

REAL PROPERTY LAW SECTION

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Newsletter

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G. Norman Gilmore
Chairman

Frank S. Sengstock
University of Detroit Law School
Editor

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2. Some critical things to observe at closing.
3. Abstracts of Title v Title Insurance.
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5. Landlord-Tenant Clinic.
6. Michigan Land Sales Act: A New Era in Vendee Protection.

Annual Meeting

by

G. Norman Gilmore, Chairman

The 1974 Annual Meeting of the Michigan State Bar is to be at the Detroit Hilton Hotel, on Wednesday thru Friday, September 11, 12 and 13th.

Our Section's part of the meeting will begin at 8 A.M. on Thursday, September 12th, with a breakfast in a room which will be designated prior to that time. There will be no speeches or other disturbances during the meal (other than perhaps a few introductions). At 9 A.M., our annual business meeting will begin, with an agenda in line with most of such affairs. After a rollcall, to make sure we have a quorum, there will be an informal report of accomplishments during the year, followed by considerations of proposed amendments to the bylaws. Following this, and any other urgent matters of new business, the Nominating Committee will report upon its recommendations for nomination of five members of the Council to serve for three year terms. Additional nominations may be made from the floor. The election will follow.

After completion of the general business, the standing committees will convene for discussion of what they have done and expect to do next year.

If we have time after that, the floor may be open for questions and answers on general real estate problems.

In the afternoon, our Section has been selected for a 50 minute panel discussion on the present state of the law as related to real property, as a part of the I.C.L.E. seminar on that day. The panel discussion will focus on recent developments in land use control. Harry C. Tatigian of the City of Livonia will comment on these developments from the perspective of city attorney. Norman Hyman of Honigman, Miller,

Schwartz and Cohn will present the views of an attorney advising a private client. The third panelist, Edward Barry Stulberg, will present the position of a builder-developer.

To recapitulate:

1. Section breakfast: Thursday, Sept. 12, at 8:00 A.M.
2. Section business
meeting: Thursday, Sept. 12, at 9:00 A.M.
3. Land-use panel
discussion: Friday, Sept. 13, at 2:15 P.M.

We hope you can be there, and that we can make the whole thing interesting and worthwhile to you. See you in September.

THE LAWYER'S JOB AT A REAL ESTATE CLOSING

by

NORBERT J. PODGORSKI

The purchase of a piece of real estate is a rather simple procedure. The real estate broker prepares all of the papers, which are double checked by the bank, which is giving the mortgage. You really don't need an attorney. These observations are rather common, and are even made by real estate brokers. The young attorney should be able to explain to his clients why he can and does perform an indispensable function in the buying or selling of real estate.

We are not talking about fraud. Most real estate transactions are made between honest people. But honesty in of itself, is not enough. Even if the entire transaction is handled by the noblest of people, we still need the attorney. We do not purchase automobile insurance because we anticipate someone deliberately causing an accident, but, life, being what it is, accidents do happen and suffering results. The attorney's mere presence expedites the closing. It is his assurance that everything is being done right that may put many a young couple buying their first home at ease.

Unfortunately, most attorneys get to see their clients after the purchase agreement is signed. Nevertheless, make a point to explain the entire purchase agreement and satisfy yourself that they understand the terms of the instrument. It is not your function to make the terms, but, it is your function to make sure your client understands what he has just signed. If the property is occupied by tenants make sure that your client understands whose responsibility it will be to remove them. Many a new buyer has gone through the agony of evicting the tenants, who were supposed to have moved out at the closing. The matter of tax pro-ration can also create problems, depending on whether you use the fiscal or due date basis. In some communities, such as Detroit, the problem does not exist. But in most of the suburb communities, the fiscal basis tends to favor the buyer and the due date favors the seller. If you are representing the seller, make sure that you explain to him the difference between the different kinds of financing. It may very well make a difference of thousands of dollars if he has to pay the points on an FHA or GI mortgage. If you represent the seller ask him if there are sewer or street pavings anticipated in that particular community, which, although not started, are already on the assessment rolls and, therefore, are already charged against the seller.

If your clients are purchasing an old home, explain to them that it is still a market of Caveat Emptor. It is your client's job to examine the home and to check the local community's building department for any violations. Be sure to explain zoning ordinances and the effect they may have on the value of the property in the future. A lovely home in the country may be in an area that is either unzoned or zoned for nonresidential activities. If your client is purchasing a parcel of land and tells you that he hopes to build a \$100,000.00 Ranch home, he may regret it after he finds out that the area is zoned for low-cost housing. Remind your clients who are buying acreage that an accurate survey is not only desirable, but it is absolutely essential to guarantee that they will receive that which is contained in the legal description. Remember that surveys made for mortgage purposes are only relatively accurate and your client is not to depend on them for the purpose of ascertaining the location of lot boundaries or the placing of fences.

During the closing, be sure that all documents are checked for typographical errors and that the description matches the title commitment. Never let the broker or the bank official explain documents to your clients. That is your job. Do not permit anyone other than a title company or a bank to disburse your client's money. There are a number of brokers who have embezzled moneys entrusted to them by sellers or buyers for such purposes as mortgage pay-offs, tax payments, recording and so on. If there is to be a pay-off or a disbursement of funds, have your client bring the checks with the actual amounts made payable to the parties who will be entitled to them.

Remember a title commitment is only as good as its date. Many an attorney who has closed, even on a two week old title commitment, has found to his horror that a levy or a subsequent tax or assessment has been put on the property, which must be paid by the new buyer if the error is not discovered before the seller leaves the jurisdiction. It is a good practice to check the status of the title on the day of the closing. Any complicated or suspicious transaction should be handled by the escrowing of funds with a reputable title company and disbursed only after all recording and title requirements are met.

If your client refuses to abide by your decision on some matter involving the closing, make sure that he signs a statement to the effect, that in spite of your advice he has decided to pursue a course of action which does not have your approval. After the deal is closed, insist on the title policy being sent to your office for a final examination. It is not a rare thing to find misspellings, transposition of numbers or incorrect parties listed on the final title policy. A lawyer who does a conscientious job at a closing is invaluable and there is no such thing as a simple, safe, easy closing.

ABSTRACTS OF TITLE vs. TITLE INSURANCE --

WHICH SHOULD YOU RECOMMEND TO YOUR CLIENT?

by

Allen E. Priestley
Burton Abstract & Title Co.

As a practicing attorney, you may often be called upon by clients to advise ---- Which is the best, an abstract of title and attorney's opinion or title insurance? There are advantages and disadvantages to both. Perhaps it is best to set them forth

and then let you consider them in advising future clients.

There are five general factors to be considered in making a selection between the abstract or title insurance route. They are accuracy, speed, responsibility, expense and coverage.

Generally speaking, an abstract of title is accurately prepared by a professional abstractor who is well versed in his trade. The matters covered in his certificate are clearly and accurately set forth. One must take care, however, to carefully read his certificate to determine just what matters are searched and reported in the abstract. These matters will vary from county to county. The accuracy of the attorney's opinion depends upon his knowledge and experience with real estate law. Most attorneys do not practice exclusively in real estate matters. Title insurance policies are all issued on the American Land Title Association standard forms and their coverage is quite uniform, no matter which company issues the policy. Since title companies deal exclusively in searching and reporting the status of land titles you can expect them to be accurate and experienced in such matters.

In the matter of speed, the title companies usually far exceed the system of abstracts and attorneys' opinions in the speed with which they produce title evidence. As we all know, this seems to be very important in today's business world. It takes almost as long to produce an abstract of title or extension thereof as it does to produce a title insurance commitment. Then after the abstract is produced, it must be sent to an attorney for his examination and opinion. The speed with which the attorney acts depends upon his work load and experience. On the other hand, the title insurance business in Michigan is very highly competitive and title companies seek to outdo each other with the speed with which they can produce title commitments and policies.

Most abstracters carry abstracter's errors and omissions insurance. If they err in their work a responsible insurance company will pay loss or damage up to the amount of the insurance coverage. Likewise, a responsible attorney carries malpractice insurance which protects against his errors in examining the abstract and rendering his opinion. However, no laws require abstracters and attorneys to carry such insurance and in the absence of the same a client may only recover based on the financial worth of the abstracter or attorney. In the event of the death or disappearance of the abstracter or attorney, the client may be hard put to recover. Title insurance companies are licensed and regulated by the state. They are required to maintain adequate reserves and to make provisions for reinsurance of risks and maintenance of liability upon dissolution. An abstracter's liability is usually considered a negligence liability for error and is limited only by actual loss or damage whereas a title insurer's liability is based on the title policy and the provisions thereof with liability limited to the face amount of the policy plus certain costs.

The protection of title insurance is more extensive than that afforded by the abstract and opinion route. Coverage under an abstract is limited to matters appearing on record. Title insurance extends the coverage to such off-record matters as forgeries, fraud, lack of consideration, incompetent parties, unknown heirs, etc. In most cases, however, the attorney must still read and interpret the title insurance commitment and policy for his client.

Finally, the last and many times the deciding factor in choosing between an abstract of title and title insurance is the comparative expense of each. Generally speaking, the abstract and attorney's opinion route is cheaper than title insurance. Abstract rates vary tremendously throughout the state but are much less than title

insurance. Of course, the client must also pay the attorney's examination fee but even so, the combined charges rarely exceed a title premium charge for the same transaction. Title insurance rates are based upon the amount of insurance purchased and by regulation a policy must always equal or exceed in amount the value of the property. Overriding these cost factors is the fact that in many transactions if a new mortgage is required in the transaction, the lender will require a mortgage title insurance policy and it may then be more economical to procure a simultaneous owner's policy than to suggest a separate abstract of title.

A conscientious attorney in advising his client as to which method to follow in a particular real estate transaction, must weigh all of the factors set forth above and then recommend either an abstract or title insurance policy to the best advantage of this client.

SOME CONSIDERATIONS IN DRAFTING AN OFFER TO PURCHASE

The following is an extract from Aiken, "Subject to Financing" Clauses in Interim Contracts for the Sale of Realty, 43 Marquette Law Review 265, 265-73 (1960). Reprinted with permission.

* * *

Certainly there is nothing either new or particularly worrisome in the fact that a high percentage of real estate purchasers, especially over the last decade, and especially in residential transactions, have found it necessary to finance a substantial part of their purchases. What is both new and worrisome, from a legal standpoint, is that this vital provision of the interim contract has ordinarily received such cursory attention from the parties, their brokers, and occasionally, their lawyers as well. Seldom, if ever, does the clause relating to the purchaser's financing requirements spell out more than a short suggestion of the various considerations involved in modern mortgage financing. Indeed, it is as common to see the simple phrase, "subject to financing," inserted randomly in the contract as it is to find any more definitive provision.

However ineptly the matter is phrased, however, its practical significance is inescapable: unless the intending purchaser can somehow raise a percentage of his purchase price on loan, using the property as security, the purchase and sale envisioned by the contract cannot conceivably be performed. In probably a majority of cases, only the scantiest investigation of the borrowing power of the purchaser has been conducted at the time of interim contract. With somewhat lesser frequency, but still quite commonly, there has been no current appraisal to determine the approximate security-value of the property. And - perhaps most universally of all - a vague set of unfounded preconceptions is the best available indication of the repayment capabilities of the prospective borrower.

What is, in consequence, very commonly unrealized by the parties (if not by the brokers) is that "financing" is a term of broad scope, involving a multitude of complexities. There are, for example, the following minimum considerations:

1. What amount is sought to be borrowed?
2. What repayment rate, extending over how long a period of time, is contemplated?
3. What interest rate, and what initial "service" or "discount" charges will be acceptable?

4. Is the contemplated loan to be "conventional," or are FHA or VA loan guarantee benefits to be sought?

5. What special security-protection provisions (tax and insurance reserves, mortgage life insurance, mortgage repayment insurance, ordinary or special acceleration provisions, etc.) are acceptable, and are they to be deemed part of the specified repayment rate?

6. By whose effort is such loan to be arranged and procured; if by the purchaser's (with or without the broker's assistance), what potential sources of the money shall be applied to, and within what span of time?

7. If a lender should indicate a willingness to make a mortgage loan, assuming that the interim contract specifies no minimum acceptable terms, may the purchaser refuse the offered loan on the ground that its terms are onerous, without violating the agreement (i.e., must the terms be "satisfactory to purchaser," "reasonably satisfactory to purchaser" or merely "reasonable")?

8. What is the consequence of a prospective lender's withdrawal, after tentative commitment, from his agreement to loan, assuming that neither party to the interim contract foments such withdrawal?

To answer any of these important questions on the basis of an interim contract which merely recites that the transaction is "subject to financing" is to undertake an herculean feat of construction. Whenever it occurs, however, that one of the parties seeks to enforce the contract, and the other takes refuge in the indefinite financing "contingency," the only alternative to judicial construction of the clause is to declare the unenforceability of the sale, frequently in the face of an agreement that is in all other respects unmistakable in its provisions.

Cases may arise under such clauses, it is true, which are entirely too plain for argument. On the one hand, the "subject to financing" clause may spell out with uncommon attention to detail the particular financing requirements envisioned by the parties, specifically declare each element thereof as being "of the essence," and positively state that, unless each such element is satisfied, the agreement shall be null and void. Any litigable question arising under such a clause would necessarily be either a straight question of fact, or would arise under some aspect of the law of waiver or estoppel. On the other hand, regardless of the indefiniteness of the clause itself, it could occur that, after diligent inquiry, the purchaser would find it impossible to obtain any amount of financing from anyone on any terms whatever. In such cases, the only legal problem which can arise with respect to the clause is whether it should be construed to express a contingency at all, or whether it was simply inserted for some incidental purpose, not affecting the primary obligations to buy and sell.

These plain cases, however, are by no means usual. It may be wondered, therefore, why only a comparatively few cases involving the construction and effect of such clauses have reached our appellate courts. The answer is largely a practical one. From the seller's standpoint, his primary aim is ordinarily to convert his property into cash as quickly as possible. Any attempt to enforce the contract, as by declaring the down payment forfeit under the liquidated damage clause, or by suing for damages or for specific performance, would necessarily thwart that primary objective over a protracted period of time. Furthermore, the "demurrage" which may be expected to accumulate over the period of litigation (taxes, insurance, upkeep, lost rents, heating, etc.) is frequently so substantial as to overshadow completely a small down

payment. While such elements of seller's damages may be recoverable in a proper form of action, the difficulties of collection of such a judgment are usually obvious.

From the buyer's standpoint in any but the plain cases, the trouble and expense of litigation, especially up to the appellate level, will ordinarily not be justified by a nominal amount of "earnest money," which is all the buyer can hope to recover. In close cases, faced with the distinct possibility of sending good money after bad, the buyer will most often be inclined to negotiate rather than to litigate a solution of the dispute.

The ultimate practical decision, however, is most often that of the broker. By the prevailing rule, his commission is earned when the interim contract is executed, regardless of whether the transaction is ever consummated. Whether or not the same rule obtains where the interim contract is itself subject to a contingency is a point that has not yet been clearly determined (though better reason would clearly suggest the negative); but, it seems clear that the commission has been earned. By the usual form of contract, the expenses and commission of the broker are given first claim against the earnest money deposit in the event of forfeiture. The result is that any litigation respecting the proper construction of the "subject to financing" clause will boil down, practically, to a quarrel between broker and buyer.

But practical considerations will ordinarily dissuade the broker from litigating such a question. In the first place, his client, the seller, will be inclined to take a dim view of such proceedings, because they involve the same practical handicaps to the seller's interests as were discussed above. In the second place, the broker is in no position to litigate the issue directly against the buyer. His claim for commission against the down payment is assertable only against the seller, who must, in turn, litigate the question against the buyer. Both of these circumstances will ordinarily be deemed to reflect so seriously upon the broker's business reputation as to deter him from recommending litigation, or from claiming commission, if his listing contract remains in force.

The result is that the construction of the "subject to financing" clause is most frequently determined by negotiation rather than by litigation. So long as the real property market continues to enjoy brisk activity, it may be expected that a claimed buyer-default, arising from inability to finance or from different causes, will not be uniformly enforced by litigation. The alternative of prompt and equivalent resale is entirely too promising.

LANDLORD-TENANT LAW IN DETROIT: THE COURT AND LEGAL AID

by

RAMSEY A. GREGORY AND LAVAIL/HULL

Students at the University of Detroit Urban Law Clinic and
employed by the Legal Aid & Defender Association of Detroit

This article is meant to acquaint members of the State Bar with the Landlord-Tenant Court and the Landlord-Tenant Clinic of the Legal Aid Office. The author feels, in light of the importance of the effect of landlord-tenant actions on the lives of people and in light of the apparent lack of knowledge of both the existence and practices of the Court, that the information contained herein will be of interest and usefulness.

Part A of the article will attempt to explain the structure of the Landlord-

Tenant Court and the nature and scope of a landlord tenant lawsuit. Part B will cover the Landlord-Tenant Legal Aid Office, its purpose, structure, and relationship to the Court.

A. THE COURT

The Landlord-Tenant Court, as it is commonly known, is one Division of the Common Pleas Court for the City of Detroit. The Court is physically located on the second floor of the Lafayette Building in Detroit. Roughly 75-100 cases a day, on the average, are tried in the Court. The docket is divided semi-equally between the two Common Pleas judges.

The judges sit on the landlord-tenant bench for a month at a time, each of the thirteen Common Pleas judges doing so in rotation. While taking his turn on the landlord-tenant bench, the judges hear those cases brought pursuant to the Summary Proceedings Statute, MCLA 600.5701 et seq. The types of cases usually seen in landlord-tenant consist primarily of nonpayment and termination cases, with Summary Proceedings after foreclosure of a mortgage constituting a much smaller percentage of the 20,000 plus cases heard each year.

Much less frequent than any of these three are land contract cases. Other types of cases which the Landlord-Tenant Court has jurisdiction to hear include trespass, health hazard, and physical injury to the premises (waste) cases although these cases are not very frequently started. All actions under the Summary Proceeding Statute are possessory actions, money judgments are not available in this Court.

In all cases, except for trespass cases, prior to the commencement of the lawsuit, the plaintiff, "the person entitled to any premises" MCLA 600.5714, must give the appropriate notice to the defendant. For nonpayment cases the notice must be at least seven days, termination cases generally requires 30 days notice according to MCLA 554.134 (the notice is to equal the rental period), health hazard/physical injury cases require a seven day notice, MCLA 600.5714 (1) (C), and forfeiture of land contracts require fifteen days notice, MCLA 600.5728.

After the requisite notice has been given, suit can be started as simply as going to the clerk's office (which is also in the Lafayette Building) and filling out a simplified form complaint provided by the Court. Upon filing of the complaint a summons is issued, which is returnable within 10 days but which, as a matter of practice, is always returnable 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 these on the Defendant. If the bailiff is unable to serve the papers the first time, an alias summons is issued, copies of which are tacked by the bailiff and concurrently mailed by the Court to the Defendant. The alias is returnable one week from the original return date.

As a result, the plaintiff is able to get his case before a judge in no more than two weeks, at the most, from the day the complaint is filed.

At the present, all cases are scheduled for 9:00 in the morning. (By the time this article is in print, there will, hopefully, be in effect a system of staggering the docket, i.e. approximately one half of the cases will be scheduled for 9:00 a.m. and the other half for 11:00 a.m.) Defendants are given until 10:00 a.m. to appear before a Default Judgment is entered against them, and plaintiffs are given until 10:30 a.m. to appear before their case will be dismissed. If both defendant and plaintiff appear the case will be sent before a judge at which time the parties have

an opportunity to tell their story. At this time the defendant can raise any number of available defenses, but as indicated by a recent study done by Marilyn Mosier and Richard A. Soble, Mosier and Soble, Modern Legislation, Metropolitan Court, Miniscule Results: A study of Detroit's Landlord-Tenant Court, 7 University of Michigan Journal of Law Reform. 8, 61 (1973) these defenses are not raised when the defendant is unrepresented.

When judgment is entered, whether it is a defaulted or contested case, the defendant has ten days to vacate the premises (in termination cases) or, in nonpayment cases, to pay the plaintiff the amount which has been determined to be the rent owed or alternatively to vacate the premises. Should the defendant fail to abide by the terms of the judgment (i.e if defendant does not vacate the premises in the time period allotted to him to do so) the plaintiff is entitled to order a Writ of Restitution. The writ, once signed by a judge and put in the hands of a bailiff of the court, authorizes the bailiff to forcibly evict the defendant from the premises. Usually this entails nothing more than the bailiffs going to the premises and informing the defendant that he, the bailiff, will return in a day or so with some helpers to move the defendant's possessions out onto the street. From the author's discussions with the bailiffs, it appears that it is a relative rarity for the bailiffs to have to actually remove a defendant's possessions.

What has been described is an outline of a landlord-tenant lawsuit. Depending on the type and nature of the case, time periods may fluctuate, but what has been described is a fairly accurate representation of the process. The above outline also covers generally the powers of the court.

Before the court was attached to the Common Pleas Court as a separate division, the Landlord-Tenant Court was a Commissioners Court, presided by a Circuit Court Commissioner. In both cases, then and now, the court is a statutory court of limited jurisdiction.

As such, the court does not have equitable powers. All the court has jurisdiction to do is to determine who has the right to possession. There is no power in the court to determine title, nor does the court have the power to order a plaintiff to make repairs. This last point is probably the court's major weakness. The reason for this stems from the fact that in nonpayment of rent cases, one of the defendant's defenses is based on MCIA 554.139, which requires all landlords to keep the premises in reasonable repair and to comply with all local and state health and safety laws. If the landlord does not comply with this law the tenant is entitled to withhold his rent. When the landlord sues for the rent the tenant can raise this as a defense and, depending upon the seriousness of the defects in the premises, can obtain an abatement of the rent. The theory is that if the landlord is not able to collect his rent that sooner or later he will make the necessary repairs. Experience indicates that the theory does not work. Landlords do not make repairs if they are not receiving their rent.

If, on the other hand, the court, besides being able to abate rents because of defective conditions, also had the power to enter binding orders requiring landlords to make repairs, or else face contempt charges, then the court could really begin to effectively deal with the deteriorated housing situation in Detroit. This is much needed especially in light of the seriousness of the housing situation:

Of the 167,000 dwelling structures in Detroit's inner and middle city, only 45,000 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. (Citations omitted).

B. THE LANDLORD-TENANT LEGAL AID OFFICE

The Landlord-Tenant Legal Aid Office is a free legal aid clinic. The office, which is also located on the second floor of the Lafayette Building, provides legal services for both landlords and tenants. These services include representation, advice, and preparation of pro per pleading.

The Office first opened in November, 1972, and has been in operation ever since. The office operates pursuant to a Supreme Court Administrative Order, dated January 12, 1973. That order, recognizing the basic need for legal aid and realizing that the then existing indigency standards precluded many persons from qualifying for legal aid, stated:

...that all parties in summary proceeding actions who cannot afford an attorney in the proceedings shall be eligible for legal assistance from the legal aid clinics in the nature and manner administered under GCR 1963, 921; provided however, that no plaintiff shall qualify for said services if he has a monetary interest in more than one income unit of real property.

As a result, eligibility for legal assistance is no longer tied directly to income. Rather, eligibility is to be determined by ability to afford an attorney. As of late there has been much controversy and discussion of the eligibility standards for legal aid. It has become painfully apparent that the income limits used by many free legal aid organizations are too restrictive. The well-to-do can afford to retain their own lawyers. The very, very poor, and those receiving one form or another of categorical assistance from the Department of Social Services qualify for free legal aid. Caught in the middle are those working people earning \$7 - 12,000 per year who do not qualify for free legal aid, but who, at the same time, cannot really afford to retain a lawyer because their income is most times barely sufficient to cover their expenses and because, in many cases, a lawyer would cost more than what could be recovered.

1. THE STAFF

At the present time the office has a permanent staff of three - the supervising attorney, one staff attorney, and a secretary. The balance of the staff consists of second and third year law students recruited from the three Detroit area law schools - Wayne State University, Detroit College of Law, and the University of Detroit.

During the school year, students spend on the average of six - eight hours a week in the Landlord-Tenant Legal Aid Office. These are students who are working for credit in the clinical programs at their respective law schools. In the summer months, the office is staffed with students who are on federally funded work-study programs or who are hired and paid by the Legal Aid and Defender Association of Detroit, or the Law Students Civil Rights Research Council.

The students perform the full range of services provided by the office, practicing pursuant to GCR 921. In the performance of their activities the students are supervised by a licensed attorney who is in the office full-time. Answering the telephones, interviewing prospective clients, in-court representation, giving legal advice and helping to prepare pro per pleadings are some of the services and activities performed.

2. REPRESENTATION

As mentioned in Part A, the court processes on the average of 75 to 100 cases a

day. All cases are scheduled for 9:00 o'clock in the morning. In the large majority of cases, the prospective client does not make contact with the office until the morning of their court date.

As the client comes in the office their name, case number, and the type of case are entered on the offices in-take book.

The client is then given a standardized paper containing the case number. The client then takes this to the assignment clerk who makes a notation in the docket book that the person is present and attaches the form to the court file. All those cases having the form attached are then held until the client has had an opportunity to discuss their case with Legal Aid. After the client has checked in with the assignment clerk, they have a seat, if any are available, in the assignment room or the halls until their name is called. The client is then interviewed by Legal Aid.

During the initial interview information pertaining to their eligibility is elicited from the client after the client has been informed of the status of the interviewer, i. e. that he/she is a law student, that they practice pursuant to a court rule and are supervised by an attorney. If the client consents to this arrangement, the student continues the interview eliciting as much information as possible from the client concerning the case. Every element (notice, condition of the premises, rent payments, relationship with the landlord or tenant, as the case may be, whether or not the tenant wants to move or to stay in the premises, etc.) is discussed.

After the student has gathered all the facts and information available to him in the short period of time available (each student usually acquires three or more cases on any given morning) the necessary pleadings are prepared.

The court provides all the forms necessary for a plaintiff - landlord to start his case. These forms include the appropriate type of notice, the complaint and the summons. The court does not provide answers. The Legal Aid Office also has forms. The forms which are available in the office include appearances, answers, motions to set aside default judgments, and motions for new trials, petitions to show cause and to stay proceedings, etc.

The vast majority of the office's clients are tenants who are recipients of Social Services benefits. Over 90% of the clients are completely unaware of their rights, of legal procedures, and of the most rudimentary aspects of presenting their case or of preserving their rights when in court. The Legal Aid Office truly represents that class of people who need legal aid the most - the unpowerful.

Just as the court is responsive to the needs, desires, and wants of the landowners, the office attempts to be responsive to the needs and protective of the rights of the unpowerful nonlandowners. Because of the lack of knowledge of their legal rights, extra care has to be taken to explain everything: their right to a jury trial, the need for legally admissible evidence (this evidentiary rule, in this author's experience, appears to apply only to tenants in many cases), the effect of a judgment against a defendant, the right to appeal, just to cite a few examples. In recent months, reports have begun to filter back to the Legal Aid Office that landlords are beginning to feel, after many many years, that they are entitled too. The author believes that this indicates that defendants are beginning to receive semi-equal consideration before the bar of justice. Hopefully the trend will continue until such time as the system is truly impartial, something which the author does not believe has been the case in the past.

3. DRAWBACKS AND WEAKNESSES

So far, we have attempted to discuss and to give an overall picture of the Legal Aid Office. Now we shall discuss some of the weaknesses of the office.

Probably the major weakness stems from the constant changing of staff personnel. As mentioned above, the office is staffed primarily by law students. Most of the students work only for one semester, the semester they participate in a Clinical Education program at their school. As a result, at the beginning of each semester a new batch of students must be trained in the law as it is written and as it is applied. Concomitantly, each new group must work for several weeks before they acquire the expertise to work effectively.

The second problem which the office faces every day is the overwhelming case load. Out of the 75 to a 100 cases heard every day by the court, the Legal Aid Office deals with, in one form or another, a third or more of those cases. Thus, one of the constant problems faced is insufficient time to service all those wanting legal aid.

Every day there are lawyers and plaintiffs coming in the office literally yelling and screaming because they cannot get their judgment quickly enough. There have even been occasions when a judge has appeared in the office trying to speed things up. In short, it is difficult to obtain the time to prepare a client's case.

Another problem involves another aspect of legal representation - i. e. appellate work and extraordinary remedies. The Summary Proceedings statute, which governs landlord-tenant actions, has been in effect since 1968, with Amendments added in 1972. In those two years, there have not been many reported decisions, as far as the author is aware, interpreting the new statutes. One of those few decisions is Rome v. Walker, 38 Mich App 458 (1972). That decision interpreted the Summary Proceeding statute to permit tenants to raise a statutory defense of breach of the lease by the landlord as a means of abating the rent.

At the present time, the office does not have a sufficient staff to service all our clients at the trial level and to also handle a large appellate docket. The office does appeal those cases which it is believed are particularly important, but for the most part appellate work cannot be done by the office.

Another area of importance in landlord-tenant law is lock-outs and public utility terminations. It is, as a general rule, illegal for a landlord to cut off a tenant's gas, water, electricity or other vital services. Similarly, it is illegal to forcibly evict a tenant. In both these situations, there is a remedy - an injunction (commonly known as a temporary restraining order (TRO) can be obtained from the Circuit Court. Usually, though, the requirements of drafting and typing the necessary pleadings and then filing them and seeing a judge takes the better part of a day (if the attorney is uninterrupted). Again, as with appeals, time and staff limitations prevent the Legal Aid Office from doing this work on any type of consistent basis. Fortunately though, the Legal Aid Office and the University of Detroit School of Law Urban Law Clinic have made arrangements whereby the Legal Aid Office refers the great majority of these type of cases to the Urban Law Clinic.

C. CONCLUSION

What has been set forth in the preceding pages is an overall picture of the Landlord-Tenant Court and the Legal Aid Office. This article has attempted to give

a picture of the practicalities and realities as they exist in the system. This author believes that the most important measure of any system of justice is not the way landmark cases are handled, but by the way litigants are treated in those courts which the average citizen deals with everyday. In Detroit, the courts most directly affecting people are the Common Pleas Court, of which the Landlord-Tenant Court is one Division, and the Traffic and Ordinance Division of Recorders Court.

In this author's opinion increased representation of litigants, landlords as well as tenants, in the Landlord-Tenant Court is needed. One of the chief benefits of increased representation would be a more orderly process. This would, in turn, reduce wasted court time while also affording a greater degree of fairness and due process to all parties involved.

THE MICHIGAN LAND SALES ACT

A NEW ERA OF VENDEE PROTECTION

by

KENNETH W. SCHMIDT
Third Year Student

University of Detroit School of Law

The new Michigan Land Sales Act, effective October 1st, 1973, was designed to "protect the purchaser from unfair and deceptive trade practices" in the sale of subdivided lands within the State of Michigan. Act No. 286, Public Acts of 1972 as amended by Act No. 5, Public Acts of 1973, as amended by Act No. 184, Public Acts of 1973 being MCLA 565.801 et seq.; MSA 26.1286. To accomplish this end, the Act has created a new Land Sales Division of the Department of Licensing and Regulation to oversee initial registration procedures more significantly the Act has also generated new and unique liabilities for the developer and remedies for the aggrieved purchaser. This article will seek first to briefly guide the developer and his attorney in determining when registration with Department of Licensing and Registration is required, second to inform them of registration procedures, and lastly and most importantly to point out some of the potential liabilities and remedies by way of hypothetical examples.

Transactions Within Act

The Land Sales Act requires that:

Unless the subdivided lands or the transaction is exempt by this act:

- (a) A person may not offer or dispose of any interest in subdivided lands ... prior to the time the subdivided lands are registered in accordance with this act. (Underlined portions are words further defines by the Act). Section 6.

For the purposes of this Act, subdivided lands include any land, whether located in Michigan or not, which is divided or to be divided into 25 or more interests in land, and are offered, or if solicitations for offer are sought, within the state. Section 2(n). This coverage is somewhat limited by the exemptions provided for in Sections 4 and 5. Some of the more noteworthy exemptions are:

- 1. If there is a building to be constructed upon the interest in land BY THE

SELLER OR HIS ASSIGNEE OR AGENT within a 2 year period from the date of sale, option lease, etc. Many of the typical residential subdivisions would fall within this exemption. Section 4(c).

2. Condominiums located in Michigan if regulated by the corporation and securities bureau. Section 5(d).

3. Campsites and mobile home parks developed pursuant to other Michigan laws. Section 4(j).

4. Subdivided lands which also must be platted under the Subdivision Control Act. (This exemption applied only to the subdivisions where there are fewer than 50 lots). Section 4(k).

A developer should first look to these and other statutory exemptions contained in these sections 4 and 5 to determine if registration is required. To assist in this aspect, the Department may issue a declaratory ruling as to whether a particular subdivision is within the Act. R. 338.3451 of the 1954 Administrative Code. When in doubt the attorney should seek such a ruling prior to any disposition of the subdivided land.

Application to the Department

Once it is determined that the subdivision falls within the Act, "the developer" has to file with the department an application for approval (a statement of record). See Section 2(g). This application must contain specific, mandatory, statutory disclosures. See Section 7. It also must contain a proposed property report. See Section 7(n) and Section 8. Forms are provided for this "statement of record" by the Department of Licensing and Regulation and may be obtained by writing the Department at 1008 South Washington Avenue, Lansing, Michigan 48926 (Phone 517-373-7360). Once this form is received in proper order, the Department will issue a notice of receipt and thereafter has 60 days in which to investigate the disclosures and either accept or reject the registration statement. Section 14. Certain minimal requirements must be determined by the Department, including whether the developer can convey title, whether there is reasonable assurance that all proposed improvements will be completed as represented, whether the advertising is false or misleading and finally whether there has been any conviction of the developer involving land sales. Section 13. If the registration is accepted, a certificate of registration is issued and the developer can begin to solicit buyers. If initially rejected, the Department must give notice of the rejection and state with particularity the facts upon which the Department relied for rejection. The developer then has 15 days, after receipt of the notice, to correct these particulars. If not corrected, the Department may then issue an order of final rejection. Section 14.

Purchaser's Remedies

The remainder of this article will deal with remedies provided for an aggrieved purchaser and also will deal with any criminal remedies enforceable by the State of Michigan. (There are administrative remedies enforceable by the Department essentially contained in Sections 22-26 which will be covered superficially). As an overview, Section 6 (d) of the Land Sales Act gives the purchaser a non-waivable right to void ("is voidable") any contract if the conditions imposed by the section are not met. Sections 27 and 28 are the felony and misdemeanor provisions, respectively. Finally, the major civil remedies provision is contained in Section 31. It provides for liability for violation of the Act and prescribes the method for determination of

damages. It also provides for a statute of limitations on certain causes of actions.

Each of these provisions will be considered separately by first considering a typical hypothetical situation, followed by the author's opinion as to the applicability of the relevant section of the Act. For the purposes of the hypothetical situations, Blackacre (BA) will designate a subdivision that is required to be registered under the Act; P will designate a purchaser of an interest in land in BA; and V will designate the developer-vendor of the interest (unless otherwise indicated).

SECTION 6(d) - NON-WAIVABLE RIGHT TO RECISSION

HYP0 1: P buys a lot in BA and 5 days after signing the contract, receives a property report. The property report fully complies with the ISA (i.) and shows no misrepresentations were made in the transaction. On the 4th day after receiving the property report, P wishes to rescind for the reason that he has found a better "deal" elsewhere.

"Any contract or agreement for the disposition of a lot, parcel, unit or interest in a subdivision covered by this act, where the property report has not been given to the purchaser in advance of the time of his signing, is voidable at the discretion of the purchaser ... "

A literal interpretation of the ISA would require that P be allowed to rescind. Section 6(d) mandates that the property report be given prior to the time of the final contract execution. The major purpose of the property report is to give the P the opportunity to determine if there are any "undesirable" aspects of the location, construction, financing, etc. This is the basic purpose of the ISA -- to give the P full prior disclosure of all pertinent information before executing a final contract. This is a drastic change from the common law remedies regarding misrepresentation, disclaimers, etc., in that it gives an "absolute" right to rescind, at the purchaser's option, regardless of damage, reliance, etc. See MLP, Vendor and Vendee, Section 36 and 40. Only the purchaser has the right to rescind. If the purchaser wishes to keep the land, but also wishes to sue for damages, he would have to look to Section 31 discussed below.

HYP0: Same situation as above, except that it is 6 years after receipt of the property report. P now wishes to rescind.

The ISA as originally passed did not provide for a statute of limitations on this action for recission. However, 1973 Public Act No. 184, effective January 3, 1974 (hereinafter referred to as the Amendment), amended the ISA to provide that "the right of recission terminates 5 years after the date the purchaser signs the contract or agreement". Section 6(e) as amended. Thus, in the above situation, since the statute of limitations has now tolled, P cannot rescind.

HYP0 2: On day 1, P signs and receives a copy of a land contract for Lot 1 in BA. Two weeks later P receives a copy of the property report. No misrepresentations were made and all other aspects of the ISA were complied with. On day 4, after receipt of the property report, P wishes to rescind.

"In addition, the purchaser has an unconditional right to rescind any contract, agreement, or other evidence of indebtedness between (ii.) the purchaser and the developer, or revoke any offer within 5 days

from the date the purchaser actually receives a legible copy of the signed contract, agreement, or other evidence of indebtedness, or offer and the property report as provided in this act ... "

P will be allowed to do so. The clause requires receipt of both a legible copy of the contract and a copy of the property report. The allowed rescission period is "within" 5 days after receipt of both. Furthermore, in looking to the above clause (i.), the 5 day period would be irrelevant, since the P had not received a copy of the property report prior to signing the contract. In other words, P would have up to 5 years to void such a contract.

The above situation presents the overlap of clause (i.) and clause (ii.) of 6(d). If the property report is given and thereafter the contract is signed, the P has 5 days to rescind after receiving a copy of the contract. However, if the contract is first signed and then the property report is received (or if it is never received at all), then the P seemingly has 5 years with which to rescind, starting from the date the contract was signed. Furthermore, the statute of limitations applies to "rescission", while clause (i.) uses the language "is voidable". A question could be raised as to the applicability of the statute of limitations to clause (i). Obviously, good practice would require the attorney to furnish the purchaser a copy of both the contract and the property report at the closing of the sale.

HYFO 3: P receives a property report on day 1 from V for a lot in BA. Desiring to purchase, on day 6 P and V execute a land contract for Lot 1. P pre-dates the contract to read day 1. On day 10, P wishes to rescind. V defends on the basis that the 5 day period of rescission has tolled.

"Pre-dating of a document does not defeat the time in which the right to rescind may be exercised. The burden of proof the document was not pre-dated is upon the developer ... "

The language of the above clause is clear. P will be allowed to rescind. If the hypothetical is altered to read that the contract was actually executed on day 6 and P wishes to rescind on day 12, the clause would place the burden of proof upon the V to show that the contract was not pre-dated. This indicates that good practice would be to have all documents notarized by a notary who would be able to testify to that fact should the matter ever be litigated.

HYPO 4: P purchases a lot in BA from V. V, in order to obtain financing, pledges all land contracts to Bank A. Bank A perfects his security interest. P discovers a violation of the ISA and wishes to rescind (under Section 6).

"An act of the developer in assigning or pledging a contract or agreement shall not waive the purchaser's right to void or rescind the contract or agreement as provided by this subsection ... "

This section was added by the Amendment and was not contained in the ISA as originally passed. It apparently was placed in the Act to avoid a possible defense of an assignee or holder in due course. P would still be allowed to rescind and maintain a cause of action against the V. However, this clause does not indicate whether a cause of action would be allowed as against the assignee or pledgee. Presumably, it would not, but that a court would be able to discharge any debt as a result of the

transaction and then in turn, the pledgee or assignee would also have a cause of action as against the V.

The remainder of Section 6(d) provides, inter alia, the requirement that notice of such a right of rescission be prominently placed on the instrument and that the purchaser acknowledge that right by signing. It also provides that rescission notice is effective when mailed and that it must be written. No particular form of notice is needed as long as the intent to rescind is apparent.

SECTIONS 22, 24, 25 and 26 - DEPARTMENTAL ENFORCEMENT

These sections will be discussed only in passing, as they are remedies afforded the Department and not the purchaser.

Section 22 insures that the Department will receive the filing fees required by a developer who wishes to commence or continue to dispose of interest in land which must be registered under the ISA. The Department currently requires fees in the amount of \$250.00 plus \$1.00 for each additional lot for registration and consolidation registration fees of \$200.00 plus \$1.00 for each lot added to the original application. In addition, an annual renewal fee of \$100.00 plus \$.25 cent for each lot is required. These fees are promulgated pursuant to Section 19 of the ISA, and are contained in R 338.3206 of the Michigan Administrative Code. Section 22 provides that any developer who continues to refuse to pay, after notice, is liable in an action brought by the Attorney General for treble the amount of unpaid fees. In addition, the Department can suspend the license of such a Developer.

Section 24 (1) gives the right of the Department to issue a cease and desist order, after notice and hearing, requiring a person to cease all unlawful acts provided that one of the enumerated situations has occurred. Of note is subsection (b) which provides that if the person is "knowingly engaged in any false, deceptive or misleading ... method ...", the Department can issue the cease and desist order. The Regulations R 388.13241 - R 338.3259 describe with some particularity what exactly the Department considers false, deceptive and misleading.

Section 24 (2) gives the Department the right to issue (essentially) an ex parte cease and desist order, followed by a hearing within 30 days if it determines that there will be "irreparable harm" by delay. The Department must attempt, however, to give notice of the proposal to issue the same.

Section 25 gives the Department the right to revoke a license if, after notice and hearing the Department finds any of the enumerated situations.

Section 26 provides that the Department may, at its option, bring an action in Ingham County Circuit Court, without any prior administrative hearing, to enforce the ISA. It further gives that Court the jurisdiction to issue any restraining order and appoint a receiver, upon a proper showing of need.

SECTION 27 - FELONY PROVISION

HYP0 1: Real Estate broker A disseminates literature with knowledge that some of the matter contained therein is false.

HYP0 2: Attorney A, in a title summary, falsifies the title of the developer in order to assist him in the sale of BA. This falsification was done with his knowledge and was placed in the property report.

"EVERY developer or agent of a developer who authorizes, directs, or aids in the publication, advertisement, distribution, or circularization of a false statement or misrepresentation, made WITH KNOWLEDGE of its falsity, concerning a subdivision offered for disposition or who knowingly fails to comply with the terms of a final cease and desist order ... ". Section 27.

These two hypotheticals show the distinction that the ISA makes with respect to the definition of an "agent". An "agent" is defined in Section 2(b) to include a real estate broker and to exclude an attorney whose representation consists solely of rendering legal services. Thus, in the former situation, there could be criminal liability, while in the latter, the issue would turn on whether the attorney was strictly rendering legal services. Undoubtedly, if the attorney was interested monetarily in the project, he would also be criminally liable. In any case, the attorney may be liable under Section 27.

It should be noted here that the Amendment to the ISA changed the wording of the section to read WITH KNOWLEDGE instead of KNOWINGLY. Apparently, this was done to require some sort of SPECIFIC intent to violate the ISA, rather than a general intent.

"and every person with knowledge that an advertisement, pamphlet, prospectus, or letter concerning a subdivision contains any written statement that is false or fraudulent, who issues, circulates, publishes, or distributes the same or causes the same to be issued, circulated, published or distributed or who knowingly fails to comply with the terms of a final cease and desist order ... ". Section 27.

From hypothetical (ii.), above, the attorney may be liable under this clause since "person" is defined in the Act as all encompassing. See Section 2 (1). Again, the Amendment changed the wording to read with knowledge, rather than knowingly, but only in the first phrase. In the case of a "person" failing to comply with a final cease and desist order, it must be done knowingly to incur felony liability.

"is guilty of a felony and may be fined not more than \$25,000.00 or imprisoned not more than 10 years, or both. Each violation constitutes a separate offense."

Under this clause, each offense is indictable.

SECTION 28 - MISDEMEANOR PROVISION

"Any violation of this act other than as provided in Section 27 is a misdemeanor and every violator may be fined not more than \$2,000.00 or imprisoned for not more than 90 days, or both for each offense."

The obvious scope of this section extends to every developer or his agent, or any person required to perform in accordance with the provisions of the ISA. In all of the above and following hypotheticals, there may be criminal misdemeanor actions started.

SECTION 31 - CIVIL LIABILITY

HYPO 1: Corp. X, an Arizona corporation, in advertising literature for BA, an Arizona condominium project, showed a picture of condominium units which

have a lake in the background. The literature states "Get away from the ice and into the water--warm enough to swim all year 'round." The advertising literature was approved of by the Department. P buys a lot in BA after a sales-dinner talk in Michigan. All other requirements of the ISA were met. After flying to BA and discovering the units were not anywhere near a lake, P wishes to rescind.

"A person who disposes of subdivided lands in violation of (Section 6) or who, in disposing of subdivided lands engages in a deceptive act or practice ... ". Section 31.

P will be able to do so. Corp. X is a "person" within the definition of Section 2 (1). The defense that BA is not in Michigan would not be valid under Section 2(n) which defines "subdivision" as including "any land ... located outside this state which is promoted by mail, telephone calls, solicitation or advertisements within or directed into this state". The defense of approval of the Department would likewise be invalid. This is supported by Section 9 which provides that a person cannot use the Department's approval for any promotional purpose. In determining liability, the question will turn on whether this is determined to be a "deceptive act". This term is not defined in the ISA itself and will have to be developed and defined by case law. Again, the Regulators attempt to define deceptive acts and practices at some length but they are not binding on the court.

HYPO 2: To induce P to purchase a lot in BA, V informs P that a swimming pool and community house for recreational purposes will be completed within two years. P, relying on this statement, purchases a lot. All other requirements of the ISA were met. In year 3, the swimming pool was not yet started and P wishes to rescind. V never intended to build.

"... makes an untrue statement of a material fact or omits a material fact required to be stated in a registration statement or property report or necessary to make the statements not misleading ... "

P will be able to do so subject to the proof that the statement was untrue when made and that the statement was of a material nature in the purchase of the lot. The ISA language implies that such rescission will be allowed regardless whether the statement was made innocently, negligently or intentionally. The language does not indicate what the impact of a merger and bar clause would have on the transaction.

This HYPO shows that rescission can still be had (as discussed infra), even though the transaction was completed 3 years prior to the commencement of action. The remedies of rescission under Section 6 are not exclusive equitable remedies provided for in the ISA.

HYPO 3: In the property report of BA, a lake subdivision, V did not mention the fact that, due to the low area and proximity to the lake, Lot 1 could not have a septic tank put in. P purchases Lot 1 with the intent of putting a cottage on it. After discovering that he could not build due to the inavailability of adequate waste disposal, he seeks rescission.

P will be able to do so, since this fact would be required to be in the property report (Section 8 (e)). In this case there is not too much doubt that this was a material omission.

HYPO 4: Same facts as above, except that P dies and his administrator is attempting to rescind.

"... is liable as provided in this section to the purchaser ..."

Since purchaser under Section 3(m) is defined as a person "who acquires or attempts to acquire or succeeds to an interest in land", the administrator will have standing to do so.

HYPO 5: Same situation as the Arizona condominium above, except that P was only interested in the condominium for the climate and as a retirement home.

"... UNLESS in the case of an untruth or omission it is proved that the purchaser did not rely on the untruth or omission."

P will not be allowed to rescind. This section provides for the defense of non-reliance. However, note that it is limited to untruths or omissions and the defense may not be available in the case of deceptive acts or practices.

Section 31 (2) provides, inter alia, that "in addition to any other remedies", the purchaser can rescind the transaction if a violation of Section 31 (1) is found and a tender of reconveyance is made. The amount recoverable is not limited to the purchase price, but includes interest at 6%, taxes paid and other costs, including reasonable attorney's fees. If the purchaser no longer has the land, he can, in essence, recover the difference between the purchase price less selling price.

The "in addition to other remedies" clause allows the aggrieved purchaser to essentially elect his remedies between an equitable action for rescission or for the traditional contractual damages. It also affords a suit under a Section 6 violation. The obvious situation where this clause would be essential is where the purchaser wished to keep the purchased land, but also wishes to recover for the lost market value of the property due to the deceptive acts or misrepresentations.

HYPO 6: Q Bonding Company, bondsman for the construction of BA by Z Corporation, requires that all contracts, agreements, checks, etc. be approved by them in writing. P wishes to sue Q for a violation of Section 31 (1).

"Every person who directly or indirectly controls a subdivider (who is) liable under subsection (1) ... ". Section 31 (2).

The answer to this turns on the issue of control. Seemingly, if the act is purely a ministerial act, without a duty to discover more, then the control test would not be met. In the situation posed by the above, since the requirement of approval of all writings, contracts, etc. was needed, the control test may be met.

The issue of control in this type of situation would also go to banks, parent corporations of developer corporations, and corporations with respect to their directors and shareholders. Again, case law will be determinative as to what is the actual amount of control that is needed to incur liability. There is the defense of lack of knowledge discussed below, however.

HYPO 7: XYZ Partnership, developer of BA, engaged in a deceptive act in violation of Section 31 (1). Limited partner Q, a prominent local figure, signed the property report and endorsed BA in local advertising. P sues Q.

"... every general partner, officer, or director of a subdivider, every person occupying a similar status or performing a similar function, every employee of the subdivider who materially aids in the disposition ... ". Section 31 (3).

While Q would not be liable under the first part of the above clause (since he was not a "general partner"), he would be liable as a person occupying a similar status. His endorsement lent credence to the whole project and thus would indicate that it would be a material aid in the disposition of the subdivided lands.

This section specifically includes "officers or directors" of a corporation. One could argue the "expressio unius" rule of construction of legislation in that stockholders would be thus excluded. However, if the stockholder were to act in a manner which gave him a "similar status" to an officer or director, then he also would be liable.

HYPO 8: Attorney A draws up all of the purchase agreements and contracts for sale in BA. V, the developer of BA, is liable under Section 31 (1). P sues A.

HYPO 9: Attorney B, who is a limited partner in BA, did the title work erroneously in BA. His summary of title was contained in the property report. P, having defective title, sues B.

"... and every agent who materially aids in the disposition ... ".
Section 31 (3).

While the concept of attorney is traditionally that of agency, the ISA specifically excludes an attorney from the definition of agency, but only if the "representation of another person consists solely of rendering legal services". Section 2 (b). In the first situation, since A was acting in a professional manner only, there would be no liability to P, UNDER THIS SECTION. The second situation is more narrow since B also had an interest in the property and the representation may not have been solely for rendering legal services.

In the definition of agency, the ISA specifically includes real estate broker. Section 2 (b). Thus, if a broker represents a developer for a total subdivision (a common situation), and if that developer is in violation of Section 31 (1), then the broker could also be liable to the purchaser under this definition of agency. If the developer is insolvent (or close to it), this section could create a large amount of liability for the broker without any chance for contribution or indemnification from the developer.

HYPO 10: Y and Z of XYZ Partnership handled the business and financial aspect of BA, while X handled the promotional aspect. Y and Z falsified financial records of the partnership in the property report without the knowledge of X. P was damaged by this falsification and sues X individually.

"is also liable jointly and severally with and to the same extent as the subdivided, unless the person otherwise liable sustains the burden of proof that he did not know and in the exercise of the facts by reason of which the liability is alleged to exist. There is a right to contribution as in cases of contract among persons so liable." Section 31 (3).

The defense of lack of knowledge in this situation may not exonerate X from liability. The test is whether X exercised "reasonable care" in determining the actual financial status of the partnership. Since the general rule of partnership is to impute the knowledge and bad acts among partners, the defense probably would not be valid.

X is not left without a remedy. X may in turn sue Y and Z for contribution. Under modern impleading methods, this would be litigated in the same case.

HYPO 11: Advertising Agency, AA, was employed exclusively by V for the preparation of a statement of use for BA, pursuant to Section 8(d). AA, at the request of V, recited that the lots were to be used solely for single family residences, when in fact plans had been drawn and were in the possession of AA for the construction of a bar. P, the owner of the lot next to the bar sues AA for decrease in property value.

"Every person whose occupation gives authority to a statement which with his consent has been used in an application for registration or property report, if he is not otherwise associated with the subdivision and development plan in a material way, is liable only for false statements and omissions in his statement and only if it is proved he knew or reasonably should have known of the existence of the true facts by reason of which the liability is alleged to exist ... ".
Section 31 (4).

AA will be liable to P, subject to the proof that he knew of the true facts when the statement was prepared. Similarly, if AA had not known, but had reason to know, of any falsity in their statement, they also may be held liable.

This section limits the damages to only those connected with the false statements and omissions and is not the general liability of third persons imposed by subsection (3). Presumably P will have to show reliance on the statement and subsequent damage and also show that the damage was caused by the statement.

HYPO 12: S, a registered professional surveyor, set an erroneous bench mark causing Lot 1 of BA to be 3 feet shorter than shown on the plat. Y, a professional engineer, approved of the survey and used it in designing the building on the lot. P sues both S and Y.

"However, if the person is a registered professional licensed by this state whose statement was part of his representation of another person in rendering professional services, liability hereunder shall not exceed that resulting from a duty to exercise a reasonable degree of care and skill ordinarily possessed and exercised by members of that profession similarly situated." Section 31 (4).

This section was added by the Amendment to the LSA. It holds professional persons not liable for rendering opinions when given with a reasonable degree of care and skill possessed by members of that profession.

In the former situation, S would be held liable for the erroneous setting of the bench mark, since a reasonable surveyor would not set it in the first place, or else would discover it prior to the final plat. However, the professional engineer would

be exonerated from liability since it was reasonable for him to rely on the survey taken by S. Professional engineers would not be required to re-survey (at least in the normal situation) the whole subdivision and would be entitled to rely on the survey taken by the professional surveyor.

HYPO 13: Q, an attorney, doing title search work for V, did not indicate that W, the wife of the former owner of BA, did not sign the deed to BA. W asserted her dower interest against P and P, in turn, sues Q.

HYPO 14: Same facts as above, except there was no indication that the owner of BA was married.

Again, this situation would turn on whether a reasonable degree of care was used in giving the title opinion. In the first situation, if the record indicated that the owner was a married man, undoubtedly liability would be found. In the second situation, it may be found that reasonable care was used in that the attorney would not have to go outside of the records of the register of deeds, without some other indication that the owner was married.

"A tender of reconveyance may be made at any time before the entry of judgment." Section 31 (5).

Author deems this to be self-explanatory.

Section 31 (6) provides for the time limitations on causes of actions under the ISA. As a general rule, no action can be brought after 3 years from the time of performance is completed. It also provides that in the case of deception or omission of a material fact, the statute of limitations begins to run at the time of discovery or when it should have been discovered. In no event, though, shall an action be commenced more than 6 years after the sale or lease to the purchaser. The latter limitation was added by the Amendment.

SUMMARY

From the above discussion, it can be seen that remedies under the ISA are as wide as the coverage it affords. The main remedy lies against the developer or the person who controls the developer, as it should. However, primary liability still runs to any person who violates Section 31 (4) and this could include about anybody connected with the subdivision, if he has knowledge or reason to know of the situation which violates the ISA.