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ABA REAL ESTATE QUARTERLY REPORT

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AMERICAN COLLEGE
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Quarterly Report on Current Developments in Real Estate Law

October 1 through December 31, 2009

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

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AGENCY; FRAUD; APPARENT AUTHORITY: Notwithstanding fraud by the purported agent of the a Principal owner of real estate, a mortgagee deceived by such fraud cannot collect on the mortgage because it is the responsibility of a mortgagee to perform due diligence on mortgage transactions into which the mortgagee enters. ***ER Holdings, LLC v. 122 W.P.R. Corp, 887 N.Y.S.2d 138 (N.Y. App. Div. 2009),*** discussed under the heading: "Mortgages; Fraud; Duty of Due Diligence."

ASSOCIATIONS; ARCHITECTURAL REVIEW: Although Association has general right to enjoin violations of architectural covenants, it is bound by its own rules establishing time frames in which to act upon alleged violations, even if the violator failed to request advance approval. Thus, objection to nonconforming shingles was waived. ***Falkner v. Colony Woods Home Ass'n**, **198 P.3d 152 (Ka. App 2008).***

A provision of the subdivision declaration stated: "Roofs shall be covered with wood shingles, wood shakes, slate or tile. Any building products which may come into general usage for dwelling construction in this area after the date of these restrictions shall be acceptable if approved in writing by the Architectural Control Committee."

The Declaration established an Architectural Control Committee (ACC) as a 5 member group of homeowners that accepts requests for new buildings and alterations and approved the requests under the Declaration of Restrictions. In 1998, the ACC promulgated a form and procedure for applications for approvals of non-conforming shingles. The new approval process required the homeowner to fill out and sign the form, include a material data sheet and bid proposal, include a copy of the City of Lenexa's Building Roofing Permit, and "await a written and signed response from [an] ACC member prior to ordering material or any work to begin." The Notice specified that the ACC would then have 30 days to respond in writing to any request received. The letter concluded by providing a 2-week period for "comments, objections, or suggestions to the new rule on alternative roofing.

Another provision of the Declaration provided for waiver by Association inaction:

"[I]f no suit to enjoin the erection of said building or the making of such alterations has been commenced prior to the completion thereof, such approval will not be required and this covenant will be deemed to have been fully complied with."

Other provisions, of the Declaration, however, gave the Association general authority to seek injunctions to enforce the Declaration.

Falkners installed a new, arguably nonconforming, roof, without seeking permission in advance. A few weeks after installation, they received a letter from the Chair of the ACC requesting that they fill out the required form asking permission. Otherwise, the letter threatened the ACC would find the Falkners "out of compliance." The Falkners complied and filed their form on March 23. The ACC did not respond within 30 days. When Falkners' attorney requested information on June 6, he got a letter from the ACC attorney informing him that the Falkners' roof had previously been disapproved and that further action was coming.

Falkners sued for declaratory relief.

The court held that the general provision for seeking of injunctions might be viewed as applicable if Falkner's had never applied for a permit. The 30 day restriction, apparently, applied only to disputes that had already been joined.

Although Falkner's did not apply for a permit prior to building their roof, they in fact did so thereafter, at the invitation of the ACC. The court held that this act triggered the internal 30 day period set forth in the ACC's own rules. Because the ACC failed to act within three months, they could not now object to the roof.

Comment: Clearly one of the problems here is that the Declaration was written to establish the original Developer's control over construction of new homes in the subdivision and simultaneously to establish the ACC control over subsequent developments. This was a "lazy" way to do things, and clearly didn't work well for the Association here.

ASSOCIATIONS; ARCHITECTURAL REVIEW: DEMOLITION: Where a restrictive covenant requires homeowners association approval of changes or alterations to buildings in a development, such approval is not required for a homeowner to demolish the homeowner's house where no replacement structure is planned. ***Service Corp. of Westover Hills v. Guzzetta, 2009 Del. LEXIS 221 (Del. Ch. Dec. 22, 2009)***, discussed under the heading: "Servitudes; Architectural Review; Demolition."

ATTORNEYS' FEES; SLANDER OF TITLE: Attorney's fees and other legal expenses incurred in clearing a disparaged title are recoverable as special damages in slander of title actions (first impression in Missouri). ***Lau v. Pugh, 299 S.W.3d 740 (Mo. Ct. App. 2009)***, discussed under the heading: "Slander of Title; Attorney's Fees."

BANKRUPTCY; FRAUDULENT CONVEYANCES; JUDGMENTS; DEFAULT JUDGMENTS: Default judgment in marital dissolution action is not avoidable in defaulted party's bankruptcy in absence of extrinsic fraud and conclusively established lack of reasonably equivalent value. ***Batlan v. Bledsoe (In re Bledsoe) 569 F3d 1106 (9th Cir 2009),*** discussed under: "Judgments; Fraudulent Conveyances; Bankruptcy."

Here are two little bankruptcy homestead decisions in Kansas. Note that Kansas is one of a handful of states (I believe Texas, Florida and possibly Minnesota are others) that permit homestead exemption without limitation as to value, although within a city th area is limited to one acre is size. It has elected for state law treatment of homestead claims. Thus these cases have some consequence to the parties. Debtors won in both cases.

BANKRUPTCY; HOMESTEAD: Where husband and wife have separate residences, they may claim their own residence as a homestead, or the residence of the spouse as a homestead (should they have an interest in it) but not both. ***In re Hall 2009 Westlaw 4456542 (10th Cir. BAP 12/4/09)***.

Husband and wife were separated, and husband had moved out of the family residence and moved into a mobile home on the same property. Apparently they jointly owned the property. Both parties declared a Chapter 7 bankruptcy, and the trustee objected to the inclusion of both the house and the mobile home as homestead property.

A homestead may be claimed in property on which the Debtor lives or on which a member of Debtor's family lives. But the court noted that the statute provides for claiming of a "homestead," not homesteads. So neither husband nor wife could claim two homesteads.

The trial court found that the husband indeed had abandoned the house and had established a residence in the mobile home, but still had a one half interest in the house where his family lived. Under these circumstances, the court held that the husband could claim the mobile home as his homestead, or could claim a homestead in his one half interest in the family home, but not both.

Since the wife had only a one half interest in the family house, she could claim a homestead in only a one half interest in that property. Because her husband lived in the mobile home, she could also elect to claim the mobile home as the homestead.

Since the mobile home consisted of a 1973 Bell mobile home with no tongue and no wheels and a value of around $3000, it is likely the parties will elect the house.

Comment 1: Note that Kansas does not have "judgment proof" tenancy by the entireties.

Comment 2: There may be some confusion as to whether the wife or the husband could individually elect to invoke homestead in property as to which they own only a one half interest. The court seems to say at one point that the husband can invoke a homestead as to a one half interest in the family house. But at other points it simply states that he has the option to exempt "the motor home" (on property, at least, that is half owned by the wife) and that the wife has the option to exempt "the house," despite the fact that she only owns half. Since the ambiguity rests with the opinion, and since bankruptcy mavens undoubtedly will clear this up for us, I pass on the confusion.

BANKRUPTCY; HOMESTEAD: Even though debtors may reside in another house more than half the time each year, they can continue to claim their original home as an exempt homestead if it remains empty but maintained while they are not there and they have a clear intent to return to it. ***In re Curry, 2009 Westlaw 5198294 (D. Ka. 12/22/10)***.

Debtors resided from time to time during the year in one of two properties, located 120 miles apart. There was a "country home," wife's family home, which was not rented, connected to utilities, and where they spent some of their time. There was the "city apartment," where Husband, at least, spent eight months a year for his work as a school bus driver. Wife's presence in the country home was uncertain, but she apparently spent quite a bit of time in the city apartment.

Both debtors have extensive activities in the City, where they vote, attend church, receive medical care, bank, insure and license their vehicles and receive mail. But both Debtors claim that they view the country home as their residence, despite their temporary sojourn in the City, and intend to return there full time.

The court, compiling a long list of case summaries which would be useful to any Kansas lawyer, at least, concluded that the parties in fact never intended to abandon their country home, though circumstances might have compelled a temporary absence. Since no one else lived there in the meantime, it remained their homestead.

BOUNDARIES; STATUTES OF LIMITATIONS: When removal of an encroachment is barred by statute and is not within the court's discretion, a notice of pendency on the encroaching property will remain until an action for damages caused by the encroachment is completed if there is a potential transfer of title to the property if damages are awarded. ***Chi Wei Chan v. 2368 West 12th Street LLC, 884 N.Y.S.2d 834 (Sup. 2009)***, discussed under the heading: "Statutes of Limitations: Boundaries."

CONSTITUTIONAL LAW DUE PROCESS; REGULATORY TAKINGS; STATUTE OF LIMITATIONS: Even though a government entity may effectively have substantially destroyed any beneficial use that a property owner might have, resulting in inverse condemnation or a regulatory taking, the property owner may lose the right to compensation if it waits until its claim is time-barred by the six year statute of limitations. ***Klumpp v. Borough of Avalon, A-2963-07T3 (N.J. Super. App. Div. 2009), Unpublished; July 31, 2009*** , discussed under the heading: "Eminent Domain; Inverse Condemnation; Statute of Limitations."

CONSTRUCTION LAW; SUBCONTRACTORS; PAROL EVIDENCE: If a property owner agrees in an unambiguous contract with a subcontractor to pay for work related to the construction of a residence, courts will not use parol evidence to invalidate such contract, even if the parties believed that the subcontractor would be paid by the general contractor when the contract was executed. ***Barber Cabinet Company, Inc. v. Sparks, 2009 Westlaw 4406079 (Ky. Ct. App. 2009). (Not yet released for publication.)***

Sparks hired Parker as general contractor to construct a residence. Sparks selected Barber, a subcontractor recommended by Parker, to complete the cabinets in the residence. Written specifications for the cabinets were prepared in a sales contract, and Sparks executed language at the end of contract which included a provision that "[t]he undersigned has ordered and approved all specifications, materials and finishes on this job. The undersigned will be responsible personally for payment in full of the total job cost ...."

Barber built the cabinets to the satisfaction of Sparks. However, Parker failed to pay Barber for the work, prompting Barber to file a lien on the property in an effort to obtain payment. Subsequently, an entity Barber owed for work associated with the project filed suit for payment against Barber, and Barber cross-claimed against Sparks and sought enforcement of its lien and payment of the debt. The trial court addressed the issue of "whether, upon Parker's failure to pay Barber, Sparks is liable to Barber under the written instrument [described above]."

The trial court allowed parol evidence of precontractual negotiations and the parties' course of conduct to determine intent, concluding that despite Sparks' signature on the contract, there was no meeting of the minds with respect to Sparks' personal responsibility for payment. Accordingly, it held that both Sparks and Barber believed Parker would be responsible for the debt. In holding for Sparks, the trial court relied on *Murphy v. Torstrick,* a case in which parol evidence was admitted to invalidate the terms of a contract after the court determined that the parties did not intend to be bound by the writing.

On appeal to the Kentucky Court of Appeals, Barber argued that the language of the written agreement was unambiguous, and therefore parol evidence should not have been allowed into evidence. The court began with a general discussion of when parol evidence may be considered as a means to determine whether a contract has been formed, noting that parol evidence may not be considered to vary or alter the terms of a written agreement. It also acknowledged the practical difficulties of the *Murphy* case and its understanding of the trial court's decision to allow parol evidence, given two innocent parties and the sympathy often afforded to homeowners under the circumstances. Nevertheless, being "bound to observe the basic precepts of contract law and the overriding principles served by the enforcement of contracts as written," the court stated that the rule that "a written contract should be enforced according to its terms in all but very limited circumstances is, in a broad sense, necessary to realize … predictability and efficiency in business transactions."

The court distinguished *Murphy* from the subject case, noting that the writing in *Murphy* was a bid for a construction project, the language in the contract was utilized only to obtain financing from a third party, and neither party expected the writing to serve as a binding contract. In contrast, the court in the subject case believed the minimum expectation was that Parker would pay Barber, and that if such payment did not occur, the contract should not be negated.

"Even though both parties expected Parker to pay, when Sparks signed the contract he undertook responsibility to see to it that Parker did pay prior to his final payment to Parker."

Quoting a 2007 Kentucky Supreme Court case, the court stated that "[i]f the legality of the contract can be sustained in whole or in part under any reasonable interpretation of its provisions, court should not hesitate to decree enforcement." While the parties intended for Parker to pay Barber, that mutual presupposition did not negate the express intention of the parties in their written instrument. Because an objective analysis of the language used in the contract clearly indicated mutual asset, the court of appeals reversed the trial court holding in favor of Sparks and ordered payment to Barber.

Comment: Missouri case law, at least, is replete with cases in which owners or lenders provided assurances to subcontractor that they would be paid, with the result that the subcontractor's liens were granted greater enforcement or higher priority. Although one has sympathy for the owner/consumer here, he is the one who picked the contract and consequently delivered the bad apple into the basket. The subcontractor's reliance on the language of the contract is fair and appropriate.

CONTRACTS; EXECUTION; SEALS: With respect to an individual, in contrast to a corporation, the presence of the word "seal" next to an individual's signature is all that is necessary to create a sealed instrument, irrespective of whether there is any indication in the body of the instrument indicating an intent to create a sealed instrument. ***Whittington v. Dragon Group, L.L.C., 2009 Del. LEXIS 654 (Del. Dec. 18, 2009).***

Plaintiff brought an action in the Delaware Chancery Court against Dragon Group, L.L.C. and various family members of the Plaintiff (collectively, "Holders") to enforce Plaintiff's rights as an alleged member of Dragon Group, L.L.C.

One relevant document in determining the Plaintiff's alleged membership rights was an Agreement in Principle, which was executed by Plaintiff and certain of the Holders in 2001 with the word "seal" appearing in typed letters beside each signature line. As the Plaintiff first brought an action in 2006, five years after the parties' execution of the Agreement in Principle, the Holders contended, *inter alia*, that the doctrine of laches barred the Individual's claims.

The Chancery Court observed that the analogous statute of limitations at law is generally given great weight in deciding whether claims brought in equity are barred by laches, and found that the applicable statute of limitations for contract actions under Delaware law was three years. The Chancery Court noted, however, that one exception to the three-year statute of limitations was for contracts under seal, to which the common law twenty-year period instead applies. Nevertheless,, citing prior case law, the Chancery Court found that a documents (other than a mortgage) must show an intent to enter into a contract under seal more clearly than the mere insertion of the word "seal" next to the signature lines of the instrument. Accordingly, the Chancery Court held that the Plaintiff's claims were subject to the three-year statute of limitations and should therefore be dismissed on the ground of laches.

On appeal, the Delaware Supreme Court revisited the question of what evidence is necessary to establish a sealed instrument. The Court, unlike the Chancery Court, found a conflict in prior case law on the issue. One lower court decision ("*Estate*") held that the printed word "seal" next to the signature line was sufficient to create a sealed instrument regardless of whether there was any indication in the body of the instrument that it was intended to be a sealed instrument, while another lower court decision ("*Harris*") held that for an instrument other than a mortgage to be under seal it must contain language in the body of the contract and extrinsic evidence showing the parties' intent to create a sealed instrument.

Although the Chancery Court had relied on Harris, the Court noted that New York law governed the sealed instrument in Harris and found that the *Harris* decision may have been based upon the erroneous identification of a document or an incorrect interpretation of Delaware law. As a result, the Court adopted the *Estate* decision, holding that in the case of an individual, the presence of the word "seal" next to an individual's signature is all that is necessary to create a sealed instrument, regardless of whether there is any indication in the body of the document that it was intended to be a sealed instrument. The Court therefore remanded to the Chancery Court to apply a twenty-year statute of limitations for contracts under seal in determining laches.

Jacobs, J., dissenting, argued that the Court's rule represented an inadvisable policy choice that would frustrate the reasonable expectations of parties to many commercial contracts by subjecting them to a longer statute of limitations without requiring any evidence beyond the printed word "seal" next to the signature line to indicate that the parties intended that result.

Comment: If, indeed, the state has a policy (questionable in any even to the editor) that some agreements ought to have a statute of limitations nearly seven times longer than other agreements, wouldn't the best way to implement such a rule be to require language in an agreement stating specifically that the parties opt for the longer period? Typing the word "seal" admittedly is confusing, but putting in the agreement that the parties intend a seal may be equally confusing.

Of course, as in many other fine distinctions in the law, it might be argued that these kind of traps are what drive clients to resort to professional legal advice before entering into agreements, and undoubtedly Delaware lawyers are skilled in the nuances of the seal.

The editor is all for creating more job opportunities for Delaware lawyers, but believes that there must be some kind of absurdity test even in creating job opportunities. The "seal" device just doesn't pass.

CONSTRUCTION LAW; SCAFFOLD LAW: Office lessee that didn't hire maintenance company was not potentially liable in company's employee's scaffold law suit. ***Ferluckaj v. Goldman Sachs & Co., Inc., 908 N.E.2d 869 (N.Y.).***

DEEDS; REFORMATION: Court denies request of incarcerated Father to reform deed of farmland to Son and Daughter to reflect a life estate in Father; Father had unclean hands because sole purpose of transfer was to evade government acting as creditor. ***Hardy v. Hardy, 910 N.E.2d 851 (Ind. Ct. App. 2009)***.

Hardy is interesting because it demonstrates the brazen way in which a person clearly undeserving of equitable relief audaciously asked for it anyway, and then took his outlandish request up on appeal. It is a reassuring case because the party requesting equitable relief lost.

In this case, a Father owned approximately 80 acres of farmland in Indiana. This property included his residence. Father apparently faced an assortment of criminal charges related to both tax evasion and methamphetamine. On October 15, 2004, Father "purposefully conveyed seventy acres of his farmland to his Son and Daughter as joint tenants with right of survivorship." The court noted that the probable reason for the conveyance was the possibility that Father would soon be convicted of crimes that would lead to forfeiture of his land, significant fines in two states, a federal tax lien on property, and incarceration. In other words, the conveyance was meant to deprive state and federal governments, in their capacity as creditors, of assets that might satisfy the respective fines and debts.

In fact, Father was convicted and sent to the Big House in June of 2005 (actually, two Big Houses – first in Oklahoma and then Indiana, consecutively.)

At the time Father conveyed the property to Son and Daughter, Daughter was seventeen years old and a minor. Son was aware of the transfer, but neither Father nor Son told Daughter. She did not become aware of the conveyance in which she was granted a joint tenancy interest in the property until December of 2005, when Son demanded that she sign a quit claim deed of to two acres of her interest in the property to Son and Son's then wife. Son explained that he wanted to build a house on the property and according to the trial record (repeated in appellate opinion) Daughter "didn't really understand that [she] was a co-owner of [the land]." At her brother's insistence, Daughter signed the deed, which was recorded December 9, 2005. Apparently, Father was part of the deal. The opinion indicates that he promised to give Daughter $4000 for execution of the deed, but he failed to do so. This left Daughter with a joint tenancy interest in approximately 68 acres.

During years 2005 to 2008, while Father was behind bars, Son served as Father's "attorney in fact." Pursuant to Father's instructions, Son leased some of the land and earned lease rental income. Neither Father nor Son told Daughter about the lease income.

Daughter eventually became a bit more proactive and asked her sibling and Father about her interest in the farmland that she had not given to her brother by the earlier quit claim deed. Not surprisingly, both Father and Son ignored her inquires. This led to Daughter's decision to file a complaint seeking partition and sale of the real estate, as well as an accounting of all profits and income generated by the property.

Son responded in his answer that, rather than partitioning the property, the court should instead "reform the deed to reflect the intent of the parties including [Father] and [to] impose a constructive trust to protect the interests of Father, Son, and Daughter." By court order, both Son and Father were joined as party defendants in the action brought by Daughter.

Discovery revealed that Father had forged Daughter's signature on the lease agreements to the property. Father claimed that Daughter gave him permission to forge her signature, which Daughter denied.

The family dynamic was pretty toxic. Mother testified at trial that Father had conveyed the property with the intention of creating a life estate in Father, and remainder in Son and Daughter, thus giving Father a right to lease the property and to retain the rental income from such leases. Thus, Mother, Father and Son were aligned against Daughter.

Father was not beyond making internally inconsistent arguments. On the one hand, he alleged that the conveyance was real but technically wrong [he really intended to create a life estate with remainder in Son and Daughter], but also argued that the court should exercise its equitable power and create a constructive trust to reconvey the property back to him. The court noted that this demand "would have defeated Father's intent in making the conveyance to begin with."

The trial court had awarded partition by sale, as the land could not be divided "without damage to the owners, Son and Daughter." The Daughter received cash representing her share of lease rentals on an accounting. Finally, the trial court held that the Father had no interest in the property after the conveyance: no life estate, and certainly no right to a constructive trust for purpose of reconveyance of the property back to him.

The appeals court found no reason to dispute the trial court's findings of fact, and affirmed the trial court's award of partition and accounting revenues.

There are really two issues here: the demand of Father and Son that the court reform the deed, and Father's argument that the court imply a life estate.

As the court noted, the ability of a court to reform a deed rests in the court's equitable powers. This is therefore a wonderful case for reviewing the basic doctrine that a party asking a court to act in equity must have clean hands, and that a party seeking equitable relief must affirmatively "do equity."

It is possible that a court might award equitable relief to a party in court notwithstanding the fact that the party asking for equitable relief has committed wrongdoing. The point, as the court noted, is that "the alleged wrongdoing must have an immediate and necessary relation to the matter being litigated." In this case, Father and Son engaged in a conveyance to hinder, delay and defraud Father's creditors. The wrongdoing – thwarting efforts of the government to take the asset – is directly connected to the conveyance to Daughter. The behavior of Father was clearly intentional. Son was similarly denied equitable relief – he was "complicit" in his Father's scheme.

Furthermore, Father and Son had an obligation to "do right" by Daughter. To this end, dealing with her in such a poor fashion, especially when she was initially a minor, hiding the true nature of the transaction, taking lease rentals without telling her, intimidating her into executing a quit claim deed, failing to answer questions, all suggest that Father and Son were not acting fairly towards her. As the court pointed out, Father only claimed he meant to reserve a life estate after Daughter learned she owned an interest in the property and began to demand her share of rental income. Then, and only then, did Father ask a court to act in its equitable power to reform the deed.

Father requested reformation of the deed and an implied trust, arguing that it had been his intent to reserve a life estate. The court stated "The record is clear as to Father's primary motivation for the initial conveyance.... Father and Son both testified that Father effected the conveyance in order to place his property beyond the reach of his creditors – specifically, to evade government efforts to seize or lien his land."

Reporter's Comment 1: The only party who really knew the intention of Father when he conveyed the property was Father, and there is every reason to believe he would have answered a question on intent in the manner most suitable to a beneficial result. But for the testimony of mother on Father's behalf, this reason alone might have been enough to defeat Father's request for reformation. (Mother had reason to testify in Father's favor; presumably revenues from tenants would flow to Mother as well as to Father.)

Reporter's Comment 2: The interesting questions have to do with fraudulent conveyance law, but these are not directly before the court. If Daughter was unaware of the conveyance in the first place, if she did not rely to her detriment on it, and paid no consideration, one might ask if government creditors ought to be entitled to place the property in constructive trust in order to reach it. It seems to the reporter that government creditors might still be in the game.

Comment 3: We often say that to receive equity one must do equity. But it is hard to find a case in which a party who has so clearly failed to act in an appropriate manner would so brazenly ask for the court's equitable assistance.

EASEMENTS; CREATION; "EQUITABLE EASEMENT:" In the absence of a true implied easement, California court grants equitable easement to landlocked property owners. ***Linthicum v. Butterfield, 95 Cal. Rptr. 3d 538 (Ca. Ct. App. 2009)***.

This dispute originates in 1891, when federal government granted a large tract of land to a Mr. Thomas Bush in Santa Barbara County, California. The property is located adjacent to the Los Padres National Forest.

The government essentially divided the property into ten separate parcels, and patented parcels 2 through 10 to Mr. Bush. The government kept parcel 1. The opinion is unclear on several key facts. Here is the first: did parcels 2 through 10 have separate access to a public road at the time they were granted to Bush? The opinion reports that in 1943, “Griswold obtained parcels 2 through 10. A public road, San Marcos Road, gave Griswold direct access to his parcels.” As the reporter notes below, a true easement by necessity arises if the severance of parcels gave rise to the necessity – in other words, if the grant from the government to Bush landlocked the parcels. The opinion is unclear.

What is clear is that Griswold wanted additional access to San Marcos Road for his parcels. He therefore negotiated a special use permit (SUP) from the U.S. Forest Service over the retained parcel 1. This SUP granted Griswold a 12 foot right of way roadway.

Over the next decades, parcels 2 through 10 changed hands, both as a block and in individual units. The Forest service reissued the SUP providing for the roadway over parcel 1 when the entire block was sold to Hyde in 1949. Hyde sold individual parcels beginning in 1958 to different purchasers, each time reserving an access easement over the property sold for the benefit of property he retained. Hyde was not entirely accurate in his sales. At one point, he conveyed parcels 9 and 10 to Ygnacio, and in so doing purported to grant easements over parcels 2 and 8. However, at this point in time, as the opinion related, Hyde had already sold parcels 2 and 8.

Eventually Butterfields purchased parcel 6. (The lawsuit involved owners of other parcels, but Butterfields are named defendants, so the discussion of the case will focus on them.)

Throughout this entire period, the Forest Service retained ownership of parcel 1. Furthermore, after the date Hyde began selling the individual parcels, none of the individual grantees of parcels 2 through 10 sought reissuance of the SUP for a roadway across parcel 1. But in 1998, the Forest Service finally sold parcel 1, conveying the land to Jensen. Linthicum purchased parcel 1 in 2000.

The opinion is unclear on a second important fact. By the time the defendants in the case obtained their individual parcels, the only access to San Marcos Road was apparently through and across parcel 1. The opinion is not clear as to when these parcels lost access that Thomas Bush had to San Marcos Road at the time of the original land patent. Butterfields testified that in 35 years of ownership of their parcel, they had used parcel 1 to reach the Road without obstruction or interference. Other owners made similar statements. All said that without the right to reach the public road, their parcels would be inaccessible and valueless. One thought that he had a “lawful easement” across lot 1. One of the defendants had been crossing parcel 1 for nearly 60 years without impediment.

A forest service employee testified on behalf of the defendants that, in his opinion, the rights granted under the SUP did not die when Hyde began transferring the parcels. The SUP was still valid “and simply needing to be reissued.”

During the course of litigation, experts for the defendants testified that it would be onerous to build alternate access to parcels 2 through 10, and that obtaining county approval for any of the alternatives was uncertain. One possibility required the creation of a huge 40 foot retaining wall and the moving of some 40,000 cubic yards of earth.

Eventually, the judge visited the property at the request of the parties. The judge found that the access across parcel 1 was the only real possibility for parcels 2 through 10. The trial court therefore quieted title in the defendants to a 66 foot wide right of way over parcel 1. Although the California Court of Appeals remanded on factual issues (the appropriate width of the right of way) it affirmed the primary result of the trial court. The court of appeals found that the defendants had “an equitable easement” across parcel 1.

The court of appeals noted that in California a court may create an easement in equity by refusing to enforce a landowner’s right to eject a trespasser. The court will do so after “balancing the equities”: “the hardship to defendant by granting the injunction must be greatly disproportionate to the hardship caused plaintiff by the continuance of the encroachment, and this fact must clearly appear in the evidence to be proved by defendant.” In addition, defendant trespasser will receive an equitable easement only if it has clean hands. The court stated that it would not create an easement in equity if such an order would cause irreparable harm to the plaintiff – the owner of parcel 1.

In "doubtful" cases, according to the court, the injunction will be granted. However, according to the court, the facts in Butterfield were not doubtful. The court stated that — given the trial court's physical visit to the site and expert testimony – there was no alternative access to the property. Further, the trial court found that allowing the easement barely affected the landowner.

Furthermore, the court of appeals stated that it was appropriate in granting the equitable easement to determine who among the parties "is responsible for the dispute." In this case, the landowner, Linthicum purchased parcel 1 with knowledge that owners of parcels 2 though 10 were and had been using parcel 1 for access. That must have been factored into the price. The landowner then turned around and sought to bar the access to parcels 2 through 10.

The court was far more generous to the defendants. Owners of parcels 2 through 10 could have discovered during their years of ownership that they did not have rights to cross and have taken steps while the property was still in government hands to obtain the SUP. In essence, the defendants were negligent. But the court stated "The doctrine [of equitable easements] presumes the defendant is a wrongdoer. It hardly could be applied if a showing of some negligence is in every case enough to defeat its application."

The court then declined to award damages. It stated:

"It is true that when the trial court creates an easement by denying an injunction, the plaintiff is ordinarily entitled to damages. (See *Christensen v. Tucker,* supra, 114 Cal.App.2d at p. 559, 250 P.2d 660 [the court may deny an injunction and compel plaintiff to accept damages].)

Here Linthicum testified the financial impact of the roadway to parcel 1-A exceeds $900,000. But that amount is based on the theory that the roadway prevents all development, a theory the trial court expressly rejected. Instead, the trial court found the roadway did not prevent Linthicum from fully developing his parcel.

Robert Bjorklund and John Butterfield testified that they valued the roadway at $12,000. But there is nothing in the record that compelled the trial court to accept their evaluation.

"The trial court cannot award damages in the abstract. As plaintiff, Linthicum has the burden of proof on damages. (See *Wardrop v. City of Manhattan Beach* (1958) 160 Cal.App.2d 779, 791, 326 P.2d 15; *Sherman v. Associated Telephone Co.* (1950) 100 Cal.App.2d 806, 808, 224 P.2d 846.) Linthicum points to no credible evidence of the amount of damages. Under the circumstances, the trial court did not err in failing to award any."

Reporter's Comment 1: There is more to this opinion, but the reporter would like to focus on the question of easements. An easement is an interest in real property and ordinarily must be written and meet the requirements of the Statute of Frauds. However, in limited circumstances, an easement may be implied. There was no express appurtenant easement in favor of the owners of parcels 2 through 10; thus these property owners were forced to find a right in an implied easement or persuade a court to create an easement in equity.

Reporter's Comment 2: The problem for plaintiffs, right off the top, is that the fact pattern does not conform to the traditional notions of an easement by necessity or an easement implied by prior use. Easements by necessity apply the word "necessity" rather strictly. The facts suggest that by the time of the litigation, access across parcel 1 was truly necessary – it was impossible to make it to the road in absence of the easement. However, this is just one element of an easement by necessity. An easement by necessity will arise only if the dominant parcels became landlocked as a result of the severance of the parcels. In this case, it is not entirely clear from the facts recited in the opinion, but it seems likely that parcels 2 through 10 had alternate access at the time of severance. An easement by necessity does not exist here for parcels 2 through 10.

Reporter's Comment 3: A similar result arises with respect to an easement by pre existing use. The use – a roadway across parcel 1 for access – must have existed at the time parcel 1 was severed from parcels 2 through 10. The facts suggest that the roadway use across what was then national forest service property came about after severance.

Reporter's Comment 4: This leaves the defendants hoping the court will create an easement through equity. The reporter is suspicious of any such order, and in any event, the creation of an easement in equity should be a very rare event. Note how this right comes into being: the court refuses to follow the law of trespass and eject the trespasser, leaving the trespasser with a judicially created interest. Some courts recognize an "easement by estoppel," and perhaps this is what the court means to create here. The prototypical situation is that of an oral easement or license. This oral easement would be unenforceable under the statute of frauds, and does not satisfy the requirements of the two implied easements discussed above. However, if the owner of the alleged easement acts in reliance on the easement – perhaps builds a road, then the court may enforce the easement. A few courts will actually take what amounts mere permission (a license) and convert that into an easement if the "easement holder" invests money into the easement and time passes without incident, during which the easement holder uses the access right. Again, if it would work an injustice or serious hardship, these courts would grant the "easement" right. Finally, if the owner of land defrauds his neighbor into believing that an easement exists, then if the normal elements of fraud are met (inducement, reasonable reliance, damages, untrue statements, etc.) a court might in equity create the easement.

Reporter's Comment 5: The reporter suspects that it is the behavior of the owner of parcel 1 that puts things over the edge for the court and causes it to find an equitable easement. The owner of parcel 1 purchased the property allegedly with knowledge that his neighbors used parcel 1 for access "and made a concerted effort to deprive the Butterfields of the value and use of their properties."

Reporter's Comment 6: The court's affirmance of the trial court's failure to award any damages at all strains this reporter's credulity. The court of appeals sanctioned a continuing trespass and then stated, essentially, that this does not represent a loss to owner of parcel 1. True, the court couched this holding in the failure of plaintiff to prove the loss, and the reporter is in no position really to assess what was and what was not presented in evidence at trial. But how is it possible that the easement exists without any impact on the value of parcel 1.

Reporter's Comment 7: But the reporter wonders what the neighbors thought they were doing when they continually crossed parcel 1? One of the owners said he "thought" he had easement rights. What does this mean? If the neighbor thought he had an easement right, he should have ascertained whether this was so. True, the owners of parcels 2 through 10 were in the habit of crossing the property for a very long time, but they had many years to work things out with the forest service. Maybe the reporter is simply lacking in compassion.

Editor's Comment: The editor has never seen a case like this. He hopes that it is one of a kind. Equity typically grants easements by estoppel on the basis of some conduct by the servient tenant. Nothing like that here. He wonders, also, if, at some future time, access does arise for the landlocked lots, the then existing servient tenant could seek and obtain an injunction.

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

EASEMENTS; MODIFICATION: One more court adopts Restatement position allowing owner of servient tract to obtain court permission to relocate easement, over express objection of dominant owners, in order to address flooding by water and sewer runoff from existing location of easement. ***McGoey v. Brace, —- N.E.2d ——, 2009 WL 3351035 (Ill. Ct. App. Oct. 16, 2009)***.

This case follows close on the heels of another case summarized by this reporter (*St. James Village, Inc. v. Cunningham*, 210 P.3d 190 (Nev. 2009) (reported 9/9/2009) that adopted the controversial position of the Restatement (Third) of Property (Servitudes), allowing the owner of a servient tract to relocate an easement burdening the land. This case is interesting for a variety of reasons, which will be discussed in the comments below.

In this case, McGoey was the owner of a lot on which was located her personal residence. Several neighbors owned lots that were benefitted by an appurtenant easement for a driveway allowing access to their properties across McGoey's lot. Betsy Brace was one of these easement holders, and this summary will refer to Brace when detailing the position of the easement holders. McGoey and Brace were not the original parties to the easement.

According to McGoey, her home, which was located only a few feet from the driveway easement, was at times uninhabitable because of the driveway. She asserted that "the location and size of the driveway contributes to poor storm water drainage on her property, which in turn causes frequent and severe flooding in her home." This flooding, she stated, "causes rain water and raw sewage to intrude upon her downstairs bedroom, basement, and garage.... The flooding also fosters the growth of mold and has a negative effect on the structural integrity of her house."

McGoey proposed to relocate the driveway at her own expense to her property line 70 feet away. This, she said, would not materially affect the utility of the easement to the owners of the easement but it would mitigate the water runoff problem.

The opinion explains that McGoey successfully persuaded three of the easement holders to accept relocation of the driveway, but the court makes clear that she could not obtain consent of all the affected parties. (Brace and two other easement holders held firm and refused to consent.) Rather than relocating the easement and waiting to be sued, (a risky strategy, for certain), McGoey brought an action for declaratory relief permitting McGoey to relocate the easement. Thus, McGoey was the plaintiff in the case, and Brace was the defendant.

The trial court determined that under Illinois law "articulated in *Sullivan v. Bagby*, 335 Ill. 192, 195-96, 166 N.E. 449 (1929), no "substantial" change in an easement is permitted without the consent of all owners of the easement; it further found that McGoey's proposed change was substantial as a matter of law." The trial court stated that McGoey's proposal to move the easement 70ft across the lot "is substantial by any definition and therefore requires the consent of all five property owners." The trial court therefore granted Brace's motion to dismiss.

The court of appeals reversed and remanded the trial court.

McGoey won one of her arguments, so it matters little that she lost the other. Her first argument was that "the rule articulated in *Sullivan* only applies where a change to an easement effects a change in the identity of the burdened party, and there is no such change under the facts as alleged in her complaint, since her estate will remain the servient estate even after the proposed relocation of the driveway." She argued that consent of all the parties to the easement under *Sullivan* is only necessary where there has been a change in the identity of the burdened party. Moving the easement would not have burdened a different party – that is, the easement was not to be relocated to property of another person.

The court rejected this argument fairly quickly, noting that the language of *Sullivan* was broader and was intended to cover all substantial changes. The relocation of the easement by 70 feet was, on its face (according to the court) substantial.

McGoey fared better on her second argument. The court stated: "McGoey argues that when an owner of a servient estate wishes to make a change to an easement on her property, that change is not substantial unless it harms the interests of the owner of the dominant estate; where no such harm results, as she has alleged in the current case, she contends that the servient owner should be allowed to make such changes unilaterally. She further argues that, if we should find that the Sullivan standard does not permit an inquiry into the detriment caused to the easement holder, we should abandon it in favor of the standard laid out in section 4.8(3) of the Restatement (Third) of Property (Restatement (Third) of Property § 4.8(3) (2000)), which calls for such inquiry."

The court chose not to abandon its opinion in *Sullivan*, but reread *Sullivan* to conform to the new Restatement approach. According to the court, a change is "substantial" if it has a significant impact on the easement holder, in this case Brace. This approach allows the court to fold in the Restatement test into its existing law on modification of easements.

The court stated "If a modification to an easement causes more than a *de minimis* loss in utility to the other parties, or changes the purpose or character of the easement, then it is substantial; if not, then not." (The court suggests that the test is the same whether the party affected by the change in the use of the easement is the easement holder or the owner of the burdened property.) The court suggested that this "is akin to the equity-based test laid out in section 4.8(3) of the Restatement (Third) of Property for when the owner of a servient estate may modify an easement on her property." That section provides:

"Unless expressly denied by the terms of an easement, as defined in § 1.2, the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not

(a) significantly lessen the utility of the easement,

(b) increase the burdens on the owner of the easement in its use and enjoyment, or

(c) frustrate the purpose for which the easement was created." Restatement (Third) of Property § 4.8(3), at 559 (2000)."

The court recognized that the Restatement position is contrary to the traditional and majority rule, but also noted that a number of courts have adopted the Restatement (citing *Lewis v. Young*, 92 N.Y.2d 443, 705 N.E.2d 649, 682 N.Y.S.2d 657 (1998); *M.P.M. Builders, LLC v. Dwyer*, 442 Mass. 87, 809 N.E.2d 1053 (2004); *Roaring Fork Club, L.P. v. St. Jude's Co.*, 36 P.3d 1229 (Colo.2001); *Burkhart v. Lillehaug*, 2003 S.D. 62, 12, 664 N.W.2d 41; *Wells v. Sanor*, 151 S.W.3d 819 (Ky.App.2004); *R & S Investments v. Auto Auctions, Ltd.*, 15 Neb. App. 267, 725 N.W.2d 871 (2006)). The court further acknowledged that no Illinois court had to date expressly adopted the Restatement position, but said "the principles animating the Restatement standard are reflected in the case law cited by the Sullivan court in reaching its decision, as well as in our subsequent case law interpreting Sullivan."

According to the court, "In the present case, plaintiff has alleged those ultimate facts through her contention that defendants will not be negatively impacted in the use and enjoyment of their properties as a result of her proposed relocation of the easement. It remains to be seen whether plaintiff's allegations will be borne out by the evidence. However, if they are, then, pursuant to the Sullivan substantiality standard as discussed above, she would be entitled to her requested relief-namely, a declaration that she has the right to move the easement upon her property in the manner described in her complaint. Nor can the court determine substantiality simply on the basis of the distance that the plaintiff proposed to move the driveway, namely, 70 feet, since distance and the magnitude of the change do not establish substantiality by themselves; rather, it must also be established that such a move would have a negative impact upon the defendants."

Reporter's Comment 1: The court stated that the Restatement position is more in line with Illinois precedent and easement law. What is interesting is that almost all of the cases the court cited involved a complaint made by the owner of the servient tract when the easement holder modified the use or relocated the easement. In *McGoey*, the roles were reversed; the party wishing to relocate the easement was the owner of the servient tract. Therefore, the cases cited by the court might be seen as inapplicable. Indeed, Restatement § 4.8(3) treats specifically and only the right of the servient tract owner to relocate the easement, and not the right of the easement holder.

Reporter's Comment 2: Assume, however, (and in the absence of a full record on the facts, this can only be an assumption) that McGoey was correct. In other words, assume that relocating the easement by 70 feet placed no additional burden on the easement holders. Indeed, further assume that the relocation would alleviate McGoey's real misery associated with her sewage filled house. If the majority rule forbidding relocation of the easement without consent of the easement holder remains, the easement holder has a monopoly right and may demand more than the real cost to them of consenting to relocation. True, the original parties to the easement bargained over the price for the easement and McGoey purchased her home knowing of the easement. But is there anything to suggest that the original parties, when negotiating the easement, included in the easement price the cost of future damage associated with massive water run-off, mold, sewage, etc.? Perhaps this is a better scenario for demonstrating the advantage of the Restatement rule. It not only allows the servient tract owner to relocate an easement to better develop the servient tract, but also to avoid some truly unexpected impact of an easement after negotiation.

Reporter's Comment 3: In the prior reported case of *St. James Village, Inc. v. Cunningham*, 210 P.3d 190 (Nev. 2009)(reported 9/9/2009), the court adopted the Restatement rule on relocation of easements. However, in that case the easement location had been described accurately in a legal description. The Restatement provides that the owner of the servient tract may relocate the easement, given other factors, if the easement does not specify its location. The idea, essentially, is that if the parties specifically identify the easement location, they must have intended the location and bargained for it. The St. James court therefore held in favor of the easement holder. In *McGoey*, the opinion is unclear. Did the easement document specify the easement location? In a footnote, the court stated "McGoey's complaint also alleged that the driveway in its present form was eight feet wider than provided for in the easement agreement." This suggests that the easement location may have been specified. If so, then the court might have agreed to implement the Restatement but limit the defendant to the easement so specified. Apparently, the trial court acknowledged that McGoey could have asked for such an injunction, but McGoey dropped this aspect of her complaint.

Editor's Comment 1: The Editor is also concerned that this case may not have taken into account that the easement was a described easement, which would render Restatement 4.8 (3) inapplicable, as pointed out in *St. James Village.* As the editor has stated repeatedly in other posts, the editor sees no reason why the courts should credit Section 4:8 (3) at all. The relatively small number of cases in which an easement owner is acting as a "dog in the manger" and has no legitimate interest in enforcement of the servitude can be dealt with through traditional equitable theory.

Editor's Comment 2: The Restatement permits parties going forward to avoid the application of the modification rule by providing for no modification or by setting forth the easement by specific metes and bounds. Although some lawyers will still be caught be surprise, cautious dominant easement holders ought to take that into account. What the editor particularly decries is the application of the "unilateral change" rule to existing easements drafted under a different legal regime. Those dominant owners thought that they had a property right. Now maybe they don't.

Editor's Comment 3: In this particular case, absent the Restatement, Ms. McGoey could have argued that the maintenance of the easement constituted a common law nuisance as to her and could have had the use of the road in its present condition enjoined. Ensuing negotiations might have resulted in a mutual settlement in which all concurred, which avoids this appeal and is better policy. A court is not going to leave her up to her waist in sewage just because it doesn't care to adopt the Restatement.

EASEMENTS; RECORDING ACTS: If a recorded purchase contract calls for the seller to grant an easement to the buyer, it doesn't matter that the deed makes no reference to the easement and the general appurtenance clause in subsequent deeds is sufficient to convey the easement to subsequent purchasers of the dominant estate. ***Franklin Park Plaza, LLC v. V & J National Enterprises, LLC, 870 N.Y.S.2d 193 (App. Div. 2008).***

A small shopping center was accessible by way of three driveways and public roads. The improvements at the shopping center were served by a common parking area. Adjacent to the shopping center was an outparcel with a restaurant.

The outparcel had been created by a former owner of the shopping center. The deed to the outparcel made no reference to easement rights for the owner or users of the outparcel on or across the shopping center, but a rider to the purchase contract specifically provided as follows: "[s]eller ... covenants to grant or convey to [the b]uyer a perpetual, non-exclusive easement for automobile parking and automobile and pedestrian ingress and egress, to and from [the outparcel], appurtenant to [that outparcel] over, upon and across the parking areas ... driveways ... exits and entrances ... as said areas now exist on the property ... hereinafter referred to as [the shopping center]." The rider also stated that those rights and easements were to run with the land and to inure to, and be for the benefit of, the buyer, the seller, "their successors and assigns, and tenants, sub-tenants, licensees, concessionaires, mortgagors in possession, customers and business invitees."

Although the parcel had frontage on one of the streets bordering both it and the shopping center, the only access to the outparcel was by way of entrances through the adjacent shopping center. Further, the outparcel had a limited number of parking spaces and customers of the restaurant frequently parked at the shopping center.

The restaurant was operated by a tenant. The current shopping center owner sued the tenant for damages arising out of the tenant's alleged unauthorized use of the shopping center's driveway and parking spaces.

The shopping center owner argued that the court should have applied the general rule that "provisions of the contract for the sale of land are merged in the deed and, as a result, are extinguished upon the closing of title." The court, however, found that the merger rule does not apply "where the parties ... have expressed their intention that such provision shall survive delivery of the deed." The Court then looked at the contractual provisions and saw that they included the following: "[a]ll representations and warranties contained herein shall survive closing of this transaction."

Here, the contract and its rider, with an attached map, were properly recorded even before the deed was recorded. The Court, in this event found that this had the effect of binding the owner of the shopping center and all its successor owners, otherwise "there would have been no need to record the contract and rider unless the parties intended to ensure that the easement contained therein would survive the closing." Further, the court pointed out that the deed itself contained "a general appurtenance clause that is sufficient to convey the easement to a subsequent purchaser of the dominant estate ..., and that the easement is enforceable against [the shopping center owner] because it appears in [its] direct chain of title, thus establishing that [the shopping center owner] had actual notice of it." Thus, according to the court, even if the contract rider had not been recorded, the deed's general appurtenances clause would have given the owner and users of the outparcel all of the rights stated in the contract to the extent those rights survived the closing.

Reporter's Comment 1: The court assumes that the contracting parties either "forgot" to memorialize the easement in the conveying deed or "thought" that it was sufficient to record the contract to create the express easement. That seems like a stretch because the parties could just as easily have agreed, at or before closing, that the outparcel should create its own, direct access to the public roads.

*Reporter Comment 2:*Can one assume that the court really understood that the original parties must have intended to allow for an easement for access and parking over the shopping center because that was the natural consequence of creating a restaurant outparcel without its own paths directly to the highway and with (probably) inadequate on-parcel parking? That's what an experienced practitioner would have concluded.

Reporter Comment's 3: Had the court ruled otherwise, would the outparcel owner have had a valid title claim?

Editor's Comment 1: Of course the editor agrees that the recording of the contract gave notice of its contents, and that it was not merged away, nor intended to be merged away. That being said, what's left? We have a non-exclusive general easement with no restrictions as to use or size over the entire balance of the shopping center. If we don't have that – in other words if the parties intended something more limited – we've got a Statute of Frauds problem, and maybe no easement at all. The question is whether the parties really got what they intended. Was the idea that the parties would reduce the easement to a second writing that reflected more limitations on its use? Is this just an "agreement to agree?" Well, it's all moot, because the outparcel owner got a gigantic easement that will certainly interfere with changes in the size and shape of the center in the future.

EASEMENTS; TERMINATION; ABANDONMENT: Temporary rerouting of easement pathway around obstacles established by servient owner does not establish abandonment of an easement. ***Stonier v. Kronenberger, 230 Or. App. 11, 214 P.3d 41 (Or. App., 2009).***

Servient and dominant owner entered into a written and recorded sixty foot wide easement along the northern edge of servient's 160 acre parcel. was blocked by a river. The easement was needed only during wet month in order o access the "back acreage" belonging to dominant when passage through dominant's own land was blocked by a swollen river.

When the easement was created, a small portion of it was partly blocked by an old farmhouse and some outbuildings owned by servient tenant, but not in regular use. Dominant tenant simply drove around these obstacles and remained within the sixty foot right of way.

Later, however, the servient tenant leased the farmhouse to a tenant who built a horse enclosure with barbed wire fencing that cut of the route of the easement. Dominant, when he had to pass over this area, simply bypassed the enclosure, but this required him to pass out of the easement area for a short distance.

Later, dominant tenant obtained a government contract to do some earth moving work and proceeded to law down gravel on the easement to accommodate the movement of heavier equipment. Dominant took down the barbed wire horse enclosure to lay gravel on the easement track, and this activity triggered the present dispute.

The trial court found that the easement had been abandoned due to evidence that the dominant had not used it during the period the horse enclosure was in place (about 2 years). It also found that the easement had been terminated by prescription because of the farm buildings and another "yard fence" that allegedly had existed earlier and for the prescriptive period. Notwithstanding these findings, the trial court granted a revised easement passing around the farmhouse buildings and curtilage and horse enclosure. (!!!)

The appeals court pretty much tore apart the trial court decision. The court repeated the oft stated rule that non use is not itself evidence of abandonment. The fact that for a brief interval the dominant tenant drove around, rather than through, the horse enclosure, and departed the easement, did not indicate an abandonment of easement rights. The fact that the easement area was in large part blocked by the existing farmhouse and outbuildings at the time the easement was created was relevant to this decision as well.

As to the trial court's finding of prescriptive blockage, the appeals court found that there was inadequate evidence that the "yard fence" in fact constituted a continuing block to the dominant tenant's passage through the easement. The dominant had testified that where the yard fence existed (and there was testimony that it wasn't always complete), the dominant went around the obstacle but stayed within the sixty foot easement area. It went out of that area only in the year or so that the tenant installed the horse enclosure.

Comment 1: For a court to find that there was inadequate evidence to support a trial court's finding of fact when the trial court was sitting without a jury strikes the editor as a somewhat extraordinary insult to the trial court. Clearly there was *some* evidence of the yard fence and the trial court could have made judgments about the credibility of witnesses on other testimony. The appeals court just seemed to feel that the trial court got the whole thing wrong.

Comment 2: Note that the trial court in an extraordinary decision, had granted to the dominant a rerouted easement around the whole farm area. This obviously didn't satisfy the dominant, and of course the issue became moot in light of the court's decision. But it is remarkable judicial activism under the circumstances, even if Oregon had embraced the new Restatement on Servitude's idea permitting relocating of easements – an idea that the Editor and others have criticized here and elsewhere.

Comment 3: On the principle finding – that there was no abandonment – note that the court did have more evidence of abandonment other than nonuse – the dominant had rerouted the path for more than a year. The court didn't deem this significant because the frequency of use was light to begin with (only in wet periods) and the dominant still persevered in crossing the general area. Another court might have come out differently on this point if the facts had been just a bit stronger.

EASEMENTS; USE; IMPLIED EASEMENTS; CHANGES IN PURPOSE: Dominant owner of implied easement developed at time when the dominant and servient tenements were both agricultural in character may use the easement for residential purposes and, in connection therewith, install underground utilities within the easement boundaries. ***Stroda v. Joice Holdings LLC, 288 Kan. 718, 207 P.3d 223 (2009).***

There has an old farmhouse on the dominant tenement, abandoned in 1957, and there had been a granted easement running to that house. But the same party acquired both dominant and servient tenements, and thus that easement was destroyed by merger. The road continued to exist.

Subsequently the common owner of the parcels died and devised each of the parcels to different relatives. Through further transactions, the parcels passed into the hands of others, and the owner of the former dominant parcel, grandson of the party in whom the easement had merged, argued that the easement had become an implied easement when she died and divided the two parcels between two devisees. The required "quasi easement" was the old road to the then unused farmhouse, which apparently had been used for farm access. He further argued that the uses of implied easements are not limited to those uses existing at the time the easements arise, but can be expanded into foreseeable new uses as time goes on.

Most of the discussion by the court here deals with interpretations of the first Restatement of Property, since Kansas precedent had discussed that Restatement. Only at the end does the court acknowledge the existence of the new Restatement, and states that its outcome is consistent with that authority as well.

The court drew a distinction between prescriptive and granted easement on one side and implied easements on the other. As to implied easements, the court stated, there is no specific language defining permitted uses and no specific conduct either. Rather, the presence of the preexisting use of the easement is relevant only to determine that, at the time of the easement's arising, there was some reasonable necessity that drives the court to conclude that the parties probably intended and easement. It refuses to look to those preexisting uses as defining future uses.

Consequently, where residential use of the easement was a foreseeable future use, it matters not that there was no residential use at the time the easement was created. It was something the parties likely would have covered had they actually written the easement. As to the utilities, the court's treatment is quite short. If the easement can be used for residential purposes, then, in the modern world, it must be permitted to install underground utilities, at least, in the easement area, since otherwise the residential purposes would have no meaning.

Comment: One cavil that the editor has with the court is the attempt to apply different reasoning to implied easements and easements by grant. The general approach is to permit granted easement to expand to meet new uses demanded by the modern world, even if such uses might not even have been conceivable to the original parties. Thus, a cart path for a slaughter house can become a paved access for reasonably heavy industrial equipment, even when self propelled vehicles could not have been imagined by the original drafters. Of course, where the original granted easement states specific limitations on use, then they will be honored. In this way granted easements may differ from implied easements, as the latter contain no express limitations because they are not in writing. But both types of easements are generally viewed as accommodating reasonable expansion requirements, where prescriptive easements are more narrow.

EMINENT DOMAIN; INVERSE CONDEMNATION; STATUTE OF LIMITATIONS: Even though a government entity may effectively have substantially destroyed any beneficial use that a property owner might have, resulting in inverse condemnation or a regulatory taking, the property owner may lose the right to compensation if it waits until its claim is time-barred by the six year statute of limitations. ***Klumpp v. Borough of Avalon, A-2963-07T3 (N.J. Super. App. Div. 2009), Unpublished; July 31, 2009.***

In 1962, a major storm obliterated numerous beachfront properties located in a municipality. In accordance with New Jersey's regulatory scheme concerning property under the purview of the United States Army Corps of Engineers, the New Jersey Department of Environmental Protection (DEP), and other funding agencies, the municipality was required to maintain the dune area. The municipality enacted a series of resolutions and ordinances authorizing it to enter upon the beachfront properties to clear debris and to construct immediately a protective barrier in the form of sand dunes along the beachfront. Apparently these ordinances and activities rendered useless the homesites for residential use. It also instituted a property-exchange program as a means of compensating property owners whose lots had been destroyed by the storm. The municipality continued to tax property owners for their lots.

In 1979, the municipality rezoned the protected area from residential to public use. In 1997, certain owners of beachfront property within the area inquired to the municipality about the adoption of the various ordinances and resolutions. The municipality acknowledged that the owners could not develop their property, but denied that the ordinances effectuated a taking, asserting instead that its ordinances merely regulated activities on the dunes for the benefit of the community. The municipality refused to compensate the owners and the owners never demanded compensation.

In 2003, the owners sought to build a home. They applied for a DEP permit. They told the municipality that the DEP would not issue the permit unless they could show access to the property. When the municipality didn't respond, the owners sued for a declaration that they had pedestrian and vehicular access to develop the property. The municipality admitted that the owners held title to the property, but then it sought title to the property by adverse possession, an easement by prescription in the public interest, or an easement under the public trust doctrine.

The lower court ruled that the municipality had been continuously in possession of the property since the early 1960's and dismissed the owner's complaint. The owners appealed.

The Appellate Division remanded the matter. First, it determined that there was insufficient evidence on the record supporting the lower court's finding of continuous possession by the municipality. Second, it found that the question of whether the municipality had the ability to provide or authorize access could not be answered without further proceedings.

On remand, the lower court held that the municipality had taken functional possession of the property by including it within its dune line area and by constructing and maintaining an engineered dune. Further, it noted that once the end of the street was vacated, access to the property was limited by fencing and vegetation. It also found that there was a footpath cutting across the property which extended from the end of the street. It further noted that due to the municipality's obligations to the DEP to maintain the dune, the municipality couldn't grant access to the owner's property. The lower court found that the owners were aware that the dune project and its related resolutions and ordinances made use of the property impossible.

The lower court then ruled that the municipality had taken the property without compensation and without definitively acknowledging that it had taken the property during the relevant period. According to the Court, the taking process was "without any semblance of due process or compliance with statutory requirements" and was tantamount to an inverse condemnation. Then, to the owner's dismay, it opined that the owners were obligated to contest the acquisition "years ago," when they first learned of the dune project and of the subsequent ordinances and resolutions and did nothing.

Additionally, the lower court ruled that the rezoning of the property in 1979 constituted a regulatory taking. Even though it held that the owner's claims for access and for damages for trespass and ejectment were not time-barred, it refused to award damages for such claims because it also held the owners' bare legal title alone could not "support" those claims. It also dismissed the municipality's counterclaims. The owners appealed again.

This time, the Appellate Division affirmed, agreeing with the lower court that there had been an inverse condemnation and that the municipality was the true owner of the property. It found that the tax bills, municipal records, and recorded title were indicia of the owners' bare legal title, but nothing more. Further, it held that a taking of possession without payment constitutes the very essence of inverse condemnation, and noted that the owners' retention of legal title did not refute that conclusion. It agreed with the owner that the proposition that "only the holder of legal title can be an 'owner' of property [has] no support either in our jurisdiction or in everyday conversation." It also agreed with the lower court that the 1979 rezoning of the property, together with the prior ordinances affecting the property, effectively barred any practical use of the property and substantially destroyed any beneficial use. Thus, it found that there had been a regulatory taking as well. Unfortunately for the owners, it also concluded that once they became aware of the physical occupation of the property by the municipality, the burden shifted to them to recover just compensation.

In sum, the Court ruled that the municipality had taken exclusive control of the beach area years earlier, but the time period within which the property owner could have sued for compensation for the taking had long ago run out.

Editor's Comment: There is an unusual feature here in that there had apparently been some kind of "compensation/replacement" program at the time of the original dune building activities, but the two courts appear to make little of that in defense of the takings claims – perhaps because the statute of limitations holdings were more efficient.

Note that, even with the rezoning, the owners might have been able to claim damages for the prior inverse condemnation but they were far more than a day late and dollar short. It's interesting that some enterprising lawyer didn't get involved in the potential class action at the time of the inverse condemnation. Maybe the available lawyers were drying out their own properties.

EQUITY; LACHES: A sealed document will be subject to a twenty year statute of limitations in Delaware, an such period is relevant in determining whether a laches defense will apply. ***Whittington v. Dragon Group, L.L.C., 2009 Del. LEXIS 654 (Del. Dec. 18, 2009).***

GUARANTORS; LANDLORD/TENANT: A guarantor of a lease is not obligated under a purported "extension" of such lease where the lease extension actually amounts to a new lease between the initial parties. ***Lo-Ho LLC v. Batista, 881 N.Y.S.2d 33 (A.D. 1 Dept. 2009).*** Discussed under the heading: "Landlord and Tenant; Guarantors."

GUARANTORS; LANDLORD/TENANT: If a lease is intended to make the person signing on behalf of the tenant personally liable for the tenant's obligations, the lease must say so directly. Courts will not impose such liability just because the lease names the signatory as a guarantor without more. ***Fairway Mortgage Solutions, Inc. v. Locust Gardens, 988 So.2d 678 (Fl. App. 4th Dist. 2008); July 30, 2008.***, discussed under the heading: "Landlord/Tenant; Guarantors."

HOUSING; LOW INCOME HOUSING; RENT: Housing authority may charge increased rent where tenant has received retroactive compensation award for periods in which tenant payed lower rent, but such may not be in excess of fair market rent of apartment ***Northampton Housing Authority v. Kahle, 908 N.E.2d 814 (Mass.App.Ct.).***

Housing authority brought summary process action against tenant, seeking rent in excess of fair market rent of apartment.

During tenant's occupancy, the Board of Veterans' Appeals ("VA") ruled that tenant was entitled to compensation, including retroactive payment in the amount of $173,704, for his service-connected disability of post traumatic stress disorder. Before the additional compensation, he paid $254 per month in rent. He notified the authority of his new compensation and subsequently it determined that he was required to pay thirty percent of his net household income as rent, which amounted to $934 per month. This amount exceeded the fair market rent of the unit. Also, he was required to pay a retroactive amount of $54,000 because of the retroactive payment.

Although tenant's income may now, in fact, have been higher than the threshold for low income housing, rules binding the authority prohibited terminating a veteran's lease that had been in effect for more than eight years. So the tenant was permitted to stay, but at what rent?

The tenant claimed that he was obligated to pay no more than market rent for the apartment. The Housing Court allowed the authority's motion for summary judgment and entered judgment for $56,297.90 and costs. Tenant appealed. Tenant pointed out that the statutes required that no housing authority should manage and operate any such project for profit. M.G.L.A. c. 121B, § 32. The Appeals Court agreed with him that, as a consequence of this statute, the authority could not charge in excess of the fair market rental value of his apartment.

Tenant lost, however, as to the retroactive rent claim. The relevant code of the regulation provides that an agreement may requires tenant to pay increased rent for the period in which the retroactive compensation would have been paid. The code does not require that veterans be back charged for disability benefits, but permits the practice. The authority had earlier determined that it would back charge in this case. Also, sections in tenant's lease require that tenant make an additional rental payment on account of such payments and that both he and the NHA are bound by the regulations. 760 Code Mass. Regs. §6.04(9).

The judgment was vacated and the matter was remanded to the Housing Court to enter a judgment for retroactive rent based on the fair market vale of the tenant's apartment at the respective time periods covered by each of the retroactive payments.

Comment: The editor only has rare opportunities to discuss low income housing cases because (a) no one sends them to him and (b) they tend to be fact and state law and regulation-specific. Here, however, the primary issue appears to be the policy that authorities may not operate for a profit. The editor suspects that this policy appears in many state housing law schemes, and the application of it in this case is what provoked the editor to write.

JOINT TENANCY; PARTITION: There is an apparently universal rule in this country that a pending suit for partition of a joint tenancy does not survive the death of one of the tenants. ***Orlando v. Deprima, 870 N.Y.S.2d 871 (Supr. Ct. 2008); December 18, 2008.***

Two sisters and their brother owned property as a joint tenancy with rights of survivorship. One sister sought partition and it was ordered as a matter of right. The court invited the siblings to make an appropriate application "as to the claims that remained to be resolved." Then, three months later, in response to a motion made by the brother, a referee was appointed. Shortly thereafter, the sister suing for partition died. Her estate continued the litigation, but the court responded there is an "apparently universal rule in this country ... that a pending suit for partition of a joint tenancy does not survive the death of one of the tenants." Citing out-of-state cases, the court wrote that "[t]his rule is compelled by two related concepts: first, the theory of survivorship that at the moment of death title to the property vests exclusively in the surviving joint tenant or tenants[] and second, the doctrine that severance of the joint tenancy does not occur until the suit for partition reaches final judgment.

Therefore, unless partition has been decreed before the death of the joint tenant, no interest in the property remained in the representatives of the decedent which can support an action for partition." New York cases, with some fact dependent provisos, follow the same rule.

With that rule in mind, the court needed to decide whether its original summary judgment granting the motion of partition or the order appointing a referee "to 'ascertain' the rights[,] shares and interest that the parties constitute[d] an interlocutory judgment that 'declare[d] the right, share or interest of the various parties ... [served to] direct a sale ..." was the equivalent of a final judgment.

According to New York's procedural statutes governing real property disputes, the court had to rule if its prior actions constituted an interlocutory order or constituted a final order because those statutes recite that "[a]n interlocutory judgment shall determine the right, share or interest of each party in the property as far as the same as been ascertained." Here, according to the court, no such judgment had been issued. "This battle was hotly disputed and could hardly be characterized as one in which there was a virtual agreement between the parties." Every attempt to settle the matter between the siblings had always met with "abject failure." Accordingly, the deceased sister's estate had no right to continue the partition action and the property was declared to be owned half by the surviving brother and half by the surviving sister.

Reporter's Comment 1: Matrimonial law would seem to lead to the same result. If a spouse dies after a divorce complaint has been filed, but before a divorce judgment has been issued, the property goes to the surviving, though estranged, spouse. See, for example: *Delvito v. Delvito*, 2004 N.Y. Slip Op. 02707, 775 N.Y.S.2d 71 (2004). See also: www.hoffsemm.com/documents/MARCH2009.pdf.

Reporter's Comment 2: Again, matrimonial law suggests that there are equitable principles that might warrant imposition of a constructive trust. *See: Carr v. Carr,* 120 N.J. 336 (1990) and *Kay v. Kay,* A-1594-07 (N.J. Super. App. Div. 2009), Unpublished; January 28, 2009. The threshold for such relief appears to be very high, but not unobtainable.

Reporter's Comment 3: One can't but help thinking that the tension between maintaining some semblance of family ties and the desire to separate the property interests led to a dragging out of the proceedings, and ultimately to this result where the deceased sister's family lost the property. Why didn't that sister convey out of the right of survivorship thereby converting the tenancy to one "in common"? Immortality is rarely a good estate plan.

Editor's Comment: As Ira points out in his comment 3, the sister could easily have effected a severance by unilateral action in a variety of ways. She could in most jurisdictions, simply have conveyed an interest to a "straw" with a conveyance back to her. In some jurisdictions its even simpler than that. If she wanted a partition, of course she also wanted a severance. If she was of uncertain health and expected that others would inherit her half of this property, counsel clearly had a duty to advise her of this option.

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

JUDGMENTS; DEFAULT JUDGMENTS; BANKRUPTCY: Default judgment in marital dissolution action is not avoidable in defaulted party's bankruptcy in absence of extrinsic fraud and conclusively established lack of reasonably equivalent value. ***Batlan v. Bledsoe (In re Bledsoe) 569 F3d 1106 (9th Cir 2009).***

In the bankruptcy proceedings of Jennifer Bledsoe (Debtor), the trustee brought an adversary proceeding against Ryan Bledsoe (Husband), her former husband. The trustee argued, under 11 USC §544(b)(1), that transfers made to Husband under the dissolution judgment in the Bledsoes' 2003 divorce were avoidable as fraudulent transfers because they were voidable under applicable (Oregon) law. The trustee also argued that the transfers were avoidable under 11 USC §548(a)(1)(B)(I) because Debtor did not receive reasonably equivalent value in exchange. The bankruptcy court granted Husband summary judgment, and the trustee appealed. The Ninth Circuit affirmed.

In the Oregon divorce action, the court struck Debtor's appearance and entered a default judgment against her on the ground that Debtor had willfully and in bad faith failed to comply with the discovery and production requirements of Oregon law. Debtor had also failed to comply with a court order. Under Oregon's law mandating equitable distribution, Husband was granted items valued at $93,737 and Debtor received items valued at $788.

The bankruptcy court determined that, under the Uniform Fraudulent Transfer Act, the trustee's claims were an impermissible collateral attack. Under Oregon law, to set aside a dissolution judgment, a party must allege and prove extrinsic fraud. The trustee's claim under 11 USC §544 failed because, as the trustee conceded, the trustee made only a constructive fraud claim and did not even allege extrinsic fraud. Citing its agreement with the decision in *Ingalls v. Erlewine (In re Erlewine)* 349 F3d 205 (5th Cir 2003), the Ninth Circuit held that a dissolution judgment following a regularly conducted state court proceeding conclusively establishes reasonably equivalent value. The trustee alleged no irregularity in the dissolution proceedings. Moreover, a default judgment has the same dignity as a judgment after trial. Therefore, the claim under 11 USC §548 also failed.

Reporter's Comment: Inevitably, one wonders whether this decision would hold as true in California as in Oregon. Both states have the same Uniform Fraudulent Transfer Act (ours is at CC §3439), and both probably require the fraud to be extrinsic for a transfer to be set aside, so there is a good deal in common.

Oregon divides marital property equitably, however, whereas in California, division on dissolution is equal (Fam C §751). Thus, an allocation of $94,000 of the community property to the husband with only $800 going to the wife would be very unlikely to ever occur here in the first place.

On the other hand, §548 of the Bankruptcy Code requires that the debtor not have received "reasonably equivalent value," which sounds like the comparison should be between the value of the property transferred and the value of property received in return for it, rather than between the values of the portions that each of the spouses was awarded. So, maybe giving up $94,000 to the ex-spouse just for the peace of mind that comes with freedom is value enough.

In commenting on *Gagan v. Gouyd* (1999) 73 CA4th 835, 86 CR2d 733 (reported at 22 CEB RPLR 211 (Oct. 1999)), I observed that transmuting property into the community would not be an effective way to defraud creditors, whereas transmuting it out of the community might work when done as part of a divorce. This decision seems to make that prediction probable.

The Reporter for this item is Professor Roger Bernhardt of Golden Gate Law School, publishing in the Cal. CEB Real Property Reporter (reprinted with permission – and edited without permission.)

LANDLORD/TENANT; AGENTS: Building personnel are considered "agents" of a landlord for the purposes of imputation of knowledge under New York's "Pet Law" statute even where they are not direct employees of the landlord or of the landlord's managing agent. ***1725 York Venture v. Block, 884 N.Y.S.2d 6 (A.D. 1 Dept. 2009).***

LANDLORD/TENANT; GUARANTORS: A guarantor of a lease is not obligated under a purported "extension" of such lease where the lease extension actually amounts to a new lease between the initial parties. ***Lo-Ho LLC v. Batista, 881 N.Y.S.2d 33 (A.D. 1 Dept. 2009).***

Landlord and Tenant entered into a commercial lease agreement in April 2000 in which Tenant's obligations were personally guaranteed by Tenant's cousin ("Guarantor"). The guaranty executed by Guarantor in April 2000 provided that the Guaranty would "remain and continue in full force and effect as to any renewal, change or extension of the Lease."

Perhaps critically, although the guarantee covered "any renewal, change or extension of the Lease," the April 2000 lease did not itself provide for renewal or extension, and stated that any holdover would result in an increase in rent but would not itself renew the lease.

The April 2000 Lease expired in March 25, 2005. Tenant apparently held over. Landlord and Tenant entered into another lease agreement on April 25 2005 (the "April 2005 Lease") which was designated as an "Extension of Lease" and was effective as of April 1, 2005. The April 2005 Lease provided for a substantial increase in rent and real estate tax payments by Tenant as compared to the April 2000 Lease. When Tenant defaulted under the April 2005 Lease, Landlord sought to enforce the Guaranty.

The rent at the end of the 2000 Lease was about $2700 per month, up from $1950 five years earlier. The rent under the 2005 Lease started at $2400 per month which increased annually by $2400. Tenant had paid some taxes under the old lease. Under the new lease, it undertook to pay all taxes.

The New York Supreme Court held that the Guaranty did not apply to the April 2005 Lease since the terms of such lease were too different from the April 2000 Lease for it to be considered a mere modification or extension. The Supreme Court, Appellate Division (the "Court") affirmed the finding of the lower court. The Court found that the new terms and conditions of the April 2005 Lease meant that it was not the type of extension contemplated by the Guaranty.

The increased rent provided for under the April 2005 Lease would have substantially changed Guarantor's obligations and such changes would have required the prior consent of Guarantor. Additionally, the Court noted that the April 2000 Lease did not even include an extension option and the April 2005 Lease itself stated that the April 2000 Lease had expired in March 2005.

Comment: The editor is puzzled by the reasoning described here. The court also talked about the fact that the new lease was not the old lease, which had expired by its own terms and did not provide for renewal. The editor can accept that analysis of the problem. But to argue that a guarantee of "any extension, change or renewal" of a lease would not be binding when the landlord and tenant in fact extended and changed the lease to add additional burdens strikes the editor as bad law, and likely not supported by precedent in New York or elsewhere. Certainly the editor is not impressed with the application to the facts here. Note that the rent actually went down, and then increased only $200 per year. The court stated "[t]he April 2005 Lease contained new terms and conditions including an incrementally higher rent. The increased rent would have substantially and impermissibly changed the guarantor's obligations under the original agreement." To that the editor says: "Baloney." The guarantor made a bad financial choice, but the editor believes that in general the New York courts are a bit less forgiving.

LANDLORD; TENANT: GUARANTEES: If a lease is intended to make the person signing on behalf of the tenant personally liable for the tenant's obligations, the lease must say so directly. Courts will not impose such liability just because the lease names the signatory as a guarantor without more. ***Fairway Mortgage Solutions, Inc. v. Locust Gardens, 988 So.2d 678 (Fl. App. 4th Dist. 2008); July 30, 2008.***

A tenant entered into a five year lease. Its president signed the lease, hand printing his name, and indicating that he was the tenant's president directly below the signature line. "Also below the signature line, closer to the bottom of the page," was a hand printed provision saying that the tenant's signature "above also indicates acceptance of personally guaranteeing [sic] this lease and is being freely given as per section 'G' of this lease." The president initialed each page of the lease including the page on which a schedule of lease terms listed the name of the tenant's president in the following context: "G. GUARANTOR FERNANDO RECALDE." Later in the lease, it defined the guarantor as "any 'Person' as hereinafter defined, who has executed or has agreed to execute any guarantee of tenant's obligations hereunder."

When the tenant stopped paying the rent, the landlord sued for possession, damages, and breach of guarantee. The tenant and its president responded with the defense that the president had signed the lease "solely as the president of the corporate tenant ... and not individually as guarantor." The president "attested that the hand written notation below his signature acknowledging him as guarantor was added after he signed the lease and without his knowledge or consent." The trial court found the president personally liable, and in doing so, it "expressly held that the hand written language found below [the president's] signature did not create a genuine issue of material fact."

The Appellate Court disagreed. It pointed out that the president had, in fact, raised "genuine issues of material fact concerning the personal guarantee." Under Florida case law, a "signature preceded by the word 'by' and accompanied by *descriptio personae*, that is, language identifying the person signing the document as a corporate officer or something similar, does not create personal liability for the person signing a contract to which he or she is not a specified party," unless "the contract contains language indicating personal liability or the assumption of personal obligations."

The Court focused on the language of the agreement itself. It pointed out that the printed provision near the beginning of the lease defined the guarantor as one "who has executed or has agreed to execute any guarantee of Tenant's obligations hereunder." It found no place in the lease or in any collateral document that the terms and conditions of the guarantee were defined or that had been executed by the president. Consequently, the landlord did not, in fact, have a valid claim against the tenant's president. Personal liability against the tenant's president would have to have been based on the disputed hand written language beneath the president's signature and not on the "standard" lease provision whose caption included the president's name. That provision contemplated the execution of a separate guaranty, but none had ever been executed.

Reporter's Comment 1: This is hardly a surprising result given the general notion that guarantees have to be in writing and are strictly construed against the obligee. What is surprising is that a lower court saw this otherwise to the point of ignoring, in a motion for summary judgment by the landlord, the president's testimony that the only language explicating the guaranty had been added to the document after its execution.

Reporter's Comment 2: Attorneys solely engaged in sophisticated practices may not realize that these types of lease provisions are common in "local" and landlord-prepared, small lease documents. Landlords using this style of hidden guaranty provision fear that if one clearly says what they mean, the tenant will not sign the lease.

Reporter's Comment 3: Not being there during whatever lease negotiations took place allows one to speculate that the tenant's president actually expected to be the guarantor given that his name appeared on the first page of the lease, in upper case letters, after the word "GUARANTOR." Even if the tenant didn't read the rest of the lease, this would have been in the same list where the rental amount and the length of the term was to be found. That makes it hard to miss.

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

LANDLORD/TENANT; EVICTION; LICENSEES; PERSONAL RELATIONSHIPS: A co- habitating girlfriend is considered a licensee of her property owner boyfriend and is subject to summary eviction from the property upon 10 days' notice. ***Drost v. Hookey, 881 N.Y.S.2d 839 (Dist.Ct. 2009).***

Petitioner ("Landowner") held exclusive title to a property (the "Property") in which he co-habitated with his girlfriend, the respondent (the "Girlfriend") for over three years. Following the demise of their romantic relationship, Landowner sought to evict the Girlfriend from the Property pursuant to a summary proceeding under Section 713(7) of New York Real Property Actions and Proceedings Law ("Section 713(7)"), which allows a property owner to dispossess a licensee upon 10 days' notice. The District Court (the "Court") found that the Girlfriend met the common law definition of "licensee" and was not otherwise exempt from Section 713(7) summary eviction. The Court rejected the Girlfriend's claim of being a "tenant at will" who is entitled to 30 days' notice of eviction. Unlike a "licensee," who receives unexclusive use and occupancy of a space without a landlord-tenant relationship, a "tenant at will" is subject to a landlord-tenant relationship and is given exclusive possession of a space. The Court also declined to use a co-dependency test to determine whether the familial relationship exception to the common law definition of "licensee" applied. Instead, the Court held that Section 713(7) "includes all common law licensees except those who can claim an 'opt out' status by virtue of inclusion in a legislative vehicle which grants them greater rights than those of a licensee," such as the Domestic Relations Law. The Girlfriend could not cite alternative statutory protection that would exempt her from Section 713(7) and, therefore, the Court held that she was a "licensee" subject to Section 713(7) summary eviction.

LANDLORD/TENANT; FRUSTRATION OF PURPOSE: Rare case permits tenant to avoid lease based upon failure to obtain a liquor license. ***Merry Homes, Inc. v. Luu, 2010 Westlaw 547373 (Tex. App. 2/.18/10***) ***(not yet released for publication)*** discussed under the heading: "Landlord/Tenant; Illegality."

LANDLORD/TENANT; ILLEGALITY: Rare case permits tenant to avoid lease based upon failure to obtain a liquor license. ***Merry Homes, Inc. v. Luu, 2010 Westlaw 547373 (Tex. App. 2/18/10***) ***(not yet released for publication).***

Very few decision permit the tenant to escape a lease based upon public zoning and licensing problems arising after the lease commences. Typically the court finds that it is up to the tenant to evaluate the risks and assume them. Where zoning is adverse, often the courts find that the parties intended that the tenant would seek a variance, and took the risk of obtaining it. In many cases, of course, the courts note that the tenant still has some residual value in its lease where the original purpose is frustrated. And there is the odd case where zoning authorities "targeted" the tenant and change the zoning after the lease specifically to frustrate tenant's activities. Tenants have fared better in these cases.

Here, however, it was simply a matter of a liquor license. The lease provided (who thought this was a good idea?) that the premises were to be used for a bar and nightclub " and for no other purpose." Prior to entering into the lease, the tenant-to-be indeed did explore the possibility of obtaining a liquor license, and was told that the license application would require financial information about the landlord. Landlord's broker, apparently anxious to close the deal, indicated that this information would not be provided until the lease was signed. Thus, tenant was between a rock and a hard place.

It should be noted, however, that both landlord and tenant believed that the liquor license would be a routine matter, because there was nothing adverse in tenant's record and there were several other nightclubs in the area. When the tenant finally applied, however, the licensing board denied the license because the establishment was within 300 feet of both a school and a hospital.

The court held that, under the circumstances the lease turned into a lease for an illegal purpose and was therefore void.

The court also discussed at some length the possibility that the lease was terminable for frustration of purpose, as the trial court had also held. A study of the court's discussion here doesn't yield any conclusive on this point. Although the court appears to affirm the trial court holding, it continually turns back to the illegality notion.

What likely makes the case different from most precedent is the fact that the use was in fact illegal from the outset, because of the proximity to public buildings, and the fact that the lease permitted no other use. One might argue that this is an issue that the tenant could have resolved in advance, measuring off the distance to a school and hospital in the area. But licensing agencies often have their own way of measuring, and it might have been difficult for the tenant to get a good "read." And, of course, the landlord's agent obstructed the tenant from getting a definitive reading from the licensing board before the lease was signed.

Comment: The court seems to say that even if the tenant knew of the illegality before signing the lease, the lease would still be void. It is less clear whether this would be true if the only defense was frustration of purpose, but there is certainly that suggestion.

LANDLORD TENANT; LANDLORD'S REMEDIES; SETTLEMENT; STATUTE OF FRAUDS: The Statute of Frauds does not apply to the settlement of a lawsuit to collect damages in the form of rent due under a lease – the fact that the effect of the lawsuit may also result in the surrender of the lease does not draw the settlement into the Statute of Frauds. ***St. Louis Union Station, Inc., v. The Discovery Channel, Inc., 2009 Westlaw 4823866 (Mo. App. 12/15/09)***.

Tenant had abandoned leased premises and landlord brought a suit for damages. Simultaneously, apparently, landlord's agent, counsel and others were engaged with tenant in discussions of the overall dispute, which would involve a lease termination. No lease termination had been entered into as yet. Ultimately, the landlord's manager, a commercial broker, who had been involved in the negotiations, sent an email to tenant that stated;

"I am aware that you have had conversations with my colleague [named] and as well as our attorney [named] regarding the lease termination of Discovery Channel Store, and thus, after most recently speaking with our ownership, our owner will agree to counter your previous offers with $220,000.

Tenant responded:

"Your lease termination counteroffer of $220,000 "all inclusive and as is condition is accepted for [tenant]. Kindly prepare the lease termination agreement and e-mail it to me for processing and review by [tenant].

Then problems arose, and four months later Tenant filed a motion to enforce settlement.

The trial court entered summary judgment for Tenant, after a hearing in which the court examined the emails and their background. Landlord appealed, arguing that the settlement agreement amounted to a modification or termination of a real estate interest – the lease – and did not satisfy the requirements of the Statute of Frauds. Landlord further pointed out that the lease itself required that the lease could not be modified or terminated without an agreement in writing.

The appeals court, noting that in this case it would provide "great deference" to the trial court as to the meaning and intent of the email exchange, affirmed the summary judgment for the tenant on the grounds that the lawsuit was entirely about money damages, even if the settlement negotiations were not, and that the email exchange constituted a complete settlement of the money claims. The Statute of Frauds does not apply to agreements to settle a lawsuit for money damages.

Landlord, not surprisingly, noted that both emails discussed a negotiation for a "termination agreement" and that Tenant's counter offer included the phrase "all inclusive and as is condition," which suggested that the agreement was indeed a "wrap up" of all claims between the parties. The court does not indicate whether there was time left on the lease, but in Missouri the landlord is entitled to leave the premises vacant and to collect further rent in a subsequent lawsuit even after bringing a claim for past due rent. No mitigation required. Thus, the question of whether the settlement indeed provided for the termination of the lease was certainly significant.

The court dealt with the Landlord's argument by stating that there was no clear explanation of what "all inclusive and "as is" condition" might mean, and that so far as the court was concerned the agreement was not about the termination of the lease, but simply about settlement of the disputed rent claim.

Comment 1: There is no indication that the case has been certified for publication, and perhaps for good reason. The court also ducked out when it said that it relied heavily on the trial court in the construction of the settlement agreement.

Comment 2: So far as the editor can make out, the court is saying that there in fact was no settlement on the termination of the agreement – and the language suggesting that a termination agreement be sent for review was mere surplusage. All that the court looked to the agreement for was a settlement of the money claim. This may come as a surprise to the Tenant if indeed the landlord has not retaken possession of the premises and there is additional time left on the lease. Have such claims been settled? The Tenant clearly believed that any disputes about the condition of the premises were resolved by the agreement. But were they? This opinion, apparently, does not answer that question one way or the other. Verrrrrry interesting.

LANDLORD/TENANT; LANDLORD'S REMEDIES; LIQUIDATED DAMAGES: "LATE OPENING CHARGE: A late-opening charge in a commercial lease is not an unenforceable penalty where the actual damages to the landlord are difficult to ascertain, the charge is reasonable with respect to the potential injuries, and the charge is applied on a daily basis rather than in a single lump sum. ***CPMI, Inc. v. Kolaj, 885 N.Y.S.2d 496 (N.Y. App. Div. 2009) (Michigan Law).***

Defendant tenant ("Tenant") entered into two commercial leases (the "Leases") with plaintiff managing agent ("Managing Agent"), which Leases were to be construed in accordance with the laws of the State of Michigan. The Leases imposed a "late-opening charge" on Tenant in the event that the restaurant that was to be operated at the leased premises was not opened within 120 days after execution of the Leases. For each day after the expiration of this 120-day period that the restaurant was not opened, Tenant was obligated to pay Managing Agent 1/360 of the annual rent.

Tenant did not open the restaurant until 6 months after the expiration of the 120-day period and, as a result, Managing Agent demanded a late-opening charge of $40,869.39 from Tenant. Tenant failed to pay this charge and ultimately vacated the leased premises prior to the expiration of the Leases.

Managing Agent brought an action against Tenant for breach of the Leases. The lower court found in favor of the Managing Agent and awarded Managing Agent damages for unpaid rent and the late-opening charge. Tenant appealed the decision of the lower court on the grounds that the late-opening charge was an unenforceable penalty, but the appellate court affirmed.

Michigan law provides that a liquidated damages clause is appropriate where actual damages are difficult to ascertain, and such a clause is not an unenforceable penalty if "the amount stipulated is reasonable with relation to the possible injury suffered" and "is not unconscionable or excessive." The appellate court found that the potential injuries to Managing Agent as a result of the delay – including "dark space" in the retail complex of which the leased premises were a part, maintenance problems and diminished traffic, sales, reputation, value and leasing, mortgage refinancing and sale opportunities with respect to the retail complex – were difficult to quantify so a liquidated damages clause was appropriate. The appellate court held that the late-opening charge was reasonable in relation to these possible injuries and was not excessive given that it was applied on a daily basis rather than as a single lump sum. Therefore, the late-opening charge was not an unenforceable penalty and Tenant was obligated to pay Managing Agent the stipulated amount.

Comment: Not every "double rent" liquidated damages clause is upheld. The landlord's lawyers did a pretty good job of detailing how injurious the tenant's failure to open his pizza restaurant would be to the landlord's business operations. The tenant didn't show up, apparently, with much firepower to resist. But the special feature to note was the court's acceptance of the notion that the day to day nature of the charge made it less onerous. Hmmmm.

LANDLORD/TENANT; LANDLORD'S REMEDIES; DAMAGES; MITIGATION: When, following default by a tenant, the lease guarantor offers to relet the premises under the same terms and conditions as were in the terminated lease the landlord, because it has a legal obligation to mitigate damages, will not be permitted to recover post-refusal damages from that guarantor if the landlord does not enter into such a replacement lease. ***Danada Square, LLC v. KFC National Management Company, 392 Ill.App.3d 598, 913 N.E.2d 33, 332 Ill.Dec. 438 (Ill.App. 2 Dist. 2009).***

Under Illinois law, "a landlord or his or her agent shall take reasonable measures to mitigate damages recoverable against a defaulting lessee." Further, "the landlord bears the burden of proving that it complied with the statutory duty of mitigation. ... If the landlord cannot show that it took reasonable steps to mitigate its damages, the damages that it could otherwise recover are reduced and 'losses which reasonably could have been avoided are not recoverable'." Under Illinois common law, that state's courts "held that a landlord's thwarting of a tenant's efforts to find a reasonable sublessee cut off the tenant's liability under the lease after that point."

A national restaurant franchisor had a fifteen year lease that also included three, five-year renewal options. After about eleven years, it assigned that lease to a franchisee but remained a guarantor of the lease obligations, including obligations under lease extensions if the assignee exercised the renewal options. After expiration of the initial term, the assignee extended the lease for five years, but shortly thereafter filed for bankruptcy and rejected the lease. The franchisor, acting as guarantor, continued to make lease payment and attempted to negotiate a lease for the remainder of the extended lease term, and even beyond if a deal could be struck. While negotiations continued, the guarantor continued to pay the full amount due monthly under the lease.

The national franchisor, as guarantor, was unsuccessful in negotiating a new lease. The last lease tendered by the landlord "contained essentially the same terms as those in the [original] lease, but also contained a provision allowing [the landlord] to retake possession of the Premises on 60 days' notice (the parties referred to this as 'the 60-day out')." The guarantor informed the landlord "that it would accept all of the proposed terms except for the 60-day out." Thereafter, the guarantor stopped making monthly rent payments and, nearly a year later, the landlord entered into a new lease with a different franchisee, but at a lower rent than that in the original lease or in the proposed lease that had contained "the 60-day out." This new lease did not contain "the 60-day out."

The landlord sued the guarantor for damages, seeking unpaid rent beyond the time for which the guarantor had been paying rent. It also sought damages to compensate for the deficiency between the lower rent in the lease it had signed and the rent called for under the original lease.

The guarantor, as its primary defense, argued that under Illinois law the landlord had a duty to mitigate damages, and the landlord's failure to give it, the guarantor, a replacement lease which included all of the essential terms of the original lease, meant the landlord had not met its mitigation obligation and therefore would not be entitled to a judgment for damages attributable to the period after the time of the landlord's refusal.

The landlord argued that its original insistence on including "the 60-day out" related to its possible plans to raze the premises and build a larger building in its place. It also pointed to an internal e-mail message between certain employees of the guarantor in which it was stated that, "[i]f our interest in operating the store is solely because of our contingent lease liability, this is a good deal for us." It raised this issue despite the fact that it was undisputed that the guarantor later had sent it a letter stating that the guarantor "was not willing to enter into the proposed lease, because the 60-day out effectively resulted in a short-term lease that was 'not suitable for [the guarantor],' but that [the guarantor] remained 'willing to enter into a new lease for the Premises for a substantially similar term as set forth in the Lease' and would also be willing to consider a longer term than that provided by the Lease."

The landlord had its real estate broker testify "regarding the steps [the landlord] took to find a new tenant for the Premises." Included in those steps were the placing of "signs near the entry point to the shopping center, advertising that there was space available to rent; list[ing] the Premises in an online brochure on a Web site and sent weekly e-mail 'blasts' to real estate brokers and possible clients, listing the Premises as part of the space available at the shopping center; while attending a trade show communicat[ing] to approximately 50 different retailers that the Premises were available; and communicat[ing] with at least seven prospective tenants."

The Court was not interested in the steps that the landlord had taken to relet the premises after the point that the guarantor had rejected the landlord's lease proposal. According to the Court, the landlord was presented with a replacement tenant, in this case – the original guarantor, who "stood ready willing and able to take over the lease." According to the Court, by insisting on the "60-day out" provision, the landlord breached its duty to mitigate damages. Consequently, because the landlord had breached its duty to mitigate, the Court found no damages thereafter owing by the guarantor. Eventually, regardless of the steps the landlord subsequently took to relet the premises, its "inclusion of the 60-day out was unreasonable and led to rejection of a suitable tenant [the guarantor] that was ready, willing, and able to rent the Premises on terms essentially identical to those in the Lease, which would have prevented [i.e., the landlord] from incurring any of the damages [it] sought." Once the landlord had rejected a suitable tenant, it breached its obligation under Illinois law to "undertake reasonable efforts to relet the premises after a defaulting tenant departs." The Court would not permit the landlord to allow "the premises to stand vacant and then attempt[] to collect the lost rent in the form of damages." Essentially, the landlord "could reasonably have avoided all of the damages accruing after [the guarantor stopped paying the rent] by entering into a lease with [the guarantor] that did not include the 60-day out."

Reporter's Comment 1: One underlying explanation as to what a landlord's mitigation obligations are (in states that obligate landlord's) is that the landlord should be acting as if it were the tenant's agent and not for the landlord's own interests.

Reporter's Comment 2: Some situations aren't as clear. In an unreported New Jersey case, a cellular company's lease contemplated other tenants might co-locate their cellular phone antennas on the tower, and provided, in such case, the landlord would pay the original cellular company 25% of the rental amount received from future tenants. The cellular tower tenant breached the lease and the tower owner-landlord found another cellular company to locate its antennae on the tower. The owner-landlord wanted to give the defaulting tenant a 25% credit, but the New Jersey Appellate Division rejected that approach as being inconsistent with the landlord's duty to mitigate damages, holding that such an approach assumed, "without sufficient support in the record, that [the newer company] would have, or could have, co-located the cellular phone company on the" tower. Fact sensitive? Yes.

The Reporter for this case is Ira Meislik of Meislik & Meislik, Montclair, New Jersey.

LANDLORD/TENANT; OPTIONS (PURCHASE OR RENEWAL); RULE AGAINST PERPETUITIES: In New York and many other states following the same rule, where the definition of a lease's term does not include the month-to-month tenancies after the lease's expiration, any purchase or renewal option exercisable once the month-to-month periods begin are subject to being voided as violative of the Rule Against Perpetuities if they do not vest within the designated limitations period because each month-to-month period is treated as a new lease and not part of the expired lease. ***Bleecker Street Tenants Corp. v. Bleeker Jones LLC, 992 N.Y.S.2d 42 (App. Div. 2009); June 23, 2009.***

This appeal required a New York appellate court "to consider the centuries-old rule against perpetuities, specifically, whether the exception to the prohibition against remote vesting of options appurtenant to a lease [was] applicable to the renewal option contained in the parties' lease."

In 1983, an owner converted part of a building to cooperative ownership and, at the same time, leased the converted first floor of commercial space to an entity owned by the converting sponsor. The lease was for an initial term of fourteen years followed by nine consecutive, ten-year renewal options. The renewal option required the landlord to send a "reminder notice" at the appropriate time if the tenant had not already exercised its renewal right. The tenant's renewal right was to remain in effect until some period of time after it actually received the landlord's reminder notice.

The tenant did not exercise its renewal option at the end of the initial 14 year term and the landlord did not send a reminder notice. Therefore, as provided by the lease, the tenant remained in possession as a month-to-month tenant. The landlord then sued, "seeking a declaration that the lease renewal options [were] void under [New York's] statutory and common-law rules against perpetuities and unreasonable restraints on alienation." Quoting earlier case law, the lower court favored the tenant, stating that the Rule against Perpetuities did "not apply because the lease's renewal option [was] appurtenant to the lease, in that it 'originate[d] in one of the lease provisions, [was] not exercisable after lease expiration, and [was] incapable of separation from the lease.'" Here, the lower court "reasoned that during the period of extended month-to-month possession, '[w]hile the 'term' of the lease may [have] expire[d] upon the failure of either party to issue their respective notices, the Lease itself [did] not.'" The landlord appealed.

New York has a statutory rule against perpetuities which includes "a codification of the common-law rule prohibiting the remote vesting if interests and provides that '[n]o estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate ... .'" According to the appellate court, this rule flows from "the principle that it is socially undesirable for property to be inalienable for an unreasonable period of time ..., and is designed to 'ensure the productive use and development of property by its current beneficial owners by simplifying ownership, facilitating exchange and freeing property from unknown or embarrassing impediments to alienability.'" In New York, where the parties to an agreement are corporate entities and no measuring lives are stated in the instrument, "the perpetuities period is simply 21 years." The rule against vesting is applied to purchase options in leases as well as to lease renewal options. Therefore, according to the appellate court, on the face of the lease, "all except the first renewal options ... would run afoul of the rule, as they vest more than 21 years after execution of the lease."

There is, however, "an exception to the rule's generally strict application ... for options appurtenant to a lease, which are considered 'part of' the lease. ... The required characteristics of such options are that they (1) 'originate[] in one of the lease provisions,' (2) 'are not exercisable after lease expiration,' and (3) are 'incapable of separation from the lease.'" Thus, if a renewal option could be exercised after a lease term has already expired, requirement (2) would not be satisfied and the renewal option would be null and void. Citing a number of other New York cases where lease option provisions were tested against the Rule against Perpetuities, the appellate court realized that "the critical difficulty lies in whether the options [were] exercisable after the expiration of the lease or only during the lease term." It realized that the lease in question contained no explicit extension of the term of the lease. In fact, it said that if a reminder notice was not sent, and, "[i]f the term shall have expired, Lessee shall remain in possession as a month-to-month tenant" until the notice was given. To the appellate court, this explicitly recognized that "the lease term expire[d] if not renewed [and] establish[ed] that the renewal option clause was intended to give a tenant the ability to renew the lease after it had already expired." In the prior cases, this type of lease renewal option had been considered and rejected as violative of the Rule against Perpetuities.

The tenant's argument, successful before the lower court, was that "a distinction must be made between the expiration of a term of the lease and the expiration of the lease itself, so that while the 'term of the lease' may have expired, the lease itself did not. The appellate court rejected this as "a semantic distinction that cannot avail the tenant as in this case." The appellate court looked at the lease itself and saw where it defined the "term of this lease" as "the initial term and any renewal term with respect to which Lessee has exercised its right of renewal," taking note that this definition did not include the month-to-month tenancy created after the lease expires." Therefore, "[a] month-to-month tenancy that results by an operation of law when a lease expires does not extend the term of the expired lease; rather, each month is a new term for a new period, each a separate and new contract." In addition, the appellate court, relying on earlier case law, held that "a month-to-month tenancy that is created by a holdover provision in a lease does not create an extension of the original lease term."

In essence, the appellate court believed that the "option provision actually allow[ed] its exercise after the termination of the lease term" and therefore this precluded it from falling within the category of options appurtenant to a lease.

New York statutes have a rule of construction accompanying its Rule against Perpetuities. Those rules of construction create a presumption that "the creator intended the estate to be valid." Nonetheless, the appellate court held that the rules of construction do "not authorize us to rewrite instruments that unequivocally allow interests to vest outside the perpetuities period." Further, the appellate court took special note that the lease itself was a "sweetheart lease," and therefore it saw no reason to construe it in the way sought by the tenant because "the very object of the Rule against Perpetuities" is "to defeat the intent of a grantor to create unreasonably long restrictions upon the use or marketability of both real and personal property."

Reporter Comment 1: The Bar Examiners are vindicated once again.

Reporter Comment 2: It appears that had the draftspeople defined the "term of the Lease" to include the subsequent month-to-month periods, this result would not have come about. Given that the draftspeople were representing both side of the original lease, this would not have been a very contentious negotiation.

Reporter Comment 3: There are many valid ways to draft a "landlord must remind a tenant of the renewal option provision," but this is one of them. Had the term of the Lease expressly continued, by way of extension, until the tenant either elected to extend the lease term or affirmatively elected not to do so (not later than a given number of days after the landlord sends a reminder notice), the lease would have delivered what the original parties clearly intended.

Reporter Comment 4: With apologies to George Santayana, "those who cannot remember prior Rule against Perpetuities destroy lease option decisions are condemned to be sued for malpractice."

The Reporter for this item was Ira Meislik of Meislik & Meislik, Montclair, New Jersey.

LANDLORD/TENANT; PROPERTY TAXES: A tenant with a long term lease who bears the burden of paying the entire tax obligation assessed against a property may have the right to control the tax appeal process and receive any resulting benefits if the lease doesn't specify otherwise and doing so actually represents the property interests to a greater degree than would be the case if the landlord controlled the tax appeal process. ***Aperion Enterprises, Inc. v. Borough of Fair Lawn, 25 N.J. Tax 70 (2009); July 24, 2009,*** discussed under the heading: "State and Local Taxation; Leases."

LANDLORD/TENANT; RENEWALS; RULE AGAINST PERPETUITIES: The exception to the Rule Against Perpetuities for options that are "appurtenant" to a lease does not apply to renewal options that are exercisable after expiration of the lease term during the month-to-month tenancy created by a holdover provision in the lease. ***Bleecker Street Tenants v. Bleeker Jones, 882 N.Y.S.2d 42 (A.D. 1 Dept. 2009).***

The Lease between plaintiff landlord defendant tenant provided for an initial 14-year term, with nine options to renew the Lease for consecutive 10-year periods. The Renewal Options were exercisable by Tenant by giving notice to Landlord prior to the end of the then-existing term, and Landlord was required to send Tenant a reminder notice regarding such options (the "Reminder Notice").

If Landlord did not send the Reminder Notice and Tenant did not exercise its Renewal Options, the Lease provided that the Renewal Options would remain in effect until such time as Landlord sent the Reminder Notice, and "[i]f the term shall have expired, Lessee shall remain in possession as a month- to-month tenant."

After expiration of the initial 14-year term, Tenant did not exercise its Renewal Options and became a month-to-month holdover tenant. The Landlord commenced an action to declare the Renewal Options void under the Rule Against Perpetuities ("RAP") and the New York Supreme Court held that the Renewal Options were exempt from RAP since they were options "appurtenant" to the Lease.

The Supreme Court, Appellate Division (the "Court"), reversed the holding of the lower court and found that the exception for options appurtenant to a lease did not apply to the Renewal Options. In *Symphony Space v. Pergola*

Properties (99 N.Y.2d 466 (1996)), the New York Court of Appeals, stated that the exception to RAP for options appurtenant to a lease applies where the options (i) originate in one of the lease provisions, (ii) are not exercisable after lease expiration and (iii) are incapable of separation from the lease. In this case, the Court found that the Renewal Options were exercisable after expiration of the Lease since the Lease expressly provided that such options continued to exist during Tenant's month-to-month tenancy, after expiration of the Lease term. The month-to-month tenancy did not extend the term of the expired Lease.

Therefore, the Court applied RAP and found that the Renewal Options violated RAP's rule against remote vesting (EPTL 9-1.1(b)) because the Renewal Options were exercisable 21 years after the date of the Lease. The Court also found that the Renewal Options did not violate the prohibition against unreasonable restraints against alienation under common law and RAP (EPTL 9-1.1(a)) because the Renewal Options did not directly restrain Landlord from transferring its property, although they may have indirectly affected the building's sale price.

Comment: On first thought (and that's all you usually get in these comments) the editor is suspicious of the conclusion that the lease was no longer in effect when it was being continued on a month to month to basis following the original term. Although the usual rule is that a month to month holdover tenancy is a new lease (Friedman on Leases [Randolph Edition]) at 18-46, such a rule perhaps not to apply to holdover arrangements what were agreed to in the original lease specifically to accommodate he situation where notice of renewal still had time to run.

Here, the parties apparently stipulated that the renewal option was part of the extended term. Why shouldn't the option be able to "shelter" from the operation of the RAP under these circumstances. If, conceivably, under the original lease, there was a period of time when there would be NO lease and the option could be renewed, of course that's a different matter.

LANDOWNER LIABILITY; INJURIES TO INVITEES; "SLIGHT DEFECT" RULE: Kansas refuses to apply "slight defect" qualification to duties of owners of public sidewalks and adjacent areas (public or private) to parking lots. ***Elstun v. Spangles, Inc., 2009 Westlaw 3233757 (Ka. 10/9/09).***

Plaintiff was injured in defendant's parking lot when, while getting into her car on a "misty day," she stepped back into a two inch deep hole that was filled with dark water and hard to detect, and broke her hip. Defendant won on summary judgment in the trial court by arguing that the Kansas "slight defect" rule should logically be extended to parking lots, and that the defect in question fit within the judgment.

On appeal: *Held: reversed.* The policy arguments supporting the "slight defect" doctrine do no apply here, even if logically the physical areas are similar.

Since 1935, Kansas courts have applied a judicially created rule that "[s]light and inconvenient defects in the sidewalk of a city street do not furnish basis for actionable negligence, even though a pedestrian may trip, fall, and injure [himself or] herself on account of such a trivial defect."

Although cases that apply this slight-defect rule generally use the terms "actionable negligence" or "actionable defect," in fact, that the rule is actually based on the definition of the duty owed by municipalities or property owners to pedestrians using the walkways in question. Specifically with regard to municipalities, the Kansas court has reasoned that "[t]he city is not an insurer of the safety of those who use its streets and walks. It is not required to furnish perfect walks. Its only duty in this respect is to furnish walks that are reasonably safe for use.

All of the early cases applying the slight-defect rule involved municipal liability for public walkways. As time wore on, however, this court applied the same rule in actions against individuals or private corporations whose property abutted a public sidewalk.

The question presented in the instant case-whether a property owner should always be relieved of the duty to repair slight defects in parking lots – is a policy question regarding the duty owed to patrons of parking lots. The question presented is whether the slight-defect rule should also be extended to parking lots, such as that owned by Spangles here. Spangles argues, and the district court agreed, that the same cost-utility analysis that underlies the rule regarding sidewalks-measuring the cost of the repair against the benefit of maintaining perfectly smooth surfaces-applies equally to parking lots, which often become worn down after normal wear and tear and Kansas weather conditions.

Plaintiff responded that sidewalks are different from parking lots in a number of ways that weigh against extending the rule. Most specifically, Plaintiff pointed out that parking lots are generally owned and maintained by businesses or other entities for the purpose of providing its clientele a convenient place to park vehicles; sidewalks are walkways open to the public.

The Kansas Court decided that the negligence issue should go to the jury:

"'The law favors trial by jury and the right should be carefully guarded against infringements. It is a right cherished by all free people. A trial court, in the exercise of its prerogative in determining questions of law only in these kinds of cases, should not usurp the power and function of the jury in weighing evidence and passing upon questions of fact'."

The court concluded that the slight-defect rule is a narrow, judicially created exception to this general principle that has until now been applied only to sidewalks. It declined to expand that application.

LENDER LIABILITY; FORECLOSURE; TITLE ERRORS: A third party purchaser has no claim for damages against foreclosing lender where lender had failed to provide for naming of junior lienholders as parties defendant, leaving their liens still attached to title. ***First National Bank and Trust in Larned v. Wetzel, 219 P. 3d 819 (Ka. App. 2009)*** discussed under the heading: "Mortgages; Foreclosure; Liability of Foreclosing Lender for Title Defects."

LICENSEES; PERSONAL RELATIONSHIPS; EVICTION: A co-habitating girlfriend is considered a licensee of her property owner boyfriend and is subject to summary eviction from the property upon 10 days' notice. ***Drost v. Hookey, 881 N.Y.S.2d 839 (Dist.Ct. 2009).***

Petitioner ("Landowner") held exclusive title to a property (the "Property") in which he co-habitated with his girlfriend, the respondent (the "Girlfriend") for over three years. Following the demise of their romantic relationship, Landowner sought to evict the Girlfriend from the Property pursuant to a summary proceeding under Section 713(7) of New York Real Property Actions and Proceedings Law ("Section 713(7)"), which allows a property owner to dispossess a licensee upon 10 days' notice. The District Court (the "Court") found that the Girlfriend met the common law definition of "licensee" and was not otherwise exempt from Section 713(7) summary eviction. The Court rejected the Girlfriend's claim of being a "tenant at will" who is entitled to 30 days' notice of eviction. Unlike a "licensee," who receives unexclusive use and occupancy of a space without a landlord-tenant relationship, a "tenant at will" is subject to a landlord-tenant relationship and is given exclusive possession of a space. The Court also declined to use a co-dependency test to determine whether the familial relationship exception to the common law definition of "licensee" applied. Instead, the Court held that Section 713(7) "includes all common law licensees except those who can claim an 'opt out' status by virtue of inclusion in a legislative vehicle which grants them greater rights than those of a licensee," such as the Domestic Relations Law. The Girlfriend could not cite alternative statutory protection that would exempt her from Section 713(7) and, therefore, the Court held that she was a "licensee" subject to Section 713(7) summary eviction.

MORTGAGES; EQUITABLE MORTGAGES: Elaborate third party purchase, lease option is in fact a disguised mortgage, but no one seems to notice. ***Garcia v. Roberts 173 CA4th 900, 93 CR3d 286 (2009).***

The published portion of this decision discusses whether the trial court abused its discretion by granting a substituted plaintiff's motion to amend the complaint (to conform to the proof) by adding a breach of written contract claim. The breach of written contract claim conflicted with the deposition testimony of plaintiff Johnny Garcia, who died before trial. The substituted plaintiff (his wife, Omega Garcia) prevailed at trial on all causes of action, including a claim of fraud. The court of appeal vacated that part of the judgment awarding damages to plaintiff on the cause of action for breach of written contract, but affirmed the other orders and judgment of the trial court.

The dispute arose out of Johnny Garcia's attempt to purchase real property, including a mobile home that he had been renting for $500 per month from the Sasashima Family Trust. Garcia lived in the mobile home and operated from there a modest business as a backhoe operator.

In 2001, Garcia reached an agreement with the Trustee of the Trust for an option to purchase the property for

$140,000. Under the agreement, Garcia paid $7500 to the Trust and had two years to come up with the balance. The $7500 would be treated as a down payment and Garcia would continuing paying the $500 monthly rent until the purchase concluded. When Garcia had difficulty obtaining financing, he asked defendant Ronald Roberts, a plumbing contractor for whom he occasionally worked, if he would be willing to lend the money. Roberts orally agreed to pay $132,500 for the property to the Family Trust as a loan; title to the property, however, would be put in Roberts's name and Garcia would pay 12 percent interest (about $1325 per month) for a period of two years, at the end of which Garcia would have to secure independent financing to pay off the loan and receive title.

Although the closing costs raised the final price to $133,027, Roberts closed escrow on September 26, 2002. Shortly thereafter, Roberts invited Garcia and his wife, Omega, to his home to sign paperwork. Roberts's wife filled out (and the parties signed) a form contract entitled "Lease with Option to Purchase," which Mrs. Roberts read and explained, since Johnny Garcia spoke some English but could not read it and Omega Garcia did not understand English at all.

In 2004, with the assistance of a mortgage broker, Garcia cleaned up his credit history and took steps to obtain home insurance while the mortgage broker applied for financing and ordered an appraisal. In late August or early September, the mortgage broker called Roberts, who confirmed the terms of the sale. The mortgage broker also informed Roberts that escrow had been opened and attempted to arrange a meeting for signing a purchase agreement required by the lenders. Roberts delayed action pending his vacation. On his return, although Roberts eventually met with Garcia and the mortgage broker, he postponed signing the purchase agreement until the next day at the title office. The next day, Roberts refused to sign the agreement but requested no changes. Roberts continued to complain that he did not like the papers and would not sign. On October 26, 2004, Roberts told Garcia that he had lost his opportunity to purchase the property.

Garcia filed suit on December 16, 2004. At the time of trial, on June 25, 2007, the operative complaint was premised on the breach of an oral loan agreement. Although Roberts's pleadings originally referred to a written contract, by the time of trial, his position was that there was no enforceable or valid oral or written contract. During discovery, Johnny Garcia insisted that the only agreement he had with Roberts was the oral agreement; Garcia denied knowing anything about a written lease option agreement. On February 7, 2007, Johnny Garcia died; his wife was substituted into the case as successor-in-interest and personal representative. At the beginning of trial, during the discussion of *in limine* motions, Garcia's counsel announced the motion to amend to add a breach of contract claim. Thereafter, the motion was formally made, a brief filed in support, and substantial oral argument held. Garcia's counsel acknowledged that Johnny Garcia had refused to allow any reference to the written contract. Roberts's counsel argued that the motion was unduly prejudicial because defendants had relied on Johnny Garcia's repeated denials. The trial court granted the motion to amend.

The court of appeal focused on "the crucial fact that at the time of trial plaintiff was deceased and so could not be questioned further on any issues relevant to the lease option agreement." The court of appeal ruled that the trial court abused its discretion in permitting the amendment because Roberts was unfairly prejudiced by the reversal of position on plaintiff's part.

Reporter's Comment 1: There is no doubt in my mind that the deal in *Garcia v Roberts* was, in fact, a hidden mortgage. But it was so well concealed that I am not sure that anyone-neither lawyers nor the judges, nor even the parties-realized it. The positions taken and the rulings made-whether the deal involved an oral loan agreement or a written lease option, whether a cause of action for one could be added to the other at a later time, whether one of those theories could complement or supersede the other, whether and how the parol evidence rule and the statute of frauds had an impact, the effect of the expiration of the option date, an optionor's duty of good faith and fair dealing, plus many other rather bizarre twists and turns in the case-all arose because everyone attempted to analyze the transaction as it had been literally concocted by the parties. Because of that approach, I do not believe that the opinion makes much sense or is likely to ever be cited by another court or relied on by another attorney; the opinion and the "actual facts" on which it relies are just too complicated to be useful.

From my perspective, however, the case is an intriguing one, with useful cautions for those who borrow or loan money. The deal was simply a camouflaged purchase money loan transaction. Garcia, the borrower, started out having an option to purchase property that he had been renting, but lacked the $132,500 necessary to exercise that option and complete the purchase. This led him to seek to borrow that amount from his friend, Roberts. In an ordinary transaction, Roberts might have merely advanced that money to Garcia directly for Garcia to buy the property, and then taken back a deed of trust on it when Garcia acquired title to it. Instead, Roberts gave the money directly to the seller and took title himself, giving Garcia a two-year lease on the property together with an option to purchase it from Roberts when that lease ended. Since the monthly payments Garcia had to make to Roberts during the lease period were expressly stated to amount to 12 percent of the purchase price that Roberts had paid the seller, there was no doubt that they were interest payments on the loan rather than rent payments under a lease. This sale and leaseback was a mortgage arrangement, with the added twist that title to the property went to the lender from a third party seller rather than from the borrower-a twist that makes this mortgage transaction one of purchase money rather than a refinance.

Reporter's Comment 2: If the judges had appreciated that this was a mortgage loan, they would have said that Roberts held title to the property both in trust and as security for a loan to Garcia. The trust is a resulting trust because Garcia was really the one who paid the price (by way of using funds he had borrowed from Roberts). But while Roberts held his title only in trust, he was nevertheless entitled to have his loan to Garcia repaid out of the property, making that trust a security device or equitable mortgage securing his loan. That was the real deal, rather than the phony paperworked or oral versions the parties bickered about.

If, in fact, this was a mortgage loan between Roberts and Garcia, it would not matter whether it was structured as an oral agreement or a written lease and option. In any case, Garcia would be entitled to assert his equity of redemption and pay his debt late, i.e., after the date stated in the lease option or the date for payment declared in the loan agreement had passed. Mortgage debtors always get extra time to "redeem" themselves.

Characterization as a mortgage would also bear on the remedies issues, now awaiting a new trial. The traditional remedy would be to allow Garcia to assert his right of redemption (i.e., exercise the original option) and obtain title to the property by repaying Roberts the $133,027 (including closing costs) he had borrowed from him. The earlier trial court judgment had instead awarded damages to Garcia of $367,000, based on a breach of contract theory. That result appears premised on the assumption that Roberts keeps the title he has and Garcia recovers the benefit of the bargain he would have obtained by purchasing property worth $500,000 for only $133,000. (Fraud was also found, but that finding did not appear to have been used to increase Roberts's liability.) The alternate recoveries work out the same way economically, given a debt of $133,000 and a market value of $500,000. Ordinarily, Roberts would not be able to elect to keep the property and pay Garcia damages, since that would amount to a strict foreclosure combined with a damage kicker. But I suppose that Garcia can elect to treat Roberts's behavior as constituting a wrongful foreclosure and choose to take his recovery as damages rather than as rescission and restitution. As I say, the numbers work out the same either way.

Reporter's Comment 3: Before I read this decision, it had never occurred to me that an unintended virtue of deciding that a contract transaction constituted a mortgage in disguise was that it could save the lawyers and the judges from the near-impossible task of attempting to literally interpret or enforce that otherwise incomprehensible contract language. This whole case would have been a lot simpler if that fact had only been appreciated.

The Reporter for this item was Roger Bernhardt of the Golden Gate Law School. This was reprinted (and edited) with permission from the California Real Property Reporter.

MORTGAGES; FORECLOSURE; ASSIGNMENTS OF RENTS; FEDERAL GOVERNMENT LESSEES: United States Government cannot be made a party defendant in a receivership action in connection with a mortgage foreclosure when it holds a leasehold interest in the foreclosure property but will not be subject to the foreclosure, and insists on paying rent into court under an interpleader rather than paying to the lender under the Assignment of Rents. ***United International Bank v. Redstone USA Corp., 2009 Westlaw 2525132) (D.E.D.N.Y. 8/17/09).***

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Bank held a mortgage and assignment rent on some commercial property in Brooklyn. Under a prior stipulation, the tenants were to be instructed to remit the rent directly to the tenant. One of the tenants was the United States Government, which apparently held a senior lease that would not be foreclosed in Bank's foreclosure action. (The court does not say why.)

It appears (again only by inference) that the United States Government did not remit the rents to the Bank, and Bank brought an action to foreclose and also sought a receiver t o implement the assignment of rents It named the United States as a defendant under the "Quiet Title Act," 28 U.S.S. 2409a(a)a. Apparently the United States offered to pay rents into court pending the outcome of the dispute.

The United States District Court for the Eastern District of New York, on motion of the fee owner, dismissed the action for lack of subject matter jurisdiction based. The Quiet Title Act states that "[t]he United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights …" According to the Court, however, the United States claimed no interest adverse to the Bank here, as it was not being foreclosed upon and stipulated to payment of rents into court under an interpleader.

"B]ecause the Quiet Title Act does not waive the sovereign immunity of the United States unless the United States holds an interest in real property adverse to the plaintiff, this action must be dismissed for lack of subject matter jurisdiction."

Comment 1: This pithy little case, which the editor drew from the First American Title Insurance New York current developments, prepared by Michael Berry, is a bit puzzling to the Editor. Surely payment of rents into court as an interpleader is far different from paying directly to a receiver who could use the funds (pursuant to court order) to maintain the property and pay expenses. Perhaps, since the court also will supervise the receivership, the court intended to release the funds from the interpleader account to permit their expenditure. Otherwise, it would appear that the Government's refusal to honor the receivership does put it adverse to the foreclosing Bank.

Comment 2: The editor sees no distinction based upon the fact that the Bank is not getting foreclosed. Assuming that the Government is senior to the mortgage, the Bank's rights would still include collecting the rents from the property under the assignment, as these are current receivables of the tenant and have been assigned for security under the Assignment.

MORTGAGES; FORECLOSURE; AVOIDANCE OF SALE: Where a foreclosure sale takes place after a mortgagor and a mortgagee have entered into a forbearance agreement and have agreed to set aside any foreclosure sale, the wrongful foreclosure sale should be set aside and the down payment returned to the successful bidder. ***Wells Fargo Bank Minnesota, N.A. v. Ray, 880 N.Y.S.2d 454 (Sup. 2009).***

The New York Supreme Court (the "Court") entered a judgement on June 7, 2005 to foreclose a mortgage encumbering real property (the "Property") belonging to the defendant ("Mortgagor") and scheduled a foreclosure sale for April 17, 2008.

On April 16, 2008, Mortgagor paid the plaintiff, its mortgage lender ("Mortgagee"), $4,000.00 and was told by Mortgagee that the foreclosure sale would be cancelled and that a forbearance agreement would be prepared whereby Mortgagor would be given the opportunity to pay the arrears owing under her mortgage.

The following day, the Property was nevertheless sold in a foreclosure sale to the successful bidder (the "Successful Bidder") for a price that was below the appraised value of the Property, and a down payment was tendered by the Successful Bidder to the referee (the "Referee").

The Court found that although Mortgagor did not follow the redemption procedures mandated by Section 1341 of New York Real Property Actions and Proceedings Law, other factors in the case compelled the Court to set aside the foreclosure sale. The Court cited *Guardian Loan Co. Inc. v. Early*, 47 N.Y.2d (1979), where the mere inadequacy of the purchase price did not furnish sufficient grounds for vacating a foreclosure sale, but relief could be granted by a court where one of the categories integral to the invocation of equity, such as mistake, was shown. In this case, the Court noted that in addition to the fact that Mortgagee agreed to enter into a forbearance agreement with Mortgagor (which agreement Mortgagor relied upon) and to accept payment from Mortgagor (which payment Mortgagee did accept),

(i) Mortgagee mistakenly failed to notify the Referee that it had accepted payment from Mortgagor and (ii) Mortgagor had notified the Successful Bidder of her arrangement with Mortgagee on the day of the foreclosure sale.

In vacating the foreclosure sale and directing the return of the down payment to the Successful Bidder, the Court also noted that "[a]t a time when homeowners are struggling to keep their homes without the financial means to do so, this homeowner was able to tender the money, without a bailout, to save her home... [I]f ever there was a case for equity, this is it."

Comment: Note that there was no bona fide purchaser relying on the foreclosure because mortgagor herself had informed the bidder that a deal had been made. It's not clear whether she would have won notwithstanding this information, but it certainly was in her interest to be proactive in this way.

MORTGAGES; FORECLOSURE; LIABILITY OF FORECLOSING LENDER FOR TITLE DEFECTS: A third party purchaser has no claim for damages against foreclosing lender where lender had failed to provide for naming of junior lienholders as parties defendant, leaving their liens still attached to title. ***First National Bank and Trust in Larned v. Wetzel, 219 P. 3d 819 (Ka. App. 2009).***

Bank brought a judicial foreclosure action to sell at foreclosure three parcels owned by Debtor. Buyers purchased on of the three parcels at foreclosure sale for $200,000. Bank purchased the other two parcels. Subsequent to the sheriff's sale, it was discovered that several judgement lienholders were not named as parties defendant at the sale.

Debtor (yes, Debtor) brought an action to set aside the foreclosure judgment and sale. Buyers were named as parties defendant to this action. A review of the case and the briefs does not indicate why the Debtor filed this motion. The court granted limited relief in that it refused to set aside the foreclosure judgement or order of sale but did set aside the sheriff's sale itself. This apparently would permit a new foreclosure in which the unnamed junior lienholders could be named. Apparently neither Bank nor Buyers opposed this relief. Apparently the presence of the unnamed junior lienholders was the cause of the Debtor's request for relief.

Buyers noted that Bank had included in the foreclosure judgment "expenses for title examination"and they argued, therefore, that they had been misled into believing that the Bank had actually checked the title and named all judgment lienholders. They therefore sought over $3000 in damages – interest on the loan that they had taken out to acquire the property. The trial court awarded these damages and Bank appealed.

Held: Buyers were proper parties to the motion to set aside the foreclosure, and therefore could crosscomplain for the damages, but they were not entitled to a damage claim here because they were responsible for doing their own title check, and thus caused their own damages.

The court noted first that a foreclosure deed is a quitclaim deed, and that in Kansas persons taking a quitclaim have a duty to search the title for themselves. Further, all parties taking title are on constructive notice of public records.

Comment 1: Perhaps the unnamed juniors were potential bidders for the property, and that is why the Debtor sought a new sale. Except for this remote possibility, it is a puzzle to the editor what benefit the Debtor obtained by setting aside the sale. The Editor should note that the Buyers and the Debtor were both named Wetzel, so perhaps this was a "bail out" of a relative at the initial foreclosure, and the Debtor did not want his relatives or himself stuck with property still subject to judgment liens against Debtor.

Comment 2: The primary reason the Editor chose this case to report was the clear language that the foreclosure purchase is responsible for checking the title for itself in order to ascertain whether juniors have been named. Although there may be procedures for reforeclosing against unnamed juniors in certain circumstances, that might have been cumbersome here with parcels selling at foreclosure to different parties.

MORTGAGES; FORECLOSURE; SALE; RESCISSION: While a corrective deed may not be used to convey additional, separate properties erroneously excluded from an original trustee's deed in a foreclosure sale, courts may consider extrinsic evidence to rescind the conveyance on the basis of mutual mistake if enforcement of the original conveyance would result in a windfall to the mortgagor not contemplated by the parties. ***Myrad Properties, Inc. v. LaSalle Bank***

National Association, ___ S.W.3d, 2009 Westlaw 4877733 (Tex. 2009).

Myrad Properties, Inc. ("Myrad") financed two apartment complexes for $1.05 million. When it obtained the loan, Myrad executed one promissory note in favor of LaSalle Bank National Association's predecessor ("Lender"), which was secured by a deed of trust covering both properties. The deed of trust provided that upon default, Lender could sell the property through non-judicial foreclosure. After Myrad defaulted, LaSalle (as Lender's successor) directed the designated trustees to foreclose. In accordance with Texas law, the trustees posted notice of the sale. However, the property description in the exhibit to the notice only referenced one of the two properties described in the deed of trust.

At the auction, the trustees read only the legal description for the property referenced in the notice (the "Casa Grande Property"), but unspecifically referred to the other property described in the deed of trust. LaSalle made the sole bid of $978,000, and the trustees issued a deed to LaSalle in which the "property" was defined as "the real property described in Exhibit A," which again included only the Casa Grande Property. LaSalle recorded the trustee's deed.

After LaSalle discovered the error and attempted to file a correction deed, Myrad sought a temporary restraining order to prohibit the filing. After a hearing, the district court dissolved an initial order and LaSalle filed the correction deed. Myrad then brought a quiet title action, asking the court to declare that LaSalle owned only the Casa Grande Property, and that Myrad owned the other property free and clear. In response, LaSalle sought a declaration that it held title to both properties, or in the alternative, sought rescission of the trustees' conveyance to LaSalle. The trial court granted final judgment to LaSalle on the issue of property ownership, declaring that the sale resulted in the conveyance of both properties to LaSalle. The court of appeals affirmed the relevant portion of the trial court's judgment.

On the resulting appeal, the Texas Supreme Court first discussed the circumstances in which correction deeds are typically allowed under Texas law, such as to correct facial defects or imperfections in the title. For instance, Texas courts have allowed the use of correction deeds to correct (1) an improper acreage description, (2) an inaccurate metes and bounds description, and (3) a defective description of the grantor's capacity.

The court distinguished those situations from situations where the use of a correction deed would be inappropriate. The latter situations mentioned by the court included the use of correction deeds to (1) convey an additional, separate parcel of land, (2) convey a mineral interest in an additional tract from a separate survey where the first deed mistakenly conveyed only an interest in a separate tract, (3) release and convey additional lots not covered by a vendor's lien, and (4) change the fractional interest of a mineral estate or change a mineral interest to a royalty interest.

When analyzing these cases in the context of the facts in the subject case, the court expressed concern about using correction deeds to convey additional, separate properties not described in the original deeds, noting that doing so "would introduce unwarranted and unnecessary confusion, distrust, and expense into the Texas real property records system." Specifically, "it could require those who must rely on such records to look beyond the deed and research the circumstances of ownership to make sure that no conveyance mistake such as [the one in the subject case] was made, undermining the entire purpose of record notice."

Accordingly, the court held that the correction deed purporting to convey both properties was void as a matter of law. However, with respect to LaSalle's other argument that the conveyance should be rescinded on the basis of mistake, the court was more receptive. Courts "may consider extrinsic evidence of intent [when] determining whether to enforce a deed," and when that extrinsic evidence discloses that the parties to an agreement "have contracted under a misconception or ignorance of a material fact, the agreement will be voided."

When courts decide whether mutual mistake exists, they employ an objective standard. Here, the court was not "blind to the equities of [the] dispute," and recognized that the enforcement of the original trustees' deed would result in a windfall to Myrad. "While a correction deed may not be used to correct a mistake of omitting an entire second property …, all the evidence indicates a mutual mistake in the [trustees'] deed, contrary to the clear intent of the grantor and grantee.

Comment: This is not an unusual problem, but the editor was surprised at the outcome reached below, which found that a sale of one property resulted in a deed for two. The rescission mechanism makes a lot more sense, although one can expect that occasionally the court will look skeptically at evidence of mistake when a bank sells to itself. But we know that banks have made a few mistakes lately, and probably will again.

MORTGAGES; FRAUD; DUTY OF DUE DILIGENCE: Notwithstanding fraud by the purported agent of the a Principal owner of real estate, a mortgagee deceived by such fraud cannot collect on the mortgage because it is the responsibility of a mortgagee to perform due diligence on mortgage transactions into which the mortgagee enters. ***ER Holdings, LLC v. 122 W.P.R. Corp, 887 N.Y.S.2d 138 (N.Y. App. Div. 2009).***

The alleged agent (the "Agent") of a principal (the "Principal") represented himself as the sole shareholder of the Principal to a lender (the "Mortgagee") and consequently provided two mortgages to the Mortgagee as security for two loans. The Agent then defaulted on the loans and the Mortgagee brought suit to foreclose the mortgages. The trial court denied the Mortgagee's motion for summary judgment and granted the Principal's motion for summary judgment dismissing the case on the grounds that the Agent's daughter was the Principal's sole shareholder and therefore lacked apparent authority to bind the Principal to the mortgages.

The appellate court affirmed on the basis that a principal must communicate words or conduct to a third party in order to create apparent authority in an agent and one who deals with an agent must perform due diligence to determine the actual scope of authority of the agent. Accordingly, the court held: (i) that the trial court properly determined that the Mortgagee failed to identify any conduct or words by which the principal conferred apparent authority on the agent and (ii) the Mortgagee failed to make a prima facie showing that it had conducted due diligence, as the Mortgagee did not investigate any of the Agent's claims regarding his ownership of the Principal.

Comment: It all flows well in light of the fact that a father was defrauding a daughter. But where did this "duty of due diligence" come from? Isn't it simpler to say that apparent authority requires reasonable notice of the Principal's acquiescence? Maybe it's all the same thing.

MORTGAGES; MERGER; UNNAMED JUNIOR LIENHOLDERS: If given opportunity to redeem foreclosed property junior lienholders were to pay full mortgage. ***Deutsche Bank Nat. Trust Co. v. Mark Dill Plumbing Co., 908 N.E.2d 1273 (Ind.App.).***

This decision clarifies and earlier decision of the same court that sets forth the relevant facts. Lender brought a judicial foreclosure of certain property that was subject to recorded junior liens. Lender did not actually knowledge of these liens and did not name them as parties defendant and join them in the foreclosure (the court does not tell us the reason that Lender was not aware of the liens – there are plenty of possibilities.)

After foreclosing on mortgage, the mortgagee filed an action to remove the junior liens on title to property. The court affirmed the denial of this motion in the first iteration of this case, and indicated that the unforeclosed but recorded junior lienholders had a right to redeem. Mortgagee brought this request for clarification and asked the court to delineate for the trial court the exact order of priority for payment amongst the parties on remand and explain to the trial court that it can order the junior lienholders to redeem the property from mortgagee rather than order a second sheriff's sale of the property.

Essentially, the first case had established that the foreclosure title had not merged with the foreclosing mortgage to extinguish the lien of that mortgage as against the unforeclosed juniors. The court noted that the benefit of the "anti-merger" rule is meant to protect the mortgagee's priority. The rule allows the mortgagee to prevent junior lienholders from stepping up in priority, foreclosing, and reducing the mortgagee's recovery because it bars all but the mortgagee from re-foreclosing or reselling the property, and guarantees the mortgagee's priority in any proceeds.

The court stated that although in this case there was no clear evidence that the mortgagee intended for there to be no merger. But purchase of the property at auction infers that the mortgagee intended to do so by preventing the property from being purchased at below market value.

What is the consequence for the junior lienholders? The Court of Appeals indicated that on remand, the trial court is to determine whether to order another sheriff's sale (in which the juniors definitely will be named, and given the opportunity ti exercise their equity of redemption by paying off the senior's claim), or provide what is known as a "strict foreclosure," – simply give the juniors an equitable period during which they can redeem the property from the mortgagee – again by paying the full amount payable on the mortgage, and not the foreclosure sale price or property value. mortgagee's title to the property. Either remedy protects the equity of redemption that the juniors did not get in the first foreclosure sale. The second remedy does not expose the property to a public auction, since the only parties who have a legitimate remedy are the junior lienholders.

Editor's Comment: 1 This is pretty much the standard procedure in this situation, although some courts will simply reinstate the senior lien as against the juniors and let the parties deal with the situation as they desire. Typically the senior will in fact reforeclose. Yes, this is a foreclosure in effect, against itself as the owner, but the real target of the foreclosure is the juniors.

Some scholars have argued that even if the senior had not particular reason for omitting the juniors from the sale, the senior should have this remedy, since any other result would be inequitable to the mortgagee. They argue, properly, that the extinguishment of the senior lien through merger should not occur to the disadvantage of the party in whom merger would occur.

To the editor, if the mortgagee deliberately omitted the juniors, the senior did not follow proper procedure and comes to court with "unclean hands." The editor would not permit reinstatement and avoidance of merger without an "equitable excuse."

Editor's Comment 2: The same result applies even if the senior lien has already been formally released and discharged, so long as the juniors in question existed at the time of the first foreclosure.

Editor's Comment 3: A similar rule has been applied in cases of deeds in lieu of foreclosure where the mortgagee acquires title from the defaulted mortgagor and then recorded junior liens appear, now apparently senior to the title acquired by the mortgagee. If the mortgagee can argue that there is no merger versus these junior interests, the mortgagee may reforeclose them. No less an authority than Jack Murray has argued, with cases supporting his argument, that the mortgagee taking the deed in lieu can protect himself from merger vs. these junior lienholders by "non merger" language in the original deal by which the deed in lieu is carried out. The editor has cavilled and argued with Jack on this, but admits that now he is "purt near convinced."

Editor's Comment 4: Note that even in judicial foreclosure states that have statutory redemption rights the unforeclosed juniors must pay the full mortgage claim. They are not "redemptioners" because they were not parties to the original foreclosure.

MORTGAGES; PREDATORY LENDING; HOEPA: Payment of prepayment and settlement costs to dispose of preexisting loans cannot be included in interest rate computation to trigger duties of lenders under HOEPA. ***Holbert v. Fremont Inv. & Loan, 179 CA4th 1067 (2009).***

Holbert sued her lender, then Fremont Investment Loan, and her loan broker, Samantha Pham, owner of California Real Estate Investments & Loans, Inc. (CREIL), for violation of the federal Truth in Lending Act (TILA) (15 USC §§1601-1693r), as amended by the Home Ownership and Equity Protection Act of 1994 (HOEPA) (15 USC §§1602(aa), 1639).

The trial court found that HOEPA was inapplicable and granted summary judgment for Fremont on the several claims based on HOEPA. Holbert obtained terminating sanctions against Pham and CREIL and, after entering their defaults, obtained a judgment against them. In December 2007, the trial court entered judgment of dismissal in favor of Fremont. The court of appeal affirmed in an opinion certified for publication as to Part II concerning the HOEPA claims.

Between her husband's death in 2003 and February 2005, Holbert refinanced her home loan three times to pay off the prior loans, other debts that had accrued since the last refinance, and the fees and charges of the new loan. The first refinancing was with Ameriquest in 2003; the second with World Savings in June 2004; and the third with New Century Mortgage in February 2005. Holbert's monthly payment on the New Century loan was $943.50. In 2005, Holbert was over age 65, unemployed (though previously certified as a notary), and living on Social Security benefits of $1137 per month. Having decided that she could not afford the monthly payment, Holbert listed her home for sale in June 2005.

On June 7, 2005, Holbert informed an employee of CREIL of her fixed income and that Holbert was interested in refinancing only if it would reduce the monthly payment pending the sale of Holbert's home. On July 1, 2005, Holbert informed Pham of Holbert's current monthly payment, fixed income, and need for a single payment including taxes and insurance.

Pham assured Holbert that the Fremont loan application and documents would be consistent with the information provided to CREIL by Holbert, that the loan proceeds could be used to make monthly payments on the loan pending sale, and that Pham would assist Holbert in selling the refinanced home. The loan application submitted by Pham listed the value of Holbert's home as $265,000 and represented Holbert's monthly income as including $4800 per month as a self-employed notary. (!!!!)

The Fremont loan documents provided for a $265,000 loan, listed the debts to be paid, including $4528.80 owed to Wells Fargo Bank, and disclosed a penalty for prepayment of the New Century Loan. The monthly payment on the Fremont loan was over $1900, taxes and insurance were not included, and the loan included a penalty for prepayment within two years. Holbert was unsuccessful in selling the house and Pham provided no assistance. Fremont refused to waive the prepayment penalty and refused to consider a short sale. Most of the loan proceeds were used to make monthly payments to Fremont.

Holbert argued that the costs of paying the "Wells Fargo Loan, New Century prepayment penalty, and the notary fee paid to Pham were finance charges associated with the Fremont loan, that those charges brought the total finance charges above the 8-percent threshold triggering application of the HOEPA disclosures, and that Fremont had failed to supply the required disclosures.

The court of appeal concluded that the charges could not be included in the total costs and fees for the Fremont loan. The payment of the preexisting Wells Fargo loan could not be included because it did not constitute the creation of a new financial obligation. The prepayment penalty imposed by New Century was a charge associated with the New Century loan, not the Fremont loan. The $300 notary fee paid to Pham could be excluded if reasonable and not paid to the lender or an affiliate. However, the facts regarding the notary fee did not need to be determined; if included, the notary fee alone would not cause the finance charges to reach the 8-percent HOEPA threshold. Therefore, the claims based on HOEPA failed.

The court also concluded that, to the extent Holbert relied on misrepresentations in agreeing to the Fremont loan, the misrepresentations were made by Pham and CREIL and not by Fremont.

Reporter's Comment: The legal issues covered in this case are less interesting than some of the facts that generated them. Before 2003, Holbert 's house was subject to a deed of trust in the amount of $121,250 (a fact not stated in the opinion but mentioned in Fremont's brief). In 2003, she refinanced that loan with a new loan from Ameriquest for $144,500; in 2004, she refinanced with a loan from World Savings for $153,750; in 2005, she refinanced with a loan from New Century for $204,000; and then, finally (?) in 2006, she refinanced with a loan from Fremont for $265,000. (All numbers have been rounded by me.)

Along the way, it appears that Holbert paid over $30,000 in loan fees for those refinancings, the final charges being the foundation of her claims for Truth-in-Lending Act and Home Ownership and Equity Protection Act (HOEPA) violations (as well as Fin C §4973, unfair business practices, and elder abuse). If all of the previous refinancings had been done by one lender, their cumulative impact might well have been great enough to support those claims, but since the challenge went only to the particular charges imposed by Fremont – her last lender – the fact that that involved paying off some of her different previous lenders meant that they were not the sort of items included in a HOEPA calculation, with the result that Fremont's loan did not come under its statutory prohibitions and requirements. So, she may have paid too much, but her treatment was not predatory.

Holbert's loan history is interesting and instructive, whether or not it was predatory. If her mortgage balance started at around $121,000 and ended at $265,000, her debt burden ballooned by about $144,000 during her four years of refinancing. According to the opinion, she received from these refinancings, respectively, $18,000, $5000, $6000, and $31,000-about $60,000 in cash. (Fremont's brief says that she also had obligations to other unsecured creditors of $32,000 that were paid off, making for a total of over $90,000 of income to her.)

Holbert's loan fees of $30,000-$40,000 were surely high, but all of those fees were paid not out of her pre-loan pocketbook, but rather out of loan proceeds that came from her lenders. That amount would be too high if she herself had to pay them back, but what if she doesn't have to do so?

Holbert's brief declared that her house had a value of only $240,000 at the time of the final refinance with Fremont, making it worth considerably less (by $25,000) than what she then owed on that mortgage. If that number is accurate, then Holbert had no equity in the property that she will lose on foreclosure. True, Fremont may have a technical possibility of obtaining a deficiency judgment, but that is not a realistic possibility. Even assuming that a refinance eliminates the ability of a borrower to defend on §580b purchase-money antideficiency grounds (a possibility I do not consider as well-settled as most lenders hope), it is still unlikely that a rational lender would want to go through the hoops of a judicial foreclosure action and the uncertainties of a fair value hearing (especially considering that someone thought the property was worth the amount of the loan just a short while earlier) just to obtain a small money judgment against a widow with no outside wealth and living on Social Security. So, Holbert may lose her house, but that is probably the total extent of her loss. I am not sure that this was such a bad deal for her.

Indeed, if Holbert had gone to a loan modification counselor three years earlier, she might have been advised to follow a strategy not that different from what she did end up doing-i.e., pulling as much equity out of the property as possible, while she could, and then just walking away at the end. Lawyers might feel uneasy in telling debtors to do that, but we all know that such advice is often given. When there is equity in the house but insufficient income to continue servicing the mortgage, and both sales and property values are declining, no choices are very appealing.

To all this, it should be added that the opinion does not say what has been happening to Holbert's mortgage while the lawsuit has been going on. There is no mention of any foreclosure proceeding being prosecuted by the lender, and it is unlikely that Holbert has been paying her mortgage while she was litigating over it. I doubt that any loan counselor would advise Holbert to continue paying off a $265,000 mortgage on a $225,000 house, regardless of the predatory lending issues. Given those numbers, a debtor would be better off financially by moving out and getting into a rental (or a lower-priced purchase) that her monthly income can handle. There is, no doubt, the embarrassment and perceived immorality of not paying one's debts, but the cost of preserving a reputation may be too high.

MORTGAGES; USURY: State usury law is not preempted by the federal Depository Institutions Deregulation and Monetary Control Act of 1980 if the lender of the loan in question does not directly make or invest in residential real estate loans aggregating more than $1,000,000.00 annually, even if subsidiaries of the lender satisfy this requirement. ***JPMorgan Chase Bank, N.A. v. Malarkey, 884 N.Y.S.2d 787 (A.D. 3 Dept. 2009).***

The Court found that Lender did not make or invest in the requisite amount of real estate loans for the Loan to qualify as a "federally related mortgage loan." In reaching this conclusion, the Court refused to consider the residential real estate loans that were originated by the Lender's subsidiaries and satisfied this requirement, in the absence of any indication that Lender invested in the mortgage assets of its subsidiaries or had another right to claim such assets as its own. The Court stated that it found "no reason to depart from 'the general rule in this [s]tate that in no legal sense can... the business of a subsidiary corporation be said to be that of a parent.'"

NUISANCE. Farm business owner operated his furnace to dry mycelium in manner that constituted nuisance. ***Bonewitz v. Parker, 912 N.E.2d 378, (Ind.App. 2009).***

Farm business owner obtained variance to operate furnace used to dry mycelium. Neighbors of farm business owner alleged that wet mycelium that sat in sun emitted stench that permeated neighbors' home and clung to fabrics, that sawdust used to heat dryer blew onto neighbor's property, that vibrations from operation of dryer caused neighbors' house to shake, that trucks came and went everyday and at all hours of night, and that neighbors avoided having to go outside, kept windows closed, and did not have unrestricted use of their yard or swimming pool.

Neighbors brought action to abate nuisance caused by owner's operation of furnace, and sought permanent total injunction, or in alternative, award of money damages. The trial court found that "improvements" farm owner made to the operation "greatly reduced" the adverse effect of farm owner's mycelium-drying business on the home, and the court declined to enter a total permanent injunction against the business or damages.

The Court of Appeals reversed, holding that (1) owner operated his furnace to dry mycelium in manner that constituted nuisance, and (2) injunction would issue to enjoin farm business owner from operating furnace to dry mycelium if trial court found that neighbors affected by nuisance could not be made whole by award for money damages.

Indiana Code Section 32-30-6-6 defines a nuisance as whatever is injurious to health, indecent, offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property. The Court of Appeals noted that when deciding whether one's use of his property is a nuisance to his neighbors, it is necessary to balance the competing interests of the landowners, invoking a common sense approach. Thus, "reasonable use" of one's property may be a defense to a nuisance action where the use merely causes incidental injury to another.

Where, however, one uses his property for his profit so as to practically confiscate or destroy his neighbor's property he should be compelled to respond in damages, for it can hardly be said such use is reasonable. Whether one's use of property is reasonable is determined by the effect such use has on neighboring property. Liability is imposed in those cases where the harm or risk thereto is greater than the owner of such property should be required to bear under the circumstances.

The mere fact a business is operated in accord with various rules and regulations does not require a finding the use is reasonable. A lawful business may be of such a nature, so situated, or so conducted as to constitute or become a nuisance. Here, the Court of Appeals determined that the neighbors suffered a number of unreasonable infringements on the use and enjoyment of their property as a result of farm business owner's business, citing uncontradicted evidence that offensive odors enveloped and permeated the neighbors' home.

Regarding damages, the Court of Appeals noted that injunctive relief is available only if the remedy at law is inadequate. To decide whether there is an adequate remedy at law, the Court of Appeals charged the trial court with determining whether the legal remedy is as full and adequate as an equitable remedy.

Editor's Comment: Most of this is hornbook law, and not surprising to our readers. But it is worth making the points that: (1) even an activity that received sanction from the zoning board through a variance can be a nuisance; (2) operation of a business in accordance with all applicable rules and regulations to not protect it from being a nuisance; (3) If one's activity is "noxious" – that's a hard burden to overcome; (4) courts increasingly are tilting toward looking for a damages remedy before automatically issuing an injunction, as might have been the case in the past.

OPTIONS; RIGHTS OF REFUSAL; SCOPE OF RIGHT: Despite rule that an optionee under a right of first refusal may not tender to the optionor an offer to purchase more than the subject property, thereby frustrating optionor's rights, a Texas Appeals court has held that a party with land subject to a right of refusal may tender to the optionee and offer to acquire all of the personal property on the land *and the personal and real propeerty owned by optionor at another location* as a condition of exercising its rights, even though the likely value of the property subject to the right is only about 7.6% of the overall price being demanded. ***FWT, Inc. v. Haskin Wallace Mason Property Management, L.L.P. , 2009 WL 4114140 (Tex. App. 11/25/2009) (on rehearing), petition for appeal filed 1/10/10.***

A petition for appeal has been filed in this case and the editor believes, if there is integrity in the Texas legal system, this petition will be granted and the case reversed. But it is so amazing that a panel of the Texas Court of Appeals would rule as it did that the editor notes the case anyway.

FWT owned a vacant six acre parcel that it sold to HWM. The transaction included a right of first refusal in FWT, stating:

> "In the event Grantee desires to sell, leaese or otherwise convey all or any part of the Property and shall have a bona fide offer from a third party … then Grantee shall furnish to Grantor written notice of the name of the prospective purchase and the terms and conditions of such offer.… Grantor shall have 20 days after receipt of the notice in which to elect to purchase, lease

> or otherwise accept such conveyance … at the same price and under the same terms and conditions offered by the prospective purchaser."

HWM owned and operated a galvanizing plant through a corporate subsidiary in another city. It proceeded to install a galvanizing plant on the subject parcel as well, owned and operated by another subsidiary. Apparently the galvanizing plant and equipment consisted primarily of removable personal property.

Subsequently, another company submitted an offer to buy HWM's personal property assets in both cities, acquire title to the land in the other location, and to lease, with option to buy, the Subject Property that was the subject of the right of first refusal. The total consideration (other than lease payments) that was to pass in cash to HWM was $16,500,000, with an additional $2.5 million if the lease option were later exercised.

HWM submitted this offer to FWT and argued that the"conditions" that the Buyer had placed upon its offer to lease/option the Subject property were not made for the purpose of frustrating FWT's right of refusal (HWM argued that it expected FWT to waive that right for other reasons) and that the terms were commercially reasonable (the court doesn't tell us why a requirement that two plants pass in same transaction is commercially reasonable. Consequently, the court upheld a grant of summary judgment to HWM that FWT would lose its right of first refusal unless it came up with the total of over $19,000,000 (including the option price) to acquire these facilities.

The court invoked what appears to be a narrow and little used exception to the general rule that an optionor cannot eliminate a right of first refusal by agreeing to sell more than the property occupied by that right. The exception states that if the conditions imposed on the sale to the third party are not made to frustrate the refusal right, made in good faith, and commercially reasonable, the optionee must meet those conditions. But the precedent cases cited by the court are nothing like this case. In one precedent case, the condition was that the FTC approve the transfer of an oil pipeline right. In another, the conditions were granting a buyer's commission and including one-year employment rights for certain key employees of an optician's office. In both cases, of course, the basic substance of the sale tendered to the holder of the refusal right was the same asset that the optionee had bargained over. But in the instant case, it would appear, the property subject to a right of refusal is only a small portion of a huge and expensive business acquisition.

Comment 1: All prior postings on DIRT on this subject reiterate the rule that one can't "oversell" property subject to a right of refusal. The extensive case law cited in Friedman on Leases (Randolph Edition) at Section 15.6 is also consistent with this concept.

Comment 2: It seems that the Texas court has permitted the exception to swallow the rule. Although many deals involving property subject to a right of refusal combined with other property might make economic sense, this doesn't mean that the right should be "sold out" to permit these deals to go ahead. The mere fact that an outside offer is in good faith and not made to frustrate the refusal rights also are beside the point. The first question we must ask is whether the optionee has a reasonable opportunity to match the offer on the property that was the subject of the right.

RECORDING ACTS; SALE AGREEMENTS: If a recorded purchase contract calls for the seller to grant an easement to the buyer, it doesn't matter that the deed makes no reference to the easement and the general appurtenance clause in subsequent deeds is sufficient to convey the easement to subsequent purchasers of the dominant estate. ***Franklin Park Plaza, LLC v. V & J National Enterprises, LLC, 870 N.Y.S.2d 193 (App. Div. 2008)***, discussed under the heading: "Easements; Recording Acts."

RULE AGAINST PERPETUITIES; LEASE RENEWALS: The exception to the Rule Against Perpetuities for options that are "appurtenant" to a lease does not apply to renewal options that are exercisable after expiration of the lease term during the month-to-month tenancy created by a holdover provision in the lease. ***Bleecker Street Tenants v. Bleeker Jones, 882 N.Y.S.2d 42 (A.D. 1 Dept. 2009),*** dicussed under heading: "Landlord Tenant; options; rule against perpetuities."

SERVITUDES; ARCHITECTURAL CONTROLS; DEMOLITION. Where a restrictive covenant requires homeowners association approval of changes or alterations to buildings in a development, such approval is not required for a homeowner to demolish the homeowner's house where no replacement structure is planned. ***Service Corp. of Westover Hills v. Guzzetta, 2009 Del. LEXIS 221 (Del. Ch. Dec. 22, 2009).***

Owners owned two adjacent lots, each containing a single family home, in a development. They Owners, who initially owned one lot containing a house in the development, purchased the adjacent lot for the purpose of demolishing the house on the adjacent lot in order to create a field on which their children could play. Association was a homeowners association formed to regulate certain activities in the development. Pursuant to a deed restriction, each lot owner in the development was to be a member of the Association and bound by its rules and regulations. One such regulation stated that no building or structure could be commenced, erected, or maintained, nor any change or alteration be made thereto, until plans and specifications, showing the nature, kind, shape, height, materials, floor plans, location, frontage, and approximate cost of such structure, were approved by the Association.

The Association, arguing that such regulation required the Owners to obtain the Association's approval before demolishing the house, brought an action against the Owners to enjoin the Owners from their planned demolition.

The Court first noted that the first clause of the regulation, covering structures to be "commenced, erected, or maintained," did not apply to the complete demolition of a house. The Court then found that although a "change or alteration" to a structure referred to in the second clause could be read to cover the complete demolition of a house, that clause must be read in conjunction with the third clause of the regulation, which referred to the "nature, kind, shape, height, materials ..., location ... and approximate cost *of such structure*" (emphasis in original).

The Court noted that a complete demolition to create a grassy field would result in a change that had no height, shape, materials, floor plans, location or frontage. The Court observed that a grassy field may have a "nature," "kind," and "cost," but the regulation required that those factors be described as they apply to "such structure," and a grassy field is not a structure.

The Court therefore held that, read together, the second and third clauses of the regulation apply only to changes to an existing structure where some structure will remain afterward. The Court further noted that even if the relevant regulation could be found to apply to the Owners' proposed demolition, all of that regulation's criteria for the Association's consideration of the plans and specifications, except for the consideration of "aesthetic and other reasons," referred only to structural criteria.

Because courts have voided restrictive covenants that allowed building plans to be rejected for purely aesthetic reasons as unreasonable, the Court found that the Association's decision to deny the Owners' demolition based upon the only available criteria, "aesthetic and other reasons," would have been arbitrary. Accordingly, the Court held that the deed restriction did not give the Association approval authority over the complete demolition of a house where no replacement structure of any kind was planned.

Comment: Certainly one aspect of the case wort noting is the court's joining the group of jurisdictions that deny associations the right to regulate aesthetics. The editor does not believe that this is the universal view, but it seems to be the Delaware rule.

SLANDER OF TITLE; ATTORNEYS' FEES: Attorney's fees and other legal expenses incurred in clearing a disparaged title are recoverable as special damages in slander of title actions (first impression in Missouri). ***Lau v. Pugh, 299 S.W.3d 740 (Mo. Ct. App. 2009).***

Pughs and Laus were neighboring landowners. The Pughs and Laus were friendly toward each other until approximately May 2006, when the Laus hired Wayne Davis to cut down trees for the purpose of selling the trunks. Davis cut down the trees and placed the remaining leaves and limbs into an existing brush pile located near the boundary line. Prior to that point, the Pughs and Laus had not established the exact location on the boundary line, but had agreed not to damage the property in that area. After Mrs. Lau informed Mrs. Pugh that the brush pile may not be located on the Pughs' property, the Pughs demanded that the Laus move the pile. The parties met at the brush pile in June 2006 and had a heated dispute regarding the pile and boundary line. The Laus' eventually hired Wetstein to move the brush pile to their property and place a line of logs along what they believed to be the boundary line.

Disagreements about the boundary continued until Laus had a survey done, showing that they had misunderstood the boundary some during the earlier dispute.

Pughs then fired another salvo – an invoice and mechanic's lien claim for work in removing three trees on Laus' land prior to any other of the above difficulties. Laus claimed that this work, at the time, was simple "neighborly accommodation" and that there had been no discussion or expectation of remuneration.

Laus filed a petition against the Pughs, requesting a declaratory judgment that the Pughs' purported mechanics lien was invalid and asserting an action for slander of title against the Pughs for "maliciously" and "without justification" filing the mechanics lien. The trial court held in favor of the Laus on both counts and ordered the Pughs to pay the Laus $1,814.67 plus court costs. The Pughs appealed, advancing arguments on several issues.

On appeal, the relevant issue of first impression addressed by the Missouri Court of Appeals was "whether attorney's fees incurred in a slander of title action are recoverable as damages." The court began its analysis by setting forth the following requirements plaintiffs must meet in order to establish a claim for slander of title in Missouri: (1) that the plaintiff has an interest in the property; (2) that words were published which were false; (3) that such words were maliciously published; and (4) that the plaintiff suffered pecuniary loss or injury as a result of the false statement. The court also noted that Missouri recognizes a claim for "injurious falsehood" if the plaintiff establishes proof of pecuniary loss as an element of its damage claim.

After discussing damages available in "injurious falsehood" cases, the court addressed the specific issue in the case by highlighting the holdings of the "clear majority" of other jurisdictions. Specifically, it stated that "attorney's fees expended in an effort to clear a disparaged title are recoverable as special damages in a slander of title action" (citing cases from the Washington Supreme Court, Utah Court of Appeals, New Mexico Court of Appeals, Minnesota Supreme Court and Michigan Supreme Court). After a brief analysis of these cases, the court affirmed the trial court's judgment, holding that "there seems to be no sound reason based upon either precedent or policy why Missouri should not adopt the majority view … that attorney fees and other legal expenses incurred in clearing a disparaged title are recoverable as special damages in slander of title actions."

Comment: Veteran lawyers well know the thornbush that is a slander of title action and usually steer their clients away from any tactic in a property dispute that may give rise to such an action. "Newbies" wanting to please their clients with an aggressive first move in court should take note. Slander of title is not a consequence worth inviting. Here, one hopes that the Pughs were not represented at all when they filed their mechanic's lien claim. The claim related to Mr. Pugh's apparently voluntary assistance in cutting down three trees at a time prior to the later controversy. Mr. Pugh, after that controversy, did send an invoice for the work, but the evidence showed that there had been no expectation of remuneration at the time the work was done.

STATE AND LOCAL TAXATION; LEASES: A tenant with a long term lease who bears the burden of paying the entire tax obligation assessed against a property may have the right to control the tax appeal process and receive any resulting benefits if the lease doesn't specify otherwise and doing so actually represents the property interests to a greater degree than would be the case if the landlord controlled the tax appeal process. ***Aperion Enterprises, Inc. v. Borough of Fair Lawn, 25 N.J. Tax 70 (2009); July 24, 2009.***

A landlord and its commercial tenant entered into a long-term "triple net" lease. The lease covered the entire property and contained one freestanding building occupied by the tenant. Pursuant to the terms of the lease, the tenant was obligated to pay the real estate taxes directly to the municipal tax collector for the entire property. The landlord, without its tenant's knowledge, filed tax appeals for a four-year period. The tenant sought to be joined as a party to the tax appeals. Both the landlord and tenant claimed that they were entitled to control the appeal, including the right to accept or reject any settlement offers made by the municipality. In addition, both the landlord and tenant claimed entitlement to any tax refunds if the tax assessments were reduced.

The Tax Court applied the factors set forth in *Village Supermarkets, Inc. v. Twp. of West Orange*, 106 N.J. 628 (1987) in determinating that the tenant, rather than the landlord, was entitled to control the appeal process. In analyzing whether a landlord or tenant should control the tax appeal process, a court must consider the following factors: (a) the provisions of the lease, such as its duration, the burden of the tax surcharge on the tenant, and the possibility that the issue can be resolved by renegotiation; (b) the tenant's relationship to the property such as whether it is the lease tenant in a shopping center or one only slightly affected by the tax assessment; (c) whether the tenant will adequately represent the interests of the landlord and other tenants, i.e., whether the tenant has interests adverse to either group; (d) the tenant's ability to mount and prosecute an effective appeal; and (e) the landlord's overall relationship with the taxing authority, such as whether the subject property is one or multiple properties for which the landlord may wish to pursue a tax appeal.

Here, the Tax Court found that the lease was silent as which party had the authority to pursue the appeal, but noted that tenant had a long term lease and bore the burden of paying the entire tax obligation assessed against the property. It also found that, as the sole tenant of the property and under a long term lease, the tenant was responsible for the entire tax burden and the landlord had almost no real interest in the assessment. The tenant was paying the taxes directly so the landlord really did not have any stake in whether the taxes were lowered or not. The Tax Court also found that the tenant had competent legal counsel and had the motivation to mount a successful tax appeal because it would receive reimbursement for overcharges if it succeeded. In addition, the landlord did not establish any special relationship with the municipal tax assessor nor did it show that it had other properties within the municipality for which it was contemplating a tax appeal.

Therefore, the tenant, not the landlord, was entitled to control the appeal process. However, the landlord was still entitled to notice of the proceedings as the record owner of the property.

In determining who was entitled to receive any reimbursement, the Tax Court found that since the lease required the tenant to pay the real property taxes directly to the tax collector in addition to paying its base rent, the tenant was entitled to any refund. If the landlord received the tax refund it would be receiving a windfall for which it was not entitled. Further, nothing in the lease stated that the landlord was entitled to refunds. Basically, the Tax Court refused to rewrite the lease for the landlord, noting that if the landlord wanted that benefit it should have drafted the lease to provide specifically that it would receive any tax refunds.

Editor's Comment: Clearly the basic question is whether the remaining term of the lease is such that any considerations of the landlord's interest are moot. Here the court determined that this was the case. Perhaps it should not be the case as the lease term continues. One more point that parties might consider when drafting the lease originally. "Value added."

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

STATUTE OF FRAUDS; LEASE SETTLEMENTS: The Statute of Frauds does not apply to the settlement of a lawsuit to collect damages in the form of rent due under a lease – the fact that the effect of the lawsuit may also result in the surrender of the lease does not draw the settlement into the Statute of Frauds. ***St. Louis Union Station, Inc., v. The Discovery Channel, Inc., 2009 Westlaw 4823866 (Mo. App. 12/15/09)***, discussed under the heading: "Landlord Tenant; Landlord's Remedies; Settlement; Statute of Frauds."

STATUTES OF LIMITATIONS; BOUNDARIES: When removal of an encroachment is barred by statute and is not within the court's discretion, a notice of pendency on the encroaching property will remain until an action for damages caused by the encroachment is completed if there is a potential transfer of title to the property if damages are awarded. ***Chi Wei Chan v. 2368 West 12th Street LLC, 884 N.Y.S.2d 834 (Sup. 2009).***

In March 2007, plaintiff landowners ("Plaintiffs") returned home from a vacation abroad to find that a brick wall, (the "Wall") erected by their neighbors, ("Defendants"), and encroached upon Plaintiffs' land by four inches. Plaintiffs brought an action for the removal of the Wall and for damages in April 2008. Under Section 611(2) of New York Real Property Actions and Proceedings Law ("Section 611"), Plaintiffs' claim for injunctive relief was barred by the statute of limitations since it was brought over a year after the completion of the Wall, but the damages claim could be maintained.

Section 611 provides that upon satisfaction of the judgment for damages, title to the strip of land that is burdened by the encroachment shall be transferred to the defendant party. Defendants argued that (i) they were not liable for damages because they did not own the property at the time the Wall was erected and (ii) the notice of pendency that was filed on the Defendants' property should be cancelled.

The New York Supreme Court (the "Court") found that an "encroachment is a continuing trespass and an owner is liable for damages for an encroachment for the period they owned the property even if they did not create the encroachment." Additionally, the Court distinguished this case, where removal of the encroachment was barred by Section 611, from cases where the court declined to order the encroachment removed because the burden of the encroachment did not justify the expense of removal. Where the removal of the encroachment was within the Court's discretion, courts have generally held that the notice of pendency should be cancelled if the removal is denied, even if an action for damages remains. However, in the instant case, where there was a potential transfer of title to the Defendants if damages were awarded and paid to Plaintiffs, the Court found the notice of pendency on the Defendants' property should remain until the damages action was completed.

STATUTES OF LIMITATION; SEALS: A sealed document will be subject to a twenty year statute of limitations in Delaware, an such period is relevant in determining whether a laches defense will apply. ***Whittington v. Dragon Group, L.L.C., 2009 Del. LEXIS 654 (Del. Dec. 18, 2009).***

TITLE INSURANCE; DUTY TO DEFEND; SETTLEMENT RIGHTS: Although insurer may avoid duty to defend by tendering insured's actual damages to insured, even if they are less than the total amount of insurance, policy language is vague as to how that amount is to be determined. ***Fleishour v. Stewart Title Guaranty Co., 2009 Westlaw 2151154 (E.D. Mo. 7/16/09).***

This case deals with the same policy condition that was the basic issue in *First American Title Insurance Co. v. Grafton Partners, LLC.*, 2009 Westlaw 792263 (3/20/09), the DD for 8/25/09. The Insurers argued for different constructions of the policy condition in each case, however, and in neither case did the Insurer interpret the condition as the ALTA Forms Committee had interpreted the language in the 1992 ALTA policy comparison grid published when the condition was adopted.

Insured obtained a policy of title insurance in the amount of $121,500. Insured tendered to title Insurer a dispute involving a claim of adverse possession. Insurer determined that the injury to Insured was about $1000, and tendered that amount to Insured. Insured claimed that it was entitled to a defense unless insurer tendered the whole policy amount. In addition, it disagreed that the injury it had suffered was only $1000. The *Grafton* case, more or less, had concluded that under the policy condition asserted by the insurer, the insurer was required to tender the entire policy amount to avoid a duty to defend.

The policy language construed in *Grafton* consisted only of the following:

"In case of a claim under this policy, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Insurance.

To pay or tender payment of the amount of insurance under this policy together with any costs, attorneys' fees and expenses incurred by the insured claimant, which were authorized by the Company, up to the time of payment or tender of payment and which the Company is obligated to pay.

Upon the exercise by the Company of this option, all liability and obligations to the insured under this policy, other than to make the payment required, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, and the policy shall be surrendered to the Company for cancellation."

The court in *Grafton* did note that the Insurer did not mention Part (b) of that same policy condition (probably for reasons that this Report will discuss below). The Insurer court in *Fleishour,* however, did argue that Part (b) gives the Insurer the right to pay an amount the Insurer concludes is the amount of the Insured's loss, albeit less than the policy amount, and still walk away from the duty to defend. Here is the language of part (b), ignored in *Grafton* but stressed by the insurer in *Fleishour.*

"included in the list of options]

"(b) to Pay or Otherwise Settle with Parties Other than the Insured or With the Insured Claimant.

… (ii) to pay or otherwise settle with the Insured Claimant the loss or damage provided for under the policy, together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by [Defendant] up to the time of payment and that [Insurer] is obligated to pay."

Section 8 of the policy provided that the Insured's liability under the policy "'shall not exceed the lesser of "the Amount of Insurance; or (ii) the difference between the value of the Title as insured and the valued of the Title subject to the risk insured against by this policy." The court concluded that, as a consequence, Insurer was entitled to avoid the duty to defend by settling with Insured solely for the difference between the value of the property as insured and the value without the claimed adversely possessed property, whether Insured agreed or not.

The court, however, indicated that the policy had no provision for determining how that loss should be established, and disputed that the Insurer was entitled to just pick a number out of the air – here $1000 – and satisfy its obligation to defend. The court therefore denied judgment on the pleadings for the Insured.

The concern in *Grafton* was the Insurer's new interpretation of Part (a) of this policy condition to permit the Insurer to treat the amount the Insurer' unilaterally estimated to be the amount of the Insured's loss as "the Amount of Insurance," pay that, and walk away from the duty to defend. In *Fleishour*, the concern was the Insurers' new interpretation of Part (b) to permit the Insurer similarly to estimate, unilaterally, an amount of the Insured's loss less than the policy amount, pay that, and walk away from the duty to defend.

Reporter's Comment 1: Part (b) giving the Insurer the option to "Pay or Otherwise Settle … With the Insured Claimant" was first added in the 1992 ALTA policy forms. Under pre-1992 ALTA forms, the Insurer was deemed to have the option to pay the full policy amount and walk away from further obligations, or defend or act to establish the title and then pay whatever amount of loss the Insurer was not able to avoid (other options existed that are not relevant to this discussion). The helpful Chart that ALTA published comparing the 1992 policies to the 1970 policies and the CLEs presented by title insurers to teach about the 1992 policy provisions said regarding this condition:

"CHANGE SHOULD BE NOTED. This [condition] … has been clarified to specifically authorize partial settlement with third parties in the name of the insured and with the insured …."

Reporter's Comment 2: No one was surprised by or objected to the concept that the Insurer and Insured might agree to a settlement of the Insured's claim that was less than the policy amount when the Insured admittedly suffered only a partial loss. As with most settlements, the idea was simply that when the Insurer and Insured agree to a settlement and the Insurer "pays or otherwise" satisfies the settlement agreement, the claim is done, though the policy remains in force for future claims up to the reduced Amount of Insurance. The condition does not say Pay or Settle, but "Pay or Otherwise Settle" – the concept being that the settlement could be by payment of money "or otherwise settling" the Insured's claims with some agreed to action, such as the Insurer buying the unexcepted prior interest, etc.

Black's Law Dictionary also defines "settlement" as "An agreement ending a dispute…."

But in *Fleishour and Grafton*, the Insurers seem to now be arguing that this condition authorizes just payment of the Insurer's estimate of the Insured's partial loss without any settlement with or agreement by the Insured.

Editor's Comment: The editor doesn't have the benefit of Professor Palomar's historic perspective. Looking at the issue without that benefit, the editor sees the critical question to be whether the language in part (b) "to Pay or Otherwise Settle [with Insured]" means that the Insurer can unilaterally elect to pay or whether such payment must be part of a settlement to which the Insured must agree. With the benefit of Professor Palomar's instruction, the editor sees that the most logical construction is that the right "to Pay" must be part of a "Settlement." Even if this wasn't clearly the best construction, it is, of course a possible one, and consequently likely to be the construction adopted by the court after applying the rule preferring constructions in insurance policies in favor of the insured.

The Reporter for this item was Joyce Palomar of the University of Oklahoma Law School, author of Palomar on Title Insurance. The editor started and finished the item, but Joyce provided the substance.

TITLE INSURANCE; ENDORSEMENTS; EXCEPTIONS: Title insurer may not rely on a specific exception contained in the general Schedule B list of exceptions in a lender's policy to avoid coverage of a title defect that arises under a specific endorsement (ALTA 9) providing coverage against a "right of refusal or [a requirement for] the prior approval of a future purchaser or occupant." ***Nationwide Life Ins. Co. v. Commonwealth Land Title Ins. Co., 579 F.3d. 304 (3rd Cir. 2009).***

This opinion reverses a District Court opinion that apparently was not well received among title insurance commentators.

Insurer issued a $3.5 million loan policy relating to property that was subject to a Declaration that *inter alia* gave an identified third party the right to approve any transfers of the subject property. [This right may be of questionable enforceability, but the question in this case, arising on insurer's motion to dismiss, is whether the insurer has any coverage responsibility, so the issue of enforceability of the right is not yet ripe.] Insurer listed this Declaration in its listed exceptions in Schedule B, stating it was not insuring against the priority of the Declaration versus the insurer's security interest.

The policy contained an ALTA 9 endorsement, specifically providing insurance against, among other things, "any instrument referred to in schedule B … containing "[a right of] prior approval of a future purchaser or occupant." But the language of this endorsement states that it applies to such instruments "unless expressly excepted in Schedule B." And as stated, the offending Declaration was listed as an exception to Schedule B.

Nevertheless, Insured argued, the mere listing of a general Declaration in Schedule B does not state an exception to the specific coverage of the endorsement, essentially because, if it did, there would be no point to the endorsement.

"[I]t surpasses strange to think that [Insured] would pay for an ALTA 9 Endorsement just to cover matters already listed as subordinate to its interest in Schedule B, Part II …"

The court concluded that one purpose of the ALTA 9 Endorsement was to provide notice of restrictions on sale and other matters that might reduce the value of the security. "By permitting insurers to except expressly all loss from an instrument simply by listing that instrument in Schedule B, Part I, [Insurer's interpretation would strip away this notice benefit from the ALTA 9 Endorsement."

The court concludes that the insurer must list specifically a right restricting the sale of the land as an exception to the Endorsement or call out the specific provision so providing when it states the exception for the Declaration in Schedule B.

Comment 1: The opinion contains an extended discussion noting that its view of the policy is consistent with "best practices" recommended by title insurers themselves and with industry custom and practice as described by commentators Joyce Palomar and James Gosdin.

Comment 2: The editor finds appealing the practical argument that the insurer must have felt it was getting **something** for the money it laid out for the endorsement, and, in light of the courts' tendency to read insurance policies as giving the insured what it expects, rather than what the language expressly provides, the decision is correct. The court accuses the Insurer of attempting "to lead us down a path that would make title insurance a Barmecide feast." The editor has no idea what such a feast comprises, but from context he would prefer not to partake.

VENDOR/PURCHASER; CONSTRUCTION; CONDITIONS: Where a contract of sale for real property specifies a completion date for construction but does not attach conditions to such completion date, the purchaser is entitled to a refund of the down payment if the construction is not completed in time, even if the delay was caused by governmental interference rather than by the seller. ***Neng Duan Lin v. 111-38 Management Corp., 883 N.Y.S.2d 700 (Supp. 2009).***

Sellers and Purchasers entered into a contract of sale for real property in January 2007 pursuant to which Seller agreed to construct a three family home on the Property by January 2008. The Contract granted Purchasers the right to cancel the Contract and receive a refund of their down payment if the construction was not completed by the Completion Date. The Contract also provided that "Seller assumes no responsibility for failure to meet the "on or about" closing date due to … governmental agency requirements."

Prior to completion of the construction, the New York City Department of Buildings issued a stop work order on the Property for reasons that were unrelated to Seller. Purchasers then exercised their right under the Contract and requested a refund of their down payment given that the construction was not finished by the Completion Date.

The New York Supreme Court (the "Court") held that the impossibility of Seller's performance due to the government's interference did not excuse Seller's construction obligation and Purchasers' rights with respect thereto since the Contract did not attach conditions to the completion date. Furthermore, the only language in the Contract which excused Seller's performance due to governmental interference was related to the closing date, a date that was clearly distinguished from the Completion Date in the Contract.

"The parties' contract of sale makes a clear distinction between completion/construction and closing; defendants cannot muddle the two scenarios in order to achieve a different result other than the return of plaintiffs' down payment."

Comment: The court's result strikes the editor as somewhat unforgiving. Was it really the intent of the parties to permit the Buyers to cancel if government action interfered with completion? Is that the central question? Apparently not to the court.

Accordingly, the Court held that Purchasers were entitled to a money judgement in the amount of the Contract down payment, plus interest.

VENDOR/PURCHASER; MERGER BY DEED: If a recorded purchase contract calls for the seller to grant an easement to the buyer, it doesn't matter that the deed makes no reference to the easement and the general appurtenance clause in subsequent deeds is sufficient to convey the easement to subsequent purchasers of the dominant estate. ***Franklin Park Plaza, LLC v. V & J National Enterprises, LLC, 870 N.Y.S.2d 193 (App. Div. 2008)***, discussed under the heading: "Easements; Recording Acts."

VENDOR/PURCHASER; MISREPRESENTATION; DISCLAIMERS: Broker and Seller may be liable for affirmative misrepresentations as to size of house notwithstanding disclaimers contained in sale agreement that state that there are no warranties by Broker as to size and that Seller or Buyer will hold Broker harmless with respect to defects, and notwithstanding acknowledgment at closing that Buyer had either inspected or waived inspection. ***Bowman v. Presley, 212 P.3d 1210 (Okla., 2009).***

Buyers alleged that they shopped for a house larger than their own, and that broker and seller each represented to them that the house that seller was offering was 2800 square feet. In fact, a post closing appraisal received by buyers indicated that the house was 2100 square feet. Buyers alleged that Sellers and Broker knew that the house was smaller than they told Buyers, and that Buyers had computed the value of the house, and the price that they would offer, based upon a value "per square foot."

Defendants moved for summary judgment, first, on the grounds that the Buyers got what they bargained for, as the appraised value of the house equaled what they paid for it. Court responded that the Buyer's claimed that they had computed a "price per square foot," and expected something other than they got. In light of the "warring appraisals," the court concluded that the Buyers' claim survived summary judgment on this score.

Defendants then argued that the fact of the size of the house was within Buyers' competence to ascertain and that the size was in fact the size listed in the multiple listing service and on the appraiser's records.

Apparently there is some Oklahoma authority that when there is a representation of "opinion" made by a Seller or Seller's representative, Buyer has the duty under the doctrine of "*caveat emptor*" to make reasonable investigation. But the court concluded that such authority has no application where the alleged misrepresentation was as to a matter of fact, even though the buyer still could have checked the facts himself. The buyer is entitled to rely upon the representation.

Defendants also pointed to language in the contract absolving Broker, at least, from liability:

"h) * * * Buyer is purchasing the Property based on Buyer's own inspection, unless waived, and NO WARRANTIES are expressed or implied by [Broker and licensees] that shall be deemed to survive the Closing in reference to the condition of the Property * * *.

15. DISCLAIMER AND INDEMNIFICATION: It is expressly understood by Seller and Buyer that [Broker and licensees]do not warrant the present or future value, size by square footage, condition, structure, or structure systems of the Property or any building, nor do they hold themselves out to be experts in quality, design and construction. Seller and Buyer shall hold [Broker and licensees] harmless in the event of losses, claims or demands by or against Seller or Buyer.* * *"

Buyer also executed documents at closing providing waivers relating to inspections:

"1. Inspection. Buyer has either inspected the Property in accordance with the Contract or by acceptance of the Deed to the Property. Buyer waives Buyer's right to inspect. In either event, the Property is accepted in its present condition.

3. Waiver and Release. Buyer hereby waives all claims to repair, replace, or remedy any defects in the Property and does hereby forever release and discharge the Seller, the "Listing Broker"), the "Selling Broker", their respective affiliated licensees, employees, representatives from all claims, demands, charges, losses, and liability whatsoever arising out of the contract and from the purchase of the Property.***

Broker, incidentally, was listed as both the listing Broker and the Selling Broker and also was selling Broker's daughter's house.

The court ruled that public policy required that these waivers be ignored when the charge is one of fraud or intentional misrepresentation:

"A whisper of fraud can topple the pillars of even the most impregnable contract, for to base a contract upon fraud is to build it upon sand ... "Fraud vitiates everything it touches, and a contract obtained thereby is voidable. And evidence is always admissible to show that contracts have been fraudulently obtained.… the public policy fostering the certainty and stability of contracts gives way to the public policy against fraud."

As to the argument that the appraiser's office and multiple listing service also erred as to the size of the house, the court simply responded that in this action for fraud, where the Defendants were charged with knowing the true facts and misrepresenting them, the fact that the same wrong information appeared elsewhere was of no consequence, at least on a motion for summary judgment.

Comment: This is a simple fraud case, and the most important language, to the editor, is the court's refusal to honor the waivers contained in the contract, even where they stated expressly that the waiver was given as to any representations as to size. This would contradict some commercial contract cases in other jurisdictions, but the editor believes the conclusion is correct when the language appears in form documents introduced, undoubtedly, to the Buyer as "routine." The Editor is especially incensed when waivers and disclaimers favoring the Broker appear in form sale contracts prepared by the broker for use of the Buyer and Seller in documenting their agreement of sale. Brokers have an ethical responsibility, in the editor's view, to provide documents that simply are consistent with the best interests of the parties to the sale and not to sneak in language that serves the interest of only the broker, not a party to the contract, or to the closing.

WORDS AND PHRASES; "CHANGES OR ALTERATIONS TO BUILDING;" DEMOLITION: Where a restrictive covenant requires homeowners association approval of changes or alterations to buildings in a development, such approval is not required for a homeowner to demolish the homeowner's house where no replacement structure is planned. ***Service Corp. of Westover Hills v. Guzzetta, 2009 Del. LEXIS 221 (Del. Ch. Dec. 22, 2009)***, discussed under the heading: "Servitudes; Architectural Review; Demolition."

ZONING AND LAND USE; VARIANCES; DIVISION OF PROPERTY BY DEVISE: Although a testamentary devise is a legitimate method of dividing land, if the resulting lot does not conform with the zoning ordinance, the nonconformity is to be considered a self-created hardship. ***Egeland v. Zoning Board of Adjustment of the Township of Colts Neck, 2009 WL 456572 (N.J. Super. App. Div. 2009); February 20, 2009.***

A lot was owned by a woman who received an interest in a parcel through a testamentary devise from her mother carved from the mother's larger parcel. The remaining portion of the original lot was separately devised to the same woman and her sister, jointly. The original lot met the zoning requirements for single family residences, but was not large enough to subdivide into two residential parcels. Thus, the will created a lot that would require variances for residential construction.

The woman then entered into a contract to sell the non-conforming lot to a developer, conditioned upon the developer's ability to obtain approvals required to build a single family dwelling on the lot. The municipal zoning board denied the builder's application. It found the non-conforming to be a self- created hardship. The woman filed suit to challenge the zoning board's decision. The lower court affirmed the zoning board's ruling that the hardship was self-created, and dismissed the complaint.

On appeal: *Held: Affirmed.* Because the determination was of a legal, rather than a factual, nature, the Court reviewed the issue *de novo*. In such a situation, the board's decision was not presumed to be valid. The woman claimed that she would have been granted a variance because a strict application of the zoning regulation would result in the imposition of an undue hardship upon the development of her property.

The Court disagreed, holding that the relief sought by the woman was not, in fact, available if the hardship was "self-created." The Court also determined that, even if the present owner had not created the hardship, if a prior owner created the hardship, the impediment would pass to the subsequent owners of the property. The Court ruled that while a testamentary devise is a legitimate method of dividing land, the resulting lots should not be deemed to be an approved subdivision unless they would otherwise be treated as such under the Municipal Land Use Law. It held there is no public policy inconsistency in applying local zoning requirements to land subdivided by testamentary devise. It found the zoning power relates solely to the manner in which an owner utilizes land, and that testamentary dispositions are focused primarily on devolution of title in accordance with the design of the decedent.

The Court also rejected the notion that there need be an element of misconduct by the person creating the non-conforming lot as such activity is not specifically stated as a requirement under case law precedent. Finally, the Court pointed out that the woman was in a position to rejoin the two lots to create a single conforming lot, but chose not to do so.

Comment: The landowner loses on several appropriate grounds. She had the ability to sever the joint tenancy with the other land, partition that land, and have her usable lot. In addition, the notion that a predecessor in interest (her mother) elected to create the problem by attempting a subdivision when none was possible ran to the current owner is consistent with other case law.

Comment 2: Note that the court had no problem with the notion that the devise created a non- conforming lot. Why is there no violation of the subdivision ordinance? In fact, New Jersey law so provides. Testamentary dispositions indeed are exempt from subdivision laws. But if that is so, should we really be so quick to find that such aa testamentary devise results in a "self created" hardship? The devisor was doing what she was legally entitled to do. Why not treat the resulting situation created for the devisee as a hardship, as indeed it is when the devisee is stuck with an undevelopable lot. (Note that here the possibility of partition and the extreme departure of the lot's dimensions from the legal standard might have resulted in the denial of a variance anyway.)