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

January 1 to March 31, 2008

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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.

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

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ADVERSE POSSESSION; PUBLIC PROPERTY; "PUBLIC USE:" Property owned by the Metropolitan Water Reclamation District was public property for the use and benefit of the public even though the property owned by the district was subleased to a golf course open to the public; thus the adverse possession statute did not apply to the property. ***Miller v. Metro. Water Reclamation Dist. of Greater Chicago, 870 N.E.2d 1040 (Ill. App. Ct. 2007).***

Plaintiffs owned land adjacent to property owned by the Water Reclamation District of Greater Chicago. District leased the land to Evanston Wilmette Golf Course Association, a public golf course. Plaintiffs discovered that portions of their property were built on District's land. District notified Plaintiffs of the encroachment and requested that the encroachments be eliminated. Plaintiffs filed a complaint alleging that they owned the land by adverse possession.

District argued that adverse possession cannot apply to their land because adverse possession does not apply to land used for the public and owned by the state. The trial court granted summary judgment in favor of District.

On appeal, Plaintiffs argued that the property lost its immunity to adverse possession once District leased it to the golf course and it became a proprietary business. The controlling law on the issue stemmed from *Brown v. Trustees of Schools*, 79 N.E. 579 (Ill. 1906). *Brown* defined public use by holding that the public at large must have a general interest in the property. *Brown* held that this definition does not mean the public has open access to the property at all times but simply that the property is used for the general benefit of the public. Using the reasoning in *Brown*, the Appeals Court agreed with the trial court and held that the golf course was used for the benefit of the public and was open to all persons in the state.

Comment 1: The District obtained the property, apparently, through merger with a prior public sanitary district. The court outlines the public purposes served by sanitary and drainage districts to prevent the pollution of Lake Michigan. It concludes, properly, that such purposes are public purposes and property owned by such districts for such purposes are exempt from adverse possession. Unfortunately, it does not tell us what role the ownership of the subject property plays in the carrying out of such purpose. If, indeed, ownership of the land relates to the drainage function of the District, perhaps the court should have stopped there. Even if the property is leased to a golf course, if it still serves its original purpose as well, surely no adverse possession could apply.

Comment 2: Perhaps because of the troublesome authority of *Brown*, which held that where a municipal agency leased a building to a school district, the leased property was subject to adverse possession by third parties. Even though obviously a school use is a "public" use, the court concluded that the use of the property as a school did not serve the interests of "the people of the state at large" – and not a limited subgroup of them - such as residents of a school district.

Although local governments may hold property insulated from adverse possession, apparently, in Illlinois, such property must be held "in respect of governmental affairs affecting the general public."

Following the above line of reasoning, the court distinguished *Brown* here because the golf course was open to the general public. (Presumably for a fee.)

Comment 3: Of course, many jurisdictions only protect from adverse possession public property held for a "governmental" as opposed to a "proprietary" purpose. See, *e,g, Eller Media Company v. Bruckner Outdoor Signs, Inc*., 753 N.Y.S.2d, 28 (A.D. 1 Dept. 2002) (the DIRT DD for 5/22/03).

The editor was not familiar with the special "statewide public interest" requirement espoused in *Brown.* He had assumed that a local government purpose was a sufficiently public purpose to insulate property used for that purpose from adverse possession.

The editor still believes that to be the general rule.

The Illinois rule, in the editor's view, makes very little sense. Land held by local government and used for local government purposes is vested with the public interest. Why shouldn't such land be regarded as free from adverse possession to the same extent as land owned by the State?

In addition to the logical impediments the *Brown* rule creates, the rule presents impossible analysis problems for courts. For instance, although education for local students occurs in schoolhouses, these days there are plenty of personnel in such buildings carrying out state mandated education plans, spending state money for a variety of programs, and filling out form after form after form to be sent to state government. Where is the line between local and state interest in such a situation?

Comment 4: Note that *Brown* is a 1906 precedent. Perhaps the Court of Appeals here felt bound by it, and could only reinterpret it, and it will fall when the Illinois Supreme Court gets the proper opportunity.

ADVERSE POSSESSION; REQUIREMENT OF HOSTILITY: Maryland claimant can adversely possess land she knows to be titled in another after the titled owner has abandoned the property in the face of a threatened third party foreclosure. ***Yourik v. Mallonee, 921 A. 2d 869 (Md. App. 2008) cert. denied, 925 A.2d 635***

This is a fascinating "mother vs. son" case, quieting title in the mother to a home formerly owned and entitled to the son. The son abandoned the property pending a third party foreclosure and the mother and her deceased husband entered and for the next forty years, repaired and maintained and paid taxes on the property, and at various times either occupied it or rented it out. All along the mother knew that the son had title and the son knew that his parents were occupying the property.

The son originally obtained title when his parents bought the property for him as a sort of wedding present. The parents paid the down payment and all the closing expenses and arranged for title to be transferred from third part sellers to the son and his new bride as tenants by the entireties. The balance of the purchase price was financed by a mortgage. The court doesn't tell us whether the parents cosigned or guaranteed the mortgage note, but it was clear that the new could undertook originally to make the payments and they, undoubtedly were themselves on the note, as they were owners.

Unfortunately, the marriage quickly fell apart, and within a year the wife had left the home and more or less disappeared from the scene. (In this action, she resurfaced long enough to quitclaim any interest she had to the mother and acknowledge mother's ownership. Her actions may be moot because the court never indicates that there was a divorce, so one assumes the wife could not unilaterally transfer the entireties estate. To keep things simple, we'll just assume as the court did, that the departed wife had nothing much to do with the dispute.)

As indicated, mother and the late father cured the defaults, took over payments on the mortgage, and continued to look after the property for the next forty years. During that time, father died, and ultimately mother took up residence in the property. Apparently the parents had lived there on and off over the years.

The testimony was full of disputes as to who said what to whom about what the parties intended concerning the state of ownership of the property. The trial court concluded that the parents occupied the property under claim of ownership, and not pursuant to the son's permission, and that such possession was sufficiently hostile to qualify as adverse possession. The appeals court here affirmed that decision.

The son argued that Maryland's adverse possession statute, as interpreted by prior Maryland case law, requires that there be both claim of right and "title." The court concluded that, despite the language of prior cases saying that a "claim of title" was required, the only requirement for adverse possession hostility in Maryland was occupation under claim of right, even when title is known to be in another:

"The rule at law, as well as in equity, established by an unbroken course of authority, is, that possession, to be adverse, must be accompanied with a positive and exclusive claim of the entire title, and if the title claimed be subordinate to, or admits the existence of a superior title, the possession will not be taken as adverse to that title; nor does it matter how long such a possession may be continued, for it can have no effect in the way of barring the legitimate title. [Son] misconstrues this language, along with the oft-repeated test that adverse possession claimants must occupy the property "under claim of title or ownership," to mean that adverse possession can never be established by a claimant who occupies the property with knowledge that another person has legal and/or record title. This interpretation rests on [Son's] misunderstanding of the terms "claim of title," "color of title," "claim of ownership," and "claim of right," all of which are alternative methods of proving that the claimant's possession was sufficiently "hostile" to be "adverse." As a first step in sorting through the semantics, we observe that "color of title" has a narrower meaning than "claim of title." "Color of title is that which in appearance is title, but which in reality is not good and sufficient title." . . . When adverse possession is premised upon a deed or other instrument believed to convey title, but does not, whether because the instrument is invalid or otherwise fails to convey the claimed interest, that instrument will "give color" only if it is "prima facie good in appearance [so] as to be consistent with the idea of good faith on the party entering under it." . . . Yet the established rule, followed in Maryland, is that proof of color of title is not necessary to establish adverse possession."

Consequently, Mother's possession of the property was sufficient to satisfy the "hostility" requirement. The fact that Son knew that she was there did not mean that she was acting with his permission, rather than under her own independent claim of right.

Comment 1: Not only are the facts interesting, but it is fascinating that in all Maryland's long legal history the Maryland courts have never had occasion to construe the adverse possession doctrine to determine whether a claim of title is required.

Of course, in most adverse possession cases, the possessor does claim title, even if the possessor lacks "color of title" because the possessor believes that the possessor's record ownership includes the land occupied. In other words, most adverse possession involves boundary disputes where possession over the legal boundary begins by mistake, but later is confirmed as establishing a new ownership due to the long established fact of the adverse possession.

This case is quite different, since mother knew all along that Son had title. In fact, she had originally intended that Son receive title, and no one documented any transfer or title or other interest when parents moved in following Son's abandonment of the property. On these facts, it seems clear that the parents were not possessing the property as agents of the son. They made all decisions and rented it out as they saw fit, apparently keeping any net rents. So the editor agrees with the decision, and views it as consistent with established law.

Comment 2: But note the outcome of this precedent when applied in other circumstances, unfortunately all too prevalent in the current period: After a mortgage holder goes into default and abandons the property, a third party comes in and somehow convinces the mortgagee to reinstate the mortgage and accept payments from that third party. With the number of foreclosures going on, it is not so surprising that a mortgagee might jump at the chance to reinstate a defaulted file and ignore the fact that a home theft might be occurring. In fact, the third party, waving around a bit of cash, might even convince the lender to renegotiate the default payment claims or even the principle.

The third party continues to rent out the property as the years go by, paying the taxes and ultimately retiring the mortgage. The title holder, of course, assumes that the property passed at foreclosure and probably is simply grateful that no one is pursuing a deficiency. Voila!! After the appropriate time – title passes. Note that in Maryland the adverse possession period is 20 years, but in California it is only five years, and many other states have shorter periods than Maryland's.

Comment 3: Some might say that the outcome described above seems about right? Who cares whether the "interloper" began with title? Wasn't title earned by retirement of the debt?

The Editor, however, fears that recognition of the possibility of adverse possession in this case might lead to a "cottage industry" of foreclosed home occupiers. In fact, this is exactly what happened in California during the RTC years, and the Editor believes California now has a statute that regulates this behavior.

Once the practice is established, it is a short step from looking for abandoned homes to helping the abandonment along through dishonorable "foreclosure advisors" creating situations in which they can step in and take over a home while purporting to act in the interests of the defaulted homeowner.

Much as we dislike the widespread foreclosures, is permitting any clever interloper to seize defaulted property by adverse possession a wise approach to the problem?

Comment 4: The general issue of whether an adverse possessor ought to be able to claim title to property the possessor knows belongs to another has been much in the news lately. The majority view, certainly, is that "good faith belief in ownership" is not an issue, and the court in the reported case above cites to Tiffany for the notion that such a rule would only cause "liars' competitions." A 2006 New York case, *Walling v. Przybylo*, 851 N.E. 2d 1167 reaffirmed the rule that hostililty does not require a good faith claim of ownership. But the New York decision was criticized by the "landowners' rights" groups, and, the editor understands that legislation to change the long standing common law rule has now been signed into law, much to the chagrin of many New York practitioners and title insurers. The editor also recalls that in Colorado, where a judge allegedly adversely possessed a neighbor's land, and won in court, legislation requiring good faith possession was adopted – but this based on hearsay and a foggy memory.

ADVERSE POSSESSION; REQUIREMENT OF HOSTILITY; PERMISSION: Permission to occupy property given to a prior tenant does not negate hostility requirement when successor to landlord occupies property with building and fence. . ***United Pickle Products Corp. v Prayer Temple Community Church, 843 N.Y.S.2d 1 (A.D. 1 Dept. 2007).***

The plaintiff owned two adjacent properties on which a factory was located. A building on one property extended 25 feet onto a parcel of land owned by the defendant. The plaintiff claimed title to the land through adverse possession.

To prevail on an adverse possession claim, the possession must be hostile and under claim of right, actual, open and notorious, exclusive and continuous. For possession to be hostile, it must constitute an actual invasion of or infringement upon the owner's rights. Hostility can also be inferred by the existence of the other four elements, shifting the burden to the record owner to rebut the presumption of adversity.

The parcel in question was walled off and included as part of the plaintiff's property since 1979 and accessible only from the plaintiff's property. Therefore, the court found that the plaintiff's use was actual, exclusive, open and notorious and continuous for a period of at least 10 years. The court also found that because the plaintiff believed the parcel was part of its property, the possession was under a claim of right.

The defendant argued that the use was not hostile because a prior official of the defendant, a Bishop, had authorized a tenant of the prior owner to use the property for loading and unloading as part of the tenant's milk distribution business. But there was no evidence that this permission was ever given to the tenant's landlord, plaintiff's predecessor. Further, the permission was for a different use than the exclusive possession of the property by a building and wall that completely occupied the property.

Comment 1: In light of the recent turmoil in New York concerning adverse possession of property known to belong to another, it should be noted that the adverse possessor here did not get notice of a competing title claim until it had occupied beyond the adverse possession period.

Comment 2: The notion of prior possession is always problematic for adverse possession claims. Although, in general, scholars and title experts support the application of the doctrine based upon objectively identifiable facts, and would prefer to avoid evidence of state of mind, it is hard to escape the reality that possession by permission cannot be hostile. And evidence of permission often is old and uncertain, and presents barriers to the benefits of the doctrine to quell title disputes.

Comment 3: Compare: Pioneer Mill Company, Limited v. Dow, 978 P.2d 727 (Hawaii 1999) (the DIRT DD for 2/14/00) Possession by remote grantee of party who was presumed to possess permissively is not adverse, even if continued for over 100 years by numerous successor to original possessor) . At the time of publishing that DD, the editor researched the treatises to see what they say about whether permission dies upon transfer of the adversely possessed property. He couldn't find any discussion in the treatises, and the authority that he could find dealt primarily with prescriptive easements and was old and uncertain. Here's a good law review research job for someone.

Of course, in the instant case, the nature of the possession was inconsistent with the alleged original possession, and it would not be unusual for a court to view such a change in use as a communication that the use was hostile and no longer consistent with the original permission. In other words, the walling off and building of a building to the property line was, in effect, and "ouster" of the original owner.

ADVERSE POSSESSION; RIPARIAN RIGHTS: A privately owned submerged island wholly situated within a navigable stream becomes property of the State through adverse possession if it is continuously submerged for seven years, even if the water level is artificially elevated and the island was formerly owned by a riparian owner, absent adequate permission for the elevated water level by the riparian owner. ***State of Arkansas v. Hatchie Coon Hunting & Fishing Club, ___ S.W.3d ___ (Ark. App. Ct. 2008).***

In 1892, the Hatchie Coon Hunting and Fishing Club acquired 700 acres of land along both banks of the St. Francis River from the State of Arkansas. Hatchie believed that at some point, it acquired title to an accreted, submerged, 43-48 acre island on the river as a riparian landowner first by accretion. Later, an avulsion separated the island from the west river bank, but of course this would not have changed Hatchie's title.

Subsequently, in 1940, the U.S. Corps of Engineers condemned a flowage easement over and across some of Hatchie's land in order to construct levees. In the 1980s, members of Hatchie, who wished to participate in duck hunting from the island, requested that the water level of the river be artificially elevated in a manner that the island would be almost entirely submerged by a shallow layer of water.

In the 1990s, Hatchie requested that its members refrain from duck hunting on the island, a practice which had been occurring since the 1960s.

When Don Hancock refused to comply, Hatchie filed a complaint against him, seeking an injunction to prevent him from trespassing on Hatchie's property by hunting from a duck blind on the island. As part of the complaint, Hatchie asserted that it owned the island by means of accretion, and as a riparian owner, ownership did not change with the avulsion. In response, Hancock asserted that the State of Arkansas owned the property as trustees for Arkansas citizens. Hancock then moved to join the State as a necessary and indispensable party, which was granted by the circuit court.

Following a bench trial, the circuit court found that while the river was navigable (a fact that typically would give the State title to a submerged island), Hatchie retained title to the island based on the ordinary high water mark that would exist if the water level had not been artificially elevated. Further, the court rejected the State's claim of adverse possession of the island because (1) the State never initiated condemnation proceedings, gave notice, or paid compensation for the island, and (2) the 1940 condemnation case noted above for flood control purposes and the Hatchie members' letters in the 1980s requesting that the water level be submerged constituted Hatchie's permission to submerge the island. Therefore, because Hatchie retained title, Hancock had no interest, and the circuit court granted Hatchie's injunction. The State appealed and the court of appeals affirmed the circuit court. The State then appealed to the Arkansas Supreme Court.

On the appeal to the supreme court, the State focused on its adverse possession argument, contending under *State ex rel. Thompson v. Parker*, 132 Ark. 316 (1917) that "when navigable waters are extended by artificial means for a continuous period of time sufficient to provide a new ordinary high water mark, the State acquires title to the inundated areas after passage of that continuous period of time by adverse possession." Further, the State argued that (1) it did not have to condemn the island or pay just compensation in order to acquire title to the submerged land by adverse possession, (2) Hatchie did not consent to the island being submerged in conjunction with the 1940 condemnation case (which the State argued had no nexus to the island being submerged in the 1980s) or based on its members' letters supporting the submergence of the island.

In *Thompson*, the court had held that after seven years, the artificial level of a lake must be regarded as the natural level, and treated as such in determining the title of riparian owners whose lands have thus become part of the lake bed. In applying *Thompson* to the facts of this case, the court noted that because the river was determined to be navigable, the State held title to the riverbed, and even though Hatchie owned the island at some point, the fact that the island had been submerged for more than 25 years resulted in the State owning the island under the holding in Thompson and the adverse possession doctrine. Further, the court found no connection between the 1940 condemnation action and the inundation of the island in the 1980s, and it held that Hatchie did not give express permission for the flowage easement or implied permission by virtue of its members' letters because the raising of the river bed was done for a number of public policy reasons, and not in direct response to those letters.

Ultimately, the court held that the State acquired title by adverse possession for the public trust and for the public's use, and it reversed the circuit court's and court of appeals' judgments.

ATTORNEY'S FEES; CONSUMER FRAUD ACT; CONTRACTORS: An award of attorney's fees under the New Jersey Consumer Fraud Act does not require an adjudication of liability as long as the relief obtained in the settlement is substantially the same relief as is sought in the complaint. ***Schmoll v. J.S. Hovnanian & Sons, LLC, 394 N.J. Super. 415, 927 A.2d 146 (App. Div. 2007)***

BANKRUPTCY; FORECLOSURE; REDEMPTION: In the Bankruptcy Court, a mortgage default cannot be cured once the owner's right to redeem under state law has expired and, in New Jersey, the redemption period is measured from the day the foreclosure sale is conducted, not from the later date when the Sheriff's deed is delivered. ***In Re Connors, 497 F.3d 314 (3d Cir. 2007);***

A homeowner defaulted on a mortgage loan and its lender foreclosed the mortgage. A final judgment for foreclosure was entered and a foreclosure sale was conducted. At the foreclosure sale, the property was sold and the buyer tendered the deposit. Shortly thereafter, the homeowner filed a voluntary bankruptcy petition under Chapter 13 of the Bankruptcy Code, which triggered an automatic stay. The homeowner then filed a Chapter 13 plan in which he proposed to cure the default. However, he did not exercise his right to object to the foreclosure sale within the ten- day period provided under state law, or within sixty days of the filing of the bankruptcy petition as provided under New Jersey Court Rule 4:65-5 and 11 U.S.C. 108(b). After the sixty-day period expired, the buyer moved to lift the automatic stay so that it could pay the balance of the purchase price and receive the deed. The homeowner opposed the motion.

The Bankruptcy Court held that, under Section 1322(c)(1) of the Bankruptcy Code, the homeowner could not cure the mortgage default once his right to redeem under state law had expired. It found that, since the homeowner did not timely object to the foreclosure sale, the right to cure expired once the foreclosure sale concluded. The District Court affirmed, and the homeowner appealed, but the Court of Appeals affirmed. Section 1322 of the United States Bankruptcy Code lists the requirements for a Chapter 13 plan. It permits the debtor's plan to provide for the "curing or waiving of any default within a reasonable time and the maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due." Subsection (c)(1) limits the right to cure a default with respect to a lien on a debtor's principal residence until the residence is sold at a foreclosure sale conducted according to applicable non-bankruptcy law.

The question before the Court here was when the right to cure ceased under New Jersey law. New Jersey federal courts have been divided, with some deciding that the right to cure expires once the foreclosure sale is conducted, while others decided that the right to cure expires once the Sheriff's deed is delivered. Here, the Court of Appeals found that the right to cure expires once there is a successful bidder at the foreclosure sale. It found that the term "foreclosure sale" is understood to mean the foreclosure auction, and referred to it as a single event rather than an ongoing process that ends with the delivery of the Sheriff's deed.

The court noted that, in New Jersey, the successful bid at a foreclosure sale is generally irrevocable except in narrow circumstances. The successful bidder acquires equitable title to the property that day, subject to the homeowner's right to object or redeem within ten days. Therefore, the foreclosure sale is deemed to have occurred once the auction takes place. The Court noted that the homeowner had the right to object to the foreclosure sale within ten days after it took place, or within sixty days after the debtor filed his bankruptcy petition. Since he failed to do so, his right to cure expired once the sixty-day period expired.

Household Bank, FSB v. Lewis, 2008 Westlaw 2132467 (Ill. 5/22/08), discussed under the heading: Mortgages; Foreclosure; Finality." (Trial court has discretion to vacate a foreclosure sale that occurred after the mortgagor's pre sale statutory right of redemption had elapsed, for purpose of facilitating a "short sale" by mortgagor with mortgagee's consent, notwithstanding objection by the foreclosure purchaser.)

BANKRUPTCY; TRANSFER TAXES: U.S. Supreme Court resolves the issue of transfer tax exemptions for pre-confirmation transfers that are included in the plan – no exemption available. ***Fla. Dept. of Revenue v. Piccadilly Cafeterias, Inc., 128 S.Ct. 2326 (2008)***

Section 1146(a) of the Bankruptcy Code which exempts from state or local transfer or stamp taxes the issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer pursuant to a plan confirmed under Chapter 11 of the Bankruptcy Code, is a benefit of great consequence to secured lenders and to borrowers in connection with mortgage loan workouts and restructuring, especially in these troubled economic times. Many states (as well as counties and municipalities) impose significant transfer taxes in connection with conveyances of real property, whether made voluntarily or (in some states and municipalities) as the result of foreclosures or other enforcement actions. Such taxes and impositions often add "insult to injury" to secured lenders (or third-party purchasers) who take title (voluntarily or involuntarily) to real property collateral from delinquent borrowers. This is especially so if the value of the property transferred is significant or multiple properties are to be conveyed. These expenses often can be eliminated if the transfer occurs as part of a consensual or "pre-packaged" Chapter 11 bankruptcy reorganization plan. Such cost considerations, therefore, could well play a part in determining the "exit strategy" of both lenders and borrowers.

Numerous bankruptcy courts (and several federal courts of appeal) have examined the language in § 1146(a) that states only transfers occurring "under a plan confirmed" are exempt from taxation. The issue that has been raised is whether this specific language applies only to a transfer that occurs subsequent to court approval and confirmation of the plan, or whether it can also be construed to apply to a transfer that is part of a bankruptcy plan that has been submitted and is an essential component of the plan confirmation but is not approved and confirmed by the court until after the transfer of the property. The resolution of this issue has been of utmost importance to bankruptcy trustees and debtors in possession because it is often necessary, in order to pay current debts and to fund the debtor's Chapter 11 reorganization plan, that the debtor be able to sell assets as quickly as possible during the course of the bankruptcy proceeding before they begin to lose value. The court decisions in this area have not been consistent, especially among the federal appellate courts. Governmental tax authorities have, in some cases, argued (successfully) that the property transfer occurred prior to confirmation of the plan and should not be entitled to the § 1146(a) exemption. The meaning of "under a plan confirmed" has generated disagreement among the courts. Fortunately (or unfortunately, depending on one's viewpoint and perspective), ruling that the § 1146(a) exemption applies only to post-confirmation transfers of the debtor's assets.

Because of the split of authority among the federal circuit courts as to whether the § 1146(a) transfer-tax exemption applies to pre-confirmation asset sales under § 363 of the Bankruptcy Code, the U.S. Supreme Court took up the issue on appeal from an Eleventh Circuit case. It ruled that the Bankruptcy Code's § 1146(a) transfer-tax exemption does not apply to transfers made before a plan is confirmed under Chapter 11.

The Court noted that while "both sides present credible interpretations of § 1146(a), Florida has the better one." The court acknowledged that there was some ambiguity in the language of § 1146(a), but ruled that the interpretation posited by Florida was more plausible and "clearly the more natural," and that Piccadilly's interpretation placed "greater strain on the statutory text than the simpler construction advanced by Florida" [and adopted by the Third and Fourth Circuits.] The Supreme Court noted that it was irrelevant whether or not the statute was ambiguous on its face because "the ambiguity must be resolved in Florida's favor," reasoning that the distinction between "plan confirmed" and "confirmed plan" was irrelevant because § 1146(a) specifies not only that the tax-exempt transfer must be "under a plan," but that it must also be confirmed pursuant to § 1129 of the Bankruptcy Code.

The court then dealt with each of the parties' specific arguments. First, although not dispositive of the issue, the court noted that the subchapter of the Bankruptcy Code in which § 1146(a) appears is entitled, "POST CONFIRMATION MATTERS." The court acknowledged that "a subchapter heading cannot substitute for the operative text of the statute," but reasoned that it was "informative that Congress placed § 1146(a) in [that subchapter]. The court then ruled that the most natural reading of the language "under a plan confirmed" was to require that there be a confirmed plan at the time of the transfer. The court noted that Piccadilly had not even submitted a plan at the time of the asset sale, and therefore the sale could not possibly have been conducted "in accordance with" any plan confirmed under Chapter 11.

The court also noted that, although the sale was conducted in accordance with the procedures set forth in § 363(b)(1) of the Bankruptcy Code, "[t]o read the statute as Piccadilly proposes would make § 1146(a)'s exemption turn on whether a debtor-in-possession's actions are consistent with a legal instrument that does not exist – and indeed may not even be conceived of – at the time of the sale." The court further noted that the provisions of § 365(d)(1) were not analogous to the requirements of § 1146(a), because even though the decision to assume or reject the contract or lease under § 365(d)(1) must be made before confirmation of the plan, the fact remains that the rejection takes effect only upon or after confirmation of the Chapter 11 plan. The court ruled that in this case, only at the point that the court confirms the plan in question does the transfer become eligible for the § 1146(a) transfer-tax exemption. Next, the court agreed with Florida's assertion that it should recognize the "federalism canon" that § 1146(a)'s exemption should be construed narrowly, since Congress had not clearly expressed an exemption for pre-confirmation transfers.

The court also rejected Piccadilly's assertion that § 1146(a) was a preference-granting provision, noting that the applicable statutory text made no mention of "preferences." The court then rejected Piccadilly's claim that § 1146(a) should be construed liberally to serve its supposedly remedial purpose. The court reasoned that the aim of the Bankruptcy Code was to strike a reasonable balance between debtors and creditors, and that generally the rights of states with respect to property rights should not be disturbed. The court noted that it was up to Congress, and not the Judiciary, to determine if changes were needed in the language in § 1146(a), and stated pointedly that "we see no absurdity in reading § 1146(a) as setting forth a simple, bright-line rule instead of the complex, after-the-fact inquiry Piccadilly envisions."

In his dissent from the majority's opinion, Justice Breyer (with whom Justice Stevens joined) argued that "the statutory language itself [in § 1146(a)] is "perfectly ambiguous" as to whether a transfer takes place "under a plan" that has already been confirmed or under a plan that is subsequently confirmed. Justice Breyer also argued that he could not "find any text-based argument that points clearly in one direction or the other." He further argued that the canons of interpretation do not provide clarity on this issue and stated that in fact "the majority's reading of temporal limits in § 1146(a) serves no reasonable congressional purpose at all," in light of Chapter 11's purpose of preserving going concerns and maximizing property available to apply to creditors' claims. Justice Breyer noted that the pre-confirmation process can take a great deal of time, even years in some cases, and that the value of the debtor's assets could decline precipitously during this period, reducing the funds that would otherwise be available to creditors or for reorganization of the debtor under Chapter 11. Justice Breyer noted that in this case, Piccadilly realized $80 million by selling the assets quickly after the negotiation of a pre-confirmation settlement agreement with its creditors, which was considerably more than the $54 million originally offered to Piccadilly before it filed its Chapter 11 bankruptcy proceeding. Justice Breyer conceded that the majority's ruling provided the advantage of a clear "bright-line" rule, but argued that "the statute supplies a clear enough rule – transfers are exempt when there is confirmation and are not exempt when there is no confirmation."

Reporter's Comment 1: Twenty-seven states and four cities filed an amicus curiae brief, expressing concern that the public interest would suffer because they would lose billions of dollars in tax revenue if the Supreme Court should rule that pre-confirmation asset sales are entitled to the § 1146(a) transfer-tax exemption.

Reporter's Comment 2: In a loan workout situation in the current real-estate market, significant transfer-tax costs may have a high level of economic impact and be a critical consideration. When property owned by the bankrupt debtor is transferred subject to the § 1146(a) exemption (especially in single-asset real estate bankruptcy cases), the lender may be able to recover its real property collateral at a lower cost, free and clear of liens and encumbrances and without the payment of (often significant) transfer or stamp taxes. This, in turn, may encourage the lender — at least in certain factual situations — to agree to a consensual plan that reduces bankruptcy expenses and delays and perhaps even frees up additional funds for unsecured creditors. But the plan must be structured, as clearly set forth in the U.S. Supreme Court's ruling in *Piccadilly*, so that the sale of assets occurs after confirmation of the bankruptcy reorganization plan providing for the sale of such assets, and so that it does not run afoul of § 1129(d) of the Bankruptcy Code, which prohibits confirmation of a plan that has as its principal purpose the avoidance of taxes.

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

BROKERS; COMMISSIONS: A broker's violation of a statute or regulation that would authorize the Real Estate Commission to place the broker on probation, suspend or revoke license or to otherwise cause penalties, does not automatically deprive the broker of its commission, because it makes the commission agreement voidable, but not necessarily void. ***Exit A Plus Realty v. Zuniga, 395 N.J. Super. 655, 930 A.2d 491 (App. Div. 2007)***

A seller executed an exclusive listing agreement with a broker in connection with the marketing and sale of his house. During the exclusive listing period, the broker procured a buyer for the property, but the deal fell through. One day after the listing period expired, the seller and buyer revived the deal for a lower price and closed without paying the broker. The broker sued for its commission. The seller claimed that the broker violated a statute applicable to real estate brokers which requires brokers to provide sellers with a copy of the listing agreement on the date it was signed. It also prohibits a broker from allowing a seller to sign a listing agreement with a significant term missing. In this case, the seller claimed that the broker never gave him a signed copy of the listing agreement on the date it was signed. The seller also claimed that broker left blank a provision relating to the "extended protection" afforded to brokers if a buyer it has introduced to the seller buys the property within a certain period after the expiration of the listing agreement. The seller argued that due to its failure to comply with the statute, the broker should be barred from receiving a commission. The lower court agreed.

The lower court relied on the case of *Winding Brook Realty v. Platzer,* 166 N.J. Super. 575 (Law Div. 1979), a trial court decision that concluded that a broker who violates public policy as reflected in a statute is not permitted to enforce a commission agreement. In this matter, the Appellate Division reversed, noting that the statute in question empowered the Real Estate Commission to regulate the conduct of brokers and to investigate their actions. The statute authorizes the Real Estate Commission to place brokers on probation, suspend or revoke licenses, and impose penalties on brokers that fail to comply with the statute. However, the Court held that the statute does not specify what remedy or discipline is to be taken against a broker that fails to comply with the statute, nor does it state that if the broker violates the statute, then the listing agreement is void. It found that a violation of the statute makes the listing agreement voidable, but not automatically void. The listing agreement could have been voided if the sellers suffered any prejudice by the broker's failure to leave a copy of the listing agreement, or by the insertion of the expiration date of the extended protection period at a later time. However, the Court found that, in this case, the seller suffered no prejudice. It found that the seller did not suffer any prejudice since the broker mailed a copy of the signed listing agreement to the seller the next day. The Court also noted that after the seller objected to the inserted date for the extended protection period, it changed the date to a shorter period and the broker agreed to the new date. Thus, since the broker substantially complied with the statute and the seller did not suffer any prejudice from the technical noncompliance, the agreement was enforceable. The Court also noted that the seller, who received a benefit from the broker's efforts, also owed the broker a duty of good faith and fair dealing. Lastly, it questioned the seller's good faith in waiting until the listing agreement expired before agreeing to a price adjustment with a buyer introduced to him by the broker.

The Reporter for this item was Ira Meislick of the New Jersey Bar.

BROKERS; COMMISSION; ESTOPPEL: When a property owner induces an unlicensed individual to enter into a brokerage agreement thinking that the unlicensed individual could not collect because he or she was unlicensed, the owner will not be permitted to benefit from such wrongful behavior and may be liable to pay an otherwise uncollectible commission. ***Sammarone v. Bovino, 395 N.J. Super. 132, 928 A.2d 140 (App. Div. 2007).***

A man sought to enforce an oral contract with real estate developers, pursuant to which the developers promised him compensation for introducing them to the owner of a valuable property they wished to purchase. The real estate developers moved to dismiss the claim. They claimed that since the man was not a licensed real estate broker, he was not entitled to sue for a commission.

The developers relied on the Real Estate Brokers and Salesman Act, N.J.S.A. 45:15-1 to -42, which prohibits unlicensed persons from acting as a broker and does not allow unlicensed brokers to sue for commissions. The lower court, relying on the statute, dismissed the complaint.

The "broker" appealed, and the Appellate Division reversed. It noted that a motion to dismiss a complaint for failure to state a claim should only be granted in the "rarest of instances" if, after an in depth examination and with liberality, no cause of action can be gleaned from the facts. In reviewing the claim, the Court noted that the purpose behind the Real Estate Brokers and Salesman Act is to protect consumers by excluding dishonest and unscrupulous people from the real estate business. The Court also noted, however, that the New Jersey Supreme Court has declined to permit sophisticated real estate professionals from using the statute as a sword, when the statute was intended to be a shield to protect consumers.

In this case, the Court noted that the developers were sophisticated real estate developers who, years before this agreement, were involved in litigation with an unlicensed broker. In that case, the developers were able to defeat the broker's claim for a commission on the basis that the broker was not licensed. Here he developers, who had been frustrated in earlier attempts to buy the property, used the "broker" as a way to meet with the seller and eventually buy the property. They were not previously able to meet with the seller to negotiate a sale and used the "broker" to make inroads with the seller. The developers negotiated a commission agreement of three percent of the purchase price, as opposed to a higher commission, specifically because the person was not a broker and a letter from the "broker" acknowledged that fact.

In essence, the Court found that the developers entered into the agreement with the knowledge that they had previously defeated a claim from an unlicensed broker. According to the Court, the developers induced the man to enter into a brokerage agreement thinking that he could not collect since he was unlicensed. Thus, it found that they should not benefit from their wrongful behavior. The Court did not determine if the "broker" could ultimately prevail, only that his claim should not have been dismissed.

Compare: ***Exit A Plus Realty v. Zuniga, 395 N.J. Super. 655, 930 A.2d 491 (App. Div. 2007)*** , reported under this heading. (A broker's violation of a statute or regulation that would authorize the Real Estate Commission to place the broker on probation, suspend or revoke license or to otherwise cause penalties, does not automatically deprive the broker of its commission, because it makes the commission agreement voidable, but not necessarily void.)

Editor's Comment: Apparently New Jersey would not have recognized a fee for an unlicensed "finder," or else this guy got too involved in the deal to make an argument that he was a finder. Other jurisdictions have "single deal" exemptions. Apparently that wouldn't fly in New Jersey also. There are many examples of courts awarding *quantum meruit* to avoid injustice where a deal that commission deal that is otherwise unenforceable for such reasons as the Statute of Frauds has resulted in a benefit to sellers.

But the problem with *quantum meruit* in this case is the public policy behind the licensure statutes, which often are held to prevail over equitable considerations. Although we didn't get to the final litigation in this case, the court here appears to be saying that the policy is not so strong in New Jersey as to let real estate sharpies beat up on innocents. (We don't know the real facts – only the allegations, so we don't know who's sharp and who's innocent here.)

The Reporter for this item was Ira Meislick of the New Jersey Bar.

BROKERS; MISREPRESENTATION: Seller broker's overstatement of square footage in home on MLS listing is actionable as broker misrepresentation where it shows no independent source for the information; and question of whether buyers relied on misrepresentation is a jury question notwithstanding that buyers had signed a form indicating that they were not relying on any information supplied by the "REALTOR." ***Pleasant v. Bradford, 2008 Westlaw 2544814 (Tex. App. 6/26/08)***

Listing Broker listed a house for sale and prepared an MLS sheet that disclosed the square footage of the house as approximately 1850 sq. ft. She obtained this information from the local county assessor. It was the custom to put square footage information in MLS listings, although not required. It was also the custom to reveal in the listing the source of the information, *e.g.* "per Bell County Assessor's Office." But in this case, allegedly because of a scrivener's error by an employee of the broker's office, this qualification did not appear next to the square footage information on this particular MLS sheet. The computerized MLS listing automatically computed a "per square footage" price that was part of the information on the sheet.

You can guess, of course, what happened next. Buyers looked at the house with a selling broker, and, one way or another, got the selling broker's MLS listing sheet, which was also not an unusual event. Buyers maintained at trial that they were attracted to the house because, although it needed repair, it was substantially lower per square foot than other houses in the neighborhood.

Because Sellers were anxious to close the deal and because Buyers were could not get a loan until they received confirmation of the husband's residency contract at a local hospital, the parties executed a contract that permitted Buyers to occupy the home on a rental basis before closing, during which time they did substantial repairs and renovation. When they did get the confirmation and applied for a loan, however, the bank appraisal indicated (accurately, unfortunately) that the house was in fact 1571 square feet. Buyers closed on the house and sued broker for the difference between the value of the house at its true size and the value of the house at the size represented. A jury found for Buyers and awarded them the difference of about $2500. Plus Buyers got attorney's fees. Broker appealed.

Held: Affirmed.

Broker first argued on appeal that Buyers had not relied on the broker's representation because there was evidence that Buyers had indeed checked the assessment department's website on their own and saw the (erroneous) square footage report. The court conceded that indeed there was Texas authority that said that there must be evidence of reliance, and that if a party, after receiving a misrepresentation, independently checks out the facts, there may be no factual link between the representation and the actual reliance. In this case, however, there was evidence that Buyers, encouraged by their broker, had gone to the website not to check the square footage but to look for any evidence of defects in the property so that they could understand why the per square foot price was so much less than other houses. They incidentally saw the square footage information, but the purpose of their checking the website was not to verify that information. Consequently, the jury could have found that they were still relying, at least in part, on the selling broker's representation.

Broker next pointed out that Buyers had signed a document provided by the selling broker that contained the following statement:

"The Buyer is advised to verify all information important to him/her and to ask the appropriate questions of the appropriate authorities himself/herself or through an attorney with respect to important issues such as . . . size of structure.... Any statements with respect to problems or with respect to the availability or existence of any of these items which were made by the REALTOR and his/her associates were made based on information given to the REALTOR by the Seller/Owner and/or government agencies, and/or others, and there is no intention that the Buyer rely on the statements of the REALTOR and his/her associates, and the Buyer is urged to confirm any such statements on his/her own.

Having read the foregoing disclaimer, I/we, the prospective Buyer(s), by my/our signature(s) below, state that I/we have not relied upon any statement given to me/us by the REALTOR and/or his/her associates with regard to the property, and my/our decision to make an offer on the property and to subsequently purchase the property is based on my/our independent decision with or without legal counsel."

The court ruled that it was a jury issue whether this constituted a statement that Buyers were not relying upon the **listing broker's** representations, as opposed to the only the representations made by their selling broker. The court noted that the statement quoted above did not constitute a waiver of a right to make a claim or bring a lawsuit, and at best could only be construed as an assertion of non-reliance. To this extent, the question was properly before the jury. The jury, of course, had found for the Buyers on the point.

Comment 1: To a certain extent, the case is "plain vanilla;" but the interplay between the Buyers' inquiry of the assessor's office and the conclusion of reliance certainly is interesting. The selling broker testimony here assisted the buyers. They were wise not to sue her.

One supposes that if Buyers had not checked the appraiser's office – few do – their case would have been stronger on this point. We can hear the seller broker's teeth grinding when the Buyers claimed that they in fact were relying on the broker's misrepresentation. But the broker made the original error when the MLS listing document went out without attributing the square footage to the assessor's office.

The editor suspects that the local MLS form may now been amended to indicate that, except as noted otherwise, square footage is as per the assessor's office.

The editor admits that the problem of the appraiser's office having the wrong square footage is a common one, and probably the specific documentation that the broker is merely passing on the square footage information ought to be honored. But the selling broker here dropped that ball, but still tried to get the down played over.

BROKERS; BUYER'S BROKERS; DUTY OF LOYALTY: A brokerage may have agents representing different buyers bidding on the same property, but the same agent may not submit bids on the same property for two buyers. ***Rivkin v. Century 21 Teran Realty LLC, 858 N.Y.S. 2d 55 (N.Y. 2008)***

Buyer was looking for a lakefront property in a certain area that had special meaning to him. He contacted Luborsky an agent for Teran, a real estate brokerage, and got internet information about certain property listed for $100,000. He realized that this might be his dream property, and told Luborsky as much, authorizing Luborsky to make a verbal offer of $75,000 before he had even visited the property, but indicating that he wouldn't be in a position to sign a contract until he had made such a visit. Luborsky contacted the listing broker and made the offer.

Three days later, Buyer visited the property and, although the improvements were, in his view, "tear down," the site was perfect, and he authorized, with Luborsky's advice, to make a written offer of $75,000, expecting a counter offer or an invitation for final highest bids. He told Luborsky that he was willing to go to the asking price to get the property. He also signed an agency disclosure that stated, as required by New York law, that "buyer's agent acts solely on behalf of the buyer" and has "without limitation, the following fiduciary duties to the buyer: reasonable care, undivided loyalty, confidentiality, full disclosure, obedience and a duty to account."

Over the weekend following, Luborsky told Buyer that other offers had been received, and Buyer indicated that he would go higher. So Luborsky agreed that he would contact the selling Broker and ask whether a counteroffer or a "highest and best" solicitation would be forthcoming.

Unbeknownst to either Buyer or Luborsky, another set of buyers, Martins, were interested also in the property. Martins had been working with another agent from Teran, Luborsky's office, and had submitted a full price unconditional offer on the property, which the sellers ultimately accepted, despite Buyer's and Luborsky's attempts to communicate an unconditional overbid. Buyer made several direct contacts with one of the sellers, who consistently referred him to the selling broker, who ultimately informed Buyer that the property had in fact been sold through an offer from Teran, Buyer's own brokerage.

Buyer brought this lawsuit claiming that Teran and Luborsky and the other agent had all violated the exclusive fiduciary duty set forth in the disclosure and required by New York law.

This was apparently an issue of first impression since the law had been amended and buyer brokers began to appear on the scene. The court concluded that the statute sometimes used the term "broker" and sometimes used the term "agent," and that the term "agent" referred only to an individual. It concluded that Luborsky owed an exclusive duty of loyalty to Buyer, and could not have acted on behalf of another client, but another agent in the office could represent a competing buyer:

"An individual buyer's agent acting on behalf of multiple clients bidding on the same property cannot negotiate an optimal purchase price for all of them. The buyers' interest conflict; the agent's representation is inevitably compromised. But two buyer's agents simply affiliated with the same real estate brokerage firm and acting on behalf of different buyers bidding on the same property generally do not present comparable risks. . . . they only earn commissions for sale to their own clients. As a result, in this situation the agents have every reason to negotiate in their clients' best interest."

The court also noted that a brokerage with an agency relationship with a seller would have the right to show other competing properties to potential buyers, even if those properties are listed for sale with the same brokerage, but suggested that a seller's agent would have a duty to disclose that it intended to do so.

Comment 1: The editor has little quarrel with the outcome here. The new statutes the brokerage agency has pushed through legislatures around the country essentially eviscerate traditional agency law and set up a whole new paradigm of relationships. The interpretation made here – differentiating between and individual agent and the brokerage, seems right. But we should not that sometimes a client will be so far down the road with the whole brokerage that there may be conflicts even if another agent is selected.

Comment 2: Note particularly that the court's conclusion is based directly on the notion that neither of the two "dueling agents" will profit from the success of the competing sale. The editor knows little about the fashion in brokerage compensation these days, but wonders whether that conclusion is 100% true in every case. If not, then the selection of the competing buyer's broker should be made with the "no shared commission" concept in mind. This probably would preclude a brokerage owner or supervising broker, who profits from every deal, from undertaking such a role.

Comment 3: As to whether all this can be handled, as the court suggests, but simply adding more boiler plate into the "exclusive fiduciary duty" disclosure creating exceptions for everything that the brokerage or the agent may due that is inconsistent with such a duty. These are consumer documents, after all, and at some point, notwithstanding the statutes, courts will draw a line.

BROKERS; MISREPRESENTATION: Broker's representation that property is a "three family" property is not actionable as a misrepresentation, even when zoning records show that the property is not lawful, because broker has no duty to verify zoning. ***Quinlan v. Clasby, 71 Mass.App.Ct. 97, 879 N.E.2d 703 (Mass. App. 2008)***

In the early 90's Clasby converted his property from a four family house to a three family house. Although Clasby first applied for a variance for this purpose, he discovered that a 20 year old zoning ruling relating to the house that permitted use as a three family dwelling, but required that no more than one unit be located on the second floor. Upon discovering this ruling, Clasby elected not to tug on Superman's cape and withdrew his variance request and just went ahead with the conversion, substantially upgrading the property when he did so. But he put two of the three apartments on the second floor. Several subsequent city inspection records indicated that the property was a lawful three family property, although apparently it wasn't.

When Clasby listed the property for sale with Broker five years later, Broker was aware that the property has been a four family property at one time, and that in fact it was being taxed as a four family property. But Broker listed it as a three family property, which is how it was physically conformed, of course. Broker did not check the zoning record of the property, and was unaware of the requirement for two downstairs apartments. (Remember, the requirement was imposed in 1974, but the conversion didn't occur until 1993.) There had been a property assessment change from R-4 to R-3 at about this time, but it is unclear from the record what this meant, and it did not appear that the change meant that the taxing authorities viewed the property as a lawful three family residence.

Based upon the listing of the property as a three family property, Quinlan bought the property from Clasby in 1998. A few years later, Quinlan elected to sell the property, and at this time it became clear to everyone that the property was not a lawful three family property, and Quinlan lost two successive buyers when he was unable to get the property approved as a three family property. Ultimately he sold it for $30,000 less than the highest of these two lost contracts, and sued Clasby for breach of contract and misrepresentation and sued Broker breach for of the state's deceptive trade practices act which apparently was the equivalent of a negligent misrepresentation claim.

The trial court granted summary judgment to Clasby on the misrepresentation claim, presumably because Clasby, although aware of the problem from the time he made the conversion, made no representation to Buyer. But trial proceeded on the breach of contract claim and the deceptive trade practice claim against Broker.

At trial Broker's agent testified that she typically checks tax records, but not zoning records. Quinlan introduced no evidence that it was the custom and practice in the area for brokers to check zoning records.

Although the jury found for both defendants, the trial court issued a judgment notwithstanding the verdict as to the Broker, finding that if the Broker listed the property as a three family property, Broker should have made certain that it was such a property, physically and legally, and, of course, the information was in the zoning records, albeit somewhat obscurely, if the Broker had checked. Amicus local Board of Realtors objected on appeal that it was not appropriate to hold brokers responsible for understanding zoning. The trial judge commented that the Broker was free to say nothing about the zoning status of the house, just describing the number of rooms, but if the Broker said "three family building," the Broker had the responsibility to be reasonably in establishing the truth of that statement.

On appeal, the appeals court granted that an deceptive trade practice claim may be based upon a non-willful, negligent misrepresentation. But it found that Broker had not made such a misrepresentation here. Broker, it ruled, had no duty to check zoning for the Buyer, and its representation that the property was a three family house was not a representation that it was lawfully a three family house. It was up to Buyer to verify that.

The court cited a 1995 case in the same appeals district, *Fernandes v. Rodrigue,* 646 N.E.2d 414, that held that where a broker made a specific representation that listed property was 4 acres, relying upon assessor's records, and did not disclose to the buyer that it was relying upon public records, it was not making an actionable misrepresentation. Again, the court ruled, the buyer had no right to rely on broker's statement, but ought to have checked itself.

Comment 1: Obviously, this case is a far cry from the Texas case reported under the same heading, ***Pleasant v. Bradford, 2008 Westlaw 2544814 (Tex. App. 6/26/08)***, where a broker that didn't disclose that information concerning size came from a public record was held liable when the representation was incorrect. For another case finding liability, like the Texas case for such a misrepresentation, see *Shaeffer v. Earl Thacker Co.*, 716 P.2d 163 (Haw. 1986). For one that, like the instant case, lets the broker off, see *Hoffman v. Connell,* 736 P. 2d 242 (Wisc. 1987). Of course, many of these issues are now covered by statute. In general, the broker is liable for affirmative misrepresentations, even innocent ones, but generally is able to escape by statutory or contractual provisions exculpating it for any information it passes on from the client seller. It appears that in this case Clasby had said nothing to Broker about the three family status, which Clasby knew to be unlawful. Clasby was exonerated by the jury from the misrepresentation claim.

Comment 2: Another interesting point is the failure of the disclaimer language to protect the listing broker. Obviously, the language of the disclaimer that purports to extend to the "REALTOR and/or his/her associates" could be read to include other brokers involved, through

MLS, with the marketing of the property. Perhaps the court was wise, however, to leave this question to the jury. It was, after all, a consumer instrument whose language was totally out of the control of the Buyers. How many buyers would be sophisticated enough to exclude from the disclaimer information that they in fact were relying upon and that the broker in fact represented to them?

As to the amount of damages, the jury was permitted to accept the bank appraiser's valuation as to the value of the house at its actual size, and the bargained for price as evidence of the valuation at the misrepresented larger size.

CONSTITUTIONAL LAW; DUE PROCESS; NOTICE; TAX FORECLOSURE: Constitutional due process requires the state to exercise "reasonable diligence" in attempting to notify deficient taxpayers before selling their real property in order to collect compensation for back taxes. ***Gates v. State of N.M. Taxation & Revenue Dep't, 143 N.M. 446, 176 P.3d 1178 (2008)***

Plaintiff Ollie Gates ("Plaintiff"), a lifelong resident of Kansas City, Missouri, owned dozens of pieces of property in the Kansas City, metropolitan area, including a chain of barbeque restaurants. In 1977, he purchased a parcel of rural land located in Torrance County, New Mexico ("Property"). In 1996, Plaintiff leased the Property to Joe and Mary Jane Chavez (the "Chavezes") for the purpose of livestock grazing, but the Chavezes never recorded the lease. They did, however, contact the electric cooperative to set up electrical service on the Property.

Taxes on the property went upaid and, in August 2002, Defendants Ray and Joyce Halderman ("Defendants") purchased the Property from the New Mexico Taxation and Revenue Department ("TRD") in a tax sale.

Plaintiff's primary mailing address in Missouri changed in May 1997; but he failed to inform Torrance County officials of his new address. From 1998 to 2002, the Torrance County Treasurer mailed property tax bills to Plaintiff's pre-May 1997 mailing address. During this time period, the bills were marked as "forwarding order expired" and returned by the postal service. Plaintiff did not pay any property taxes for the Property during this time period.

In July 2001, Plaintiff's account was listed as a delinquent property tax account and in early 2002, a TRD employee was assigned the task of locating Plaintiff in order to collect the back taxes.

The TRD employee attempted to locate Plaintiff by looking in the Torrance County property records to no avail. Then the TRD employee attempted to physically access the Property to either personally notify Plaintiff or to provide him with a notice by placing a "red tag" warning of the tax deficiency in a conspicuous place. However, because the TRD employee encountered a locked gate that denied access to the Property, and because he was unsure whether the gate belonged to Plaintiff, he opted not to affix the "red tag." Soon thereafter, the TRD employee learned that Defendants owned a home on the land adjacent to the Property, so he contacted them by telephone and asked whether they knew the Plaintiff. Because Defendants did not know the Plaintiff or how to reach him, the TRD employee called telephone operators in New Mexico and Missouri. The operators in New Mexico had no record of Plaintiff and the operators in Missouri informed the TRD employee that there were unpublished Missouri telephone numbers under Plaintiff's name. The TRD employee also attempted to locate Plaintiff by entering Plaintiff's name into two Internet databases that provide published telephone and address listings of people living in the United States. These databases did not provide the TRD employee with any useful information. While the TRD employee had used a different free Internet search engine to locate deficient taxpayers in the past when it was absolutely necessary, he could not recall whether he conducted such a search in this case.

At the end of July 2002, the TRD employee mailed a certified letter to the pre-May 1997 address warning Plaintiff that his property would be sold at a public auction in order to pay his tax debts, but Plaintiff never received the letter. TRD then advertised the sale of Property in a regional newspaper in a final attempt to notify Plaintiff of the impending auction.

The auction took place about a month later and Defendants made the winning bid of $22,000. Plaintiff did not receive actual notice of the sale of Property until the Chavezes informed him that Defendants had purchased it at the tax sale.

Plaintiff filed a civil complaint against Defendants. One of the issues was whether Plaintiff had received adequate notice before the Property was sold at auction. The district court concluded that the notice was constitutionally inadequate and the New Mexico Court of Appeals affirmed.

The general rule is that "constitutional due process requires the state to exercise 'reasonable diligence' in attempting to notify deficient taxpayers before selling their real property in order to collect compensation for back taxes." Id. 17 (citing *Patrick v. Rice*, 112 N.M. 285, 289, 814 P.2d 463, 467 (Ct. App. 1991)); see also *Jones v. Flowers*, 126 S. Ct. 1708, 1713 (2006). "In determining whether specific efforts are 'reasonably diligent,' the inquiry becomes 'whether the identity and location of a party entitled to notice [is] reasonably ascertainable.'" Id. 17 (quoting *Patrick v. Rice*, 112 N.M. 285, 289, 814 P.2d 463, 467 (Ct. App. 1991)).

The Court of Appeals concluded that Plaintiff's contact information was reasonably ascertainable and the TRD was not reasonably diligent in attempting to contact him before auctioning the Property to pay for his delinquent taxes.

Comment 1: This case cites and purports to follow *Jones v. Flowers*, a recent U.S. Supreme Court decision reported as the DD for 4/27/06. This case does not indicate that it is relying independently upon an interpretation of the U.S. Constitution. The other case it relies upon, however, *Patrick v. Rice*, does state that it is applying both the New Mexico and U.S. Constitution Due Process clauses. The distinction is important because *Patrick* preceded *Rice* by fifteen years. It is not a bit clear that *Patrick* states the current view of the U.S. Supreme court on the question of what constitutes the notice responsibility of property tax agencies. It is clear that the view of the Court is that if the agency gets back notice that the certified letter wasn't sent, and it hasn't sent a regular mail letter, it must do something. But it may be, as the DD indicates, that nothing more than sending a regular mail letter, with hopes it will be forwarded, is required.

Note that, in this case, such a letter may in fact have been forwarded to Mr. Gates. But the New Mexico court seems to be of the view that more than this simple expedient was necessary. And to the extent it does suggest this, the New Mexico court may be requiring more under the New Mexico Constitution than the U.S. Supreme Court requires as minimum Due Process.

Comment 2: For a more lax approach in a state court decision, favoring a less diligent taxing authority, see: *Mosssafa v. Kleiman,* 100 N.Y.2d 1, 789 N.E.2d 607, 759 N.Y.S.2d 429 (N.Y. 2003) (The DIRT DD for 4/4/03) (New York Court of Appeals upholds tax foreclosure where mailed notice was returned and county did not check "ordinary sources" for alternative addresses.)

Comment 3: Obviously someone on the court has been to Kansas City and knows that Ollie Gates indeed is a very well known personage and that his restaurants are spread throughout the metroplex, and for good reason. Kansas City barbecue is one of the city's finest features, and Gate's is certainly near the top of the barbecue purveyors (the editor is cautious not to get in an argument as to which really is the best – a discussion that can get very involved in this town.)

COTENANCY; ACCOUNTING; MORTGAGEE: A co-tenant, even one who acquires its interest by foreclosure of its borrower's interest in the property, must reimburse a co-tenant in possession for a proportionate share of operating and maintenance expenses, taxes, insurance, repair costs, and the principal and interest payment on purchase money mortgages. ***Capital Finance Company of Delaware Valley, Inc. v. Asterbadi, 398 N.J. Super. 299, 942 A.2d 21 (App. Div. 2008)***

A husband and wife purchased a single family house (an expensive vacation home "on the Jersey shore") that was subject to a foreclosure action filed by a second mortgagee. The property was already subject to a first mortgage. The husband and wife then took out a mortgage to pay off the original first mortgage and to pay the balance of the purchase price to the sheriff at the second mortgage foreclosure sale, and took title in a form that the court concluded was tenancy by the entireties (although there was an issue on this).

In the interim, a finance company obtained a judgment against the husband. The sheriff advertised the husband's interest in the property for sale as part of the judgment execution, and the finance company purchased the husband's interest in the property subject to the wife's ownership interest and the open mortgages. The company notified the wife that it had acquired her husband's interest in the property and filed a complaint for partition, requesting sale of the property, an accounting, and the appointment of a rent receiver.

The lower court held that the husband and wife purchased the property as tenants by the entirety, but that after the husband's interest was sold at sheriff's sale, under New Jersey law, the wife and the finance company became tenants-in-common with rights of survivorship. Thus, there could be no sensible way to partition the property, since the wife had a survivorship interest if the husband predeceased her. It concluded that the court was not required to order partition under such circumstances.

But the lower court ordered the wife to provide an accounting with respect to her possession of the property, directed both of them to establish a fair rental value for the property, and ordered the finance company to account to the wife for its share of taxes, assessments, and insurance.

With respect to the mortgages, the lower court concluded that the finance company had to account to the wife for its share of the second mortgage, but not the first mortgage. It found that the husband and wife paid for the house in cash and they cashed out on the equity by taking out the mortgage. The lower court found it fundamentally unfair to require the finance company to repay the loan when the loan proceeds were owned by the husband and wife. With respect to the second mortgage, it found the finance company responsible for its share of that mortgage.

The wife appealed that aspect of the holding relating to the first mortgage, and the Appellate Division reversed. (The balance of the decision apparently was not appealed.)

With respect to the first mortgage, the Court found that the lower court mistakenly presumed that the first mortgage loan taken out to buy the house was a cash-out mortgage and not a purchase money mortgage. It also found that the lower court failed to consider evidence that would have supported the wife's contention that the loan proceeds were used to preserve the property. Having concluded that the first mortgage was not a cash-out of the equity, the Court then analyzed whether the finance company had to account to the wife for its portion of the mortgage payments for that loan.

The Court noted that when a court denies partition to a creditor who acquires the property interest of a debtor-spouse, the creditor is entitled to an accounting. The wife, who was living in the house, was entitled to an accounting from the ousted co-tenant (in this case, the finance company) for its pro rata share of the operating and maintenance expenses, including taxes, insurance, mortgage payments, and repairs. Because, however, the finance company was an ousted co-tenant not entitled to possession or use of the property, the finance company was entitled to recover the reasonable rental value of its share of the property from its co-tenant, the wife. Here, the Court concluded that the finance company was responsible for paying its share of the mortgage payments, taxes, and maintenance expenses to the wife, but that it was entitled to a credit for one-half of the rental value of the property.

DEEDS; CONSTRUCTION; ATTACHMENTS: Restrictive covenants listed on an undated and unsigned attachment to a deed that does not show on its face any encumbrances to the property can be enforced as an equitable servitude against a remote grantee if (1) the restrictions touch and concern the land, (2) the original parties intended them to run with the land (particularly if the covenant expressly states that intent), and (3) the remote grantee has actual notice of the restrictions. In such a situation, equity does not require a common plan of development if the grantor is the party seeking enforcement and if the remote grantee took title with actual notice. ***Gambrell v. Nivens, 2008 WL 539310, ___ S.W.3d ___ (Tenn. Ct. Appl. 2008).,*** discussed under the heading: "Servitudes; Equitable Servitudes; Common Plan Requirement."

EASEMENTS; CREATION; EXECUTED LICENSES: A neighbor's use of a shared driveway is a revocable license, and the neighbor cannot recover damages absent evidence either that he expended money or labor in reliance on the license being irrevocable or that the license was given for valuable consideration. ***Hay v. Baumgartner, 870 N.E.2d 568 (Ind. Ct. App. 2007).***

Hay and Ronald and Baumgartners owned adjacent parcels of land and used a shared driveway along the western boundary of the Baumgartners' property and the eastern boundary of Hay's property. The driveway was used by both Hay and the Baumgartners and their predecessors in interest for purposes of ingress and egress to East Eli Road, which fronted both properties. In 1980, the parties paved the driveway, which was originally a gravel path. They split the cost. At the time, Hay's mother owned the Hay property and contributed towards the cost of labor and materials. She also twice thereafter shared the cost of sealing the driveway.

The Baumgartners built a new driveway on their property that linked their garage to East Eli Lilly Road, eliminating their need to use the original shared driveway. They removed removed the portion of the shared driveway that was located on their property. Hay sued for injunction to protect his driveway usage. The trial court held in favor of the Baumgartners and Hay appealed.

On appeal, Hay argued that the license to use the driveway became irrevocable by the act of Ruby Hay sharing the expense of paving and sealing the driveway, and that this irrevocable license was granted to him as Ruby Hay's successor in interest. The Court of Appeals found that, "in the context of real estate, a license merely confers a personal privilege on someone to do some act or acts on land without conveying an estate in land." 870 N.E.2d at 571–72 (quoting *One Dupont Centre, LLC v. Dupont Auburn, LLC*, 819 N.E.2d 507, 513–14 (Ind. Ct. App. 2004)). While a license is revocable and not assignable, an irrevocable license is similar to an easement in that when it "has been executed by the licensee through the expenditure of money or labor in reliance upon the license being perpetual, or when a license has been given for a valuable consideration paid, it cannot be revoked by the licensor" without remuneration to the licensee. *Id.* at 572 (quoting *Indus. Disposal Corp. of Am. v. City of E. Chicago*, 407 N.E.2d 1203, 1205 (Ind.Ct.App. 1980)).

Having stated the rule, however, the court refused to invoke it to aid Hay here. It held that there was no evidence that the cost of paving and sealing was incurred by Ruby Hay on the faith of any license to use the driveway in perpetuity, nor was the license given for valuable consideration. Thus, although there was a license, it was revocable, albeit with compensation payable. Hay could be compensated for expenditures made by his mother, but the right to compensation for the Baumgartners' revocation of the license was limited to the amount of labor and capital expended by Hay and his predecessors to improve the driveway. However, because there was no evidence as to the amount contributed by Ruby Hay to the driveway improvement, the Court of Appeals held that Hay could not recover damages from the Baumgartners.

Comment 1: The editor, frankly, was confused by the analysis here. If a license is an executed license, as described by the court, why shouldn't it be treated as an easement, and be protected by an injunction? If the interest in question is not an irrevocable license, why should Hay be entitled to any compensation for the expenditures made by his mother on a revocable right? (The court suggested that Hay could be compensated if he could prove those expenditures.)

Search for the answer to these questions produced a very satisfying visit to the editor's copy of Bruce and Ely, The Law of Easements and Licenses in Land, Sections 11.7-11.9.

The authors of that treatise note that there is some authority that does require compensation when a licensor cancels a revocable licenses (not an executed license) in which the licensee has made some improvements benefitting the licensor. There is even an ALR annotation on the subject – 120 ALR 549, and the treatise authors include an Indiana Supreme Court decision as one of two cases they cite for authority (in addition to the ALR. The other state decision is from Maryland.

Comment 2: In the course of noodling, however, the editor read on to discover that the treatise authors are very skeptical of the vitality of the general rule of executed licenses, which the editor has always viewed as more or less commonly accepted in the common law. They point out that the concept is heavily criticized and not uniformly followed.

The argument against the theory of "executed license" is that if the party making the investment in fact understands it is receiving a revocable right, then what equities support rewarding such investment with something other than a revocable right. (Compensation for the investment, as noted, might be allowed if the investment benefits the licensor.)

If, on the other hand, the licensee believes that it is receiving something more permanent than a revocable right, then the proper analysis might be to analyze whether the Statute of Frauds permits the licensee to assert that right. If there is no writing, then the doctrine of part performance may permit the licensee to prove up the agreement for a permanent right. But the fact remains that such an agreement must be proven. If the licensor never intended or represented that the licensee would have a permanent right, why should the licensee's ill advised investment in a revocable interest be rewarded as equitable reliance?

EASEMENTS; SCOPE: Where shopping center landlord agrees to provide shared parking rights and limit development of further commercial space benefitting from those rights, court will enjoin covenantee from exceeding the development limit notwithstanding arguments of "changed circumstances" due to changes in shopping center design. ***Pathmark Stores, Inc. v. Bernard Oster, Inc., BER-C-232-07 (N.J. Super. Ch. Div. 2008)***

A 1974 shopping center supermarket lease for 48,000 feet of space granted a parking easement and promised availability of parking in the property's common areas during business hours. The lease also provided that the square footage of commercial space in the center other than that leased to tenant would not exceed 30,500 square feet.

Forty years later, Landlord sought to expand the center, by adding some new buildings that would increase somewhat the total commercial space beyond that allowed under the grocery store lease and would be built in the common area providing parking. But landlord also tore down existing buildings to provide additional parking, so that the gross available parking would by the same as it had been before, and consistent with zoning requirements. Tenant sought a permanent injunction of Landlord's planned construction activities. It argued irreparable harm to the full enjoyment of its parking easement rights under the lease.

The Court first stated that to obtain permanent injunctive relief, the tenant had to make a showing that its right to such relief had been established and that the injunction was necessary to prevent a continuing irreparable injury. It found no factual dispute concerning the landlord's violation of the supermarket's easement right. The Court stated that an easement holder is entitled to use the easement to the extent explicitly provided for in the easement agreement, and to that extent the easement burdened and limited the landlord's rights. As such, the court found that the supermarket was not limited to only some parking spaces, but was entitled to full enjoyment of parking in the entire common area under the lease. It also found no changed circumstances that would serve to redefine rights under the lease, as any changed circumstance would have to demonstrate the supermarket's lack of need for a parking benefit, which clearly did not exist.

Even if the number of parking spaces remained the same, if landlord generated additional business in the commercial complex as the result of landlord's construction, this increase the demand for parking would provide less parking available to the supermarket. Tenant convinced the court that this would constitute an irreparable injury and the Court held that the supermarket was entitled to summary judgment permanently enjoining the landlord from conducting any construction at the property except in accordance with the lease.

There are two issues of note here.

Comment 1: First, an easement to share the use an undifferentiated parking area became a limitation on the amount of other users, even when the number of parking spaces remained unchanged.

But the tenant was a major user of parking and had bargained specifically for a limitation on the square footage of other users. The tenant was able to convince the court that the bargain should be upheld. The original tenant's lawyers had done well in building a protected right that would survive the test of time.

Here are the "magic words" that the Tenant relied upon (in fact negotiated by a predecessor and stated specifically to run with the land):

(1) The improvements shall conform to exhibit A [the 1973 site plan] and, except as otherwise provided herein, landlord shall not at any time during the term of this Lease construct or permit to be constructed any buildings or improvements on the Land which do not conform thereto; (2) The aggregate gross floor area of the buildings constructed on the Land, exclusive of the Tenant's Building, shall not at any time during the term of this Lease exceed 30,500 square feet… C. During the term of this Lease, the Common Area shall be sufficient for the parking of not less than 8.3 automobiles for each 1,000 square feet of gross floor area of buildings in the Shopping Center…

Comment 2: From a jurisprudential standpoint, the case is a major test of the continuing vitality of a case decided by the New Jersey Supreme Court in 1990: *Davidson Brothers v. D. Katz & Sons, Inc.*, 121 N.J. 196 (1990), a decision the editor has always viewed as one of the worst of its decade, unfortunately enshrined by the Restatement of Servitudes into an example of the application of the

Restatement's view of judicial discretion in dealing with covenants – a view that the Editor deems extremely overbroad. The court here views *Davidson* as applying a "reasonableness" test in enforcing any servitude, including easements. This transfers to easement law the "changed circumstances" test often applied to covenants and equitable servitudes, a decision the editor views as mistaken. Fortunately for the tenant, however, it concludes that the tenant had made out a specific legally protectable interest with the specific language of its easement rights and that changed circumstances did not diminish the tenant's interest:

"The "reasonable" test articulated in *Davidson* consists of eight factors: 1) The intention of the parties when the covenant was executed, and whether the parties had a viable purpose which did not at the time interfere with existing commercial laws, such as antitrust laws, or public policy; 2) Whether the covenant had an impact on the considerations exchanged when the covenant was originally executed; 3) Whether the covenant clearly and expressly sets forth the restrictions; 4) Whether the covenant was in writing, recorded, and if so, whether the subsequent grantee had actual notice of the covenant; 5) Whether the covenant is reasonable concerning area, time or duration; 6) Whether the covenant imposes an unreasonable restraint on trade or secures a monopoly for the covenantor; 7) Whether the covenant interferes with the public interest; 8) Whether, even if the covenant was reasonable at the time it was executed, "changed circumstances" now make the covenant unreasonable.

As a threshold matter, plaintiff's counsel urges the "reasonable test" of *Davidson* is inapplicable to this case as the lease provision entitling the plaintiff to parking spaces is an easement, not a restrictive covenant. The argument has some appeal. Plaintiff's counsel insists the plaintiff has an easement, Article 2 in the lease uses the word "easement," and defendant's counsel concedes the plaintiff has a leasehold interest "with certain easement rights." In *Davidson*, the court dealt with a restrictive non-compete agreement and articulated the "reasonable test" in that context. . . . .Although the "reasonable test" has been applied to "restrictive covenants" which run with the land, see e.g., Perelman v. Casiello, 392 N.J. Super. 412 (App. Div. 2007) and *Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*, 192 N.J. 344, 370 (2007), defendant's counsel has cited no case, nor could the court find any, where the test was applied to an "easement" or to an instance where a lease restricted the landlord's, rather than the lessee's, use of the land.

Whether the lease provision is an "easement" or a "restrictive covenant," however, appears to be largely an academic inquiry. In *Citizens Voices Ass'n v. Collings Lakes Civic Ass'n*, 396 N.J. Super. 432, 445-446 (App. Div. 2007), a case which plaintiff's counsel cites, the court held courts have "a reservoir of equitable power to modify or terminate a servitude should changes occur in the future which would make it impossible as a practical matter to accomplish the purpose for which the easement was created." Hence, even easements are subject to some form of "changed circumstance" review. See also, Restatement (Third) of Property § 7.10(1); but see, *Welitoff v. Kohl*, 105 N.J. Eq. 181, 186-187 (1929) (distinguishing the legal impact of "changed circumstances" on "easements" and "restrictive covenants," suggesting only in the latter could a court refuse to enforce the covenant).

The court stated that the fact that modern shopping center development might involve different shared parking techniques is irrelevant if the Tenant can demonstrate that the specific parking privileges that it bargained for in 1974 would be adversely affected. Thus, overall "reasonableness" was not so important where the beneficiary of the original right could argue it still had an interest. This departs somewhat from *Davidson*, where the court denied enforcement of a noncompete that the protected party argued was economically important to it. The *Davidson* court's rationale looked at the impact on the property subject to the noncompete much more than it regarded the impact on the party seeking enforcement. The editor is happy to see the case get so limited.

Comment 3: In response to the court's footnote, quoted above, the editor concedes that courts always have the power to withhold injunctive relief where a party can show inequitable injury from granting such relief and the party seeking such relief can not show that denial of the injunction would cause it irreparable injury. This test, however, does not deny the existence of the legal rights created, but only leaves the party to its remedy at law. The traditional "changed circumstances" test (applied to covenants only) and the ill-starred *Davidson* rule would purport to alter vested legal easement rights because the court finds them inconvenient today, regardless of whether they might be valid in the future.

The editor confesses that the complexity of covenants and equitable servitudes in existence in modern law does compel some judicial supervision in order to prevent holders of these rights from unjustly tying up development of property. But easements are far more straightforward, easier understood by the original bargaining parties, and properly should be left to the definition that those parties have established.

In this case, although it is the easement that is being protected, the protection in fact is being provided by a covenant limiting further construction on the center's land, so in a sense the court need not have considered specifically the application of *Davidson* or the changed circumstances rule to easements. But it clearly did so.

Here, although the court necessarily does give "lip service" to the precedent established by its own state's Supreme Court, it fortunately does not rely upon that precedent to destroy the easement rights that the original parties had created, and in fact redefines the limited extent of the *Davidson* case in this regard. Unfortunately, it fails to draw a line between easement law and servitude law generally, but on the other hand it didn't publish its result, either. So the case does not stand as precedent.

EASEMENTS; INTERFERENCE: Where shopping center landlord agrees to provide shared parking rights and limit development of further commercial space benefitting from those rights, court will enjoin covenantee from exceeding the development limit notwithstanding arguments of "changed circumstances" due to changes in shopping center design. ***Pathmark Stores, Inc. v. Bernard Oster, Inc., BER-C-232-07 (N.J. Super. Ch. Div. 2008), Unpublished; March 28, 2008.***, discussed under the heading: "Easements; Scope."

This DD is based upon a report by Liskow and Lewis www.liskow.com: Harold J. Flanagan; William W. Pugh; and Kevin J. Connolly

EMINENT DOMAIN; POWER TO CONDEMN; AFFORDABLE HOUSING: In order to pass constitutional scrutiny, a municipality's action of enacting an eminent domain ordinance for land to be used for affordable housing has to be supported by a well developed record from which a rational nexus between the exercise of the eminent domain power can be found and the increase in the number of affordable housing units can be used. ***Cramer Hill Residents Association, Inc. v. Primas, 395 N.J. Super. 1, 928 A.2d 61 (App. Div. 2007)***

EMINENT DOMAIN; POWER TO CONDEMN; EASEMENTS: Village's acquisition of surface easement by eminent domain was within its statutory authority, even if occurring during the pendency of a dispute over ownership. ***Stefanis v. Village of Fleischmanns*, 842 N.Y.S.2d 600 (A.D. 3 Dept. 2007)**.

EMINENT DOMAIN; TITLE: Where a town fails to take reasonable steps to find the record owner of a parcel subject to an eminent domain taking and lists the property's titleholder as "owners unknown," the taking order is invalid as not recorded in due course, the record owner did not have constructive notice of the taking, and a subsequent purchaser for value had standing to challenge the taking as a bona fide purchaser without notice. ***Devine v. Town of Nantucket, 870 N.E.2d 591 (Mass. 2007).***

In 1968, the Town of Nantucket (the "Town") initiated an eminent domain action, acquiring certain property next to the Nantucket Airport (the "Parcel"). Due to administrative inefficiencies, the parcel was listed in the Town's tax records as "owners unknown." Based on this information only, the Town recorded the taking order, and a 1970 amendment to that order (collectively, the "Taking Order") in the registry of deeds, listing the Parcel as "owners unknown." Obviously, there was no listing in the grantor/grantee index, as there was no known owner.

The background for the "owner unknown" designation was that one George Loomis was the record owner of the property in 1923, when he died leaving the property by will to his sisters, Mary and Caroline Loomis. The will was probated in New Jersey, but no ancillary probate was opened in Massachusetts. The sisters promptly conveyed the property to one Carmer, who apparently recorded the deed. But there was no precise link to the title of his grantees, the sisters, as the record owner of the property was George. But the court found that a reasonably prudent title examiner, at the time of the 1968 takings, would have identified that the property had been subdivided and could have checked the subdivider's transfers, getting to George. Then, looking for "Loomis" in the grantor index, the title search would have found the sisters and the deed to Carmer. Thus, the court was unforgiving as to the Town's failure to carry out a condemnation against the owner of the property, Carmer. In 1985, a group of persons making a business of identifying lost inheritances and other long ignored property claims came across this parcel and made a deal with Carmer. Carmer conveyed the Parcel for $7,500 to Paul Vozella, who promptly recorded the deed and in 1988 conveyed the Parcel to William J. Devine as trustee of Loomis Realty Trust, who also promptly recorded the deed. None of the Parcel owners had actual notice of the Taking Order.

The 1980's transfers led the Town , apparently unaware of its own eminent domain proceeding, to view Carmer and then the Trust (through Devine) as owners, and at various times between 1985 and the commencement of this action, the Town collected taxes on the Parcel and issued building permits to its owners. In June 2001, Devine received a letter from the Town's counsel notifying him of the Taking Order, and the Town subsequently barred Devine from entering onto the Parcel by erecting a fence, issuing a stop work order, revoking all building permits, and filling in excavations made on the land.

Less than three months later, Devine brought an action for damages and to quiet title. The Superior Court found for Devine, the Town appealed, and the Supreme Judicial Court heard the case on its own motion.

The Town first argued that Devine's claims were time-barred under the three year statutes of limitations for bringing an action to assess damages for a taking and challenging a taking's validity. The Supreme Judicial Court disagreed, holding that taking orders must be recorded "in due course" in the registry of deeds to be valid; the Taking Order was not recorded "in due course" because it was not indexed under the owner of record (Carmer), it could not be found in the ordinary grantor-grantee index, and the act of recording failed to give constructive notice; and thus the Taking Order was invalid and its recording did not trigger the running of the limitations period.

Next, the Town argued that Devine did not have standing as a bona fide purchaser to challenge the taking because he had constructive notice of the taking. The Supreme Judicial Court also rejected this argument, holding that the Town's failure to record the Taking Order "in due course," in addition to the Town's actions between 1985 and 2001, necessitated a holding that Devine had no notice of the 1968 taking order.

Comment 1: Note that in fact all the owners should have had knowledge that there was a gap in the chain of title in 1923. But even if they knew that, what would they have done that would have given them knowledge of the Town's condemnation? So the problem was not with the validity of the owner's title, but with the invalidity of the Town's eminent domain title. And the court was unforgiving of the Town's failure to properly index, apparently because, as noted, it was of the view that the Town should have identified Carmer's deed by a proper title search. The Town could come up with very little factual detail of what happened and why in 1968.

Comment 2: Obviously the Town was reluctant to reward Devine and his friends for their research, and fought through this appeal. Devine, apparently, has been round the barn before with public agencies on such issues, and the court noted that his name appears in a number of these sorts of "missing owner" disputes. Perhaps the Town thought that Devine, clever as he was, would certainly have discovered the 1968 condemnation order, but the trial court made a finding that no owner of the Parcel had actual knowledge of that order, so that's how it stands.

Comment 3: Adverse possession might have solved this, but apparently the property was simply left vacant.

INSURANCE; PUNITIVE DAMAGES: Texas court wrestles with question of whether public policy permits arrangements by which commercial parties insure themselves against punitive damages for gross negligence. ***Fairfield Insurance Company v. Stephens Martin Paving, LP, 246 S.W.3d 653 (Tex. 2008)***

The Texas Supreme Court (upon referral from the federal Court of Appeals for the Fifth Circuit) considered whether Texas' public policy prohibits a "liability insurance provider from indemnifying an award for punitive damages imposed on its insured because of gross negligence." The court answered this question in the negative by narrowly holding that exemplary damages are insurable under workers' compensation and employers' liability policies. Rather than clearing the air, the court's long awaited opinion actually raises more questions about the insurability of punitive damages.

An employee died as a result of injuries sustained when road construction equipment he was operating rolled over. His employer, carried a workers' compensation and employers' liability insurance policy. The employee's survivors brought suit against the employer alleging gross negligence, seeking relief outside the workers' compensation policy. The employer's insurer took the position that it did not owe sued a duty to defend or indemnify the employer for exemplary damages based upon gross negligence, and sued to assert its position in federal court. The federal district court concluded that the language in the policy covered exemplary damages and that the public policy of Texas did not prohibit insurance coverage for those damages, and ordered defense, and if applicable, indemnification.. The insurer appealed, and the U.S. Fifth Circuit certified the broad question of the insurability of punitive damages for gross negligence to the Texas Supreme Court.

For purposes of its analysis, the Texas Supreme Court assumed that the policy provided coverage for the exemplary damages sought in the underlying suit. It limited its discussion to the second prong of the analysis and presumed that the policy language covered the exemplary damages sought.

The court first analyzed the context in which the relevant legislative background, concluding that the Texas legislature had spoken on the issue with respect to the workers' compensation statutes and the Texas Department of Insurance's execution of those statute. The court determined that the Legislature clearly intended to provide for and to allow additional insurance coverage for an employer's gross negligence. This, in fact, ended the inquiry, since the legislature's determination of public policy was dispositive.

But the court recognized that the Fifth Circuit framed its certified question as a broad inquiry into Texas public policy concerning coverage for exemplary damages. Although hesitant to opine on policy language and fact situations not before the court, it did continue to discuss other circumstances where the insuring of punitive damages might violate Texas public policy. First, the court cited a variety of examples where the Legislature had taken action and explicitly prohibited an insurer from payment of punitive damages. Second, the court expressed concern that the insurability of punitive damages in some other contexts might violate public policy, even if not expressly prohibited by the Legislature. For instance, the court noted that coverage for exemplary and punitive damages in the uninsured and underinsured motorist context might be against public policy given that the uninsured motorist would not be punished for his recklessness and that such payment would, in practice, be made by all of the policyholders in the state. Thus, the court recognized the deterrent effect of punishing a party by punitive awards, and expressed concern that transferring these costs to an insurer could defeat their purpose. Ultimately, the high Court left open many questions about the limits of insuring against such damages.

Comment 1: Whether other states will adopt the narrow holding of this case – applicable to worker's compensation situations, depends, of course on the language of the statutes in those states.

Comment 2: But what about the broader policy issue? As the Texas Supreme Court stated, freedom to contract is a major consideration in resolving disputes over the insurability of punitive damages. How far this freedom runs, however, is still unclear. In some insurance agreements, insurers and their policyholders explicitly bargain for and agree to include coverage for punitive damages. But, in many instances there are no explicit contractual terms demonstrating the specific intent to insure such damages. Regardless, even if the policy clearly provides coverage for punitive awards, state law or public policy may explicitly or implicitly prohibit coverage for certain types or categories of such awards.

For example, even if punitive damages based on vicarious liability are insurable under this decision, awards based on direct liability may not be. The Texas court clearly noted that the purpose of exemplary damages is to punish the wrongdoer and to deter similar behavior. This purpose could be frustrated by allowing the penalty to be shifted to a third party through insurance. An offender who can "pass the buck" for his wrongdoing to an insurer arguably does not directly suffer the loss and therefore might not be sufficiently deterred from repeating his behavior. For this reason, although sometimes making an exception for vicarious liability, California, Florida, Massachusetts, and New York, to name a few, have strictly prohibited the insuring against punitive damages that are directly assessed against a policyholder.

Comment 3: Likewise, even if punitive damages based on gross negligence are insurable, it is still unclear what this means for awards based on other standards such as fraud, malice, or reckless, willful or intentional conduct. The standard in the instant case was based on gross negligence. The court did not address whether it would violate public policy to insure an award of punitive damages based on some other standard of conduct. Further, the meaning of these standards is often undefined and may differ based on a state's common law and statutory provisions.

For instance, would it be permissible to insure conduct so reckless as to demonstrate a substantial lack of concern for whether an injury would result? If so, is it also permissible to insure a course of action that shows an actual or deliberate intention to cause harm? Generally, such conduct is expressly excluded. But whether or not excluded, it is not an insurable event because it is not fortuitous. At least where actual intent is at issue, there clearly are open questions as to whether claims for punitive damages would be insurable, even under facts very similar to this case and even in Texas.

JOINT TENANCY; SEVERANCE: Conveyance by two of three joint tenants from themselves as joint tenants to themselves as joint tenants severed the joint tenancy with the third joint tenant. ***Sathoff v. Sutterer, 869 N.E.2d 354 (Ill. App. 2007)***

Grantor conveyed property to a married couple and a third party "as joint tenants with right of survivorship." Thereafter, the married couple conveyed their interest "from themselves as joint tenants to themselves as joint tenants." The husband died, then the wife died. The third party filed an action against the executor of the wife's estate to quiet title in herself in the entire estate and for a declaratory judgment that the married couple's conveyance had not severed the joint tenancy. The circuit court granted the executor's motion to dismiss the complaint, and the court of appeals affirmed. In short, the joint tenancy had been severed, and the third party obtained a cotenancy interest.

Understanding the issue in this case requires a quick review of first-year Property law. The creation and continuance of a common law joint tenancy, which included a so-called "right of survivorship," required that the interests of the joint owners share four unities: time, title, interest, and possession. That is, their interests must commence at the same time, derive from the same title, be of the same quality, and give the same undivided right of possession. As a necessary consequence, a conveyance by a sole owner to himself and another did not at common law result in a joint tenancy, even if it was intended to have that effect. To create a joint tenancy in such a case required the use of a so-called "straw-party conveyance," that is, a conveyance from the sole owner to a third party (the straw man), who then re-conveyed to the two as joint tenants. This requirement has been eliminated by statute in most states, including Illinois, but the plaintiff in the present case argued that the language of the statute did not cover the case of two of three joint tenants conveying from themselves as joint tenants to themselves as joint tenants. As a matter of statutory construction, this was unpersuasive, and in any event the court indicated that it would give the statute a liberal construction. (It is a nice question whether the statute was needed at all in this case. Even at common law, the grantors here had all the unities to begin with.)

In a few states another nice question could arise concerning the grant to the married couple. At common law all such grants were presumed to be in tenancy by the entirety unless a contrary intention is expressed in the conveyance, and a few states continue the presumption as a matter of common law or by statute. Was the indication that the three held "as joint tenants with right of survivorship" enough to rebut the presumption? Or could it be interpreted to mean that the married grantees held their interest in tenancy by the entirety with the third grantee "as joint tenants with right of survivorship"? If the couple took in tenancy by the entirety, another question could arise: whether they took one share or two; that is, whether among the three, the married pair as a unit took one-half or they together took two-thirds? There is authority, most of it old, that in such cases they took one-half.

Reporter's Comment: The case illustrates the perils of the joint tenancy. As the court reminds us: "An undisputable right of each joint tenant is the power to convey his or her separate estate without the knowledge or consent of the other joint tenant and thereby to sever the joint tenancy, transforming it into a tenancy in common and extinguishing the right of survivorship." (356) By self-conveyance, one (or in this case, two) of the joint tenants can continue the concurrent ownership but eliminate the "winner take all" feature. Was the plaintiff in this case taken by surprise? And did that explain the motive for pursuing the lawsuit?

The Reporter for this case was Professor John Orth of the University of North Carolina Law School.

JOINT TENANCIES; SEVERANCE: A joint tenancy may be severed by to oneself if that is the grantor's intent. ***Estate of Johnson, 739 N.W.2d 493 (Iowa 2007)***

Husband and wife held property as joint tenants with right of survivorship. When the wife became seriously ill, the family prevailed upon her in her hospital room to execute a power of attorney allowing them to retitle the property in the husband's sole name. This they attempted by having the husband and the wife's attorney-in-fact convey from themselves as joint tenants to him alone.

Confounding the family's expectations, the husband predeceased the wife. The wife (or those acting on her behalf) alleged that she was incompetent at the time she executed the power of attorney and claimed the property by right of survivorship. The trial court agreed that the power of attorney was invalid, but held that the effect of the husband's participation in the grant from the couple as joint tenants to him as sole owner had the effect of severing the joint estate, converting it into a tenancy in common. The Iowa Supreme Court reversed on the issue of severance, holding that the deed was void and therefore the wife became sole owner on her husband's death.

The Supreme Court used the case as the occasion to announce Iowa's abandonment of the time-hallowed requirement of the four unities (of time, title, interest, and possession) to create and maintain a joint tenancy. Henceforth, the state would join others in following an "intent-based approach" for recognizing the existence of a joint tenancy. The problem in this case, of course, was determining intent. It was argued on behalf of the husband's estate that his intent to terminate the joint tenancy was clear and although without the wife's joinder he could not transfer the entire estate to himself, his action in executing the deed was effective to convert the joint tenancy into a tenancy in common. While accepting that a conveyance from himself as joint tenant to himself as tenant in common – impossible at common law under the rule of the four unities – would have been effective under the new intent test, the court held that the husband's intent in this case, as gathered from the deed, was not simply to sever his interest from his wife's, but to secure the entire estate for himself.

Intention alone is not enough. The court held that there must be "an instrument effectuating the intent." (499) In this case, the deed relied upon as evidencing the intent to sever was void, and a void conveyance cannot be evidence of intent. Of course, the discarded four-unities test would have produced the same result in this case.

Reporter's Comment: I assume the court does not intend to carry its "intent-based approach" so far that the intent to sever if unequivocally expressed in a will would eliminate the right of survivorship. Perhaps the court addressed this by saying that its new rule required, in place of the formal requirement of the four unities, a formal requirement that there be "some action or instrument sufficient to corroborate and give effect to that intent."

The Reporter for this case was Professor John Orth of the University of North Carolina Law School.

The reporter for this item was Dale Whitman, of the Missouri-Columbia Law School (emeritus)

LANDLORD TENANT; COMMERCIAL; SHOPPING CENTERS; EXCLUSIVE USE CLAUSE; LIQUIDATED DAMAGES: Court upholds a clause requiring payment of $100,000 for breach of a restriction on competition in a shopping center lease. ***Valentine's, Inc. v. Ngo, 251 S.W.3d 352 (Mo.App. Southern Dist.2008).***

Valentine's leased about 4,000 square feet of space in a shopping center to operate a full-menu restaurant. The lease was for 15 years, with an initial rent of $4,600 per month. Because Valentine's did not want other space in the center to be leased to a competitor, it insisted that the following clause be included in the lease.

Landlord agrees to not lease any space in the retail building to any other restaurant which serves steaks, seafood or pasta. In the event Landlord violates this non-competition clause it agrees to pay Tenant the sum of $100,000.00 as and for liquidated damages, it being acknowledged, that damages in the event of such a breach would be difficult, if not impossible to ascertain.

Subsequently, the Ngos, owners of the shopping center, leased another space to the Baja Grill, a Mexican restaurant. The evidence was clear that Baja Grill sold steak and seafood dishes, thus causing a violation of the non-competition clause. The trial court ordered an award to Valentine's of $100,000, and the Ngos appealed.

The appellate court noted that Missouri follows the Restatement (Second) of Contracts §356, which provides that:

Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy.

The Restatement is ambiguous in the sense that either "anticipated" or "actual" loss may be the standard against which the reasonableness of the liquidated sum is measured. However, the Missouri court took the view, as have most cases in recent years, that the test is *ex ante*: is the liquidated sum a reasonable advance estimate of the probably damages?

The court noted that Valentine's had insisted on the $100,000 liquidated sum because that was approximately the amount its contractor indicated was going to be spent on leasehold improvements before the restaurant opened. (In fact, it spent $124,000, plus an additional $140,000 in further improvements after opening.) The court conceded that "the $100,000 is not directly related to any actual loss of profits that would occur if [Landlord] breached the lease agreement by leasing space to another restaurant that sold steak, seafood, and pasta." But it nonetheless upheld the liquidated sum, noting that lost profits are notoriously difficult to measure. The harder it is to measure, the less weight should be given to the reasonableness of the estimate, the court said.

The court also assessed the clause's reasonableness by comparing the amount to the total sum Valentine's would spend on rent on the restaurant: about $890,000 over the 15-year term of the lease. The liquidated sum was 11.2% of this total, and prior Missouri cases had upheld liquidated damage clauses for far greater percentages of the contract's total value.

Reporter's Comment 1: The court was exceedingly kind to the plaintiff tenant in this case. The tenant never produced any evidence whatever that its sales or profits had declined as a result of the advent of the Baja Grill into the shopping center. Yet Missouri has always applied the doctrine that no liquidated damages can be recovered unless there is proof of at least *some* actual damages. For all we or the court know, the Baja Grill may have generated *more* traffic in the shopping center, resulting in an actual increase in sales and profits to Valentine's.

Reporter's Comment 2: Aren't the measures the court applies completely irrelevant? What do the damages resulting from a competing restaurant have to do with the amount the tenant expected to spend on leasehold improvements, or on rent for the 15-year term? These comparisons are completely arbitrary, since they have no bearing and shed no light on the restaurant's profitability or the effect of the Baja Grill on it.

Reporter's Comment 3: Yet, when all is said and done, is $100,000 a reasonable advance estimate of what it might cost a restaurant if a competing restaurant moved in nearby? Probably so. And while liquidated damage clauses are not supposed to be punitive, or to punish the breaching party, they ought to impose enough of a bite to discourage breaches. On this basis, $100,000 seems about right.

Editor's Comment 1: The editor favors a "hardball" approach here, which means the editor would uphold the deal unless it is patently unreasonable, which, as Dale agrees, it is not. This is a commercial lease between consenting parties with regard to an injury as to which damages would be difficult to ascertain. Under those circumstances, great latitude should be given to the parties' stipulation of damages. For another case of similar import, see: *Bates Adver. USA, Inc.* v. 498 Seventh, LLC, 850 N.E.2d 1137 (N.Y. 2006) (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.)

Editor's Comment 2: A frequently overlooked problem here is the fact that, unless the exclusive use lease is recorded, other possible future tenants may take with no knowledge of it, and therefore are not bound by it. Thus, the tenant indeed will suffer the injury over the life of the competing lease. This makes the case for liquidated damages stronger. *See, e.g. Mabros v. DonutsRUs, Inc.*, 536 S.E.2d 215 (Ga. App. 2000) (*dicta*) (Where a landlord transfers property subject to a radius clause to a transferee who has no knowledge of the clause, the transferee may take as a bona fide purchaser free of the restrictions, but the landlord may remain liable in damages to the party protected by the clause if such party can show that there has been diminution in the value of the premises as a result of the violation.) Of course, the protected tenant may also want to get the exclusive use right into the record so as to support injunctive relief. Tenants should watch out for the fact that the shopping center may consist of several parcels, and recordings should be made against each. These issues are discussed in Friedman on Leases (Randolph edition) at Section 28:6.1 and in note 69 and accompanying text of the same Chapter 28.

The new tenant arguably may be on inquiry notice of the rights of each tenant in a shopping center. But is this an appropriate burden to place on such a tenant?

The reporter for this item was Dale Whitman, of the Missouri-Columbia Law School (emeritus).

LANDLORD/TENANT; HOLDOVER; RENEWAL: Where a farm lease provides that it will last for a year "provided it is satisfactory for both parties" and for a number of years following the original the tenant has held over, and the lease therefore has been renewed by law, the provision stating that the lease continues only if "it is satisfactory" is superceded by statutory language providing that oral annual farm leases will renew unless landlord indicates nonrenewal on or before June 30. ***Seidenstricker Farms v. Doss, ___ S.W.3d ___, 2008 Westlaw 95773 (Ark. 1/10/08)***

Seidenstricker and the Dosses' predecessor in title entered into a written lease for the term of January 1, 1993 through January 1, 1994. The lease had language appearing to give either side the right to terminate at will during the term:

TO HAVE AND TO HOLD unto said TENANT from the date of January 1, 1993, unti the first of January, 1994, provided it is satisfactory with both parties. After one party has given the other a 90 day notice in writing before the expiration of this lease which is accepted by the other party, the term of said lease shall be renewed or extended for another year under the same terms and conditions."

In July 1993, the Dosses acquired ownership of the farm. Seidenstricker continued to make annual rental payments and farm the land until 2001. No written renewal or new lease was executed by the parties at any time after 1993, although the parties annually met at harvest time to discuss issues.

In September, 2001, the Dosses orally notified Seidenstricker that the lease would terminate at the end of 2001. Subsequently, Seidenstricker filed suit against the Dosses alleging that the Dosses improperly terminated the lease, arguing the applicability of an Arkansas statute that provided:

"The owner of farmlands which are leased under an oral agreement may elect not to renew the oral rental or lease agreement for the following calendar year by giving written notice by certified registered mail to the renter or lessee, on or before June 30, that the lease or rental agreement will not be renewed for the following calendar year."

The trial court dismissed the case, finding that the provision in the 1993 lease governed the parties' relationship, and therefore the Dosses properly terminated the lease.

On appeal, the Supreme Court of Arkansas considered whether the 1993 lease or the statute (requiring notice by June 30) governed in the present case. In deciding this issue, the court began by addressing whether Seidenstrecker leased the farmland under an oral lease or whether it was a year-to-year tenant, since the statute specifically applied to tenancies from year to year. It noted that parties to a lease may create a tenancy from year to year if the tenant holds over after the end of the original term, continues to pay rent in accordance with the terms of the original lease, and the landlord accepts the payment. Here, though the original lease was never explicitly renewed and a new lease was never executed, Seidenstricker continued to farm the land and pay rent through 2001, which the court concluded constituted a tenancy from year to year. Therefore there was no oral renewal of the original term lease, but rather an annual periodic tenancy. The court concluded that, even though typically when holdovers result in annual period tenancies, the terms of the original lease apply, the "at will" provision of the original lease did not apply here, since it expressly was included in the statement of a term lease for the first term only. Therefore the statute applied and required that the terminating party give six months notice before terminating the lease.

[T]he 1993 lease gave an explicit period of time for which the lease was to govern" (one year), and nothing in the contract contemplated a continuation of the lease if conditions remained satisfactory. The renewal provision "was essentially waived by the parties' conduct since the expiration of the original 1993 lease term."

Comment: There were two dissenters who argued that the traditional rule is that all the terms and conditions of a lease, other than the term, continue to apply when there is a renewal by holdover. But note that Arkansas, like most other states today, does not apply that rule literally, since the holdover of a term lease resulted in a periodic annual tenancy, and not a term lease. So it cannot be said that all the terms of the original lease remained valid. But still, it was tricky business to for the court to conclude that the somewhat unusual [at least in the editor's experience] "at will termination" provision did not apply. True, the terms of the original agreement said that it was only for one year, but the parties implicitly flipped into a year to year lease with respect to all other terms of the lease (such as rent), so why not include this provision as well? Perhaps we just have to conclude that the court saw a public policy in the statute that it thought should be applied. The statute, by the way, was repealed, but "grandfathered" to these facts.

LANDLORD TENANT; COMMERCIAL; SHOPPING CENTERS; EXCLUSIVE USE CLAUSE; LIQUIDATED DAMAGES: Court upholds a clause requiring payment of $100,000 for breach of a restriction on competition in a shopping center lease. ***Valentine's, Inc. v. Ngo, 251 S.W.3d 352 (Mo.App. Southern Dist.2008).***

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LANDLORD/TENANT; RESIDENTIAL; PUBLIC HOUSING; "ZERO TOLERANCE" POLICY: The federal law that permits federally subsidized tenants to be evicted for engaging in "criminal activity" permits a housing authority to evict a tenant who is convicted a disorderly persons offense because "criminal activity" does not mean only crimes or felonies, but includes any conduct that causes social harm as is defined under, and is punished by, law. ***Housing and Redevelopment Authority of the Township of Franklin v. Miller, 397 N.J. Super. 1, 935 A.2d 1197(App. Div. 2007)***

A federally subsidized public housing authority sought to evict a tenant after she was convicted of a disorderly persons offense for assaulting another tenant in the building. After the tenant was evicted, she appealed. The Appellate Division affirmed. Federally subsidized housing agencies are required to provide safe housing for their tenants. Applicable federal law requires every subsidized lease to provide that "any criminal activity that threatens the health, safety or right of peaceful enjoyment" would be the basis of an eviction complaint. The tenant's lease did, in fact, provide that there was a one-strike policy with respect to any criminal activity that threatened the health, safety or right of peaceful enjoyment of the other tenants. When the tenant was convicted for assaulting another tenant, the housing authority filed its eviction complaint under New Jersey's Anti-Eviction Act. That Act allows public housing authorities to evict tenants that breach covenants in their leases pertaining to illegal activities, so long that the covenants comply with federal guidelines.

The tenant argued that because she was convicted of a disorderly persons offense, and not a felony, she should not have been evicted. The Court disagreed, rejecting the tenant's argument that she needed to be convicted of a felony. The Court found that if Congress had intended to limit a housing authority's right to evict on the basis of conviction of a felony, the statute would have explicitly stated "any crime" or "any felony" instead of "any criminal activity." It noted that "criminal activity" is defined as, "conduct that causes social harm and is defined and punished by law." It found that when Congress included the phrase "criminal activity" in the federal statute, it intended to cover not only felonies, but also disorderly persons offenses. The Court reasoned that if it accepted the tenant's argument that federally subsidized housing agencies could not evict tenants convicted of disorderly persons offenses against other residents, then the federal policy of providing safe housing could not be achieved.

The reporter for this item was Dale Whitman of the Missouri, Columbia law school, emeritus.

LANDLORD/TENANT; RESIDENTIAL; RENT STABILIZATION: A tenant's status as a holder of a tourist visa precluded her from maintaining primary residence in a rent stabilized apartment, allowing the landlord to recover the apartment. ***Katz Park Avenue Corp. v. Jagger, 843 N.Y.S.2d (A.D. 1 Dept. 2007)***.

LANDLORD/TENANT; RESIDENTIAL; WARRANTY OF HABITABILITY; SEX OFFENDERS: Warranty of habitability did not impose a duty on landlord to remove registered sex offender, but landlord breached implied covenant of good faith and fair dealing by refusing to terminate lease and release tenants from obligation to pay rent. ***Knudsen v. Lax, 842 N.Y.S.2d 341 (Co.Ct. 2007)***.

Landlord and tenant signed a form that landlord had downloaded from the internet that provided that if tenant vacated early it would be liable rent for the whole term of the lease.

Tenants submitted a request to terminate their lease prior to the expiration of the one- year term after a level 3 sex offender moved in with the tenants living in the adjacent apartment. Failing to receive a response from the landlord, tenants vacated the premises and commenced a proceeding to recover the security deposit. The landlord counterclaimed for the balance of the rent due for the remainder of the term of the lease.

The court noted that it is state public policy to protect potential victims of a sex offender from the risk of a repeated offense, basing its view on the fact that there were a number of requirements to warn the public about the presence of a registered sex offender residing or working at a particular location.

On the other hand, the court found that Real Property Law Section 235-f prohibits a landlord from removing a registered sex offender based solely on that designation. Consequently, if the editor reads the case correctly, the court reluctantly concluded that the presence of the sex offender was not itself a violation of the implied warranty of habitability.

But the court also concluded that remaining in the apartment with three young daughters would place unreasonable pressure on the tenants and would destroy their peaceful and quiet enjoyment of the apartment, as covenanted by the lease. It therefore found that the landlord's refusal to permit the tenant, under these circumstances (three daughters) was a violation of the implied warranty of good faith and fair dealing.

Of course, it is difficult to rely upon a implied warranty when the parties have expressly bargained otherwise – and there was that difficult language that if the tenant vacated it had to nevertheless pay the rent for the term (New York imposes no duty to mitigate). The court was up to this challenge, however, and found that the lease was an adhesion contract that the tenant entered into with a lack of meaningful choice and an inequality of bargaining power, and therefore the clause in the contract that held the tenant liable for a full year's rent regardless of the tenant's reasons for abandonment was unconscionable.

Even had the clause not been unconscionable, the court concluded that it should be set aside because the parties could not possibly have anticipated the instant facts, and thus did not bargain with them in mind, so the landlord had duty to be reasonable in responding to the facts. The judge quoted extensively from analysis by Judge Posner. Here is the ultimate conclusion:

"The Court finds in this case "a reasonable person in the position of the promisee [tenant] would be justified in understanding" . . . the landlord would allow him to terminate the lease in the event a Level 3 Sex Offender moved into the next door apartment because neither he or the landlord would have expected any objection to such an early termination in such an event when the landlord could not force the Level 3 Sex Offender to vacate the apartment for the safety of the tenant's family.

In this case when the landlord refused to allow the tenant to terminate the contract before the expiration date six months later and seeks under the "abandonment" clause an additional six months rent of $2700 under the circumstances after it was **350 evident the tenant could no longer enjoy the quit enjoyment of living there shattered by the level 3 sex offender moving in next door which, the Court concludes he should have agreed to do so under the covenant of good faith implied in the lease agreement to deal with a situation at the time it was signed."

Comment 1: The old tenet that hard facts make bad law could not be more evident. Basically the court has lifted this case out of ordinary legal analysis and decided independently to ignore the contract and stick the landlord with the problem of the neighboring sex offender, even though the law required the landlord to permit the sex offender to remain in the apartment.

Comment 2: The editor is sympathetic with the outcome. The landlord should have been reasonable. But the court appears to be concluded that every lease that the landlord presents to a residential tenant that the tenant doesn't try to bargain about is an unconscionable lease that the tenant can ignore. Of course, this goes beyond even the implied warranty of habitability, but may indeed be the modern attitude of the courts. Perhaps landlords ought to include "cannon fodder" in every lease that they point out to the tenant and angle so that the tenants object and the language comes out. But the editor questions whether this would work for long.

Comment 3: In any event, the notion of the injection of good faith and fair dealing here tends to eliminate the unconscionability argument. Although the parties appeared to have made a bargain about the cost of the tenant leaving for reasons unrelated to landlord breach, the court essentially holds that unforeseen circumstances cannot possibly be part of that kind of bargain. The question is – will courts apply the same analysis to economic allocations made by commercial parties? When there is an economic burden to be suffered due to unforeseen circumstances – and a lease allocates a loss – why should a court disturb such allocation?

Comment 4: On the implied warranty of habitability point, note that another lower court case in New York held the landlord in breach of the implied warranty when next door neighbors generated second hand smoke that disturbed landlord's tenants, even though landlord did not own the smokers' apartment and had no apparent power over them. *Poyck v. Bryant,* 820 N.Y.S. 2d 774 (N.Y.S2d Misc. 2006) (The DIRT DD for 10/2/07)

LENDER LIABILITY; DUTY TO DETECT FRAUDULENT SCHEMES: A lender making a loan to a "foreclosure rescue" artist has a duty to investigate the mortgagor's financial status, and whether it is engaged in fraud against the prior owner of the property. ***Mathurin v. Lost & Found Recovery, LLC, 19 Misc.3d 756, 854 N.Y.S.2d 629 (N.Y.Sup.2008)***

This is a variation on the typical "absolute deed as mortgage" case. Paulina Mathurin owned a house but was in default on her mortgage loan. She was approached by Lost & Found Recovery, LLC (hereafter LFR), run by McDowall, who promised her that he would provide refinancing of her mortgage on much more favorable terms. She agreed, and attended a closing. However, in a classic "bait-and-switch" routine, she was told at the closing that her credit was not good enough to qualify her for the wonderful loan she had been promised. Instead, she was persuaded at the closing to agree as follows: (1) she would deed the property to Opuiyo (apparently a business associate of McDowall's); (2) Opuiyo would obtain a mortgage on the property, refinancing her existing loan, and would make the payments on it for one year; (3) after one year the property would be deeded back to her. She was "represented" at the closing by LFR's lawyer.

She deeded the property to Opuiyo, who gave a mortgage to Greenpoint for $562,000. The proceeds of this loan were used to pay off her old mortgage, but the amount of the new loan was in excess of the balance on the old loan by more than $133,000! The excess money was retained by LFR for "services" and various miscellaneous (i.e., "junk") fees. Opuiyo never made any payments at all on the new mortgage to Greenpoint, so it immediately went into default.

Mathurin brought this action to have the court declare the note and the mortgage void and unenforceable. Greenpoint and MERS (which was nominally the mortgagee) filed a motion to dismiss. The court refused to grant the motion, concluding that Mathurin had stated a cause of action based on "negligent underwriting." Her allegations were that Greenpoint had failed to make a reasonable investigation of Opuiyo's ability to make the payments on the loan, failed to discover that Opuiyo was a "straw buyer" in numerous other transactions, and failed to prevent Opuiyo and LFR from perpetrating a fraud on her.

Perhaps most arresting is the following statement in the court's opinion: "Considering the present difficulties faced in the subprime mortgage market, a lender underwriting a mortgage has a duty to investigate and ascertain the economic status of the purchaser/mortgagor and whether the purchaser/mortgagor may be committing a fraud against the seller in the underlying transaction."

Reporter's Comment 1: This holding, if it gains a following, has the potential to become a powerful defensive weapon in the hands of borrowers facing foreclosure on onerous mortgage loans. In the present case, the nominal borrower was a "straw buyer" who obviously never had the slightest intention of making payments on the loan. But the reasoning seems to apply equally to situations in which the original homeowner is granted a loan, but plainly has no capacity to make the payments – either the initial payments, or the payments that will be due after the teaser rate on the ARM expires and a fully-indexed rate applies.

Reporter's Comment 2. A number of "predatory lending" statutes around the country purport to impose a duty on a lender of a subprime loan to make reasonable investigations to ensure that the borrower has the financial capacity to make the loan payments. But this is the first case, to my knowledge, in which a court has imposed such a duty without reference to any statute at all.

Reporter's Comment 3. Of course, this case is only at the pleading stage, and we're not sure whether the homeowner's proof will establish the facts alleged in the complaint. But they are not very difficult to believe. The remedy sought is to make the note and mortgage void. Is that too generous? Should the court, instead, hold her liable on the basis of the balance and interest rate on the old loan that was refinanced? (Of course, she was already in default on that one when this scam was perpetrated, and very likely still doesn't have the financial capacity to keep it current.)

Reporter's Comment 4. An incidental fact: when Paulina Malthurin got to the closing, she was told that she had to be "represented" by LFR's lawyer. Why would any intelligent lawyer allow himself or herself to be place in that position? Even if the scheme isn't fraudulent, it's an egregious conflict of interest for the lawyer. If it is fraudulent, the lawyer is likely to end up in even deeper trouble! For the lawyer, it seems to be a case in which greed becomes plain old stupidity.

The Reporter for this item was Dale Whitman of the Missouri Columbia Law School, emeritus

MECHANIC'S LIENS; NOTICE TO OWNER: Where a Notice of Unpaid Balance is properly served and contains an address that a property owner can use to identify the property as one it owns, an error that misidentifies the true owner of the property where construction work was performed can be considered to be a *de minis* error. ***In Re Kara Homes, Inc., 374 B.R. 542 (D. N.J. 2007)***

MORTGAGES; DEEDS OF TRUST; PRIVATE FORECLOSURE: A regularly conducted trustee's sale is final when the winning bid is accepted, even if, through trustee's error, the permitted opening bid was dramatically lower than that required by lender and the sale was therefore for an inadequate price. ***Udall v. T.D. Escrow Services, 159 Wash. 203, 154 P. 2d 882 (Wash. 2007)***

Trustee instructed its auctioneer to open the bidding at

$159,422.20. The auctioneer (in error) opened the bidding at $59,421.20. Udall (collaborating with other potential bidders, was the only bidder at $59,422.20. The Trustee had a practice of withholding to deed in order to verify funds and to make sure that the debtor had not filed a last minute bankruptcy, and this policy was known to the foreclosure purchaser.

On discovering the error (before the deed had been delivered), Trustee cancelled the sale and sent Udall a refund. He refused the refund and sued to quiet title.

The Washington Court of Appeals upheld the Trustee's position that the sale wasn't final until the deed was delivered, and could be cancelled.

The Washington Supreme Court, however, reversed, based upon an analysis of the statutory language for Washington deeds of trust. The court held that the sale was final upon the acceptance of the highest bid and the delivery of the trustee's deed to the successful bidder was a ministerial, not a discretionary, act.

Although the trustee had not authorized its auctioneer to open the bidding or sell the property at the low price, the court held that the auctioneer was vested in apparent authority upon which Udall was entitled to rely.

The court noted that there was no ill consequence to the borrower because of the inadequate sale price, because under Washington law, there is no deficiency following a non-judicial foreclosure of a deed of trust.

Comment 1: Compare this case to *Household Bank, FSB v. Lewis*, 2008 Westlaw 2132467 (Ill App. 5/22/08), the DIRT DD for 7/11/08, where the court permitted a lender to back away from a an accepted auction bid in a judicial foreclosure. Local law law provided for judicial confirmation of the sale. The lender decided, after the auction, to permit the borrower to complete a "short sale" of the property to avoid a deficiency, and withdrew its petition for confirmation. The court specifically stated that, under Illinois, law, the foreclosure sale purchaser had no right to control whether the sale went through for confirmation. (The foreclosure purchaser got its money back, of course.) Certainly a different philosophy from here.

Comment 2: In the instant case, should Udall, by all appearances a veteran foreclosure sale shopper, have been entitled to assume that there was no error when this huge bargain appeared on the foreclosure list? The court certainly felt that Udall was entitled. Compare the view of the same court in 1988 in *Glidden v. Municipal Authority of Tacoma,* 11 Wash. 2d 341, 758 P. 2d 487 (Wash. 1988), where the court dealt with the question of whether a bidder was a BFP as to a trustee's error in notifying a junior lender of the sale. Under the statute at the time, a BFP enjoyed a conclusive presumption that the sale is technically valid. The court held that, even though the trustee insisted that she had notified the junior lienholder, it was still a question of fact whether the foreclosure purchaser should have accepted this at face value when the junior had a significant economic interest to protect at the sale. It remanded for more factual analysis.

Comment 3: According to Arizona lawyer, Michael Denious, in Arizona (also a trustee sale state), the sale is not deemed completed until actual payment of the bid price. See *In re Benson*, 293 B.R. 234 (D.Ariz.Bkr. 2003), which interpreted the Arizona trustee sale statutes to conclude that the sale of property was complete, so as to cut off a Chapter 13 debtor's statutory right to cure the prepetition default, only upon payment in full of the bid price. (NB: In Arizona the prevailing bidder must pay the bid price in full by 5 p.m. on the next business day following the auction; following that, the recordation of the trustee's deed is a ministerial act.)

The Reporter for this case was John Weaver of the University of Seattle Law School, although most of the text above was in fact substituted by the editor into John's useful brief summary.

MORTGAGES; FORECLOSURE; FINALITY: Trial court has discretion to vacate a foreclosure sale that occurred after the mortgagor's pre sale statutory right of redemption had elapsed, for purpose of facilitating a "short sale" by mortgagor with mortgagee's consent, notwithstanding objection by the foreclosure purchaser. ***Household Bank, FSB v. Lewis, 2008 Westlaw 2132467 (Ill. 5/22/08).***

Mortgagor defaulted on a home mortgage held by Bank. On August 27, 2003, Bank filed a foreclosure complaint and moved for an entry of default judgment. In March 2005, the trial court entered a judgment of foreclosure and sale specifying that the statutory period for redemption would expire on June 17, 2005.

On June 21, Greenwich purchased the house at the foreclosure sale, paying substantially less than the debt. Bank filed a motion to approve the sale, but later continued the motion to allow Mortgagor to negotiate a short sale. Two weeks later, Bank withdrew its motion to confirm and filed a motion to vacate the sale to Greenwich, so as to allow a short sale by the Mortgagor to Tate for a sum greater than the price to be paid by Greenwich. The trial court vacated the judicial sale to Greenwich, and a month later mortgagor sold the property for one third more than the foreclosure bid, and Bank accepted such payment in full satisfaction of the defaulted debt.

Greenwich appealed the trial court's vacating of the sale. The Illinois Court of Appeals reversed, but the Supreme Court of Illinois took the case and affirmed the trial court.

In Illinois, "a judicial foreclosure sale is not complete until it has been approved by the trial court." *Washington Mutual Bank, FA v. Boyd*, 861 N.E.2d 1041, 1041 (Ill. App. Ct., 2006). The court of appeals had reasoned, nevertheless that a trial court must approve an order confirming a judicial sale unless it finds that justice is not otherwise done. *Id*. But here's what the statute says:

"Upon motion and notice in accordance with court rules applicable to motions generally, which motion shall not be made prior to sale, the court shall conduct a hearing to confirm the sale. Unless the court finds that (i) a notice required in accordance with subsection (c) of Section 15-1507 [735 ILCS 5/15-1507] was not given, (ii) the terms of sale were unconscionable, (iii) the sale was conducted fraudulently or (iv) that justice was otherwise not done, the court shall then enter an order confirming the sale." 735 ILCS 5/15-1508(b) (West 2004).

The lower court of appeals had reasoned that, although the short sale price to Ms. Tate exceeded the judicial sale price to Greenwich, the trial court abused its discretion by vacating because Greenwich had participated in a proper sale following the expiration of any redemption right in mortgagor. Thus, there was no injustice.

But the Illinois Supreme Court noted that a final sale was complete only after the mortgagee had filed a motion for confirmation. It seemed to be of the view that such motion would terminate any independent discretion by the trial court. Here, the Bank did file such a motion, but withdrew it after the mortgagor convinced it that a short sale was possible.

In essence the court took the view that Bank, the plaintiff in the foreclosure proceeding, was in control of the litigation, and could terminate it at any time until the proceedings were final. As to the expectations of the foreclosure sale purchaser, the court simply stated that there weren't any, at least not until the judicial foreclosure process has run its course and title is confirmed in the purchaser. And, although this of course might lead to some interference with commercial expectation, the court concluded, the price was worth paying, at least until the legislature concluded otherwise:

Greenwich's argument presupposes that protecting the position of third-party bidders should be the preeminent principle guiding our construction of the laws governing judicial sales. We find no support for that view. It is true that our court has long recognized the need to promote stability in the conduct of judicial sales so as not to " 'impair that confidence so essentially necessary to induce persons to become purchasers when real estate is offered for sale under a judgment or decree of a court.' " . . . At the same time, however, the courts have also consistently held that the law favors redemptions . . . and protection of a mortgagor's equity in the property . . . (Citations omitted)

Comment: The bottom line rule that the interests of the mortgagee, but not the interests foreclosure purchaser, are relevant in adjudicating finality to the judicial foreclosure process, is a clear policy decision that indeed the Illinois legislature ought to consider.

Compare: In the Bankruptcy Court, a mortgage default cannot be cured once the owner's right to redeem under state law has expired and, in New Jersey, the redemption period is measured from the day the foreclosure sale is conducted, not from the later date when the Sheriff's deed is delivered. ***In Re Connors, 497 F.3d 314 (3d Cir. 2007),*** discussed under the heading: "Bankruptcy; Foreclosure; Redemption."

MORTGAGES; FORECLOSURE; "FORECLOSURE RESCUE" SCHEME: A lender making a loan to a "foreclosure rescue" artist has a duty to investigate the mortgagor's financial status, and whether it is engaged in fraud against the prior owner of the property. ***Mathurin v. Lost & Found Recovery, LLC, 19 Misc.3d 756, 854 N.Y.S.2d 629 (N.Y.Sup.2008)***, discussed under the heading: "Lender Liability: Duty to Detect Fraudulent Schemes."

MORTGAGES; FORECLOSURE; PARTIES: Mortgagee, or legal assignee, is party plaintiff to mortgage foreclosure action in Illinois, and servicer cannot foreclose in its own name. ***Bayview Loan Servicing v. Nelson, 2008 Westlaw 2440621 (Ill. App. May 21, 2008)***

This case mirrors trial court decisions from around the country that are part of the ongoing battle between foreclosing securitized lenders and defaulted home mortgagors. Obviously a rising tide of foreclosure specialist lawyers are finding adequate support to raise defenses in these cases.

The court treats as an obvious and irrefutable reality that Illinois law requires the mortgagee to be a party plaintiff in a foreclosure action. The lender here demonstrated that the mortgage had been assigned from the original mortgagee to a Limited Partnership named Bayview Financial Trading Group.. But the plaintiff, although sharing the name Bayview, was a different legal entity, serving as servicer to the Partnership. Not good enough, said the court, reversing summary judgment entered in favor of the lender. Remanded, but it's clear the mortgagee will have to show up in court.

Also see ***DLF Mortgage Capital, Inc. v. Parsons, 2008 Westlaw 697400 (Ohio App. 3/13/08)*** (unpublished) (summary judgment for lender inappropriate where there is nothing in the record except an affidavit from lender's officer that it owns the note. Mortgagee's production of a recorded assignment attached to the appellate brief, where the recording occurred subsequent to the summary judgment, is insufficient to justify affirmation. Remanded.)

Comment 1: The court doesn't describe the details of the servicing agreement, concluding only that it didn't meet the standard. Should it? Should the mortgagee be able to sue through a surrogate? On the other hand, why can't the mortgagee be a party? Are there "doing business" problems? What else. Note that in the Ohio case there was an assignment to the servicer in the end, but too late to get past a reversal. Presumably, if there are no statute of limitations problems, the mortgagee now will proceed below to prove its ownership.

Comment 2: Note that neither the Illinois or Ohio decisions in fact required that assignments be recorded. But there must be some evidence of assignment, apparently, beyond the naked affidavit of a mortgagee officer, to support summary judgment, at least when the mortgagor is contesting ownership. Would this be the same where the mortgagor doesn't appear? The editor guesses that the answer is no, but he's not sure, given the new judicial attention to these issues.

Comment 3: This problem isn't going away, so the mortgage industry is going to have to develop a method of proving ownership in the name of the foreclosure plaintiffs in judicial foreclosure states.

MORTGAGES; FUTURE ADVANCES; DRAGNET CLAUSE: An advance that otherwise would be beyond the scope of the dragnet clause in a senior mortgage will not be permitted to prime a junior mortgagee even if the senior mortgage contains broad terms permitting modification of the senior lien. ***Nature's Sunchine Products, Inc. v. Watson, 174 P.3d 647 (Ut. App. 2007)***

Watson borrowed $75,000 from First Security Bank, apparently agreeing to a "home equity line of credit" mortgage on certain property. The court states that the security was "valuable property" and, since it described the loan as a "home equity line of credit," we must assume that he lived there.

The mortgage contained a both a dragnet clause and a modification clause. The language becomes relevant, so we'll set both clauses forth here.

First, the dragnet clause:

"FOR THE PURPOSE OF SECURING (1) payment of all obligations now or hereafter arising pursuant to or otherwise related or connected to that certain "First Security Home Equity Line Agreement, Note, and Disclosure Statement" of even date herewith executed by the Trustor (the "Agreement"), which Agreement evidences a revolving credit line in the maximum principal sum of SEVENTY FIVE THOUSAND AND 00/100 Dollars ($75,000.00) together with interest, costs, and expenses, as therein provided, payable to the order of Beneficiary at the times, and in the manner and with interest as therein set forth, together with any extensions, renewals, modifications, and future advances thereof or thereunder; (2) the performance of each agreement of Trustor herein contained; (3) the payment of all sums expended or advanced by Beneficiary under or pursuant to the terms of this Trust

Deed and/or the Agreement, together with interest thereon as provided therein."

The modification clause, contained in paragraph 10, provides in part as follows:

At any time, and from time to time upon written request of Beneficiary, . . . Trustee may . . . grant any extension or modifications of the terms of the Agreement[.]"

Seven years later, Watson borrowed $775,000 from NSP, secured by a trust deed on the same property.

Four years later, First Security Bank assigned its first mortgage interest to Waters. We're not told what the balance of the mortgage was at that time, but presumably it did not exceed the $75,000 cap in the line of credit.

Five years after that, Watson was in default on the note to NSP and NSP was preparing to foreclose. Waters assigned the senior mortgage debt to MoneyCode, which purported to "modify" the mortgage pursuant to the modification language set forth above to turn it from a $75,000 mortgage into a $1,320,000 mortgage. This was done on the very day that Waters assigned to MoneyCode. The very next day, NSP completed its trustee's sale. A few weeks after that Watson signed a deed in lieu of foreclosure to MoneyCode and MoneyCode leased the property back to Watson, who remained in possession.

Guess what? NSP didn't think all this was quite kosher. Claiming ownership under its own trust deed, it brought a summary possession action against Watson. MoneyCode responded by declaring a default on the $1,320,000 note, apparently setting up to foreclose away NSP. NSP brought a lawsuit challenging, basically the priority of MoneyCode to the $1,320,000 claim. NSP admitted that the $75,000 originally contemplated principle had priority over its mortgage, but disputed whether the parties had the right to "modify" the mortgage to effectuate what was essentially a massive future advance. The court noted that a provision permitting modifications does permit a senior lender to modify its loan, even to the detriment of a junior lender. Restatement of Mortgages Section 7.3(c) And of course the junior lender had constructive notice of the provision permitting modifications. But that massive change of almost $1.3 million in principle amount was not a modification within the contemplation of the original mortgage, it was a "future advance." Of course, the future advance clause in the prime mortgage had a specific dollar limit, and otherwise consistent with the purposes of the original line of credit agreement. The court read this future advances clause as an implicit limitation on the right of the parties to modify the mortgage pursuant to the modification clause. It concluded that any other reading would be unfair to junior lenders, as they would be misled by the future advance clause into believing that only increases in principle pursuant to that clause would be permitted.

Comment 1: The editor has drafted an article on this subject that he published as PLI course materials. It can be found on the DIRT website: www.umkc.edu/dirt His conclusions are similar to those reached by Nelson and Whitman with respect to the modification right. Modifications that may be injurious to the security of juniors are permitted (by agreement of the mortgagor and mortgagee) but likely *not* future advances unless they are otherwise permitted by law or the agreement. The editor is not necessarily in line with the Restatement on future advances, as it attempts to engraft what is essentially a statutory approach into the common law, but acknowledges that the current common law "optional/obligatory" test is problematic as well. That debate about future advances is beyond the scope of this discussion.

Comment 2: Unfortunately, to the editor, the appeals court's is all over the place with respect to its reasoning. For instance, it notes that the instant mortgagee is two places removed from the original mortgagee, and suggests that this makes a difference with regard to the validity of the modification. Of course, it might well make a difference if we were talking about a future advance. There certainly is an argument that one shouldn't traffic in future advance rights. But is it appropriate to permit junior lenders to limit the right of subsequent transferees of the mortgage to effectuate modifications other than advances if the mortgagor so agrees? The editor would not so limit a modifications clause.

Comment 3: The court also goes on and on about how various modifications might be injurious to juniors, citing cases decrying such occurrences. But the authority deals almost exclusively with situations in which the modification was not contemplated by the prime mortgage. The court seems to agree with the Restatement (and the editor) that (other than future advances) the parties can draft an enforceable modifications clause valid against juniors. So the discussion about injury to juniors in the case, which takes up a good deal of the discussion, is superfluous.

Also see: *Cottingham v. The Citizens Bank, CV-01-14, 2003 Westlaw 133246* (Alabama 1/17/03) (A mortgage that provides that it secures a certain note, "and all renewals, extensions and modifications," shall not be construed as a note securing future advances, and consequently, when the loan balance is paid down to zero, the mortgage is deemed cancelled.)

MORTGAGES; SATISFACTION; "PROMPT SATISFACTION" STATUTES: A lender that records a satisfaction of a mortgage within the time allowed by the state's mortgage payment statute is not liable for statutory damages, despite the fact that the lender did not "deliver" the satisfaction to the mortgagor as required by the statute. ***Huber v. Wells Fargo Home Mortgage, Inc., 248 S.W.3d 611 (2008).***

The Hubers borrowed money on a home mortgage loan from Franklin, a mortgage banker. The loan was subsequently sold on the secondary market to Wells Fargo. On February 6th, 2004 they paid off the mortgage. Wells Fargo acknowledged receiving payment, and on February 23, the mortgage satisfaction (a "deed of release) was recorded.

The mortgage satisfaction statute in Missouri, Mo. Rev. Stat. §443.130, was revised in 2004, but the revision was not in effect when these events occurred. Prior to the revision, the statute required the mortgagee to "deliver to the person seeking satisfaction a sufficient deed of release," within 15 days of receiving a demand letter from the mortgagor. Failure to do so would subject the mortgagee to penalties of ten percent of the loan amount.

On March 4, 2004, the Hubers (who had apparently had a conversation with a lawyer in the meantime) sent a demand letter to Wells Fargo. The bank responded by returning the Huber's check for recording costs and explaining that the satisfaction had already been recorded. The Hubers then filed this suit to recover the statutory damages.

The court wasn't buying. While the statute literally required a "delivery" of the satisfaction to the mortgagors, the court said that its purpose was "to enforce the duty of the mortgagee to clear the mortgagor's title so that the record is no longer encumbered." Since Wells Fargo had done this already, it had complied with the purpose of the statute, even though it did not literally comply by delivering the satisfaction to the Hubers.

Reporter's Comment: Courts don't generally like heavy penalties for failure to satisfy mortgages, and the old Missouri statute was one of the heaviest. As a result, there was a long string of decisions refusing to apply it for various technical reasons. Here, at least, the reason wasn't a technicality. The court was correct that the Hubers got what was really important to them, even though they didn't get a literal delivery of the satisfaction.

The 2004 amended version of the statute reduces the penalty to $300 per day, extends the lender's time to provide the satisfaction to 45 days after payment is made, and requires the lender to "submit for recording" the satisfaction, not to deliver it to the mortgagor. Thus the statute has become far less Draconian. It will be interesting to see if the courts become more willing to enforce it, since in general, one would expect that the heavier the penalty, the harder the courts will work to avoid enforcing it.

The Reporter for this item was Dale Whitman of the Missouri, Columbia law school, emeritus.

MORTGAGES; SUBROGATION; CONSTRUCTION LOANS: A permanent mortgage may not claim subrogation to a construction mortgage in order to gain priority over an intervening mechanics lien. ***Lawson v. Brian Homes, Inc., ____ WL______, ______ So.2d ______ (Ala, Jul. 18, 2008)***

This case presents a simple but challenging fact pattern. Brian Homes built houses in a subdivision, financing the work with a construction loan obtained in 2003 from New South Federal Savings Bank, whose mortgage was properly recorded. During the course of construction, Brian hired Lawson to perform work on the houses. Brain failed to pay Lawson for her work. In January 2004 the completed homes were sold, and the buyers all obtained "permanent" loans from other lenders. After these closings occurred, but within the time allowed by the Alabama mechanics lien statute, Lawson recorded a notice of mechanics lien.

The Alabama mechanics lien statute gives mechanics liens a priority date as of the date work commences on the project, and provides that liens are subordinate to mortgages recorded before work commences. However, it states that mechanics liens have priority over mortgages created after work commences. Ala. Code 35-11-211.

On the face of things, the permanent loans would appear to be subordinate to the mechanics liens, which is what Lawson argued. However, the permanent lenders claimed that they should be subrogated to the priority of the construction loan, which they had paid off, and hence gain priority over the liens. The Alabama Supreme Court ultimately rejected the subrogation argument and held that, under the statute, the liens had priority.

The court employed three arguments in rejecting subrogation, each of which is discussed below:

1. *The "same debtor" argument.* The court quoted prior Alabama case law that had held the first element of equitable subrogation was that "the money is advanced at the instance of the debtor in order to extinguish a prior incumbrance." In the present case, the court observed that the money advanced by the permanent lenders was lent not at the request of the original debtor (Brian Homes) but at the request of the individual buyers who were purchasing the homes.

This is a rather mechanistic argument, but it raises a genuine policy issue: should subrogation be available for a refinancing in connection with a purchase of the property, or only when there is a refinancing by the same owner? There is surprisingly little discussion of this issue in the cases. Several recent cases have granted subrogation in the context of a sale of the property and new financing by the new owner. *See In re Project Homestead, Inc.*, 374 B.R. 193 (Bkrtcy.M.D.N.C. 2007); Ocwen Loan Servicing, LLC v. Williams, 305 Wis.2d 772, 741 N.W.2d 474 (Wis.App.2007); *Decaro v. M. Felix, Inc.*, 371 Ill.App.3d 1103, 864 N.E.2d 890 (Il.App. 1 Dist.,2007). But none of these cases appear to recognize that the issue is controversial or attempt any serious discussion of it. I'm aware of only one case that does: *E. Boston Sav. Bank v. Ogan*, 701 N.E.2d 331 (Mass. 1998), where the court said:

Because we find that the equities are substantially similar in refinancing and sales transactions, and that application of equitable subrogation to a sale is consistent with our precedent, we hold that equitable subrogation applies in this case. . . . [T]he distinction between a sale and a refinancing exists, but subrogation arising out of either context yields the same result.

For what it's worth, the Restatement expressly includes sale transactions within its definition of subrogation; Rest. (Third) of Property (Mortgages) §7.6(b)(4) speaks of a payment of a mortgage "upon a request from the obligor or *the obligor's successor* to do so." (italics added)

The bottom line is that the Alabama court in *Lawson* applied the "same debtor" argument mechanically and without giving any reason that it ought to be the rule. In this respect, the opinion is weak and unconvincing.

2. *The lender must be ignorant of the intervening lien.* The court held that subrogation will only be available where the refinancing lender lacks notice of the intervening lien. Prior Alabama case had held that anyone who buys a new building "has constructive notice that material used to build the structure may not be paid for," and therefore has notice that there may be a mechanics lien filed on the property.

Since this sort of notice *always* exists when the intervening lien is a mechanics lien, it is tantamount to saying that no lender can ever use subrogation to gain priority over a mechanics lien. Of course, the real culprit here is the basic structure of the lien law, which allows the lien claimant to file up to 6 months (for general contractors) or 4 months (for subcontractors and materials suppliers) after the last item of work on the project has been completed. (Ala. Code §35-11-215) Thus, for a period of up to 6 months, the impending lien can be *secret*, and impossible to find by any title search.

This is, of course, outrageous in terms of public policy, but it is well-established in Alabama and many other states. Contractors, lumber yards, and others in the construction business love it. It has the effect of making buyers and their lenders responsible for the unpaid bills of the builders of newly-constructed real estate. There is no satisfactory way that buyers and their lenders can guard against this risk. Getting lien waivers is fine as far as it goes, but it's impossible to be sure that all of the people who have supplied labor or materials have signed waivers. One might buy title insurance against the risk, but many title policies sold don't cover it. Because some policies do, it is the largest single source of title insurance claims. It's difficult to believe that a civilized society puts up with this sort of rule, but we do.

Rant over! Alabama has made its choice on this point. And if buyers and their lenders are generally subject to intervening (and secret) mechanics liens, why should the doctrine of subrogation bail them out? That seems to be the court's position: the statute says that later lenders are the losers, and by golly, they're losers!

3. *Subrogation to a construction loan would be unfair to the intervening lienor.* This third argument against subrogation was made only by the concurring opinion of Justice Lyons, but it may be the most persuasive. Everyone agrees that subrogation is proper only if it will (in the Restatement's words) "not materially prejudice the holders of intervening interests." If subrogation is granted, the mechanics lien claimant, who was previously subordinate only to a short-term construction loan, will now be subordinate to a 20-year or 30-year permanent loan. That sort of switch, the argument goes, is detrimental to the lien claimant. This argument makes some sense. If the construction loan had gone unpaid, it would likely have been foreclosed quickly. With a long-term loan as a substitute, it's likely that the borrower will make the payments and no foreclosure by the senior lender will ever occur. The lien claimant can foreclose the lien, of course, but if it's subject to a senior mortgage for a large amount, maybe foreclosure of the lien will produce little or nothing to pay the lien.

Reporter's Comment 1: Bob Harris, a very experienced Alabama lawyers who filed a brief in the case arguing against subrogation, made the following additional argument in an e-mail to me.

It has long been my view that the dynamics of a construction loan mortgage situation are quite different from those involved in conventional permanent lending. Typically the construction lender loans a lower percentage of the expected improvement value and the loan term is much shorter. Also, typically an ongoing business relationship exists between a construction lender and a developer that does not exist where a lender makes a long term loan to a home buyer. Even threats of prosecution by unpaid contractors against a construction loan borrower frequently cause the developer to find funds and either pay the contractors or satisfy the construction lender so that a release of the property subject to a lien is given. These considerations are taken into account by a material supplier when asked to extend credit to a developer; and while the supplier may be willing to extend credit subordinate to the construction loan mortgage that same supplier would not extend the credit as subordinate to a mortgage given to a permanent mortgage lender.

Thus, I would argue that the Restatement Subrogation view should not be applicable to a "refinancing" by a permanent loan borrower of a debt secured by an earlier construction loan debtor, where there are intervening statutory liens. Indeed, I do not think the buyer of a new residence who gives a mortgage to secure funds with which to purchase a house, a part of which is paid to secure the release of a lot from a construction loan mortgage, can in any legitimate sense be regarded as "refinancing" the construction loan debt.

I'd be interested in whether DIRT readers find these argument convincing. If you represented a mechanics lien claimant, would you rather be subordinate to a construction loan than a long-term loan?

Reporter's Comment: 2: The court says that its position is approved by an illustration in the Restatement, but that's not quite accurate. The illustration, which is in Restatement s7.6, comment f, involves a different fact pattern, one in which there is a delay of a few days between the satisfaction of the old construction mortgage and the recording of the new long-term mortgage, and the work of construction commences during that period of delay. The illustration says the court is justified in refusing to grant subrogation because it would unjust to the lien claimant to do so. That's true, of course, because when the lien claimant commenced construction, the public records would have indicated that there was no prior mortgage on the property. But it's quite different from *Lawson*, in which the lien claimant knew full well, when she did the work on the land, that there was a construction loan that would have priority over any lien that might be filed. In effect, *Lawson* holds that the lien claimant "lucked out" by virtue of the fact that the construction loan was replaced by a permanent loan.

Editor's Comment: This case illustrates a very important point that the editor, candidly, has lost sight of, assuming he ever knew it. The subrogated position is as to the new loan, at least insofar as the equities are appropriate. And if, as here (see the third argument above), the equities are inappropriate, subrogation is denied entirely. The editor certainly, in his ruminations about this before, has speculated that the subrogating loan not only gets priority as to the original loan, but also the terms and conditions of that earlier loan. Apparently, according to Dale, after research, this is not the situation. The court will install the new loan (up to the amount paid to the earlier loan) on the new loan's terms, so long as not equitably injurious. Since the editor has researched the question of whether a mortgagor and mortgagee can modify a loan (even without a provision so permitting) and has generally concluded that they can, this is not a surprising result. But what is interesting is that if the court should conclude that giving the new lender's terms priority is not equitable, it apparently will not elect to give the new lender the old lender's terms. It will just deny subrogation entirely.

In the instant case, where the construction loan probably had past its due date and had been paid off by the individual mortgage loans to the purchasers, it would not have made any sense to grant subrogation to an expired loan.

The Reporter for this item was Dale Whitman of the Missouri, Columbia Law School, emeritus.

MUNICIPAL CORPORATIONS; DEMOLITION; LIENS: Despite the fact that property owner has notice that the city has defects in the property and will demolish the improvement is the defects are not repaired, the city has a statutory obligation to provide a property owner with prior exact notice and a hearing before demolishing the improvements. . ***Gamba v. Township of Brick, 395 N.J. Super. 143, 928 A.2d 147 (App. Div. 2007)***

A municipality issued a complaint letter to a landowner stating that his property had become so out of repair as to be unsafe and unsanitary and that repair might be necessary. However, the letter did not advise the owner of his right to file an answer to the charges. This was required by statute. Although the letter indicated the date and time of a hearing, the municipality did not schedule the hearing at least seven days after the serving of the complaint, as required by law. The owner asked for an adjournment which would have cured the timing problem, but the request was denied. Subsequently, the municipality failed to give timely notice of demolition proceedings, and the initial order did not clearly notify the owner that the house would be demolished. Rather, it presented a remediation schedule of tasks that the owner should undertake. Ultimately, the municipality demolished the home and billed the owner for its costs. The owner sued the municipality, alleging that the municipality failed to give him proper prior notice and a hearing before demolishing his house and before imposing a lien for the demolition costs. The lower court held that the municipality did not follow statutory procedures, but nonetheless instructed jurors at trial that the owner could not prevail if he had actual notice that his house would be subject to demolition and thereafter did not make the repairs required by the municipality. The matter was appealed by the owner.

The Appellate Division acknowledged that statutory law gives municipalities the authority to demolish or cause or require the repairing, closing or demolishing of buildings that are unsafe or dangerous or harmful to the health and safety of residents of the municipality. However, the Court observed that a municipality must exercise that authority in the manner provided under the statutes. It restated that strict compliance with procedures relevant to notice and hearings is required in municipal demolition proceedings where an intrusion or substantial property right may result.

The Court additionally noted that a second complaint and second hearing was required prior to any demolition where the municipality's intention and right to remove or demolish is not clear. It observed, in the instant matter, that the initial order did not include any requirement on the owner to begin removal or demolition within a specified time. The Court also noted that a second demolition order in which the municipality had advised the landowner that it could demolish the structure and remediate all code violations did not give a start date for such action. Thus, it violated statutory procedures.

The Court generally stated that the purpose of all such statutory procedures is to give those with an interest in property adequate advance notice so that they could challenge the charges that the structure was unfit or the requirement to make necessary repairs, and if demolition is required, to make the necessary arrangements in a manner and cost satisfactory to them. Here, the Court concluded that the municipality did not substantially comply with procedures that would afford adequate notice and fairness to the owner of the property. The notice given by the municipality of the potential for demolition of a property at an unspecified future date neither satisfies nor substantially complies with the municipality's statutory obligations to provide the property owner with prior notice and a hearing. Therefore, it reversed the lower court's dismissal, stating that the owner was entitled to a jury instruction directing that the municipality's demolition of the owner's property was unauthorized.

Comment: The question of whether actual notice will suffice when technical notice is lacking is one that comes up constantly in real estate matters, and is answered inconsistently from matter to matter and among jurisdictions. Here, it appears that the notice requirement actually would have given the plaintiff an opportunity to object formally to the city's complaints and demolition plan, even though one suspects that there had been a lot of give and take and informal discussions.

Although phrased as a statutory interpretation case, the editor suspects that Constitutional Due Process would require than an owner receive adequate notice and an opportunity to a hearing before at least a quasi-neutral party with some procedural protections before the city has the right to tear down the building and slap the property with the lien.

NUISANCE; "STIGMA:" The escape of natural gas from a facility, and a resulting explosion, although actionable by parties in fact injured through damage or interference with use, cannot sustain a judgment of liability to property of nearby residents who sustained no such injury, simply because of the perceived stigma among the land-buying public. ***Smith v. Kansas Gas Service Co., 169 P.3d 1052 (Kan. 2007)***

After explosions and geysers of gas and brine occurred at various locations in the city of Hutchinson, Kansas, experts determined that the source of the problem was natural gas escaping from the well casing that was part of a natural gas storage facility located near the city. The escaped gas had purportedly migrated through a porous geologic formation and had risen to the surface in the city through abandoned brine wells that were not properly plugged. After the incidents, deep well vents were installed to allow the gas to escape into the atmosphere.

Various property and business owners settled their damage claims against the storage facility, but a class of property owners whose property had not suffered physical damage brought action claiming loss of the quiet enjoyment of their property. Eventually it was determined that no actual physical intrusion, interference or injury had occurred on any of the plaintiff properties. Witnesses at trial testified as to difficulty in selling their properties. The plaintiffs obtained a jury verdict for nearly $8 million dollars of damages, but this was all reversed by the state supreme court on appeal.

The Kansas Supreme Court noted that no evidence established loss of market value based on any physical injury to the real property or on any interference with the use and enjoyment of the property. Instead, the testimony as to loss of market value was based on a perceived stigma or fear among the buying public, whether or not the fear was factually or scientifically justified. Although stigma damages are recognized in Kansas, it is only in cases where the property has sustained physical injury as a result of the defendant's conduct. Thus, in Kansas a property owner cannot collect damages, under either a negligence or nuisance theory, for diminution in property value caused by stigma or market fear relating to accidental contamination when neither injury to nor interference with the property has occurred.

Comment 1: The case is significant because Kansas has precedent awarding "stigma" damages for perceived danger of electromagnetic interference as part of an eminent domain claim. This is the minority rule nationwide, and indicates that Kansas is somewhat more receptive to the notion of "stigma" claims. But the claim didn't work here.

Comment 2: The court cites decisions from a number of other jurisdictions that also have denied stigma claims. Interestingly, it cites no authority for the contrary position, although plaintiffs were represented by competent counsel and one assumes would have brought such authority to the court's attention if it existed. Cases cited in agreement with the principle case include authority from Arkansas, California, Kentucky, Michigan, Mississippi, Pennsylvania, North Carolina and Utah.

SERVITUDES; EQUITABLE SERVITUDES; COMMON PLAN REQUIREMENT: Restrictive covenants listed on an undated and unsigned attachment to a deed that does not show on its face any encumbrances to the property can be enforced as an equitable servitude against a remote grantee if (1) the restrictions touch and concern the land, (2) the original parties intended them to run with the land (particularly if the covenant expressly states that intent), and (3) the remote grantee has actual notice of the restrictions. In such a situation, equity does not require a common plan of development if the grantor is the party seeking enforcement and if the remote grantee took title with actual notice. ***Gambrell v. Nivens, 2008 WL 539310, ___ S.W.3d ___ (Tenn. Ct. Appl. 2008).***

The Gambrells purchased 69 acres in Fayette County in 1991 and subdivided the parcel into four lots, selling three and retaining one 20-acre lot. In the deed for two of the lots (one of which was sold to Foshee), the Gambrells did not include any encumbrances in the applicable section of the deed. However, they did attach to the deed an untitled, undated, and unsigned page which listed several restrictions, and this page was recorded with the deed. Apparently recognizing their error, the Gambrells expressly incorporated the attachment into the third deed.

Foshee subsequently conveyed his lot to the Nivenses in 1996. The warranty deed evidencing that conveyance affirmatively represented that there were no encumbrances on the property. However, when Foshee put the lot on the market, he provided his real estate agent with a copy of the restrictions, and the agent later provided the copy to the Nivenses' agent, giving the Nivenses actual notice of the restrictions.

After acquiring the lot, the Nivenses began construction of a large wedding chapel and facility, which was in violation of the restrictions prohibiting commercial uses. The Gambrells filed suit seeking injunctive relief and damages, arguing that the restrictions precluded the Nivenses from constructing the wedding facility. In response, the Nivenses contended that their lot was unencumbered, the restrictions did not run with the land, and they had no notice of the restrictions when they took title to the property.

At trial, the court held in favor of the Gambrells, granting a permanent injunction against the Nivenses. The trial court reasoned that (1) the Nivenses had actual notice of the restrictions prior to the transfer of title, and (2) the attachment at least constituted a cloud on the title. On appeal, the court addressed three primary issues:

On appeal, the Nivenses argued first that under *Patterson v. Cook*, 655 S.W.2d 955 (Tenn. Ct. App. 1983), a plaintiff/grantor is estopped by the equitable doctrine of estoppel by deed from enforcing restrictive covenants that contravene the deed's apparent recital that the property is unencumbered. The court agreed that unsigned paper that the Gambrells had attached to the Foshee deed was not part of that deed, and that the warranty deed showed no encumbrances. Thus, to that extent it could be argued that the Gambrells were attempting to negate the quality of the title passed by their deed, which is grounds for invocation of the doctrine of estoppel by deed. The court, however, distinguished *Patterson* from the current situation on a variety of technical grounds, but most importantly because, unlike the party to be bound in *Patterson*, the Nivenses had actual notice of the restrictions in this case and accordingly, did not detrimentally rely on any express or implied representation that the property was unencumbered. Of course, estoppel by deed, like any estoppel, is an equitable doctrine, and Nivens had full awareness that the Gambrells and Foshee, Nivens' predecessor, regarded the property as encumbered and also the nature of those encumbrances.

Nivenses next argued that the restrictions could not be enforced as an equitable servitude because there was no common plan of development and the Gambrells did not similarly restrict their retained lot, as evidenced by the Gambrells growing their grass too long and Mr. Gambrell "strategically discharging his shotgun" during a wedding ceremony at the "wedding chapel" site. The court concluded simply that, although common plan analysis often was useful in the recognition of an equitable servitude, it was not a necessary element of the concept in every case.

To establish an equitable servitude in Tennessee, three basic requirements exist:, (1) a restriction must touch and concern the land, (2) the original parties to the restriction must have intended that it run with the land, and (3) the remote grantee must have had notice of the restriction. All of those factors were abundantly clear here. The court held that each of these elements was satisfied in this situation. The existence of a common plan might be useful to identify those persons whom the originally parties intended to benefit. Or it might be useful to demonstrate that a parcel was burdened by a set of restrictions by implication even though no express promise was made by a grantee of that parcel to be bound. But Tennessee courts have not established the existence of a common plan as a condition to recognition of an equitable servitude in every case.

First, the "touch and concern" requirement was satisfied by the building restrictions here. The court did note that the case did not clearly raise the question of whether an "covenant in gross" – with no benefitted parcel, would run with the land. Although it was not clear that the parties intended that Gambrells' successors could enforce the covenant, there was no question that Gambrells' land was benefitted by promise in the requisite way.

With respect to the second element, the record revealed that Foshee firmly believed that the terms of his contract included the restrictions (which he understood would run with the land for thirty years) despite the fact that this intent was embodied in undated and unsigned writings located below the signatures that did not constitute "part of the deed." While the written covenants failed in form, "the original covenanting parties confirmed their substance," and the firm language in the attachment clearly indicated Gambrell's intent that the covenants run with the land. Finally, the record established that the Gambrells had notice of the restriction.

Nivenses finally argued that when Foshees gave a warranty deed that stated on its face that there were no encumbrances, they released the covenants. The court quickly disposed of the last issue. All beneficiaries of the restrictions (most notably the shotgun toting Gambrells) must agree to a release in order for it to be effective.

Comment: An interesting further inquiry might be what liability Foshee might have on the warranty deed that denied the existence of covenants. Remember that simultaneously with delivery of the deed Foshee delivered a statement of the covenants and had informed the Nivenses of their existence. Although some might argue that some technical argument such as merger by deed or a Statute of Frauds bar might be used, a court, operating in equity, can and often will make happen what the parties clearly intended to happen, nothwithstanding the absence of technical niceties.

SERVITUDES; MODIFICATION; "CHANGED CIRCUMSTANCES DOCTRINE:" Where shopping center landlord agrees to provide shared parking rights and limit development of further commercial space benefitting from those rights, court will enjoin covenantee from exceeding the development limit notwithstanding arguments of "changed circumstances" due to changes in shopping center design. ***Pathmark Stores, Inc. v. Bernard Oster, Inc., BER-C-232-07 (N.J. Super. Ch. Div. 2008), Unpublished; March 28, 2008.***, discussed under the heading: "Easements; Scope."

SHOPPING CENTERS; EXCLUSIVE USE CLAUSES: Court upholds a clause requiring payment of $100,000 for breach of a restriction on competition in a shopping center lease. ***Valentine's, Inc. v. Ngo, 251 S.W.3d 352 (Mo.App. Southern Dist.2008)*** , discussed under the heading: "Landlord Tenant; Commercial; Shopping Centers; Exclusive Use Clause; Liquidated Damages."

SHOPPING CENTERS; PARKING RIGHTS: Where shopping center landlord agrees to provide shared parking rights and limit development of further commercial space benefitting from those rights, court will enjoin covenantee from exceeding the development limit notwithstanding arguments of "changed circumstances" due to changes in shopping center design. ***Pathmark Stores, Inc. v. Bernard Oster, Inc., BER-C-232-07 (N.J. Super. Ch. Div. 2008), Unpublished; March 28, 2008.***, discussed under the heading: "Easements; Scope."

TITLE; MARKETABLE TITLE; "AS IS" CLAUSE: City's right of reverter rendered title to property acquired at a foreclosure sale unmarketable, even where buyer agreed to accept property "as is" and subject to conditions and covenants of record.. ***NYCTL 1998-1 Trust v. Mayfield, 841 N.Y.S.2d 199 (Sup. 2007)***. Plaintiff, a trust that held city tax liens, held a foreclosure sale. The successful bidder paid a deposit and thereafter assigned its bid to movant. After doing a title search, movant discovered that the City of New York had a right of reverter. Two title companies declined to insure title over the reverter interest. Movant moved for an order staying the closing of the sale and directing plaintiff to cure the exceptions to title as a precondition to closing, or, alternatively, directing that the sale be vacated in its entirety and that plaintiff return the initial deposit to movant. The court noted that the terms of sale provided that the premises be sold in "as is" condition and subject to covenants, restrictions and easements of record. However, the terms of sale also provided that if the purchaser raised written objection to title, plaintiff had the option of providing fee title insurance, at purchaser's expense. Because plaintiff was unable to convey marketable title or obtain title insurance, the court found that plaintiff breached its obligation under the terms of sale. As a result, movant was not compelled to accept title as encumbered by the city's right of reverter. The court ordered that the foreclosure sale be vacated in its entirety and directed plaintiff to return the deposit to movant.

VENDOR/PURCHASER; BUYER'S REMEDIES; DECEPTIVE PRACTICES ACT: Breach of Contact of Sale by Vendor May Be a Violation of a State Unfair Practices Act. ***Schaumberg v. Friedmann, 888 N.E.2d 963 (Mass.App.Ct.2008)***

The vendor under a contract to sell a condominium unit refused to close or to remove encumbrances on the title. The court found this was a violation of the Massachusetts Unfair Consumer Practices Act and held the vendor liable for treble damages and attorneys' fees.

Friedmann contracted to sell a condo unit to Schamuberg and Dana. They gave Friedmann an earnest money deposit of $100,000. Their title examination disclosed several encumbrances, including a petition to foreclose a tax lien from the city of Cambridge, a tax taking from the city of Cambridge, and two writs of attachment. They notified Friedmann of the encumbrances and offered to extend the closing date to allow him time to remove them.

Friedman, however, refused to take any action to remove the encumbrances or extend the closing date. He also refused to return the purchasers' deposit. He became abusive and threatening to the purchasers. He offered a deed to the purchasers from a limited partnership, but provided no evidence that he had authority to convey in behalf of the partnership or had a power of attorney from it.

The trial court found that his behavior was "was done unreasonably and in bad faith in violation of G.L. c. 93A, § 9(3) [the Unfair Consumer Practices Act." The appellate court agreed. Because the Act was violated, the court ordered Friedmann to pay (1) damages to compensate the buyers for their inspection and appraisal fees (trebled); (2) their attorneys fees for both the trial and the appeal; (3) their attorneys fees in preparing for the closing of the sale (which never occurred); and (4) a return of their $100,000, with interest at12%.

Reporter's Comment 1: To be liable, Friedmann had to be classified as conducting "trade or commerce." The court found that he was, as he "routinely purchased and sold residential property in Massachusetts as well as other States, operating under the name "Friedmann Financial Company." He had sold seven other properties in Cambridge during the previous 25-year period. He held the condo unit as an investment and never lived in it. This seems to be a fairly minimal definition of "trade or commerce," but it was enough.

Reporter's Comment 2: The Act provides for treble damages, including "reliance" damages. The court indicated that Friedmann was lucky that the purchasers had not included their attorneys fees in preparing for the sale as damages; if they had done so, it would have been proper to treble them as well. The trebled inspection and appraisal fees amounted to only $2,925; if the attorneys fees had been trebled, they would have been $175,000!

Reporter's Comment 3: The Unfair Consumer Practices Act makes illegal "unfair methods of competition and unfair or deceptive acts or practices." How did this contract breach fit into that language? The court isn't specific on the point, but it is hard to see how Friedmann's conduct was an unfair method of competition or a deceptive act. This leaves only "unfair acts," and I suppose Friedman's behavior was indeed "unfair." Exactly how bad does a contract breacher's conduct have to be in order to fall within the Act? The standard is a bit vague, but apparently it requires a showing, not merely of a good faith difference of opinion as to the parties' rights, but "knowing and wilful" conduct, engaged in "unreasonably and in bad faith."

So this isn't your grandfather's breach of contract suit. Bringing in the Unfair Consumer Practices Act provides the plaintiff with much stronger remedies, including treble damages and recovery of attorneys fees. But not every contract breach will fit; the defendant must be in the "trade or business" of buying and selling real estate, and the breach must be fairly outrageous.

The Reporter for this item was Dale Whitman of the Missouri-Columbia Law School, emeritus.

VENDOR/PURCHASER; BUYER'S REMEDIES; RESCISSION: Condominium budget increase by developer does not warrant purchaser in rescinding contract. ***D&T Properties, Inc. v. Marina Grande Associates, Ltd., —- So.2d ——, 2008 WL 2356855 (Fla.App.2008).***

The developer of a condominium project increased the estimated budget for insurance, utilities, and an upgraded internet access system. A buyer argued that these were material adverse changes, allowing him to rescind the contract to purchase a unit. The court, however, found that they were not, and he was still bound to his contract.

In 2005 D&T contracted to purchase a condo unit under construction in Palm Beach by Marina Grande for $495,000, giving a $99,000 earnest money deposit. The developer had prepared a budget for the homeowners' association in 2004, but in 2006 it was revised upward by about 36%. Monthly assessments under the old budget would have been $490, while under the new budget they would be $670, or $180 per month higher. The increase resulted from higher costs for electricity and insurance, and the cost of an upgraded internet communications system for the building.

D&T claimed that this increase warranted it in rescinding the contract and recovering its earnest money. The court implies that D&T's *real* reason for wanting to rescind was the major fall in sale prices of condos on Florida's east coast.

Under the relevant Florida statutes, a purchaser was entitled to rescind if the developer made changes in the condominium documents "that materially alter or modify the offering in a manner that is adverse to Purchaser." It was clear that changes to the budget made by the developer were included within the scope of this right. By statute, however, budget changes that are "beyond the control of the developer shall not be considered an amendment that would give rise to rescission rights."

The court found that the increases in electricity and insurance costs were occasioned by market cost increases resulting from hurricane damage in Florida, and hence were "beyond the control of the developer." However, the upgraded internet service (which was estimated to cost an additional $90 per month) presented a harder question. It was obviously not beyond the developer's control, so the question was whether it was an amendment which "materially altered or modified the offering in a manner that was adverse to the purchaser."

The developer argued that it was not adverse because it added to the project's value, but the court refused to accept this argument, pointing out that it proved far too much. On this theory, "A developer's substitution of gold fixtures for those of stainless steel would not be adverse to the buyer because the new plumbing added value to the unit. The statute should not be construed in a way that defies common sense."

Nonetheless, the court found that the change was not "material." The term "material," it noted, "connotes something significant, a change that would 'appreciably affect or influence' the function, use, or appearance of the building. Our definition of 'material' calls for an objective test, not one that depends on the particular sensibilities of a unit owner." The court found the upgraded internet system was not a "material" change on three grounds:

(1) Improved internet service would be good for the residents and would benefit them. "Like electricity, internet access is becoming a necessity of modern life. Unlike a change from a beige to a hot pink exterior, this modification is one of which a reasonable buyer would approve."

(2) The improved internet service amounted to only 18.35 % of the original monthly budget – not a huge increase.

(3) On an annual basis, the cost of the internet service upgrade would be only .21% of the $495,000 contract price of the unit.

Finally, the court noted that it did not matter what D&T's *real* reason for rescinding was; they would be entitled to rescind if the statutory test was met. Here it was not, and no right of rescission accrued.

Reporter's Comment 1: While the rescission right here is based on the Florida condominium statutes, it is very likely that a court in a jurisdiction with no statutes on the point would reason in a very similar manner. It is basic contract law that a material breach by one party will discharge the other party from a duty of further performance. If the developer sufficiently changes the terms of the deal, for reasons that are within the developer's control, a purchaser should have the right to rescind in any jurisdiction.

Reporter's Comment 2: Is an 18.35% (or $90 per month) increase material? Bear in mind that, at a sale price of $495,000, these are not extremely high-end condos. Bear in mind that the unit purchasers are already being "hit" with an increase of $90 per month for higher insurance and electricity costs. In effect, the internet service upgrade doubled the budget increase. It sounds pretty material to me.

Reporter's Comment 3: Is the comparison of the budget increase to the capital cost of the unit relevant at all? It is hard to see why. Isn't this a case in which unit buyers are being forced to buy something that they didn't agree to, and that some of them, at least, don't want.

The reporter for this item was Dale Whitman of the University of Missouri -Columbia Law School. The editor, of course has edited, that being his wont.

VENDOR/PURCHASER; CONDITIONS; FINANCING: A buyer under a real estate contract can waive a financing contingency provision that would otherwise automatically terminate the contract by taking actions subsequent to execution of the contract which are inconsistent with such termination. ***Crabby's Inc. v. Hamilton, 244 S.W.3d 209 (Mo.App. S.D.,2008.)***

Seller operated Crabby's restaurant in Joplin, Missouri. Seller listed the restaurant and accompanying real property for sale in 2003, and accepted an offer for $290,000 from one Hamilton who later assigned his interest in the contract to Buyer.

The sale agreement The contract contained a clause providing that the contract was contingent upon the Buyer's ability to obtain financing at certain specified terms, including a requirement that Buyer furnish Seller a copy of an effective loan commitment within 30 days from the effective date of the contract. Though Buyer never furnished Seller with the loan commitment, financing arrangements were made, and the contract and closing date was extended in order to complete repair work on the property.

Subsequently, Buyer sent a letter to Seller indicating its intention not to close the transaction on the grounds that (1) fixtures were removed by Seller from the property; and (2) tax liens existed on the property (these were satisfied as of the date set for closing), and failed to appear on the closing date. Seller later sold the property for $235,000, and filed suit against Buyer for breach of contract, seeking (among other costs) damages constituting the difference in the sales price agreed upon by Buyer and the price actually obtained when the property finally sold. The trial court entered a judgment in favor of Seller, and Buyer appealed.

On appeal, Buyer argued that it did not breach the contract by refusing to close because the contract automatically terminated by its terms when Buyer did not furnish a copy of an effective written loan commitment as required by the financing contingency provision noted above. Seller responded that Buyer waived the financing contingency provision by its conduct after entering into the contract.

The court began its analysis by noting that financing contingency provisions protect the buyer, and as such, they are a condition of the buyer's duty. Further, a buyer "can elect to waive the contingency and proceed with the contract under the rule that a party may waive any condition of a contract in that party's favor."

While the contract "automatically terminated" by its explicit terms when Buyer did not furnish Seller with an effective loan commitment within 30 days, Buyer's actions after the 30-day period expired were inconsistent with a termination. Specifically, Buyer executed two amendments to the contract which extended the closing date, as well as a rider to the contract granting the Buyer the right to take possession of the property prior to closing. Buyer accepted a key to the property, changed utilities to its own name, and obtained licensing to operate a restaurant on the property. Buyer also did in fact obtain financing, which was not on the terms specified in the contract but which was nevertheless the only loan Buyer ever applied for, and Buyer did accept it. Therefore, the court concluded that, "the only reasonable explanation possible for and consistent with Buyers' signatures on these documents is their waiver of this contract requirement and the resulting automatic termination of the contract."

Comment 1: Although in general financing conditions protect buyers, they can also protect sellers, and certainly the requirement that a written commitment be produced within thirty days is the kind of requirement that protects the seller, giving the seller comfort that the closing indeed will occur. It is of little advantage to buyer. But the statement that the contract was void if the commitment was not delivered has an absolute tone to it, and perhaps it should matter who is the beneficiary. What it says is what it says. If Buyer had pulled out on the basis of that clause immediately, it might have had a claim, albeit an unintended benefit.

Comment 2: Despite the drafting glitch, the court properly regarded the clause from the buyer's standpoint as fundamentally nothing more than a "subject to financing clause" that could be waived. The woods are full of similar cases. If you intend to exercise a condition – do so. If you continue to move toward a closing, waiver is just around the corner.

VENDOR/PURCHASER; MISREPRESENTATION; CONSTRUCTIVE NOTICE: A seller's disclosure of an easement does not automatically place a purchaser of real estate on constructive notice of the terms of that easement and impose a duty to investigate further, particularly in the contexts of misrepresentation or mutual mistake. ***Insko v. Ransdell, ___ S.W.3d ___ (Ky. Ct. App. 2008) (unpublished).***

Insko approached Ransdell in 1999 about a 0.75 acre lot Ransdell was offering for sale. Eventually, the parties reached an oral agreement on a $12,000 purchase price. Ransdell informed Insko of a utility easement that diagonally bisected the lot, but that according to Ransdell would not interfere with Insko's plans to build a log cabin and leather shop on the lot. Insko made installment payments on the lot for a year, at which time Ransdell delivered a deed to the lot. Subsequently, Insko learned the easement was 150 feet wide, and that due to setback and zoning restrictions, essentially nothing could be constructed on the lot. As a result, Insko brought an action against Ransdell for rescission of the deed and refund of the purchase price.

The trial court granted Ransdell's motion for summary judgment on the grounds that his disclosure of the easement to Insko placed Insko on constructive notice of the encumbrance, such that Insko had a duty to investigate further. Because he failed to do so, his request for rescission was barred. On appeal, the Kentucky Court of Appeals addressed "whether the trial court erred by granting summary judgment for the seller on the basis that the seller's disclosure of an easement placed the purchaser on constructive notice of the terms of the easement and imposed on the purchaser a duty to investigate further."

The court began by discussing a longstanding principle that a victim of a fraudulent misrepresentation is not required to have prevented the fraud by examining the public record to ascertain the truth of that representation. The trial court refused to apply this rule, reasoning that under two Kentucky cases, since the easement was properly recorded and Ransdell brought it to Insko's attention, Insko had a duty to make further inquiries. However, the court of appeals distinguished the cases applied by the trial court. One case involved damages to a buyer resulting from a railroad right of way relocation which was pending during the time the buyer was attempting to purchase the property (rather than a seller's misrepresentation), while in the other case the court characterized the seller's alleged misrepresentation as "boosting talk."

After distinguishing those cases, the court here focused on the fact that "the condition or state of a title is not readily apparent to one who is unskilled in the examination of real estate records." In this situation, the scope and extent of any easement or zoning regulation which would restrict Insko's intended use were not obvious and apparent. Further, there was a genuine issue of material fact as to whether Ransdell knew the extent of the easement and that it effectively resulted in the lot's unsuitability for building. Therefore, the court reasoned that "constructive notice and Insko's failure to examine the title do not bar his action for rescission."

In addition, the court noted that there was strong evidence suggesting that the basis for the parties' bargain in this case "was a mutually mistaken belief that Insko would be able to build on the property, and that the parties learned otherwise only after the transaction was consummated." Case law in Kentucky provides that in cases of mutual mistake, rescission is an available remedy, "notwithstanding that resort to public records could have corrected the misunderstandings."

VENDOR/PURCHASER; SELLER'S REMEDIES; DAMAGES: Seller may use a resale eleven months following buyer's default in order to establish the value of property at time of default, and fact that, at time of such resale, seller may have been "under financial duress" is of no consequence. ***Crabby's Inc. v. Hamilton, 244 S.W.3d 209 (Mo.App. S.D. 2008.)***

The gist of this dispute is reported under the heading "Vendor/Purchaser; Conditions; Financing; Waiver." Essentially, buyer bailed out after lengthy preparations for closing and tried to argue that it was excused for a variety of reasons, chief among them the "subject to financing clause." Didn't work.

The property was a small town restaurant, and, not surprisingly, it took a while to sell it again. The court permitted the seller to use a sale price about 20% lower and eleven months later as the basis for the determination of the difference between contract and sale price at time of default. The appeals court agreed, noting that prior Missouri authority had authorized such a tactic.

One of the sellers also stated under cross examination (arguably) that when they sold the property at the later sale the sellers were under financial duress and "had to sell." The court discredited the buyer's interpretation of the testimony, but went on to say that such information didn't matter. The fact that one party feels some independent economic compulsion doesn't make the sale something other than market, at least when the property has been publicly marketed in the time leading to the sale.

Comment: In Missouri, where a seller can pocket the earnest money and still sue for damages, this is a particularly helpful precedent.

Generally, however, sellers considering a damages remedy always wonder how they will establish the amount of damages at time of breach. If they remarket the property, will the buyer be able to argue that a later sale is not representative of the market at time of breach? The Missouri authority certainly offers some

VENDOR/PURCHASER; SUBDIVISIONS; SELLER "BUY BACK:" Seller's buy-back right in an agreement of sale that does not set forth the terms or timing for reconveyance is an option, rather than creating a fee on condition subsequent, and therefore violates the Rule Against Perpetuities and is unenforceable. ***Welsh v. Heritage Homes of DeLaWarr, Inc., C.A. No. 1901-VCN, 2008 Westlaw 442549 (Del. Ch. 2/19/08)***

Plaintiff Buyers sought relief from a contractual provision that obligated them to re- convey property they acquired from defendant Heritage Homes of DeLaWarr, Inc. ("Seller"), and Seller counterclaimed for specific performance.

Buyers and Seller entered into an Agreement of Sale and Construction Agreement,) for a lot in a community of Colonial-style homes. The Agreement contained a buy-back provision in the event Buyers did not construct a residence on property, however, no time limitation was imposed for construction and the Seller was not obligated to re-acquire the property.

"Buyer agreed [*sic*] that in the event Buyer is unable to commence construction for any reason not attributed to Seller, Buyer agrees to re-convey the subject lot at the same price as sold to Buyer, within 30 days of receipt of Seller's request to re-convey."

The court noted that there is no time set for construction (although there was some evidence supporting the notion that the parties contemplated three years, which the court noted was "a reasonable period") and that Buyer did not have the right to require Seller to repurchase. The right ran only one way. Further, and critically, there was no time limit within which Seller may exercise the right to repurchase.

The Agreement also contained a provision that Seller was to be the builder, but the essential terms of the construction of the residence were not included. The deed was silent as to the buy-back and builder tie-in provisions.

The property was further subject to a Declaration of Restrictions that required architectural review of all construction in the development.

Since the Seller and Buyers could not agree on a home for construction on the property, Buyers located another builder and had plans drawn up. Seller, who was the Declarant and architectural review committee under the Declaration, rejected Buyers' proposed plans citing several reasons, including that Heritage Homes was the only authorized builder in the community. Seller, shortly thereafter, sought to exercise its right to re-purchase the property and Buyers filed suit.

The Court found that the buy-back provision of the Agreement does not create a fee simple determinable estate since it didn't operate automatically. But it spent more time with the distinction between construing the interest as an option as opposed to the creation of an estate subject to a condition subsequent. It concluded that a right of reentry under a condition subsequent does not typically require payment of consideration, while of course an option does. Indulging the statutory preference against construing a deed as creating a conditional estate [note that the deed was silent in any event about the condition] the court concluded that the right in question was an option.

The court went on to conclude that , because the option was unlimited in duration, it was void for failing to comply with the Rule Against Perpetuities.

Perhaps more importantly, the court also struck down the developer's right to require the Buyers to use it as the builder. Here was the language about that in the agreement:

"The parties agree that Seller shall build and construct and furnish all labor and materials for a single family residence to be erected in accordance with the plans and specifications to be provided as soon as practical, which plans and specifications shall be incorporated herein. It is further agreed:

"1. a. A detailed construction agreement shall be executed at a later time, as a soon as practical, and shall be incorporated herein as part of this agreement.

b. The price for the construction of the residence shall be $ TBD, to be paid out in accordance with the construction agreement, and/or the construction loan agreement, to be incorporated herein."

There was also a financing contingency for the construction loan. The preamble to the agreement also provided that the developer's intent was that it build all the homes in the subdivision, but the court pointed to other language in the architectural review provisions that appeared to contemplate that other builders might also be building homes there. The court concluded that many of the terms in the purported construction agreement were vague, most notably the price. Consequently, the agreement was not enforceable. The court enjoined enforcement.

In a footnote, the court commented that not all agreements to agree or letters of intent are unenforceable. The agreement here it concluded, was just too vague. Even though there was some evidence that Buyers knew quite a lot about basic issues, such as materials, styles and even price of various models, there were no specifics in the agreement as to price, time for completion, or any detailed. specifications. The court noted that Seller did not allege that Buyers' failure to agree with it on a construction plan resulted from bad faith. It also noted some argument that the now discredited "buy-back" was an exclusive remedy, rendering the construction tie in now unenforceable by any means.

Comment 1: Yes, apparently that's how the developer chose to spell it's name. Maybe it's historical.

Comment 2: The court confessed that Delaware had been somewhat lenient on clearly defined commercial agreements vs. the Rule. Note that if Seller had been an individual, the Rule would have been satisfied ("life in being") and Delaware authority has upheld 30 year rights created in corporations. But, as the court noted, the right to buy here had no time limit at all.

Comment 3: Seller had already lost a very similar case several years earlier involving the "tie in." *Heritage Homes of De La Warr v. Alexander,* 2005 WL 2173992 (Del. Ch. Sep. 1, 2005), aff'd, 900 A.2d 100 (2006) Here, because, apparently, it felt that the construction choices available to the Buyers were more clear, it decided to pursue its case again this time. It may be that the developer, faced with a very weak market, has quite a few of these provisions attached to properties it has sold, and had no choice but to go for it. Didn't work.

WATERS AND WATER RIGHTS; ADVERSE POSSESSION: A privately owned submerged island wholly situated within a navigable stream becomes property of the State through adverse possession if it is continuously submerged for seven years, even if the water level is artificially elevated and the island was formerly owned by a riparian owner, absent adequate permission for the elevated water level by the riparian owner. ***State of Arkansas v. Hatchie Coon Hunting & Fishing Club, ___ S.W.3d ___ (Ark. App. Ct. 2008).***, discussed under the heading: "Adverse Possession; Riparian Rights."

WATERS AND WATER RIGHTS; NATURAL WATERCOURSES: Even in the absence of well-defined beds or banks, water which ran through a definite channel and ultimately discharged itself into a tributary in a swampy lowland area enticing to beavers was held to be a natural watercourse rather than mere surface water, resulting in the court's application of the reasonableness doctrine over the common enemy doctrine in the situation of a defendant's diversion of water from his land. ***Bilo v. El Dorado Broadcasting Co., ___ S.W.3d ___ (Ark. Ct. App. 2008).***

WORDS AND PHRASES; "NATURAL WATER-COURSE:" Even in the absence of well-defined beds or banks, water which ran through a definite channel and ultimately discharged itself into a tributary in a swampy lowland area enticing to beavers was held to be a natural watercourse rather than mere surface water, resulting in the court's application of the reasonableness doctrine over the common enemy doctrine in the situation of a defendant's diversion of water from his land. ***Bilo v. El Dorado Broadcasting Co., ___ S.W.3d ___ (Ark. Ct. App. 2008).***

WORDS AND PHRASES; "RELATIVELY STEEP SLOPE:" Where dune regulations lack any definition of a "relative steep" slope, the definition of "relatively" will be its plain meaning and a court may consider the slope of particular dune in comparison to the slope of nearby dunes**.** ***Seigel v. New Jersey Department of Environmental Protection, 395 N.J. Super. 604, 930 A.2d 461 (App. Div. 2007)***, discussed under the heading: "Zoning and Land Use; Coastal Zones; Dunes Construction."

ZONING AND LAND USE; COASTAL ZONES; DUNES CONSTRUCTION: Where dune regulations lack any definition of a "relative steep" slope, the definition of "relatively" will be its plain meaning and a court may consider the slope of particular dune in comparison to the slope of nearby dunes. ***Seigel v. New Jersey Department of Environmental Protection, 395 N.J. Super. 604, 930 A.2d 461 (App. Div. 2007); July 26, 2007.***

A property owner and her mother owned a beachfront lot with a single family house. She sought to build a second house on her property. Her surrounding neighbors had done the same thing. The house faced the street and the proposed second house would have faced toward the beach. The New Jersey Department of Environmental Protection (NJDEP) denied the property owner's request and determined that the eastern portion of her property, which was closest to the beachfront, was on a dune and that the proposed second house would have been located in a coastal high hazard area.

In her administrative appeal, the property owner testified that the area for the proposed second house was flat and the dune was demarcated by a sand fence that was built along the easternmost boundary of her property. She also testified that the proposed second home would have better accommodated her aged and ill mother and that the previous summer a nearby property had been reconstructed and built into the dune. An attorney who was familiar with the area and with local land use law in the municipality testified on behalf of the property owner that the lot had nearly twice the amount of open land necessary for the construction of a second home and that subdividing the lot would not have been necessary. An environmental expert testified for the property owner that the presence of significant amounts of gravel indicated that the area in question was man-made and not the result of natural dune formation and also that since that area appeared to be flat, the area for the proposed second home was not on a dune at all, and therefore was not in the coastal high hazard area. The environmental expert also testified that even if the house was in the coastal high hazard area, extensive development that surrounded the property owner's lot allowed for an infill exception and that a second home's construction would not have been detrimental to the dune structures.

A NJDEP official testified that the entirety of the property owner's lot was on a dune and that the existing home was built into a pre-existing dune. The official also testified that the infill exception did not apply because the property owner's lot had never been subdivided. The administrative decision upheld the finding of the NJDEP and agreed with the NJDEP official that the infill exception did not apply because there was no evidence that the lot had ever been subdivided. The decision also stated that the NJDEP appropriately balanced the economic impact on the property owner with the benefits of protecting oceanfront sand dunes. The decision did note that it was not made in consideration of equity or public policy and that nothing in the ruling prevented the property owner from expanding her existing house.

On appeal, the Appellate Division pointed out that administrative agencies, such as the NJDEP are entitled to deference in their factual findings and interpretations of statutes but that approval of their decisions is not automatically granted. The Court also pointed out that a single family home or a duplex did not have to conform to dune regulations if was built on the landward slope of a secondary or tertiary dune and that such houses had considerably less impact on the coastline in comparison to larger developments.

Here, the Court disagreed with the NJDEP's construction of the definition of a "relatively steep" slope and pointed out that the regulations lacked of any definition of "relatively" other than its plain meaning. It found that the slope landward of the frontal dune was not steep in comparison, or relative, to the steep slope of the frontal dune or to the slope of any of the surrounding properties, and that since the entire property was not built on a frontal dune, dune regulations did not apply to the area where the property owner wanted to build a second house. The Court also found that the NJDEP's suggested alternative measures that the property owner could have taken such as expanding the existing house or buying another property, were not practical or feasible. It noted that even if the entire property was located in a frontal dune, it did not see how the construction of a single family home would have had a particularly adverse impact. Thus, the Court reversed and remanded the decision for a determination that was consistent with the its findings.

ZONING AND LAND USE; DEVELOPMENT AGREEMENTS: New Jersey law validly provides for approval of a "general development plan" to give greater flexibility for facilitating an agreement between a municipal board and an applicant and such plans need only show the general features of the proposed improvements, thereby allowing for deferral of the details of preliminary site plan and subdivision approvals to a later time. ***Citizens United to Protect the Maurice River and its Tributaries, Inc. v. City of Millville Planning Board, 395 N.J. Super. 434, 929 A.2d 606 (App. Div. 2007)***

ZONING AND LAND USE; PROCEDURE; EXHAUSTION OF REMEDIES; REGULATORY TAKINGS: To determine whether a governmental regulation limits the use of land and results in a taking, requires that the land use authority had the opportunity, using its own reasonable procedures, to decide and explain the breach of the agency's regulations and that is why a property owner is required to exhaust all available administrative remedies before pursuing a regulatory taking claim in court. ***OFP, L.L.C. v. State of New Jersey, 395 N.J. Super. 571, 930 A.2d 442 (App. Div. 2007)***

All approvals and permits associated with the developer's subdivision had been approved, but one. Then, the property became subject to the New Jersey Highlands Water Protection and Planning Act and fell under the jurisdiction its new agency, the Highlands Water Protection and Planning Council. The Act created a preservation region in which further land development would be strictly regulated; the tract at issue was located in the preservation region.

The property owner sued the State, challenging the Act's constitutionality as applied to its property. It asserted that the Act operated as a bar to development and this resulted in an uncompensated taking. The lower court dismissed the complaint, finding that the Act provided protection to property owners through an administrative process to lessen the effect of land restrictions that it imposes. The Court noted that the administrative process included provisions for hardship waivers, yet the property owner failed to exhaust these administrative remedies prior to suit.

In affirming the ruly, the appeals court noted specifically that the Highlands Council could allow for a hardship waiver on a case-by-case basis. It noted that the property owner, here, simply submitted an application for a total exemption from the provisions of the Act and, upon denial, filed the instant action, rather than exhaust all administrative remedies.

The Court also held that lack of a transfer of development rights program, a voluntary program in which affected properties could obtain compensation for restricting the development of its properties, as required by the Act, did not excuse the property owner from applying for a hardship waiver, as there existed no evidence that the Council required any applicant for a hardship waiver to first show that it had made a good faith effort to transfer development rights even though such a program did not exist. The Court found that the remedy of a hardship waiver application was sufficient on its face to prevent a regulatory taking of the owner's property, and that the agency had to be afforded the opportunity to arrive at a final position as to a hardship waiver before a court could determine whether a regulatory taking had occurred

ZONING AND LAND USE; VARIANCES: A variance for an extension of a nonconforming use is not available not permitted for structures built on the parcel after the use became nonconforming. ***Louchheim v Zoning Bd. of Appeals of Town of Southampton*, 843 N.Y.S.2d 180 (A.D. 2 Dept. 2007).**

Applicants submitted an application for a variance to allow expansion of two structures which benefitted from a pre-existing nonconforming use as a labor camp for migrant workers. One building was built before the enactment of the applicable zoning ordinance in 1957 and the other was built in 1964. Under the applicable code, the zoning board was permitted to grant a variance of an extension of no more than 50% of the floor area of a nonconforming use, as measured from the date the use first became nonconforming.

The Zoning Board of Appeals permitted the variance and the petitioners commenced an Article 78 proceeding to review the determination. The court noted that in a proceeding to review a zoning board's determination, the zoning board's interpretation of its zoning ordinance is entitled to great deference.

When the question is purely legal interpretation of statutory terms, however, deference to the zoning board's interpretation is not required. The court found that the use first became nonconforming in 1957, before the second structure was added. As such, the grant of the variance violated the 50% rule because it did not apply to the floor area existing when the use first became nonconforming in 1957.

Comment: Note that the question was not whether the 1964 building was permitted as a nonconforming use. That is also a nice question. There are cases that permit reasonable expansion of existing nonconforming uses, such as in the case of mines. But building a whole new building is a considerable change in the original use.

But there the applicant attempted to bootstrap the nonconforming extension to increase the availability to add additional square footage under a new ordinance. It is lucky to have the extra building to begin with. But perhaps that luck will run out if the opponents to this application get busy.

ZONING AND LAND USE; PROCEDURES: In making a decision on a variance application, a zoning board cannot take into consideration prior misrepresentations made by the applicant as to its intended use or general community opposition based upon activities unrelated to the impact of the proposed variance. ***Caspian Realty v. Zoning Bd. of Appeals, 842 N.Y.S.2d 887 (Sup. 2007).***

Prior to constructing a building, the petitioner obtained approval from the Planning Board. After petitioner completed of construction and received a certificate of occupancy, however the Town found the petitioner to be in violation of zoning ordinances due to the use of the lower level as a retail furniture outlet. Petitioner argued that it in fact had disclosed that it had intended retail on the lower level, but the Board found, and the court affirmed, that in fact petitioner had misrepresented that the lower level would be used for storage.

In order to support the retail activity, the petitioner needed area variances and parking variances. It pointed out that what is was seeking was similar to variances that the Board had granted to retail furniture outlets in the past. It indicated it was willing to accept a restriction that it would limit its use to retail furniture sales.

The Zoning Board of Appeal, however, affirmed the denial of the variances. It expressly took into consideration the fact that the petitioner misrepresented its intended use of the lower level to the Planning Board. It stated that to grant the variance under such circumstances was against the public interest in that it would encourage lying by future applicants. The Board also took into account neighbors' complaints about various annoying activities on the property, such as trucks arriving too early and improperly unloading, parking of commercial vehicles over night, etc.

On appeal: the appeals court reversed the denial of the variances. The court acknowledged that a determination of a zoning board should be sustained if it does not have a rational basis and is not arbitrary and capricious and that the board must engage in a balancing test weighing the benefits to the applicant against the detriment to the community. But it also found that the basis for these conclusions must lie in the statutory standards under New York law. Further, the court could not deny variance benefits in one case that it had granted in another case without showing a rationale basis.

The court found that, although it did not condone misrepresentations, the Zoning Board of Appeals improperly considered the misrepresentations in its denial. Furthermore, the court found that the complaints were not associated with the zoning violations and the Zoning Board of Appeals did not properly consider an expert's report. The court annulled the decision and remitted the matter for reconsideration.

Comment 1: The case was remanded for a new determination based on further findings. The local authorities have sufficient discretion, however, that the editor does not anticipate a happy final outcome for petitioner here. Nevertheless, the case is a good object lesson to lawyers representing such authorities to stick to the statutory standards.

Comment 2: The neighborhood objections were not properly taken into account because they did not address problems caused specifically by the nonconforming aspects of the petitioner's structure. Again, here is an object lesson for attorneys representing such groups.

The editor believes that the real problem for the zoning authorities was that there was history of granting variances to what the court regarded as similarly situated applicants.

ZONING AND LAND USE; RELIGIOUS ACTIVITIES: A church was not improperly excluded from an industrial park. ***Wesleyan Church v. Village of Lancaster, 841 N.Y.S.2d 740 (Sup. 2007)***.

Petitioners, a church and its corporate parent, purchased a structure in a village industrial park. The Village Board ultimately denied the church a special use permit to convert the property to religious use. Weighing the beneficial effects of use of the property for religious purposes against the benefits of industrial use, the Village Board concluded that it would be contrary to the public welfare to approve the church's application. Though recognizing the general presumption that churches benefit the public welfare, the Village Board cited economic development goals as "other legitimate interests" with an overall impact on the public welfare. Petitioners challenged the denial of the permit.

Applying a rational basis standard of judicial review, the court upheld the Village Board's determination. The court noted that municipality consideration of economic development concerns and compliance with a comprehensive plan has been considered by New York courts to be a legitimate exercise of public purpose over matters of land use.

Comment: This is a trial court ruling, and does not consider the impact of the federal statute requiring zoning authorities to give special consideration to churches. It is of interest, but possibly of little significance.