

REAL PROPERTY LAW SECTION

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REAL ESTATE SETTLEMENT PROCEDURES ACT OF 1974

BY

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(The author is a member of the Subcommittee on Forms, etc. in Real Estate Practice, Committee on Economics in Real Estate Practice, Section of Real Property, Probate and Trust Law, American Bar Association. In this capacity, he is in continuing communication with officials of the Department of Housing and Urban Development in regard to implementation of this Act. Some of the statements contained herein are based on specific discussions with HUD representatives but as of this writing, do not necessarily represent any official position of the agency.)

On December 22, 1974, Congress enacted Public Law 93-533, known as the "Real Estate Settlement Procedures Act of 1974" [12 U.S.C. 2601 et. seq.], to become effective June 20, 1975. This Act will have a significant impact on the real estate industry in the United States and it is essential that practitioners involved in residential real estate transactions, as well as mortgage lenders, brokers and title agencies, direct their attention to its provisions without delay. Proposed partial regulations were published in the Federal Register, Vol. 33, p. 7072, on February 18, 1975. The proposed regulations do not provide any amplification of the Act. They do include, however, a draft of a Uniform Settlement Statement, discussed below.

To satisfy the Congressional findings and purposes of the Act, the Act embodies two basic legislative thrusts; namely, (1) provision for form and timeliness of disclosure of real estate settlement costs to buyers and sellers of residential real property, and (2) substantive regulation of certain areas of so-called abuses such

as kickbacks, referral fees, title costs, and establishment and maintenance of escrow accounts. There is a third aspect of this legislation, reform and modernization of local land title records, which will be implemented at a later date, and which is not of immediate concern.

SETTLEMENT PROCEDURES: SCOPE

Although one of the stated purposes of the law is to provide for more effective advance disclosure of settlement costs to home buyers and sellers [12 U.S.C. 2601 (b)(1)], the Act governs settlement procedures only in transactions which involve "federally regulated mortgage loans". [12 U.S.C. 2603]. This term is defined as including any loan which (a) is secured by residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families; and (b) either (i) is made in whole or in part by any lender the deposits or accounts of which are insured by any agency of the federal government or any lender which is regulated by any agency of the federal government; or (ii) is made, insured, guaranteed, supplemented or assisted in any way by HUD or any other agency of the federal government or in connection with any housing and urban development program of HUD or a housing program administered by any other officer or agency; or (iii) is eligible for purchase by FNMA, GNMA, FHLMC, or which could be purchased by FHLMC, or (iv) is made, by any "creditor" as defined in Section 103(f) of the Consumer Credit Protection Act [15 U.S.C. 1602(f)] which makes or invests in residential real estate loans aggregating more than \$1,000,000.00 per year.

Several immediate problems are apparent in ascertaining the coverage of the Act itself. First, the term "residential real property" is not defined. At a later point in the Act, at Section 12, it is stated that no fee shall be imposed or charge made by a lender on account of the preparation of the Uniform Settlement Statement in connection with a federally related mortgage loan made by it, or a loan for the purchase of a mobile home. Is a mobile home regarded as residential real property for purposes of the Act? In response to this question, the HUD Office of the General Counsel has stated that the answer to this depends on state law pertaining to the nature of mobile homes as real or personal property. While mobile homes are regarded as personal property under Michigan law, a lender would be placed in an interesting situation when making a loan to an individual who desires to borrow money through a bank's mortgage department to acquire a lot and to construct a mobile home pad, and a loan through the consumer loan department for the acquisition of the mobile home. Neither one by itself would be considered a loan for residential real property, but in combination, the transaction might be regarded as a residential real property loan. It is anticipated that this will be clarified in the future regulations to be promulgated by the agency.

Secondly, does a construction loan to a developer of a subdivision or condominium project of single-family (or "from one to four families") residences come within the purview of the Act? While it is not thought to be within the purpose of the Act to cover this type of loan, there is certainly nothing in the Act which excepts such a loan transaction, and all of the other literal language of the Act and proposed regulations would include it. Final regulations are expected to except this type of transaction, and confine coverage of the Act to loans for acquiring property for residential purposes of the borrower. Since that broad a limitation could leave some loans outside the scope of the Act which might be intended to be covered, this regulation will bear close examination.

Thirdly, there appears to be some confusion as to whether mortgage assumption transactions are also covered by the Act. Again, the literal terms of the Act would

definitely include the mortgage assumption transaction, both in the form of release and substitution of borrowers, and a simple assumption which is normally a transaction solely between a buyer and a seller. This is an important point in considering the duty of the mortgage lender to make disclosures, discussed below. An opinion or regulation on this subject has been requested from the Office of General Counsel, and it is thought that only "formal" assumptions in the nature of substitution and release will be covered.

DISCLOSURES OF SETTLEMENT COSTS: PROCEDURES AND FORM

Under Section 4 [12 U.S.C. 2603] of the Act, it is provided that HUD shall prescribe a Uniform Settlement Statement to be used in all subject transactions as the settlement statement, which shall "conspicuously and clearly itemize all charges imposed upon the borrower and all charges imposed upon the seller in connection with the settlement, and which shall indicate whether any title insurance premium included in such charges covers or insures the lender's interest in the property, the borrower's interest, or both." The form will also include all information and data required to be provided for such transactions under the Truth-In-Lending Act and Regulation Z.

There is no definition in the Act of the terms "settlement" and "charges" referred to in Section 4. HUD has taken the liberty of identifying more than sixty principal items for disclosure, including all of the information normally confined to a buyer-seller closing statement. The HUD draft of the settlement statement is included with this Article as an appendix. The Truth-In-Lending Section of the form has not yet been developed by the Federal Reserve Board for publication.

In addition, the Uniform Settlement Statement is to serve as a disclosure statement, for the purpose of advance disclosure of all settlement costs, prior to closing. Thus, the Uniform Statement serves two purposes: disclosure and settlement. It apparently must be used twice in every transaction, if the advance disclosures made under Section 6(a) differ from the settlement figures under Section 4.

Most of the content of HUD's form is within the scope of what is usually disclosed in the mortgage and buyer-seller phases of the transactions covered by the Act. It takes a somewhat liberal reading of the terms of the Act to conclude that information as to the buyer's and seller's transaction should be included within the disclosures on the Uniform Settlement Statement. Although the purpose of the Act is to provide information to buyers and sellers, the entire Act is directed to certain mortgage loan transactions. Logically, if the "abuses" referred to in Section 1 of the Act relate only to the mortgage industry, only the mortgage settlement should be subject to this law. If the "abuses" pervade non-mortgage phases of transactions, then the buyer-seller closing should be regulated under all circumstances, under a commerce jurisdictional theory, as in the case of Truth-In-Lending. Since the Act does not purport to regulate any transaction other than mortgage loans, the buyer-seller phase should not be regulated and that portion of the Uniform Settlement Statement should be omitted. It is almost without doubt, however, that the final form will require the buyer-seller transaction disclosure.

The importance of the involvement of the buyer-seller statement in the uniform form is highlighted by the imposition, in Section 6 of the Act [12 U.S.C. 2605] of a duty upon the mortgage lender to obtain or caused to be obtained from the persons who will provide services in connection with the settlement, the amount of each charge to be made, and to make advance disclosure of all of the information required on the Uniform Settlement Statement to the prospective borrower, the prospective seller, and to any officer or agency of the federal government involved

or to be involved in the loan. These disclosures must be made at the time of the loan commitment, but in no case less than twelve (12) calendar days prior to the closing. If the lender fails to provide the borrower and seller with this advance disclosure, it is liable to the borrower or the seller, "as the case may be" in an amount equal to "the actual damages involved or \$500.00, whichever is greater" and for all court costs of any action brought to enforce this liability, together with reasonable attorney's fees as determined by the court. The Act provides several ameliorations of this onerous responsibility:

(1) In the event that the exact amount of any charges are not available at the time of advance disclosure, a good faith estimate of the charges may be provided;

(2) The disclosures may be provided any time before settlement if the prospective borrower or seller executes a waiver of the requirement of disclosure at least twelve (12) days prior to settlement; and

(3) A lender may not be held liable for any violation if it is shown by a preponderance of evidence that the violation was unintentional and resulted from a bona fide error notwithstanding the maintenance of procedures adopted to avoid any such error.

The relief provisions may not provide much comfort as they may seem initially. Certainly there would be no justification for a lender to obtain a waiver of the twelve (12) day period from all parties in every single transaction. This practice would seem to be in direct contravention of the spirit of the Act, and indeed Section 6(c) states that in HUD's issuance of regulations relative to the waiver of the twelve (12) day disclosure, the department should take into account the need to protect the borrowers' and the sellers' right to a timely disclosure. The proposed regulation (24 CFR §82.4) lays down specific ground rules and form for this waiver, which are extremely limiting. Further, the standard of practice of the lender must be designed to obtain accurate and complete information of all of the subject disclosures, and yet there are no standards now known as to what would constitute reasonable procedures to avoid improper or incomplete disclosures.

The present draft form of disclosure/settlement statement appears to be a disorganized mass of lines, small print, and confusing entries. If it is a document to be used as the settlement form in mortgage transactions, it would be practical and useful for the real estate industry, including all title closers, loan closers, brokers and attorneys to adopt the final Uniform Settlement Statement as the only closing statement which would be used in every transaction. Many attorneys, brokers, mortgage lenders and title closers would welcome standardization of form rather than have to interpret the varying approaches of lenders, brokers and attorneys now extant. If the Uniform Settlement Statement is to be at all useful, and since it is forced upon us in virtually all transactions involving residential real property, then the form should be redesigned into a transactional mode, contrary to its present appearance. Under present practice, a buyer and a seller review a closing statement which reflects their separate and individual responsibilities in a transaction, or which may embody the entire scope of the purchase and sale transaction. Whether or not the closing or settlement statement between buyer and seller is reviewed in advance of or at the time of closing, the parties need be concerned only with one phase of the transaction at a time. The mortgage closing is normally handled independent of the buyer and seller closing so that one is accomplished first, and the other afterward.

If the buyer-seller closing and the mortgage closing statements are to be combined, then placing the order of disclosure in a transactional form would be of great assistance. Obviously, the present proposed draft leaves much to be desired in this regard. For example, it begins with the disclosure of the broker's commission, then goes into certain loan data, back to private title transfer data, then to government charges, then to additional mortgage data, before reaching the buyer and seller closing statement. It appears that, even at this late date, HUD is willing to consider a total revision of the format of the Uniform Disclosure/Settlement Statement.

The Act vastly increases administrative burdens upon lenders. The lender now must consult with and coordinate efforts among perhaps two brokers, at least one buyer and one seller, an attorney for each of the buyer and the seller, and the title insurer, in addition to attending to its own closing problems and coordination with lenders whose mortgages are to be paid off at the time of closing. Several parties must receive a copy of the disclosures at the time of mortgage commitment or offering. Much of the information required to be disclosed on the settlement statement has been difficult, if not impossible, or unnecessary to obtain twelve (12) days before closing. Mortgage pay-off data is not relevant until the time of closing, and may change in the interim. Attorneys' fees for both buyer and seller, as well as lender's counsel, are also required to be disclosed, but many times attorneys are not even retained more than twelve (12) days in advance of the closing, much less are they able to ascertain the amount of their fees. Disclosure to each party of the other's attorney's fees seems pointless, and contrary to the history of confidentiality between attorney and client.

In addition to the two disclosures on the Uniform Settlement Statement, Section 7 of the Act adds another disclosure requirement. No lender may make a commitment for a loan on a residence which has been completed more than twelve (12) months prior to the date of commitment, unless the lender confirms that the following information has been disclosed in writing by the seller or its agent to the buyer:

1. The name and address of the present owner of the property being sold;
2. The date the property was acquired by the present owner; and
3. If the seller has not owned the property for at least two (2) years prior to the date of the loan and has not used the property as a place of residence, the date and purchase price of the last "arms length transfer" of the property, a list of any subsequent improvements made to the property, and the cost of the improvements.

The lender itself is not required to make this disclosure, but is required to supervise that it is made. A criminal penalty for providing false information under this section or for willfully failing to comply with the requirements (lender liability) is a fine of up to \$10,000.00 or imprisonment for up to one year, or both.

The Uniform Settlement Statement will be drafted by HUD, but it will be the responsibility of each lender to prepare its own form for transactional use. It is understood that any additional information which each lender desires to include in the form will be permitted. The Federal Reserve Board will also dictate the form of Truth-In-Lending disclosure, and it is also anticipated that additional data which suits the requirements of individual lenders may be included in addition to the content of the federally prepared document. HUD has promulgated in the regulations, 24 CFR §82.4, the form of waiver of advance settlement disclosure.

The agency will not prescribe the form of disclosure under Section 7. Since the disclosures under Section 7 must be made prior to the time of mortgage commitment, the preparation and execution of this form should be the responsibility of builders, brokers and attorneys handling purchase and sale transactions. The execution, delivery and acknowledgement of receipt of the Section 7 disclosure should occur at the time of agreement of purchase and sale. Whenever a broker takes a listing, or an attorney is retained to represent a seller prior to consummation of the purchase transaction, it would be appropriate to obtain the Section 7 disclosure form for ultimate delivery to the buyer at the time the deal is made. Lenders or title transfer agents in transactions involving federally regulated mortgage loans should require and receive a fully executed copy of the Section 7 disclosure document not later than the time of mortgage application.

OTHER SUBSTANTIVE PROVISIONS

The Act, in Section 8, provides a prohibition against "kickbacks and unearned fees". This section bears very careful review by counsel for any party to a transaction, including builders, title companies, lenders, real estate and mortgage brokers. In essence, (a) no person shall give and no person shall accept any fees, kickback or thing of value pursuant to any agreement or understanding that business incident to or a part of a real estate settlement (involving a federally related mortgage loan) shall be referred to any person, and (b) no portion of any charge made or received for real estate settlement service shall be paid to or accepted by any person other than for services actually performed. Both criminal and civil penalties are provided for violation of Section 8. The full impact of this provision has not been ascertained, and there are many questions about its scope.

Are title companies now precluded from giving builder rates on owners' title insurance policies? Is there a problem with title policy reissuance or simultaneous issue rates, which constitute a thing of value given for the referral of title business?

Title insurance comes in for special treatment in Section 9, where it is provided that no seller shall require as a condition to selling the property that the buyer purchase title insurance from any particular title company. Any seller who does so is liable to the buyer in an amount three times the cost of the title policy. Caution must be exercised in the drafting of purchase and sale agreements by sellers' agents which dictate the title company to be used. While the seller's furnishing of the owner's policy of title insurance does not appear to come within the purview of Section 9, the buyer's purchase of a mortgage policy might, if the buyer is required to purchase the lender policy from the same title company.

ESCROW

Section 10 of the Act contains specific limitations on the amount of deposits into escrow accounts, both at the time of closing and for the duration of the mortgage loan. The Act permits the calculation of the initial escrow deposit to be made on an estimated basis from the last due date of taxes to the date of settlement where taxes are paid in advance, or on an actual amount basis where taxes are paid in arrears. Although it is not clear, it is thought that this provision relates to the due date of taxes and not the fiscal years of the taxing authorities, in considering whether taxes are prepaid or postpaid. The lender may collect each month thereafter one-twelfth (1/12th) of the estimated total amount of taxes and insurance payments which will become due during the twelve (12) month period beginning on the date of settlement. After the month of settlement, the lender may not require deposits into escrow in any month of amounts in excess of one-twelfth (1-12th) of

the total amount of estimated taxes and insurance premiums which will become due and payable during the twelve-month period, beginning on the first day of such month. However, if the lender determines that there will be a deficiency on the due date for such taxes and insurance premium, the lender may require additional monthly deposits into escrow of pro rata portions of such deficiency corresponding to the number of months from the date of the determination of such deficiency to the date upon which taxes and insurance premiums become due and payable. It is not clear whether the lender can relate its escrow requirements to each separate item or must examine the fund of the entire escrow account. Moreover, this provision for adjustments for escrow deficiency appears to apply only prospectively and never retrospectively. The lender must anticipate what deficit will occur, and may require the build up of the escrow account only from the date of its ascertainment that there will be a deficiency to the due date of payment. There appears to be no way that the lender may readjust the escrow account in the future after the deficit occurs. Under this circumstance, a lender must analyze each mortgage loan's escrow account on virtually a monthly basis, obtaining tax computations and assessment data relative to all loans subject to an escrow account. The borrower will be unable to rely upon a fixed obligation to a mortgage lender, since the borrower's monthly escrow deposit may be adjusted three or four times each year. If an insurance premium increases by \$100.00 a year, that fact is generally not known until the insurance premium bill is submitted to the lender for payment. Normally, such bill must be paid within a limited period of time, often less than one (1) month. The lender must react to this by charging the borrower the \$100.00 increase in one lump sum for the next monthly payment.

This appears to be a totally unsatisfactory situation both to lender and borrower. The Act appears to regulate excessive deposits to escrow and the occurrence of escrow deficits. But its treatment of the latter event will result in sizeable cash escrow adjustments for borrowers, without the option to extend repayment of escrow deficiencies over a period of time. Because HUD has spent all of its time to date in concern over the Uniform Settlement Statement and instructions, little, if any, consideration has been given to interpretation of Section 10. It is hoped that the regulations will provide a fairer means of handling escrow deficiencies.

SUMMARY

The foregoing provides only a cursory review of several of the most important features of the Real Estate Settlement Procedures Act of 1974 and its implementation, as it now appears. It is incumbent upon all attorneys involved in any way in residential real property transactions to carefully review the Act and determine its applicability to their client's situations.

HUD has tentatively targeted April 21, 1975 as the final publication of forms and regulations in the Federal Register. That will leave two months for all of us to get our clients into compliance with this law. It is hoped that before this date, the many troublesome questions concerning the meaning of many portions of the Act, and the procedures to be followed thereunder, can be resolved to provide for fulfillment of the real purposes of the law without the unnecessary impact upon the lending industry and ultimately upon the borrowers of mortgage funds.

Comments on the proposed regulations and forms are solicited by HUD, and should be in triplicate to the Rules Docket Clerk, Office of the General Counsel, Room 10245, Department of Housing and Urban Development, 451 Seventh Street SW, Washington, D.C. 20410, referring to Docket No. R-75-318.

PROPOSED RULES

January 1975 Form Approved OMB Number U. S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT UNIFORM DISCLOSURE/SETTLEMENT AND TRUTH IN LENDING STATEMENT	A. TYPE OF LOAN 1. <input type="checkbox"/> FHA 3. <input type="checkbox"/> FmHA 5. <input type="checkbox"/> Conv. Unins. 2. <input type="checkbox"/> VA. 4. <input type="checkbox"/> Conv. Ins. 6. Purpose of Loan: _____ 7. Loan Number: _____ 8. File Number: _____ 9. FHA/VA/PMI Case No.: _____ 10. Loan Commitment Date: _____ 11. Contract Sales Price: _____ of Property.....
<i>NOTE: This Statement must be accompanied by Truth in Lending Statement prescribed by the Federal Reserve Board.</i>	

B. NAMES AND ADDRESSES:

1. Seller	2. Buyer/Borrower	3. Lender
4. Property	5. Settlement Agent Place and Date of	6. Beneficial Owner

NOTE: This form when furnished prior to settlement provides the Advance Disclosure of Settlement Costs and Truth In Lending Statement required by law. When prepared at settlement, this form constitutes the Standard Statement of Settlement Costs prescribed by law. Charges itemized on this form at the time of advance disclosure may include good faith estimates. The lender does not warrant that an estimated charge will be identical to the final charge at settlement.

	<u>BUYER/BORROWER</u>	<u>SELLER</u>	<u>DISBURSEMENTS</u>
I. SALES/BROKER'S COMMISSION:			
101. Based on Contract Sales Price of \$ _____ at _____ %			
102. Disbursed to: _____			
102. _____			
103. _____			
104. TOTAL - SECTION I.....			
II. ITEMS PAYABLE IN CONNECTION WITH LOAN OR CREDIT:			
201. Loan Origination Fee			
202. Loan Discount Points			
203. Appraisal Fee			
204. Credit Report			
205. Amortization (Loan Repayment) Schedule			
206. Photographs			
207. Survey: pay to: _____			
208. Property Inspections			
209. _____			
210. _____			
211. Mortgage Insurance Application Fee			
212. Total Disbursed to Lender			
213. TOTAL - SECTION II.....			
III. PREPAID ITEMS IN CONNECTION WITH LOAN OR CREDIT:			
301. Prepaid Interest from _____ to _____			
302. Mortgage Insurance Premiums for _____ years.			
303. Hazard Insurance Premium for _____ years			
ESCROW RESERVE FOR:			
304. Hazard Insurance			
305. Mortgage Insurance			
306. Real Estate Taxes			
307. Unpaid Assessments			
308. Flood Insurance			
309. _____			
310. TOTAL - SECTION III.....			
IV. PRIVATE TITLE TRANSFER CHARGES:			
401. Settlement or Closing Fee, pay to: _____			
402. Abstract or Title Search, pay to: _____			

IV. PRIVATE TITLE TRANSFER CHARGES:

401. Settlement or Closing Fee, pay to: _____	_____	_____	_____
402. Abstract or Title Search, pay to: _____	_____	_____	_____
403. Title Examination, pay to: _____	_____	_____	_____
404. Preliminary Title Binder(s), pay to: _____	_____	_____	_____
405. Title Insurance, pay to: _____ (Includes Items: _____)	_____	_____	_____
406. Lender's Coverage _____	_____	_____	_____
407. Owner's Coverage _____	_____	_____	_____
408. Endorsements, pay to: _____	_____	_____	_____
409. Document Preparation, pay to: _____	_____	_____	_____
410. _____	_____	_____	_____
411. _____	_____	_____	_____
412. Attorney's Fees, pay to: _____ (Includes Items: _____)	_____	_____	_____
413. _____	_____	_____	_____
414. Notary Fees, pay to: _____	_____	_____	_____
415. _____	_____	_____	_____
416. TOTAL — SECTION IV.....	<input type="text"/>	<input type="text"/>	<input type="text"/>
	<u>BUYER/BORROWER</u>	<u>SELLER</u>	<u>DISBURSEMENTS</u>

V. GOVERNMENT TRANSFER CHARGES:

501. Recording Fees: Deed \$ _____; Mortgages \$ _____; Release \$ _____	_____	_____	_____
502. City/County Tax/Stamps _____	_____	_____	_____
503. State Tax/Stamps _____	_____	_____	_____
504. _____	_____	_____	_____
505. TOTAL — SECTION V.....	<input type="text"/>	<input type="text"/>	<input type="text"/>

VI. ADDITIONAL CHARGES AND CREDITS:

Prior First Mortgage to: _____			
601. Principal _____	_____	_____	_____
602. Interest to Date _____	_____	_____	_____
603. Prepayment Charge _____	_____	_____	_____
604. Escrows for Insurance, Taxes _____	_____	_____	_____
605. _____	_____	_____	_____
606. Total of Prior First Mortgage.....	_____	_____	_____
Prior Second Mortgage to: _____			
607. Principal _____	_____	_____	_____
608. Interest to Date _____	_____	_____	_____
609. Prepayment Charge _____	_____	_____	_____
610. Escrows for Insurance, Taxes _____	_____	_____	_____
611. _____	_____	_____	_____
612. Total of Prior Second Mortgage.....	_____	_____	_____
613. Fee for Refinancing or Assuming Existing Mortgage _____	_____	_____	_____
614. Other Charges _____	_____	_____	_____
615. _____	_____	_____	_____
616. Inspection(s) _____	_____	_____	_____
617. _____	_____	_____	_____
618. TOTAL — SECTION VI.....	<input type="text"/>	<input type="text"/>	<input type="text"/>

VII. TOTAL SETTLEMENT CHARGES:

701. Total Charges from Section I, II, III, IV, V, and VI _____	_____	_____	_____
702. Less Items (no., _____) settled outside closing _____	_____	_____	_____
703. _____	_____	_____	_____
704. _____	_____	_____	_____
705. TOTAL — SECTION VII.....	<input type="text"/>	<input type="text"/>	<input type="text"/>

VIII. FUNDS REQUIRED FROM BUYER/BORROWER:

801. Contract Sales Price _____	_____
802. Total Charges (from Line 705) _____	_____
Adjustments Charged to Buyer/Borrower:	
803. Proration of Taxes _____	_____
804. Unpaid Special Assessments _____	_____
805. Utilities _____	_____
806. Rent _____	_____
807. Fuel _____	_____
808. _____	_____
809. Total Sales Price Adjustments _____	_____
810. Total Charges to Buyer/Borrower _____	_____
Less:	
811. Earnest Money _____	_____

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812. Mortgage Loan Proceeds _____
 813. Adjustments Paid by Seller _____
 814. _____
 815. Total Buyer's Credits _____
 816. AMOUNT DUE FROM BUYER/BORROWER.....

IX. DISBURSEMENTS TO SELLER:

901. Contract Sales Price _____
 902. Adjustments (from Line 809) _____
 903. Gross Amount Due Seller _____
 Less:
 904. Total Charges (from Line 705) _____
 905. Earnest Money (from Line 811) _____
 906. Adjustments Paid by Seller _____
 907. _____
 908. _____
 909. Total Charges to Seller _____
 910. AMOUNT DUE TO SELLER.....

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NOTES: (1) If disclosure of settlement costs was not provided at the time of commitment or at least twelve (12) calendar days prior to settlement, a waiver of the requirement for advance disclosure must be executed in accordance with HUD Regulations by the borrower or seller, as the case may be, and attached hereto.

INSTRUCTIONS FOR COMPLETING UNIFORM DISCLOSURE/SETTLEMENT STATEMENT

The following are procedures and instructions for completing the Uniform Disclosure/Settlement and Truth in Lending Statement prescribed by the Real Estate Settlement Procedures Act of 1974. The lender is required to make in advance of settlement an itemized disclosure on this form of each charge arising in connection with settlement. It is recognized in the Real Estate Settlement Procedures Act of 1974 that the precise amount of every individual charge to be assessed at settlement will not in all cases be known at the time of advance disclosure. The Act provides: "In the event the exact amount of any such charge is not available, a good faith estimate of such charge may be provided."

It is the responsibility of the settlement or closing agent ("Closer") to complete the Settlement Statement and to submit copies to parties at the settlement showing all charges actually incurred. The body of the form is to be used for entry of charges, credits, and disbursements. The Uniform Disclosure/Settlement Statement will set forth each settlement service as a charge to the Buyer or to the Seller (or a split between the two) in accordance with the agreement between the parties. In the case of certain settlement items, FHA or VA Regulations forbid charges to a Buyer using FHA or VA financing, and such charges therefore become the Seller's obligation.

Since this form is used nationwide, it is important that all Closers follow the standard procedures.

The Act requires that this form be used in the following transactions: property sale financed by origination of a first mortgage, refinancing of existing mortgage indebtedness, origination of a junior mortgage to help finance a property sale, the giving of a purchase money mortgage by a federally related lending institution, and any borrowing secured by the borrower's principal residence.

SECTIONS A AND B

Section A: Type of Loan. Check appropriate loan type and complete items 6, 7, 8, 9, 10, and 11 as applicable. In item 6, state the purpose of the loan, i.e., home sale, refinancing, junior mortgage, etc.

Section B: Names and Addresses. In completing each box, provide as a part of the address the city, postal abbreviation of State, and zip code. Fill in item 6, Beneficial Owner, only in the event that title will be held in trust for a person other than the Buyer/Borrower.

SECTIONS I THROUGH VII

General. There are four columns across the page, from left to right:

The explanation of the item.

The Buyer/Borrower's Column. In this column enter all charges (amounts the Buyer/Borrower is expected to pay at settlement).

The Seller's Column. In this column enter all charges (amounts the Seller is expected to pay at settlement).

The Disbursements Column. In this column the Closer will enter actual disbursements on the line corresponding to each settlement charge requiring disbursement by the Closer. This column is filled out only at closing and remains blank at the time of advance disclosure of settlement costs.

Section I: Sales/Broker's Commission. The items included in this section are assessed by the Real Estate Salesperson(s) or Broker(s) who sold the property.

Line 101: Enter contract sales price from Section A, line 11 and the percent of sales commission. Enter dollar amount of commission in Seller's column and the name of the person to whom the commission is to be paid on the line following "disbursed to".

Lines 102 and 103: Blank lines on which may be entered other items included in the transaction such as amount of commission already received by salesperson.

Line 104: Enter totals for transactions in Section I.

Section II: Items Payable in Connection with Loan or Credit. The items in this section are charges assessed by the Lender or the Lender's investors for processing the loan.

Line 201: Enter the amount the Lender charges the Buyer for origination of the loan.

Line 202: Enter the amount the Lender charges for extending the loan to the Buyer. The loan discount is frequently called "points".

Line 203: Enter the charge assessed by the Lender for an appraisal to determine the value of the property.

Line 204: Enter the charge assessed by a credit reporting agency to ascertain the status of the Borrower's credit.

Line 205: Enter the charge, if applicable, for a table showing the principle and interest payments monthly for the life of the loan.

Line 206: Enter the charge for photographs of the property required by the Lender or the Lender's investors.

Line 207: Enter the charge for a survey or plat of the property. Enter the name of the Surveyor to be paid on the line after "pay to".

Lines 208-210: Enter charges for inspections required by the Lender to ascertain the status of certain fixtures or the building on the property (e.g. termite inspection, heating plant inspection, plumbing or electrical fixtures inspection). Lines 208 to 210 may also be used for additional items payable in connection with the loan or credit not specified above.

Line 211: Enter the amount of FHA application and commitment fee or PMI fees as applicable.

Line 212: Total all charges to be disbursed to the Lender and enter in the Disbursements Column.

Line 213: Enter the totals for items in Section II.

Section III: Prepaid Items in Connection with Loan or Credit. The items in this section are those which are required by the lender to be prepaid (escrowed or impounded).

Line 301: In the case of conventional loans enter the interest to be paid by the Buyer on the loan amount from the date of the closing to the date of the first payment (to the end of the month for FHA or VA loans).

Line 302: Enter the prepaid premium for insurance the Buyer purchases to insure the Lender against loss because of nonpayment of the loan.

Line 303: Enter the prepaid premium for insurance that the Buyer purchases from a private company insuring against fire, and possible additional hazards or risks such as personal liability, theft, flood, etc.

Lines 304-308: Enter the amounts reserved to cover the cost of insurance, taxes, and unpaid assessments from the date of the Closing until the date of the next insurance or tax payment is due.

Line 309: This blank line may be used for other reserves not specified on lines 304 to 308.

Line 310: Enter totals for Section III.

Section IV: Private Title Transfer Charges: The charges in this section relate to title insurance, settlement, closing or escrow fees, and attorneys' fees. Note. - Lines 405 and 412 may, according to the legal and administrative practices and requirements in different areas of the country, include any of the other items in the section.

Line 401: Enter the charge to be paid for the services of the Closer, indicating the name of the person or company to whom the fee should be paid on the line after "pay to".

Line 402: Enter the charge to be paid to a private company or attorney for making a search of the public records. Indicate the name of the person or company to whom the fee should be paid, if applicable on the line after "pay to".

Line 403: Enter the charge to be paid for a private company or attorney for examining the abstract or title search and giving a written opinion of the status of the title. Indicate the name of the person or company to whom the fee should be paid on the line after "pay to".

Line 404: Enter the charge for the preliminary commitment to insure title issued by a private company based on its search and examination of the public records. Indicate the name of the person or company to whom the fee is to be paid on the line after "pay to".

Line 405: Enter the premium to be paid to a private company, to insure against any defects in the title to the property. Indicate the name of the company to whom the fee is to be paid on the line after "pay to". If this line includes other items in this section as described above in "NOTE", indicate these items by line number.

Line 406: Enter the amount of the charge for a Lender's Title Insurance policy, if applicable.

Line 407: Enter the amount of any charge for an Owner's Title Insurance policy, if applicable. Purchase of such coverage is at the Buyer/Borrower's option.

Line 408: Enter the charge for endorsements which may be added to a Title Insurance policy to give additional coverage specifically requested by the Owner or the Lender. Enter the name of the company to whom the fee for the endorsement(s) should be paid on the line after "pay to".

Line 409: Enter the charge to be paid for drafting any documents necessary for the settlement, such as Deeds of Conveyance, Trust Deeds, Mortgages, etc. Type the name of the person or company to whom the fee should be paid. No charge may be made for preparation of the Uniform Settlement Statement, the Advance Disclosure Statement, or any statement required by the Truth in Lending Act.

Lines 410, 411, and 415: These blank lines may be used to specify additional title transfer charges not shown in this section.

Line 412: Enter the fee charged by an attorney or attorneys for services in connection with the transaction or on behalf of the Borrower or Seller. Type the name of the attorney to whom the fee is to be paid on the line after "pay to". If this line includes other items in this section as described above in "NOTE", indicate these items by the line numbers.

Line 414: Enter any fees charged for notarizing documents and type the party to whom the fee is paid on the line after "pay to".

Line 416: Enter totals for Section IV.

Section V: Government Transfer Charges. The charges in this section include the various fees assessed by cities, counties or states for transferring title of property, and for recording documents relating to the transfer.

Line 501: Enter the fees paid to a governmental body for placing a document in the public record.

Line 502: Enter the fee to be paid to a city or county as a tax, or for revenue stamps which must be affixed to a document, for placing the documents related to the transfer in the public record.

Line 503: Enter the fee to be paid to a State as a tax, or for revenue stamps which must be affixed to a document, for placing documents related to the transfer in the public record.

Line 504: This line may be used to specify additional governmental transfer charges not shown in this section.

Line 505: Enter totals for Section V.

Section VI: Additional charges: The charges in this section include any items not covered in prior sections, such as the payment and release of the prior mortgage(s), the refinancing or assumption of an existing mortgage by the Borrower, and inspections which may be required by the sales contract, but not by the Lender.

Lines Unnumbered: Enter the name(s) of the Lender(s) who made the loan(s), if any, to be paid and released in the space(s) after "prior First (Second) mortgage to".

Line 601: Enter the amount of principal remaining to be paid on the loan in the Explanation Column.

Line 602: Enter the amount of interest to be paid from the date of the last payment to the date of the Closing.

Line 603: Enter the amount any charge for early payment of the loan.

Line 604: Enter the amount the Seller has in prepaid reserves for the payment of taxes or insurance, or the deficit in these reserves if one exists in the Explanation Column.

Line 605: This blank line may be used to specify other fees required in the release of the mortgage.

Line 606: Make the calculations for Lines 601 to 605 and enter the total to be paid the prior Lender in the Explanation Column.

Lines 607-612: These lines should be completed if a second loan is to be paid and released. Follow the same procedures as for Lines 601 to 606 above.

Line 613: Enter any fee charged by the Lender to the Borrower for refinancing or assuming an existing mortgage, or for taking out any second mortgage or other loan to be secured by the real property. Refinancing may also involve charges for points (line 202), updating of title insurance (line 405), and government transfer fees (Section V).

Lines 614 and 615: These lines may be used to specify additional charges or credits.

Lines 616 and 617: Enter the charge for inspections other than those required by the Lender and included in Lines 208 through 210 of Section II. Enter the type of inspection on the lines provided.

Line 618: Enter totals for Section VI.

Section VII: Total Settlement Charges and Credits. In this section are shown charges for the transfer, including those settled outside of the settlement.

Line 701: Enter the total charges from Sections I, II, III, IV, V and VI (total for Lines 104, 213, 310, 416, 505, and 618).

Lines 702-704: Enter any items which were or are to be settled outside settlement. Exclude any items relating to contract sales price adjustments which may be made outside of settlement. These appear in Sections VIII and IX only.

Line 705: Enter totals for Section VII by subtracting Lines 702, 703 and 704 from Line 701.

Section VIII: Funds Required from Buyer/Borrower. This section summarizes the Buyer/Borrower's transaction and shows the amount of funds required from the Buyer/Borrower to complete the settlement.

Line 801: Enter the Contract Sales Price of the property from Section A, Line 11; or in the case of a loan not involving a sale, enter the new amount of loan principal owed by the Borrower.

Line 802: Enter total settlement charges from Line 705 of the Buyer/Borrower column.

Lines 803-808: In these spaces enter all contract sales price adjustments which the Buyer agrees to pay.

Line 809: Enter the total of Lines 803-808.

Line 810: Enter the total of Lines 801, 802, and 809.

Line 811: Enter any earnest money deposit made by the Buyer.

Line 812: Enter the new mortgage proceeds; or in the case of a loan not involving a sale, enter the loan proceeds made available to the Borrower.

Lines 813-814: Enter any contract sales price adjustments which the Seller agrees to pay.

Line 815: Enter the total of Lines 811-814.

Line: Subtract Line 815 from Line 810 to arrive at the Buyer/Borrower's final cash obligation at settlement.

Section IX: Disbursements To Seller: This section summarizes the Seller's transaction and shows the amount owed to the Seller at settlement. It is filled out only if the loan finances sale of a 1- to 4-family residence.

Line 901: Enter the Contract Sales Price of the property from Section A, Line 11.

Line 902: Enter the contract sales price adjustments paid by the Buyer (from Line 809).

Line 903: Enter the total of Lines 901 and 902.

Line 904: Enter total settlement charges from Line 705 of the Seller column.

Line 905: Enter the Buyer's earnest money deposit (from Line 811).

Lines 906-908: Enter any contract sales price adjustments which the Seller agrees to pay.

Line 909: Enter the total of Lines 904-908.

Line 910: Subtract Line 909 from Line 903 to arrive at the final amount owed to the Seller at settlement.

Self-Help: An Intrusion into the Tenant's Rights

by

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The purpose of this article is to explore the legality and use of self-help activities in the Detroit area. Self-help, briefly stated, is the means by which a landlord enforces, against his tenant, a right, or supposed right through the use of force as opposed to orderly court processes. In this article, I will examine landlord-tenant relationships in Detroit, with emphasis on self-help in the context of those relationships as well as some proposed solutions to the problem of self-help.

Housing Conditions in Detroit

The best starting point for an examination of landlord-tenant relations in Detroit would be a brief look at the availability and conditions of the rental units themselves.

That there exists in Detroit a severe shortage of suitable rental units goes without question. "Of the 167,000 dwelling structures in Detroit's inner and middle city only 46,000 were considered sound by the Detroit Community Renewal Program. Even more severe was the problem in the inner city, where only 1,000 of 27,000 structures were considered sound." Modern Legislation, Metropolitan Court, Minuscule Results: A Study of Detroit's Landlord-Tenant Court, 7 Journal of Law Reform 1 (Fall 1973) at 14-15 (Citing Summary Report, Community Renewal Program, reprinted in City of Detroit, Detroit: The New City at 49-50 (1960). In a more recent study of housing in the Detroit area it was stated that...

An estimate of the housing situation in the Detroit Metropolitan area indicates that of approximately 1,100,000 units, at least 100,000 are substandard. Some are almost completely so and must sooner or later be demolished; others are well within the range of rehabilitation. Of the substandard units, approximately 75,000 are within the city of Detroit and the vast majority of those are occupied by Negroes. Progress Report of the New Detroit Committee, April 1968 at 33.

It should be noted that 67% of the inner city dwellings are renter occupied, while in the middle city the figure is 47%. M. Alsborg, "Property Abandonment in Detroit" Wayne Law Review Vol. 20, No. 3 March 1974 at 848.

The problem of inadequate housing is not native solely to Detroit. It is an illness which afflicts almost all large urban areas. At the time of the 1960 census there were 3,680,000 urban slum housing units in the United States. In human terms, one estimate indicated that one of every six persons in the urban population was housed in a slum environment. M. Clinard, Slums and Community Development, 5 (1966).

A further problem exists in Detroit, in that the median income for inner and middle city individuals is \$3,873 and \$5,552 respectively. M. Clinard, Slums and Community Development, 848 (1966). Thus the tenant forced to seek adequate

shelter in a seller's market will inevitably find the rental too high for his budget. Conversely, landlords forced to select tenants from a low income population may be unable to recapture their investment in the rental property. As a consequence they become unwilling or unable to invest any substantial sum of money in the maintenance or improvement of the rental unit. This in turn leads to the increased abandonment of houses in the urban area, thus hastening the decaying process and further depleting the market. M. Clinard, Slums and Community Development, 855-856 (1966). Moreover, because of their low incomes, the urban poor are unable to flee to the suburbs. Accordingly, they must accept whatever housing is available.

In sum, a tenant seeking housing in Detroit's inner and middle city, faces the three pronged dilemma of inadequate and scarce rental units which are priced beyond his means.

Summary Proceedings: An Introduction

In response to this severe housing shortage and a growing tenant's rights movement, the Michigan Legislature enacted Chapter 57 of the Revised Judicature Act, MCLA 600.5701 et. seq. This legislation provided the perspective tenant-defendant with a series of defenses in an action for eviction. The belief was that the tenant would stand and force the landlord to repair the premises. Many were optimistic that this legislation would remedy some of the long standing problems of inadequate housing in the Detroit area. That it did not do so seems now evident. M. Clinard, Slums and Community Development, note 1 at 16 (1966).

The summary proceedings action contained within that legislation provides a quick method for the recovery of property wrongfully held by a tenant. The entire process is easily handled by a layman without the assistance of an attorney. After the required notice has been given, a suit for possession can be commenced with the filing of a simplified form complaint provided by the Court. Upon the filing of the complaint a summons is automatically issued. The summons is made returnable within ten days, but as a matter of practice, it is always returned one week from the filing of the complaint. A copy of the summons and complaint is given to one of the bailiffs who then attempts to serve the defendant-tenant. If the bailiff is unable to obtain service on the first attempt, an alias summons is automatically issued, copies of which are tacked by the bailiff and concurrently mailed by the Court to the defendant-tenant. The alias is made returnable one week from the original return date. As a result, the plaintiff-landlord is able to get his case before a judge in no more than two weeks, at most, from the day the complaint is filed.

The two principal types of cases filed under the summary proceedings statute by landlords are first, a suit for non-payment of rent and second, a suit for termination of tenancy.

As regards a suit for non-payment of rent, a landlord must first give a written notice demanding that the tenant pay all rentals in arrear or vacate within seven days. MCLA 554.134 and MCLA 600.5714 (1). If the notice expires and the tenant fails to do either, the landlord may commence an action for possession of the premises. In such a suit a tenant-defendant is armed with a number of defenses which may be raised at the hearing stage. Among those defenses are the common law defenses of actual eviction, constructive eviction, partial actual eviction and partial constructive eviction. These defenses were generally limited by the requirement that the tenant vacate the premises. This moving requirement rendered the common law defenses useless, in that vacating the rental premises would in all cases moot the summary proceedings litigation. This

is obvious in that the summary proceedings action in Detroit concerns itself solely with determining rights of possession. Accordingly, where a tenant has vacated, the issue of possession is no longer relevant. However, as regards partial constructive eviction, this moving requirement has been deemed unnecessary. See Ravet v. Garelick, 221 Mich. 70 (1923).

Summary Proceedings: Non-Payment of Rent

For our purposes, the most important defense currently available to a tenant faced with eviction for non-payment of rent is the landlord's breach of the lease or any statutory covenants. Where there is such a breach, the tenant is entitled to a statutory abatement of rent according to MCLA 600.5741, which reads in part...

In determining the amount due under a tenancy the jury or judge shall deduct any portion of the rent which the jury or judge finds to be excused by the plaintiff's (landlord's) breach of the lease or by his breach of one or more statutory covenants imposed by Section 39 of Chapter 66 of the Revised Statutes of 1846, as added, being Section 554.139 of the Compiled Laws of 1948. See also Rome v. Walker, 38 Mich. 458 (1972).

The "statutory covenant" most often raised by a tenant-defendant under month to month tenancy is that imposed by MCLA 554.139 (1) (b). A month to month tenancy is the most common form of rental agreement in Detroit. Rent is paid each month and the tenancy is automatically renewed despite the absence of a written agreement. That "statutory covenant" requires the landlord to "keep the premises in reasonable repair."

If the tenant does not prevail on the above defense, he will be allowed ten days to pay the unabated remainder, appeal, or vacate the premises. If the tenant fails to do any of the three, the landlord may, after ten days from entry of judgment, order a writ of restitution. The writ, once signed by a judge and put in the hands of a bailiff of the court, authorizes that bailiff to forcibly evict the defendant-tenant from the premises.

An important right which the tenant has in a non-payment suit, up to and until the expiration of the ten day appeal period is that created by MCLA 600.5744. That statute allows a tenant who has won or lost at the trial stage to redeem his tenancy by paying the entire amount of rental owing, including costs.

Summary Proceedings: Termination of Tenancy

The second type of summary proceedings suit most often filed in the Detroit area is one for termination of tenancy. Where a landlord, under Michigan law, seeks to regain possession of his property, rented under a month to month tenancy, no specific reason for terminating that tenancy is required. Because the agreement is renewed each month, either party may refuse to continue the relationship. However, the landlord must give a notice, in writing, requesting the tenant to vacate the premises within a time span equal to the rental period. MCLA 554.134. Thus, for example, where a tenant pays rent monthly, the notice must clearly state that the tenant has thirty days in which to vacate the premises. Acceptance of rent after the giving of a notice to terminate or a non-payment notice creates a new tenancy and would void the notice given.'

The principal defense available to a tenant in a termination action is that the landlord has committed a "retaliatory eviction". MCLA 600.5720 provides that

a landlord may not recover a judgment for possession where the "...alleged termination was intended primarily as a penalty for the defendant's attempt to secure or enforce rights ... under the laws of the state, ..." or "...as a penalty for the defendant's complaint to a governmental authority..." Thus, where a tenant has complained to the city health department and the landlord seeks a judgment for possession because of that activity, the tenant may interpose "retaliatory eviction" as a defense. As in a non-payment of rent action, the parties are automatically allowed a ten day appeal period after the entry of judgment, with the writ of eviction issuing only after that period has expired.

Summary Proceedings: Health Hazard

A third, less common type of suit, initiated under the summary proceedings act is one for possession because of a serious health hazard. This action requires the giving of a seven day notice in writing, requesting the tenant to vacate the premises or remove the hazardous condition. MCLA 600.5714 (1). In a suit for possession because of an alleged health hazard the court has the power to issue a writ of eviction without waiting the normal ten day appeal period. MCLA 600.5744 (2) (e). The basic defense available in this action is that the condition complained of does not exist or that it is not significant enough to constitute a health hazard.

Self-Help: The Landlord's Response to Summary Proceedings

As can be seen from the first two types of summary proceeding actions and the defenses thereunder, it was the intention of the legislature to place in the hands of the tenant-defendant greater bargaining power. Schier, Draftsman: Formulation of Policy, 2 Prospectus 227, at 227-228. It was hoped that the tenant would accordingly use that bargaining power, within the framework of a suit for possession, to compel the landlord to improve the rental unit. It is this author's contention that some landlords reacted by turning to self-help activities, purposely avoiding the confrontation provided by summary proceedings. The most common form of self-help employed by landlords is that of a utility termination. Thus where the flow of heat, electricity and water is under the control of the landlord, he may manipulate those utilities to his own end. The least common, but by far the most volatile form of self-help, is the lockout. That is where the landlord secures the entrance to the rental property while the tenant is away. On occasion, though it is rare, a landlord will go a step further and remove all of the tenants belongings to the street. In addition, a landlord may implement a host of other effective and imaginative ploys to prod a tenant. For example, he may impound mail, threaten violence, remove exterior doors, discharge firearms, remove personal belongings or take any one of a number of other actions.

There are basically three reasons why a landlord would resort to self-help as opposed to summary proceedings.

First, he may not be aware of the existence of the Landlord-Tenant Court and the legislation governing that Court. Generally this occurs where a landlord rents only a single unit and has had no prior exposure to the court system. As a result he may have no concept of how to enforce his rights in the property. Accordingly, self-help seems the most accessible and prompt means available. Further, because of ignorance about the system, an individual landlord may be timid about appearing in court, being unwilling or unable to retain counsel.

Secondly, the cost in time and money of pursuing an eviction through the courts is high. It is true that the summary eviction process is far shorter than its common law predecessor. Under the common law an action to recover rental

premises was in the nature of a suit for replevin. Michigan's summary proceedings action differs from that plenary action principally in the shortened time periods for service and answer. However, summary proceedings requires that the landlord wait at least twenty-five days until the issuance of a writ in a non-payment case. Timetable for Non-payment of rent cases (provided landlord acts promptly) is as follows:

<u>Event</u>	<u>Total Days Expired</u>
-non-payment of rent	-
-notice (7 day)	1
-filing of complaint	8
-trial	15
-expiration of appeal (10 days)	25

It is nearly twice that in a simple termination case. Timetable for Termination cases (provided landlord acts promptly) is as follows:

<u>Event</u>	<u>Total Days Expired</u>
-notice (30 day)	30
-filing of complaint	31
-trial	38
-expiration of appeal (10 days)	48

This lengthy wait tempts many landlords to avoid using the courts. Further, the initial cost of filing, although recoverable in the judgment, is \$16.50, and the price of retained counsel far exceeds the budget of most landlords. In addition, if the tenant stands firm after judgment and the expiration of the appeal period the landlord may be confronted with the additional cost of obtaining a writ of eviction. The current fee for a writ of eviction is \$9.50. The hiring of a bailiff to execute on that writ is additional costs. The current rate charged for the execution of a writ of eviction by a bailiff is from \$12.00 to \$20.00 per room.

The third reason why a number of landlords are resorting to self-help is their inability to win possession in a summary judgment action. As before mentioned, a number of defenses exist to a suit for non-payment of rent, i.e., improper notice, retaliatory rent increases, constructive eviction, etc. Thus, where a tenant, often through his legal aid attorney, can show that the premises are not kept in reasonable repair, he may be awarded a substantial abatement in rent. In the past the Landlord-Tenant Court had gained a reputation as being primarily a landlord's court. That this had not significantly changed in the first three years after the promulgation of the new legislation was made evident by a study conducted between April of 1970 and April 1971. That study revealed that 97% of all cases filed in Landlord-Tenant Court were resolved with the landlord receiving everything he had requested in his complaint. Modern Legislation, Metropolitan Court, Minuscule Results: A Study of Detroit's Landlord-Tenant Court, 7 Journal of Law Reform 1 (Fall 1973) at 34 (Citing Summary Report, Community Renewal Program, reprinted in City of Detroit, Detroit: The New City at 49-50 (1960). As a result of that

study the Landlord-Tenant Clinic was established with offices adjacent to the court. For an in-depth discussion of Landlord-Tenant Clinic, see Landlord-Tenant Law in Detroit; The Court and Legal Aid, Real Property Law Section, State Bar Newsletter, August, 1974. Its impact has not been measured in terms of any deterrent effect on landlord's customarily employing that forum. However, as the new legislation takes hold, partially through the efforts of that clinic, it is becoming increasingly evident that a landlord operating a substandard building in the city of Detroit is no longer assured an easy victory in a summary proceedings action. Accordingly, as it has become more difficult for a landlord to gain positive results through legitimate means, the temptation to employ self-help has increased.

The Legality of Self-Help

In terms of the legality of self-help in Michigan, I would suggest that, at most, it is not allowed under any circumstances and, at least, it is so narrowly limited as to render it useless to the average landlord.

Self-help acts prior to the giving or expiration of notice in Michigan are clearly illegal in that the tenancy has not been terminated. This is due to the fact that by statute, written notice is required to terminate leasehold estates. MCLA 554.134 and MCLA 600.5714 (1) and (2). Accordingly, the landlord is required to give a seven day notice where his tenant has failed to pay rent. MCLA 554.134. He must also give a notice when a health hazard has been created. MCLA 600.5744 (2) (e). He must give a notice equal to the rental period for simple terminations. MCLA 554.134.

Once notice has been given and expires, there arises a question as to the legality of self-help. If the action results in a breach of the peace or is contrary to law, then it is illegal, as the landlord is required by statute to resort to the summary proceedings act. That statute reads,

A person may not make any entry into or upon premises unless the entry is permitted by law. If entry is permitted by law he shall not enter with force but only in a peaceable manner. MCLA 600.5711.

For the purposes of determining what constitutes a forcible entry, the Michigan Courts have consistently cited the rule laid down in Shaw v. Hoffman, 25 Mich. 162 (1872). There the court stated that...

...the statute was not intended to apply to a mere trespass, however wrongful; but the entry or the detainer must be riotous, or personal violence must be used or in some way threatened, or the conduct of the parties guilty of the entry or detainer must be such as in some way to inspire terror or alarm in the persons evicted or kept out--in other words, the force contemplated by the statute is not merely the force used against, or upon, the property, but force used or threatened against persons, as a means, or for the purpose of expelling or keeping out the prior possessors. (Quoted with approval in Christian v. Amster, 253 Mich. 400, Chylowski v. Steinberg, 193 Mich. 547 and Janesick v. City of Detroit, 337 Mich. 549).

However, even where the landlord's action is peaceful according to the above definition, and proper notice has been given, some dispute arises as to the legality of self-help.

In Smith v. Detroit Building and Loan Association, 115 Mich. 340 (1897), the Michigan Supreme Court held that summary proceedings were available primarily as an alternative to self-help. Further, that the sole purpose of the summary proceedings action itself was to avoid breaches of the peace. Accordingly, Smith v. Detroit Building and Loan Association, has long stood in Michigan for the proposition that self-help is allowed in the absence of a breach of the peace. Although that case has not as yet been overruled, its validity is in serious question for the following reasons.

First of all, in employing self-help the landlord may not use trickery or ruse to gain entrance to the rental property. In the case of Gallant v. Miles, 200 Mich. 532 (1918), the defendant landlady, after the giving and expiration of a proper notice, gained entry under the ruse that she had come to repair the water pipes. Once inside she evicted the tenant by displaying a false writ of eviction. This was held by the Court to be within the meaning of the forcible entry statute. In Pelavin v. Misner, 241 Mich. 209 (1928) the landlord gained possession by having his attorney lure the tenant outside on the pretense of inspecting the premises. Once the tenant was in the street the landlord locked the doors and refused the tenant readmittance. In commenting on this method of gaining possession the Court stated that...

Such an invasion, under color of a legitimate purpose, supplemented by stratagem or trick, carried out under a false pretense and successful for a moment only, did not result in a possession recognized by the law. Pelavin v. Misner, 241 Mich. 209, at 213.

The Court went on to find that where force was employed by the landlord to maintain possession, there was a violation of the forcible entry statute.

An examination of these two cases reflects the court's unwillingness to condone self-help where trick or stratagem is employed. Thus, the court has in effect redefined "forcible entry" to include entry under ruse or trick. Accordingly the scope of permissible self-help has been narrowed. The redefinition is a decided shift away from that adopted in Smith v. Detroit Building and Loan Association, wherein the court stated that forcible entry was such as to "inspire terror or alarm". Smith v. Detroit Building and Loan Association, 115 Mich. 340 at 349.

Secondly, self-help is not allowed where lockouts or utility terminations are employed to gain possession. In Ludwigsen v. Larsen, 227 Mich. 528 (1924) where the plaintiff-tenant had fallen behind three months in the rent, defendant-landlord fastened the front door of the rental premises and caused the lights and water to be shut off. In commenting on the method of eviction the Court stated...

Had the defendant been able to peaceably obtain possession, a different question would be presented. The acts by which he compelled plaintiff to abandon the premises were unlawful and tortious, and must be regarded as a forcible expulsion of her by him. The instruction of the trial court that what he did "was without authority and unwarranted in law" was fully justified. Ludwigsen v. Larsen, 227 Mich. 528 at 531.

Thus the court has further narrowed the scope of permissible self-help by including lockouts and utility terminations within the definition of "forcible expulsion." This further redefining of force, seems clearly aimed at limiting the use of self-help as it was applied in Smith v. Detroit Building and Loan Association.

Third, the recent line of cases dealing with 14th Amendment due process, indicate an unwillingness to allow individual rights to be extinguished or abridged without prior notice or hearing. In Klim v. Jones, 315 F.Supp. 109 (1970), the United States District Court for the Northern District of California found "state action" in a California statute which had established an "innkeeper's lien" on a tenant-guest's property. Further, it was found that the taking of a tenant-guest's property under that statute without prior notice or hearing was a violation of due process. Accordingly it seems evident that the same infirmity would exist in our summary proceedings statute, were it interpreted as it is under Smith v. Detroit Building and Loan Association to allow a landlord to take property with a prior hearing.

In the recent case of Northrip v. Federal National Mortgage Association, Civil Action No. 40074 in the United States District Court, Eastern District of Michigan, Southern Division, (1974) Judge Damon Keith found a violation of 14th Amendment due process where under Michigan's "Foreclosure of Mortgage by Advertisement Statute". MSA 27A.3201 et. seq. Plaintiff-Mortgagee was denied adequate prior notice. That case is instructive in that the court found "state action" for the reason that the challenged activity was encouraged by state statute. That opinion reads in part...

Courts have recognized that state action can result when the challenged activity is encourage (d) by state statute. See Reitman v. Mulkey, 387 U.S. 369 (1967); and Bond v. Dentzer, 362 F.Supp. 1373 (N.D. N.Y. 1973). In view of plaintiff's allegation and the fact that the statute itself makes foreclosure by advertisement possible, the Court is of the opinion that the statute does significantly encourage foreclosure by advertisement. Accordingly, the Court concludes that state action exists. Northrip v. Federal National Mortgage Association, Civil Action No. 40074, no page available.

Applying this principle to the Smith v. Detroit Building and Loan Association holding, it seems clear that the use of self-help is encouraged by judicially recognizing it as an alternative to a summary proceedings action.

In Northrip v. Federal National Mortgage Association the court goes on to state that Michigan's "Foreclosure by Advertisement Statute" violated minimal due process requirements because...

... the procedure did not include arrangements for a hearing before the sale of plaintiff's property and thereby placed upon plaintiff the burden of bringing suit to stop the selling of her property and getting a hearing on issues of default and the appropriateness of the sale. Here, where the contractual arrangement does not effectively specify the method of foreclosure or waive the due process rights, it would be unjust to require plaintiff to assume such a burden in view of the fact that the party asserting the claim is generally expected to bear the burden of legal action and proof. See Palmer v. Columbia Gas of Ohio, Inc., 479 F.2d 153 (6th Cir. 1973).

Again applying this principle to the Smith v. Detroit Building and Loan Association holding, it seems apparent that the tenant is placed in an untenable position. There is no prior hearing before the landlord acts. Accordingly, the burden of bringing suit to determine the issue is shifted from the party asserting the claim to the party defending.

For the above stated reasons there seems serious doubt that the Smith v. Detroit Building and Loan Association rational and holding could withstand a constitutional attack on 14th Amendment due process grounds.

Fourth, the doctrine adopted by the Smith v. Detroit Building and Loan Association case, interpreting the summary proceeding statute as an alternative to self-help, suggests a possible 4th Amendment violation.

In La Prease v. Raymours Furniture, 315 F.Supp. 716 (N.D. N.Y. 1970) under New York's replevin statute a sheriff entered plaintiff-debtor's apartment pursuant to a directive by defendant-creditor and seized certain chattels. No prior notice was given or required and the sheriff acted solely upon an affidavit filed by the creditor. A three judge panel deemed this a violation on its face of the 4th Amendment, made applicable by the 14th Amendment, in that there was a search and seizure without prior judicial scrutiny.

In contrast to the statute struck in New York, self-help in Michigan is carried out by the individual citizen as opposed to a sheriff, who stands as a governmental official. It is clear that the 4th Amendment was not designed to protect a private citizen from his fellow citizens. However, where, as here, court interpretation of a summary proceedings statute allows individual citizens to intrude into a tenant's home without prior judicial scrutiny, I would suggest a violation of the 4th Amendment exists. The constitutional infirmity is the same whether the seizure is pursuant to a statute duly executed by a sheriff, or via a court interpretation of a summary proceedings statute allowing execution by a private citizen.

Fifth, summary proceedings as it exists today is substantially different from the summary proceedings action as it existed in 1897, when Smith v. Detroit Building and Loan Association was decided. The most apparent change is the inclusion of a number of defenses which a defendant-tenant may raise against his landlord in an action for eviction. The existence of a retaliatory eviction (MCLA 600.5720), the disrepair of the rental premises (MCLA 600.5741), and the failure of the landlord to give proper notice are just three of several possible defenses to a summary proceedings action. That these defenses would be extinguished where a landlord resorts to self-help seems obvious. Accordingly, this would effectively undercut the legislative intent in establishing those defenses.

Some may argue that the landlord may act but at his peril. However, this would seem an untenable position in light of the legislative intent, not to create a tort right but rather to provide the tenant with sufficient bargaining power to stand and compel the landlord to repair the premises.

In sum it would appear that Smith v. Detroit Building and Loan Association has been effectively undermined and its validity can no longer be accepted. The redefinition of what constitutes forcible entry, the constitutional infirmities and the substantial shift in the nature of summary proceedings all belie the principle enunciated in Smith v. Detroit Building and Loan Association. Accordingly, the belief that the summary proceedings action is merely an alternative to self-help designed to prevent breaches of the peace has been at most, buried and at least, so severely limited as to leave it non-existent. I would therefore argue that self-help prior to completion of summary proceedings or in lieu of those proceedings is no longer acceptable in Michigan.

Along the same lines of reasoning, self-help cannot be tolerated during the appeal period. Again, this would undercut the legislative intent in allowing such an appeal and the further need for a fair hearing.

Self-Help Following Judicial Action

Once an individual has completed the entire judicial proceedings and the appeal period has expired, the question arises as to the landlord's right of self-help. The current practice in Detroit is for the landlord to pay \$9.50 for a writ of eviction and hire a bailiff to execute on that writ. The current rate for execution is from \$12.00 to \$20.00 per room. MCLA 600.5711 specifically states that every entry must be in a peaceable manner, even where the landlord has a legal right. Thus it would appear that the use of force against an unsuccessful tenant-defendant holding over after the expiration of the appeal period would be in contradiction to the statute. It further appears that "peaceable manner" must be defined in light of the long line of cases dealing with self-help when it existed in the court's eyes as an alternative to summary proceedings. Shaw v. Hoffman, 25 Mich. 162.

In Detroit there exists a special problem with regards to self-help activity. Currently in the city there are a number of multi-unit buildings, with all of the internal characteristics of apartment dwellings, which are operating under the guise of hotels. Licensed by the city (Detroit City Code § 29-1-1 et. seq.), they are able to take full advantage of an 1897 "innkeeper's" lien statute. MCLA 427.201 et. seq. That statute provides in part that...

Wherever the keeper of any hotel, ... shall receive into his hotel, ... any person ... he shall have a lien upon and right to detain the goods, baggage and effects of such guest ... to secure and compel the payment of his customary charges ... MCLA 427.201.

The manner of securing such "goods, baggage and effects" of a boarder is in all cases, known to this author, the simple act of changing the locks while the tenant is away. There is no prior notice requirement contained within the statute, and the tenant generally returns to his room to find the door locked and all his worldly possessions being held pending payment of any rentals owing or alleged to be owing.

The statute goes on to prescribe an elaborate method for the sale of secured goods. MCLA 427.202 et. seq. The proceeds are distributed first to the landlord to satisfy his lien (MCLA 427.204), with any remainder to the tenant or to the county treasurer if the whereabouts of the tenant is unknown. MCLA 427.206. However, it is important to note that there is no requirement that the landlord sell the impounded property. He may, as is generally the case in Detroit, store the secured goods indefinitely.

Although holding their buildings out as hotels, it is this author's contention that they are in fact apartment buildings. Many do not service transient guests, but rather provide housing for individuals residing in Detroit on a more or less permanent basis. It is to be noted that service of transient guests is the principal characteristic of a hotel under the common law. 40 Am. Jur. 2d 900, also see Op. Atty. Gen. 1939-40 at 94. That element was enunciated in Bram v. Briggs, 272 Mich. 38, wherein the court stated...

One essential element of the innkeeper-guest relationship at common law was that the person to whom accommodations are extended must be a transient, coming to the inn for a more or less temporary stay... Bram v. Briggs, 272 Mich. 38 at 41.

Further, the method of payment is most often on a periodic basis, either weekly or bi-weekly. Pursuant to such a method of payment, under Michigan law, a

tenancy may be inferred. Generally the intention of the parties is controlling. See Trip v. Gregory, 315 Mich. 364 (1946) also see C.J.S. § 146.

The net effect of a landlord operating his building as a hotel is the extinction of the tenants rights under the summary proceeding act. The tenant is faced with the dismal choice between yielding to the landlord's demands or abandoning all of his worldly goods. He is summarily denied prior notice and the opportunity to explain his position before an independent tribunal. In passing, it should be mentioned that the individuals who reside in these dwellings are generally at or near the bottom of our social scale, comprised of indigents, alcoholics and the elderly. Accordingly, they are the least equipped to effectively resist.

An identical statute in California, providing for an innkeeper's lien has been struck down as unconstitutional...

...for its failure to provide for any sort of hearing prior to the imposition of the innkeeper's lien thereunder, thus depriving the boarder of property without due process of law. Klim v. Jones, 315 F.Supp. 109 (1970) at 122.

The issue has yet to be decided in Michigan.

Prevalence of Self-Help in Detroit

The extent of self-help activities in the Detroit area cannot be properly measured. Because of ignorance of their rights or fear of retaliation many tenants simply do not protest. The poor, the elderly and those at the bottom of society's hierarchy lack the power and all too often the will to strike back. That self-help occurs on more than an occasional basis has been made clear to this author. The University of Detroit Urban Law Clinic has in the past six months interviewed 81 individuals faced with self-help activities by their landlords. This number may seem insignificant when compared to the total number of rental units in the Detroit area. However, it is to be noted that the Urban Law Clinic has made no significant effort to educate the public either to its existence or willingness to handle this specific type of case.

The Argument Against Self-Help

The question inevitably arises "should self-help be excluded in all its forms? In the absence of a breach of the peace should a landlord be allowed to recover his premises through his own efforts? I think it clear that self-help cannot be tolerated where a landlord acts entirely on his own without subjecting his claim to a fair and open hearing.

The home as our Anglo-Saxon legal tradition conceived it was a sanctuary unto itself. It stood as a haven, to which each individual could retreat from king and countryman.

For a man's home is his castle, et domus sua cuique tutissimum refugium. (One's home is the safest refuge to everyone.)
Pandects (6th Century) Lib. II, Tit. IV De In Ius Vocando.

The house of everyone is to him as his castle and fortress, as well for his defense against injury and violence as for his response. Semayne's Case 5 Report 91.

Certainly our founding fathers recognized this concept of the home as sanctuary and embodied in our constitution certain protections. The prohibition against unwarranted search and seizure is but one example.

As our urban areas become more and more densely populated many individuals must turn to rentals, often in multi-unit buildings. Accordingly, as the pressures of a modern world close in on the individual the importance of the home as sanctuary or retreat remains a prime interest which society should strive to protect. Some sociologists have recognized this concept and its validity in a modern urban society.

The... separation of home and work ... and the growth of cities into sprawling, black, transportation maps are two factors that help make the home a refuge against the impersonality of the outside. ...by now the home as sanctuary has legal and constitutional support in both England and the United States. Sebastian de Grazia (1962), Of Time, Work and Leisure, N.Y.: Twentieth Century Fund. at 184.

It seems therefore evident that the interest one has in his home goes beyond that of simple property rights. Further, where a landlord seeks to overthrow that institution, his actions should be put to the test of an open and fair hearing. However, where that landlord resorts to self-help he stands as both judge and executioner.

Some would argue that the landlord is put to a severe economic disadvantage where he is compelled to resort to the summary proceedings. However, in light of the recent security deposit statute which allows a landlord to extract 45 days rent in advance of occupation, this economic disadvantage seems negligible. MCLA 554.604. Currently in Detroit the minimum time necessary for completing the eviction process in a non-payment of rent case is 25 days. I would also contend that the landlord is generally in a better economic position to bear the burden of the summary proceedings, as opposed to a tenant forced to withstand a wrongful eviction. Further, I would suggest that where a landlord places a rental unit on the open market, he must be prepared to withstand the expense of litigation and collection, like any other businessman. That we do not condone a violation of the home by other creditors without first subjecting their claim to a fair and open hearing should lend guidance to our dealings with a landlord-creditor.

In conclusion I would offer some suggestions and possible solutions to the problem of self-help in the Detroit area.

First and foremost, the solution to self-help activities lies in an improved housing market. Where the bargaining position of the landlord weighs so heavily against a tenant, there seems little hope for the striking of a proper balance. Supported by a vast pool of tenants from which to select, the landlord has little need to improve the conditions of the building or to fear any substantial resistance to his self-help activities.

The situation becomes further aggravated when the core city landlord is able to justify his activities through the hotel owners lien statute. Thus in Detroit's inner city, there exists a floating pool of individuals whose only recourse is submission. They live completely dominated by their landlord, enjoying neither the benefit nor the spirit of the landlord-tenant law.

The problems of improving the housing conditions in Detroit's inner and middle city are indeed formidable. I do not know nor can I suggest a quick or easy method of improving housing. Yet I am convinced that all of our efforts

to improve the education and working conditions of our urban poor will be rendered useless where the individual must return each night to inadequate and substandard housing.

Secondly, I would suggest that an expanded legal service agency, created specifically to deal with peripheral landlord-tenant problems including self-help, be established in Detroit. Currently in Detroit there is only one agency willing or able to provide legal assistance on a regular basis to tenants who have been locked out. Their activities are severely limited by the lack of personnel and facilities.

The proposed agency would operate out of the currently existing Landlord-Tenant Clinic. That clinic, located in the Lafayette Building in downtown Detroit, is currently capable of handling only those actions which are in the summary proceedings stage. Any peripheral litigation, including suits on behalf of tenants wrongfully evicted, must be referred out. This inability to handle peripheral litigation has been cited as one of the principle drawbacks of the Landlord-Tenant Clinic. The location of the proposed agency would serve two purposes; first, it would support the existing Landlord-Tenant Clinic, and second, it would provide easy access by the public through an existing agency.

Third, I would propose that the Landlord-Tenant Court be vested with a limited equitable power to enforce or control their own judgments. Where a plaintiff-landlord has been defeated in the summary proceedings litigation it is often all too easy for him to return to the rental premises and cut off the electricity. Accordingly, a successful tenant litigant is left with a useless judgment. He must seek aid in a new forum and re-allege that which he had been hard pressed to prove before. It is evident that every court suffers to the extent that its judgments can summarily be ignored. Thus by vesting in Common Pleas Court, Landlord-Tenant Division, a limited equitable power, I think a certain degree of credibility would be lent to that tribunal.

Fourth, I would propose that Circuit Court establish a quicker method by which a tenant could obtain equitable relief. Currently a tenant faced with self-help activity by his landlord must seek out an attorney willing to render assistance. This is due to the fact that it is virtually impossible for a layman to pursue all the necessary steps to gain an injunction. An attorney once retained must file a complaint with all the requisite allegations. If the tenant is not indigent a \$30 filing fee must be paid. The attorney must then take a notarized complaint, order to show cause and a temporary restraining order to the presiding miscellaneous judge for signature. For the temporary order to have any effect it must be served on the party complained of. The temporary order has supposedly immediate effect. However, where the landlord chooses to ignore that order, a tenant must go further to file and serve an order to show cause why the landlord should not be held in contempt. In the interim the tenant is without relief.

I would suggest that the presiding miscellaneous judge of the Circuit Court be permitted to issue a temporary restraining order and order to show cause upon sworn oral testimony by a tenant. Thus where a tenant is locked out he would appear in person, without an attorney or pleadings, and submit his story to the scrutiny of a judge. That judge could then summarily issue the injunction and direct a bailiff to serve it forthwith. Should the tenant misrepresent his story he would be liable in damages. Thus an aggrieved tenant could obtain prompt and effective relief.

Fifth, although the eviction process can be completed by a layman with little or no legal expertise, some landlords complain, perhaps justifiably so,

that the process is cumbersome and time consuming. As before mentioned, a landlord can protect his interests by requiring a security deposit and giving notices promptly. The security deposit would offset any unpaid rental owing and the costs of the summary eviction proceedings. I would suggest therefore an effort to educate those individuals who place rental units on the market to their rights and obligations. That among those obligations is the legal necessity of following the summary proceedings statute. This effort at community education should be directed specifically at those landlords with one or two rental units, in that they are more often injured by the delays in the eviction process. Further, the tenants themselves should be made aware of their rights and obligations. Specifically, that among their obligations is the responsibility to pay rent promptly and among their rights, is the right to a fair hearing prior to eviction.

In conclusion I would like to state that it is not my belief that self-help constitutes one of Detroit's more pressing problems. Urban blight, unemployment and a severe housing shortage, to name a few, are concerns which demand, and rightly so, our fullest attention. Yet I would contend here, that the security of an individual's home should be diligently protected. I do not feel that at this time there is an epidemic of self-help activity in Detroit, yet the illness is present. Although the new law replete with tenants' rights has, as yet, not significantly deterred landlords from using our courts, its impact is beginning to be felt. Groups of landlords are banding together in earnest to protest what they feel is a harsh and unjust law. This is but one form of an expression of dissatisfaction, self-help is another. Finally, it is my belief that as the economy deteriorates and unemployment increases the incidence of self-help will increase. In times of economic and social stress from the outside world, we can ill afford to allow the individual home to be breached without first carefully and rationally examining that intrusion.

TEXT OF TAX CREDIT FOR PURCHASE OF NEW PRINCIPAL RESIDENCE

(Tax Reduction Bill of 1975)

SEC. 44. PURCHASE OF NEW PRINCIPAL RESIDENCE.

"(a) GENERAL RULE.--In the case of an individual there is allowed, as a credit against the tax imposed by this chapter for the taxable year, an amount equal to 5 percent of the purchase price of a new principal residence purchased or constructed by the taxpayer.

"(b) LIMITATIONS.--

"(1) MAXIMUM CREDIT.--The credit allowed under subsection (a) may not exceed \$2,000.

"(2) LIMITATION TO ONE RESIDENCE.--The credit under this section shall be allowed with respect to only one residence of the taxpayer.

"(3) MARRIED INDIVIDUALS.--In the case of a husband and wife who file a joint return under section 6013, the amount specified under paragraph (1) shall apply to the joint return. In the case of a married individual filing a separate return, paragraph (1) shall be applied by substituting '\$1,000' for '\$2,000'.

"(4) CERTAIN OTHER TAXPAYERS.--In the case of individuals to whom paragraph (3) does not apply who together purchase the same new principal residence for use as their principal residence, the amount of the credit allowed under section (a) shall be allocated among such individuals as prescribed by the Secretary or his delegate, but the sum of the amounts allowed to such individuals shall not exceed \$2,000 with respect to that residence.

"(5) APPLICATION WITH OTHER CREDITS.--The credit allowed by subsection (a) shall not exceed the amount of the tax imposed by this chapter for the taxable year, reduced by the sum of the credits allowable under sections 33, 37, 38, 40, 41, and 42.

"(c) DEFINITIONS.--For purposes of this section--

"(1) NEW PRINCIPAL RESIDENCE.--The term 'new principal residence' means a principal residence (within the meaning of section 1034), the original use of which commences with the taxpayer, and includes, without being limited to, a single family structure, a residential unit in a condominium or cooperative housing project, and a mobile home.

"(2) PURCHASE PRICE.--The term 'purchase price' means the adjusted basis of the new principal residence on the date of the acquisition thereof.

"(3) PURCHASE.--The term 'purchase' means any acquisition of property, but only if--

"(A) the property is not acquired from a person whose relationship to the person acquiring it would result in the disallowance of losses under section 267 or 707(b) (but, in applying section 267(b) and (c) for purposes of this section, paragraph (4) of section 267 (c) shall be treated as providing that the family of an individual shall include only his spouse, ancestors, and lineal descendants), and

"(B) the basis of the property in the hands of the person acquiring it is not determined--

"(i) in whole or in part by reference to the adjusted basis of such property in the hands of the person from whom acquired, or

"(ii) under section 1014(a) (relating to property acquired from a decedent).

"(d) RECAPTURE FOR CERTAIN DISPOSITIONS.--

"(1) IN GENERAL.--Except as provided in paragraphs (2) and (3), if the taxpayer disposes of property with respect to the purchase of which a credit was allowed under subsection (a) at any time within 36 months after the date on which he acquired it (or, in the case of construction by the taxpayer, on the day on which he first occupied it) as his principal residence, then the tax imposed under this chapter for the taxable year in which terminates the

replacement period under paragraph (2) with respect to the disposition is increased by an amount equal to the amount allowed as a credit for the purchase of such property.

"(2) ACQUISITION OF NEW RESIDENCE.--If, in connection with a disposition described in paragraph (1) and within the applicable period prescribed in section 1034, the taxpayer purchases or constructs a new principal residence, then the provisions of paragraph (1) shall not apply and the tax imposed by this chapter for the taxable year following the taxable year during which disposition occurs is increased by an amount which bears the same ratio to the amount allowed as a credit for the purchase of the old residence as (A) the adjusted sales price of the old residence (within the meaning of section 1034), reduced (but not below zero) by the taxpayer's cost of purchasing the new residence (within the meaning of such section) bears to (B) the adjusted sales price of the old residence.

"(3) DEATH OF OWNER; CASUALTY LOSS; INVOLUNTARY CONVERSION; ETC.--
The provisions of paragraph (1) do not apply to--

"(A) a disposition of a residence made on account of the death of any individual having a legal or equitable interest therein occurring during the 36 month period to which reference is made under such paragraph,

"(B) a disposition of the old residence if it is substantially or completely destroyed by a casualty described in section 165(c) (3) or compulsorily and involuntarily converted (within the meaning of section 1033(a), or

"(C) a disposition pursuant to a settlement in a divorce or legal separation proceeding where the other spouse retains the residence as principal residence.

"(e) PROPERTY TO WHICH SECTION APPLIES.--

"(1) IN GENERAL.--The provisions of this section apply to a new principal residence--

"(A) the construction of which began before March 26, 1975,

"(B) which is acquired and occupied by the taxpayers after March 12, 1975, and before January 1, 1977, and

"(C) if not constructed by the taxpayer, which was acquired by the taxpayer under a binding contract entered into by the taxpayer before January 1, 1976.

"(2) SELF-CONSTRUCTED PROPERTY BEGUN BEFORE MARCH 13, 1975.--
In the case of property the construction of which was begun by the taxpayer before March 13, 1975, only that portion of the basis of such property properly allocable to construction after March 12, 1975, shall be taken into account in determining the amount of the credit allowable under subsection (a).

"(3) BINDING CONTRACT.--For purposes of this subsection, a contract for the purchase of a residence which is conditioned upon the purchaser's obtaining a loan for the purchase of the residence (including conditions as to the amount or interest rate of such loan) is not considered non-binding on account of that condition.

"(4) CERTIFICATION MUST BE ATTACHED TO RETURN.--This section shall not apply to any residence (other than a residence constructed by the taxpayer) unless there is attached to the return of tax on which the credit is claimed a certification by the seller, in accordance with regulations prescribed by the Secretary or his delegate, that the purchase price is the lowest price at which the residence was ever offered for sale."

STATE OF MICHIGAN

COURT OF APPEALS DIGEST

(MICHIGAN SUPREME COURT CASES INCLUDED)

DASSANCE v NIENHUIS (Aff'd in part; Rev'd in part) January 7, 1975 18282-83

CONTRACTS - BREACH - SPECIFIC PERFORMANCE - PROPRIETY Where the material terms of a contract between plaintiffs and defendant such as the property, the parties and the consideration were clearly established, and where the trial court's findings that (1) plaintiffs had unconditionally accepted defendant's counteroffer and (2) that additional wording on the contract form was placed there solely for the convenience of the realtor were supported by the record, an award of specific performance was proper.

APPEAL AND ERROR - FINDINGS OF FACT - "CLEARLY ERRONEOUS" TEST Findings of fact made by a trial court will not be set aside unless clearly erroneous.

CONTRACTS - INTERFERENCE - DEFENDANT - KNOWLEDGE - DUTY TO INQUIRE If a person has knowledge of such facts as would lead any reasonable man to make further inquiries and avoids making such inquiries, he must be taken to have notice of those facts which he would have discovered if he had used ordinary diligence.

LIS PENDENS - EFFECTIVE DATE A lis pendens is effectual from the time of filing as notice of the claims made therein.

CONTRACTS - INTERFERENCE - MALICE UNNECESSARY Damages may be awarded where a tortious interference with another's contractual rights occurs; malice is not a prerequisite, and liability may be found if the interference is by inducement or is purposeful.

CONTRACTS - INTERFERENCE A defendant-third party tortiously interfered with the plaintiffs' purchasers' contractual rights in a contract for sale of real estate where he effectively induced the owner to breach his contract to sell to the plaintiffs and persuaded the owner to sell to another party, knowing all the time that plaintiffs had a prior contract with the owner.

DAMAGES - PUNITIVE - PROPRIETY Where there is evidence in the record supporting a finding of vindictive, willful, wanton, or malicious conduct, punitive damages are in order.

CONTRACTS - INTERFERENCE - DAMAGES - ATTORNEY FEES - PRIOR LITIGATION Reasonable attorneys' fees incurred in prior litigation with a third party may be recoverable in a subsequent proceeding where the defendant by his wrongful conduct caused the plaintiff to defend or prosecute the previous legal proceedings. The mere fact that the matters were consolidated for hearing does not operate to prevent plaintiff's from recovering the fees.

PANEL: T. M. BURNS, R. B. Burns, Carland

BURKHARDT v CITY NATIONAL BANK OF DETROIT (Aff'd) January 27, 1975 14699

CONTRACTS - PERFORMANCE - MANNER - DISCRETIONARY - GOOD FAITH Where a party to a contract makes the manner of its performance a matter of its own discretion, the law does not hesitate to imply the proviso that such discretion be exercised honestly and in good faith.

APPEAL AND ERROR - FINDINGS OF FACT - CLEARLY ERRONEOUS TEST Where the trial court found that defendant's utilization of its accounting method was not in breach of the contract establishing the escrow account, and this finding of fact has not been shown to be clearly erroneous, the Court adopts the trial court's findings as its own.

STATUTE: GCR 1963, 517

CONTRACTS - ESCROW AGREEMENT - ACCOUNTING METHOD - PROPRIETY The plaintiff and defendant established three separate escrow accounts requiring the plaintiff to make monthly payments in order that the defendant could pay city and county taxes and the insurance premiums on the mortgaged premises as they became due. While plaintiffs claim that the accounting method chosen by defendant oversecures the bank, guarantees a positive balance after the largest expense has been paid, and evidences bad faith, the accounting method was not in breach of the contract and did not, in fact, oversecure the bank nor result in an excessive escrow account balance.

PANEL: Gillis, Allen, ELLIOTT

WEST MADISON INVESTMENT CO. INC. v FILECCIA (Rev'd & Rem'd) January 28, 1975 18850

PROPERTY - DEED - WARRANTIES - BREACH - MORTGAGE - ESCROW AGREEMENT - SATISFACTION Where plaintiff relied upon an escrow agreement to cover any liability arising out of a second mortgage which was not recited in the warranty deed, and was induced to purchase the property by the execution of the agreement, plaintiff cannot now complain that the presence of that second mortgage constituted a breach of warranty of title.

EVIDENCE - PAROL - ADMISSIBILITY - SEPARATE INSTRUMENTS - ONE TRANSACTION No violation of the parol evidence rule occurred when the trial court admitted into evidence and considered a letter from defense counsel to plaintiff regarding an escrow agreement. The letter was properly admitted as within the rule that separate instruments executed at about the same time, regarding the same matter,

between the same parties, and made as elements of one transaction may be examined together and construed as one instrument in order to ascertain the intention of the parties.

PANEL: Danhof, Bashara, ALLEN

RAY v MASON COUNTY DRAIN COMMISSIONER (Vac'd & Rem'd) January 21, 1975 55248

TRIAL COURT - FINDINGS OF FACT - REQUIREMENTS Findings of fact must include as much of the subsidiary facts as is necessary to disclose the steps by which the trial court reached its ultimate conclusion on each factual issue. The findings should be made at a level of specificity which will disclose to the reviewing court the choices made as between competing factual premises at the critical point that controls the ultimate conclusion of fact. That is, at the point where a given choice as to the concrete facts leads inevitably to the ultimate conclusion, the findings should disclose the choice which was made, so that the appellant court may test the validity of its evidentiary support.

TRIAL COURT - FINDINGS OF FACT - NON-COMPLIANCE - APPEAL - DISPOSITION While plaintiffs are correct in asserting that, as an alternative to remand, this Court could hear the action *de novo*, the more appropriate disposition upon a finding that the trial judge has failed to comply with GCR 1963, 517 is to remand the original record to the trial judge for preparation and certification of finding of facts.

STATUTE: GCR 1963, 517

ENVIRONMENT - TRIAL COURT - FINDINGS OF FACT - REQUIREMENTS To satisfy the requirements for findings of fact under the Environmental Protection Act, the trial judge should consider, and where appropriate make findings of fact with regard to each of the following: how the plaintiff has established a *prima facie* case that the defendant's conduct "has or is likely to pollute, impair or destroy the air, water, or other natural resources" or how he has failed; how the defendant has rebutted plaintiffs' *prima facie* case with evidence to the contrary, or how he has failed; how defendant has established as an affirmative defense that "there is no feasible and prudent alternative. . . and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the State's paramount concern for the protection of its natural resources from pollution, impairment or destruction," or how he has failed.

STATUTE: MCLA 691.1201 et seq; GCR 1963, 517

WORDS AND PHRASES - PRIMA FACIE CASE A litigating party is said to have a *prima facie* case when the evidence in his favor is sufficiently strong for his opponent to be called upon to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced on the other side.

EVIDENCE - DEFENDANT - PRIMA FACIE CASE - REBUTTAL - STANDARD In determining whether the defendant has successfully rebutted plaintiffs' case in an action brought under the EPA, the trial court should look to the general rules of evidence.

ENVIRONMENT - EVIDENCE - BURDEN OF PROOF - BURDEN OF GOING FORWARD While the burden of proving environmental pollution or impairment remains with the plaintiff, the burden of going forward with the evidence shifts to the defendant once the plaintiff establishes a prima facie case. If the defendant successfully rebuts, the burden of going forward with the evidence would then shift back to the plaintiff.

ENVIRONMENT - PLAINTIFF - PRIMA FACIE CASE - STANDARD Plaintiffs' burden of establishing a prima facie case is governed by general rules of evidence. A prima facie case is one that is sufficient to withstand a motion by the defendant that the judge direct a verdict in the defendant's favor.

STATUTE: MCLA 691.1201 et seq

PANEL: Entire Bench, (Except T. G. Kavanagh), WILLIAMS

SAMSON v SAGINAW PROFESSION BLDG, INC. (Aff'd) January 21, 1975 5485

LANDLORD - TENANT - LANDLORD - NEGLIGENCE - THIRD PARTY - ASSAULTS Where an injured tenant attempts to hold his landlord liable for assaults upon him by a third party upon the landlord's premises, the general rule of law applicable is that an act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

NEGLIGENCE - ELEMENTS - FORESEEABILITY - KNOWLEDGE Knowledge is fundamental to liability for negligence. The very concept of negligence presupposes that the actor either does foresee an unreasonable risk of injury, or could foresee it if he conducted himself as a reasonably prudent man. Foreseeability of harm, in turn, must depend on knowledge. Knowledge has been defined as the consciousness of the existence of a fact, and fact includes not only objects apparent to the senses but the characteristics and traits of people and animals and the properties and propensities of things.

NEGLIGENCE - ELEMENTS - FORESEEABILITY - DEFINED Foreseeability depends upon whether or not a reasonable man could anticipate that a given event might occur under certain conditions.

NEGLIGENCE - ELEMENTS The mere fact that an event may be foreseeable does not impose a duty upon the defendant to take some kind of action accordingly. The event which the defendant perceives might occur must pose some sort of risk of injury to another person or his property before the actor may be required to act. In addition, to require the actor to act, some sort of relationship must exist between the actor and the other party which the law or society views as sufficiently strong to require more than mere observation of the events which unfold on the part of the defendant. Finally, the risk of harm must be an unreasonable one.

NEGLIGENCE - RISK - FORESEEABILITY - REASONABLENESS - FACT QUESTION In negligence cases, the reasonableness of the risk of harm, as foreseeability, is normally a question for the jury to determine.

LANDLORD - TENANT - COMMON AREAS - SAFETY - LANDLORD - DUTY The common areas of a building are leased to no individual tenant and it is the responsibility of the landlord to insure that these areas are kept in good repair and reasonably safe for the use of tenants and invitees. The existence of this relationship between

the defendant and its tenants and invitees place a duty upon the landlord to protect them from unreasonable risk of physical harm.

NEGLIGENCE - LANDLORD - MENTAL CLINIC - LEASE - TENANTS - SAFETY When defendant leased its premises to a state mental clinic, the fact that patient-visitors might commit criminal actions in the future was foreseeable to this defendant. It had even been brought to its attention by other tenants in the building. The magnitude of the risk, that of a criminally insane person running amok within an office building filled with tenants and invitees, was substantial to say the least. To hold that, possessed of these facts and no other, this defendant should have inquired further into the reasonableness of its inaction, that is, the probability of such an event occurring in the future, and that its failure to make such an inquiry may be deemed negligence on its part, does not shock the conscience of this Court. The jury in the instant case found the actions of this defendant unreasonable. We are unable to disagree on this record.

PANEL: Entire Bench, T. M. KAVANAGH, Levin (dissenting) joined by Coleman, Fitzgerald.

Proration of Taxes

by

Frank S. Sengstock

In the previous issue of the Newsletter, I asked for information concerning proration of real property taxes. Your editor has received a substantial response to his request. That response has indicated a real interest and desire on the part of the members of the Bar to achieve some uniformity in this area. I have selected some key practices for reprint and will publish other documents as they come to my attention.

Internal Revenue Code

164(d) Apportionment of Taxes on Real Property Between Seller and Purchaser

(1) GENERAL RULE.--For purposes of subsection (a), if real property is sold during any real property tax year, then--

(A) so much of the real property tax as is properly allocable to that part of such year which ends on the day before the date of the sale shall be treated as a tax imposed on the seller, and

(B) so much of such tax as is properly allocable to that part of such year which begins on the date of the sale shall be treated as a tax imposed on the purchaser.

(2) SPECIAL RULES.--

(A) In the case of any sale of real property, if--

(i) a taxpayer may not, by reason of his method of accounting, deduct any amount for taxes unless paid, and

(ii) the other party to the sale is (under the law imposing the real property tax) liable for the real property tax for the real property tax

year, then for purposes of subsection (a) the taxpayer shall be treated as having paid, on the date of the sale, so much of such tax as, under paragraph (1) of this subsection, is treated as imposed on the taxpayer. For purposes of the preceding sentence, if neither party is liable for the tax, then the party holding the property at the time the tax becomes a lien on the property shall be considered liable for the real property tax for the real property tax year.

(B) Paragraph (1) shall apply to taxable years ending after December 31, 1953, but only in the case of sales after December 31, 1953.

(C) Paragraph (1) shall not apply to any real property tax, to the extent that such tax was allowable as a deduction under the Internal Revenue Code of 1939 to the seller for a taxable year which ended before January 1, 1954.

(D) In the case of any sale of real property, if the taxpayer's taxable income for the taxable year during which the sale occurs is computed under an accrual method of accounting, and if no election under section 461 (c) (relating to the accrual of real property taxes) applies, then, for purposes of subsection (a), that portion of such tax which--

(i) is treated, under paragraph (1) of this subsection as imposed on the taxpayer, and

(ii) may not, by reason of the taxpayer's method of accounting, be deducted by the taxpayer for any taxable year, shall be treated as having accrued on the date of the sale.

Revenue Rule 67-31

26 CFR 1.164-6: Apportionment of Taxes on Real Property Between Seller and Purchaser

For purposes of section 164(d) (1) of the Internal Revenue Code of 1954, the "real property tax year" of the State of Michigan and local government units thereof is the calendar year.

Advice has been requested as to what period is considered the "real property tax year" of the State of Michigan for purposes of apportioning real property taxes between a seller and purchaser of property situated within the State under section 164(d) (1) of the Internal Revenue Code of 1954.

Section 164(a) of the Code provides, in part, that State and local real property taxes shall be allowed as a deduction for the taxable year within which paid or accrued.

The rules set forth in section 164(d) of the Code, relating to the apportionment between seller and purchaser of the allowable deduction, however, are applicable when real property is sold during any "real property tax year." Section 164(d) of the Code provides the general rule that if real property is sold during any "real property tax year" then so much of the tax as is properly allocable to that part of such year which ends on the day before the date of the sale shall be treated as imposed on the seller, and so much of the tax as is properly allocable to the part of such year which begins on the date of the sale shall be treated as imposed on the purchaser.

Section 1.164-6(c) of the Income Tax Regulations provides that the term "real property tax year," as used in section 164(d) of the Code, refers to the

period which, under the law imposing the tax, is regarded as the period to which the tax imposed relates. Where the State and one or more local governmental units impose a tax on real property, the real property tax year for each tax must be determined for purposes of applying the rule of apportionment of section 164 (d) (1) of the Code to each tax. The time when the tax rate is determined, the time when the assessment is made, the time when the tax becomes a lien, or the time when the tax becomes due or delinquent does not necessarily determine the real property tax year. The real property tax year may or may not correspond to the fiscal year of the governmental unit imposing the tax. In each case, the State or local law determines what constitutes the real property tax year.

The provisions relating to the taxation of property in Michigan, both real and personal, are contained in the General Property Tax Law, Michigan Stat. Ann. ch. 59, sections 7.1, et seq. (1960). Although the Michigan law does not specifically state what period constitutes the real property tax year the Michigan attorney general opinions on this issue state that such taxes are levied for a calendar year and are collected for the calendar year in which the levy is made. See Opinion No. 2074 (1955), Report of the Attorney General of Michigan, Vol. 1, 257; Opinion No. 4463 of the Michigan Attorney General, dated February 21, 1966, and the case of Pere Marquette Railroad Co. v. Kalamazoo Lake Shore Railway Co., 122 N.W. 356 (1909), cited therein. Therefore, it follows that the taxes assessed and levied on real property are for the calendar year.

Accordingly, for purposes of section 164 (d) (1) of the Code, the "real property tax year" of the State of Michigan and local governmental units thereof is the calendar year.

Michigan Statute

The February, 1975 issue of the Newsletter arrived this morning. The lead item is your appeal for information concerning the proration of taxes in real property transactions.

While I agree with your statement that there is no standard system for the proration of taxes throughout Michigan, and I also agree that the project is very worthwhile, one of the first things which should be pointed out in connection with this undertaking is that the Michigan Legislature has declared a method of proration of taxes in real estate transactions, which, if followed, would solve the problems which give rise to your inquiry.

In MCLA, § 211.2 it is stated:

"In any real estate transaction between private parties in the absence of any agreement to the contrary, the seller shall be responsible for that portion of said annual taxes levied during the twelve months immediately preceding, but not including, the day title passes, from the levied date or dates to, but not including, the day title passes and the buyer is responsible for the remainder of such annual taxes. As used in this paragraph 'levy date' means the day on which any general property tax becomes due and payable."

This very simple section adopts the due date concept of tax prorations, and relieves all parties of concern of the niceties of breaking out the fiscal years of the various taxing authorities whose taxes may be billed prospectively, retroactively or partially prospectively and retrospectively, and also eliminates

the assertion of the rather peculiar position of some parties that all taxes which are paid at any time are really a lien as of December 31 of the preceding calendar year, the so-called lien date concept.

Otherwise, it is generally recognized that one representing a purchaser of real property will attempt to have taxes prorated on a fiscal year basis in most jurisdictions because school taxes are generally billed partially retrospectively and partially prospectively along with the county tax bill which first comes due around December of each year. Likewise, township taxes frequently are billed at the same time as the county taxes, whereas the fiscal year of the township is often April 1st of that year, nine months in arrears. Since no tax ever seems to have a fiscal year extending more than twelve months past the due date, and many taxes have a fiscal year beginning prior to the due date, it is in the purchaser's interest to attempt a fiscal year proration.

On the other hand, when representing a seller, it is advisable to insist upon a due date proration for the same reasons.

It would be a complete solution to the problem you raised if everyone would follow the statutory method of proration. I can really see no argument against using that method as to all real estate transactions. Certainly its use does not adversely affect the owners of all property. At the time such owners purchased property, they could not have been required to pay more in tax prorations than would have been required under a due date method, and hence there is no economic loss to be incurred by the use of the due date method at the time of future sale. If the purchase transaction required proration on a fiscal year basis, a sale on a due date basis may result in some "enrichment" of the selling property owner but that certainly seems to be irrelevant to the new purchaser.

Yours very truly,

William B. Dunn
Clark, Klein, Winter, Parsons and Prewitt

August 25, 1969

Upper Thumb Board of Realtors
5536 Main Street
Lexington, Michigan 48450

Att: Mr. Edward McNulty, President

Dear Mr. McNulty:

Your letter of June 17, 1969, relates to the proration of ad valorem taxes between private parties to real estate transactions. In 1968, the Michigan legislature, for the first time, provided in Act No. 277, effective July 1, 1968, for such proration in the following language:

"In any real estate transaction between private parties in the absence of any agreement to the contrary, the seller shall be responsible for that portion of said annual taxes levied during the 12 months immediately preceding, but not including, the day title passes, from the levy date or dates to, but not including, the day

title passes and the buyer is responsible for the remainder of such annual taxes. As used in this paragraph 'levy date' means the day on which any general property tax becomes due and payable."

It would appear that the proration formula specified in Act No. 277 met with legislative favor. However, in order to guard against unconstitutional invasion of the freedom of individual contract, the legislature took care to except from the statutory proration those transactions which contained a contractual proration agreement to the contrary. In the absence of such contrary private agreement, the proration is mandatory.

I appreciate your concern for a standard or uniform property tax proration procedure. Indeed, the legislature, by enactment of No. 277, PA 1968, indicates a like concern. However, the wisdom and commendability of absolute uniformity in proration of ad valorem taxes must not clash with the right of the individual to freely contract.

Both of these concerns, for uniformity of proration procedures and for observance of the individual's freedom of contract, are observed in the 1968 enactment.

Very truly yours,

Frank J. Kelly
Attorney General

Due Date v. Fiscal Year
by

Brian A. Urquhart
Crippen, Dever, Urquhart & Cmejrek

ASSUMPTION OF FACTS:

Taxes Due December 1, 1974, which include:

<u>Taxing Authority</u>	<u>Amount</u>	<u>Fiscal Year</u>
School Taxes	\$1,000	7/1/74 - 6/30/75
County Taxes	500	1/1/75 - 12/31/75
Township Taxes	<u>200</u>	4/1/74 - 3/31/75
TOTAL	\$1,700.00	

Taxes Paid 12/15/74 by Seller
Date of Sale - 5/15/75

1) "Due Date" Method:	<u>Chg'd to Seller</u>	<u>Chg'd to Pchsr</u>
165/365 x \$1,700	\$768.49	
200/365 x \$1,700		\$931.51
TOTALS -----	\$768.49	\$931.51

2) "Fiscal Year" Method:

a) School Tax:		
Seller (318/365 x \$1,000)	\$871.23	
Pchser (47/365 x \$1,000)		\$128.77
b) County Tax:		
Seller (134/365 x \$500)	\$183.56	
Pchser (231/365 x \$500)		\$316.44
c) Township Tax:		
Seller (100% of 1974 Township Tax)	\$200.00	-0-
and add: 44/365 of Dec. '75 Township Tax to be paid by Purchaser for fiscal year 4/1/75 - 3/31/76	24.11	
	<hr/>	
TOTALS -----	\$1,278.90	\$445.21

Under the due date method above, the Purchaser would pay the Seller \$931.51 on May 15, 1975, which would have to be included in income by the Seller in 1975, assuming the Seller itemized his deductions on his 1974 tax return. However, the Purchaser can only deduct \$445.21 on his 1975 income tax return, and if the property is the purchaser's new residence, only that amount qualifies for the credit under the Michigan tax laws.

In short, the Seller's deduction is only \$768.49 (\$1,700 in 1974 less \$931.51 income in 1975), and the Purchaser's deduction is only \$445.21, for combined total deductions of \$1,213.70 and a "loss" to the benefit of the government of \$468.30 (\$1,700 - \$1,213.70) or a real dollar loss of \$243.15 if the taxpayers are both in a 50% tax bracket plus the loss of part of the Michigan tax credit.

Dear Mr. Sengstock:

I have been practicing for almost eight years in the City of Ann Arbor in Washtenaw County, and am pleased to report to you that it is common practice in Washtenaw County to pro-rate real property taxes between the buyer and the seller based upon the fiscal year or years of the various taxing authorities, and not upon the "due date" custom as is prevalent in Wayne County and other areas of the state.

I would strongly support the adoption by the Bar Association of a resolution recommending uniform adoption of the fiscal year method of tax pro-rating of personal property and real property taxes for the reasons hereinafter set forth.

Proponents of the due date method often argue that fiscal year pro-rating is too difficult or complex, due to lack of information. However, the various provisions of Michigan law relating to the preparation of tax statements by the taxing authorities require that the tax statements set forth the fiscal year or years of the taxing authority or authorities to which a particular tax applies, and for this reason, the "lack of information" argument is invalid.

For example, in the City of Ann Arbor, Washtenaw County, a tax statement mailed in July of 1974 would contain the following statement or statements:

City Taxes -- July 1, 1974 to June 30, 1975
School Taxes -- July 1, 1974 to June 30, 1975
Community College Taxes -- July 1, 1974 to June 30, 1975

Also, the tax statement which was mailed out by the City of Ann Arbor in December of 1974 reflected the following:

School Taxes -- July 1, 1974 to June 30, 1975
County Taxes -- January 1, 1975 to December 31, 1975

As you will note, Ann Arbor happens to bill part of the school tax in July and part of the school tax in December. Both installments, however, are for the entire fiscal year. Up to a few years ago, the entire school tax was levied in December, as it still is in most townships.

Although I have never spoken with anyone who has a complete history of the matter, it is my understanding that the "due date" method originated primarily as a convenience to brokers or others who handled real estate transactions, as the simplest way of handling the allocation and pro-rating taxes.

As a practical matter, as between a buyer and seller of a residence, the actual manner of pro-rating probably makes very little difference since it is merely a part of an entire sales package and so long as the seller of a residence pro-rates taxes the same way when he purchases his new house, the "net effect" to him, from a pure dollar standpoint, probably washes out except for income tax treatment.

From the standpoint of the deductibility of taxes pursuant to Section 164 of the Internal Revenue Code, and from the standpoint of determination of that portion of pro-rated taxes which are eligible for the credit for real property taxes paid on a homestead on the Michigan income tax return, the manner employed can make a substantial difference. Suffice it to say that the Internal Revenue Code, and accordingly the Michigan income tax law by reference, requires that real property taxes be pro-rated based upon the fiscal years of the taxing authorities, for purposes of determining the deductible portion thereof, or the portion thereof which is eligible for the credit as the case may be.

I have found that field auditors are very much aware of this requirement and frequently investigate whether or not the taxes have been properly handled by taxpayers on their returns.

A most unfortunate consequence which can arise if property taxes are not pro-rated in accordance with the fiscal year method, and if they are in fact allocated between the parties on the "due date" method, is that a deduction will vanish into thin air to the benefit of the government and to the detriment of one or both taxpayers.

Since almost all individuals are on a "cash basis" as opposed to an "accrual basis", for a taxpayer to claim a deduction it is necessary that he in fact "pays it." A deduction cannot be taken by one taxpayer for a deductible item which has in fact been paid by another taxpayer.

Since the Internal Revenue Code limits the deduction for a seller of real estate to that portion of the property taxes represented by that fraction of the

fiscal property tax year which has accrued up to but not including the date of sale, and limits the deduction for the purchaser to that portion of the taxes represented by that fraction of the fiscal year including and subsequent to the date of sale, it becomes obvious that a seller who has been "over-reimbursed" for real property taxes (as is often the case under the "due date" method of allocation) loses a deduction, or suffers an increase in his income subject to tax, to the extent that he has been reimbursed for any portion of the taxes which are properly allocable to that portion of the real property tax fiscal year preceding the date of sale (although he is not truly harmed in this sense since he has received dollars in exchange for the loss of his deduction). However, the seller in that case must include in income any amount received by him which exceeds the amount of taxes properly chargeable to him under the method of pro-rating taxes, if the prior year's tax deduction reduced his taxable income, which could result in additional taxable income (which results in an increase in his income subject to tax for both Federal and State income tax purposes).

Under the "due date" method, it is more frequent to see the purchaser being truly harmed in the income tax sense, since the purchaser may deduct only that portion of the allocated taxes which in fact represents a pro-rating of the taxes based upon the fiscal years of the taxing authorities. (See my examples attached).

If a party is truly concerned about the dollar loss in changing from a "due date" to fiscal year method, he might better increase the sale price by a corresponding amount, and at least convert the income to a capital gain or possibly a non-recognized gain, as is true in the majority of residential transactions.

It is the opinion of the undersigned that a most welcome revision in Michigan would be the adoption of a uniform method of pro-rating taxes, and it seems most logical that the method to be employed be that which is consistent with the relevant provisions of the Internal Revenue Code regarding the deductibility of taxes by a buyer and a seller.

With regard to the need for uniformity, I have frequently represented individuals who have purchased one residence and sold another and where the method of pro-rating taxes was under the "due date" method in one case and the fiscal year method in another, and which clients often express to me that they believe it to be asinine that taxes are not uniformly handled (especially when they sell on a fiscal year transaction and purchase on a due date transaction).

In conclusion, if an individual desires to make a contribution to the government it should be done in an intelligent and tax deductible manner, and not through the ignorance of blind adherence to the "due date" method of pro-rating taxes, which might also result in a malpractice claim against the attorney who fails to advise his client of the tax implications involved when the attorney is fortunate enough to have the opportunity to review the Sales Agreement prior to its execution.

It should be noted that this letter is not intended as a memorandum on the subject, but merely as an opinion from an interested practitioner.

Very truly yours,

Brian A. Urquhart

Oakland County

Dear Professor Sengstock:

The purpose of this letter is to acquaint you with a method of pro-rating taxes which seems to be prevalent in Oakland County and also seems to me somewhat inequitable.

The Birmingham Board of Realtors uses a standard purchase offer form which contains among its General Conditions this provision:

- (2) Seller shall discharge all City, County, Township, Village and Schools taxes upon the premises which, at the date of possession as provided elsewhere herein, shall have become a lien against the premises. At consummation of sale, any such taxes covering the current taxing period (i.e., the period in which the date of possession shall fall) shall be adjusted between the Seller and Buyer from the date upon which each of said taxes became a lien against the premises and not upon the fiscal year of the taxing authority; and Buyer shall reimburse the Seller for such proportion thereof as the number of days from the date of possession to the next date upon which said similar tax shall become a lien against the premises bears to 360.

In Bloomfield Township, the school fiscal year is July first to the following June 30th. There, one-half of the school taxes become due on July first. The other half becomes due on December first, along with County and Township taxes for the full year.

The practice in that area is to pro-rate the school taxes paid in July on a full year basis, commencing on July 1, even though they represent exactly one-half of the school taxes. The second half of the taxes are pro-rated on a full year basis, commencing on December first.

Obviously, the seller is given what amounts to a windfall under this practice. If a fiscal year pro-ration was applied, the buyer would pay a lesser tax pro-ration. If the entire school tax becomes due on July first, again the buyer would pay less.

Very truly yours,

Harvey R. Dean
Wall and Dean

Macomb County

JOHN Z. BRUNTON,
Plaintiff,

-vs-

NO. 17458.

TONY NEHRA,
GEORGE NEHRA,
Defendant.

OPINION OF THE COURT

The problem seems to be around the use of the various terms, a question of terminology. In other words, what one person has in mind in certain terminology, another person puts a different interpretation and meaning on it. As far as this court is concerned in the matters coming before it in the past, and in the future, until there is something more definite in the line of Supreme Court decisions, the court's interpretation is as follows: the taxing procedure and the statutes provide for your assessing officer to start his work beginning of 1950, it is processed through your allocation board, your equalization board, until it gets down to the preparing of the budget. This is all during the year of 1950. The budget is then prepared, which budget is then assessed based on the work of your equalization board and assessment officer prior to that time in 1950. That budget that is then prepared (in the case of the county it is the fall of 1950) is for the operational expenses of the following year. In the case of the county it happens to be the calendar year 1951. In the case of other governmental units it may be for certain fiscal years, but it is for the future operation of that unit.

The amount of that tax is then levied upon the real estate and in the state and county anyway becomes a lien on the property December 1, 1950. The taxes are then collected from December 1, 1950, on throughout the year 1951. Those taxes that are so levied and collected are part of the operational expenses of the year 1951.

Now, it would be the interpretation of this court that any agreement to sell, any warranty deed given, that was absolutely silent as to taxes, if that agreement or deed was given subsequent to December 1, 1950, that the vendor would have to pay that tax in order to discharge the lien from the real estate. He would have no right to contribution or apportionment from the purchaser in the absence of anything further being said.

However, when the parties in their agreement state that they will apportion or, as in this case, pro rate all current taxes, the only interpretation that can be put on that phrase would be current taxes, meaning taxes that have been paid or are due and owing for current operational expenses of any one particular governmental unit. That means you will have to go back to your governmental unit to see for what operational period that tax is current tax. I don't know how you could put any other interpretation on the word "current". We come back to this terminology; current tax presumably must mean a tax spread for the current operation of that particular governmental unit. It doesn't make any difference whether it is paid or unpaid. It is the tax assessed and currently paid or unpaid for the current operation. It is paid or due and owing for current benefits received and to be received for that operational period.

Clearly, the preliminary agreement here, in the opinion of this court, contemplated that form of division or allocation or pro ration of the taxes.

James E. Spier
Circuit Judge

Dated: August 23, 1951

Washtenaw County

Proration in Washtenaw County appears to be usually done by fiscal year and not by due date. The due dates do not correspond to the fiscal year. As the

following materials will indicate proration problems in Washtenaw County are sufficiently confusing so that a real estate firm undertook the effort of assembling in an attractive monograph, Washtenaw County Tax Proration Guide - 1975, which is republished here with permission of the Caldwell and Reinhart Co. Realtors.

December 13, 1974

Mr. Richard Caldwell
2452 E. Stadium Blvd.
Ann Arbor, Michigan

Dear Mr. Caldwell:

I have been asked to state the fiscal years for the various units of government in Washtenaw County. They are as follows:

The fiscal year for the cities is from July 1st to June 30th. The fiscal year for all villages is March 1st to February 28th except Village of Barton Hills which is April 1st to March 31st.

The county fiscal year is from January 1st to December 31st.

The schools' fiscal year is from July 1st to June 30th, this includes the community college and intermediate school district.

The townships fiscal year is approximately April 1st to March 31st. Fiscal year for the 1974 taxes is from March 19, 1974 to March 18, 1975.

Yours very truly,

Hilary E. L. Goddard,
Washtenaw County Treasurer

THE CALDWELL & REINHART COMPANY
 REALTORS
 2452 E. Stadium Blvd., (At Washtenaw) Ann Arbor, Michigan 48104

1975 FISCAL DATE TAX PRORATION (January 1 - June 30)
 For Property Located in the Cities of Milan, Saline, Ypsilanti
 As Of _____ City _____

Property: _____
 Assessed Valuation: _____

JULY 1974 TAXES

City
 (July 1,74-June 30,75) A.V. _____ x\$ _____ = _____ ÷ 360 days = _____ per day x _____ days to June 30 = \$ _____

Community College
 (July 1,74-June 30,75) A.V. _____ x\$ _____ = _____ ÷ 360 days = _____ per day x _____ days to June 30 = \$ _____

School Operating
 (July 1,74-Dec. 31,74) A.V. _____ x\$ _____ = _____

TOTAL JULY TAX A.V. _____ x\$ _____ = _____

DECEMBER 1974 TAXES

County
 (Jan 1,75-Dec 31,75) A.V. _____ x\$ _____ = _____ ÷ 360 days = _____ per day x _____ days to Dec 31 = \$ _____

School Operating
 (Jan 1,75--June 30,75) A.V. _____ x\$ _____ = _____ ÷ 180 days = _____ per day x _____ days to June 30 = \$ _____

TOTAL DECEMBER TAX A.V. _____ x\$ _____ = _____

TOTAL 1974 TAX A.V. _____ x\$ _____ DUE FROM PURCHASER AT CLOSING = \$ _____

ASSUMPTIONS

Seller has paid tax when due
 360 day year, 30 day month, each and every month
 Purchaser pays tax for day of closing

1975 FISCAL DATE TAX PRORATION

For Property Located in the Township of _____
As of _____

Property: _____

Assessed Valuation: 1974 - _____ 1975*- _____

COUNTY
1/1/75 to 12/31/75 A.V. _____ x\$ _____ = \$ _____ ÷ 360 days = _____ per day x _____ days to Dec. 31 \$ _____

SCHOOLS, INTERMED., C.C.
7/1/74 to 6/30/75 A.V. _____ x\$ _____ = \$ _____ ÷ 360 days = _____ per day x _____ days to/from June 30 \$ _____

TOWNSHIP**
A.V. _____ x\$ _____ = \$ _____ ÷ 360 days = _____ per day x _____ days to/from \$ _____

TOTAL TAX A.V. _____ x\$ _____ = \$ _____
DUE FROM PURCHASER/SELLER AT CLOSING \$ _____

ASSUMPTIONS:

1. Seller has paid tax when due.
2. 360 day year, 30 day month, each and every month.
3. Purchaser pays tax for day of closing.
4. Purchaser and Seller acknowledge and accept the fact that estimated figures were used for the 1975 prorations due from the Seller.

*When prorating the 1975 taxes, be sure to use the 1975 assessed valuation, if available.

**Be sure to look on the individual tax rate cards in the proration guide for the appropriate dates.

1975 FISCAL DATE TAX PRORATION (January 1 - June 30)
 FOR THE PROPERTY LOCATED IN THE CITY OF ANN ARBOR, WASHTENAW COUNTY

AS OF _____

PROPERTY _____

ASSESSED VALUATION: 1974 - _____ x 1.006 State Equalization Factor = S.E.V. _____

JULY 1974 TAXES

City
 (July 1,74-June 30,75) S.E.V. _____ x \$18.00= _____ ÷360 days= _____ per day x _____ days to June 30= \$ _____

Community College
 (July 1,74-June 30,75) S.E.V. _____ x \$ 2.56= _____ ÷360 days= _____ per day x _____ days to June 30= \$ _____

School
 (July 1,74-Dec 31,74) S.E.V. _____ x \$20.21= _____

TOTAL JULY TAX S.E.V. _____ x \$40.77= _____

DECEMBER 1974 TAXES

County
 (Jan 1,75-Dec 31,75) S.E.V. _____ x \$ 6.50= _____ ÷360 days= _____ per day x _____ days to Dec. 31= \$ _____

School
 (Jan 1,75-June 30,75) S.E.V. _____ x \$20.21= _____ ÷180 days= _____ per day x _____ days to June 30= \$ _____

TOTAL DECEMBER TAX S.E.V. _____ x \$26.71= _____ DUE FROM PURCHASER AT CLOSING \$ _____

TOTAL 1974 TAX S.E.V. _____ x \$67.48= _____

ASSUMPTIONS:

1. Seller has paid tax when due.
2. 360 day year.
3. 30 day month, each and every month.
4. Purchaser pays tax for date of closing - Section 211.2 of the C.L. of 1948 as amended (General Property Tax Law)

FISCAL DATE TAX PROPORATION FACTORS
(For the City of Ann Arbor only)

January 1, 1975 - June 30, 1975

Objective: To give client a quick and accurate tax proration as of a future date.

Tax Rate is 67.48 PER \$1,000 S.E.V.
State Equalization Factor is 1.006

Multiply A.V. _____ x _____ monthly factor = \$ _____
(State Equalization value has been figured into the monthly factor)

Example: Find the tax proration as of MARCH 15, 1975, A.V. \$15,000.00

A.V. 15.0 x 23.23 monthly factor = \$ 348.45

Factors per 1,000 A.V.:

January 1, 1975	- 37.17
January 15, 1975	- 34.53
February 1, 1975	- 31.53
February 15, 1975	- 28.88
March 1, 1975	- 25.87
March 15, 1975	- 23.23
April 1, 1975	- 20.22
April 15, 1975	- 17.57
May 1, 1975	- 14.73
May 15, 1975	- 11.93
June 1, 1975	- 8.91
June 15, 1975	- 6.27

VILLAGES

Chelsca: Fiscal Year - March 1 to February 28
Tax figures will be available in April
Treasurer: Wallace C. Wood - 475-1511

Dexter: Fiscal Year - March 1 to February 28
Tax figures will be available in May
Treasurer: Nancy J. Aiken - 426-8303

Manchester: Fiscal Year - March 1 to February 28
Treasurer

Barton Hills: Fiscal Year - April to March 31
Tax figures not available at this time
Treasurer: Clinton Purdy - 663-9307

Muskegon and Oceana Counties

June 4, 1973

Dear Sir:

Due to the fact that Muskegon County is the only County in the State of Michigan not complying with the Statutes governing the proration of taxes in real estate transactions; meetings between the Muskegon County Board of Realtors, Title and Abstract Companies, Banks and Lending Institutions, and the Bar Association were held, and the associations have decided to comply with the Proration Statute, otherwise known as Act 277 of the Public Acts of 1968 (being an amendment to Section 211.2 of the Compiled Laws of the State of Michigan concerning Property Taxation).

The above mentioned associations have asked this office to assist in the interim period of change by notifying each Township, City, and Village of their intention, and asking each to carry the following message on its Tax Statements.

For Townships and Cities not levying a Summer Tax, use the following statement: "County, School and Township (City) Levy Date: December 1, 1973. For Year ending November 30, 1974."

For Cities and Villages levying a Summer Tax, use the following statement: "City (Village) Levy Date" July 1, 1973. For Year ending June 30, 1974."

If each City, Village, and Township will oblige by having these statements printed on their Tax Bills, or a reasonable facsimile thereof, it will greatly assist to allay any confusion during the transformation from the "OLD" to the "NEW".

Your cooperation is solicited, and genuinely appreciated.

Respectfully yours,

Paul Vitek, Jr.
Muskegon County Treasurer

Dear Mr. Sengstock:

As a grateful member of your section, I enclose information regarding Muskegon County and Oceana County as well, I assume.

1. Until 1972, the people who control such things in this county all used a calendar year system of proration. This system assumed that taxes were paid in arrears - samples:

A. Township - only one (1) tax for township schools and counties. Tax bill usually received in December.

Tax bill received in December, 1972 was \$240.00. Property sold June 1, 1972.

$5/12\text{ths} \times \$240 = 100$ share of Seller

$7/12\text{ths} \times \$240 = 140$ share of Purchaser

The proration was based upon an educated guess as to what the future bill might be. Last years bill was used - assessors were called for changes in evaluation and millage. Usually Sellers amount was deducted from what Purchaser owed Seller then Purchaser would pay entire bill when received. Sometimes parties waited until the end of the year then divided between themselves which worked out reasonably well in a small community and particularly where there was a land contract.

2. In '72 and beginning of '73, some of the younger lawyers began to request changes and in a few isolated cases different prorations were used.

3. Bar groups and others began to meet with realtors, county treasurers and assessing groups and started to turn thinking around to philosophy that taxes were paid in advance. Finally, in May of 1973, the local board of Realtors sent out a pamphlet which really begged the question as it said "in the absence of an agreement to the contrary". The realtors would be drawing the agreement! What they really meant is that they were not going to prorate taxes but the next bills due after closing would be the buyers. Evidently, Grand Rapids uses the date of purchase agreement rather than the closing to determine the date for which Purchaser pays next bills. I assume that having purchaser pay next bills is "due date".

4. Well, from the middle of 1973 and during first six months of 1974, things were chaotic. Everyone was doing something different. A seller would sell under one method and then purchase under another. The banks were and are indifferent - they say that parties must agree and offer no counsel, which is undoubtedly the correct course. I felt that our local people deserved some consistency, so sent out my letter dated November 29, 1973. I received back many answers, mostly that no one was sure and that all three methods would continue to be used. I personally felt that the Act would generally be followed and developed a form for my own tax proration, which I used until the middle of 1974. That form was for what I believe you call the 'fiscal year'.

5. In the latter part of 1974, a clear pattern from most of the people concerned emerged of not prorating but using due date - letting purchaser pay next bills. I feel that if this is what you call 'due date', that 70% of transactions are now so governed, although public does not understand it. I would feel that in another year or so that 'due date' will be used in 95% of cases where someone in the business is prorating for parties. Many of the brokers are still using the forms printed for the old calendar year method (paid in arrears for the calendar year in which received). The parties sign the form and God knows what how those brokers prorate.

As indicated, there is still some confusion. I enclose letter from County Treasurer (preceding item in Newsletter) as to the fiscal year periods which are as used in my form. I have not used the form for several months.

I hope that this covers all your questions and, if not, please advise. Is my understanding of the terms due date and fiscal year correct as applied elsewhere in the State?

Cordially,

Ralph Rose, Jr.

Dear Mr. Sengstock:

In Muskegon County, all county, school and community college taxes are first due and payable on December 1. Except for the cities of Muskegon Heights, Norton Shores, Whitehall and the village of Montague, all city or township taxes are also first due and payable on December 1. The excluded municipalities levy a summer tax to cover their operations, which tax is first due and payable on or about July 1.

Due to the many variations between the fiscal years of the school systems (which often overlap and do not coincide with municipal and township boundaries), and the various municipal bodies, the fiscal year is never used as a basis for proration.

In 1974, the County Board of Realtors recommended to its membership that they utilize one of their forms of purchase agreement which provides for no proration of taxes. This was viewed as a compromise position between the statutory prospective due date formula of MCLA 211.2; MSA 7.2 and the customary rule of combining the summer and winter tax and treating it as though it were levied for the calendar year in which they became first due and payable, a modified retrospective approach. To achieve the last formula, the following clause or similar language is inserted into the purchase agreement or land contract:

Those real property taxes first due and payable on or about (July 1 and) December 1, 197_ shall be prorated to the date (of closing) (of this contract) as though levied for calendar year 197_.

The majority of closings handled through this office follow the customary modified retrospective approach. I would attribute this to the fact that we represent the purchaser in the majority of the cases, or when we represent the seller he is willing to do it this way because this is the way it was done when he purchased the property. If the statutory due date formula is used, it is generally because one of the parties is from outside of the Muskegon area.

Very truly yours,

John M. Briggs, III
Parmeter, Forsythe & Rude

Newaygo County

In the February 1975 Newsletter of the Real Property Law Section, you requested information for pro-ration of taxes within the various counties of the State. Accordingly I am forwarding to you the following information concerning Newaygo County:

1. In our County, taxes are assessed on the basis of Townships, Cities of Fremont, Newaygo, Grant, White Cloud and the Village of Hesperia. The above cities and village then divide the tax into summer tax and a winter tax.
2. It has been the custom in our County to treat the payment of taxes retrospectively, although there is some question concerning the pro-ration of

the summer city and village taxes. For example; this past December a statement for 1974 taxes was sent out by all of the taxing authorities and in July of 1975 a summer tax will be sent out from each of the cities and the village. The 1974 tax statement would be pro-rated retrospectively, however, the summer tax would be pro-rated prospectively. As a result this is not a good means in the process of pro-rating said taxes.

3. To the best of my knowledge all taxes are pro-rated on the due date as opposed to a fiscal year basis.

I am looking forward to hearing from you regarding the result of your survey and I hope that some uniformity can be drawn from your survey that can be applied to our county and all of the counties throughout the state.

If you need any additional information, please do not hesitate to contact me.

Very truly yours,

Theodore A. Caris
Murphy and Caris

Kent County

This is in response to the Real Property Law Section Newsletter of February, 1975, and particularly, your request for information relative to prorating taxes.

I heartily concur in your efforts to standardize procedures throughout the State. In response to the questions which were asked, I am pleased to furnish the following information.

1. In this area we have county taxes due December 1st of each year, various city taxes most of which are due July 1st of each year, and school taxes which are collected on December 1st with the county tax.

2. Whether or not these taxes operate prospectively or retrospectively as a matter of law would seem to me to be covered by the Michigan statute relative to proration of taxes which indicates that in the absence of a private agreement between the parties to the contrary all taxes will be prorated on a prospective basis from the lien date forward. I think this is a matter as to which there is some confusion throughout the State of Michigan, and it would be most helpful if this confusion as to the effect of the Michigan statute could be cleared up.

3. As to sales where there is no agreement between the parties to the contrary, it is my opinion that the Michigan statute covers by reference to prorating from the lien date forward. As far as Grand Rapids is concerned, I enclose herewith a copy of the Standard Real Estate Board Form Sales Agreement which does not call for proration but which rather requires that the taxes coming due and payable prior to the date of closing be paid by the seller. You will note that there is some ambiguity in the form of this agreement as to whether the date of closing or the date of the buy and sell agreement controls, and even the realtors in Grand Rapids differ as to this.

I hope I have been of some assistance to you. Particularly, I wish to emphasize the need for standardization as to the application of the Michigan statute relative to proration.

Very truly yours,

Robert W. Richardson
Law, Weathers, Richardson & Dutcher

Grand Rapids Real Estate Board Buy and Sell Agreement

"7. Property Taxes and Assessments which are due and payable, on a lien or both, on the property on or before this date shall be paid by Seller, WITHOUT PRORATION. After this date all special improvements, now installed but not yet a lien shall be assessed by Buyer. Excepting_____."

Berrien County

In response to your inquiry, in Berrien County both county and city taxes are collected by the city. They operate prospectively.

We prorate them on a calendar year basis, treating the taxes payable in 1975 as attributable to 1975.

The following example will illustrate: A closing of a real estate transaction occurs on August 16, 1975. Summer taxes have been paid in the amount of \$200.00. Winter taxes will become payable in the same amount. The proration is as follows: The seller is charged with 228/365ths of \$400.00, less \$200.00 paid.

I trust this is the information you requested.

Sincerely yours,

Vance A. Fisher
Fisher, Troff & Fisher

Postscript

I would like to print information about counties other than those mentioned in this survey. To attorneys in those counties, I would say that I would appreciate hearing from you. From the materials received to date, certain conclusions appear evident. The proliferation of fiscal year periods for various taxing units produces much confusion in prorating taxes. Does such a proliferation serve a justifiable governmental objective? There appears to be significant failure to appreciate the income tax consequences of using due date, fiscal year, and calendar year as a basis of proration. There is a strong desire on the part of many lawyers to standardize the practice of proration of taxation. Should the Council undertake an active role in achieving such standardization?