friedman on Leases (Third Edition) to the effect that a "lease and option can be cut off by a paramount interest . . . Accordingly, the tenant cannot rely on the option for any serious purpose unless he satisfies himself with the condition of the landlord's title before entering the lease and then records a memorandum of the lease with the option included".

Comment 1: Although this is not quite a case of first impression it certainly is a rare case, and prior courts have addressed the overall situation differently. If the court had an up to date Friedman on Leases (Randolph – 5th – Edition), it would have found, at Section 15.5.1, notes 221 and 222, that cases in other jurisdictions have dealt differently with the situation of competing leases where one of the lessees exercises its lease option. In *Durfee House Furnishing Co. V. Great Atl. & Pac. Tea Co.,* 136 A.2d 379 (1927), a tenant exercising a lease option was held to take subject to a lease granted subsequent to the tenant's lease, on the notion that no contract came into effect until the option was exercised. The editor disagrees with this analysis, and prefers that used in this case and in *Cwiakala v Guinta,* 92 A. 2d 849 (N.J. App. 1952), where the exercise of the option permitted the optionee to avoid a lease entered into subsequent to the lease containing the optionee's right. The option was deemed to relate back to the date of the lease.

As that section also indicates, there is some confusion arising from the fact that many states do not regard an option as a real estate interest, leaving a situation where the optionee may be bound by the existing lease on the property, albeit junior to his option, but may have a damages claim against the optionor.

Comment 2: Of course, proper notice is always essential to the first optionor's rights. Here, it appears that the parties did have notice of one another.

Comment 3: Note also that there is no mention in the instant case about the survival of Aelina's lease, only its option. But the editor assumes that if one falls, both falls. But what if the optionee under the first option begins to accept rent from the existing tenant and a lease relationship forms. Under that circumstance, would the option contained in that lease also be valid? Hmmm.

OPTIONS; SPECIFIC PERFORMANCE; USURY: Court may award specific performance of a lease option to purchase the property with financing at a usurious interest rate. Tenant, however, does not waive the issue

of usury by seeking specific performance. ***Van Carr Enter. v. Hamco, Inc., 2006 Westlaw 649985 (Ark. 3/16/06)***.

The parties entered into a commercial term lease agreement with an option to purchase the building, exercisable at any time during the period of the lease. If tenant elected to purchase the building, landlord agreed to finance the purchase at an interest rate of 7% for 5 years and thereafter at 6% above the Federal Discount Rate (FDR) for 15 years. On the date of the lease, the FDR was 1.25%.

Article 19, Section 13 of the Arkansas Constitution provides that the maximum lawful rate of interest on any contract cannot exceed 5% above the FDR at the time of the contract, and any contracts having a rate of interest in excess of the maximum lawful rate shall be void as to the unpaid interest.

During the term of the lease, landlord entered into two separate leases with a subsidiary of landlord for two different suites in the building, both at below market rent. Four months prior to the expiration of tenant's lease, tenant gave written notice to landlord of tenant's intent to exercise its option to purchase. Three months later, landlord mailed a notice to tenant stating that tenant could either purchase the building subject to the current leases or sign a new lease for five more years.

Tenant filed suit alleging breach of contract and seeking specific performance under the lease option. Landlord countered that the contract contained an unlawful rate of interest and was illegal on its face.

The circuit court declared that the interest rate under the contract was usurious and void but awarded specific performance of the remaining provisions of the contract. Thus the tenant could make payments over the twenty year term, as agreed, but was not required to pay any interest.

Tenant also sought equitable compensation for the difference between the lease rents on the "sweetheart" leases to landlord's affiliates that now bound the property, but the trial court refused such compensation. Instead the trial court simply cancelled the leases, since the option agreement provided that the optionor landlord would convey title free and clear of all liens and encumbrances that might affect the title to the property.

On appeal, the Supreme Court affirmed the circuit court's decision and rejected landlord's argument that tenant should be estopped from asserting that the interest rate in the contract was usurious because tenant waived the issue by seeking specific performance of the contract. The Court reasoned that because the contract at issue is void as to the unpaid interest under Arkansas law, a borrower cannot waive a usury defense by simply requesting specific performance of the remaining clauses of the contract.

Comment 1: We haven't seen many usury issues in recent years. Many states have abolished usury in commercial contracts. But a few states have usury protection embedded in their Constitutions, including Texas and Arkansas. If, as we now expect, interest rates begin to creep up, the issue may arise again. Here, of course, usury was based upon the spread bargained by the parties, and not the absolute rate.

Is this an appropriate case to deny specific performance and leave the penalty to his remedy in damages? Note the draconian penalty resulting from specific enforcement – the tenant gets the property for a song – payments over twenty years at no interest. The court considered equitable factors such as whether the tenant or the landlord dictated the terms of the sale. It found there was no evidence that the tenant in fact controlled the deal. It apparently was simply bargained, and the landlord, obviously, needed better advice for that bargain.

Comment 2: Note that the leases were knocked out because of specific language in the option itself, binding the optionor to transfer the title free and clear. What if that language wasn't there? Was the landlord free to encumber the property with leases?

If the lease option was properly recorded, then tenants entering into leases subsequent to the lease option would be bound by the optionee's rights, so one assumes the optionee could avoid those leases. But what if, as is often the case, the tenant/optionee did not record the lease? Is its possession notice to the world of its purchase option? Note that the other tenants would be leasing other space in the building. Are they required to check with other tenants to see if they have option rights in the space they are renting? Hmmm. The editor guesses that they are not. But there are a few cases where tenants renting space in a shopping center are held on notice of exclusive use clauses contained in the leases of other tenants. Are such

clauses more likely to be found than purchase options, so that the inquiry duty is higher? The editor thinks not.

RECORDING ACTS; LEASES: Under special provision of Louisiana law, an unrecorded lease loses priority to a subsequent purchaser of the reversion, even if the purchaser had actual knowledge of the leases and their terms. ***Barnhill v. Remington Oil and Gas Corp., 918 So. 2d 52 (8/10/05)***

The case is truly extraordinary, as compared to common law jurisdictions, because the buyer in question, who cut off the leases, was the attorney for the lessor. Further, the leases had rights of first refusal (also cut off) that were specifically designed to protect lessees from being "sold out". The lessees alleged fraud and conspiracy, but the court had a deaf ear for most of their complaints.

RECORDING ACTS; REGISTRATION; ACTUAL NOTICE: Presence of utility pole on one's property, with wires running to one's home, does not provide the requisite "clear proof of actual knowledge" of the existence of a documented but unregistered encumbrance, even where the landowner had used and paid for the benefits of that encumbrance, because of the need for finality and unassailability in the registration system. ***Commonwealth Electric Company v. MacCardell, 849 N.E.2d 910 (Mass. App. Ct. 2006).***

NStar (a dba for Commonwealth) brought an action seeking to have the property registration certificate of defendant MacCardell amended to include an easement in NStar's favor. NStar was responding to a request from a neighboring parcel to increase the level of electricity service, and wished to install a transformer on the nearest utility pole serving that parcel. That pole was located on MacCardell's property.

MacCardell's property was registered simultaneously with the registration of the neighboring lot in 1944. The only reference made to an easement benefitting NStar's predecessor-in-interest was on the neighboring lot, not MacCardell's. MacCardell's lot, however, is the actual location of the electrical poles and lines that supply electricity to both lots, and this equipment was present when MacCardell purchased the property in 1977.

NStar's arguments rested almost entirely on these facts alone. It asserted that the utility structures running through MacCardell's property are so obviously visible that it was "inconceivable" MacCardell did not have actual notice of NStar's unrecorded interest. NStar noted that MacCardell relied on the existence of the easement since she was the primary beneficiary of the poles and wires on her property as the source of her electricity, and confirmed this reliance by paying the electricity bill every month.

The Appeals Court of Massachusetts rejected this argument, citing the fundamental principle of the land registration system, that the holder of a certificate of title taken for value and in good faith holds free from all encumbrances except those noted on the certificate. While there are two exceptions to this general rule—the relevant one being "actual notice"—carved out by the Supreme Judicial Court, neither is satisfied here. The court was unwilling to assume that MacCardell knew anything about why utility poles were on her property or from whence they came, or that MacCardell knew that the wires and equipment running through her property were the source of the electricity she used in her home. The court instead took rigid view requiring NStar to produce clear proof of actual knowledge, which must be more than even compelling constructive notice.

RULE AGAINST PERPETUITIES; SAVINGS CLAUSE; Maryland court upholds savings clause that uses no life in being. ***Cattail Assoc's. v. Sass, 2006 Westlaw 2639872 (9/15/06)***

Developer executed a contract with sellers in anticipation of subdividing. The contract contained a specific condition that relieved the developer from its purchase obligation unless and until all subdivision approvals were received:

"The Settlement of this contract is specifically contingent on the successful completion of the subdivision which shall be evidenced by the obtaining of all the necessary approvals from [various planning agencies] that are required . . . ."

It became clear to developer that Sellers were starting to waver on the deal. It elected to waive all conditions and demanded performance. As Developer likely anticipated, Sellers refused to close and raised a number of defenses to the validity of the agreement, among them the claim that the contract violated the Rule Against Perpetuities, as, obviously, it was remotely possible that the subdivision approvals might not be obtained with the

period of a life in being plus 21 years. Even though the developer was willing to waive this condition, such waiver would mean nothing if the contract was void from the beginning as a consequence of the violation of the Rule.

First, the developers argued that the court should imply a reasonable period of time within which the parties intended that subdivision approval be obtained before the contract right expired. This approach is used with option contracts in many jurisdictions. Even though technically the option might be exercised beyond the period of the Rule, the court, in order to save the option, reads in a reasonable period within which the option must be exercised.

Maryland, which apparently follows the traditional common law Rule, had some precedent cases that indeed do use the implied reasonable term for option contracts, but the court distinguished these cases and refused to save the contract here by assuming a reasonable period for obtaining of the zoning approval. It noted that, unlike an option, the buyer was not in control of the granting of subdivision approval.

The developer's counsel, however, had anticipated the problem with the Rule Against Perpetuities, and had inserted a "perpetuities savings clause". Notwithstanding this thoughtfulness, for some reason the lawyer did not insert the standard savings clause that is used virtually universally, albeit with different identified lives. This standard clause is variously known as the "Kennedy clause" or the "Rockefeller clause" as it terminates the future rights created in third parties in the contract 21 years after the death of the last survivor of a group of named or identified individuals, usually including the living descendants of Joseph Kennedy, the father of John F. Kennedy, or John J. Rockefeller. Both had lots of descendants whose lives, due to the notoriety of the families, are easy to track. Since the future interests cannot possibly take effect beyond the measuring period set forth in this clause in the contract, there is no possibility of a future interest vesting beyond the period of "a life in being plus 21 years".

For some reason, the drafters of the contract in this case elected to use a different savings clause – one the Editor hasn't seen before – perhaps even drafted "freehand" by the lawyers in this case:

"The parties to this contract intend that it will be binding and legally valid upon them. In order to preclude any application of the Rule Against Perpetuities which would otherwise invalidate and nullify this contract, the parties agree that this contract shall expire, unless otherwise previously terminated, on the last day of the time period legally permitted by the Rule Against Perpetuities in the State of Maryland. . . . ."

Of course, it is not absolutely necessary that the measuring life used by the Rule itself be expressed in the instrument. In fact, commonly there is no identified life, and drafters use lives that are "central to the grant". If, in a savings clause or otherwise, the instrument identifies lives in being, usually these are in addition to the lives central to the grant. But is it possible to have the savings clause itself have implied lives in being?

The simple answer is: "why not?" The implication of lives in being that is common in jurisprudence involving the Rule is nothing more than an inference of the probable intent of the parties, according to the court.

Thus, here, the court held, the parties, but use of the above savings clause, indicated their intent to used the lives of the sellers as the measuring lives. Any approval of the subdivision that occurred 21 years beyond the death of the last of the original Sellers (one of them, incidentally, had already died at time of suite) would, by the terms of the savings clause, be invalid.

Consequently, it was impossible for the contract contingency to be resolved beyond the period of lives in being plus twenty one years, and the contract was not invalidated by the Rule. (Other problems did cause some difficulties for the buyers, however.)

Comment 1: The editor really doesn't mind the Rule Against Perpetuities. It seems that there ought to be some prohibition of perpetually contingent rights. And thoughtful lawyers can always avoid the Rule with a savings clause. Further, the editor agrees with the court's interpretation here. There is no reason why this savings clause ought not to be effective. Even if there are no lives in being, at least there could be a 21 year contingency period, which would be more than enough to validate the instant contract.

Comment 2: But even though the drafters of this savings clause got away with something, why take a risk? The

traditional Rockefeller or Kennedy clauses in fact give the contracting parties a bit more latitude, have been consistently upheld by the courts, and work better with the phrasing of the Rule. This is not an area for creative writing.

SERVITUDES; ASSOCIATIONS; FORMATION: Where developer establishes a development scheme by which common areas are to be transferred to an owner's association, but does not form such an association, individual owner may form such an association 20 years later and such association shall have ownership of common areas and assessment rights. ***Bordelon v. Homeowners Assoc. Of Lake Ramsey, Inc., 916 So. 2d 179 (La. App. 2005)***, discussed under the heading: "Associations; Formation."

SERVITUDES; BENEFITTED PARTIES: Due to Massachusetts statute, a restrictive covenant that does not identify any land or person to be benefited is unenforceable and benefited parcels or persons cannot be inferred from the circumstances. ***Brear v. Fagan 849 N.E.2d 211 (Mass. 2006)***.

Fagans proposed to subdivide and develop their land (the "Fagan Land"). The Fagan Land comprised sections of parcels which had been subdivided from common land by the Burrage Trust in 1972. The Burrage Trust sold three of the four subdivided parcels subject to deed restrictions limiting uses of the land and the nature of the structures to be built thereupon. The Burrage Trust later sold the fourth parcel in January 1978, purportedly with "the benefit of restrictions contained in [the deeds of the previously conveyed parcels]," and this parcel eventually came to be held by the Buttonwood Nominee Trust (the "Buttonwood Parcel").

In 2003, the Fagan's received approval from the Ipswich planning board for a subdivision plan for the Fagan Land. Brear, as trustee of the Buttonwood Nominee Trust brought an action for injunction against the subdivision plan seeking to enforce the restrictive covenants contained in the deeds for the Fagan Land. The court denied the injunction and Brear appealed. The Massachusetts Supreme court here affirmed the denial of the injunction.

Massachusetts has historically followed the common law rule allowing the identity of benefitted lands to be inferred from "the situation of the property and the surrounding circumstances". Brear claimed that the subdivision by the Burrage Trust and the common restrictions placed in the subsequent deeds clearly implied an intent to benefit the Buttonwood Parcel.

A statute, however, G.L. c. 184, § 27 (a) ("§ 27"), now provides that the identity of property or persons benefitted must be "stated" therein.

The Supreme Judicial Court found that the revised language of § 27, together with the legislative history thereof, evinced a clear intent on the part of the legislature to eliminate the common law rule.

Brear argued that the requirement for "stated" beneficiaries could be satisfied by statements implied from the circumstances under the common law rule. The Supreme Judicial Court rejected this argument, noting that such an interpretation would render sections of the statute superfluous. The court instead found the most complete reading of §27 requires restrictive covenants to both clearly identify the parcels intending to be benefitted and to state the intent to benefit that land. The court cited support in the legislative history to §27 which discussed the impairment of marketability by restrictive covenants and the difficulty of determining benefitted parcels as they were subdivided and transferred over time. Judgment for the Fagans by the Land Court was affirmed.

SERVITUDES; COVENANTS; ENVIRONMENTAL COVENANTS: A land conservation non-profit charged with enforcement of conservation restrictions is a guardian of the public interest and cannot be barred by equitable doctrines from enforcement of the restrictions. ***Weston Forest and Trail Assn v. Fishman 849 N.E.2d 916 (Mass.App.Ct. 2006)***.

Fishman appealed from an adverse judgment by the Land Court which compelled removal of a barn constructed at Fishman's Weston residence (the "Fishman Land"). The Fishman Land is encumbered by a conservation restriction recorded by the board of selectman for Weston and the Commissioner of Natural Resources (the predecessor of the Secretary of Environmental Affairs) in 1974 (the "Restriction").

The Restriction names the Weston Forest and Trail Association, Inc. ("WFTA") as the stated beneficiary of various provisions intended to preserve the property "in its present, predominantly natural and undeveloped

condition." The chain of title to the Fishman Land gives actual notice of the Restriction.

In 1996, Fishman permitted and constructed a residence on an unrestricted portion of the land. During this process in 1996 and again in 1999, Fishman obtained a survey of the property detailing the restricted and unrestricted portions of the property, the location of the residence, and the proposed location for a new barn. In 2002, Fishman obtained a third survey in preparation for the construction of the barn. Unlike the prior two surveys, this survey did not delineate the restricted area of the property and it moved the proposed location of the barn into the restricted area.

In July 2002, Fishman permitted and began construction of the barn in accordance with the third survey. While construction was ongoing, the WFTA's treasurer (the "Treasurer") visited the property on several occasions in conjunction with a survey of the adjoining town property for the Weston conservation commission. The Treasurer did not communicate with Fishman during these visits and raised no alarm about the construction of the barn within the conservation area..

In August 2003, after the barn had been substantially completed at a cost to Fishman in excess of $300,000, WFTA contacted Fishman to inform her that the barn was located within the portion of the Fishman Land affected by the Restriction and to demand removal or relocation of the barn. Following Fishman's refusal to remove the barn, WFTA brought suit in the Land Court to compel removal or relocation.

Fishman argued that WFTA was precluded from seeking enforcement of the Restriction under the doctrine of laches or the doctrine of estoppel. Fishman claimed that doctrine of laches applied because WFTA did not raise a timely objection to the location of the barn and that Fishman would suffer substantial economic harm due to this delay. Similarly, Fishman sought application of doctrine of estoppel because WFTA's failure to object induced her to presume construction of the barn would be permissible.

The Court of Appeals noted that the doctrines of laches and of estoppel will not apply where doing so would frustrate the public interest, and it noted that the public interest is frustrated where the rights being preserved are "public rights". Citing, among other cases, *Sears v. Treasurer & Receiver Gen.* 327 Mass. 310 (1951), the court stated that the public or private nature of an entity attempting to enforce a restriction does not determine whether or not the rights at issue are public rights. Thus although WFTA is a private entity, the court found that its status as a nonprofit and its chartered purpose to protect and conserve land and water qualified its actions as in furtherance of the public interest and found the Restriction to create and preserve public rights. The judgment of the Land Court was affirmed.

Comment 1: The recent enactment in many jurisdictions of statutes encouraging the creation of conservation and environmental protection covenants will increase the impact of such restrictions, often held "in gross" by private non profit enforcement agencies. The result here seems correct – as certainly equity should take into account the public policy significance of the interests at stake. Further, the degree of reliance by Fishman was certainly questionable, in light of her clear knowledge of the presence of the boundary line, as established by two prior surveys.

But is it correct to say that a private entity with such an enforcement right *never* can be estopped? Certainly there must be cases where the degree of intended or foreseeable reliance is high and the degree of interference with the public interest is small. Shouldn't the aspect of the public interest be only a factor in the overall weighing of the equitable factors here?

Comment 2: It is quite possible that the new statutes now being considered in state legislatures will do away with equitable defenses such as laches when used against covenants enacted in accordance with the statute, so the issue raised above will be mooted over time.

SERVITUDES; COVENANTS; USE RESTRICTIONS; "RESIDENTIAL USE ONLY: Private associations are barred by New York policy from interpreting "residential only" restrictions in such a way as to bar group care homes. ***Marick Real Estate, LLC v. Ramirez, 812 N.Y.S.2d 210 (Supp.App.Term 2005)***, discussed under the heading: "Landlord/tenant; Use; Residential Only."

SUBDIVISIONS; DEDICATIONS: Where subdivision plat dedicates property to city for waste water treatment plant in order to resolve PUD requirements, city obtains fee title to property and is not limited in its use of the

property to only a treatment plant; therefore city may lease property for telecommunications tower. ***Verizon Wireless v. Sanctuary at Wulfert, 916 So. 2d 850 (Fla. App. 2005)***

In 1982, City entered into a settlement stipulation and mutual release with Developers over the development of a subdivision. The stipulation, as amended, provided that Developers would design, build and convey to the City a wastewater treatment plant on 6 acres of the Developers' land. The treatment plant showed on the subdivision plat, which stated that the tract was "dedicated" to the City, "subject to the public roadway, utility and bicycle path easement as shown. . . ."

Twenty years later, pursuant to a cell tower location plan adopted in the City, the City determined to permit the construction of such a tower on the wastewater treatment plant property. Homeowners objected, arguing first that the plant was an easement area, and inconsistent uses were not permitted; or that, if the plant was owned by the city in fee, the dedicated plat created a use covenant limiting the use to the wastewater plant; or that the PUD ordinance itself limited the use of the property.

The trial court found for the homeowners, but the appeals court reversed.

The appeals court found, in fact that the City, having adopted legislatively the cell tower location plan, was obligated to supercede any contrary provisions of the PUD ordinance and locate the tower at the site.

As to the argument that there were other use restrictions on the site, the court held that, although generally a dedication of land to public use transfer only an easement, here the settlement stipulation expressly transferred ownership of the affected land to the city. Under such circumstances, the original purpose of the acquisition establishes neither an exclusive limitation nor a permanent requirement. There was no easement of use expressly imposed and the court would not infer one.

As to the arguments based upon equity – in light of the prior dedication, the court noted that the homeowners had taken no role in the two and a half years of hearings leading to the telecommunications location ordinance, and lacked any equitable standing.

SERVITUDES; COVENANTS; USE RESTRICTIONS; "RESIDENTIAL ONLY": Repairing, storing, and parking business vehicles in a 40-by-80 foot garage constitutes commercial activities, which violate restrictive covenants prohibiting commercial or business activity within a residential subdivision. ***Smart v. Carpenter,* 134 P.3d 811 (N.M. Ct. App. 2006).**

The restrictive covenants in question specifically restricted the use of all tracts of land within the subdivision to residential purposes only. In addition, the covenants specifically prohibited the operation of any commercial or business activity within the subdivision, with the exception of a personal home office.

Appellee owned Lot 6 in the subdivision and had received a copy of the restrictive covenants, which he read and understood, at the time he purchased the lot. Appellee constructed a 40-by-80 foot garage on his property. The garage is not used as a residence in any manner. Appellee owned and operates a trucking business with three commercial truck tractors and four commercial trailers pulled by the tractors. The trucking business is operated for profit. Appellee commenced operating his business out of his home, which was not located in the subdivision. Appellee stored and parked the trucks and trailers on Lot 6 when they are not in use. He also serviced and maintained the trucks and trailers in the garage located on Lot 6. When the trucks were in use, Appellee parked his personal vehicles on Lot 6. Appellee claimed that ultimately he planned to construct a residence on the lot.

Before Appellee began construction on the garage and before he began parking and storing his trucks and trailers on Lot 6, Appellants complained to Appellee and advised him that no commercial activity or business could operate within the subdivision. Appellants later sought enforcement of the restrictive covenants governing their residential subdivision.

The trial court concluded that the restrictive covenants run with the land, are binding on all of the parties, and are valid and enforceable. The trial court, however, concluded that Appellee's activity on Lot 6 did not violate the restrictive covenants and that Appellants were not entitled to injunctive relief. Although the basis for the trial court's conclusion as to the basic parking of the trucks is unclear, there was testimony of some neighbors that they didn't regard the parking of trucks that one used in one's business near to one's home as "non residential"

or "business" in character. As to the repair work, the Appellee referred to another part of the covenants that required that any vehicle repair occur in an enclosed garage. The trial court may have inferred from this that the restrictions condoned repair of the trucks, so long as the repair occurred indoors.

The appellate court disagreed and reversed the trial court's decision.

The appellate court concluded that part of the business of running a trucking enterprise involves the storage of the vehicles when they are not in use. Therefore, the parking and storage of trucks and trailers on Lot 6 constitutes commercial activities. In addition, the repair of vehicles used in a commercial business constitutes commercial activities. By repairing, storing, and parking his business vehicles on Lot 6, Appellee violated the restrictive covenants of his residential subdivision.

Comment: Why wasn't the "residential purposes only" restriction enough? Why did we have to argue about whether parking commercial trucks was a business? It clearly wasn't a "residential use". Perhaps because the covenant used the prohibition on businesses as a way of "fleshing out" the non-residential prohibition, and therefore it was easier for the court to work with the more specific language.

The court cited a number of other cases in which business vehicles were parked within residential only subdivisions. Do we have enough authority to prohibit "over the road" truckers from parking their big rigs overnight when they are at home? What about catering trucks or other vehicles providing mobile food services? Backhoes?

The answer to all of the above is "probably." In short – a useful case.

TAXATION; ASSESSMENTS; INDIAN NATIONS; AGRICULTURAL USES: A local tax assessor's decision to change the tax classification on a large Indian Nation owned hunting ranch did not violate the equal protection clause. ***Jicarilla Apache Nation v. Rio Arriba County, 2006 U.S. App. LEXIS 5142.***

A tax assessor in Rio Arriba County changed the tax classification on a 32,000-acre "ranch" in New Mexico from agricultural to miscellaneous non-agricultural, and ceased to classify elk located on the ranch as livestock. This resulted in increasing the ranch's tax bill by over $110,000 per year. Prior to the change in assessment, the Jicarilla Apache Nation owned the ranch, and had held discussions with the Bureau of Indian Affairs about the United States' acquiring the ranch in trust for the Nation in 1996, a move which the County resisted, in part, because then none of the ranch would be taxed by the County. The County argued that the past tax assessments of the property did not reflect the Nation's recent purchase of the land and the $25 million cost of the ranch. In 1999, the BIA sent a letter to the County approving the federal trust acquisition of the ranch, a decision which the County appealed on several grounds. While the appeal was pending, the County reassessed the land in 2000 which resulted in raising the tax bill by more than $100,000 per year. The Nation disputed the assessment through the state courts. Finally, in 2002, the Nation filed a complaint against the County in federal court. The district court granted summary judgment in favor of the County on several issues, and the Nation appealed that grant of summary judgment, leading to this decision.

In April 2005, the New Mexico legislature passed a law which resolved, in the Nation's favor, the issue of whether producing captive deer or elk is agriculture. The Court, however, still heard the case based on the Nation's claim of retrospective relief.

The Nation claimed that the County's failure to reassess other similarly situated properties constituted a violation of the equal protection clause. Contrary to that position, the Court held that the County's decision to reassess the property was based, in large part, on information contained on a letter from the BIA regarding the activities on the ranch, and that this evidence provided a credible reason for reassessing the ranch without reassessing other properties.

TAXATION; TAX FORECLOSURE; CONSTITUTIONAL LAW: It is a violation of due process for a municipality to demand payment in excess of the amount stated in a foreclosure complaint and published notice. Consequently due process requires the municipality to include the amount of any subsequently arising liens in its complaint and in the notice so that a person seeking to redeem will have notice of the amount actually required. ***City of East Orange v. Kynor, 383 N.J. Super. 639, 893 A.2d 46 (App. Div., 2006)***

A municipality issued a tax sale certificate and thereafter began foreclosure proceedings on a homeowner's property. The homeowner, appearing *pro se* throughout the proceedings, filed a "motion to show cause" to compel the municipality to permit her to exercise her right of redemption for the amount of the tax sale certificate both listed in the municipal resolution and published in the newspaper. The lower court denied the homeowner's application and transferred the matter to the foreclosure unit to proceed as an uncontested case. The homeowner sought a stay of that order, but the lower court denied the request. Both the Appellate Division and the Supreme Court denied the homeowner's appeals to reverse the denial of her request to stay entry of judgment.

The municipality eventually obtained a judgment of foreclosure. However, the amount of taxes owed according to both the foreclosure complaint and the published notice was less than the amount stated in the judgment of foreclosure. The homeowner claimed that she attempted to redeem the tax certificate based on what was in the judgment, but the municipal tax collector refused to accept payment in that amount, claiming more was owed because additional tax periods had passed since the adoption of the municipal resolution. After the final judgment of foreclosure was entered, the homeowner moved before the Supreme Court for "reconsideration of her motion for leave to appeal". The Supreme Court rejected this appeal as well as the homeowner's subsequent motion for reconsideration of the denial. The homeowner continued to file other papers with the lower court seeking to stay entry of the judgment of foreclosure. Eventually, the lower court ordered that the homeowner obtain written permission from the vicinage's assignment judge prior to filing any further pleadings. The homeowner then appealed the most recent denial of her motion seeking to vacate the judgment of foreclosure.

On this appeal, the Appellate Division found that the homeowner had been denied due process because she was never provided with a hearing on her "motion to show cause" originally filed in response to the foreclosure complaint to determine if she was denied due process by attempting to redeem the tax sale certificate based on the amount owed as published in the municipal ordinance and newspaper. It is a violation of due process for a municipality to demand payment in excess of that stated in a foreclosure complaint and published notice. According to the Appellate Division, due process requires the municipality to include the amount of subsequent liens in a foreclosure complaint and in the published notice so that a person with an interest in the property will have notice as to the amount actually required to redeem the tax sale certificate and to avoid foreclosure. The Court held that the denial of due process is an exceptional circumstance under Court Rule 4:50-1(f), entitling the homeowner to relief from a final judgment. Consequently, the issue was remanded for an evidentiary hearing to determine if the published notice and the foreclosure complaint had stated the full amount required to redeem the tax sale certificate.

TITLE INSURANCE; EXCEPTIONS TO COVERAGE; "PARTIES IN POSSESSION": Exception for "parties in possession" precludes duty of insurer to defend a claim by a neighbor alleging adverse possession of property of insured due to possession that was alleged to be continuing at the time the insured acquired the property, even where in fact, as the case develops, in appears that there was no such possession. ***Smith v. McCarthy, 195 S.W. 2d 301 (Tex. App. 2006)***

The case is vague as to exactly what happened in the suit, but the plaintiffs in the adverse possession action eventually took a nonsuit with prejudice. From the court's discussion, it appears that the plaintiffs must have concluded that they could not prove the allegations in their lawsuit that they had made continuous use of the property through cultivation of the grassy areas and continuously driving on the paved areas during the claimed adverse possession period.

Nevertheless, the court ruled, the title insurer was entitled to review the complaint, which was based explicitly on a claim that possession did exist, and therefore to invoke the exclusion based upon "parties in possession."

TRESPASS; OPTIONEE'S RIGHTS: The holder of an option to purchase does not have standing to sue for trespass. ***Niagara Falls Redevelopment, LLC v. Cerrone, 814 N.Y.S.2d 427 (A.D. 4 Dept. 2006)***, discussed under the heading: Options; Optionee's Rights; Trespass.

TRUSTS; RESULTING TRUST. The Delaware Chancery Court discusses circumstances in which resulting trust will be declared. ***Taylor v. Jones, C.A. No. 1498-K, 2006 Westlaw 1510437 (Del. Ch. May 26, 2006).***

The Ireland's owned a one-acre parcel they subdivided for the use of two of their daughters, Taylor and Jones, for installation of two mobile homes. The Ireland's retained title to the parcels, with the understanding that each of the daughters would eventually obtain title to their respective parcels.

In order for Jones to obtain loan financing for the acquisition of a mobile home for her lot, the Ireland's conveyed title, not just to Jones' subdivided parcel, but to the entire one-acre parcel, in order for Jones to have adequate collateral for the loan, which conveyance was made with the understanding that once the entire parcel was no longer needed as security for the loan, Jones would convey to Taylor the parcel Taylor occupied.

Over time, Jones and Taylor became estranged, and Jones demanded Taylor either start paying rent or vacate the Taylor parcel. Taylor brought an action in the Court of Chancery to impose a resulting trust on the Taylor parcel and for the court to cause legal and equitable title to be vested to Taylor.

The Court imposed a resulting trust and found for the petitioner, Taylor. Citing precedent, the court relied on the principle that, "A resulting trust arises from the presumed intentions of the parties and upon the circumstances surrounding the particular transaction. A resulting trust is found where the legal estate is acquired with accompanying facts and circumstances from which it can be inferred or assumed that the beneficial interest is not to go with the legal title."

In *dicta*, the court examined the theory of resulting trusts, and noted that the theory of relief for resulting trusts is reversionary. Strict application of the theory would mean the proper party to receive title to the Taylor parcel would be the Irelands.

The court was willing to set aside this requirement because it felt that the discretion of equity is broad in these circumstances, albeit unlimited, and that this case is a classic candidate for equitable relief:

"The Court's apprehension is animated by the realization that implied trusts cannot be available to parties entirely without limit in order to grant relief for actions they later regret. It may also be said, however, that the Court's capacity to grant this form of flexible equitable relief most closely comports with the historical foundations of Chancery jurisdiction."

The court noted, in fact, that in Delaware, unlike most other states, even an express trust can be established through oral evidence, and that it might have been possible here to make out a claim that the grant of the property to Jones was an express trust.

But, as to resulting trusts, the court noted it was a problem that the trust was not in writing. Resulting trusts are imposed in two contexts: (1) when a party pays the purchase price for property that is transferred to another, or (2) when there is a failure, in whole or in part, of an express trust or the purpose of an express trust or when the purpose of an express trust is achieved without exhausting the income or corpus of the trust.

The Court indicated that Taylor's claim would arise under the resulting trust being imposed for failure of an express trust. The *Restatement (Third) of Trusts* suggests that, under the modern approach, a resulting trust may not be found where there is a failure to comply with the Statute of Frauds requiring a writing in order to establish the trust, and, instead, a constructive trust may be imposed or a transferee may retain the property free of the trust. Delaware, however, has not adopted such a requirement that an express trust in land be in writing to be established; therefore, the limitation would not restrict the Court's imposition of a resulting trust.

Comment 1: It is somewhat difficult to make out what the difference in consequence would be if the court had declared a constructive trust here rather than a resulting trust. The court had already determined that one unique aspect of a resulting trust, that the beneficiary is the original grantor of the land into trust, would be ignored. Are there any other aspects of the resulting trust that would make it distinct?

Comment 2: Perhaps one important issue is the court's receptiveness to proof of the trust intent. As indicated, the trust was not in writing. This is often the case with constructive trusts, which are found, for instance, where property is obtained through fraud, embezzlement, or some other inequitable circumstance. Under the Restatement, apparently, the circumstances mandating the creation of a resulting trust require some form of writing

VENDOR/PURCHASER; ASSIGNMENT OF BUYER'S RIGHTS: Assignment of contract to purchase real estate need not satisfy Statute of Frauds, and conduct of assignee in carrying out closing may indicate assignee's assent to the assignment and all terms of the assigned contract, even though assignee has never read the original contract. ***DeVenney v. Hill, 914 So. 2d 106 (Ala. 2006)***

Eason contracted with Sellers to buy certain land for $250,000. As additional consideration, Eason verbally agreed that he would perform some extensive excavation on certain land retained by Sellers. Prior to closing, Eason sought to work out a financing deal with Hill (and a partner). After some negotiation over the financing, Eason and Hill agreed that Hill would buy the property directly from the Seller for $200,000 and that Eason later would acquire the property from Hill for $275,000.

It is not clear whether Hill understood that Eason had agreed to pay $250,000 for the property, but, since the parties had negotiated over financing the purchase, it is likely that Hill did so understand. Subsequent events suggest also that Hill understood that there was a contract with Sellers for a total price higher than Hill was paying. (The fact that the later "buy out" deal with Eason likely was a disguised mortgage transaction is not relevant to the outcome here, but may cause Hill problems later.) Hill had financed Eason's project before, and perhaps they customarily undertook bizarre informal arrangements such as this. In real estate, nothing is all that strange.

After Eason made the deal with Hill, Eason returned to the Sellers and renegotiated the deal, offering to pay $50,000 extra – for a total of $300,000, if he would be permitted to pay $150,000 of the price a month following the closing. Sellers agreed, but apparently the contract never was revised to reflect the new price or terms.

The closing must have been an event to behold. There was a closing agent, who, it appears, scrupulously explained to all parties the events that were taking place, and delivered financial summaries that made them clear as well. The closing was attended by Hill and his partner, Eason, and the Sellers. Hill brought the $200,000, Eason brought two checks – one for $50,000 and one for $150,000. Both of Eason's checks were postdated a month.

While all parties were in the room, Sellers noted that the contract did not reflect the fact that Eason (as buyer) had agreed to excavate certain retained land for Sellers. Eason wrote at the bottom of the contract that "David Eason agrees to excavate [setting forth details of the work.]," and Sellers and Eason signed below this addition. Then Eason wrote on the side of the contract "Contract assigned to . . . Hill." Hill and his partner, although present, claimed that they never saw the contract until later.

The closing agent produced a statement that showed that the total contract price was $250,000. Sellers did not object that this misstated the price that they had recently revised with Eason. The Sellers' closing statement showed that Eason paid $150,000 in earnest money (through the post dated check) and that Sellers were making a purchase money loan of $150,000 and were taking away $100,000 in cash. The closing agent agreed to hold the two post dated checks and to deliver them to Sellers in one month. Note that the closing agent did not account in the statements for the additional $50,000 check from Eason, although he was aware of it and did hold it along with the $150,000 check.

Hill, as buyer, received a statement that showed that buyer paid a total of $350,000 (Hill's $200,000 cash and Eason's $150,000 check). The statement also reflected that Eason was walking out the door with $100,000 in cash – the difference between the $100,000 received by Sellers and Hill's $200,000 and that there was a "loan" of $200,000 to someone, presumably reflected the two postdated checks. The statement was not identify the borrower or the lender of this "loan".

In addition to the statements, the closing agent expressly told everyone that Eason, a non-party to the closing, was walking away with $100,000, and no one objected.

The closing agent delivered the checks a month later, and, of course, they bounced right through the roof. Eason never did the promised excavation either, and apparently was not in a position to return any money to anyone. He was a defendant in the lawsuit, and judgments were awarded against him. But the significant battle was that between Sellers and Hill (and his partner).

Hill claimed, of course, that all he did was pay $200,000 to Sellers and receive a deed, and had not relationship to all the other promises made by Eason. He pointed out

that he never saw the contract until it appeared attached to Seller's lawsuit. And he argued that the Statute of Frauds requires a writing for an assignment of a real estate contract to be valid.

The court here ruled, however, that Alabama law does not require a writing for an valid assignment of a written contract. Further, even if Hill never read the the contract between Eason and Sellers, Hill had knowledge of, and that it was this contract that brought the Sellers to the table. Further, the economics of the deal were disclosed, more or less, in the closing statement that Hill received. At least Hill had constructive knowledge of the contents of the agreement. Thus, Hill's conduct in carrying out the closing and accepting the deed constituted Hill's agreement to the assignment and the delegation of duties contained in the contract. These duties including the obligation to pay $250,000 for the land *and* to carry out the excavation.

The court concluded that the agreement to pay an additional $50,000 for a one month deferral of a $150,000 of the original price was required to be in writing under the Statute of Frauds, and that Sellers had not shown that Hill otherwise was bound by that agreement. Thus, Hill's obligation was $250,000, not $300,000.

As to the excavation obligation, Hill had argued that this clearly was a personal undertaking by Eason, as the contract indicated that Eason would do the excavation. But the court said that Eason was identified elsewhere in the agreement as the buyer and assignor, and that excavation of this sort did not require any exceptional skill. Personal service contracts that do not involve unique skills are assignable. (The excavation obligation in fact, was a substantial economic burden.)

Hill argued that he paid $200,000 to the Sellers and that, if any "loan" was made, it was made by the Sellers to Eason. Note that the postdated checks were made out to the Sellers. But the court relied upon the buyer's closing statement, which showed the money paid to Eason. There was no parallel entry on the seller's closing statement. Thus, the court concluded Hill loaned the $100,000 to Eason, and not the Sellers. And Sellers permitted a deferral of $150,000 of the purchase price to Hill, and he was obligated to pay it now, despite his payment of $200,000 at the closing.

Hill had borrowed the original $200,000 he brought to the closing, and had given a mortgage to Bank on the acquired property to secure that loan. Sellers argued that the Hill's obligation to pay the $150,000 balance of the purchase price was secured by a vendor's lien that took priority over the Bank's mortgage. They lost on this one.

The court acknowledged that an implied vendor's lien arises when there is a sale of real property and an unsecured portion of the purchase money remains unpaid. But the purchaser may show that any such implied lien was waived. Waiver can be shown by (1) the seller's affirmative intention; (2) by seller's reliance, not on land, but on substituted, independent security; (3) by reliance on the personal responsibility of the buyer.

In this case, it was clear that the sellers knew that they were extending $150,000 of the purchase obligation for a month, and that they were relying upon Eason to pay that money. Other authority supported the notion that a seller's acceptance of third party checks constitutes a waiver of an implied vendor's lien. Consequently, although, if Eason should fail to pay, Hill was obligated to perform, there was reliance on Eason personally, and no expectation of a lien against the land in Hill's hands. The court never got to the argument that the Bank likely was a bona fide purchaser for value, thus priming any vendor's lien in any event.

Comment: Of course, the case is complex, and the editor apologizes for the headache caused by plowing through the facts. But the lessons here are useful. Assignments need not be in writing, and acceptance of the benefit of the contract binds the assignee to terms of the contract of which he may have no actual knowledge, including some personal service items. The waiver of the vendor's lien is also an important discussion, although it is not likely to do Hill and his partner much good in the end, unless the costs of this litigation have exhausted all their other resources and they are judgment proof.

Comment 2: The editor acknowledges that it seems odd that the court found that the $150,000 deferred price represented on the one hand a loan from Hill to Eason, so that Hill was still obligated to Sellers to pay that amount, while at the same time the court concluded that Seller "relied" upon Eason's credit as to that amount, thus waiving a vendor's lien. But that does appear to be the court's conclusion.

VENDOR/PURCHASER; MISREPRESENTATION; LEGAL PROCEEDINGS: A purchaser may not justifiably rely on a seller's attorney's oral statements regarding the likely outcome of a future holdover tenant proceeding. ***Adrien v. Estate of Zurita, 812 N.Y.S.2d 709 (A.D. 2 Dept. 2006)***.

The plaintiff contracted to purchase real property from the defendant. The plaintiff was aware that tenants occupied part of the premises from the plaintiff's own inspection of the property and the seller's disclosure in a property condition disclosure statement. The seller's attorney allegedly made oral representations regarding the outcome of a future tenant holdover proceeding; however, the holdover proceeding was determined in favor of the tenants. Plaintiff claimed that the attorney's representation was a fraudulent misrepresentation. The court held that the attorney's statements were mere expressions of an opinion and could not be reasonably relied on by the plaintiff.

Comment: Unfortunately, the court does not tell us precisely what the attorney said, but it appears that the court was of the view that anyone ought to know that an attorney's opinion about the likelihood of success of a legal proceeding necessarily is only an opinion, and cannot be regarded as a misrepresentation.

Certainly this would not be the case if the attorney indicated that his opinion was based upon certain facts which, it later proved, the attorney knew were not true facts.

VENDOR/PURCHASER; TITLE: When seller agrees to provide warranty deed, seller implicitly agrees to provide marketable title, including the obligation to act in good faith to clear questionable title through a legal proceeding. ***Ferrara v. Walters, 919 So. 2d 876 (Miss. 2005)***

VENDOR/PURCHASER; TITLE: Where time has not expressly been made of the essence, buyer may raise objections to title and demand that seller clear title before closing even if buyer raises the issue after the original time for closing has passed. ***Ferrara v. Walters, 919 So. 2d 876 (Miss. 2005)***

VENDOR/PURCHASER; SELLER'S REMEDIES; DAMAGES; FAIR MARKET VALUE: Bank cannot use price bid at later foreclosure sale to establish fair market value in damages claim resulting from first sale if it cannot show that circumstances motivating the bids were the same. ***Bancorpsouth Bank, Inc. v. Hatchel, 2006 WL 1767757 (Ten. Ct. App. 2006)***.

Bank planned to auction off a parcel of distressed real estate at a foreclosure sale. One day prior to the sale, Hatchel met with a representative from Bank to discuss the property. Hatchel agreed to bid $575,000 for the property in return for Bank's agreement to (i) pay the taxes, filing fees, and other incidental expenses associated with the sale, (ii) allow Hatchel to keep all rents generated from the property, (iii) finance his purchase of the property, (iv) make all necessary repairs to the property, and (v) extend Hatchel a line of credit to use as he pleased.

At the foreclosure sale, the Bank placed a bid in the amount of $570,000. Hatchel then placed his successful bid in the amount of $575,000 and signed a "Confirmation of Bid and Agreement" regarding the property. A few days later, however, Hatchel stated that he would not sign any transfer documents until he had the property inspected, which he had not done prior to the foreclosure sale. Upon inspection, Hatchel felt that he had overbid on the property in light of the damage to the residential dwelling units located thereon and refused to consummate the transaction.

Bank filed suit against Hatchel in the chancery court seeking specific performance of the bid agreement, or in the alternative, sought damages for breach of contract. Hatchel counterclaimed that if the Bank succeeded in its specific performance action, he was entitled to $5,000 in damages for improvements he made to the property following the foreclosure sale.

The chancery court denied the specific performance claim and therefore dismissed Hatchel's counterclaim for damages. The court did hold, however, that Hatchel breached the parties' contract. The court reserved its ruling on damages. The court noted that the proper measure of damages is the difference between the contract price and fair market value of the property at the time of the breach, and because the Bank failed to present sufficient evidence of the fair market value during the trial, the court could not enter its final order regarding damages.

The Bank then presented evidence that the Bank conducted a second foreclosure sale of the property at which it

successfully bid $400,000 and asserted that this represented the fair market value of the property at the time of the breach, entitling the Bank to $175,000 in damages. The trial court held that the Bank could not establish the fair market value of the property by relying on the amount received at a subsequent foreclosure sale of the property conducted by the Bank post-trial. In its discussion, the court noted that the Bank initially bid $570,000 at the first foreclosure sale but did not point to any other reason for its conclusion. It did award the bank special damages caused by Hatchel's breach. The Bank appealed.

On appeal, the Court of Appeals affirmed the decision of the trial court but rejected its reasoning because Tennessee law holds that previous offers to purchase cannot be used to establish the value of the property on the date of the breach of a contract to real estate. The court, instead, pointed to the fact that in order for the price received at a subsequent sale to represent the fair market value of the property, both sales must have been conducted under similar circumstances and in an arms-length fashion. The court noted that there was a drastic change in the circumstances and motivations of the Bank between the first and second foreclosure sale because (i) the Bank was clearly motivated at the first sale to achieve the highest possible price for the property and (ii) the Bank offered Hatchel certain incentives to place the highest bid at the first sale.

As the Bank was unable to prove damages, the court affirmed the trial court's refusal to award general damages, and thus denied the Bank's attorney's fees on appeal, as it had not prevailed.

Comment: The factors motivating the parties in the first foreclosure demonstrated that the first price was not a market price. But this doesn't mean necessarily that the price bid at the second sale, which did not involve these factors, was not relevant to the determination of market at the first sale.

Note that the price bid at the first sale did not have to be a market price. Hatchel agreed to pay that price in light of special incentives, and then defaulted. Although the price Hatchel agreed to pay did not represent the market, neither should it influence the court's evaluation of the second price at the later foreclosure.

The conundrum is resolved by understanding that what the court was really getting at was the fact that the "market" at the time of the first sale was the market for a certain kind of property – one supported by a financing pledge and other incentives from the Bank. These incentives were not present at the second sale, and consequently the price at the second sale was not relevant to the price of the property at the first sale, as something quite different was sold at the first sale.

Without any hard evidence of value at the time of the first sale, the case of the Bank, which had the burden of proof, simply fizzled.

VENDOR/PURCHASER; SELLER'S REMEDIES; VENDOR'S LIEN: Although vendor's lien presumptively arises when seller defers a portion of purchase price, a seller may waive the lien by agreeing to take a post dated check from a third party for part of the price. ***DeVenney v. Hill, 914 So. 2d 106 (Ala. 2006)***

WATERS AND WATER RIGHTS; LITTORAL RIGHTS; DEED DESCRIPTIONS: Description that identifies a course ending at a "sea wall" but also gives a an angle and distance to the course that would establish a measurement beyond the sea wall is controlled by the location of the sea wall, as monuments control over courses and distances. ***Manguson v. Cossette, 707 N.W. 2d 738 (Minn. App. 2006)***, discussed under the heading: "Deeds; Descriptions; Monuments."

WORDS AND PHRASES; "COMMERCIAL RECREATION FACILITY:" A banquet hall/wedding facility is a "commercial recreation facility" within the meaning of a special exceptions ordinance for affecting an agricultural zone. ***Green v. Hancock County Board of Zoning Appeals, 851 N.E.2d 962 (Ind. Ct. App. 2006)***, discussed under the heading: "Zoning and Land Use; Special Use Permits; Scope."

ZONING AND LAND USE; BUILDING PERMITS; REVIEW; SUBSTANTIVE DUE PROCESS: To prevail on a substantive due process claim that a government official has improperly denied construction permits, a developer must show that the official's actions shocked the conscience, not merely that the official had an improper motive. ***Cherry Hill Towers, L.L.C. v. Township of Cherry Hill, 407 F.Supp.2d 648 (D. N.J., 2006)***

A developer purchased a site and submitted its applications for construction permits. Approximately

four weeks later, the subcode official called the developer to say that the construction permits were ready and available for pick up. The next day, the developer met with union representatives and told them that because the union contractor's bid was several million dollars in excess of other bids, the developers were going to award the project to non-union construction companies. Later that same day, the subcode official called the developer and advised not to pick up the permits. Nonetheless, the developer went to the subcode official's office and was advised the permits were not ready because of outstanding code compliance issues. For the next several weeks, the developer and the subcode official exchanged letters regarding the outstanding code compliance issues. A stop work order was issued after the subcode official learned that the developer was moving materials onto the site in anticipation of the grant of the construction permits.

The developer appealed the denial of the construction permits and of the issuance of the stop work order to the county construction board. The municipal subcode official chaired the county board. The county board never heard the appeal because the subcode official released the construction permits prior to the hearing date. The developer then filed a Section 1983 complaint alleging that the delay in issuing the construction permits was: (1) arbitrary, irrational, and tainted by improper motive in violation of 14th Amendment substantive due process rights; (2) in violation of 14th Amendment procedural due process rights; (3) contrary to the equal protection rights of the 14th Amendment; and (4) a tort of interference with contract and prospective economic advantage. The municipality moved for summary judgment.

To prevail on its substantive due process claim in the context of a municipal land use decision, the developer needed to show that it had a property interest protected by due process, and that the municipality's deprivation of that property interest shocked the conscience. The Court held that as the owner of the site subject to redevelopment, the developer had a property interest protected by due process. However, it also held that to prove that a municipality's actions shocked the conscience, more than an improper motive by the subcode official is required. Only the most egregious official misconduct will amount to an action that shocks the conscience. In response to the developer's claim that the subcode official withheld issuing the permits to pressure the developer to use unionized labor, the Court refused to decide whether the developer's applications were improperly denied. The Court reasoned it is not a "super zoning tribunal".

The developer contended that its procedural due process rights were violated when the subcode official failed to render a decision within twenty days of the developer's construction permit applications. The Court ruled that such failure to render a decision was not a violation of due process because the statute provides that a failure to render a decision within twenty days is considered a denial. The developer further claimed that the subcode official blocked its appeal by scheduling the county board meeting more than a month after the appeal was filed. The Court ruled that because the subcode official issued the construction permits prior to the hearing date, this was not a procedural due process violation.

For the developer to succeed on its equal protection claim, the Court required a showing that the subcode official acted irrationally or wholly arbitrary. It found no supporting evidence.

Also see: ***Woodfield Equities v. Village of Patchouge, 813 N.Y.S.2d 184 (A.D. 2 Dept. 2006).*** An owner of condemned property may not set aside a proposed condemnation simply by alleging bad faith and suspicious timing if the proposed condemnation will serve a legitimate public purpose. Petitioner purchased real property to build a group home for recovering alcoholics and drug addicts. Four months later, the Village of Patchouge condemned the property in order to expand a park and relocate several government agencies and community groups. Petitioner challenged the condemnation as pretextual, claiming that the Village did not want a group home in a residential community. The court held that unsubstantiated allegations of bad faith and suspicious timing were insufficient to overturn a condemnation that furthered a legitimate public interest.

ZONING AND LAND USE; PREEXISTING NON-CONFORMING USES; UNLICENSED ACTIVITY: Where a conditional use permit has been issued authorizing certain activities, and later the owner of the property conducts such activities without a license, these activities are deemed to be continuing even if they are not actually properly licensed, and consequently such uses qualify as preexisting nonconforming uses. ***Chan LAM v. City of St. Paul, 714 N.W. 2d 740 (Minn App. 2006)***

Prior owners obtained a valid conditional use permit to operate an auto sales business with auto repair as an accessory use. Later, the owners sold the business to new operators, who continued to sell cars and repair cars, but had no license to sell cars.

Ultimately, the city passed a new ordinance that prohibited either car sales or car repairs in this zone. The city took the position that the use "auto sales" was not being lawfully conducted at the time of the zone change because there was no valid license. As the auto repair business was permitted only as an ancillary use, this use also was not being lawfully conducted either (even though there was no required license for this activity). Therefore, the city refused to permit continued operation of either business.

On appeal, the court of appeals held that a nonconforming use need only comply with zoning laws in order to establish its validity as against a change in the zoning laws. The fact that the use does not have a valid license does not defeat its status under the zoning laws (here the conditional use permit.) Hence the car sales use, which in fact had continued, was valid as a pre-existing nonconforming use, as was the ancillary car repair business.

ZONING AND LAND USE; FEDERAL AGENCIES; ADMINISTRATIVE LAW: Administrative agency's decision to control motorized recreation in certain areas of government land was not arbitrary. ***The Silverton Snowmobile Club v. United States Forest Service, 433 F.3d 772 (10th Cir. 2006).***

Although the Forest Service was a party in this decision, the dispute in this case really arose between people who like to snowmobile and people who like to walk, snowshoe, or cross- country ski quietly in the mountains. Colorado's droughts in 1998-2000 resulted in a lack of snow at lower elevations, and resulted in an increase in motorized and non-motorized recreation on Forest Service and BLM land near Durango, Colorado. After several letters to the editor in local newspapers regarding disputes between the two groups, the Forest Service and BLM decided it was time to review their current policies regarding motorized recreation.

The governmental agencies presented three plans for winter use management of the affected area, and took public comment on the issue. The agencies also contacted the United States Fish and Wildlife Service to determine the impact on endangered species in the area. Eventually, the agencies made a decision which took away 3% of the area that had been available to recreational vehicle users, prohibited nighttime motorized recreation, but allowed motorized use on some BLM lands.

Plaintiffs, including persons interested in snowmobiling and other motorized off-road recreation, filed suit, claiming the agencies' decisions were arbitrary, capricious, and an abuse of discretion. The Tenth Circuit affirmed the district court's decision to uphold the new recreation plan.

This case is illustrative of competing uses in an ever more crowded area. Recreation space in the mountains of Colorado is a valuable resource, and disputes between people with different ideas about what that recreation should be will continue to arise.

ZONING AND LAND USE; DEVELOPMENT AGREEMENTS; DETENTION BASINS: A municipality may lawfully require a developer to retain responsibility for maintaining a detention basin for a reasonable time even after the basin has been voluntarily dedicated and accepted. ***Talcott Fromkin Freehold Associates v. Freehold Township, 383 N.J. Super. 298, 891 A.2d 690 (Law Div. 2006)***

ZONING AND LAND USE; PROCEDURE; JURISDICTION: While the passage of a new zoning resolution may affect the status of real property, it does not affect existing zoning judgments. Likewise, an action taken by a state agency has no effect on the enforceability of existing zoning judgments. ***State ex rel. Godale v. Geauga County Court of Common Pleas, 853 N.E.2d 708 (Ohio Ct. App. 2006).***

In July 1982 the Geauga County Court of Common Pleas ("County Court") enjoined Godale from maintaining certain types of motor vehicles on a parcel of real property he owned, and from engaging in certain types of businesses on the land, including the sale or repair of motor vehicles. Since that time, Godale has been found in contempt several times, and has unsuccessfully filed various appeals contesting the determination of the County Court.

Here, Godale filed for a writ of prohibition claiming the County Court no longer has jurisdiction over the matter

and that the July 1982 judgment is no longer enforceable. Godale argued that a new zoning resolution, passed in 1996, would now allow the previously enjoined use of his property, and that in 1995 the State of Ohio issued him a license to sell used motor vehicles on the subject property.

The Court of Appeals of Ohio, Eleventh District, rejected both these arguments. The court held that the passage of a new zoning resolution would at best give Godale a new defense against the continued enforcement of the July 1982 judgment, but it does not revoke or alter the County Court's jurisdiction over that judgment. The County Court necessarily has the jurisdiction to decide whether its own judgment is now moot. Moreover, the State of Ohio's granting of a license has no effect upon the County Court's jurisdiction to decide whether its own judgment is still enforceable notwithstanding the change of circumstances.

In short, the court felt that Godale was using the procedural posture of a writ of prohibition to side-step the appeals process, which has not worked in his favor over the years. The court noted that not only is a direct appeal available, but one was already pending in which Godale was raising the same basic arguments. While Godale was wrongly attempting the substitute the writ of prohibition for a direct appeal, the court nevertheless chose to address the merits of his argument to make clear the power and jurisdiction of the County Court over zoning matters in relation to the other legislative body and state agency invoked in the writ. The court dismissed the petition for writ of prohibition.

ZONING AND LAND USE; PROCEDURE; REVIEW; STANDING: Individual citizen lacks standing to argue that Town's action in creating conditional use classification exceeds its enabling authority**. *Barry v. The Town of Dewey Beach, et. al., C.A. No. 1083-S (Del. Ch. June 8, 2006).***

In 2004, the Town of Dewey Beach adopted the ordinance creating a conditional use classification for hotel and motel conversions to condominiums within the Town's RR and RB districts to accommodate the change in zoning that caused existing hotels and motels to become non-conforming uses within the Town. The ordinance that was passed, does not require compliance of the structures to certain requirements for setbacks, parking, density, etc. that are otherwise applicable to multi-family structures in districts where it is a permitted use. The result is that density can be much higher for a motel/hotel conversion property under a condition use as opposed to new construction for condominiums under a permitted use.

A citizen challenged the ordinance in court, seeking injunctive relief prohibiting the approval of the permits issued pursuant to the ordinance.

Dewey Beach Suites LLC intervened as a motel owner anticipating conversion of its project to condominiums under the ordinance, arguing that the plaintiffs lacked standing. The Court agreed, determining that a party must, in the absence of a statutory grant of standing, "show that its interest in the controversy is distinguishable from the interest shared by other members of a class or the public in general". The Court determined that plaintiffs claim was founded in an improper exercise of the Town's enabling authority to grant conditional uses, which was a general grievance that was more appropriate to resolve in the political process rather than the judicial process.

ZONING AND LAND USE; PROCEDURE; REVIEW; WETLANDS: A trial-type hearing is not required for administrative review of wetlands determinations because such reviews are subject to judicial review and evidence may have already been adduced at prior land use or similar hearings. ***I/M/O Freshwater Wetlands Statewide General Permits, 185 N.J. 452, 888 A.2d 441 (2006)***

ZONING AND LAND USE; SPECIAL USE PERMITS; SCOPE: Although a zoning appeals board interprets its list of special exceptions to encompass a new use not contemplated by the original drafters of the ordinance, its interpretation is a permissible exercise of its delegated authority and not impermissible "legislation" if its purpose is to resolve an existing controversy and its interpretation has the effect of determining the legal rights at stake. ***Green v. Hancock County Board of Zoning Appeals, 851 N.E.2d 962 (Ind. Ct. App. 2006).***

Neighbors sought judicial review of the decision of a county board of zoning appeals ("BZA") that granted Holmea, a property owner, a special exception to construct a banquet hall/wedding reception facility on her property, which was located in an agricultural zoning district.

The primary issue raised on appeal was whether the trial court erred in concluding that the BZA properly interpreted its zoning ordinance by determining that defendant Holmes' proposed banquet hall/wedding reception facility fell within the special exception of "commercial recreational use," as provided for in the Hancock County zoning ordinance. The ordinance stated that only activities listed as permitted "special exceptions" could be considered by the BZA. The neighbors argued that in interpreting the ordinance to mean that a banquet hall/wedding reception facility was a "commercial recreational use," the BZA created, in essence, a new exception not contemplated by the drafters of the ordinance.

More specifically, the neighbor appellants argued that (1) by its interpretation the BZA was acting unconstitutionally as a quasi-legislative body, and (2) even if such an interpretative method is allowed, the interpretation here was unreasonably broad.

The Court of Appeals of Indiana first found that a zoning board of appeals may properly determine that a particular use that was not contemplated by an enumerated list of special exceptions may nonetheless fit within one of those enumerated exceptions. The court said that this form of decision-making is analogous to what a court does when it attempts to give effect to a statute's underlying purpose when presented with specific questions that were not contemplated when the statute was enacted. Thus, the BZA had the authority to interpret its own zoning ordinance in its role as a quasi-judicial body.

Second, the BZA provided sufficient evidence that it had properly established that defendant Holmes' proposed use complied with the statutory criteria for special exceptions, and fit within the enumerated category of "commercial recreational use." In so finding, and consistent with its analysis on the first point, the court applied the same rules as those employed for the construction of statutes. It concluded that such a "general and prospective" decision of a board of zoning appeals is not an abuse of discretion if its purpose is to resolve an existing controversy and its interpretation has the effect of determining the legal right.

Since the BZA was found to have acted within its authority as a quasi-judicial body, and complied with all applicable statutory criteria in ruling on defendant Holmes' application for a special exception, the court affirmed the judgment of the trial court.

Comment 1: It's all a matter of degree, of course. But where the drafters of the ordinance use such a broad description as "commercial recreation facility" to describe what uses can be granted special exceptions, those affected by the ordinance must anticipate that the BZA is authorized to consider many varied activities. Note that the nature of the use is only the first step, and the BZA then is instructed to evaluate measures by which the impact of the proposed use on the balance of the agriculturally zoned property in the area can be mitigated.

Even though those drafting the ordinance might not have thought of banquet halls, there are many other "commercial recreation facilities" – such as stock car racing, soccer stadiums, and a legion of other activities that the neighbors would have found far less desirable that would have fit easily within the definition. They should consider themselves lucky that all they have to contend with is a few drunken wedding guests.

Comment 2: The real question, probably, is whether it is permissible for a legislative organ to delegate to a subordinate appointed agency the power to "fill in" such a broad definition of permitted uses. In short, although the BZA properly fulfilled its assignment here, was the assignment in fact too broad? The court didn't really address this issue, and likely it would have been a loser anyway, given the need to coordinate the myriad demands of the society within a land use scheme. The use of a board that regularly reviews the question of impacts and propriety of use through a broad delegation of authority makes practical sense, even if it is somewhat inconsistent with the notion of elected leaders making policy. It's the nature of the beast.