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Quarterly Report on Current Developments in Real Estate Law

October 1 through December 31, 2008

Sponsor:

ABA Section on Real Property, Trust and Estate Law
American Bar Association

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ASSOCIATIONS; SUCCESSION: A newly-formed homeowners' association cannot, without assignment, succeed to the rights of an original homeowners' association that has been dissolved under Missouri law and has not been not revived within the applicable statutory period. ***Valley View Village South Improvement Association, Inc. v. Brock, 272 S.W.3d 927 (Mo. Ct. App. 2008)***.

In 1974, a developer acquired land and recorded a Declaration of Covenants providing for the establishment of a property owners' association that was incorporated as a Missouri non-profit corporation. Subsequently, the original developers and the original property owners' association's charter was forfeited. The original developer divested itself of all interest in the property, and certain property residents began managing the water system for the subdivision, which was connected to 19 structures in the subdivision. One resident attempted to reactivate the original property owners' association but could not do so under Missouri law because of a 10-year limit on the time within which a dissolved corporation could be revived. Therefore, a new association was incorporated (the "Association"), having a name nearly identical to the original association.

The owners of the 19 structures with water connections collected money from the other homeowners for the purposes of maintaining the water system. Upon the incorporation of the Association, the Association sued two residents of the subdivision, asserting that it was the rightful owner of the water system to the subdivision. During the litigation, a third party, P. Douglas Associates, LL, bought 120 acres of land, including a golf course and the subdivision clubhouse. The water system was located entirely on the clubhouse property. Douglas' property included 164 lots created under the declaration, and 18 condominium units, for a total of 182 units. The association then attempted to assess Douglas over $18,000 for water charges. All of the works for the water system – the well and the chlorination facility, were located in the clubhouse.

Douglas sued the Association, seeking a declaration of its rights under the Association's bylaws and an injunction prohibiting the active residents from serving as officers and directors of the Association. The trial court held, among other things, that (1) the Association was the valid homeowners' association for the subdivision and therefore held all the rights, privileges and responsibilities contained in the original Declaration, (2) the Association was the owner of the water system and had the sole rights of administration to the water system, (3). Douglas was enjoined from interfering with the Association's rights related to the water system, and (4) the Association had an easement to access all parts of the water system located on Douglas's property.

On appeal, the court focused on one dispositive issue advanced by Douglas, which was a challenge to the trial court's finding that the Association was the "proper, valid homeowners' association" for the subdivision. While the parties agreed that the original association no longer existed, the Association cited Pioneer Point Homeowners Association, Inc. v. Booth for the proposition that a second homeowners' association, which has been assigned all the rights, title and interest, could enforce original restrictions contained in the Declaration. While the original association's charter had been forfeited and not restated in Pioneer Point, the court held that because (1) the original charter had not been challenged, and (2) nothing suggested that such assignments are disfavored, the second association had the authority to take certain actions. The Association in the subject case also argued that a ruling by the court stating it could not be the successor association would leave the subdivision with no association, despite the original developer's intention that one exist and govern the subdivision.

The court focused on the fact that the Association was a completely new entity. While it was called by a similar name and followed similar bylaws as the original corporation, there was no assignment like in Pioneer Point which was deemed a "successor association." Courts "cannot create an assignment where none was made, nor can [courts] create a legal obligation where none was agreed to [by P. Douglas]." Based on this holding, the court also reversed the trial court's finding concerning the water delivery system, holding that the Association had no ownership interest in the water system, by easement or otherwise. In so holding, the court expressly did not address the potential rights of the individual homeowners to use the water system or other common areas.

Comment 1: Note that the court stresses that Douglas was not the successor or assignee of the developer. Presumably Douglas acquired the property at a tax or mortgage foreclosure. Further, the Declaration did provide that the Developer would deed the water system to the Association at such time as the Developer was confident that the Association could manage the system, but there was no evidence of any such transfer.

Comment 1: Certainly this situation has arisen in other circumstances, and the Editor would like to hear from readers how it has been resolved. The editor is aware of three somewhat remote precedent cases in other jurisdictions. In *Odessa Texas Sheriff's Posse, Inc. v. Ector County*, Texas, 215 S.W. 3d 458 (10/26/06) (The DIRT DD for 2/21/07), An incorporated association, a riding club, went defunct and the period for renewing its charter expired. The club was lessee under a 99 year lease from the local county for a parcel of land on which it had, as part of the lease, built and maintained riding facilities. The club "reformed" itself as an incorporated association and continued to perform under the lease, with the county's acquiesence, for 20 years. The court held that there was no estoppel available against the county, and the club could not be viewed as successor to the original defunct association.

In *Bordelon v. Homeowners Assoc. Of Lake Ramsey, Inc.*, 916 So. 2d 179 (La. App. 2005). The DIRT DD for 1/6/06, a developer established a development scheme by which common areas were to be transferred to an owners association, but did not form such an association. The court held that individual ownersr could form such an association 20 years later and such association would have ownership of common areas and assessment rights.

In the well noted *Evergreen Highlands Assoc. v. West*, 73 P. 3d 1 (2003), a developer created an elaborate, amenity laden, subdivision, and an association, but neglected to grant the power to assess to the association. The developer, had, however, transferred the common areas to the association. The association levied assessments and maintained the amenities for years before a homeowner objected. The court held that an "association by implication" had been formed, with the power to assess. All other powers of the association were to be resolved under the Colorado version of the Uniform Common Interest Ownership Act (which had not been in effect when the subdivision was created.

Comment 2: None of these cases are directly on all fours with this case, of course, but they demonstrate that courts have struggled with novel approaches to resolve the problem of developer's departing with unfinished business to complete.

Comment 3: In the instant case, note that the new developer owned far more units and had far more votes than the than the existing Association members, which had only 23 units. Times were going to change for the Association anyway. Note, however, that the court expressly refused to rule on the question (not raised in the litigation) of what implied easement rights the existing homeowners had in the clubhouse and water system. It simply ruled that their association had no such rights.

BANKRUPTCY; HOMESTEAD: To qualify for state homestead allowance (at least in Illinois) a spouse, though resident in the home, must have a titled interest in the property. Potential marital rights at death or divorce are insufficient. ***In re Belcher, 2008 Westlaw 5412097 (Seventh Cir. 12/31/08)***

This case resolves a troublesome split in Illinois federal courts. In fact, in this case, both the bankruptcy court and the federal district court, on first appeal, had found for the debtors, albeit on somewhat different grounds. But a number of other lower courts had concluded that a non-titled spouse has no homestead claim.

The facts are somewhat compelling. Mr. Belcher had been married to Mrs. Belcher once before, and at that time was on the title to the house. Thereafter the couple divorced and the title passed to Mrs. Belcher. They reconciled and remarried, Mr. Belcher took up residence in the house, and marital property or Mr. Belcher's separate property was used to pay the mortgage and household expenses. Nevertheless, he never appeared on the title nor on the mortgage (though he participated in paying the mortgage.)

Both spouses declared bankruptcy, but the Seventh Circuit here, reversing the courts below, found that only the wife was entitled to the state law exemption.

The court noted a number of anomalous results that might obtain if it found otherwise. For instance, if only Mr. Belcher had filed for bankruptcy, the house (in Mrs. Belcher's name) clearly would not be part of the bankruptcy estate, certainly a result inconsistent with recognizing his homestead interest here.

Comment: Both sides make really excellent arguments – remember the debtors convinced two courts before getting to the Seventh Circuit. Certainly the rule adopted by the court provides some certainty and avoids some hair splitting factual arguments. But the Illinois homestead argument would have worked if the parties could even have documented a lease to Mr. Belcher (as the editor understands the arguments). The problem was that they were just too informal, as spouses tend to be. Clearly this is an issue a debtor's counsel should look into in preparation for filing.

BROKERS; COMMISSIONS; LEASE ASSIGNMENTS: To incur liability to pay leasing commissions following its purchase of leased property, a buyer must have affirmatively assumed its seller's obligation to pay the commissions. Whether such assumption has occurred depends upon whether: (1) there is a clear separate promise or (2) the entire record, taken as a whole, signals that the buyer agreed to assume the obligation despite the absence of a separate promise to do so. ***Pagano Company v. 48 South Franklin Turnpike, LLC, —- A.2d ——, 2009 WL 578563 (N.J. 2009)***

The New Jersey Supreme Court states the issue succinctly: Is "a purchaser of commercial property [] liable for the real estate broker commissions due under the leases it acquire[s] [by way of] a general assignment from the seller"? In a 1994 opinion from that same court, *VRG Corp. v. GKN Realty Corp.*, 135 N.J. 539 (1994), it was held that to incur such liability, a purchaser must have "affirmatively assume[d]" its seller's obligation to pay the commissions. That could be satisfied by a separate promise or by discerning such from the entire record. "If, taken as a whole, the record signals that the assignee agreed to assume the obligation, he or she will be held to it despite the absence of a separate promise to do so."

Here, the seller had executed an exclusive leasing agreement with a broker. Under it, the broker was entitled to a commission on account of a new lease and for its renewals, extensions, and options as well. The brokerage agreement recited that it would be binding on the owner's heirs, successors, and assigns.

The broker procured at least three leases and received its commission in connection with their signing. Then, the owner contracted to sell the property. The contract provided for a due diligence inspection of the property and of property-related documents such as the leases and lease correspondence. The buyer had a specific right to request copies of documents it felt were needed to adequately complete its due diligence requirements. The buyer reviewed the leases and made no further requests for documents.

Each lease was made applicable to the landlord's assigns, and expressly set forth that an assignee would be bound by the terms of the lease and would be assumed to have agreed to carry out all of the landlord's obligations under the lease. No one argued the effectiveness of that provision. Each lease also had a provision dealing with the broker and its commission. After identifying the broker and excluding others who might claim a commission, it said, "by separate commission agreement and letter of understanding said broker shall be paid a commission by Lessor. . . . Lessor agrees to fully satisfy its obligations to said broker for commissions and covenants and agrees to save Lessee harmless with respect to claims of said broker for said commissions."

There was no evidence that the buyer ever saw or actually knew about the contents of the brokerage commission agreement. There was no expressed assumption of the brokerage agreement by the buyer. What there was, however, was a provision in the assignment of leases, not about the brokerage agreement, but saying: "Assignee assumes and agrees to perform all of Assignor's obligations under the Leases."

The broker persuaded the lower court that, taken as a whole, the record demonstrated the buyer had affirmatively assumed the obligation to pay renewal commissions (which later became due). The buyer persuaded the intermediate appellate court that the landlord's brokerage obligation under the lease only ran to the tenant and not to the broker. The intermediate appellate court couldn't find anything in the record where the buyer promised either its seller or the broker that it would pay the commission. It read the lease as imposing only an obligation to indemnify the tenant for the commission, but because the tenant was never called upon to pay the commission, there was no claim for indemnification. The broker appealed.

The court undertook analysis of an important precedent case, VRG Corp. . That case nvolved a set of facts where neither the leases nor the assignment of leases referred to or included the commission obligation between the seller and the broker. Second, the assignor and assignee there purposely and explicitly amended their agreement to see that the assignor retained the obligation. Thus, the assignment and the leases were silent and the parties manifested an intention contrary to that of having the buyer be responsible for paying the broker. The Court, relying on the principal that the obligation to pay a brokerage commission is "personal," could not find an "affirmative assumption" of that obligation by the buyer in VRG Corp. The Supreme Court looked at its holding in VRG Corp. and never waivered from the underlying principal. But here, it saw the factual situation differently.

Here, the Court said that an "express promise" is not the only way to find an "affirmative assumption." The Court acknowledged "it would be '[] grossly onerous and unfair' to hold that in all contracts 'a buyer impliedly agrees with the broker that he will pay the commission if the broker cannot legally collect it from the seller.'" In this case, however, the leases detailed the broker's role in procuring the tenancies. They disclosed the seller's liability, as landlord, to pay the broker, even if the details of that obligation (such as extending to lease renewals) was not spelled out.

Even though the intermediate appellate court had looked at the very same lease provision, it was the Supreme Court's conclusion that the intermediate court focused only on the indemnification feature and not on the clause's overall implication. Basically, it concluded that the buyer, knowing from the assignment of leases that it was assuming the obligations of the landlord under those leases, had an obligation to inquire into the commission agreement referred to in the lease's brokerage provision, but never did so. Under the contract of sale, it had the right to request the brokerage agreement, notice of which was revealed by the leases themselves. It could not reasonably believe that what it didn't know couldn't harm it. In essence, the Supreme Court found that when the buyer took an assignment of leases making it responsible for the landlord's obligations under those leases, it wouldaa be liable for all of those obligations it could have reasonably discovered by reading the leases and asking about documents or obligations referred to in those leases.

Reporter's Comment 1: The principle survives, but the "empty head, pure heart" defense will not protect an assignee from being obligated to pay a brokerage commission under an agreement that could easily been discovered. The Court's decision made note that this was a sophisticated buyer who must have known to ask for any brokerage agreements. That might mean that the

Court saw an intentionally empty head in this case and was questioning the purity of the buyer's heart.

Reporter's Comment 2: The wasn't as open and shut as it might seem. There was a written dissent in which the Chief Justice joined. It made a strong point that the obligation to pay a brokerage fee or commission is personal and neither attaches to the land nor runs to a subsequent property owner. The dissenting justices were upset because they saw *VRG* Corp. as having provided a "bright line" that "skilled commercial real estate professionals" had relied upon for more than a decade. The dissent argued for a strict approach and a high barrier when finding an affirmative assumption of a personal obligation. They thought these facts "did not pass muster."

Reporter's Comment 3: The result would be the same, but there probably have been no case in a jurisdiction (if any) where a commission obligation is a lien or otherwise runs with the land.

Reporter's Comment 4: There was a footnote to the effect that the broker held a 13% ownership interest in the landlord-property owner. One wonders why it didn't act to protect itself in the sale and why its "partner(s)" didn't make the buyer affirmatively assume the brokerage fee obligation. Was that argued? Was there a deliberate reason for that?

Editor's Comment: In the editor's view, this is a perfect example of a covenant that clearly does not "touch and concern" the land and should *not* run with the land unless assumed, as the court held here. Because the court found an assumption, and because there was express assumption language, the editor doesn't think this case disrupts the common law as the dissent seems to feel. The obligation to pay leasing commissions could be viewed as a third party beneficiary obligation assumed by the buyers.

The Reporter for this item was Daniel Bogart of the Chapman Law School.

BROKERS; INQUIRY NOTICE; BROKER RELATIONSHIP: A long time close business relationship between a broker and a client will be some evidence as to whether the client has been made aware of facts known to the broker about the title history that the client is about to purchase through the broker. ***Hahn v. Love, 273 S.W.3d 712 (Tex. App. Dist 2008)*** reported under the heading: "Recording Acts; Duty of Inquiry; Corrective Deeds."

BROKERS; LISTING AGREEMENT; AMBIGUITY: The mere misnomer of an entity name in a brokerage contract does not render the contract invalid, provided that the parties understand the identity of the entity with which it is dealing. ***Realty Center New Homes Division, LLC v. Dowlen Construction, LLC, ___ S.W.3d ___, 2008 Westlaw 5423997 (Tenn. Ct. App. 12/30/08).***

Realty Center and Dowlen entered into a brokerage contract in 2005 in which Realty Center obtained the exclusive right to sell townhouses being constructed by Dowlen. In the contract, the actual entity name listed for Realty Center was "Realty Center/GMAC, New Homes Division, LLC." The two-year contract provided that either party could cancel by giving 90-days' notice of its intent to do so. The parties agreed that the contract was canceled as of August 12, 2005. Realty Center, using its licensed name, "Realty Center New Homes Division, LLC dba Prudential Realty Center/New Homes Division," filed a complaint against Dowlen seeking commissions due for all sales contracts signed prior to November 12, 2005 (90 days after the contract was canceled).

In answering Realty Center's claims, many of Dowlen's arguments revolved around the theory that "because Realty Center contracted in a name that slightly varied from the name in which it was licensed, Realty Center was unlicensed and, being unlicensed, it violated several provisions" of the Tennessee Real Estate Broker License Act of 1973 (the "Act"). Specifically, Dowlen asserted (among other defenses) that (1) Realty Center's complaint failed to state a claim upon which relief could be granted because the contracts were made by a different entity, (2) because the contracts were made by an unlicensed entity, no person (as defined in the Act) was licensed to engage in the business of a broker at the time during which the townhouse sales occurred, and (3) the contracts were made in violation of a criminal statute because the Realty Center entity signing the contracts did not possess a license to act as a broker. In addition, Dowlen argued Realty Center's use of the GMAC designation constituted wrongful use of a trademark.

The trial court ultimately held that Realty Center was a licensed broker at all relevant times and awarded it over $100,000 in commissions earned on the townhouse sales. In doing so, it relied on cases involving "misnomer" to hold that "the fact that the named plaintiff is different from the contracting party is not sufficient to dismiss the case," and that a party entering a contract with a purported corporation admits that corporation's existence and is estopped to deny it. Regarding the wrongful use of trademark claim, the trial court noted that even if such claim had merit, Dowlen was not the party with standing to enforce it.

On appeal, the Tennessee Court of Appeals affirmed the trial court's judgment on all counts. With respect to the wrongful use of trademark claim, the court held that even if Dowlen was not asserting or attempting to protect rights of GMAC, Dowlen still lacked standing because it could not show it was damaged by Realty Center's use of the GMAC trade name (in fact, Dowlen's principal admitted in a deposition that Dowlen actually benefitted from Realty Center's use of the GMAC trade name).

Dowlen's other theory, that Realty Center was unlicensed, was also discounted by the court. Specifically, the court focused on cases which hold that "[t]he general rule [in the case of a misnomer] is that the mere misnomer of a corporation in a bond, note or other deed or contract does not render the same invalid or inoperative, but the corporation may sue or be sued thereon in its true name with proper allegation and proof that it is the corporation intended; and its identity may be established by parol evidence." In this instance, although Realty Center's name on the contract was not identical to the name in which it was licensed, "Dowlen understood who the entity was it was dealing with," and Dowlen "did not rely in any way on the circumstances of Realty Center's licensing either in contracting with it or dealing with it thereafter." "Having contracted with the purported entity named in the contract, Dowlen [was] estopped to deny its existence."

BROKERS; MORTGAGE BROKERS; DISCLOSURE: Borrower receives minimal damages from mortgage broker for failing to inform her that she could remove her brother's name from an existing mortgage, and instead refinanced her mortgage into two loans including a HELOC, covering her residence. ***Enriquez v. Amerifirst Mortgage Corp., 2009 WL 498072 (Cal. Ct. App. Feb 27, 2009)***

Enriquez had a simple desire: she wished to remove her brother's name from a mortgage. She owned a home with her brother, and that home was subject to a mortgage in favor of WAMU. Brother and Enriquez were named as mortgagors. Enriquez's brother purchased another home, and presumably obtained a mortgage loan and gave a mortgage on that residence. According to the opinion, "plaintiff's WAMU loan was assumable, and plaintiff could have removed her brother from the loan for a $900 fee without obtaining a new loan." Removal of the brother's name from the mortgage was essentially ministerial under the circumstances. The trial record in an earlier opinion involving the parties reflected WAMU's understanding that WAMU would in fact have removed the brother's name from the mortgage. Amerifirst was a licensed mortgage broker for WAMU and Greenpoint Mortgage, among other companies.

Amerifirst did not inform Enriquez of this inexpensive option. Instead, its representative steered her to refinance her home. This would remove her brother but would also create two new loans. Both loans were made by Greenpoint. The first loan, secured by a deed of trust, was in the principal amount of $144,000. The second consisted of a HELOC and a second deed of trust in the amount of $15,500. Enriquez was told she needed two loans because she did not qualify for a single loan in the whole amount. Enriquez told the Amerifirst representative that she wanted to pay off her car loan, and the representative responded that she could use the HELOC for this purpose. Enriquez gave a copy of her car payment book to the Amerifirst rep. The closing of the loans took place on January 20, 2000, and included a payment of $14,885 to a company called Informed Escrow. The opinion explains that Enriquez thought that some of the loan money would be used to pay off her car loan, but this assumption was "mistaken." The reader can infer from the opinion that Enriquez's act of delivering a copy of her car payment book demonstrates her belief that Amerifirst would take care of the pay-off.

If this case demonstrates some bad lender behavior, it may suggest more than simple borrower ignorance. Enriquez told the Amerifirst rep that her monthly income was $3100. However, a much higher $4600 monthly income figure somehow crept into the actual loan application. The opinion states that this was the work of "either the Amerifirst representative or an unknown person." In its footnote, the court explains: "At trial, plaintiff denied she wrote the $4600 figure on the application. During cross-examination, Amerifirst read plaintiff's deposition testimony, where she admitted the $4600 entry "looks like my writing." On redirect, plaintiff explained that the handwriting looked like hers, except for the 4."

It is therefore at least possible (but by no means proven) that Enriquez was aware that her income was inflated on the application.

Basically, Enriquez kept waiting to hear that her car loan would be paid off. This did not happen. She called Greenpoint to ask if the HELOC money was used for this purpose, but Greenpoint sent her to Amerifirst. Amerifirst in turn told her that they no longer possessed the loan file and did not have the answer. Enriquez began calling Greenpoint, unsuccessfully, to find out the status of her HELOC loan and how the proceeds were allocated, to not avail. Eventually, she stopped paying her HELOC loan. That set in motion the sale on the second trust deed. A third party, Marin Conveyancing had apparently begun servicing the loan and Greenpoint and Marin commenced foreclosure proceedings.

This bad story only gets worse. The trustee's sale noticed a date of February 25, 2004, at 2 p.m. Enriquez apparently obtained cashier's checks in the outstanding amount and sent a third party to the sale on the 25th to redeem the property. Enriquez's agent presented himself to the auctioneer (a company called Fidelity National Agency Sales and Posting), at 2 pm, but was informed that the auctioneer had already sold the property five minutes earlier (and therefore prior to the time noticed).

In fact, Fidelity sold Enriquez's home for $239,050 subject to the $139,602 balance on the first deed of trust. Greenpoint was paid in full an amount of $17,378 – the balance of the second deed of trust loan. Enriquez received excess proceeds, which totaled $221,635. It is fair to suppose that her property could have sold for more than the price generated at a foreclosure sale, and that this amount is on the low side. Enriquez's equity was reasonably greater than $221,635.

Enriquez brought actions against the auctioneer for negligence in selling the property before the time set for sale. Fidelity settled the claim against it during trial for $10,000. In the same case, Enriquez brought an action for breach of both contract and fiduciary duty against Amerifirst "based on Amerifirst's failure to advise plaintiff she could remove her brother's name from the existing mortgage without getting a new loan, and Amerifirst's failure to respond to plaintiff's request for information about the use of the HELOC proceeds."

The jury concluded, among other things, that Amerifirst breached its fiduciary duty to Enriquez and that this breach was a substantial factor in causing harm to her. The jury determined that she suffered total economic damages of $9837. Enriquez challenged the amount of damages. However, the trial court denied a motion requesting a new trial to determine the sufficiency of that amount. In addition, during trial, the court treated Amerifirst and Fidelity as joint tortfeasors and offset the $9837 damage award by the $10,000 settlement. More important, the court awarded prevailing party attorneys fees to Amerifirst (The trust deed provided that a prevailing party would receive attorneys' fees.) As a result, Enriquez was ordered to pay Amerifirst $61,465 in fees.

The Court of Appeals affirmed many of the trial court rulings, but in the end, found a way to give Enriquez some relief, if not satisfaction.

The court rejected the damages offset. The two parties – auctioneer and mortgage broker – were accused by the plaintiff of committing very different sins. One auctioned the property too soon; the other goosed an unnecessary commission by failing to disclose information to the borrower. As a result, Enriquez got her $9837 and was freed from the attorney's fees award (a major relief to be sure). But she did not gain the substantial damages remedy that was undoubtedly the goal of her lawsuit.

Enriquez also made a succession of arguments that the court of appeals rejects. The trial court had granted a non suit on punitive damages. The Court of Appeals said that no reasonable jury would have found the elements for punitives present in the case – that Amerifirst engaged in intentional misconduct. According to the court, the plaintiff could not provide evidence that it was an Amerifirst employee who filled out and signed the HELOC application on Enriquez's behalf (and there was at least a suggestion that Enriquez filled in the income information.) In addition, she lost her claim to post foreclosure appreciation damages for her home. She could demonstrate that Amerifirst's behavior was technically a proximate cause of her loss of post foreclosure appreciation. However, "any connection between Amerifirst's failure to provide plaintiff information regarding refinancing and the foreclosure is too attenuated to allow recovery for lost appreciation." In essence, the court said that the real reason for the foreclosure was Enriquez's failure to pay the HELOC, and Amerifirst was not substantially connected to Enriquez's failure to make these payments.

Comment 1: This case is not special because it breaks significant new ground in the law. Instead, it is interesting because it lays out the chain of events that permitted a homeowner with equity to move rapidly to a position of weakness, see her house foreclosed and owe attorneys fees for the privilege. Many mortgage brokers are no longer in business; Enriquez found an ongoing entity, so she had a party against whom to seek recourse. Enriquez occupied a powerless position, and her refusal to pay the HELOC was her attempt to use the limited leverage at her disposal.

Comment 2: That said, the law in this case seems right. The mortgage broker and auctioneer are not really joint tortfeasors in this case; the torts they were accused of committing were entirely different. Enriquez apparently had the ability for a relatively nominal amount to take her brother off the mortgage, and a mortgage broker, informed of her desire, and competent in the responsible practices, would have informed her of this. The broker did not do so because this would have denied the broker the commission. This is therefore a breach of both the duties of care and loyalty.

The Reporter for this case was Daniel Bogart of the Chapman Law School.

CONSTITUTIONAL LAW; POWER TO CONDEMN; "PUBLIC PURPOSE" REQUIREMENT: Where a private company, working with a public utility, has leased land for purposes of constructing a power plant, the utilities subsequent condemnation of the leased land does not serve a public purpose, since the utility already had use of the land through arrangements with the lessee, and the only result of the condemnation was to eliminate the rental obligation of the lessee to the condemnee. ***Steel Los III, LP v. Power Authority of State, 864 N.Y.S.2d (Supp. 2008).***

In the period from 2003-2004, the Long Island Power Authority ("LIPA"), which provides electricity to people in parts of New York State, determined that due to "drastic energy needs" anticipated for the summer of 2005, a fast track project involving the construction of additional power plants was necessary. Petitioners were the owners of approximately one million square feet of property in Bethpage, New York. Calpine Corporation ("Capline"), a developer of power plants and a power producer, was ultimately awarded a contract by LIPA to construct a power plant and Calpine also entered into a 35-year lease for a portion of Petitioners' land. Under the lease, the lessee was to make annual rent payments to Petitioners starting at $430,000 in 2004. In order to successfully carry out the fast track project necessary for power production in the summer of 2005,

LIPA sought the assistance of Respondent, the Power Authority of the State of New York ("NYPA") because NYPA has the ability to supersede all local authority and issue building permits and certificates of occupancy. From the outset, NYPA planned to acquire fee simple title to Petitioners' land, believing that "ownership of the land was the key to unfettered control" and "landlord/tenant relationships . . . of the power plant site would not work."

Despite numerous discussions in which Petitioners tried to explore possible alternatives to acquisition of their land, NYPA exercised its power of eminent domain and ultimately acquired Petitioners' property in April 2003. Petitioner appealed, and here the Court cited the rule that a governmental body may only acquire by eminent domain fee title to real property for authorized "public use," and not for the primary purpose of conferring a private benefit onto a particular private party. Here, NYPA's taking of Petitioners' property did not foster any benefit to the public beyond that which had not already been obtained by Calpine's leasing of the Petitioners' property. Because the primary effect of the taking was to eliminate the obligation of Capline, a private party, to pay rent under the lease, the taking was unauthorized.

Comment: Obviously the public utility had very different ideas about whether it is practical to have a two-tier leasing arrangement with the underlying owner a private party not in an ongoing joint relationship with the utility. It strikes the editor that breaking up this arrangement was a sound enough business decision for a court to accept. Not so. Another "kick back" against *Kelo?*

COOPERATIVES; RESIDENT'S REMEDIES: : A Coop proprietary lease properly authorized a 100% abatement of the lessee's maintenance, including contributions to the cooperative's tax and mortgage obligations, upon presentation of evidence that the lessee's apartment could not be safely inhabited in the present condition. ***Granirer v. Bakery, Inc., 863 N.Y.S.2d 396 (A.D. 1 Dept. 2008).***

Plaintiff, owner of proprietary shares in a residential coop, filed an action against the cooperative alleging breach of the proprietary lease and the warranty of habitability. Upon presentation of evidence that the lessee's apartment could not be safely inhabited in its present condition, the Supreme Court held that the lessee was authorized to a 100% abatement of the maintenance fee, including contributions to the cooperative's tax and mortgage obligations.

The Supreme Court, Appellate Division, affirmed this decision for the following reasons: (i) The proprietary lease stated that when an apartment cannot be safely inhabited in its present condition, a 100% abatement of the maintenance fee is authorized, and the defendants had offered no evidence to support their contention that the abatement should not include the lessee's contribution to the cooperative's tax and mortgage obligations; (ii) Furthermore, a careful reading of the language of the proprietary lease shows the following: The abatement in question is explicitly defined in the lease as an abatement of "rent," and "rent" (or "maintenance") in turn is defined as a fixed proportion of the lessor's "cash requirements." "Cash requirements" are defined as "the estimated amount in cash which the Directors shall from time to time in their judgment determine to be necessary or proper for . . . the operation, maintenance, care, alteration and improvement of the corporate property . . ." Such definition of "cash requirement," the Court noted, was broad enough to encompass taxes and mortgage payments. Had the parties to this proprietary lease wished to exclude taxes and maintenance from the abatement provision of the lease, they could have done so. Hence, the plaintiff's abatement of taxes and mortgage obligations was authorized.

DAMAGES; EMOTIONAL DISTRESS DAMAGES; INJURY TO PROPERTY: Mental anguish based solely on negligent property damage is not recoverable, absent contemporaneous or consequential physical personal injury. ***Castillo v. City of Las Vegas, 2008-NMCA-141, 145 N.M. 205, 195 P.3d 870.***

In September 2003, Mr. Castillo and Ms. Martinez ("Plaintiffs") lived together in Mr. Castillo's home. The City's sewer system backed up, which caused property damage to the home. The home had been damaged by a prior sewer backup in 2002 and then later by a flood in 2005. Plaintiffs sued the City for personal injury and damages caused by the 2003 backup, but did not claim damages for the 2002 backup or 2005 flood. The City admitted liability for the 2003 backup, and the only issue tried before the district court was damages resulting from the 2003 backup.

Plaintiffs introduced the expert testimony of two appraisers–one who had appraised the home in 2000, before any of the damage, and one who had appraised the home in 2005. The City did not call any witnesses to testify about the damage to the home as a result of the 2003 backup alone, taken as a matter separate and apart from the 2002 backup or 2005 flood. At the close of trial, the jury was instructed that it could award Plaintiffs damages for loss of use and loss of value to the home as a result of the 2003 backup. Additionally, the jury was instructed that it could award Mr. Castillo damages for his mental anguish, which resulted from the damage to his home. The jury awarded Plaintiffs $30,000 for damage to the home and awarded Mr. Castillo $10,000 for emotional distress he suffered as a result of the 2003 backup. On appeal, the Court of Appeals affirmed the judgment as to the property damage, but reversed the damages for emotional distress. The Court concluded that "a plaintiff may not recover for emotional distress based solely on a claim for negligent damages to property."

In New Mexico, a prevailing plaintiff may recover damages for negligent or intentional infliction of emotional distress, or when a plaintiff establishes loss of consortium, intentional misconduct, defamation, or a physical injury.

"Recovery for negligent infliction of emotional distress is limited to situations in which 'a bystander . . . [suffers] severe emotional shock as a result of witnessing a sudden, traumatic event that causes serious injury or death to a family member.'" (*quoting Fernandez v. Walgreen Hastings Co. 1998-NMSC-039, ¶ 6, 126 N.M. 263, 968 P.2d 774).*

Because Mr. Castillo did not establish physical injury to himself or intentional misconduct by the City, and he did not satisfy the elements of bystander recovery, there was no legal basis to award emotional damages

In reaching its conclusion, the Court also discussed opinions from other jurisdictions that have reached similar results. *See, e.g., City of Tyler v. Likes*, 962 S.W.2d 489 (Tex. 1997); *Iannotti v. City of Amsterdam*, 639 N.Y.S.2d 537 (App. Div. 1996); *Dobbins v. Washington Suburban Sanitary Commission*, 658 A.2d 675 (Md. 1995).

EMINENT DOMAIN; LIMITATIONS ON CONDEMNATION POWER: The power of eminent domain cannot be used to take land in excess of that needed for the particular purpose involved and therefore there may not be the acquisition of a fee simple when an easement would suffice. ***Davis Holding Company, LLC v. Village of Margaretville*, 865 N.Y.S.2d 736 (A.D. 3 Dept. 2008).** Respondent, the Village of Margaretville, had for years used an unpaved access road that cut across Petitioner's land in order to gain access for maintenance and repair to a bulkhead structure and the Binnekill stream that flows through the Village. Over the past several years, because of low water levels in the Binnekill and damage to the bulkhead, Respondent has had to do increased work on the bulkhead and Binnekill, and as a result has increased the frequency with which it used the access road over Petitioner's land. After meeting with resistance from the Petitioner and failing to negotiate a right of access, the Respondent commenced an action against the Petitioner seeking a determination that it held an easement over Petitioner's property. During the pendency of that action, Respondent decided that it would be more "efficient" to exercise its power of eminent domain to acquire fee title to the subject property. The Court rejected Petitioner's contention that Respondent lacked the requisite public purpose to exercise its power of eminent domain, finding that because access to the bulkhead is necessary to preserve the structure as a means of improving water supply and fire control, Respondent's exercise of power was rationally related to a conceivable public purpose and therefore was constitutional. However, the Court also considered "whether the determination . . . was arbitrary or capricious or an abuse of discretion," and here cited the rule that eminent domain cannot be used to take land in excess of that which is needed for the particular public purpose involved. Because the sole purpose stated by the Respondent for taking in fee the Petitioner's land was to ensure immediate access to the Binnekill and bulkhead and to allow for sufficient construction equipment to reach the site, the Respondent should have been able to satisfy the public purpose of access with only an easement. Hence, the Court found that the taking of the parcel in fee was excessive.

DEEDS; SERVITUDES: Failure to amend a declaration of a homes association to show that newly developed properties are subject to the Declaration, as required in the Declaration, does not prevent inclusion of such properties under the Declaration if the association so desires and the deeds specifically subject the properties to the Declaration. ***Triple Crown Subdivision Homeowners Association, Inc. v. Oberst, ___ S.W.3d _, 2008 Westlaw 5046765 (Ky. 11/26/08/08) (not yet approved for publication.),*** reported under the heading: "Servitudes; Restrictive Covenants."

LANDLORD/TENANT; ASSIGNMENTS; BROKERAGE COMMISSION OBLIGATIONS: To incur liability to pay leasing commissions following its purchase of leased property, a buyer must have affirmatively assumed its seller's obligation to pay the commissions. Whether such assumption has occurred depends upon whether: (1) there is a clear separate promise or (2) the entire record, taken as a whole, signals that the buyer agreed to assume the obligation despite the absence of a separate promise to do so. ***Pagano Company v. 48 South Franklin Turnpike, LLC, —- A.2d ——, 2009 WL 578563 (N.J. 2009)***, discussed under the heading: "Brokers; Commissions; Lease Assignments."

LANDLORD/TENANT; LANDLORD LIABILITY; INJURY TO TENANTS; SHORT-TERM LEASES: In a short-term lease arrangement, a lessor owes a duty to a lessee if: (a) the lessee does not know or have reason to know of the condition or risk involved; and (b) the lessor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to expect that the lessee will not discover the condition or realize the risk. ***Reyes v. Egner*, Docket No. A-5977-06T35977-06T3 (N.J. Super. Ct. App. Div., January 8, 2009).**

This case makes a subtle, but important, change in the law of landlord liability, at least in New Jersey. Note, preliminarily that the case might have been solved under the implied warranty of habitability if the jurisdiction recognized the doctrine for short term residential rentals (most do) and if it imposed on the landlord a responsibility to inspect to insure that the premises are reasonably safe at the outset of the lease (some do).

The lessee obtained a short-term lease of a beach house. While on vacation, the lessee's elderly father (the plaintiff) fell when he lost his balance while stepping onto an outside wooden platform. The platform was adjacent to the sliding glass door leading from the master bedroom to a rear deck. Both the platform and deck had several structural problems that allegedly contributed to the plaintiff's fall. As a result of the fall, he suffered permanent injuries to his back. The plaintiff filed a complaint alleging, among other things, that the lessor was negligent in failing to correct or warn about the dangerous condition.

The trial court entered summary judgment in favor of the lessor, finding that no duty can attach unless the lessor actively or fraudulently concealed the dangerous condition. The court ruled that the dangerous condition – lack of a handrail and a significant drop to the platform – was patent – obvious to anyone.

On appeal, the Appellate Division reversed the entry of summary judgment. The decision began by discussing the long-established approach under which a landlord owes no duty to a tenant for dangerous conditions unless he or she had actual knowledge of the hazard and the lessee was ignorant of it. The court then stated a new approach for short-term leases: a lessor owes a duty to a lessee if the lessee does not have reason to know of the risk and the lessor has reason to know of the risk.

The court detailed the special circumstances that accompany short-term leases. Renters in this situation are not apt to perform a thorough inspection of the premises. The distance between the vacation property and the tenant's permanent residence often can make it inconvenient for the tenant to inspect the property before signing a lease. In the court's view, these special circumstances justified this new approach to premises liability for short-term leases.

The court relied extensively on the Restatement (2nd) of Torts, which puts tenant's family members within the zone of protection of the tenant. The Restatement does not limit the landlord's duty to short term leases, but the court felt constrained to make such a limitation here to escape the limitations of some precedent cases in New Jersey.

Comment 1: Anyone interested in whether this case applies to a given situation is urged to study it carefully. The editor acknowledges some confusion as to why the defects in the platform "should have been discovered" by the owner (who acquired the property for rental purposes eight years after the platform was built), but should not have been discovered by the plaintiff (who had been in the premises three days before the accident happened.

Comment 2: Whether this decision will spread- as the Restatement would have it – to all residential rentals, is certainly worth pondering. As suggested, in many jurisdictions, tort liability resulting from breaches of the implied warranty of habitability might already lead to the same result. Friedman on Leases has a chart of the state of the implied warranty state by state, identifying which of the states has used the doctrine as a basis for tort liability.

But this case supplies an alternate basis for liability. The landlord has a duty to inspect and to identify defects that the tenant might not discover. Here, the defect was found to be patent, but still undiscoverable. If the duty of inspection is extended to latent defects, unknown to the landlord, there will be a significant shift if liability and likely in insurance premiums.

Comment 3: In another interesting aspect of the case, the court absolved the broker from liability, holding that the broker, for its small fee, should not be expected to pore over "every nook and cranny" of the premises looking for defects. Apparently, the landlord is so required.

Comment 4: There was evidence that the lack of a railing was a building code violation, but the court doesn't seem to make much of that fact.

LANDLORD/TENANT; LANDLORD'S REMEDIES; DAMAGES; UNLAWFUL RESIDENTIAL OCCUPANCY: The landlord of a commercial unit that is used by the tenants for residential use in violation of the lease cannot recover the value of use and occupancy of the premises. ***Caldwell v. American Package Co., Inc.*, 866 N.Y.S.2d 275 (A.D. 2 Dept. 2008).**

Landlord sought to eject Tenants from a commercial unit on the grounds that Tenants were using the unit for residential use in violation of the commercial lease and had failed to pay rent. Landlord sought payment of rent for the duration of Tenants' occupancy. The lower court granted Landlord the right to recover the value of use and occupancy of the unit prospectively from Tenants. On appeal, the Supreme Court, Appellate Division held that Landlord could not recover the value of use and occupancy of the unit since doing so violated Multiple

Dwelling Law § 302, which prohibits the owner of a multiple dwelling that does not have a valid certificate of occupancy allowing residential use from collecting rent or the value of the use and occupancy of the premises, and violated the public policy intended to be served by the legislation (to ensure compliance by depriving a benefit to the landlord of an illegal conversion). The court found that the exception set forth in *Chatsworth 72nd St. Corp. v. Rigai*, 324 N.E.2d 888, allowing collection of rent by the landlord where the tenant had actively prevented the owner from obtaining the residential certificate of occupancy, does not extend to a situation in which the tenant merely knew or should have known the tenancy was an illegal conversion. Citing the earlier decision *Millington v. Rapoport*, 469 N.Y.S.2d 787, the court reaffirmed that an arrangement that both parties knew to be illegal at its inception does not create an exception to a statutory requirement. Accordingly, the court found that Multiple Dwelling Law § 302 applied and prohibited Landlord from collecting the value of use and occupancy of the premises.

LANDLORD/TENANT; OPTIONS TO EXPAND; AMBIGUITY; "APPROXIMATE:" The use of the term "approximate" in a lease to describe the bounds of an area that is subject to a right of first refusal does not render the lease ambiguous since it means only a "negligible deviation." ***First American Commercial Bancorp, Inc. v. Saatchi & Saatchi Rowland, Inc., 865 N.Y.S.2d 424 (A.D. 4 Dept. 2008).***

Sublessee exercised a right of first refusal over additional space whose bounds were described with the term "approximately" in the sublease and with the term "approximate" in the floor plan attached to the sublease. Sublessee's means of egress from this additional space was later blocked by a demising wall that was erected in the adjacent space by another sublessee of Sublessor.

Sublessee brought an action against Sublessor for a breach of the sublease and sought an injunction directing Sublessor and the other sublessee to restore a code-compliant means of egress. The lower court found that the sublease was ambiguous with respect to whether Sublessee was entitled to a means of egress that extended beyond the bounds described in the sublease and the attached floorplan (due to the use of the term "approximate"), and as a result, the court admitted parol evidence to establish the boundaries.

The Supreme Court, Appellate Division held that the use of the term "approximate" in the sublease to describe Sublesee's additional space did not render the sublease ambiguous with respect to the area's boundaries and was only "intended to cover slight or unimportant inaccuracies." Accordingly, the Appellate Division dismissed Sublesee's claims since there was no ambiguity with respect to Sublessee's rights to the additional space.

LANDLORD/TENANT; LEASE PURCHASE OPTIONS; CONDITIONS: Landlord must specifically perform sale of property to tenant pursuant to option in lease, even though the parties had never agreed to terms for the time and manner of payment, leaving such matters to a disputed escrow arrangement. Optionor cannot demand sufficient time to facilitate 1031 exchange in such case where this jeapordizes optionee's loan commmitment. ***Patel v. Liebermensch, 86 Cal.Rptr.3d 366 (Cal. 2008).***

Liebermenschs owned a condominium unit in San Diego. They purchased the unit hoping that one of their children would choose to live in it after completing college. Their children disappointed them however; none made use of the condominium. As their Plan B, the Liebermenschs decided to lease the unit to Patel. The Liebermenschs drafted a "proposal" for a lease agreement with Patel for a one year lease at a rental rate of $1200 per month. The proposal provided Patel an option to purchase, and set the purchase price at $290,000. By its own terms, the option right terminated at the expiration of the lease term. Liebermenschs asked Patel to accept the terms by signing and then faxing the form them, which Patel did. However, Patel attached a handwritten amendment to the lease/option proposal that granted Patel a right to extend the term for an extra year.

The Liebermenschs signed the option proposal and initialed the handwritten amendment prepared by Patel. Liebermenschs then created a lease agreement based on a form document, including a proviso that "Option to buy is attached." The case opinion suggests, but does not make entirely clear, that the referenced "Option" was the proposal signed by the parties.

In July of 2004, by letter, Patel notified Liebermenschs that Patel was exercising its option to purchase the condominium unit. It is at this point that problems began to arise. In his letter, Patel clearly informed Liebermenschs that he wanted to close quickly because interest rates were at a very attractive, low level. The usual next step would be for the seller, in this case the Liebermenschs, to create a purchase agreement setting out the mechanics of the purchase transaction – inspection rights, title abstracting, and statement of closing date. The Liebermenschs did so, but they demanded 1) that Patel take the property “as-is”; 2) that Patel pay a ten percent deposit on the purchase (to be given to the escrow company); and 3) that Patel allow Liebermenschs as many as 120 days to close, thereby permitting Liebermenschs to exercise a 1031 like-kind exchange. This was all news to Patel.

Indeed, at trial the Liebermenschs admitted that they never broached their like-kind exchange concern with their purchaser. The case opinion does not indicate whether the ten percent deposit was discussed by the parties prior to creation of the purchase agreement, but it is not mentioned in the option language repeated by the court.

Patel wanted this property and was willing to give in to their sellers, to a point. Patel accepted the as-is language requirement, but only to the extent Patel was “fully satisfied, and . . . if the seller required more than 30 days to close escrow, the deposit would be reduced to $5000” and in that event Liebermenschs would pay costs associated with escrow. Patel was informed by his broker that his interest rate could not be locked for 120 days.

The Liebermenschs were not pleased with Patel’s response, and rejected the amended purchase contract offered by Patel. They told Patel bluntly that Patel would have to buy the condominium unit on the seller’s terms, or not at all. In other words, Liebermensch demanded that Patel accept payment for the property at a time and in a manner of the seller’s choosing. Eventually, Patel gave in, and signed the purchase agreement as created by Liebermenschs, but to no avail. The seller ultimately declined to sell the property.

Patel filed his suit seeking specific performance, and won a jury trial. The court held that a valid option contract existed between the parties and Liebermensches breached that contract. As noted in a recent Development, exercise of an option to purchase real property transforms the option into a purchase contract. Patel was therefore entitled to specific performance of this contract.

The court of appeals reversed, although over a strenuous dissent. The court of appeals determined that the parties never reached a meeting of the minds. The court of appeals agreed with the seller that the manner and time of payment are essential elements of a contract and that the parties never reached an agreement regarding these elements in this transaction. The court declined to read “reasonableness” into the agreement between the parties to fill in the gaps.

The Supreme Court of California reversed the court of appeals and reinstated the result of the trial court.

The California Supreme Court admitted that disputes between parties to a contract after the contract is allegedly made “may be relevant in determining which terms they considered essential.” But the court goes on to state that “few contracts would be enforceable if the existence of subsequent disputes were taken as evidence that an agreement was never reached.” The Liebermenschs are the primary drafters here, and they could, according to the court, have provided for more detailed escrow arrangements. If the like-kind exchange was important to them, they should have disclosed that fact. They then could have provided for the extended escrow in the option and purchase agreement. This would have allowed Patel to negotiate the term to protect tne favorable interest rate Patel desired.

Reporter’s Comment 1: The overall result seems appropriate to this reporter. The Liebermenschs were looking for a way to walk on a deal when the buyers eventually caved in to all of the seller’s demands.

Reporters Comment 2: Still, an issue exists whether there was really, truly a meeting of the minds on a contract. For our purposes, the contract is the option agreement. It did not contain the “extended escrow instructions that the court suggests would have made sellers needs clear. But is there an argument that the absence of manner and time of payment language in this kind of contract should be essential elements of a meeting of the minds?

True, a court can infer reasonableness in timing issues when the parties have reached an agreement. But today timing and manner of payment are critical issues that most buyers and sellers think about when entering transactions. Many aspects of a transaction are collateral and not central to the decision of parties. The parties may choose not to detail these terms. One party may then act opportunistically, but in the end the court will enforce the contract.

For example, consider a buyer and seller who do not specifically describe in their contract what type of deed the seller will provide at closing. Seller arrives on the date for closing with a limited warranty deed and buyer refuses to close demanding a general warranty deed. A court will specifically enforce the contract and require seller to deliver the type of deed according to customary practice in that legal community. By contrast, how and when a buyer pays and seller receives several hundred thousand dollars may today be a more central issue, and one that is not as easily solved by resort to customary practice. The court relies on its own precedent, King v. Stanley,32 al. 2d 584 (1948) an old case. What if the shoe had been on the other foot? What if it was the buyer – Patel who wanted out of the contract? Would the court then hold that the manner and time of payment were not essential terms? The reporter has a funny feeling that these terms look more essential from the buyer's perspective after all, he has to come up with the cash. From a purely legal perspective, however, it should not matter.

Reporters Comment 3: Patel must have really wanted the property. A ten percent deposit is excessive; a contract would be supported by much less. A ten percent deposit might enforced as valid liquidated damages, even though there is nothing in the arrangement to indicate that the parties really tried to ascertain what the reasonable amount of damages would be in event of breach. A court might view this as a penalty. There is something almost biblical about ten percent and courts view the number as the dividing line between valid damages and unenforceable penalties.

Editors Comment: Compare *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center Assoc.*, 864 A. 2d 387 (N.J. 2005) (The DIRT DD for 2/4/05) where the optionor took the position that, absent language in the option, the optionee was obligated to tender the purchase price along with the notice of exercise. The lower court upheld this position, and the trial court ruled inferentially that it was correct as a matter of contract interpretation, but ruled that there was a duty of good faith and fair dealing to inform the optionee of the optionors interpretation while the optionee still had time to produce the funds with the option period.

LANDLORD/TENANT; LEASE PURCHASE OPTIONS; CONDITIONS; LACK OF TENANT DEFAULT: Where lease does not specifically condition lease option right on tenant's performance of other obligations under the lease, but says simply that option may be exercised during lease term, optionee may exercise option even though at the time optionee is in default under lease. ***Moosavideen v. Garrett, 2008 WL 4965165 (Tex.App.-Hous. (1 Dist.) Nov 20, 2008),*** also discussed under the heading: "Landlord/Tenant; Lease Options; Exercise; Notice.

The premises was a gas station and the tenant/ optionee stipulated that he had not been in environmental laws for the preceding two years. The lessors had a right to terminate the lease for breach of public law requirements, and did send such notice, terminating the lease if the breach was not cured in 180 days. The lessee, however, had already sent notice of exercise of the option. The court held that, even if the lessors had sent notice prior to the notice of exercise of the option, the exercise of the option was still valid, since the only stated condition was the continuation of the lease.

LANDLORD;TENANT; LEASE PURCHASE OPTIONS; EXERCISE; NOTICE: Where 1920 ground lease with 99 year term stipulates notice address of individual lessor and states a procedure for changing such notice address, such requirement remains binding on the parties 70 years later when lessee/assignee attempt to exercise purchase option contained in lease. Lessee need not seek out the addresses or identity of the heirs of the original lessor. ***Moosavideen v. Garrett, 2008 WL 4965165 (Tex.App.-Hous. (1 Dist.) Nov 20, 2008)***, also discussed under the heading: "Landlord/Tenant; Lease Options; Tenant Default."

The assignee of the leasehold estate ascertained from his predecessor the names and address of four heirs of the decedent lessor, to whom the predecessor had been paying rent. The assigne send notice of exercise of the purchase option to these four. But there was one other heir, who had died, and his estate was in probate.

The lessors contended that the lessee/optionee had notice of the identity of this heir and constructive notice of the way to contact his estate, and that his notice of exercise of the option was therefore invalid.

The Reporter for this item was Daniel Bogart of the Chapman Law School.

The court held that whether or not the lessee/optionee had notice of the fifth heir was immaterial. In fact, the only notice requirement for a valid exercise of the option was a requirement to send notice to the long deceased original lessor at her home address, as listed in the lease, and to any other successor lessor who had filed a change of notice address. It is unclear whether any of the heirs had complied with the requirement. Certainly the deceased heir had not. Therefore, no one could argue that the notice to the missing heir was inadequate.(In fact, the lessee did send notice to a Bank that was involved with the estate of the missing heir, but this apparently was an incorrect address.)

Note that there is nothing in the case indicating that the optionee in fact sent notice to the home of the original deceased lessor The court assumes that when the lessee knew that the lessor had deceased and knew the addresses of the four heirs in question, sending notice to them fulfilled the requirements.

Comment 1: Because of the issues resolved by the court in the other part of the case, referenced in the caption, all the folderol about notice is essentially moot. The lessee/optionee did manage to get notice to the last heir's estate before the lease expired, and that is all that was required.

Comment 2: The lessee's interest had changed a number of times. The court doesn't comment whether formal notice of change of address was given. It appears that the original notice address for the lessee was not the property address. Is there an argument that the lessee should not be able to take advantage of a provision that he and his predecessors had ignored? It does appear, however, that at least informally over the years, the identities and the locations of the party paying rent and the parties receiving rent were known to both sides, and it may be that the court's leaving the issue at that is the best policy here.

LANDLORD/TENANT; RENEWAL AND EXTENSION OPTIONS; RENT ADJUSTMENT; APPRAISAL: Absent a ground lease provision to the contrary, the value of the ground lease itself, that is the encumbrance of the lease, is to be disregarded when determining the fair market rental value for purposes of setting renewal rent. ***STL 300 N. 4th, LLC v. Value St. Louis Associates, L.P., 540 F.3d 788 (8th Cir. 2008)***

In 1964, a landlord and tenant entered into a 76-year ground lease. The lease provided that rent was to be periodically recalculated, with the first rental adjustment scheduled to take place at the start of the 40th year of the term. The lease required that "[a]ppraisals shall be made by three qualified appraisers, one of whom shall be appointed by landlord, one by tenant, and the third by the appointed appraisers."

The landlord and tenant disagreed as to whether the appraisers should have taken the value of the lease into account when determining the value of the property. In setting the rent, the appraisers were to use the greatest value of the "demised premises." The landlord argued that the term "demised premises" meant a "hypothetical fee simple interest" in the land, "that is the value of the land without consideration of the effect of the lease." Not surprisingly, the tenant contended that "demised premises" meant only the "leased fee interest in the land, that is the value of the land subject to the lease."

The U.S. District Court ruled in favor of the tenant, holding that "such assessment required consideration of the impact of a long-term lease on the property." It further found that even if the Lease were ambiguous, the tenant's position was still "the most rational and probable interpretation" based on the premise that "as the time remaining on the lease shortens, the value of the property, and subsequently the rent amount, will increase." In a separate ruling, the District Court found that it was the parties' intent that the third appraiser's determination would prevail if the two other appraisers [who were chosen by landlord and tenant respectively] could not come to an agreement.

The 8th Circuit Court of Appeals, making a *de novo* review, reversed both rulings and remanded the issues to the District Court for further consideration. First, it held that [after looking at the document as a whole] references to "demised premises" throughout the entire lease supported a finding that "demised premises" meant the "vacant and unimproved land, without consideration of the tenant's lease interest." The lease itself described the "demised premises" within its preamble. There, it incorporated the usual property description and appurtenances and then recited the following: "Also subject to the Lessee's fee interest in and to the buildings to be erected upon the premises above described, which they hereby retain." Much of that text was handwritten and initialed as additions to the lease.

With an eye on that language, the Court of Appeals held that: "the handwritten language makes it clear that the plain meaning of the language of the Lease [] establishes that the parties intended the demised premises to be subject to the lessee['s] fee interest in the buildings which by the very definition of a leased fee interest means that any appraisal of the demised premises must be based on the landlord['s] ownership interest in the land with the rights of uses and occupancy conveyed by the lease [] to the tenant [], the rights of each being specified in the lease []." Specifically, the Court of Appeals took special note that the lease provided: "(1) that the tenant has 'the right to demolish, tear down or otherwise remove any buildings or improvements located on the demised premises' at the time the lease is entered into; (2) that the tenant will maintain insurance for 'all buildings and improvements now existing or hereafter erected upon the demised premises'; (3) that the tenant will comply with all applicable laws and ordinances' whether or not the same require structural repairs or alterations, which may be applicable to the demised premises. . . '; and (4) that should excavations be undertaken on the adjoining premises, the tenant will permit the landlord or his agents 'to enter the demised premises. . . ." To the Court of Appeals, those characterizations of "demised premises" in the lease showed "that the parties intended 'demised premises' to mean the vacant and unimproved land itself, without consideration of the tenant's lease interest."

For that reason, the Court of Appeals concluded that "demised premises" refers to the value of the land without taking into effect the ground lease. It also mentioned that courts in other jurisdictions have found that the existence of a lease should not be a factor in fixing value of property for appraisal purposes. Further, it rejected the District Court's finding that the third appraiser's determination was binding if the other appraisers are unable to reach an agreement on the value of the property. The Court of Appeals held that, while a court may give more weight to the "non- partisan appraiser . . . *this* lease does not provide for the third appraiser to serve as a tiebreaker or for his appraisal to be binding on the parties." (emphasis added).

Reporter's Comment 1: In the words of the Court of Appeals: The District Court relied on *Mo. Baptist Children's Home v. State Tax Comm'n of* Mo., 867 S.W.2d 510, 511-12 (Mo. 1993) (*en banc*), wherein the Missouri Supreme Court held that in assessing commercial property for tax purposes, the '[t]rue value in money" of the property "is the price which the property would bring from a willing buyer when offered for sale by a willing seller" or "the fair market value of the property on the valuation date." Id. At 512. Such assessment required consideration of the impact of a long-term lease on the property." Obviously, the Court of Appeal rejected this analysis. What is of interest is that its reason for doing so was to call the case just a "tax" case.

Reporter's Comment 2: The holding is probably correct, especially given the existence of earlier cases in Missouri and elsewhere saying essentially the same thing: the tenant's rent should not be based on the fact that the tenant is already there. Logically, a "new" tenant seeking to lease the property at a fair market rental would not be leasing the property subject to the departing tenant's lease.

Reporter's Comment 3: This goes to both holdings – the setting of rent; and resolving disputes between or among the arbitrators. How much easier would it have been for the original parties to have said what they meant in the first place? Shorthand descriptions of appraisal standards and appraisal procedures are an invitation for trouble and litigation expense without any certainty of result. Ponder this: in premises that are subject to a space lease, should the fair market rental determination for a lease extension or renewal take into account the value of improvements put in by the very tenant itself? Or, should the fair market value include a component based on how much extra an existing tenant would pay rather than move to new space? We'd say: no.

Editor's Comment 1: But see: *936 Second Ave. v. Second Corporate Dev.*, 861 N.Y.S.2d 256 (Ct App. 2008). (When valuing a premises for the purpose of determining rent for a renewal term, the value of the net lease should be taken into consideration.) The editor disagreed with this case and, in polls taken at CLE programs where he has criticized it, most of the audience appeared to agree with the criticism (or were too chicken to appear contrary.)

The reporter for this item was Ira Meislik of the New Jersey Bar.

LENDER LIABILITY; DISCLOSURE: Borrower receives minimal damages from mortgage broker for failing to inform her that she could remove her brother's name from an existing mortgage, and instead refinanced her mortgage into two loans including a HELOC, covering her residence. ***Enriquez v. Amerifirst Mortgage Corp., 2009 WL 498072 (Cal. Ct. App. Feb 27, 2009)*** reported under the heading: "Brokers; Mortgage Brokers; Disclosure**."**

Comment: Buried in this case are quite a few allegations of misconduct or vicarious liability of the upstream purchaser of the loan, but the court dismissed them.

MECHANIC'S LIENS; AMOUNT OF LIEN; "DOWNTIME" CHARGES: Charges for equipment during "downtime" (periods during which the equipment sits idle on the construction site due to nonpayment by the general contractor) are not lienable labor costs under Missouri's mechanic's lien statutes. ***Missouri Land Development Specialties, LLC v. Concord Excavating Company, L.L.C., 269 S.W.3d 489 (Mo. Ct. App. 2008).***

Subdivision developer Woods Mill Development Company ("Woods Mill") retained Concord Excavating Company ("Concord") as the general contractor for the project. Concord retained Missouri Land Development Specialties ("MLDS"), an excavating and blasting company, in August of 2004 to provide construction services related to the project. When MLDS was not paid by Concord, it shut down work but left its equipment on site for some period of time. In January of 2005, MLDS filed a mechanic's lien claim in the amount of $628,595.43, one month after serving Woods Mill with a notice of intent to lien. On the lien claim, MLDS stated it was filing the attached account "for work and labor done and material furnished" by MLDS under contract with Concord, "upon, to and for the buildings and improvements" at the subdivision. Over a month later, MLDS filed its petition to enforce its lien claim, naming Woods Mill, Concord, and FirstService Bank, a lender for the project, as defendants. The petition included several causes of action, including a mechanic's lien claim.

At trial, MLDS presented testimony and several invoices explaining the charges constituting the amount of its claim. On one invoice of particular interest to the parties, the subtotal due was $62,288.65, such amount being comprised of charges for several listed invoice items. Included within these items was one dozer, two thirty-ton trucks, one excavator, and one high lift, all of which sat idle on the jobsite with no operators. The charges for those particular pieces of equipment totaled $50,538.65 and were comprised primarily of rent owed to MLDS. The trial court found that the charges claimed by MLDS were all reasonable, except for the $50,538.65, which constituted "the total of charges for the above-described pieces of equipment during 'downtime'-the period during which the equipment sat idle and shut down because of nonpayment by the general contractor." FirstService, which held an interest inferior to MLDS, asserted several weak arguments on appeal, and MLDS appealed as to the $50,538.65.

The Missouri Court of Appeals addressed, as a matter of first impression, whether "downtime" charges are lienable under Missouri law as labor costs. To complicate matters, the Missouri statute applicable to the creation of mechanic's liens was amended subsequent to the date the lien accrued, and MLDS argued that the amended statute should apply retroactively to the issue. The court did not address this argument in detail since it concluded that even if the amended statute is applied, MLDS's argument fails.

The amended statute provided that:

"Any person who shall do or perform any work or labor upon, rent any machinery or equipment, or furnish any material, . . . for any building, erection or improvements upon land, or for repairing, grading, excavating, or filling of the same, . . . under or by virtue of any contract with the owner . . . thereof, or his . . . contractor . . . upon complying with the [applicable statutory provisions], shall have for his . . . work or labor done, machinery or equipment rented or materials . . .furnished, . . . a lien upon such building, erection or improvements, and upon the land belonging to such owner . . . on which the same are situated, . . . to secure the payment of such work or labor done, machinery or equipment rented, or materials . . . furnished . . . . For claims involving the rental of machinery or equipment, the lien shall be for the reasonable rental value of the machinery or equipment during the period of actual use and any periods of nonuse taken into account in the rental contract, while the equipment is on the property in question."

Applying this language, the court held that while the statute could reasonably be read to apply to both lessors and lessees of machinery and equipment, the statutory language did not apply to "downtime" charges of lessees. In so holding, the court relied on (1) the principle announced in *Bush Construction Machinery, Inc. v. Kansas City Factory Outlets, L.L.C.*, 81 S.W.3d 121 (Mo.App. W.D.2002) (holding that a supplier of rental equipment could not obtain a mechanic's lien for the nonpayment of equipment rental fees and calling upon the legislature to consider whether a lien for lessors of machinery is desirable), and (2) the latter portion of the statute (providing that a lien shall be "for the reasonable rental value of the machinery or equipment during the period of actual use and any periods of nonuse taken into account in the rental contract") in which the language clearly refers to liens being allowed only for periods of nonuse taken into account in the rental contract, rather than the contract at issue between MLDS and Concord.

In addition, the court also held that "downtime charges" do not fall within the meaning of the term "labor," distinguishing the facts in this case from those in which equipment or "downtime" charges have been held to be lienable as labor costs. Specifically, the court focused on the fact that the costs incurred for equipment during the period of downtime in this case (i.e., rent) were incurred when no laborers were present, which is unlike the typical situation where (1) a lien award has included costs of equipment, (2) the propriety of the charges has not been at issue, and (3) the equipment charges have been necessary or ancillary to the laborer's performance of his work. In this case, the court could not say "that the costs incurred for equipment during a period of downtime were a part of the labor cost that ultimately produced the improvements to the property," and therefore, the charges were not lienable.

Comment 1: It's hard to argue with the court's literal interpretation of the statute, but was this really what the statute means? If we assume that the contractual understandings of the contractor and owner (or contractor and subcontractor) was that downtime would be recoverable when it was required by delays in the project, which should the person paying rent for the equipment during that downtime be compensated through the lien process? Maybe another amendment is needed. But who has the lobbying strength to support it?

Comment 2: The editor acknowledges that this case may not meet the hypothetical standard he proposes. Why exactly did the equipment stand unused for the period of time that it did? At the request of the contractor? When MLDS shut down, it could have withdrawn it equipment. If it didn't just for its own convenience, or to build up the damages, then the downtime probably shouldn't be compensable.

LANDOWNER LIABILITY; LIABILITY FOR INJURY TO INVITEES; ICE AND SNOW: A premises owner/operator does not have a duty to protect invitees from conditions caused by naturally forming ice. ***Haney v. Gerry's GM, Ltd. 2009 Westlaw 383761 (Tex, App. 2009) (not yet approved for publication.)***

This case involved a parking area. Plaintiff was aware of the presence of ice in the area, but didn't see it where he fell. *Wal-Mart Stores, Inc. v. Surratt*, 102 S.W.3d 437, 445 (Tex.App.—Eastland 2003, pet. denied) found had that the presence of ice is not an unreasonably dangerous condition. The court in *Surratt* expressly limited its holding to the premise's parking lot. But the Waco Court of Appeals also found naturally forming ice on a sidewalk to not be an unreasonably dangerous condition. *Gagne v. Sears, Roebuck and Co.*, 201 S.W.3d 856, 858 (Tex.App.—Waco 2006, no pet.). In *Gagne*, the Court stated:

"Holding a landowner accountable for naturally accumulating [ice] that remains in its natural state would be a heavy burden because [precipitation] is beyond the control of landowners

. . . . [A]ccidents involving naturally accumulating [ice] are bound to happen, regardless of the precautions taken by landowners. Generally, invitees like [Gagne] are at least as aware as landowners of the existence of [ice] that has accumulated naturally outdoors and will often be in a better position to take immediate precautions against injury." *Gagne*, 201 S.W.3d at 858, citing *M.O. Dental Lab v. Rape*, 139 S.W.3d 671, 676 (Tex. 2004) (holding naturally accumulating mud to not be an unreasonably dangerous condition).

MECHANIC'S LIENS; SUB-SUBCONTRACTORS: Under New Jersey law, a materials supplier seeking to file a lien under the Construction Lien Law must have a contractual relationship with either an owner, general contractor or subcontractor meaning that a relationship with a sub-subcontractor is not the proper basis for the filing of a construction lien claim against a project to which the sub-subcontractor provided materials. ***Eastern Concrete Materials, Inc. v. Tarragon Edgewater Associates, LLC, 402 N.J. Super. 583, 955 A.2d 962 (App. Div. 2008)***

MORTGAGES; DEEDS OF TRUST; TRUSTEES; DUTIES: Trustee of first deed of trust is not under a duty to verify that default has been cured, or even that the party allegedly the beneficiary of the deed of trust continues in that status, before acting on instruction to cancel notice of default. ***RJW Media, Inc. v. The CIT Group/Consumer Finance, Inc., 2008 WL 5376546 (Utah Ct. App. Dec. 26, 2008)***

This is a convoluted set of facts, but they can be pared down to their essentials as follows: Squires borrowed money from IndyMac on August 30, 2002, secured by his residence. He gave a first deed of trust and a note to the lender. The court does not say so, but we can reliably assume that the deed of trust was properly recorded. Fairly quickly afterwards, IndyMac assigned its interest in the loan to Deutsche Bank. IndyMac continued to act as loan servicer. First Southwestern Title Agency of Utah ("FSWT") was named the trustee of the IndyMac deed of trust, and Deutsche Bank was the beneficiary.

Squires then did what everyone was doing in 2002; he obtained a second loan secured by his residence. On August 30, 2002, he executed a note and entered into second deed of trust in favor of CIT. Again, we can assume that the lender duly recorded its deed of trust.

Little over a year later, Squires defaulted on the first loan on the IndyMac note. As a result, the trustee of the deed of trust, FSWT, recorded a notice of default on October 8, 2003.

On July 28, 2004, (nearly a half year after Squire defaulted on his first deed of trust loan), RJW Media ("RJW") purchased Deutsche Bank's position as holder of the indebtedness and beneficiary under the first deed of trust. Deutsche Bank's assignment to RJW of the IndyMac deed of Trust was recorded on August 9, 2004. The local recording office mailed the original back to RJW's lawyers. FSWT, the trustee, was apparently unaware that Deutsche Bank had sold its position, and that RJW was the new beneficiary to the deed of trust.

Only after purchasing Deutsche Bank's position did RJW learn of the default on the note. RJW discovered the problem in a title report it obtained on September 9, 2004.

But here is where it gets interesting: On September 22, 2004, FSWT, as trustee, unilaterally issued a notice of cancellation of default. FSWT did not inform RJW that it was doing so; of course, FSWT claimed to be unaware that RJW was the beneficiary. Why did FSWT cancel the notice of default? Apparently, Deutsche Bank, the assignor of the first deed of trust, instructed the trustee to do so.

In the words of the late Strother Martin, "what we've got here is a failure to communicate."

From this point, things proceed towards non judicial foreclosure of the first deed of trust. CIT, the beneficiary of the second deed of trust, did not learn of cancellation of notice until November 9, 2004. Three days later, on the 12^{th} of November, RJW scheduled a trustee's sale of the first deed of trust, to take place on December 13, 2004. On November 16 and 18, after scheduling the trustee's sale, RJW formally offered to buy CIT's second deed of trust, but CIT refused. RJW then went ahead with the sale, and not surprisingly won the auction.

A trustee's sale of a senior deed of trust wipes out junior encumbrances, including deeds of trust. Presumably, this would occur with respect to CIT's second deed of trust. However, CIT determined that the loan to CIT was in default and recorded a notice of default. This action would lead, eventually, to a trustee's sale of the property. CIT and RJW communicated (the case opinion does not state whether by letter or personally) but the gist of the communication was RJW's demand that CIT remove the notice of default. RJW pointed out that CIT's lien had been extinguished. CIT refused.

RJW therefore filed complaints against both FSWT and CIT. RJW claimed that the trustee of the first deed of trust, FSWT, breached its fiduciary obligation to RJW when FSWT followed the instructions of Deutsche Bank and negligently cancelled the notice of default. RJW claimed also that CIT's filing of notice of default (which is the first step towards the trustee's sale) was a slander of title.

The trial court held for RJW in its action against CIT, the holder of the second deed of trust, specifically stating that CIT was equitably estopped from challenging the trustee's sale because it was aware of the sale and failed to act to stop it. However, the trial court held against RJW in its action against FSWT, stating that there is nothing in Utah statutes requiring that the trustee meet a standard of care when responding to instructions from the purported beneficiary, if the trustee is unaware that the party giving the instructions is not the deed of trust beneficiary at all.

On Appeal, the Utah Court of Appeals affirmed the trial court's determination that the trustee did not breach a duty of care to the beneficiary. However, the court reversed the trial court with respect to CIT, holding that that the junior lien holder was not estopped from challenging the validity of the trustee's sale.

The more interesting issue is the former – the obligation of the trustee when receiving instructions from the deed of trust beneficiary.

Both the trial court and the court of appeal examine Utah statutes governing cancellation of notices of default. Although the wording varies from state to state, state statutes require mortgagees and holders of deeds of trust or deeds to secure debt to record instruments showing that the underlying indebtedness has been paid and satisfied when the note has been paid in the normal course. Similarly, if, prior to foreclosure, the borrower defaults but then comes up with the money, state statutes require the lenders to take steps necessary to acknowledge the payment, if a notice of default has been recorded.

In Utah, the controlling statute is Utah Code Section 57-1-31. It requires in subsection (1) that, after payment of the debt and cure of the default, "the obligation and trust deed shall be reinstated as if no acceleration had occurred." In subsection (2) the statute provides that if the default is cured as described in subsection (1), then "the trustee shall execute, acknowledge, and deliver a cancellation of the recorded notice of default under the trust deed; and any trustee who refuses to execute and record this cancellation within 30 days is liable to the person curing the default for all actual damages resulting from this refusal."

On its face, Section 57-1-31 does not speak at all to the relative obligations of the trustee to investigate the demand of the trust beneficiary that a default notice be cancelled. In other words, if the beneficiary says the default is cured, the statute does not demand that the trustee verify the cure. Both the trial court and the appellate court agree that the statute fails to "articulate" any standard at all. If anything, the statute tells the trustee that if the trustee fails to record a cancellation, it does so at its peril – that the trustee may be liable in damages.
The fact that the legislature does not establish a standard of care for the trustee under a deed of trust does not mean there is *no* standard. Indeed, some behavior of a trustee must be so unsound as to be "negligent" and actionable. In the absence of a standard of care fixed by statute, the court looks to industry practice. Unfortunately, RJW failed to provide evidence at trial of the standard practice in the industry or how trustees act in Utah under similar circumstances.

Comment 1: The opinion does not explain why Deutsche Bank gave instructions to FSWT to cancel the notice of default. This means that Deutsche Bank believed the default to have been cured. But at this point in time, Deutsche Bank had already unloaded the loan to RJW. Deutsche Bank received consideration for the paper and first deed of trust, and RJW was saddled with the borrower's indebtedness. RJW named CIT and FSWT as parties to the suit, but what about RJW's assignor? It seems to the author that the actionable behavior here (negligence or perhaps material non disclosure) belongs to Deutsche Bank.

Comment 2: It appears that the ordinary rule is that the trustee is under *no* duty to conduct "an affirmative investigation to determine whether the debt is in default . . .." § 7.21**,** Grant S. Nelson and Dale A. Whitman, Real Estate Finance Law at 652-53 (citing *Killon v. Bank Midwest,* N.A., 987 S.W. 2d 801 (Mo. App. 1998); Spires v. Edgar, 513 S.W. 2d 372 (Mo. 1974).

Comment 3: The author is nevertheless curious about industry standards for a trustee under a deed of trust. Just how careful must and should the trustee be in exercising its powers after receiving an instruction from the purported beneficiary? Essentially, the court is able to avoid this question by noting that the plaintiff failed to offer evidence on the issue. There was therefore no need "for the fact finder to determine the standard of care on this matter." It is as though the parties stipulated that the standard of care, whatever it may be, was met. The court says as much: "Because RJW materially agreed with FSWT's presentation of the applicable industry standard of care, did not otherwise dispute the standard, and did not offer evidence to demonstrate a breach of the articulated standard of care, we conclude that RJW did not meet its burden to present specific facts" to take to trial. The court's statement is its wonderfully circular. The court refers to RJW's failure to provide evidence that the trustee did not meet the articulated standard, but the court nowhere articulates the standard. Is there even a standard in Utah? The author cannot tell from the opinion. Perhaps a reader in Utah can fill in this gap.

MORTGAGES; FORECLOSURE; JUDICIAL; DISMISSAL; *RES JUDICATA:* Ohio Supreme Court rules that where creditor has twice dismissed an action to collect (through foreclosure) a defaulted and accelerated debt, it is barred by statutory *res judicata* rule from refiling the claim, even if it files for the period of default extending from a date *after* the second prior dismissal. ***U.S. Bank Nat'l Assoc. v. Gulotta, —-N.E.2d ——, 120 Ohio St.3d 399, 2008 WL 5157899 (Ohio 12/10/08)***

That's right, dear readers, because of negligence on the part of the lender in bringing its foreclosure action (there was authority that should have warned it), Mr. Gullotta apparently walks away scot free from a $164,000 mortgage debt (plus interest at 7.35%) on which he defaulted less than a year after signing the papers and on which he has apparently not paid a cent in almost five years.

The bank first filed for foreclosure, based upon the accelerated debt, in April, 2004. Two months later, it voluntarily dismissed the complaint. We're not told why. This being Ohio, however, this loan may have been caught up in the "prove the chain of ownership of the note" issues prevalent in the trial courts there. The same lawyer refiled an action for foreclosure a little more than a year later. About six months after that, a different lawyer representing the bank voluntarily dismissed that complaint.

Later, the bank again filed a third complaint to collect on the note, this time (forewarned by Gullotta's responsive motion to dismiss) proferring an amended complainit demanding payment of the same accelerated sum but with interest only from a date *after* the second dismissal.

Gullotta argued that, nevertheless, under the "two bites" rule articulated in the Ohio Rules of Procedure, Section 41(A), a plaintiff can indeed voluntarily dismiss, generally without prejudice, but check out this language: "Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a *notice of dismissal operates as an adjudication upon the merits of any claim that the plaintiff has once dismissed in any court.*"

A Third Circuit Court of Appeals case had already invoked this section to find that when an instalment note has been accelerated, and an action to collect it is twice dismissed by the creditor, the claim is deemed finally adjudicated against the creditor. But an Ohio appeals court had rejected the Tenth Circuit reasoning and had permitted a claim on an accelerated debt following two dismissals, assuming that the claim was for interest on that debt following the second dismissal. The technical rationale was that the debt remained unpaid and each new day was a new default. The practical rationale was that to read the statute in the way proposed by Gullotta would "toughen up" lenders, discouraging from giving borrowers a break by dismissing a foreclosure action, and thus frustrating desirable workout bargaining between the parties in the shadow of a foreclosure.

The trial court and appeals court bought in on this reasoning, but Gullotta then sought federal court review in light of the conflict with the federal analysis, and the Third Circuit promptly bounced the issue over to the Ohio Supreme Court for resolution of the Ohio rule.

The Supreme Court acknowledged the problems that might arise with workout bargaining, but felt compelled to agree with the Third Circuit that an accelerated debt is a single debt, and that practical difficulties don't change the meaning of the statute, which bars a third complaint on the "merits of any claim that the plaintiff has once dismissed." The debt is the same, the accelerated amount is the same – in short, the claim is the same.

Two judges dissented on the grounds of practicality (as noted) but also raised a technical argument that the impact of the second dismissal was an adjudication that Gullotta was not in default in November of 2003. But, the dissent argued, the plaintiff was free to show that Gullotta was in default in April, 2005, after the second complaint had been dismissed. The dissent noted that cases in Florida, and Indiana had made similar decisions (although the described facts of those cases seem a bit different.)

Comment: The answer probably lies with the legislature. The editor isn't sure whose side the Ohio legislature might be on at the moment, but suspects that lenders will get no relief on this issue or on the "who owns the note" issue without a reasonably generous package of concessions to homeowners in default. Since most of the "Ohio lenders" in fact are virtually nameless groups of secruitized owners spread throughout the globe and unable to reach agreement on where their best interests lie on any of these issues, it may be a long slog.

MORTGAGES; FRAUD; *BONA FIDE* LENDERS: The protection of homeowners in Maryland Foreclosure Act (PHIFA) does not alter the protection that property law gives to bona fide purchasers and lenders. Accordingly, PHIFA does not prevent a lender from foreclosing on property where the lender is in the position of a bona fide lender. ***Julian v. Buonassisi, No. 2740, Sept. Term, 2007 (Md. Ct. Spec. App. January 5, 2009).***

The appellant intervened in a foreclosure action and filed exceptions to the foreclosure sale, asserting an interest as the former owner of the property. She was allegedly a victim of a "mortgage foreclosure scam." When the appellant owned the subject property, she defaulted on her loan and sought the help of a mortgage foreclosure consultant. At the suggestion of the consultant, the appellant conveyed her property to another person with the understanding that the new owner would obtain a new loan to pay off the existing loan. The appellant believed that she could continue to live on the property and buy back the property after a year. The new owner did not make payments on the new loan. As a result, the lender initiated this foreclosure proceeding.

The appellant filed exceptions in the trial court, alleging that she was the victim of fraud, and that pursuant to PHIFA the deed to the new owner was void. The trial court overruled the appellant's exceptions to the foreclosure sale, and on appeal the Court of Special Appeals affirmed. The court stated that while PHIFA may make certain transactions voidable, this case involved a mortgagee who was a bona fide lender. PHIFA does not alter the protection that property law gives to bona fide purchasers and lenders. Because the mortgagee had no knowledge of the underlying alleged fraud, the appellant's exceptions to the foreclosure sale were without merit.

MORTGAGES; PREPAYMENT; YIELD MAINTENANCE: Ambiguous "yield maintenance" prepayment clause in a commercial loan may be a Deceptive and Unfair Trade Practice. ***In Sundance Apartments I, Inc. v. General Electric Capital Corp., 581 F.Supp. 2d 1215 (U.S.D.C. S.D. Florida 2008)***

Sundance Apartments I, LLC ("Sundance"), brought an action against Lender (the trustee of a commercial mortgage-backed security trust created by the lender) and the servicer, claiming that the yield-maintenance prepayment provision in the loan agreement was "deceptive," forcing Sundance to make a prepayment (under protest) in excess of the actual premium due. The court agreed with Sundance's interpretation of the provision, upholding the borrower's claims of breach of contract and violation of the Florida Deceptive and Unfair Trade Practices Act as valid claims, and denied the lender's and servicer's motions to dismiss.

The yield-maintenance provision in the Loan Agreement entered into between the parties read as follows:

As used herein, "Yield Maintenance Amount" means the sum of the present value on the date of prepayment of each Monthly Interest Shortfall (as hereinafter defined) for the remaining term of the Loan discounted at the Discount Rate.

The Monthly Interest Shortfall is calculated for each monthly payment date and is the product of (A) the prepaid principal balance of the Loan divided by 12, and (B) the positive result, if any, from (1) the yield derived from compounding semi-annually the Loan's Contract Rate minus (2) the Replacement Treasury Rate (as hereinafter defined).

The court summarized the parties' arguments as follows, based on the language in the above prepayment provision:

"Sundance alleges that the term 'prepaid principal balance' found in the [yield maintenance] Provision must be read to mean 'the prepaid balance of the loan for each payment remaining in the term as amortized' in light of its plain meaning and industry custom. Defendants, however, rejected that interpretation and instead read the term to mean 'a principal balance fixed at the time of prepayment,' which allegedly generates a windfall (the "Windfall Interpretation") and permitted Defendants to recover a yield greater than they would have recovered if Sundance had made its regular payments through the maturity of the loan."

The court ruled that the provision was deceptive and misleading because it "was intended to allow [the lender], or its successor, to charge Sundance a repayment amount that allegedly exceeds the plain meaning and common understanding of the term 'yield maintenance.'"Sundance alleged that it had suffered "actual damages" when it paid the prepayment amount demanded by the lender under protest, and argued that its actual damages should be "calculated as the difference between the alleged correct yield maintenance prepayment amount and the Windfall Interpretation as well as costs, attorney's fees, and other relief.".

Reporter's Comment 1: This case clearly illustrates the importance of clarity and completeness when drafting yield-maintenance provisions in mortgage-loan documents, as any ambiguity will undoubtedly be construed by a court in the borrower's favor when the lender has drafted the loan documents. Yield maintenance prepayment premiums are generally enforced by state courts (and even most bankruptcy courts) because they are considered commercially reasonable and have become standard in the industry over the past years (and many courts have given "guidelines" as to how these clauses should read in order to be enforceable). Yield-maintenance prepayment provisions have been inserted in commercial mortgage loan documents since the early 1980's, and are familiar to virtually all commercial borrowers.

Reporter's Comment 2: A prepayment premium clause will only be enforced to the extent permitted by the express contractual language in the loan document itself, and this is the area where most clever borrowers are still able to spot any "opening" to challenge the clause. There is simply no excuse for ambiguity or sloppiness by lenders in drafting these clauses, as the case law has become quite clear as to the language required to ensure enforcement, even where the court (mistakenly) applies a liquidated damages analysis.

The Reporter for this case was Jack Murray of the Chicago office of First American Title Insurance Company.

MORTGAGES; PREPAYMENT; "SIX MONTHS INTEREST:" Bankruptcy court concludes that standard "six months interest" in residential note will not be prioritized in bankruptcy over other lenders. ***In re Atrium View, LLC, 2008 WL 5378293 (Bankr. M.D. Pa., Dec. 24, 2008),***

At an auction sale of the commercial property in bankruptcy. The property was encumbered by three mortgage liens, and of course all three were to be taken into account in the bankruptcy sale.. There was enough money from the proceeds to pay off the first mortgagee (minus the prepayment premium) and partially pay the second mortgage.

The first lender's note contained a provision requiring the debtor to pay a "prepayment premium" if it prepaid all or part of the debt, voluntary or otherwise, within three years of the date of the note. The debtor filed its bankruptcy petition a little more than a year after the first mortgage note was executed by the debtor. The fee was a flat fee of six months interest.

The court disallowed the first lender's prepayment premium as not meeting the bankruptcy test for being "reasonable" in order to be paid out of the security with priority. The first mortgagee objected, arguing it should receive its contracted-for prepayment premium.

The court rejected the first lender's objection, and stated:

"In the instant case, [the lender] provided no evidence that the prepayment premium approximates predicted actual losses. A flat fee that is the same regardless of how many months interest is lost and that is unrelated to the market interest rate clearly is not based on a forecast of actual damages."

The court further stated that "[The lender's] only justification in support of the [prepayment] provision is that '[i]n the current residential subprime mortgage industry, a typical prepayment premium is six months' interest." In sum, while a six-month prepayment penalty may be inserted routinely in mortgage notes, that does not mean this provision passes muster in the bankruptcy context. [The lender] has not shown that the prepayment premium is reasonable, and, therefore, it is disallowed under § 506(b).

The bankruptcy court therefore disallowed the amount of the premium claimed by the first lender and ordered distribution of that amount ($15,815), which was held in escrow, to the second lender because it had not been paid in full and such distribution would still not be enough to pay the second lender's claim in full; therefore there were no funds available for the third lender.

Reporter's Comment 1: This case illustrates the affinity of bankruptcy courts to find a reason to "spread the proceeds around" to secured creditors (and unsecured creditors when possible) when there are not enough funds from a sale to pay them in full. The court stated that prepayment premium clauses are enforceable in Pennsylvania with respect to commercial loans, stating that "if the parties manifest an intent in the instrument to provide for a prepayment fee and the fee serves as measure of liquidated damages, payment of the fee will be enforced (citation omitted)." This again underscores the fact that many bankruptcy courts (and some state courts) have a basic misunderstanding of prepayment provisions, which should not be subjected to a liquidated damages analysis in connection with a commercial loan. This is certainly not a majority position. The bankruptcy court then looked to Sec. 506(b) of the Bankruptcy Code and, relying selectively on the distinct minority of courts that support its position, stated that "A prepayment charge formula must effectively estimate actual damages, otherwise, the charges may operate as either a penalty on the debtor or a windfall to a lender, at the expense of other creditors of the bankruptcy estate."

Reporter's Comment 2: This case demonstrates the danger to lenders in not inserting a standard yield-maintenance prepayment provision in the loan documents, and instead using a non-standard "flat rate" or "sliding percentage scale" provision. These types of clauses (which are still used by some lenders, especially in connection with some subprime and securitized loans) are subject to rejection by both bankruptcy and state courts, even if (as argued by the lender), "In the current residential subprime mortgage industry, a typical prepayment premium is six months' interest." Bankruptcy courts (and state courts) generally see much more justification for enforcing a standard (and well-drafted) yield-maintenance prepayment provision in mortgage loan documents, because they have become standard in the industry and appear to truly attempt to quantify the lender's estimated damages.

Editor's Comment: This was a contract claim, and the lender still can line up with other unsecured creditors for its prepayment amount. The question is one of priority, not validity. Frankly, the editor thinks that loading up a residential borrower with a yield maintenance penalty is overkill, and also likely violates many state consumer laws. Many lenders do not enjoy the preemption protection that they once did. The editor would leave well enough alone and not react to this case by beefing up the prepayment claim.

Some would argue that the lender shouldn't have been getting that high subprime interest in the first place. So it shouldn't complain about losing it from an overloaded borrower.

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

MORTGAGES; PRIORITY; LIS PENDENS; SHORT TERM LEASES: Although a short term lease is not entitled to be recorded, it nevertheless is subject to a *lis pendens* foreclosure filing under a statute that states that the *lis pendens* takes precedence over any interest arising before the notice filing but recorded after. ***Nomura Home Equity Loan Inc. v. Vacchio, 864 N.Y.S.2d 834 (Sup. 2008).***

Mortgagee brought a foreclosure action and filed a notice of pendency pursuant to CPLR § 6501. After the filing of the notice of pendency, Tenant entered into a one-year lease on the foreclosed property and then sought to intervene in the mortgage foreclosure action to claim that his tenancy should survive the foreclosure. Tenant argued that the notice of pendency did not apply to him since CPLR § 6501, which expressly binds a person whose conveyance takes place before the filing of the notice but that is recorded after the filing of the notice, does not apply to a conveyance which is not entitled to recordation under the recording acts, such as Tenant's one-year lease.

The court found that CPLR § 6501 was not intended to limit the rights of the filer of the notice of pendency or to create a safe-haven for a tenancy created after the filing of a notice of pendency. Therefore, Tenant's tenancy was not entitled to greater protection than the tenancy of one who occupied the property before the filing of the notice of pendency. The court rejected Tenant's request to intervene in the foreclosure action and found that Tenant was not entitled to permissive joinder because Tenant's claim that his tenancy survive the foreclosure shared no common questions of law and fact relating to Mortgagee's foreclosure right.

The court also found that Tenant could not be ousted from the property by a Writ of Assistance Order under RPAPL

§ 221 since Tenant would not be named as a defendant and thus would not be bound by the judgment of the foreclosure action.

NOTARIES; FEES; RECORDATION OF NOTARIAL ACTS: Title company notarites could not charge statutory $2 fee for notarization of documents if they did not further record the relevant notarial information in their notarial journals. ***Finnegan v Old Republic Title Insuranc Co. of St. Louis, 246 S.W. 3d 948 (Mo. 2008)***

Plaintiffs participated in the carrying out of various real estate transactions through several different title insurance companies. In each case, it appeared, the closing statements charged plaintiffs $2 per notarization as part of the costs of the transaction.

The statute permitted a $2 fee where a notary both notarized a signature and "properly recorded the notarial act in their notary journal." Otherwise only a $1 charge was permitted for an act of notarial service.

The notaries were employees of the involved title companies. In addition to the fee refund, the plaintiffs argued unjust enrichment and a violation of the Missouri Merchandising Practices Act. The basic statute provides that the employer is liable if the employee notary acted within the scope of employment and the employer consented. The court noted that the court below had granted summary judgment for the title companies based upon a misconstruction of the statute (which now was reversed) so the question of employer consent was a factual issue. Good luck with that one.

Comment 1: This was not styled as a class action, but the plaintiffs took the case to the Missouri Supreme Court, one assumes for more than the $30 or $40 in overcharges. So we may see more of this issue over time.

Comment 2: The author is unaware of whether to keep a journal is a common practice among title company closers. There were four companies and different closing officers involved here, suggesting that it was a common practice at the time in St. Louis. The sums are small, but can some trial lawyer pump this issue into something?

OPTIONS; EXERCISE; CONDITIONS: Landlord must specifically perform sale of property to tenant pursuant to option in lease, even though the parties had never agreed to terms for the time and manner of payment, leaving such matters to a disputed escrow arrangement. Optionor cannot demand sufficient time to facilitate 1031 exchange in such case where this jeapordizes optionee's loan commmitment. ***Patel v. Liebermensch,* 86 Cal.Rptr.3d 366 (Cal. 2008)** discussed under the heading: "Landlord/Tenant; Exercise; Conditions."

OIL AND GAS; POOLING ARRANGEMENTS: Unless otherwise provided in a pooling unit agreement, a termination of a lease for mineral interests on land which is part of a pooling arrangement does not terminate the former lessor's participation in the pooling unit, and the former lessor will be accountable for production and expenses on a unit basis after the lease is terminated including pool expenses attributable to other tracts of land. ***Wagner & Brown v. Sheppard, ___ S.W.3d ___ , 2008 Westlaw 4958501(Tex. 2008).(petition for rehearing filed – case has not been finally published).***

Sheppard owned 1/8 of the minerals underlying a 62.72-acre tract of land in Upshur County, Texas. C.W. Resources, Inc. and Wagner & Brown, Ltd. (collectively, "Lessees") leased her interest in the land. Pursuant to Sheppard's mineral lease, if royalties were not paid within 120 days after the first gas sale, her lease would terminate the following month. Sheppard's lease also permitted pooling with adjacent tracts, a practice employed to reduce excessive drilling and expenses in unnecessary exploration. Specifically, the lease provided in part that "Lessee shall have the right but not the obligation to pool all or any part of the leased premises or interest therein with any other lands or interests."

In 1997, Lessees entered into a unit agreement pooling the Sheppard tract with eight other tracts to form the W.M. Landers Gas Unit. A gas well subsequently was completed on Sheppard's tract, serving the entire unit. Proceeds and costs were split among all tracts in proportion to acreage. In 2000, it was discovered that Sheppard had not been paid royalties within 120 days after the first gas sales, resulting in the termination of her lease. Sheppard declined to enter into a new lease with Lessees, and she remained an unleased co-tenant entitled to her share of proceeds from minerals sold, less expenses. At issue in this case were two questions:

(1) "[W]hether the termination of Sheppard's lease also terminated her participation in the unit (in which case she [would be] entitled to 1/8th of 100 percent of production,

as both wells [were] on her tract), or did not do so (in which case she [would be] entitled to only 51.3 percent of production – the proportion her tract bears to total acreage in the unit)," since neither the lease nor the unit documents provided what happened to the unit when one of the leases in that unit terminates under its separate terms; and

(2) Whether Sheppard should bear costs incurred after the lease terminated that related to the unit but not her lease.

On appeal, the Supreme Court of Texas reversed the holding of the Texas Court of Appeals with respect to the issue of proceeds owed to Sheppard. Specifically, it stated that "the termination of Sheppard's lease did not terminate her participation in the unit. A lease is not necessarily required for pooling; mineral owners can join a pool even if no lease exists. Here, both Sheppard's lease and unit agreement pooled certain "premises" and "lands," not just their leased interests. Although Sheppard's lease expired, the lands themselves obviously did not. Thus, while termination of Sheppard's lease changed who owned the mineral interests in the unit, it did not cause the unit to terminate because it was a pooling of lands, not just leases."

Regarding expenses owed by Sheppard, the lower courts denied Lessees' claims for expenses to the extent they related to the unit rather than solely to Sheppard's tract based on holdings that the unit had terminated upon the termination of Sheppard's lease. However, since the Texas Supreme Court held that the unit did not terminate, the court reversed the lower courts and held Sheppard accountable for production and expenses on a unit basis, even if such expenses were not directly attributable to her tract. The court reasoned that overhead and other expenses required to operate the pool, even if not directly attributable to her tract, were valuable to Sheppard because the wells drilled on her land could not exist but for the existence of the pool.

OPTIONS; EXERCISE; SUCCESSIVE ATTEMPTS: Tenant may successively attempt to exercise option to purchase office building provided in lease agreement after its initial closing on option purchase fails; landlord held in breach for failing to participate in transaction. ***Lucia v. Ross ____ SW 3d. ____, 2008 WL 4075798, (Tex. App. September 4, 2008).,*** discussed under the heading: "Landlord/Tenant; Purchase Options; Successive Attempts."

RECORDING ACTS; DUTY OF INQUIRY; CORRECTIVE DEEDS:. Knowledge of a corrective deed may impose a duty of inquiry on a property buyer to investigate whether any title defects have arisen between the date of an otherwise valid deed and the date the corrective deed was recorded, and failure to do so may upset a buyer's claim that it was a bona fide purchaser who had taken good title to a property despite an intervening fraudulent transfer. ***Hahn v. Love, 273 S.W.3d 712 (Tex. App. 1st Dist. 2008)***.

There are five actors in this case – a property owner with a judgment against it (the Judgment Debtor); the company that was owed the money (the Judgment Creditor); a couple of people purportedly having a familial relationship to the owners of the Judgment Debtor (the Intermediate Owners); a broker; and a buyer of the property (the Ultimate Buyer).

In 1988, a judgment in favor of the Judgment Creditor was entered against the Judgment Debtor. On April 16, 1992, the Judgment Creditor filed an abstract of judgment against the property. It expired ten years later on the same day. In 2001 or 2002, the property was conveyed to the Intermediate Owners. That deed was recorded in 2002. Despite already having sold the property to the Intermediate Owner, the Judgment Debtor, more than a year later, contracted to sell the property to an unrelated third party. When the title company saw the expired abstract of judgment, it required that the judgment be satisfied. As a result, that deal fell through.

About a week later, the Judgment Creditor filed a motion to revive the judgment and sent notice to the Judgment Debtor. The same broker who had "represented" the buyer in the first contract now represented "represented" the Judgment Debtor as seller. Less than a month later, the Judgment Debtor and the buyer who had cancelled the earlier contract signed another one. Two weeks after that, on January 21, the 2002 deed from the Judgment Debtor to the Intermediate Owner was recorded. It lacked a metes and bounds description. About a week later, on January 23, 2004, just two days after the 2002 deed to the Intermediate Owner was actually recorded, the Judgment Creditor got its order reviving the Judgment. At the hearing, the Judgment Debtor's attorney unsuccessfully asked for more time to respond and never disclosed that the deed to the Intermediate Owner had been filed in the interim. On March 1, the second (now revived) abstract of judgment was recorded and two days later a corrective deed, now incorporating a metes and bounds description, was recorded.

The same broker who has been involved in the two earlier attempts to sell the property to the same buyer was then contacted by, or himself contacted, another interested purchaser. He told this interested purchaser that the contract buyer was unable to close. A closing between the Intermediate Owner and the interested purchaser then took place, however, and this purchaser became the Ultimate Buyer. A deed from the Intermediate Owner to the Ultimate Buyer was promptly recorded on April 16, 2004.

What followed was an attempted execution sale, a request for a temporary and then a permanent restraining order, and the Ultimate Buyer's intervention in the suit. Allegations of a fraudulent conveyance were raised. The validity of the originally recorded deed lacking a metes and bound description was challenged. And , most significantly for this case, the Judgment Creditor charged that property was subject to a constructive trust because the Ultimate Buyer was not a bona fide purchaser for value, in good faith. The Ultimate Buyer contended that the 2002 deed from the Judgment Debtor to the Intermediate Owner was recorded at a time when no active abstract of judgment was in force, and that the property was therefore not encumbered by the judgment lien. It successfully obtained summary judgment in its favor.

In the appeal that followed, the Texas Court of Appeals reversed and sent the matter back for further findings. In doing so, it looked at the Fraudulent Transfer Act. That Act accepts, as evidence of an actual intent to defraud, that a transfer has been made to a related party while there was a threat of suit or a creditor's claim if, at the time, the transfer had been made for less than reasonably equivalent value. Those questions were never seriously treated by the lower court. There is a limitation in the Act to protect *bona fide* purchasers. It protect those who take in good faith and for reasonably equivalent value. A putative *bona fide* purchaser has the burden of proof on those issues. Critical here is that, "[a] transferee who takes property with knowledge of such facts as would excite the suspicions of a person of ordinary prudence and put him on inquiry of the fraudulent nature of an alleged transfer does not take the property in good faith and is not a bona fide purchaser." That is a question of fact, and generally cannot be resolved on summary judgment.

The Judgment Creditor challenged the legal sufficiency of the 2002 deed to the Intermediate Owner which, if fully valid, would have placed the subsequent recorded (revived) abstract of judgment out of the chain of title. The Ultimate Buyer claimed that the original deed, though lacking a metes and bounds description, was still valid and that it had paid reasonably equivalent value (and that seems to be the case). The Ultimate Buyer, by affidavit, claimed no knowledge of the judgment's history, claiming he had first heard of the property in a telephone call from the broker, with whom he had done many prior deals.

The Judgment Creditor countered as follows: The corrective deed to the Intermediate Owner was filed two days AFTER the revived judgment was recorded. The first (failed) contract with the earlier buyer failed because the title company for that transaction raised the judgment as an objection and the broker knew about the judgment (even though the judgment had become dormant). A motion to revive the judgment had been filed. The same broker negotiated the second contract with the earlier (failed) buyer. And, the same broker, who enjoyed a long time relationship with the Ultimate Buyer, served as the broker for the Ultimate Buyer.

After sorting through this set of circumstances, the Appellate Court drilled down to the broker's relationship to the transaction. To the Court, the relationship of the broker to the Ultimate Buyer raised fact questions as to whether the Ultimate Buyer had either actual or constructive knowledge that the Intermediate Owner (as seller) had clear title to the property free of the judgment lien. "A broker is a fiduciary required to exercise fidelity in good faith toward his principal in all matters within the scope of his employment. . . ." In Texas, and in many other jurisdictions, this "imposes upon [the broker] the positive duty of communicating all information he may possess or acquire which is, or may be, material to his employer's advantage." That was enough to topple the lower court's summary judgment granted in favor of the Ultimate Buyer.

Another problem for the Ultimate Buyer was that the original deed to the Intermediate Owner lacked a proper metes and bounds description. The Court never revealed if it had any property description at all, but clearly found that the first deed was a "conveyance that several title searches indicated was of questionable validity." It would appear that even if the first deed had a sufficient property description, the existence of the corrected deed, filed two days AFTER the revived judgment was recorded, should have triggered an inquiry by the Ultimate Buyer as to what happened between the filing of the first deed and the filing of the corrected deed. According to the Court, "reference to another document puts the purchaser upon inquiry, and he is bound to follow up on this inquiry, step by step, from one discovery to another and from one instrument to another, until the whole series of title deeds is exhausted and a complete knowledge of all the matters referred to and affecting the estate is obtained."

The result: back to square one – the lower court now has to figure out whether the Ultimate Buyer was, in fact, a bona fide purchaser.

Comment 1: Excuse us if we overlooked Texas procedural law regarding such things about the expiration dates for recorded judgments. And, by way of curious note, this case has 29 headnotes and 13 footnotes. After chucking those out, the opinion isn't as long as it looks.

Comment 2: Oh, how much easier life would have been for this judgment creditor and its pocketbook had it revived the judgment before it expired. How many attorneys keep track of the expiration date of expiring judgments (or financing statements)? How many expressly disclaim responsibility to do so? And, what would be the remaining issues if the original deed had included a metes and bounds description and re-recording it as a corrective deed had not been called for?

Comment 3: What are the limits of the duty of inquiry? Presumably, the Ultimate Buyer's title search showed the corrective deed. Assuming that the originally recorded deed was valid notice of the change in ownership, why should the Ultimate Buyer have been required to see if the grantor under that deed had any subsequent judgments? What if an internet search had turned up an article about the Judgment Debtor having lost a law suit ten years earlier? Should the Ultimate Buyer have done more investigation to find out whether a judgment lien was ever filed against the debtor or the property? Wasn't the notice-filing scheme supposed to protect parties who look at the record if they are without actual knowledge of the status of a property's title? Assuming it just never occurred to the Ultimate Buyer that there was something going on here, shouldn't it have been able to rely on the record?

Comment 4: If a buyer knows that its seller obtained title from a party related to its seller, does the buyer need to inquire as to whether that transaction was a fraudulent transfer? After all, the Court is saying that investigation ends when the buyer has "complete knowledge of all the matters referred to and affecting the estate is obtained." The Reporter hopes not. The facts here sure put out a giant smell, and summary judgment certainly seems inappropriate. But, to this editor, the Appellate Court is setting a trap much larger than what would seem to be required to catch this varmint.

Comment 5: A request for a rehearing has been overruled (Dec 12, 2008), and a petition for review has been filed (Jan 26, 2009).

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

RECORDING ACTS; RECORD NOTICE; LEGAL DESCRIPTION: A duly recorded deed to secure debt [mortgage] on real property was not void and outside the chain of title to the real property when it incorrectly identified the land lot number (part of the County mapping system), but incorporated by reference a named subdivision plat, which existed only in the correct land lot. ***Deljoo v. SunTrust Mortgage, 284 Ga. 438, 668 S.E.2d 245 (Ga. Sup. Ct. 2008)***.

Borrower gave lender a deed to secure debt to secure a loan. The deed mistakenly referred to the property by the wrong land lot; however, the legal description contained in the deed made reference to and incorporated a recorded subdivision plat. The holder of a subsequent deed to secure debt on the property sought cancellation of the first deed to secure debt. The trial court and Georgia Court of Appeals found in favor of the subsequent deed holder, concluding that the error in misstating the land lot took the earlier deed to secure debt out of the chain of title, and that the subsequent deed holder was a bona fide purchaser for value without notice of the earlier deed. The holder of the earlier deed to secure debt applied for review to the Supreme Court of Georgia.

Citing the basic rule that the description of land in the conveyance should be reasonably certain and sufficient to enable subsequent purchasers to identify the premises intended to be conveyed, the Supreme Court stated that an erroneous legal description can still be deemed sufficient to put a subsequent purchaser on inquiry depending upon the attendant circumstances. The Supreme Court went on to conclude that the legal description contained in the earlier deed to secure debt was not void because of the erroneous land lot number since the deed incorporated by reference a subdivision plat, which provided a key to locating the property. The Supreme Court went on to note that the "Court of Appeals created an erroneous dual standard — that a partly incorrect legal description may be sufficient as between grantor and grantee, and though recorded, is insufficient to give constructive notice", which ignores "more than 100 years of jurisprudence which provides for broad constructive notice upon recording." The Supreme Court reversed the decision of the Court of Appeals and the trial court.

Comment: As the hypothetical "chain of title" search is almost never carried out, in light of the fact that title companies generally have title plants based on a tract index, we are already in "Never Never Land" when dealing with constructive notice problems.

This particular case, however, might have caused a problem for a tract indexer as well, since the legal description has the wrong land lot. But it appears that the same description referred to a named subdivision plat. If the subdivision plat in question did not appear on within the designated land lot, then clearly a hypothetical examiner or tract indexer should have picked up that error, and figured out where the named subdivision was. (Here the error was that "land lot 18" was inserted instead of "land lot 28"). Here, the court stated, the subdivision plat "contained a key" that would have unraveled the mystery. First, however, one must "spot the issue." That's why we professors get the big bucks for our "issue spotting" examinations.

REDEVELOPMENT; PROPERTY TAX ABATEMENT; JURISDICTION: Although governmental authorities and private parties cannot agree that disputes over taxation matters are to be resolved in a court other than the Tax Court, not every controversy touching a taxation matter is bound by that rule and such parties are free to agree that their dispute is to be heard in a different forum. ***McMahon v. City of Newark, 195 N.J. 526, 951 A.2d 185 (2008)***

An urban renewal association entered into a financial agreement with a municipality to construct an office building. As an incentive, the association was to be exempt from taxation on improvements for a period of 20 years. Instead it would pay an annual service charge. The parties agreed that any breach of the agreement could be litigated in the New Jersey Superior Court or by way of arbitration. They agreed that the sale or other disposition of the project would terminate the tax abatement unless the municipality consented to the transfer or if the transfer was in form only.

After the project began, the association encountered financial difficulties. It sought bankruptcy protection and pursuant to a reorganization plan, the association transferred ownership to a trust. Although the municipality was not a party to that order, it was present through counsel at both the hearing at which that order was entered, as well as the closing where the title transfer took place. It did not object to the transfer or warn that the tax abatement was now in jeopardy. After the transfer, the municipality revoked the tax abatement status based upon lack of its approval. It then issued tax assessments. The receiver for the protected project filed for relief in the Superior Court. The case was transferred to Tax Court where that court ultimately held that the parties could not divest by agreement the statutory role of the Tax Court to review the actions of a tax assessor that impact upon the tax liability of a taxpayer. The Court held the statute of limitations barred the complaint under its jurisdiction. The Appellate Division affirmed, concluding that the proper procedural avenue the receiver should have pursued was a tax appeal and that the initial complaint was filed more than a after the tax appeal filing deadline. The receiver appealed to the New Jersey Supreme Court.

The Supreme Court held that the parties had agreed in a detailed arm's length writing that disputes under the agreement were to be resolved in a forum other than the Tax Court. It held the controversy involved did not invoke the Tax Court at all; the complaint did not challenge the amounts or the determination of the tax assessments, but rather the unilateral determination by the municipality that by transferring the project to the trust, the financial agreement between the parties had been breached. Therefore, the Court found the matter to be a breach of contract action rather than a matter that spoke to issues unique within a tax appeal process.

REDEVELOPMENT; STANDING; CITIZEN OPPOSITION: Citizen has standing to attack the awarding of a redevelopment contract as illegal and *ultra vires* ten years after the original approval of the plan if: (1) If it is a taxpayer and the alleges that the challenged action will cost the city money – leading to a loss of funds that must be replaced with tax money; (2) if it owns a parcel adjacent to or even nearby to the proposed redevelopment project, in which case it is *prima facie* aggrieved by any land use decision made on the redevelopment property or other property affected by a land use decision, and the zoning authority must show lack of any potential adverse effect to defeat standing. ***120 West Fayette Street LLLP et al. v. Mayor and City Council of Baltimore et al., No. 49 (Md. 1/9/09)***

The first third of this opinion is a detailed analysis of the procedural details of the appeal – discussing whether a motion to dismiss was converted into a motion for summary judgment when the trial court relied on matters outside the official record in reaching its decision. Perhaps the analysis is important, but the procedurally challenged editor has difficulty perceiving why it makes much difference to the outcome of this case when the court goes on to hold that the citizens challenging the action really had to show very little to obtain standing. It may be that the "off record" information was an affidavit from a public official that no public money would be expended on the project, but it is hard to imagine that the court could make a finding on such an issue on the basis of an affidavit alone anyway. Certainly the "antis" alleged that there was a lot of fact finding that ought to go on to these this assertion.

The fundamental allegation made by the neighbors was that, after a long process of issuing RFP's and dealing with various proposed developers, the redevelopment agency suddenly found itself a new developer with a significantly different plan than that earlier addressed, and that the process of selecting this developer happened quickly and without adequate attention to what went before, and therefore was illegal. This sort of thing happens all the time in redevelopment projects, of course – a last minute "white knight," often with a new plan and out of town money, comes charging in and local developers who have been negotiating for the project get squeezed out. Undoubtedly there is a right way and a wrong way to deal with this situation, and the opinion takes no position on whether the City in fact did anything wrong.

As indicated in the caption, the court first held basically that everyone who pays taxes in the County is eligible to protest a public action that might lead to an unlawful expenditure of public funds. As the redevelopment project (known as the "Super Block") was the second largest redevelopment project in the city's history (second only to the Inner Harbor project), it is certainly easy to contemplate that commitments made by the city to facilitate the development might well cost the city a great deal of money, even if the basic financing was not public.

Finally, the "antis" argued that they owned property adjacent to the project site, "would endure construction and interminable chaos at its doorstep" (almost certainly true – veterans must admit – but perhaps with an ultimate payoff in higher land values). In any event, this fact alone would permit the opponents to have standing, even if they didn't own land adjacent to the project but even nearby. Necessarily, a project as large as the Super Block unavoidably is a land use decision made by a public agency that will impact the neighbors.

Comment: It is a rare case in which a challenger to a major project actually has to win substantively, and show some significant legal defect preventing the project from proceeding. Often, just tying up the project in litigation for a significant period of time will cost the developer whatever financing it had cobbled together. In short, for those attacking a major development – delay is death. The editor has no idea whether this is the case in Baltimore, but certainly the Court of Appeals has given land use opponents a potent weapon in its broad standing determination.

RELIGIOUS PROPERTY; OWNERSHIP OF LOCAL CHURCHES: California Supreme Court, adopting "neutral principles" approach and rejecting "principle of government" approach, finds that local Episcopal Church deeded to the local congregation indeed belongs to the larger church after the local congregation separates from the larger church. ***In re Episcopal Church Cases, 2009 Westlaw 18700 (1/5/09)***

As has been in the new lately, the local church, St. James in Newport Beach, rejected affiliation with the National Episcopal Church when the national church ordained an openly gay man as a minister in 2003 in New Hampshire.

St. James became a parish of the Los Angeles Episcopal Diocese in about 1947 and in 1950 the Diocesan Bishop transferred title to the real estate on which the church building stands to the parish.

The relationship of the parish to the broader church was meticulously documented through the years. The members' original application "promised and declared that said Parish shall be forever held under, and confirm to be bound by, the Ecclesiastical authority of the Bishop . . . the Constitution and Canons of the [Episcopal church] and the Constitution and Canons of the Diocese of Los Angeles. The Articles of Incorporation of the parish continued the same theme.

The Constitution and Canons of the general convention of the Church provided, at the time of the transfer of the property (1) no Church . . . shall be consecrated until the Bishop shall have been sufficiently satisfied that the building and the ground . . . are3 secured for ownership and use by a Parish . . . affiliated with this Church and subject to its Constitution and Canons. Other sections limited the disposition or encumbrance of such properties without the consent of the Bishop and declared that no Church should be removed, taken down, or otherwise disposed of for any worldly or common use without the previous consent of the Standing Committee of the Diocese."

The most direct and significant part of the Constitution and Canons, however was not adopted until 1971, twenty years after the transfer of the church property to the St. James Parish. Following a U.S. Supreme Court decision, Jones v. Wolfe, 443 U.S. 595 (1971), the greater church added a fourth provision dealing with church property, stating that "Any dedicated and consecrated Church . . . shall be subject to the trust declared with respect to real and personal property held by any Parish . . . [as stated elsewhere in the document.]"

The Parish relied on the deed. The greater Church relied on the reference to the Constitution and Canons, binding the Parish. There was no question in this case that the trust could be dissolved by the beneficiary.

The court acknowledged that the Establishment Clause was in play here. The court could not impose the religious values of the greater church on the local parish. In fact the local parish made that argument when it declared the case a SLAPP suit, brought for the purpose of depriving it of its protected right of religious freedom. The trial court, in fact, agreed, and dismissed the suit. The California Court of Appeals reversed. It concluded that the traditional California approach to these issues was the "principle of government," which held that in a hierarchical religious organization, the court will make no attempt to resolve religious differences, but simply defer to the decision of the "highest court" of such organization. This was one of two approaches sanctioned by the Supreme Court, be apparently had long been the approach followed in California. Under this approach, the question was simple – how did the broader Episcopal Church interpret its Constitution and Canons and their effect on the local parish? Easy call.

The California Supreme Court, however (with one dissenter) decided that California should move to the second Constitutionally permitted approach to resolution of these disputes – the "neutral principles of law" approach. Under this approach, to the extent that the court could interpret the operative statements of relationships among disputing parties in a "neutral" fashion, without regard to any interpretation of faith or doctrine, it was free to do so. The U.S. Supreme Court had approved this principle unequivocally in the 1971 *Jones* decision, *supra*, and, as indicated, this is apparently what led the Episcopal Church to make very clear neutral tracks in the sand indicating how parish property was held and controlled.

The court carefully noted that if the "neutral principles of law" approach dragged it into a dispute as to the meaning of a religious term or concept, then it would be compelled to defer to the "highest court" in a hierarchical organization. The court in fact held that provision 4, above, added in 1971, was part of the Constitution and Canons to which the parish and its operative documents had already committed themselves. In any event, the court held, that the provision merely made express what had already been implicit with respect to the use of parish property consecrated as a church.

Justice Kennard filed a dissenting and concurring opinion in which he argued that the "neutral principles of law" approach should not be used, but then concluded that under that approach, the parish would lose anyway, so it is difficult to see what the Justice's dissent really is.

Comment 1: One supposes that a loose affiliations of local congregations could create non- hierarchical rules that would give each congregation complete control over its property, as well as its doctrine. But it does appear that most of the traditional churches have hierarchical formats and, under one test or another, local congregations will be hard pressed to turn their religious disputes with their mother churches into property claims.

Comment 2: Of course, the court's view that "neutral principles" determine the case obviates the claim that the lawsuit is about gay ordination. It's just a dirt fight. No SLAPP claim is available. Frankly, one wonders how the original trial judge could conclude otherwise.

RULE AGAINST PERPETUITIES; OPTIONS: A repurchase option in a contract to purchase real property that does not specify a closing date will not violate the rule against perpetuities since the law will presume a reasonable closing date. ***Omar v. Rozen, 867 N.Y.S.2d 458 (A.D. 2 Dept. 2008).***

Purchaser and Seller entered into a contract to purchase real property that contained an option to repurchase the property for a five-year time period but that did not specify a closing date. Purchaser later brought an action against Seller for breach of contract and for specific performance of the repurchase option, to which Seller responded with a claim that the repurchase option violated the rule against perpetuities ("RAP").

The Supreme Court, Appellate Division found that the five-year time period and the unspecified closing date did not cause the repurchase option in the contract to violate RAP. The court held that where a closing date is not specified, the law will presume a reasonable closing date and that failure to close by that date will constitute a breach of the implicit covenant of good faith and fair dealing.

The Seller also claimed that essential terms of the agreement were unspecified and left open for future negotiation in violation of the statute of frauds. The court held that unspecified terms such as the quality of title, closing date and risk of loss between contract and closing would be presumed by the law, and that the contract did specifically identify the parties, the property, and provide a reasonably certain method of determining a purchase price and the terms of financing. Accordingly, the court dismissed the Seller's affirmative defenses of a violation of RAP and of the statute of frauds.

Comment: The editor agrees, and there a number of other cases so holding. The optionee's rights truly arose upon exercise of the option, and that had to happen within five years. Although it certainly is best for the parties to work out the various other details of an option exercise at the time of creation of the option, this is not necessarily the market practice, and the courts will fill in all but the most critical details. We must be clear as to the parties, the land, the price, and the time of exercise. We *should* be clear as to much more. But the courts will provide . . .

SERVITUDES; RESTRICTIVE COVENANTS: Despite the existence of language in a master declaration requiring developer to amend the declaration in the event after-acquired property was to be subject to its terms, a specific reference to the declaration in the deeds of such after-acquired property was sufficient to subject the property to the declaration, in the absence of such amendment, so long as this result mirrored the intention of the parties. ***Triple Crown Subdivision Homeowners Association, Inc. v. Oberst, ___ S.W.3d _, 2008 Westlaw 5046765 (Ky. 11/26/08/08) (not yet approved for publication.)***

After a developer acquired land for the purpose of developing a subdivision, he recorded a Declaration of Covenants, Conditions and Restrictions (the "Declaration") against all property he owned in order to establish a general plan and uniform scheme of development. In the Declaration, there was an "expansion" clause which subjected after-acquired property to the restrictions and required the developer to amend the original restrictions to include the legal description of any such after-acquired property.

The subject property in this case was after-acquired property as to which the developer included language in the deed subjecting the property to the Declaration. In violation of the expansion clause of the Declaration, however, the developer failed to amend the Declaration to include the legal description of this after-acquired property. As a result, the owners of the after-acquired property brought suit, arguing their property was not subject to the Declaration.

The trial court ruled that the reference to the Declaration in a deed (by book and page number of the document) "acting alone was sufficient to impose the covenants and restrictions . . . upon all subsequent purchasers . . . ." The Kentucky Court of Appeals reversed the trial court's judgment, concluding that the Declaration had to be amended to include the legal description of the after-acquired property in order for the restrictions to be imposed on such property. The homeowners' association (as successor-in-interest to the developer) appealed to the Kentucky Supreme Court.

The Kentucky Supreme Court began by noting that when interpreting building restrictions, courts have shifted their review from strict construction to the current rule of "intention of the parties," which governs "even if that intention [is] not precisely expressed" in the restrictions. According to the Kentucky Court of Appeals, an additional important factor to consider is the existence of a general scheme or plan of development. The Kentucky Court of Appeals then addressed *Black v. Birner*, a case in which the court addressed whether restrictions which had expired were "renewed" by language in a deed that referenced those restrictions, stating that "[t]his conveyance is subject to all restrictions and easements of record which affect the subject property." Like in the subject case, the property owner in *Black* argued that the restrictions were inapplicable. In *Black*, the Kentucky Court of Appeals held that the deed language was only precautionary and did not create restrictions since the restrictive covenants in question had expired at the time of the subject conveyance.

The Kentucky Supreme Court distinguished *Black* from the facts of this case because the intention of the language in the Declaration "was to subject the property to these restrictive covenants, incorporating them by reference, and was not intended as mere precautionary language as a more general statement, like 'subject to restrictions of record, if any,' would be." Moreover, because the restrictions were in the chain of title and the deeds specifically referenced the Declaration, the intent to incorporate the specific restrictions contained in the Declaration was clear, even though the restrictions were not amended to include the legal description of the after-acquired property as required by the expansion clause of the Declaration. While including legal descriptions "is one way to subject property to [] restrictions," incorporation by reference is also an "accepted practice for 'setting out the covenants . . . .'"

Comment: The editor believes the outcome might have been different if the association or its members could have argued credibly that they had relied to their detriment upon the property in question *not* being subject to the Declaration. But the owners of the properties who took with specific reference to the restrictions, which the association apparently welcomed, had a hard argument, which they ultimately lost.

STATUTE OF FRAUDS; EVIDENCE OF EXECUTION: Written Agreement signed after oral contract for purchase of home, and after date of breach of the oral agreement, renders the oral agreement enforceable under the Statute of Frauds. ***Royal Investment Group, LLC v. Wang, ____ A.2d ____, 2008 WL 5088600, (Md. Ct. Spec. App. December 4, 2008).***

Wang owned a very run down home in Montgomery County, Maryland. The property was covered in trash and had the obligatory non operational car sitting in the front. After receiving a series of notices from health officials (including one threatening to demolish his house) Wang decided to sell his property to Royal Investment Group, a company owned solely by Shahparast.

Despite the condition of the property, Royal agreed to an initial purchase price of $700,000. Apparently, Shahparast intended to tear down the existing home and build something much nicer. The parties entered into a written contract, setting out a closing date, purchaser price and other terms.

By separate written addendum executed the same day, the parties modified the terms of the purchase contract: Wang agreed to remove the trash on the property, the closing date was delayed, and Royal was given the right to perform "any repair/construction at buyer's risk & expense." The same addendum stated that a failure of the buyer to close the purchase vested any such improvements in the seller. Over the next several months, Wang and Royal repeatedly amended the contract, as Wang failed to clean the trash from the property. On each occasion, the parties delayed the closing date and the seller agreed to accept a lower purchase price.

Shahparast ultimately alleged that Wang was in breach of the purchase contract, but agreed to waive the breach in return for yet another extension and lower price. On June 16, 2005, the parties agreed to the price reduction, a new closing date and Wang agreed to remove his beat up car from the front driveway. The agreement was made orally during a telephone conference between Shahparast and Wang's agent. Wang signed an agreement on that date reflecting the terms of the oral agreement. Facts developed for trial indicated that Shahparast, on Royal's behalf signed a faxed copy of the same agreement.

However, the date of Shahparast's signature was left blank. Mr. Wang never formally received the signed copy, and only obtained a copy as part of the civil litigation. In essence, the purchaser, Royal failed to deliver the written addendum with signature.

The parties continued to dicker over issues, but never agreed on a new purchase price and closing date in any completed contract. Unbelievably, in October of 2005, as their dispute continued, the purchaser demolished Mr. Wang's home on the property. He then built a replacement home at a cost of around $700,000. Wang was aware of the construction but chose not to seek an injunction. Instead, he concluded that Royal was in trespass, and that any improvements built on the property by Royal would belong to the seller as per the terms of the initial agreement.

Although each party eventually claimed the other breached the contract first, and demanded a variety of remedies and damages, the crux of the case concerned the 3rd amendment to the contract dated June 16. This agreement would supplant any prior addendum, if fully executed and enforceable. Mr. Wang alleged that Royal breached this agreement by failing to close by its specified closing date of August 31. Royal denied that the agreement was enforceable citing the Statute of Frauds, requiring that agreements for conveyancing of real property be in writing.

The trial court held that the addendum was enforceable and as a result, the Mr. Wang was entitled to receive the $25,000 deposit made by Royal as well as possession of the improved property. The appellate court affirmed.

According to the court, the June 16 oral agreement among the parties would ordinarily be unenforceable, because there was no final signed agreement delivered by the buyer to the seller. There was no dispute that the parties reached a meeting of the minds and entered into an oral agreement on June 16. Royal's alleged breach of the terms of the June 16 agreement modifying the original contract occurred on August 31, the date Royal failed to close the purchase. Shahparast admitted at trial that he signed the addendum, but he claimed he did so *after* the August 31 closing deadline.

The court examined the most basic aspects of the Statute of Frauds, and the policy behind it, and determined that a writing signed by the party to be bound after an oral agreement is reached – *and even after the alleged breach of the oral agreement* – renders the oral agreement enforceable. Citing the Restatement (Second) of Contracts, Williston and Corbin, the court stated:

"The Statute does not require its satisfaction by a writing to be made simultaneously with the agreement, and it is unnecessary to make the fictitious assumption that it is in fact simultaneous in a case where it is not. Satisfaction of the Statute by the making of the memorandum does, however, result in the previously unenforceable oral agreement becoming binding, and since it is that contract which becomes binding, it should be as of the date of the oral contract; and there seems to be no limit, except perhaps that imposed by the Statute of Limitations, upon the power of a party to an oral contract at any time to make a memorandum binding upon himself."

Indeed, the court argued that the policy of the Statute is to prevent the enforcement of contracts that were not made, and rather than failing to enforce contracts that were made. Under the rather "strained" facts of the case, the addendum "is not the contract" but it is satisfactory as a writing to make the oral contract enforceable.

Reporter's Comment 1: The case is chock full of rather wonderful facts. Ultimately, the seller, Wang, obtained a court order naming the purchaser a trespasser and granting him possession. Wang changed the locks, but not before Shahparast entered the home and removed thousands of dollars worth of expensive kitchen cabinetry.

Reporter's Comment 2: The court's application of the Statute of Frauds is correct. Often, lawyers think of the Statute as requiring the simultaneous creation of a written instrument with the oral agreement. But this is not the case. A later executed document will be evidence of the oral agreement. What is interesting here is that the later executed document was discovered as a part of the trial process – this discovery substitutes for delivery of the written instrument.

Reporter's Comment 3: In any event, Shahparast's failure to fill in the date of the agreement he signed should have been grounds enough to find an enforceable agreement. Put bluntly, the purpose of the Statute of Frauds is to prevent fraud. Looking cynically at the facts, the purchaser very possibly filled in the contract on the date he received it by fax on June 16. His failure to fill in the date was his attempt to hedge his bets. If he later decided that he wanted the addendum to be enforceable, he would say that he filled it in on the date received.

Reporter's Comment 4: The seller, Wang, acted in a mercenary fashion by permitting the continued improvement and construction of a home on his property after he had notice construction was underway. The court nevertheless awarded possession of these improvements to Wang. The court denied that Wang was unjustly enriched by keeping a $700,000 home he did not pay to construct. This is a bit harsh. The common law does not establish a fiduciary duty between trespasser and the owner of property, and the ordinary rule is that the trespasser loses the value of improvements. But unjust enrichment law weighs *equities*, and neither of these two parties behaved appropriately. Why not place the burden on Wang to enjoin construction? Houses are not built overnight. The court was caught between the common law rule and forcing a sale of the house to Wang at a value the court determined. This is something the court was loath to do, perhaps because the parties had addressed the issue specifically in the contract.

Reporter's Comment 5: Once again, even relatively wealth-challenged parties can find lawyers and pursue legal action in real property matters. The purchaser likely believed that Mr. Wang was not likely to enforce his rights to their full extent – thus Mr. Shahparast's rather ridiculous decision to build a home before purchasing property on which it sits. Wang, according to the facts, made $18,000 a year and was occasionally so hard up financially that he had to resort to "dumpster diving" for food. But he certainly found a lawyer when he needed one and proceeded to win at trial and on appeal.

Reporter's Comment 6: The case generated other legal issues. For example, the trial court awarded attorneys fees to the seller even though he also received the house. The buyer thought this terribly unjust. But the contract contained a stock attorney's fees provision awarding fees to the "prevailing party." Wang was the prevailing party. Rubbing salt in the wound, Shahparast was held in contempt for his actions of removing the kitchen cabinets after reading a court order awarding possession to Wang. Cabinets in the context of a buy/sell agreement, of course, are fixtures.

The Reporter for this item was Professor Dan Bogart of Chapman Law School.

SUBDIVISIONS; SUBDIVISION APPLICATIONS; STANDARD OF REVIEW: A planning commission may not reject outright a subdivision application which meets all applicable planning and zoning requirements, despite negative comments from various state agencies about the impact of the proposed subdivision and a statutory requirement that planning commissions take state agencies' comments into account in ruling on rezoning or subdivision applications. ***Tony Ashburn & Son, Inc. v. Kent County Reg'l Planning Comm'n., 2008 Del LEXIS 546 (Del. 2008).,*** discussed under the heading: "Zoning and Land Use; Subdivision Application; Notice and Comment; Discretion of Zoning Board."

TAXATION; PROPERTY TAX; PAYMENT: Under Texas ad valorem taxation statutes, the inclusion of an insufficient postage amount in an envelope containing a taxpayer's tax payment, which causes such payment to be late and subjects the taxpayer to substantial late charges, does not comply with the statutory procedure, requiring that tax payments be sent "postage prepaid," and the late charge will be upheld. ***Tenaska Frontier Partners, Ltd. v. Sullivan, 273 S.W.3d 734 (Tex. Ct. App. 2008).***

On January 30, 2006, Tenaska attempted to pay 2005 taxes (due February 1, 2006) by mailing a check in the amount of $2,273,695.59 in a properly addressed envelope bearing a 39-cent first class stamp. Because of the weight of the parcel, the correct amount of postage owed was 63 cents, and the envelope was returned to Tenaska, marked as undeliverable. Tenaska then re-sent its payment on February 7, 2006, but the return of the envelope caused it to be late on the payment, resulting in the assessment of $159,158.66 in penalties and interest. Tenaska paid the additional assessment under protest. The county tax collector subsequently denied Tenaska's application for a tax refund, and Tenaska filed suit against the county and the tax collector ("Defendants"). At trial, the court granted the Defendants' motion for summary judgment, and Tenaska appealed.

On appeal, the Texas Court of Appeals discussed the relevant tax code which provides that a tax payment by mail is considered timely if it is sent by regular first class mail, properly addressed with postage prepaid, and bears a postmark of a date earlier than or on the specified due date and within the specified period. Alternatively, the property owner may furnish satisfactory proof that it was deposited in the mail on or before the specified due date and within the specified period. In analyzing the language of the relevant tax code section, there was little question the second payment sent by Tenaska was not timely. However, the parties disagreed on the timeliness of the original payment.

Viewing the code section in the light most favorable to Tenaska, the envelope containing the first payment bore a postmark of January 30, 2006 and therefore satisfied the code section. Similarly, it was properly addressed and affixed with a first class stamp. The only remaining issue, therefore, was whether insufficient postage constituted "postage prepaid" under the statute. On this issue, the court employed standard statutory construction methods and determined that, because the Texas Legislature had not defined "postage prepaid" in any of the 45 statutes in which the term appeared, courts should apply the "ordinary meaning" standard. The ordinary meaning of "postage prepaid" requires the full payment of the postal charges, and because Tenaska's payment was not sent with the full payment (i.e., it was 24 cents short), the payment did not comply with the statute.

The court also rejected Tenaska's argument (in citing Bullock v. Statistical Tabulating Corp.) that the court should liberally construe a punitive taxing statute in the taxpayer's favor, holding that Bullock only applies to taxing statutes which contain ambiguities. Here, the statute's provision that payment must be "postage prepaid" was unambiguous. Despite the expensive result, the court held that the statute does not permit a tax payment that "is sent by regular first-class mail, properly addressed with some postage prepaid."

TAXATION; PROPERTY TAX; PROCEDURE: Although governmental authorities and private parties cannot agree that disputes over taxation matters are to be resolved in a court other than the Tax Court, not every controversy touching a taxation matter is bound by that rule and such parties are free to agree that their dispute is to be heard in a different forum. ***McMahon v. City of Newark, 195 N.J. 526, 951 A.2d 185 (2008) ,*** discussed under the heading: "Redevelopment; Property Tax Abatement; Jurisdiction.**"**

TITLE; MARKETABLE TITLE: Buyer may rescind contract to purchase property where seller is unable to property has permanent access right, due to failure of marketable title as well as mutual mistake of fact. . ***Hinton Hardwoods, Inc. v. Cumberland Scrap Processors Transport, LLC, 2008 WL 5429569 (Ky. App. 2008)***, discussed under the heading: "Vendor/Purchaser; Marketable Title; Mutual Mistake."

VENDOR/PURCHASER; CONDITIONS; ATTORNEY'S REVIEW CLAUSE: Where a broker prepared form contract for the purchase of real property expressly allows its termination if the attorney for either the seller and buyer disapproves of the contract within some time period, a party's attorney is not bound by the covenant of good faith and fair dealing when making his or her decision. ***Moran v. Erk, 11 N.Y.3d 452, 901 N.E.2d 187 (New York 2008)***

A contract for the purchase of residential real estate was expressly "contingent upon approval by attorneys for seller and purchaser by the third business day following each party's attorney's receipt of a copy of the fully executed contract (the "Approval Period") . . . . If either party's attorney disapproves this Contract before the end of the Approval Period, it is void and the entire deposit shall be returned." The contract and the rider (which contained that language) were form documents copyrighted and approved by both a regional association of real estate brokers and the local county bar association.

Right after signing the contract, the buyers developed qualms and ultimately decided to buy a different house. They instructed their attorney to disapprove the contract, and their attorney did so within the required three-day period. The lawsuit that followed reached the New York Court of Appeals, its highest court. Immediately, that court recognized that this type of attorney approval contingency was routinely included in real estate contracts in New York State. Citing various lower court decisions, it pointed out that "[r]equiring a real estate contract to be 'subject to' or 'contingent upon' the approval of attorneys for both contracting parties ensures that real estate brokers avoid the unauthorized practice of law . . . , and allows both contracting parties to have agents representing their respective legal interests . . . ." The Court pointed out that the contract's language meant what it said: "no vested rights are created by the contract prior to the expiration of the contingency period."

The sellers argued that the contract "created an implied limitation upon an attorney's discretion to approve or disapprove the contract." In making its argument, the seller contended, and both the lower court and the intermediate appellate court agreed, "that the implied covenant of good faith and fair dealing implicitly limits an attorney's ability to approve or disapprove a real estate contract pursuant to an attorney approval contingency period." The Court of Appeals rejected this argument as misconstruing "the implied covenant of good faith and fair dealing under New York law."

According to the Court of Appeals, "[t]he implied covenant of good faith and fair dealing between parties to a contract embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." So, the Court of Appeals was not troubled because it held that "the plain language of the contract in this case [made] clear that any 'fruits' of the contract were contingent on attorney approval, and that any reasonable person in the [seller's] position should have understood." In New York, the covenant encompasses only "promises which a reasonable person in the position of the promisee would be justified in understanding were included."

Most importantly, the Court of Appeals relied on the principle that "[c]larity and predictability are particularly important in the interpretation of contracts." Consequently, it refused to read "a bad faith exception into an attorney approval contingency" because this would be a "novel notion . . . entirely dependent on the subjective equitable variations of different Judges and courts instead of the objective, reliable, predictable and relatively definitive rules" of plain text contractual language. What was also of concern was that the disapproving attorney was subpoenaed to testify about communications, and that disclosure of those communications might be detrimental to the attorney-client privilege.

With all of that in mind, the Court of Appeals held that "where a real estate contract contains an attorney approval contingency providing that the contract is 'subject to' or 'contingent upon' attorney approval within a specified time period and no further limitations on approval appear in the contract's language, an attorney for either party may timely disapprove the contract for any reason or for no stated reason."

Comment 1: This approach to balancing the market's need or desire to allow real estate brokers to have parties quickly sign contracts, but allow either a borrower or seller to then get an attorney's advice, probably began in the settlement of an "unauthorized practice of law" attack by the New Jersey bar against the real estate broker community. That resulted in a New Jersey Supreme Court "consent" order of the settlement between the brokers and the attorneys. In 1981, the New Jersey State Bar Association sued the New Jersey Association of Realtor Boards, and the "three day attorney review provision" was adopted by settlement of that suit in 1983. The Supreme Court approved the settlement. See *N.J. State Bar Association v. N.J. Association of Realtor Boards*, 93 N.J. 447 (1983). The Settlement was augmented by the adoption of an administrative regulation: N.J.A.C. 11:5-6.2.

Comment 2: A personal observation – the system has worked pretty well. Its utility from 1983 until at least 2008 probably supports the argument that the "attorney review clause" is not one of the 1,000 or more myriad claimed reasons for the current economic turmoil. Please avoid attacking the editor over "how it kills deals." First, there is no evidence that it does. Second, all of those arguments have disappeared in New Jersey. The marketplace seems to have adjusted.

Comment 3: Basically, the attorney review clause is best understood as saying that a party's attorney, following the notice rules strictly, and serving notice within the tight (3-business day timeline follow receipt of the contract by each side) may terminate the contract for any reason or no reason at all. Giving a reason only leads to trouble. Long ago, New Jersey case law accepted the reality that a party may have told its attorney – "I want out." Basically, the courts have said that such a discussion between a party and its attorney involves the express or implicit giving of advice.

Comment 4: New Jersey case law teaches that attorneys aren't always careful about giving notices. The courts has been pretty "bright-lined" about this. The New Jersey "official" version requires notice to the broker and the other party and that it be sent by certified mail, by telegram or by delivering it personally. Send the notice by fax alone has been ruled insufficient without regard as to whether the fax was received. The most recent case saying that did, however, have issues about whether it was received, but the court there essentially wrote that it didn't matter. In doing so, it said that fax was not the functional equivalent of the now outdated "telegram."

Comment 5: In the history of the attorney review clause in New Jersey (the editor remaining cognizant that the reported case was a New York case), the courts have not been stupid. In one case, it wouldn't allow an attorney to disapprove a contract when the same attorney had negotiated changes to the contract even before it was signed. These are not the words of that case, but it was "one bite of the apple only."

Comment 6: It is common practice for opposing attorneys to agree to extend the time period for disapproval, often somewhat casually, but almost always with a clear agreement.

Comment 7: Now as to this case. In our view, the New York Court of Appeals has a good understanding of the implied covenant of good faith and fair dealing. Parties are not expected to exercise an otherwise perfectly good and expressed contract right in a way that is contrary to what was a valid and understood expectation of the other party at the time of signing. Here, the court is saying that each party knew and expected that the contract was contingent on a successful attorney review period. What it didn't say, and what it probably knew intuitively, was that the contract would be no more than three business days old and that isn't a long enough period of time for a party to complain that the other side exercised a "right of rescission." That such a right might be abused didn't outweigh the benefit of allowing brokers to prepare contracts, even though not licensed attorneys, but doing so in a final way so that a party to that contract could get legal advise if it chose to do so.

The Reporter for this item, and author of all the comments, was Ira Meislik of the New Jersey Bar.

VENDOR/PURCHASER; CONDITIONS; "DAMAGE OR DESTRUCTION:". Vendor's removal of lockers from recreational facility during pre closing period permits termination under a contract clause that stated purchaser had the option to rescind contract if "any buildings or other improvements are damaged or destroyed" before closing even if Vendor restores the lockers prior to closing and even though, because of restoration, the removal was not a "material breach."***Marion Family YMCA v. Hensel, 897 N.E.2d 184, (Ohio App. 3 Dist. 2008)***.

Buyer Hensel entered into contract with YMCA for purchase of an old YMCA building. After contract was signed, buyer toured building and noticed a wall of lockers had been removed. Buyer considered this to be a breach of the contract and told YMCA the contract was terminated.

YMCA restored lockers before the scheduled closing and informed buyer of their restoration. YMCA proceeded with the sale by retaining an attorney to complete the closing. Attorney wrote buyer twice, requesting that closing be scheduled immediately or the property would be listed for sale again. After no further action was taken to resolve the matter, YMCA sold the building to a third party and filed a complaint to recover the price difference from buyer. At trial, a jury returned a verdict in favor of YMCA for $125,000.

Buyer appealed on two grounds. First, buyer claimed that YMCA materially breached the contract by removing the lockers. Generally, a material breach of contract will entitle a party to stop performance; a "material breach of contract" is a failure to do something that is so fundamental to a contract that the failure to perform defeats the essential purpose of the contract or makes it impossible for the other party to perform. Until the time of closing, YMCA still had time to perform the contract and remedy any nonmaterial breach, which it did. Therefore, the jury did not err in finding that the removal of the lockers was not a material breach of the contract.

Buyer also claimed that the contract permitted him to terminate the agreement because the lockers were improvements that were damaged or destroyed prior to the delivery of the deed. The contract stated "if any buildings or improvements are damaged or destroyed" before closing, the buyer has the option to rescind the contract. Even if the lockers were not fixtures, they were improvements to the building and were covered by the plain language of the contract. Therefore, their removal altered the property with the same effect as if they were destroyed. The contract did not require the buyer to give the seller time to cure. Thus, buyer had the right to terminate the contract as a matter of law. His termination was not a breach of the contract, and the trial court erred in holding otherwise.

In making its analysis, the court emphasized that the parties had not stipulated that the "damage or destruction" had to be "substantial." It commented also that some tiles were damaged and bolts cut, although it did not mention whether this damage was repaired or whether Buyer relied upon that damage.

Comment 1: Oh, pooh. Certainly the terms "damaged or destroyed" must have contemplated injury to the building that raises a legitimate concern that the building would be in the same condition at closing that it was at contract signing. Otherwise, vandals throwing a rock through a window or the breaking of a door hinge while sellers are removing their furniture could satisfy the condition. Here, as the seller apparently responded promptly and restored the premises to its original condition, the buyer's backing out on the basis of the lockers was nothing more than a pretext that the court should not honor.

Comment 2: The court emphasized that the Seller YMCA did not relist the property, but sold it on a three day contract to a member of the board for $125,000 less than the original contract price. The board discussed at the time whether the difference could be obtained in a damages suit against buyer. These are strong facts, of course, and may have led to the decision, but the court was wrong to mess up the precedent with a weakly reasoned case decided basically on other grounds it didn't want to admit, but was willing to discuss.

VENDOR/PURCHASER; FRAUD; NONDISCLOSURE: Developer (and likely any seller) is likely to "foreseeable plaintiffs" in constructive fraud for affirmatively disguising defect in property, even in state where there is no duty to disclose, and consequently subsequent purchaser from the developer's original purchaser can maintain an action. ***Rhee v. Highland Development Corporation, 958 A. 2d 385 (Md. Sp. App. 2008)***

This case involves a land developer and contractor who found that they had an abandoned cemetery squarely in the middle of their subdivision. The cemetery was not recorded in local land records. Defendants removed the headstones and established the area as a "no build" zone under the recorded plat, But did not disclose the existence of the cemetery to public authorities and did not remove the underground inhabitants of the cemetery, who were, according to the court, about two feet below the ground.. Most of this was in violation of local law, which does permit removal of abandoned cemeteries, but only with public supervision and approval. The property was left as an undevelopable part of lot 20 in the subdivision, and the defendants sold that lot to a purchaser, apparently with a home on it (not over the cemetery area).

About 10 years later, in 1991, the original purchasers sold to the Rhees. Thirteen years after that, the Rhees discovered from someone who had worked on the original project that their land included a four hundred year old group of buried remains. The court describes the defect, quite properly as a "desecrated cemetery."

The trial court dismissed Rhee's complaint because the developers had not committed any fraud on the Rhees and owed them no duty. The Intermediate Appeals Court here reversed, finding that modern law of fraud has developed to include as possible plaintiffs those persons foreseeable subject to injury from the initial fraud. In fact, they cited a case that spent some time on DIRT, Diamond Point Plaza Ltd. Partnership v. Wells Fargo, where the court found that the owners of a shopping center had fraudulently withheld information that a major tenant was planning on vacating the center they were refinancing. The original lender sold the loan, which was sold again into securitization, and Wells Fargo represented the securitized trust that ultimately held the loan. The defendants in the current case argued that affirmative financial fraud and simply failure to disclose a latent physical condition are two different cases and should be treated differently as to the range of plaintiffs, but the court elected to expand the doctrine to apply here.

Note that the court conceded that in Maryland, unlike in many states, there is no duty to disclose defective conditions, although of course one cannot commit fraud. Here, the developers deliberately obscured the presence of the cemetery by removing the headstones and altering documents (later recorded) that showed the presence of the cemetery. The clear intent was to deceive.

The court does qualify somewhat the range of possible plaintiffs. "[I]t is not sufficient that it is foreseeable that this concealment or misrepresentation will be passed on to subsequent purchasers. The seller must have special reason to expect that the concealment or misrepresentation will be pass on to, and relied upon by, the subsequent purchaser. [W]ith each intervening resale and with each passing year between the occurrence of the original faud and the lawsuit," that will be more difficult to prove. [quoting from a California case and the Restatement of Torts Section 531, section d).

Here, the defendants had reason to believe that the concealed fact would remain concealed, perhaps for a good long time, and that the property would change hands without the defect being revealed.

Comment 1: The editor, not a sophisticated tort thinker, admits to some confusion as to the "foreseeability" that controlled this case and "ordinary foreseeablility" that the court appears to differentiate. But the editor got a 78 in first year torts. That probably explains everythng.

Comment 2: What about materiality? Is the presence of 400 year old human remains on an unbuildable part of one's property really an actionable defect? Aren't there likely to be remains buried virtually everywhere there are populated areas, whether marked as cemeteries or not? The court confesses that this is probably true, and the simple existence of the possibility of buried remains may not affect a typical buyer's buying decision.

But the court views the existence of a desecrated cemetery as a culturally distinct element in the minds of the average buyer. It backs up its decision by noting that the acts of desecration here were in fact in violation of law at the time they occurred (and today.)

In fact, the Rhees argued that their own religious beliefs would have prohibited them from living anywhere that a cemetery had once existed, even if the remains had been removed and all evidence taken away. The court said that, true or not, this is not a typical market value and if in fact the developer had properly cleared out the cemetery, there would not have been a material defect. We'll, see, when the next case comes along, whether this proves to be true.

Comment 3: Note that here there were no easements of other rights associated with this abandoned cemetery. The injury the Rhees were claiming was that they paid an inflated price for the property because this defect had not been disclosed. It will be interesting to see how the "battle of appraisers" deals with this one.

Comment 4: Don't expect this case to be limited to developer liability. There is little in the case to suggest that any seller who deliberately disguises conditions on the property and fails to disclose them may be equally liable, perhaps for a good long time. Think about that one as you paint over the ceiling water stains in preparation for sale. Are you certain that you really fixed that leak???

VENDOR/PURCHASER;; MARKETABLE TITLE; MUTUAL MISTAKE: Buyer may rescind contract to purchase property where seller is unable to deliver access right across property reflected in a permanent easement. ***Hinton Hardwoods, Inc. v. Cumberland Scrap Processors Transport, LLC, 2008 WL 5429569 (Ky. App. 2008)***

Cumberland entered an option to purchase certain real property y from Hinton on July 17, 2006. Cumberland provided Hinton with a $10,000 non refundable deposit as consideration for the option, which was to last for thirty days. Three days before expiration of the option, Cumberland delivered a proposed purchase contract to Hinton. The parties negotiated the key terms to the contract, and agreed on a purchase price of $565,000. The contract also provided, as one would expect, that Cumberland could do a title search and that the seller, Hinton, would provide a survey. The case opinion is not explicit, but it appears that the contract for purchase and sale of the property was signed that day, on July 17, 2006. The broker involved in the transaction located a lawyer to do the legal work and close the deal. In addition to preparing closing documents, the lawyer prepared the title commitment and performed a title search. The lawyer did not discover any title defects.

However, before closing, (and before the time period for noticing title defects ended) a problem emerged. The Cumberland representatives observed on the survey that the sole public road used by Hinton to access the property did not actually extend to the property. Instead, the public road stopped at a railroad line owned by R.J. Corman. The subject property did have a driveway that physically crossed the railroad line, and connected the property to the public road. However, there was no recorded ingress, egress easement permitting the driveway.

In other words, purchaser could not be guaranteed that it would have the right following closing to access the property from the public road.

Cumberland relayed its concern to Hinton, and Hinton contacted the railroad company, R.J. Corman. Corman agreed to grant a ten year access right to cross the railroad line to Hinton, which would then be transferred to Cumberland upon the purchase of the property. There was testimony that the ten year crossing right was "standard" in the industry. However, this proposed title fix did not satisfy the purchaser. As a result, Cumberland gave its formal notice that it objected to the seller's state of title on October 18, 2006, and further gave the Hinton

20 days to correct the problem. Presumably, nothing short of a permanent easement would have satisfied Cumberland.

Hinton's lawyer responded on November 3, 2006. In his letter, the seller's attorney stated that Hinton never promised Cumberland access to the property or that the property would meet the public road. Furthermore, Hinton stated through its lawyer that it did not have notice prior to the transaction that the property lacked access rights.

To make matters more compelling, in anticipation of the sale of their property, Hinton (which was a family business) "dismantled their family lumber mill and went out of business." Because Cumberland was dissatisfied with the state of title on the Hinton property, Cumberland decided instead to enter into a purchase transaction for another property. (This alternative property was partly owned by the broker. Prior to closing of that transaction the broker sold its part interest to the other owner of that tract.)

The seller, Hinton, now out of business, brought an action for specific performance against the purchaser, Cumberland, along with an action for fraudulent misrepresentation. (Readers will not be surprised to learn that the seller also brought a breach of duty of fiduciary duty action against the broker, as well as tortious interference with contract.)

The trial court granted summary judgment for the purchaser, Cumberland, and also held that any damages for Hinton be limited to the liquidated damages specified in the contract. Furthermore, the trial court found that the purchaser and seller were both operating under a mutual mistake of fact: that the property carried with it a perpetual right of access to the public road. This mistake barred the Hinton's demand for specific performance, and provided the Cumberland with the right of rescission.

The Kentucky Court of Appeals affirmed the trial court.

The court repeated black letter law regarding mutual mistake: that both parties must be mistaken about a material fact to the transaction. Citing a string of older Kentucky cases, the court explained that if parties act on a mutual mistake, by definition they have not reached a meeting of the minds. Thus, the contract was unenforceable.

In this case, the parties all understood that Cumberland intended to put the property to industrial purposes, and that access was crucial. The court acknowledged that, even in the absence of a written agreement, the railroad had for years permitted Hinton to cross the tracks. But the court viewed this behavior as permissive and subject to revocation by the railroad at any time.

Furthermore, by its own testimony, Hinton suggested that it was unaware that it did not possess the right to cross only reinforced the court's conclusion that both parties were acting on a mistaken understanding of the facts.

The court sealed the deal by stating that a reasonable business person would not accept title to this particular property in the ordinary course of business, due to the lack of access. The property was therefore held unmarketable.

Comment 1: Perhaps Hinton could have claimed it had a prescriptive easement right, and that its prescriptive easement cured any issue regarding marketable title. Hinton was in the habit of crossing the property and did so for a period of time. Its use was open and continuous, although one might argue that its use was permitted by the railroad. Assuming, however, that Kentucky requires hostile intent for prescriptive easement to arise then Hinton's admission that it was unaware that it did not have a right eliminates prescription. In any event, some jurisdictions require marketable title to be clear from the record itself, so the fact that a right emerges from adverse possession or prescription would be inadequate (California follows this rule). Other jurisdictions are more generous.

Editor's Comment: Don't forget also that the appeals court stated that the prior use of the railroad right of way was "permissive," which kills a prescriptive easement claim.

Comment 2: This court states that marketable title is that title which "enables the record owner not only to hold the land, but to hold it in peace and, if he or she wishes to sell the land, to be reasonably sure that no flaw or doubt will arise to disturb is market value." Not all courts would agree with this definition. Some courts hold that the mere fact that property is landlocked does not mean that the seller lacks marketable title. See for example *Sinks v. Karleskint*, 474 N.E. 2d 767 (Ill. App. 1985). According to *Sinks*, title can be marketable even if the property does not have much value on the market. There is a difference, according to *Sinks*, between a legal determination of marketability and the fact that property without access has a low dollar value. The only question is whether the seller has fee simple absolute (or fee simple subject to permitted exceptions) and whether there is the likelihood of litigation over the ownership of the tract. In *Cumberland*, Hinton owned the property in fee simple and, unless the purchaser trespassed, there would be no litigation.

Editor's Comment: Perhaps one could distinguish *Sinks* by noting that there was a road physically attached to the property and an apparent appurtenance. Recently, the editor believes, DIRT discussed a case in which improvements on the property overlapped onto a neighboring parcel. The consensus appeared to be that this was a marketability problem, even though the title to the property described in the contract was good title.

Comment 3: Cumberland, the purchaser, drafted the contract. It could have made access an explicit contingency but it failed to do so. The appellate court did not think this a good excuse, largely because, as drafted, the contract gave Cumberland the right to inspect title and required Hinton to deliver a survey. The whole point of these rights and obligations, suggests the court, is to discover problems just like the one found in the case. What good is the right to inspect title and to review a survey if, having found a problem based on these rights, Cumberland must nevertheless close? Legal custom probably matters here, and the author is unaware of what Kentucky lawyers typically demand in purchase agreements of this kind. However, the author thinks that the purchaser could have protected itself. True, Cumberland contracted for the right of a title inspection and review of a survey. But Cumberland assumed that the court would adopt Cumberland's view of the definition and nature of an encumbrance or defect in title. Access rights are crucial, and the contract could easily have required the seller to spell out these rights and demonstrate access to and from the property.

Editor's Comment: Note, once again, that everyone apparently accepted that the process for exercising the option involved the development of a sales agreement, with conditions. It appears that none of this was in the option itself, as it should have been. Customs apparently vary wildly about what an optionee can demand once it accepts the option.

VENDOR/PURCHASER; SPECIFIC PERFORMANCE; REQUIREMENT THAT PURCHASER DEMONSTRATE IT IS "READY, WILLING AND ABLE:" Purchaser is not entitled to specific performance remedy, even where the contract expressly permitted purchaser to "seek to enforce" transaction, where purchaser failed to prove that he was ready, willing and able to close. ***DiGiuseppe v. Lawler, 269 S.W. 3d 588 (Texas, 2008)***

Lawler owned a large tract of valuable land in Frisco, Texas, and seemed eager to sell it. In October of 1998, Lawler entered into a contract to sell 756 acres at $40,000 an acre to DiGiuseppe. DiGiuseppe intended to develop the parcel. Closing was contingent on successful rezoning of the property to meet DiGiuseppe's development needs, and earnest money was to be deposited in three stages: 1) $100,000 at the signing of the contract, 2) $100,000 when the zoning plan was submitted to the city, and finally 3) $400,000 when the zoning commission approved the developer's plan. The contract limited the parties' remedies upon default. Lawler sole remedy upon purchaser's default was to keep the earnest money as liquidated damages. DiGiuseppe was permitted either to terminate the contract and receive a return of its earnest money or to "seek to enforce" the contract.

The zoning commission ultimately approved new zoning for the property, but to the consternation of all, it did not approve the plan as submitted by the developer.

The case opinion suggests that the approved plan "satisfied" DiGiuseppe, but because the plan was not approved as submitted, DiGiuseppe took the position that the requirement for deposit of the final $400,000 in earnest money was not met. Lawler took the opposite position, and viewed the failure of DiGiuseppe to complete the deposit as a breach of the contract. DiGiuseppe responded that it would move forward towards closing. (In fact, the seller went so far as to enter into a new contract for sale of the property with a third party, but this deal apparently fell through. According to the court, that transaction is also the subject of litigation, although the opinion says little else on the subject.)

Lawler filed suit claiming DiGiuseppe breached the purchase contract, and requesting that the court declare the contract terminated, damages and quiet title. (DiGiuseppe had recorded the purchase contract, necessitating Lawler's request for quiet title.) DiGiuseppe counterclaimed that Lawler was the breaching party. DiGiuseppe alleged that Lawler breached the duty of good faith and that Lawler's actions constituted statutory fraud. DiGiuseppe demanded damages, specific performance, and depending on the findings of the court, quantum meruit.

The parties' claims were submitted as specific questions to the jury, which sided with the purchaser, DiGiuseppe. The jury determined that Lawler breached the contract and that DiGiuseppe complied with the contract. The jury awarded DiGiuseppe $295,696.93 in damages.

On appeal, the Court of Appeals held that the purchaser failed to meet the requirements of specific performance, and specifically, that DiGiuseppe's failure to obtain the necessary zoning was not cured by a provision in the contract permitting DiGiuseppe to specifically enforce the contract.

On appeal, the Texas Supreme Court affirmed the District Court's holding on specific performance. (The court reversed the district court on a separate issue of whether the purchaser waived a request for a refund of earnest money for appellate review.)

The purchaser suggested at trial that certain unnamed builders were willing to fund its purchase, but purchaser had no written commitment. It is pretty clear from the facts that the purchaser did not really have the money on hand to close the deal. The primary issues in the case therefore concern the requirement that the purchaser be ready, willing and able to close the contract to obtain specific performance. The other primary issue involved the purchaser's demand for return of earnest money deposit. However, the author will focus on specific enforcement of the contract.

The seller's primary task is to deliver title, and the purchaser's is to deliver the purchase price. A seller should not be asked to specifically perform a contract if the purchaser cannot show that, at closing, it attempted to tender the money. The majority in DiGiuseppe correctly notes, however, that this is sometimes a "futile" act of the purchaser. On occasion, the seller will repudiate the contract in advance of closing. In that instance, it is not necessary for the purchaser to actually tender the purchaser price to the seller.

But as the court explains that this does not relieve the purchaser from showing that he would have been in a position to come up with the money, if the seller had in fact closed. As the majority explains, when the seller walks away prior to closing, "a plaintiff seeking specific performance is excused from tendering performance pre suit and may simply plead that performance would have been tendered but for the defendant's breach or repudiation."

Unfortunately for the purchaser, his testimony at trial indicated that he did not personally have the money to close the contract, did not have investors or buyers for the property who could close, had no written agreement or commitment with builders or investors to take the property. In fact, DiGiuseppe indicated in his testimony that he actually avoided contracts, stating "That's not the way I do business." Instead, the purchaser relied on oral promises. In another exchange with opposing counsel at trial, Mr. DiGiuseppe was asked "When you sent the letter that said you were ready, willing and able to close the contract, you, individually, couldn't close that contract could you?" Mr. DiGiuseppe answered that he "individually, never intended to close the contract" and did not have the personal funds to do so.

As a result, the court concluded that the ability of DiGiuseppe to close was a contested fact, and should have been submitted specifically to the jury.

In response, DiGiuseppe argued that the language in the contract permitting him to seek to enforce the contract if the Lawler breached trumped the failure to obtain a specific finding from the jury. In other words, DiGiuseppe argued that both parties agreed in advance that the purchaser would be entitled to specific performance.

The majority and dissent each cite Burford v. Pounders, 145 Tex. 460, 199 S.W. 2d 141 (1947), but each sees the case differently. In Burford, Burford leased land from Beaird with an option to purchase for $1000 less rent paid. Beaird, the landlord ignored the option and sold the land prior to expiration of the lease. At the time of the sale to the third person, Burford did not have the money necessary to buy the property. Buford did not know about the sale to the third person. However, the third person to whom Beaird sold the property knew about Burford and his lease.

Two months before expiration of the lease, and operating on the assumption that he could buy the optioned property, Burford tendered the correct amount of money to Beaird. Beaird then told Burford that the property was sold. The court held for Burford and specifically enforced the contract. (The fact that the property had been sold was not an issue; the court held in Buford that the third party had notice of the lease and the tenant's possession and therefore was not an innocent purchaser.)

According to the majority in the instanat case, Burford "makes two things clear: (1) pleading an offer to perform is in lieu of tender; and (2) adducing proof that a plaintiff was ready, willing and able to perform, as required by the pertinent authorities constitutes an entirely separate requirement from tender." The dissent sees things quite differently. Citing Burford, the dissent states "But it has likewise been a long-standing Texas rule that a non-breaching plaintiff seeking specific performance need only make such a showing by offering to perform in his pleadings." According to the dissent, in DiGiuseppe the majority departs from a 100 year Texas rule that has not "required a non breaching buyer to make the "useless and idle" showing of proof of ability to complete a transaction when the seller's repudiation of the contract excused the buyer from tendering the purchase price."

The dissent argued that the non breaching purchaser, DiGiuseppe, met its responsibility by offering to perform in his trial pleadings rather that affirmatively proving its financial capability at the time set for closing. The dissent's primary argument is that whether the "buyer is ready, willing and able to perform at the closing time is irrelevant. Although the Court does not say what the trial court is supposed to do with such a finding, presumably it would order a date for the transaction to close within a reasonable time. But what if the buyer was able to close on the original contract date and is unable to close on the court appointed date? The whole exercise is rendered meaningless. The only thing that makes sense is to do precisely what the trial court did in this case, which is to set a closing date within a reasonable period of time after a finding that the seller breached."

Reporter's Comment 1: This is a case of two parties behaving badly. The seller wants a $600,000 windfall. True, the purchaser did not prove at trial that it was ready, willing and able. But what would have happened if the transaction went to closing, and the purchaser was not able to tender the remaining purchases price? Seller would still have a breach of contract claim, and it would then retain the liquidated damages. The seller declared the breach precisely because it could take the deposit, then resell. The last thing seller wanted was for the purchaser to ruin the windfall by actually buying the property. Similarly, the purchaser is unsympathetic. Purchaser signed a contract with only a glimmer of finding the resources to close the deal. Yet here it stands at the door of equity demanding entrance.

Reporter's Comment 2: The contract provides that, as a remedy, purchaser may "seek to enforce" the contract. The majority is correct that this is not the language one associates with an automatic right. A purchaser can always seek to enforce a contract, unless the contract specifies otherwise. The term "seeks to enforce" suggests that the purchaser must demonstrate that it fully meets the elements of the remedy. One seeks enlightenment; one does not have enlightenment handed to him. It is the same with this equitable remedy. A purchaser seeks to enforce, but the court chooses not hand it to the purchaser without proving the elements.

Reporter's Comment 3: It seems to the author that the majority opinion is not so much a departure from Texas law as it is a careful parsing of precedent. And it seems to accord with conventional wisdom. James C. Smith, Friedman on Contracts and Conveyances in Real Property (7th ed.), Section 7:2.2, which states "Tender by purchaser is excused after seller has repudiated the contract but the purchaser, suing for specific performance, must nevertheless prove he was ready, willing, and able to perform under the contract. A New York court, however, has applied the rule that if time is not of the essence, the purchaser must make time of the essence by notifying the seller of a new closing date prior to commencing an action for specific performance."

The Reporter for this item was Professor Daniel Bogart of the Chapman Law School, Orange, California.

VENDOR/PURCHASER; STATUTE OF FRAUDS: AMBIGUITY: A contract to purchase real property violates the statute of frauds where the contract does not set forth an exact purchase price and establishes an ambiguous formula to determine the purchase price at the closing. ***Behrends v. White Acre Acquisitions, LLC, 865 N.Y.S.2d 227 (A.D. 2 Dept. 2008).*** Sellers and Purchaser entered into two contracts to purchase residential and commercial properties that were undergoing renovation by Sellers at the time the contracts of sale were executed. Accordingly, the contracts did not specify an exact purchase price for the properties but instead provided a formula by which the purchase price could be calculated at the closing. The Sellers brought an action against the Purchaser claiming that the contracts were void and unenforceable. The Supreme Court, Appellate Division held that the formula established by the contracts for calculating the purchase price was too ambiguous – through the use of indefinite terms such as such as "stabilized," "gross annual income," and "expenses" – to be enforceable under the statute of frauds, which requires a written contract to set forth of the essential terms of a complete agreement. Therefore, the contracts were found unenforceable on account of the ambiguous terms of payment.

in preparation for sale. Are you certain that you really fixed that leak???

WORDS AND PHRASES; "APPROXIMATE:" The use of the term "approximate" in a lease to describe the bounds of an area that is subject to a right of first refusal does not render the lease ambiguous since it means only a "negligible deviation." ***First American Commercial Bancorp, Inc. v. Saatchi & Saatchi Rowland, Inc., 865 N.Y.S.2d 424 (A.D. 4 Dept. 2008).*** discussed under the heading: "Landlord/tenant; Options to Expand; Ambiguity; "Approximate."

WORDS AND PHRASES; "POSTAGE PREPAID:" Under Texas ad valorem taxation statutes, the inclusion of an insufficient postage amount in an envelope containing a taxpayer's tax payment, which causes such payment to be late and subjects the taxpayer to substantial late charges, does not comply with the statutory procedure, requiring that tax payments be sent "postage prepaid," and the late charge will be upheld. ***Tenaska Frontier Partners, Ltd. v. Sullivan, 273 S.W.3d 734 (Tex. Ct. App. 2008).*** , discussed under the heading: "Taxation; Property Tax; Payment."

ZONING AND LAND USE; EQUITABLE ESTOPPEL: A zoning commission which previously improperly permitted development of a subdivision in a manner contrary to applicable zoning statutes is not thereby equitably estopped from denying further improper development. ***Sebastian-Voor Properties, LLC v. Lexington-Fayette Urban County Government, 265 S.W.3d 190 (Ky. 2008).***

In 1963, W.H. Sebastian began developing a residential subdivision in Fayette County, Kentucky. In connection with that development (which was an agricultural category zoned as A-1), a preliminary development plan was approved for 122 one-acre lots. Of these, 40 were approved on a final plat prior to the 18-month period in which subdivision regulations required final plat approval of the preliminary development plan to be obtained. In 1966, the preliminary development plan was re-approved for the remaining 82 lots, 19 of which were approved in a final plat. Kentucky's planning and zoning statutes were amended later in 1966 to impose a minimum residential lot size of 10 acres for all lots within an A-1 zone. Despite these new statutes the local planning and zoning commission (the "Commission") approved plats for one-acre lots over the next 29 years.

In 2002, W.H. Sebastian's grandson (who had taken over the family development business) applied for a preliminary subdivision plan for the remaining 59 acres. The subdivision plan was denied by the Commission because, among other items, the 1966 preliminary development plan had expired and was not eligible for reapproval or extension, and the proposed plan did not meet lot size requirements. Sebastian appealed to the Fayette Circuit Court, arguing that the Commission was estopped from denying the request for reapproval of the subdivision plan because of the prior approvals given in the preceding 39 years. The circuit court denied Sebastian's appeal. The Kentucky Court of Appeals affirmed the judgment of the circuit court, holding that equitable estoppel may be invoked against a governmental entity only under exceptional circumstances, which circumstances were not met in this case. Sebastian then appealed to the Kentucky Supreme Court.

On appeal, the court framed the issue in the case as being "whether a governmental entity, which previously improperly permitted development of a subdivision in a manner contrary to applicable zoning statutes, is now equitably estopped from denying further improper development." The court began by reviewing the applicable zoning statutes, concluding that the authorized political subdivision properly adopted zoning regulations in this case, and that the Commission could not approve a subdivision preliminary plat that conflicts with such regulations.

Regarding Sebastian's argument that the Commission was equitably estopped from denying the proposed preliminary plat because of its history of prior approvals, the court disagreed and affirmed the court of appeals. Specifically, it noted that "a court must find that exceptional and extraordinary equities are involved to invoke [the doctrine of equitable estoppel]," which is determined on a case-by-case basis. While improper approval was given for the development of portions of the subdivision in the past, "the nearly four-decade delay in developing portions of [the subdivision] created a foreseeable possibility that zoning regulations, applicable governmental personnel and the attitudes of the same would change." In addition, "past improper approval of lots cannot bind the current Commission to ratify an unauthorized act." "[A] public officer[']s failure to correctly administer the law does not prevent a more diligent and efficient officer[']s proper administration of the law, as [a]n erroneous interpretation of the law will not be perpetuated."

Finally, the court noted that the judicial review of the Commission's decision is limited to the determination of whether (1) such decision was arbitrary, (2) action was taken in excess of granted powers, (3) affected parties were afforded procedural due process, and (4) decisions made by the Commission were supported by substantial evidence. Here, the Commission's decision met those four standards, and equitable estoppel was not applicable in this case.

ZONING AND LAND USE; PRE-EXISTING NON-CONFORMING USE; QUARRYING: A landowner is not entitled to conduct quarrying activities on parcels of land not zoned for such activities merely because the parcels are contiguous to other parcels of land also owned by the landowner and on which quarrying had occurred over a long period of time. ***Buffalo Crushed Stone, Inc. v. Town of Cheektowaga, 864 N.Y.S.2d 598 (A.D. 4 Dept. 2008)*.**

Plaintiff owns approximately 230 acres of real property within the Town of Cheektowaga and it operates a hard rock quarry upon approximately half of its land. Certain parcels on the other half of Plaintiff's land are in dispute in this case.

Defendant enacted a zoning ordinance that created a special "Aggregate District" ("AG") in which quarrying was allowed. Plaintiff owned several parcels of land that were not within the boundaries of this district, but were contiguous to parcels of Plaintiff's land that were within the AG and on which quarrying activities had been undertaken for many years, both before and after the AG was created. Plaintiff moved for a declaration "that all quarrying operations conducted anywhere within the boundaries of [its property]" are entitled to prior nonconforming use status" under the defendant's zoning ordinance.

Plaintiff presented evidence that showed, in part, that (i) in the past Plaintiff had attempted to relocate a road to the southern boundary of his its property, demonstrating that it had intended to use such property for quarrying, (ii) there was also 6,000 feet of 16-inch pipe running along a road to a pumping station off Plaintiff's property and such pipe was evidence of infrastructure devoted to mining, and (iii) Plaintiff applied for and was issued mining permits in 1955 and 1960, long before the changes in zoning.

The Court rejected the Plaintiff's arguments and held that because Plaintiff failed to establish that it had conducted any "substantial quarrying activities" on the parcels in question that "clearly manifest an intent to appropriate [such parcels] to the particular business of quarrying," plaintiff is not entitled to extend the protection of a permitted nonconforming use for those parcels. The issuance of mining permits, without any other activities undertaken in furtherance of mining, the Court held, are precisely the type of "self-serving acts of a very limited nature that cannot be deemed to have thrown a protective mantle of nonconforming use over Plaintiff's entire parcel of land as against a later prohibitory ordinance." Furthermore, some of the acts of the Plaintiff to prepare the land for quarrying occurred after the effective date of the zoning ordinance and thus were irrelevant to establishing a prior nonconforming use.

Comment: This issue is not without some dispute. There were cases early in DIRT's history that delineated the problem. See, e.g. *Hansen Bros. v. Bd. of Supervisors of Nevada County,* 35 Cal.

Rptr. 358 (Cal. App. 1994) (The DIRT DD for 4/11/95) (Mining use in one area of a parcel land is entitled to be extended to balance of parcel as a pre-existing use, but owner cannot significantly intensify rate of extraction.) This case held that the mining activity "imprinted" the entire parcel, and acknowledged that the doctrine applies primarily to mining and not to other activities. *But compare: Township of Fairfield v. Likanchuk's, Inc.*, 644

A.2d 120 (N.J.Super.App.Div. 1994). (part of the same DD) (The expansion of a mining operation from a small area of a tract to the entire tract, where mining is a prior nonconforming use, constitutes an illegal expansion of the use.) The lattter case differentiates its facts from those applying the "diminishing asset" notion. It characterized the "So called diminishing asset" cases are slightly different, since the nature of the nonconforming use, such as excavation or soil removal, involves the utilization of a wasting asset and requires continual expansion over an area. Nonetheless, in such cases, the owner must show that the entire tract was dedicated by the owner to the mining activity despite the fact that the activity was limited when it was rendered a nonconforming use. The mere unexpressed intention or hope of the owner to use the entire tract at the time the restrictive zoning ordinance is adopted is not enough. Intent must be objectively manifested by the initial and ongoing operation of the owner before the activity was rendered nonconforming. *Hansen,* cited above, also embodies this principle.

ZONING AND LAND USE; PROCEDURE; APPEAL: Citizen has standing to attack the awarding of a redevelopment contract as illegal and *ultra vires* ten years after the original approval of the plan if: (1) If it is a taxpayer and the alleges that the challenged action will cost the city money – leading to a loss of funds that must be replaced with tax money; (2) if it owns a parcel adjacent to or even nearby to the proposed redevelopment project, in which case it is *prima facie* aggrieved by any land use decision made on the redevelopment property or other property affected by a land use decision, and the zoning authority must show lack of any potential adverse effect to defeat standing. ***120 West Fayette Street LLLP et al. v. Mayor and City Council of Baltimore et al., No. 49 (Md. 1/9/09) ,*** discussed under the heading: "Redevelopment; Standing; Citizen Opposition."

ZONING AND LAND USE; PROCEDURE; APPEAL; EVIDENCE: Appellants of a zoning decision may introduce new evidence on appeal, as it is a *de novo* review of a "legislative act." ***Stendahl v. Cobb County, 284 Ga. 525, 668 S.E.2d 723 (Ga. Sup. Ct. 2008).***

Adjacent landowners appealed approval of rezoning petition to county superior court claiming that the rezoning decision violated zoning ordinance and was unconstitutional. The county filed a motion to dismiss the complaint for failure to state a claim and for failure to join as defendants the owners of the rezoned property. The trial court granted the county's motion on both grounds. The trial court applied the "any evidence" standard: any evidence produced by the adjacent landowners would only conflict with the evidence supporting the rezoning decision and would not be sufficient to warrant overturning same.

On appeal, the Supreme Court of Georgia noted that the denial of an application for rezoning is a "legislative act" subject to a "de novo review" and that the trial court was not limited to examining the evidence presented to the zoning authority at the administrative level. Consequently, the adjacent landowners could introduce new evidence, including expert testimony.

The Supreme Court concluded that the trial court erred when it granted the motion to dismiss for failure to state a claim after applying the "any evidence" standard.

ZONING AND LAND USE; PROCEDURE; APPEAL; PARTIES: Where zoning applicants are named as parties to neighbor's appeal of a rezoning action, the actual owners of real property are not indispensable parties. ***Stendahl v. Cobb County, 284 Ga. 525, 668 S.E.2d 723 (Ga. Sup. Ct. 2008).***

The adjacent landowners also argued that the trial court erred in granting the motion to dismiss for failure to join indispensable parties. The trial court concluded that the owners were necessary parties because the zoning conditions "ran with the land" and were not personal to the applicants.

The Supreme Court, however, concluded that the trial court erred in dismissing the adjacent landowner's action for failure to join the true owners of the property on the grounds that the true owners were not a necessary party for the adjudication of the zoning appeal. The Supreme Court noted that the true owners did not fit within the definition of "indispensable parties" because the "case could be decided on its merits without prejudicing the rights of the owners since the rezoning applicant is a party and presents a thorough case on behalf of itself and ultimately the owner." Because the trial court applied the wrong standard of review and erred in concluding that the owners were necessary parties, the Supreme Court reversed the trial court's grant of the motion to dismiss.

ZONING AND LAND USE; PROCEDURE; CONFLICTS OF INTEREST: A public official is disqualified from participating in proceedings where he or she has a conflicting interest that may interfere with the impartial performance of that official's duties and the issue is not whether there is an actual conflict, but if there is a potential for conflict that would appear to taint the public official's partiality. ***Mountain Hill, L.L.C. v. Township Committee of the Township of Middletown, A-2404-06T2 (N.J. Super. App. Div. 2008)***

A developer challenged municipal zoning ordinances on the basis that the mayor's involvement in the process constituted a conflict of interest that should have disqualified her from participating. A principal of the developer and the mayor developed a business relationship over a period of time when they both served on a municipal committee. The mayor owned a title company and did title work for the principal, the principal's wife, and later for the developer. After the developer filed a variance application with the municipality, the mayor did not disqualify herself from the proceedings. Instead, she elected to terminate her relationship with the developer and cease doing title work for it.

The lower court found that the conflict arising from the title work performed several years before the ordinances were adopted did not taint the mayor's performance of her duties. The developer appealed and the Appellate Division reversed, noting that under common law, later codified in the Municipal Land Use Law (MLUL), a public official is disqualified from participating in proceedings in which he or she has a conflicting interest that may interfere with the impartial performance of that official's duties.

The issue is not whether there is an actual conflict but if there is a potential for conflict that would appear to taint the public official's impartiality. The Court then noted that the question of whether the mayor's involvement as a title officer required her disqualification was governed by the Local Government Ethics Law (Ethics Law). The Ethics Law applies a "financial or personal involvement" test to determine if a public official should be disqualified for a conflict of interest. The Court then considered whether the mayor or her title company's financial involvement with the developer or its principals required her disqualification.

The Court rejected the municipality's argument that the major's providing title work for the developer had to be contemporaneous with her participation in the zoning proceedings in order to disqualify her. The Court noted that the fundamental question was whether the title work had the capacity to impair the mayor's objectivity and "tempt [her] to depart from [her] sworn public duty." The Court found that a reasonably informed citizen, knowing of the significant involvement of the mayor in the proceedings and of the major's issuing title insurance policies to the developer's principals, might reasonably expect that the mayor's objectivity or independent judgment would be tainted. The Court rejected the municipality's argument that the conflict was limited to times contemporaneous to the time of the ordinances because limiting a disqualifying conflict of interest in that manner would erode the public's confidence in the integrity of its elected officials and appointed representatives.

The Court found that the public might reasonably perceive that the involvement of the mayor with the developer, with whom she had done business, would impair her objectivity. The Court noted that such suspicion is especially true when the ordinance under consideration is being hotly contested, as it was in this case. Therefore, the Court found that the ordinances were invalid due to the mayor's failure to withdraw from participation when she had a conflict of interest.

Comment: For a perhaps more generous view, see the following recent unreported case, also from New Jersey:

ZONING AND LAND USE; PROCEDURE; CONFLICTS OF INTEREST: Where a planning board's member's law firm has not represented an applicant and quite some time has passed since any member of that law firm represented any part owner of an applicant, there is no requirement that the board member recuse herself or himself. ***Meyer v. MW Red Bank, LLC, 401 N.J. Super. 482, 951 A.2d 1060 (App. Div. 2008), Unpublished.***

A developer, originally a limited liability company, sought a variance as part of its application to redevelop a parcel as a mixed use development. The chair of the zoning board recused himself from the variance hearing on the variance because he had represented one of the developer's part-owners in the purchase of a house. An attorney who represented objectors in a previous related matter before the board inquired whether the acting chair, who was involved with the previous matter had any conflict of interest. The acting chair said she had no conflicts of interest regarding the developer's variance request and the board subsequently approved the developer's variance request.

The objector's attorney brought an action against the zoning board challenging the acting chair's participation in the hearing on the basis that the acting chair's father, a retired judge, held a position at same the law firm where the zoning board chair was a partner. The lower court dismissed the action, finding that any conflict of interest on the part of the chair could not be imputed to the acting chair, and that the acting chair's father's status at the law firm as "of counsel" could not be reasonably expected to impair the acting chair's ability to make an unbiased determination. The lower court also found that the objector's attorney had the opportunity to apply for a stay of the variance grant pending the outcome of the previous matter on the basis of the acting chair's purported conflict of interest, but failed to do so. As a result, he was barred from raising the challenge to the acting chair's participation.

On appeal, the Appellate Division pointed out that the law firm had never represented the developer and that it had been more than two years since any member of the law firm represented the part-owner of the developer or of any of its subdivisions. It also pointed out was that the acting chair's father only had an indirect connection to the representation of the developer's part-owner. The Court found that the chair's decision to recuse himself from the matter was a choice he made individually. It agreed with the lower court that there was no requirement that the acting chair do the same. Additionally, it found that the attorney had the opportunity during discovery to find out any additional facts regarding the chair's relationship to the developer's part-owner and if the relationship improperly influenced the acting chair's judgment. As a result of its findings, the Court upheld the zoning board's approval of the developer's variance request.

ZONING AND LAND USE: PROCEDURE; TIME OF DECISION RULE: An applicant for a zoning variance that filed its application after a new zoning ordinance had been passed, but before its effective date, has no reasonable basis to assume its application would or should be reviewed under the old zoning ordinance. ***Maragliano v. Land Use Board of the Township of Wantage, 403 N.J. Super. 80, 957 A.2d 213 (App. Div. 2008)***

ZONING AND LAND USE; SUBDIVISION APPLICATION; NOTICE AND COMMENT; DISCRETION OF ZONING BOARD. A planning commission may not reject outright a subdivision application which meets all applicable planning and zoning requirements, despite negative comments from various state agencies about the impact of the proposed subdivision and a statutory requirement that planning commissions take state agencies' comments into account in ruling on rezoning or subdivision applications. ***Tony Ashburn & Son, Inc. v. Kent County Reg'l Planning Comm'n., 2008 Del LEXIS 546 (Del. 2008).***

Appellant Tony Ashburn & Son, Inc. ("Developer") filed an Application for Subdivision Plan Approval which complied with all applicable planning and zoning requirements, and which was recommended for approval to Appellee Kent County Regional Planning Commission ("Commission") by the county Planning Office. The Commission solicited comments from state agencies about the impact of the Developer's proposed development. Various state agencies voiced opposition to the plan, claiming that the water, transportation, and educational resources of the surrounding area would not support not support the proposed development.

The Commission voted to deny the Developer's application, basing its denial on the state agencies' comments and finding that (1) the requisite infrastructure was not in place, (2) the development would sit outside the area in which the county determined that new development should be encouraged, and (3) the development would negatively affect the health, safety, and welfare of the community. Both the Kent County Levy Court and the Superior Court for the State of Delaware upheld the Commission's decision.

On appeal, the Supreme Court reversed. It noted that the relevant statutory provisions empower the Commission to approve, approve with conditions, disapprove, or table a subdivision application, and state that the Commission may request and review information submitted by state agencies. But the Court found that the statutes do not give the Commission unfettered discretion to deny an otherwise legally conforming subdivision application based on impact-related concerns expressed by state agencies.

The Court stated that if the Commission were empowered to deny proposals that met all applicable statutory criteria, purchasers of land would be unable to predict whether they could develop that land due to the possibility of ad hoc denials by the Commission based on non-statutory factors.

The Court therefore held that the Commission may approve a statutorily conforming subdivision application with conditions based on non-statutory factors such as comments by state agencies, but may not deny such an application outright. Accordingly, the Court, finding that the Commission exceeded its statutory power, overturned the Commission's denial of the Developer's application.