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## CONTENTS

|   | Page |
|---|------|
| The Time Price Differential: A Bond Claimant's<br>Vehicle For Recovery of Service Charges<br>by Robert R. Nix, II | 121  |
| Regulation of the Real Estate Profession in Michigan<br>by George J. Siedel, III                                  | 124  |
| U.S. Supreme Court Denies Certiorari in Michigan<br>Dormant Mineral Act Cases<br>by Allen E. Priestley            | 139  |
| The Legislative Scene<br>by Robert J. McCullen  | 140  |
| Recent Decisions<br>by Joseph A. Lloyd  | 143  |
| Section News  | 146  |
| Section Committees: Preference Questionnaire  | 147  |
| Mackinac Island Summer Conference   | 151  |

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The law was what the church had been in the Middle Ages: the only ladder available for the elevation of the reflective, the introspective, the noncompetitive in a society of brigands.

Louis Auchincloss, **The Partners**

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**THE TIME PRICE DIFFERENTIAL: A BOND CLAIMANT'S VEHICLE  
FOR RECOVERY OF SERVICE CHARGES**

by  
**Robert R. Nix, II**  
**Kerr, Russell and Weber**

Historically, bond claimants have had difficulty collecting under labor and material payment bonds without litigation. It has become an unfortunate truism that there is little motivation for bonding companies to timely pay legitimate bond claims because of the interest income which can be earned upon money until used to pay the bond claim. The Statutory Interest Statute<sup>1</sup> with its periodic amendments increasing the rate of interest has remained substantially below market interest rates and has not provided an incentive to the prompt settlement of valid bond claims.

Bonding companies have consistently taken the position that their liability under a labor and material payment bond is limited to the principal indebtedness for such labor or material and does not encompass service charges, finance charges or interest charges for non-timely payment. Except for statutory interest which a bond claimant may recover only after prosecuting the case to judgment, the claimant was generally limited by this argument to the recovery of the principal indebtedness. The willingness of bond claimants to be satisfied with the recovery of their principal indebtedness in a less inflationary economy may explain the absence of case law challenging this artificial limit of liability created by the bonding companies.

The practice of bonding companies to force the claimant to institute suit, incur the costs and expenses of prosecuting the case and then offer to settle for a reduction in the principal indebtedness has placed an onerous economic burden upon bond claimants. The non-recoverable litigation expenses, including the loss of management time, employee time and attorneys' fees, are often substantial. The Circuit Court case load and trial calendar of two to four years has delayed the adjudication of claims and increased the pressure upon claimants. This burden has become unreasonable in the inflationary economy experienced in the last decade. The resulting economic loss of the use of money to the bond claimant has severely impacted its business operations. These events have caused some bond claimants to change their business practices and contracts to provide for finance charges, service charges or interest charges for the non-timely payment of the principal indebtedness. The purpose of these charges is to compensate the claimant for the increase in labor costs, material expenses, or manufacturing and business expenses incurred during the period of delay before the claim is paid.

The ultimate issue generated by this economic environment was whether bonding companies would be liable for such service charges, finance or interest charges. This issue of first impression was presented to the Michigan Court of Appeals in **Price Brothers Company v Charles J. Rogers Construction Company and Aetna Casualty and Surety Company**.<sup>2</sup> As the Michigan Supreme Court denied the defendants' appeal on February 19, 1982, the Court of Appeals decision became final and merits the attention of bond claimants.

Price Brothers Company, the bond claimant, contracted with Charles J. Rogers Construction Company to supply sewer pipe and materials in connection with a public construction project. The contract provided for a 5% cash discount for payments made within 30 days prior to the due date and a service charge of 1½% per month upon the balance outstanding for 30 days after the due date. The bond claimant presented two arguments: (1) that service charges were part of the

“sum justly due” within the express language of the public bond statute<sup>3</sup> and (2) that service charges constituted a time price differential which established the **price** for the materials sold. Section 7 of the Statute<sup>4</sup> provides that a claimant may sue on the payment bond “for the amount, or balance thereof, unpaid at the time of institution of the civil action, prosecute such to final judgment **for the sum justly due him** and have execution thereon.” This unambiguous statutory language provides for the recovery of “the sum justly due” and has no limitation upon the character of the indebtedness, i.e., principal indebtedness, service charges, finance charges or interest charges.

The **Rogers** court first considered the issue of whether the service charge was a time price differential. The **Rogers** court adopted the definition and concept of the time price differential found in **Silver v International Paper Co.**<sup>5</sup> The **Silver** court held that the time price differential was the difference between the cash price and the higher time price.<sup>6</sup> The **Rogers** court found that the differential was an integral part of the cost of the transaction and accepted the time price differential concept asserted by the bond claimant.

The **Rogers** court next considered the language of Section 7 of the public bond statute<sup>7</sup> providing for recovery of “the sum justly due.” Decisions from other jurisdictions construing the phrase “the sum justly due” to include finance charges were reviewed by the **Rogers** court.<sup>8</sup> Based upon this review, the **Rogers** court concluded that a material supplier “would be entitled to payment from the surety of sums justly due for material which enhanced the value of the project.”<sup>9</sup> Finance charges were found by the **Rogers** court to be inextricably related to the enhancement of the value of the project and thereby properly included within the terms of the payment bond.<sup>10</sup> Thus, the **Rogers** court concluded that the surety was liable for service charges which were an integral part of the contract between Price Brothers and Rogers.

This decision provides the vehicle for bond claimants to recover service charges, finance charges or interest charges. The use of the time price differential provides the best vehicle because it establishes a flexible price for materials sold for which bonding companies unquestionably have liability. Finance charges, service charges or interest charges which may not constitute a time price differential may equally be recoverable under the **Rogers** decision as “sums justly due” provided (1) they are an integral part of the contract and (2) enhance the value of the project.

Some questions of interpretation and application of the **Rogers** decision remain and will be the subject of subsequent litigation. The precise elements of the time price differential have not been fully articulated. The remaining questions include whether the contract must be in writing, whether the contract must specify that the charge is a time price differential and whether the time price differential concept includes the performance of labor as well as the sale of materials. Except for the sale of materials governed by the Uniform Commercial Code,<sup>11</sup> the general principles set forth in the Statute of Frauds<sup>12</sup> may apply. A “course of dealing” between the contracting parties may be a sufficient replacement for the actual contractual provision.<sup>13</sup>

The **Rogers** case is factually limited to the sale of materials. However, the concept is equally applicable to the performance of labor and the combination of material and labor supplied by subcontractors. The Attorney General, in an Opinion dated November 3, 1980,<sup>14</sup> concluded that the time price differential applied to the services performed by a dentist. The extension of the doctrine to construction contracts involving labor and materials will have to be confirmed by future decisions. The concept of “the enhancement of the value of the project” and the interplay of the Statutory Interest Statute and the recovery of service charges will present additional issues.

Although this area of the law is in its developmental stage, the **Rogers** decision provides an invaluable tool to the bond claimant in the unending battle with bonding companies to timely pay legitimate bond claims.

### FOOTNOTES

1. MCLA 600.6013; MSA 27A.6013. The most recent amendment increased the statutory interest rate from 6% to 12% effective June 1, 1980 unless the claim was based upon a written instrument in which case the increase was from 7% to 13%. Importantly, this amendment provided for compounding of the interest on an annual basis.
2. 104 Mich App 369 (1981), lv den, 412 Mich 938 (1982).
3. MCLA 129.201 et seq; MSA 5.2321 (1) et seq.
4. MCLA 129.207; MSA 5.2321 (7).
5. 35 Mich App 469; 192 NW2d 535 (1971 lv den 386 Mich 764 (1971)).
6. **Silver v International Paper Co.**, supra, at 470. See, also, **Keefe v Bush and Lane Piano Co.**, 247 Mich 82; 25 NW 585 (1929); **Attorney General v Contract Purchase Corp.**, 327 Mich 636; 42 NW2d 768 (1950); **Mathews v Aluminium Acceptance Corp.**, 1 Mich App 570; 137 NW2d 280 (1965).
7. MCLA 129.201; MSA 5.2321 (7).
8. See **Yanofsky v Marinucci Brothers & Co., Inc.**, 351 Mass 698; 218 NE2d 405 (1966); **Faulkner Concrete Pipe Co. v United States Fidelity & Guaranty Co.**, 218 S2d 1 (Miss., 1968); **Commonwealth v Continental Casualty Co.**, 429 Pa 366; 240 A2d 493 (1968); **Oscar E. Chytraus Co., Inc. v Wasatch Furnace and Electric, Inc.**; 28 Utah 2d 339; 502 P2d (1972).
9. **Price Brothers v Rogers Construction Co.**, supra, at 379.
10. Ibid.
11. MCLA 440.1101 et seq; MSA 19.1101 et seq.
12. See, MCLA 566.132; MSA 26.922, for the statute of frauds generally affecting contracts and MCLA 440.2201; MSA 19.2201 for the statute of frauds provision established by the Uniform Commercial Code.
13. See, MCLA 440.1205 (3); MSA 19.1205 (3).
14. 1 OAG, 1980, No. 5809, Page 1061 (November 3, 1980).

**REGULATION OF THE REAL ESTATE  
PROFESSION IN MICHIGAN\***

by

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The purpose of this article is to review Michigan Department of Licensing and Regulation (DLR) rules and other interpretations of Michigan licensing law. The following DLR outline has been used to organize this material:

- I. Duties and powers of the Department of Licensing and Regulation
  - A. General Powers
  - B. Examination of records
  - C. Investigations, hearings, and appeals
  - D. Penalties
- II. Licensing requirements
  - A. Activities requiring a license
  - B. Types of licenses
  - C. Change in license
- III. Requirements governing the activities of Licensees
  - A. Advertising
  - B. Broker/salesperson relationships
  - C. Commissions
  - D. Disclosures/conflict of interest
  - E. Handling of documents
  - F. Handling of monies
  - G. Listings
  - H. Place of business
  - I. Misleading and illegal offerings
  - J. Recommendations to buyers

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For each topic on the outline, a DLR rule (if there is one relating to the topic) is quoted in full and for most topics the rule is followed by other interpretations of Michigan licensing law. The interpretations include case examples, Attorney General opinions and DLR interpretive statements. The impact of the new Occupational Code, which became effective in October, 1980, on the rules and interpretations is uncertain at this time, although it is clear that certain rules must be revised. Rule 1, for example, still refers to the 1919 licensing statute that was repealed in 1980.

## **I. Duties and Powers of the Departments of Licensing and Regulation**

### **A. General powers**

#### *RULES*

#### **R 338.2762. Fee and commission disputes.**

**RULE 62.** The department shall not conduct a hearing involving a dispute over fees or commissions between cooperating brokers, brokers and salesmen, or brokers and residential building contractors unless the dispute arises out of agreements which have been reduced to writing and which embody the complete agreement between the parties.

#### **R 338.2767. Suspension or revocation of licenses.**

**RULE 67.** A broker or salesman, upon notice of suspension or revocation of his license, shall immediately forward the license and his pocket card to the department. If the suspended or revoked license is that of a broker, the broker shall also forward to the department with the broker's license and pocket card the licenses and pocket cards of all salesmen and associate brokers issued under the broker, and all the branch office licenses. A refund will not be made by the department to a licensee if a license is surrendered or revoked.

#### *INTERPRETATIONS*

1. Complaints filed with the Department of Licensing and Regulation must be disclosed to the public. Furthermore, investigative reports compiled by the department relating to licensees and persons holding themselves out as real estate brokers and salespersons must be disclosed to the public after the investigation has been completed. Attorney General Opinion No. 4730 (1972).

2. The statute requiring applicants to pass an examination establishing that the applicant has a fair knowledge of "the fundamentals of real estate practice and of the laws and principles of real estate conveyancing, deeds, mortgages, land contracts, leases" does not conflict with the Michigan statute prohibiting the unauthorized practice of law. Consequently, Michigan statutes give licensed real estate brokers the right to engage in conveyancing by filling out standard printed forms, so long as completing the forms is incidental to the transaction, no extra charge is made for executing the forms, and no legal advice is given as to the effect and validity of the forms. *Petitions of Ingham County Bar Association*, 69 N.W.2d 713 (1955). See also *State Bar of Michigan v. Kupris*, 116 N.W.2d 341 (1962).

**B. Examination of records**

*RULES*

**R 338.2761.**

RULE 61. A real estate broker or salesman shall produce for inspection, at the broker's place of business, during normal business hours, for an authorized representative of the department of licensing and regulation, any document or record as may be reasonably necessary for investigation in the enforcement of the act and these rules.

**C. Investigations, hearings, and appeals**

*RULES*

**R 338.2761. Investigations and informal conferences.**

RULE 61. (1) The department upon its own motion or upon a written complaint filed in duplicate, shall investigate the conduct of a licensee who is performing or attempting to perform any act for which a license may be suspended or revoked.

(2) In the investigation of the conduct of any licensee who is performing or attempting to perform any acts for which a license may be suspended or revoked, the department may request the appearance of the licensee at such informal conference as may be necessary to determine whether there is cause for complaint as would require a formal hearing. The request for an appearance shall be made in writing and sent by mail a reasonable time before the conference to the address appearing on the license and shall set the time and place of the conference. All parties requested to appear at such conference shall have the right to appear with and be represented by counsel.

(3) A real estate broker or salesman shall produce for inspection, at the broker's place of business, during normal business hours, for an authorized representative of the department of licensing and regulation, any document or record as may be reasonably necessary for investigation in the enforcement of the act and these rules.

**R 338.2763. Hearing procedure.**

RULE 63. (1) A formal hearing in a contested case shall be conducted in accordance with sections 71 to 92 of Act No. 306 of the Public Acts of 1969, as amended, being sections 24.271 to 24.292 of the Michigan Compiled Laws.

(2) A hearing for denial of an application for original licensure or for denial of or renewal of a license shall be held in accordance with section 14 of the act.

(3) If the department denies the application of a person for license under the act, the applicant may make written request for hearing on the decision within 10 days after receipt of the notice.

(4) A hearing shall be public.

**R 338.2764. Answers.**

RULE 64. A necessary party may file a written answer to charges or claims made. Copies of written pleadings and briefs shall be served on the department and all other parties directly interested in the hearing, at least 5 days before the date set for hearing.

**R 338.2765. Adjournments and continuances.**

RULE 65. (1) The department or its designated and authorized hearing officer may adjourn or continue a contested case on its own motion.

(2) The department or its designated hearing officer may adjourn or continue a contested case for good cause shown in writing. A request for an adjournment or continuance shall be filed at least 5 days before the date assigned for hearing or showing made that reasons beyond the control of the party prevented him from making such filing.

**R 338.2769. Declaratory rulings.**

RULE 69. (1) An interested person may request a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the department or of a rule or order of the department. The request shall be forwarded to the department and include:

- (a) The names and addresses of all interested parties.
- (b) A recitation of all pertinent facts including the interest of the requesting party.
- (c) The statute, rule or order in question, if known.
- (d) A request for relief and reason the relief is appropriate. The reason may be given in the form of a brief.

(2) The department shall promptly notify the person requesting the declaratory ruling of the intended disposition of the request. The department may notify the person submitting the request that the department does not choose to comply with the request.

(3) A declaratory ruling issued by the department shall be supported by a statement of the reasons for the ruling.

*INTERPRETATIONS*

The hearing was considered proper in a case where a broker was notified of a hearing but did not attend on the advice of his attorney, who thought the hearing would be adjourned. The hearing, in fact, was not adjourned and was attended by the broker's attorney. *Ranke v. Michigan Corporation and Securities Commission*, 26 N.W.2d 898 (1947).

**D. Penalties**

*INTERPRETATIONS*

An unlicensed person negotiated the assignment of oil leases for another individual in exchange for a royalty interest in the leases. The court determined that the unlicensed person was dealing as

a real estate broker in violation of the licensing statute; such violation is a crime punishable by fine and imprisonment. Courts will not enforce contracts which violate a statute and, consequently, the court refused to allow the person to collect the royalty interest. *Jaenicke v. Davidson*, 287 N.W. 472 (1939).

## II. Licensing Requirements

### A. Activities Requiring a License

#### *RULES*

#### **R 338.2701. Definitions.**

RULE 1. (1) A term used in these rules shall have the same meaning as defined in section 2 of the act.

(2) "Act" means Act No. 306 of the Public Acts of 1919, as amended, being sections 451.201 to 451.219 of the Michigan Compiled Laws.

#### **R 338.2748. Sale of owned real estate.**

RULE 48. (1) An owner of real estate who engages in the sale of real estate as a principal vocation is a person, corporation, partnership or other entity who does any of the following:

(a) Engages in more than 5 real estate sales in any 12-month period.

(b) Holds himself out to the public as being principally engaged in the sale of real estate.

(c) Derives over 50% of his net annual income for 3 consecutive years from the sale of real estate.

(d) Devotes over 50% of his working time, or more than 15 hours per week in any 6-month period to the sale of real estate.

(2) A sale of real estate, other than his principal residence, by a real estate salesman shall be done as a principal vocation of the salesman and the sale shall be through a licensed broker.

(3) Sales of real estate owned by or under option to a broker are subject to the act and these rules.

#### *INTERPRETATIONS*

1. The following are required to be licensed as real estate brokers: (1) "a profit corporation, partnership or individual whose principal business activity is buying and selling real estate, but which does not engage in the sale of real estate for others" and (2) "a profit corporation, partnership, individual or other legal entity engaged in the buying and selling of real estate for its account on a continuing basis, but which has another vocation . . . unless the real estate work of such entity is not its main occupation or where it spends a major portion of its time." However, a "profit

corporation, partnership or individual engaged in the sale of its own property and subject to the broker licensing requirements is not required to have a license if it makes those sales through a duly licensed broker.” Attorney General Opinion No. 4669 (1971).

2. “A person selling condominiums for another or as an owner as a principal vocation must hold a real estate license.” Attorney General Opinion No. 4757 (1973).

3. An attorney who finds a prospective real estate purchaser, in conjunction with a broker, is not exempt from the license law. Consequently, an attorney not licensed as a broker could not recover his fee. This result is mandated even though this was an isolated transaction. The court also noted that sale of the vendor’s interest in a land contract is covered by the broker’s licensing act. *Krause v. Boraks*, 67 N.W.2d 202 (1954).

4. A joint adventurer, when selling property of the joint adventure, falls within the statutory exception for sales by a person, firm partnership association, copartnership, or corporation of property owned by them. Consequently a former real estate broker, whose license had been revoked, was entitled to enforcement of a joint adventure agreement to share equally the profits from the sale of the owner’s real estate. *Summers v. Hoffman*, 69 N.W.2d 198 (1955).

5. A person who charges for listing real estate in a book, which he shows to prospective purchasers who select and negotiate the purchases directly with the owner, is not a real estate broker. Attorney General Opinion No. 20341 (1941).

6. A salaried bank employee who is engaged in selling the bank’s real estate is not required to obtain a broker’s or salesperson’s license. Attorney General Opinion 1937-38, p. 424.

7. “Persons engaged in the business of appraising real estate for lending institutions for a fee must be licensed under the provisions of the real estate license law.” Attorney General Opinion No. 5337 (1978).

8. A person licensed to sell securities but not real estate is not entitled to a commission under an agreement involving the sale of a business, even though the sale was accomplished by a transfer of capital stock. *Hague v. DeLong*, 292 Mich. 262 (1940). (This decision was affirmed by an evenly divided Michigan Supreme Court.)

9. An auctioneer who advertises and auctions real estate is not subject to the licensing act. Attorney General Opinion No. 3420 (1959).

## **B. Types of Licenses**

### *RULES*

#### **R 338.2727. Temporary licenses.**

**RULE 27.** The department may authorize or issue temporary licenses and pocket cards as evidence of proper licensing containing such information as the department prescribes.

**R 338.2729. Associate broker licenses.**

RULE 29. (1) Every officer of a corporation, or member of a partnership association or copartnership, who performs the acts of a real estate broker or salesman, shall obtain an associate broker's license.

(2) The license of an officer or member who ceases to be connected with the firm is suspended automatically, and the associate broker shall return his license and pocket card to the department immediately. If the officer is the only person designated as an officer or member entitled to perform all the acts of a real estate broker for the firm, the broker's license and that of every real estate salesman granted to any person by virtue of his employment by the broker is suspended automatically and shall be returned to the department, to be held by the department until a new associate broker is licensed to the firm.

**C. Change in License**

*RULES*

**R 338.2723. Conversion and transfer.**

RULE 23. (1) A broker's license shall not be converted into a salesman's license nor vice versa. An individual broker's license is not transferable to a corporation or partnership nor vice versa. A broker's or associate broker's license is not transferable.

(2) A salesman applicant, desiring to transfer to another broker prior to the issuance of his original license must file a completed new salesman application with \$5.00 transfer fee.

**R 338.2724. Broker as salesman.**

RULE 24. A broker to be employed by another broker as a salesman shall surrender his broker's license and obtain a salesman's license. The broker's license which is surrendered may be reinstated at any time during the period for which it is issued, upon surrender of the salesman's license.

**R 338.2725.**

RULE 25. (2) A salesman transferring to a new broker may satisfactorily account for his pocket card, pursuant to section 10 of the act, by submitting a signed statement to the department that he has endorsed the name and permanent identification number of his new broker on the reverse side of the pocket card; has dated and signed the card; and has had the card dated and signed by the former broker. Upon receipt of the signed statement along with a completed application to transfer to a new broker, the proper fee and the old wall license, the department shall consider the pocket card proper evidence of licensing for 30 days from the date endorsed on the back of the card. If the applicant for transfer is notified that the department does not approve the application in its current form or denies the application, the applicant for transfer shall wait until his transfer is approved and he receives his pocket card before working as a salesman. If a broker is not available or refuses to sign the transfer form and pocket card within a reasonable time, the department may waive the requirement for the former broker's

signature if the salesman certifies in writing that he has notified the broker whose employ he is leaving that he is transferring his license to another broker.

**R 338.2767. Suspension or revocation of licenses.**

RULE 67. A broker or salesman, upon notice of suspension or revocation of his license, shall immediately forward the license and his pocket card to the department. If the suspended or revoked license is that of a broker, the broker shall also forward to the department with the broker's license and pocket card the licenses and pocket cards of all salesmen and associate brokers issued under the broker, and all the branch office licenses. A refund will not be made by the department to a licensee if a license is surrendered or revoked.

**III. Requirements Governing the Activities of Licensees**

**A. Advertising**

*RULES*

**R 338.2732. Assumed names.**

RULE 32. (1) A broker shall not conduct business or advertise under a name other than that in which his license is issued.

(2) A broker desiring to operate under an assumed name shall send to the department, with his application for broker's license, a copy of the certificate of assumed name, certified by the clerk of the county where the certificate is on file. In the case of a corporation, the certificate shall be certified by the proper state authority.

**R 338.2751. Broker's advertising.**

RULE 51. A broker shall not advertise to sell, buy, exchange, rent, lease or mortgage property in a manner that indicates the offer to sell, buy, exchange, rent, lease or mortgage property is being made by a private party not engaged in the real estate business. An advertisement by a broker shall not be inserted in a publication where only a post office box number, telephone number or street address of the broker appears. A broker shall indicate affirmatively and unmistakably that the party advertising is a real estate broker and not a private party when advertising a real estate or a business opportunity.

**R 338.2752. Salesmen's advertising.**

RULE 52. (1) Advertising by a salesman shall be under the direct supervision and in the name of the employing broker.

(2) A salesman shall not advertise:

(a) To purchase or sell property under his own name unless the property is the principal residence of the salesman.

(b) Property for rent or lease under his own name unless the salesman is the owner of the property.

## *INTERPRETATIONS*

1. A real estate broker is liable for fraud when he tells his principal that property the principal is receiving in an exchange is worth \$7,000 when in fact it is worth only \$3,000, unless the broker acted honestly and in good faith. *De Lockerby v. D'Archangelo*, 235 N.W. 205 (1931).

### **Broker-Salesperson Relationships**

#### *RULES*

#### **R 338.2725. Salesmen's licenses.**

RULE 25. (1) A salesman shall be licensed under a broker. A salesman shall not be licensed with more than 1 broker during the same period of time. A salesman shall not commence work until the salesman receives a pocket card from the department, on original application or transfer, except as provided in subrule (2). A broker or salesman shall carry his pocket card while acting in such capacity. A duplicate card shall be issued on submission of satisfactory proof of loss of the original.

#### **R 338.2745. Broker.**

RULE 45. A broker shall not contract with a licensee in the broker's employ so as to lose the authority to supervise the licensee.

## *INTERPRETATIONS*

1. A broker obtained from an owner a listing agreement giving the broker the exclusive right to sell a home, although the listing agreement stated that "owner reserves one prospect." A rule adopted by the Lansing Board of REALTORS® provided that when such reservations are used, the prospect must be identified by name. A salesman was hired by the broker under a contract providing that he would be paid "immediately after consummation of any sale as soon as [the] . . . commission has been collected by the broker." The salesman took a prospective purchaser to the home, but the owners were indisposed and unable to show it. Later the owners sold the home directly to the prospect. The broker investigated the sale and concluded that the seller owed no commission. The salesman then sued the broker for his commission, and the court ruled for the salesman. The court noted that the employment contract, not the listing agreement, governed the dispute. Furthermore, the court determined that under the rule of the Lansing Board of REALTORS®, the reservation in the listing agreement was invalid with respect to the salesman and consequently the provision could not be used by the broker to deny payment. *Abraham v. Walter Neller Company*, 172 N.W.2d 817 (1969).

2. "Commissions, fees, or other valuable considerations earned by a real estate salesman while employed by a real estate broker may be paid to the salesman after he leaves the employ of the broker." (Interpretive Statement #2, August 16, 1974)

## C. Commissions

### *RULES*

#### **R 338.2742. Licensee gaining interests, commission.**

RULE 42. A licensee who buys or acquires an interest in property, directly or indirectly, shall not charge or accept from the seller, directly or indirectly, a commission, fee or other valuable consideration as a result of the sale of the property in the transaction, without the prior written consent to the specified consideration by the seller.

#### **R 338.2743. Commissions for other services.**

RULE 43. (1) A licensee shall not accept directly or indirectly a placement fee, commission or other valuable consideration for placing a loan with a mortgage lender or representative unless the licensee fully informs the purchaser and seller of that fact and obtains prior written consent of the purchaser and seller to the transaction.

(2) A licensee shall not accept a commission, fee or other valuable consideration from an abstract, mortgage, title insurance or insurance company or representative in any real estate transaction in which the licensee, directly or indirectly receives, or is entitled to receive, a real estate commission as a result of the sale of property in such transaction unless such fee, commission or consideration is accepted with the prior knowledge and written consent of the party or parties to the transaction with which the licensee has an agency relationship.

### *INTERPRETATIONS*

A broker hired by the seller agreed to pay an employee of the purchaser \$3,500 of his commission. The seller later refused to pay the broker a commission on the grounds that the agreement to pay \$3,500 constituted fee splitting. Although the court had "great discomfiture" over this arrangement, it awarded the commission to the broker on the grounds that the split was "one-way" and placed no temptation before the broker to sacrifice the seller's interests. The court quoted Professor Seavey: "Likewise, it is not improper for him (an agent) to give part of his commission to the other party, since this aids rather than harms the principal's interests." Furthermore, the court held that since the employee was a licensed broker, there was no violation of the licensing statute. *Greater Bloomfield Real Estate Co. v. Braun*, 235 N.W.2d 168 (1975).

## D. Disclosures and Conflict of Interest

### *RULES*

#### **R 338.2741. Licensee acquiring interests.**

RULE 41. (1) A broker or his salesman shall make his true position clearly known to the listing owner, in buying or acquiring, directly or indirectly, an interest in a property that is listed with the broker. Satisfactory proof of this fact shall be produced by the broker upon request of the department.

(2) A broker or his salesman shall make his true position clearly known to the owner of a particular property who requested the broker's services as a broker, when the broker acquires, directly or indirectly, an option to purchase that particular property. Satisfactory proof of this fact shall be produced by the broker upon request of the department.

(3) A broker shall not become a party to a net listing agreement for an owner or seller as a means of securing a real estate commission.

**R 338.2753. Misrepresentation.**

RULE 53. Advertising shall not, directly or indirectly, misrepresent material facts.

*INTERPRETATIONS*

1. A potential purchaser signed a purchase agreement and delivered it to the seller's broker. Before acceptance by the seller, the purchaser attempted to withdraw the offer. The broker claimed that the offer was irrevocable under the following clause in the agreement: "In consideration of the Broker's effort to obtain the Seller's approval, it is understood that this offer is irrevocable for 15 days from the date hereof. . . ." The court held that this clause was unenforceable. First, the clause violated the licensing statute because it required the broker to act as the buyer's as well as the seller's agent, and this fact was not disclosed to the seller. Second, when the broker argued that the clause required him to work exclusively for the buyer, the court disagreed on the basis of Rule 35, which is reprinted in part E below. *Barbat v. M. E. Arden Co.*, 254 N.W.2d 779 (1977).

2. A real estate agent hired by sellers told the purchasers, "I am doing your dealings" and "I'm taking care of everything." By making these statements, and by actually taking care of the buyer's part of the real estate transaction, the agent became the buyer's agent. However, the agent failed to tell the sellers that he was also representing the purchasers. As a result, the agent was held liable to the purchaser for a mortgage on the property which was not recited in the deed and of which the agent had no knowledge. *Grandchamp v. Patzer*, 197 N.W.2d 537 (1972).

3. "The full disclosure by a licensee to a buyer of material facts within his knowledge about the condition of the real estate he is offering for sale shall not be grounds for disciplinary action, despite the claim by a seller that such disclosure constituted disloyalty to the seller in violation of an agency relationship." (Interpretive Statement #7, October 15, 1976)

**E. Handling of Documents**

*RULES*

**R 338.2735. Offer to purchase.**

RULE 35. A broker or salesman shall deliver to an offeror a signed copy of offer to purchase immediately after it has been signed by the offeror. A broker or salesman, upon receipt of a written offer to purchase, shall promptly tender a written offer to purchase to the seller. Upon obtaining a proper acceptance of the offer to purchase, signed by the seller the broker or salesman shall promptly deliver true executed copies of the acceptance to the purchaser and seller. A broker or salesman shall make certain that all terms and conditions of the real estate transaction are included in the offer to purchase.

**R 338.2737. Closing transactions.**

RULE 37. (1) The broker involved at the consummation of a real estate or business opportunity transaction shall furnish, or cause to be furnished, the buyer and seller a complete and detailed closing statement signed by the broker showing the receipts and disbursements in the transaction.

(2) A salesman shall not close a real estate or business opportunity transaction except under direct supervision of a broker under whom the salesman is licensed. The broker shall assume full responsibility for execution of the closing statements prepared by the salesman or other persons acting under the broker's direct supervision.

(3) A broker or salesman shall not close a transaction contrary to term or condition of an executed offer to purchase, without written approval of the seller and purchaser.

**F. Handling of Monies**

*RULES*

**R 338.2738. Trust accounts.**

RULE 38. (1) Trust or escrow accounts shall be maintained in demand accounts only and only the broker or an associate broker may be a signatory on checks drawn on the accounts.

(2) [Replaced by Article 25, Section 2512 of the Occupational Code]

(3) A broker may maintain more than 1 trust account. He may maintain his own funds in an amount not to exceed \$100.00 in each trust account to cover bank service charges and to avoid the account being closed when there are no other funds in the account. Such funds shall be accounted for in a bookkeeping system as described in subrule (4).

(4) A broker shall maintain a bookkeeping system in his office consisting of at least the following:

(a) A permanent record book or record, called a journal, which shows the chronological sequence in which funds are received and disbursed:

(i) For funds received, the journal shall include the date of receipt and deposit, the name of the party who is giving the money, the name of the principal and the amount.

(ii) For disbursements, the journal shall include the date, the payee, the check number and the amount.

(iii) A running balance shall be shown after each entry both receipt and disbursement.

(b) A ledger, a record book or record, which shows the receipt and the disbursements as they affect a single, particular transaction as between buyer and seller or landlord and tenant. The ledger shall include the names of both parties to a transaction, the dates and the amounts received. When disbursing funds, the date, payee, check number and amount shall be shown. The ledger shall segregate 1 transaction from another transaction.

### *INTERPRETATIONS*

1. The failure to comply with the licensing law does not bar recovery of an earned commission. *Greater Bloomfield Real Estate Co. v. Braun*, 235 N.W.2d 168 (1975).

2. A real estate broker may not delegate to another person, such as a secretary, spouse, or salesperson, his duty to draw funds from a trustee or custodial account. Attorney General Opinion No. 4535 (1968).

3. The trust account provisions are applicable to sales of "condominium apartments." Attorney General Opinion No. 4757 (1973). (This was written before the 1978 condominium law took effect. It appears that the escrow provisions in the 1978 law supersede the license law.)

4. "The department encourages cooperation between brokers when such cooperation is in the interest of the client. Failure of the listing broker to cooperate is not, in itself, a violation of the law, or rules, unless the broker has indicated or implied to the seller that he would cooperate with other brokers. The broker who accepts the deposit must retain such deposit. Although either broker may close the sale, and furnish closing statements, it is the final responsibility of the listing broker to close the sale and furnish signed closing statements to the buyer and seller." (Interpretive Statement #3, August 16, 1974)

5. "In the absence of a pending civil action, it shall not be grounds for disciplinary action for a broker to return an earnest money deposit to a purchaser, if the return of such deposit is based upon a good faith decision that a contingency in the purchase agreement has not been met, notwithstanding the failure of the seller to agree to said return. **THIS DOES NOT RELIEVE THE BROKER FROM CIVIL LIABILITY.**" (Interpretive Statement #5, October 15, 1976)

6. "In the absence of a pending civil action and upon the passage of one year's time from the date of an accepted offer to purchase, it shall not be considered grounds for disciplinary action for a broker to pay out an earnest money deposit to a seller if the payment of such earnest money deposit has been based on a good faith decision that the buyer has abandoned any claim to such earnest money deposit. **THIS DOES NOT RELIEVE THE BROKER FROM CIVIL LIABILITY.**" (Interpretive Statement #6, October 15, 1976)

#### **G. Listings**

### *RULES*

#### **R 338.2734. Listings.**

**RULE 34. (1)** A broker or salesman who obtains a listing shall give the party or parties signing the listing, a true copy thereof, at the time of signing by the listing owner. Every listing agreement shall be fully completed by the broker or salesman before it is signed by the listing owner.

**(2)** A listing agreement shall set forth a definite expiration date and shall not contain a provision requiring the party signing the listing to notify the broker of the party's intention to cancel the listing upon or after the expiration date.

(3) Any listing agreement shall have as one of its terms the following nondiscrimination clause: It is agreed by the broker and seller or lessor, parties to this listing agreement, that as required by law, discrimination because of race, creed, color or national origin by said parties in respect to the sale or lease of the subject property is prohibited.

**R 338.2741.**

RULE 41. (3) A broker shall not become a party to a net listing agreement for an owner or seller as a means of securing a real estate commission.

**H. Place of Business**

*RULES*

**R 338.2733. Place of operation.**

RULE 33. A licensed broker or salesman may operate anywhere in Michigan.

**R 338.2744. Place of business.**

RULE 44. (1) A broker shall maintain a place of business in this state which is an actual and established physical location from which the broker can and does conduct the broker's business and where the broker's books and records are maintained.

(2) A broker licensed as an individual proprietorship, associate broker for a corporation or partnership, or the associate broker who manages a branch office, shall be reasonably available to manage and supervise the place of business during regular business hours.

**R 338.2747. License display.**

RULE 47. A broker shall display his license and the licenses of all the salesmen in his employ in a conspicuous position in his place of business.

*INTERPRETATIONS*

1. The licensing law requirement that "every real estate broker shall maintain a place of business in this state" requires (1) a place physically equipped to accommodate a real estate business; (2) the actual maintenance of the place for conducting the business; and (3) the conducting of the business at such place. Attorney General Opinion No. 3170 (1958).

2. The 25-mile rule in the licensing statute "requires that an associate broker be so located that he can act as a resident in charge of the office at all times." Attorney General Opinion No. 3171 (1958).

3. "A branch office is considered to be any specific physical location, maintained for the use of a broker or salesman:

1. wherein the broker or his salesmen regularly do business or consult with clients or customers.

OR

2. which, by advertising or signs or otherwise is held out to the public as a place where clients or customers may do business or consult with a broker or his salesmen.

A mere post office box number or a telephone answering service is not a branch office.” (Interpretive Statement #1, November 1, 1973)

#### **I. Misleading and Illegal Offerings**

##### *RULES*

#### **R 338.2757. Misleading offerings.**

RULE 57. A licensee attempting to transact business through the use of advertising, pictures, brochures, displays, models or model installations, signs or printed matter, shall portray the offering accurately so as not to mislead or deceive the public.

#### **J. Recommendations to Buyers**

##### *RULES*

#### **R 338.2736. Licensee's recommendation.**

RULE 36. (1) A broker or salesman involved at the time of execution of an offer to purchase in a real estate transaction, shall recommend to the purchaser that a complete abstract of title or fee title policy in the amount of the purchase price, be furnished to the purchaser by the seller, issued or certified to the approximate date of the closing of the real estate transaction.

(2) A broker or salesman shall recommend to the purchaser that an attorney be retained to pass upon the marketability of the title to the property involved and to ascertain whether or not the details in the sale of the real estate or business opportunity have been strictly adhered to, before the transaction involved is consummated.

**U.S. SUPREME COURT DENIES CERTIORARI IN  
MICHIGAN DORMANT MINERAL ACT CASES**

by  
**Allen E. Priestley**

As previously reported in the June, 1981 issue (Vol. 8, No. 3) of the **Michigan Real Property Review**, the constitutionality of the Michigan Dormant Mineral Act, MCLA 554.291 et seq; MSA 26.1163 (1) et seq., was upheld by the Michigan Supreme Court. Subsequently, by petition for writ of certiorari, the U.S. Supreme Court was requested to review the decision.

Since that time, in the case of **Texaco, Inc. v. Short**, 70 L. Ed. 2d 738, 102 S. Ct. 781, 50 U.S.L.W. 4117, decided January 12, 1982, the U.S. Supreme Court has upheld the constitutionality of an Indiana statute that provides for automatic lapse and reversion to the surface owner of severed mineral interests in lands after 20 years of nonuse. The statute was in many ways similar to the Michigan law.

On January 18, 1982, the U.S. Supreme Court, in a decision (Docket No.'s 80-1575 and 80-1624) cited at 50 L.W. 3565, denied certiorari in the Michigan cases, thus affirming the decision of the Michigan Supreme Court.

## THE LEGISLATIVE SCENE

### BILL INTRODUCED TO EXTEND THE USURY STATUTE

House Bill 5693 has been introduced to extend the expiration date of the usury statute applicable to mortgages and land contracts (MCLA 438.31c, MSA 19.15 (1c) ) from July 1, 1982 to December 1, 1982.

House Bill 4409, exercising the option available under the new federal bankruptcy act to elect state exemptions, remains in the Senate Committee on Corporations and Economic Development.

House Bills 5554 through 5562, introduced to override certain provisions of the federal interest rate preemption, have not progressed any further since the April report. These bills would raise the permissible interest rate on second mortgages by financial institutions to 21% and the interest rate on land contracts to 15%.

Senate Bill 821 has been introduced to prohibit mortgage foreclosures against unemployed persons under certain circumstances.

### ACTION ON PREVIOUSLY REPORTED LEGISLATION

- HB 5141 Revises the powers of regional planning commissions — 4-8-82, 3rd reading with amendment(s), amended, passed; 5-3-82, Senate amendments concurred in as amended; 5-4-82, House amendments concurred in, ordered enrolled; 5-18-82, approved by Governor as Public Act 156.
- HB 5405 Provides certain farmers with deferments of payment and collection of summer property tax — 3-25-82, passed; 3-29-82, Committee on Finance.
- HB 5526 Provides for incorporation of villages as cities when an entire township lies within village boundaries — 4-6-82, 2nd reading; 4-7-82, 3rd reading; 4-8-82, passed; 4-20-82, Committee on Municipalities and Elections.
- SB 327 and 328 Prohibits leasing of gas and oil rights in Great Lakes bottomlands — 4-14-82, approved by Governor as Public Acts 67 and 69.
- SB 600 Deletes sunset date on toxic substance control commission act — 4-1-82, general orders.
- SB 692 Prohibits an exemption from property tax for educational organizations which discriminate on the basis of race or national origin — 5-6-82, 3rd reading with substitute; 5-10-82, passed; 5-12-82, Committee on Taxation.

### NEWLY INTRODUCED LEGISLATION

- HB 5611 Provides for licensing of residential builders without examination within five years of the expiration of a previous license — introduced by Rep. Trim et al on 4-1-82 and referred to the Committee on State Affairs.

- HB 5625 Increases the severance tax on oil and gas by 2% — introduced by Rep. Scott and Brotherton on 4-6-82 and referred to the Committee on Taxation.
- HB 5632 Eliminates certain fees of plat boards at the option of the county board of commissioners — introduced by Rep. Harrington and Mahalak on 4-7-82 and referred to the Committee on Towns and Counties; 5-6-82, 2nd reading with substitute.
- HB 5633 Provides an income tax credit for home security improvements — introduced by Rep. Hertel et al on 4-7-82 and referred to the Committee on Taxation.
- HB 5637 Permits certain financial institutions to make reverse mortgage loans — introduced by Rep. Skrel et al on 4-7-82 and referred to the Committee on Corporations and Finance.
- HB 5646-5648 Allows local control of annexation, consolidation and incorporation in counties of more than one million — introduced by Rep. Fessler et al on 4-8-82 and referred to the Committee on Towns and Counties.
- HB 5656 Increases the license fee for real estate brokers and salespersons — introduced by Rep. Trim on 4-21-82 and referred to the Committee on State Affairs.
- HB 5667 Excludes parochial and denominational schools from certain construction requirements — introduced by Rep. Cropsey et al on 4-26-82 and referred to the Committee on Education.
- HB 5673 Deletes provisions which allow contractors to charge public agencies an interest penalty on late payments under construction contracts — introduced by Rep. Fitzpatrick on 4-28-82 and referred to the Committee on Appropriations.
- HB 5679 Revises the act regulating tall structures as to aircraft — introduced by Rep. Vanek et al on 4-29-82 and referred to the Committee on Urban Affairs.
- HB 5691 Eliminates the requirement that township treasurers make personal demand for payment of delinquent property taxes — introduced by Rep. Giese et al on 5-5-82 and referred to the Committee on Taxation.
- HB 5693 Extends the expiration date on the mortgage and land contract usury statute to December 1, 1982 — introduced by Rep. Keith on 5-5-82 and referred to the Committee on Corporations and Finance.
- HB 5695 Eliminates permit requirements for homeowners making plumbing alterations or repairs on their homes — introduced by Rep. Nash et al on 5-6-82 and referred to the Committee on Urban Affairs.
- HB 5700 Limits the authority of the mobile home commission to mobile homes in parks — introduced by Rep. T. Brown on 5-6-82 and referred to the Committee on Towns and Counties.

- HB 5701 Eliminates the requirement of compliance with mobile home commission rules for mobile home condominiums — introduced by Rep. T. Brown on 5-6-82 and referred to the Committee on Towns and Counties.
- HB 5702 Provides for the location of mobile homes in areas zoned for multiple family — introduced by Rep. T. Brown on 5-6-82 and referred to the Committee on Towns and Counties.
- HB 5707 Requires the entity handling a real estate closing to report the name and address to the local treasurer or assessor — introduced by Rep. T. Brown on 5-6-82 and referred to the Committee on Taxation.
- HB 5757 Allows home rule cities immediate and retroactive effect for millage authorization for the fiscal year during which it was adopted if that effective date is specified in the proposal, and allows for county collection of these taxes — introduced by Rep. Emerson et al on 5-19-82 and referred to the Committee on Taxation.
- HB 5759 Allows municipalities and counties to levy a fee regarding certain sanitary landfills — introduced by Rep. Dunaskiss et al on 5-19-82 and referred to the Committee on Conservation, Environment and Recreation.
- SB 780 Provides districts of the district court having a real estate division with jurisdiction of appeals from zoning boards — introduced by Sen. Kelly et al on 4-2-82 and referred to the Committee on Judiciary.
- SB 781 Establishes a real estate division of the district court in the 36th district (City of Detroit) — introduced by Sen. Kelly et al on 4-2-82 and referred to the Committee on Judiciary.
- SB 819 Regulates surface coal mining and reclamation operations — introduced by Sen. Faust et al on 5-6-82 and referred to the Committee on Environmental and Agricultural Affairs.
- SB 821 Prohibits mortgage foreclosures against unemployed persons under certain circumstances — introduced by Sen. Plawecki on 5-12-82 and referred to the Committee on Judiciary.

Submitted by: Robert J. McCullen  
Chairman, Committee on  
Legislation

**RECENT DECISIONS**  
by  
**Joseph Lloyd**  
**Lloyd, Rutzky & Dodge**

**CASE NOTES**

ESTATE OF KOZIEL, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (No. 52128, 54985, May 6, 1982)

Inchoate Dower - Implicit repeal

The Plaintiff elected to take against the will of her deceased husband and sought to exercise her right to inchoate dower under the 1846 dower statute. (MCLA 558.1 et seq, MSA 26.211, giving a widow a life estate in 1/3 of the lands in which her husband held an estate of inheritance) The trial court held that the Plaintiff was barred from taking her statutory rights by being out of the state for more than one year, and held that the statutory right to inchoate dower had been implicitly repealed in the 1979 revisions to the Michigan Probate Act.

The Court of Appeals affirmed the denial of the statutory share for the reasons given by the trial court, and affirmed that court's holding that the right of inchoate dower had been repealed. Although it is clear that the dower right has not been explicitly repealed, the Court, analyzing both the 1978 and the 1980 revisions to the Probate Code, inferred that the intent of the legislature was to merge that right into the new legislation, terminating the right of inchoate dower.

KIMBERLEY HILLS NEIGHBORHOOD ASSOCIATION v DION, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (No. 43678, April 5, 1982)

Environmental Protection - Endangered species

The Defendant sought to develop an 18 acre site covered for the last fifty years with second growth trees and bush. The site contained a pond and was the habitat of certain local pheasants and other wildlife. The Plaintiff, a neighboring homeowners association sought equitable relief against development. The trial court, based on the Michigan Environmental Protection Act (MEPA), ordered that at least 4 acres of the site be set aside as a nature preserve and breeding ground for local wildlife.

On appeal, the Court addressed two questions: (1) whether a natural resource was involved, and (2) whether the effect of the development would rise to the level of impairment justifying an injunction. On the first question, the court held that the animals and plant life constituted a "natural resource" protected under MEPA. On the second question, the court noted that the statute did not protect only those resources which are "biologically unique" or "endangered." The court, rather must balance the rarity of the resource with the magnitude of the harm involved.

On the facts of the case, the court found that there was nothing unique about the clearings, growth or species of animal found on the subject property. There was further no showing that the animals in question would not move to other suitable habitats. The Court therefore reversed the decision of the trial court as regards the wildlife preserve.

DeROSIA v AUSTIN, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (No. 56150, April 23, 1982)

Specific Performance - Tender

The Plaintiff had a signed sales agreement for the purchase of certain property. The agreement called for closing on a certain date, and did not provide that time was of the essence. Because of problems in obtaining a mortgage survey, the purchaser's attorney asked for a delay in the closing date. He did not receive any response from Seller's attorney. The Seller, one day before the date set for closing, sold the property to a third party. The Purchaser brought suit for specific performance of the contract. The trial court found that the Seller had committed an anticipatory breach of the contract, but denied the remedy of specific performance. The purchaser having failed to show any damages, the trial court awarded him \$1.

The Purchaser's argument in favor of specific performance was that he had obtained a mortgage commitment and was prepared to close the sale within a few days. These actions, it was argued constituted a tender of performance. The Court of Appeals in affirming the trial court, held that tender was insufficient. An offer to close, unaccompanied by the necessary payment does not constitute legal tender. The Purchaser was limited to his remedy of damages arising out of the anticipatory breach.

COMMODITIES EXPORT CO v CITY OF DETROIT, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (No. 55545, May 4, 1982)

First Amendment - Private Property - Commercial Speech

The Plaintiff sought to pass out handbills advertising its business and prices in a parking lot leased from a municipal authority by a competitor. The Lessor was the corporation operating the Ambassador Bridge. The Lessee was a private corporation, selling duty free merchandise. The Plaintiff was a competitor of the duty free store. The Plaintiff's employees, while passing out the handbills, were arrested for trespass. The Plaintiff thereupon sought an injunction, claiming first amendment protection for its advertising.

The trial court granted summary judgment in favor of the Defendants. The Court of Appeals, reviewing both the Federal and Michigan cases, found that the parking lot should be treated as private property and affirmed the denial of the injunction. The Court noted that the speech in question was commercial speech and not political speech, and reasoned that, since a public authority, against which the first amendment is directed, has the right to reject commercial advertising, surely a private property owner has the right to forbid unconsented commercial advertising on its premises.

PEOPLE v HUBBARD, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (No. 49865, April 7, 1982)

Criminal Trespass - Necessity

The defendants were arrested for criminal trespass on property belonging to Consumers Power Company. They had taken part in a demonstration against nuclear power at the site of a nuclear power plant. The defendants raised a defense of "necessity" and argued that prosecution impaired their constitutional right of free speech.

The defense of “necessity” was based on the desire of the demonstrators to warn the citizens in the area and the employees of the plant of the danger to health and property incident to the operation of the nuclear plant. The Court of Appeals held that there may exist, on suitable facts, a defense of necessity to prosecution for criminal trespass. It would be necessary to show a “well grounded apprehension or reasonable fear of harm” arising from physical forces. On the facts of the case, however, the court held that where there was exhaustive legislative debate and legislation, as in the case of nuclear power, the defense of necessity would not be permitted. To allow such defense would permit an individual to substitute his own convictions for those of the reasoned and deliberate legislative process.

The court further noted that in order to support the defense of necessity, it would be necessary to show that the trespass would alleviate the impending harm. On the facts of the case, it was held that the demonstration would not be reasonably calculated to have any effect on the development of nuclear power.

In reviewing the constitutional claims, the court held that the right to demonstrate on the private property of Consumers Power was not a protected right.

## SECTION NEWS

Our thanks to Eugene Simonoff, Vice President of Warren, Gorham & Lamont, for permission to reprint part of Chapter 4 from **Michigan Guide to Real Estate Licensing Examinations**, copyright 1982.

\* \* \*

The author of the lead article, Robert R. Nix, II, is a cum laude graduate of Wayne State University and was admitted to the Michigan Bar in 1971. He is a partner in the law firm of Kerr, Russell and Weber, and specializes in real estate law, including construction litigation, mechanic's liens, mortgage lending and commercial leasing. He is a member of the Real Property Sections of the American Bar Association and State Bar. He has lectured and provided seminars on the Mechanic's Lien Statute and new Construction Lien Act to various contractor trade associations.

## SECTION COMMITTEES

Just a year ago, the Section reorganized its committees, and circulated a questionnaire to all members by which interest in serving on committees could be designated.

The number of responses was enormous. It is believed that those who respond to such a questionnaire do want to work on projects as they arise from time to time in the selected subject area. Many of the new committees have provided valuable service during this year, and it is hoped that the year ahead will offer an even greater chance for those who wish to be active to have more certain opportunity to do so. In this direction, all committee chairmen who will be serving during the next year will meet with Section officers and Council at the Summer Conference at Mackinac. The purpose of this meeting will be to discuss and develop the projects for the coming year, and identify how these projects may be best carried out and their results most effectively implemented.

The committee membership rosters will be established, in large part, by the Annual Meeting of the Section in September, and published in the **Review**. Committee membership is based on the recent questionnaires and, in most instances, membership will continue on the same committees as this year. Of course, new Section members and those who did not indicate interest previously may join a committee of their choice at any time. If you have not sent in your questionnaire and want to work on a Section committee, please tear out the questionnaire form and send it to William B. Dunn, 1600 First Federal Building, 1001 Woodward Avenue, Detroit, Michigan 48226. **Those of you who sent in the questionnaire within the last year need not respond again unless you desire to make a change.**

We are very proud of the work of our committees which, over the relatively few years of this Section's existence, have accomplished much in terms of educating the bar and the bench, and in carefully participating in legislation. We look forward to your continued interest and involvement, and the resulting benefit to the state of the law.

**STATE BAR OF MICHIGAN  
Real Property Law Section**

**Committee Preference Questionnaire**

From the committee list below, please select the committees you are interested in and would be willing to work on during the coming year (Sept. 1982-1983), according to preference, designating at least one but not more than four choices, by putting the numeral 1 in the blank for your first choice, 2 for your second choice, etc.

- |   |   |
|---|---|
| <input type="checkbox"/> Legislation (Reporting)<br>(State only)  | <input type="checkbox"/> Commercial Leasing and Management of Real Estate   |
| <input type="checkbox"/> Decisions (Reporting)  | <input type="checkbox"/> Landowners' and Users' Liability and Insurance<br>(Subcommittee)   |
| <input type="checkbox"/> Title Examination, Assurance and Conveyancing<br>(including deeds, easements, licenses and other<br>interests) | <input type="checkbox"/> Construction Liens (Mechanics' Liens)  |
| <input type="checkbox"/> Legal Forms (critique of forms, new forms, standard<br>forms, practice guides, source of forms)                | <input type="checkbox"/> Construction (including construction contracts,<br>architect contracts, bonds)   |
| Residential Transactions:   | <input type="checkbox"/> Bankruptcy, Debtor/Creditor Rights   |
| <input type="checkbox"/> (a) Sales, Financing (Subcommittee)  | <input type="checkbox"/> Mortgages and Related Financing Devices and<br>Security Interests  |
| <input type="checkbox"/> (b) Leasing, Landlord and Tenant (Subcommittee)  | <input type="checkbox"/> Land Contracts (Subcommittee)  |
| <input type="checkbox"/> Zoning and Use, Land Sales Regulation  | <input type="checkbox"/> Partnerships, Joint Ventures and other Investment<br>Vehicles (including syndication)  |
| <input type="checkbox"/> Environmental Law and Energy   | <input type="checkbox"/> Public Financing (including EDC, IDRB, MSHDA,<br>HUD, etc.)  |
| <input type="checkbox"/> Historical Preservation  | <input type="checkbox"/> Real Estate Legal Practice Methods (including<br>economics, ethics, professional responsibility,<br>specialization, new practice developments) |
| <input type="checkbox"/> Condemnation   | <input type="checkbox"/> Oil, Gas and Natural Resources   |
| <input type="checkbox"/> State and Local Taxation   | <input type="checkbox"/> Continuing Legal Education   |
| <input type="checkbox"/> Federal Tax Aspects of Real Estate Transactions  | <input type="checkbox"/> Publications   |
| <input type="checkbox"/> Condominiums, PUDs and Cooperatives  |   |

NAME:

ADDRESS:

Please send to:

William B. Dunn  
1600 First Federal Building  
1001 Woodward Avenue  
Detroit, Michigan 48226

**SEVENTH ANNUAL SUMMER CONFERENCE**  
**July 14-17, 1982**  
**REAL PROPERTY LAW SECTION**  
**STATE BAR OF MICHIGAN**  
**“THE COMMERCIAL REAL ESTATE PROJECT IN DISTRESS”**

The faculty will analyze and discuss the practical aspects of evaluating, electing, exercising, defending and preventing claims of debtors and creditors in the distressed commercial real estate context. Presentations will be made with reference to a single but complex hypothetical situation involving a specific property and will be designed to illustrate and generate serious discussion of what can and does happen when everything that can go wrong actually does go wrong, on an independent, successive or simultaneous basis. The orientation will be highly practical in nature and will include a comprehensive treatment of actions, tactics, strategies and countermeasures available to the various parties involved. The discussions will also incorporate a “nuts and bolts” approach to all of the procedures with which real estate lawyers should be thoroughly conversant, including:

- Judicial and non-judicial mortgage foreclosures
- Land Contract forfeitures and foreclosures
- Landlord-Tenant procedures (eviction and collection)
- Bankruptcy reorganization/litigation (state court and out of court proceedings involving the developer, contractor, tenant, guarantors, etc., and their impact)
- Mechanic’s lien foreclosures
- Tax implications and other economic imperatives
- Receiverships
- Redemption
- Interim management and control
- Levies, executions and enforcement of deficiency and other money judgments
- UCC remedies concerning related personalty
- Collateral assignments of leases and land contracts
- Marshalling and equitable defenses
- Foreclosure sales

The speakers will focus on “what to, how to and when to” with regard to the critical procedures necessary and available in distressed situations and will touch upon the preventive drafting of real estate documentation in advance. Analyses of strategy will cover the entire panoply of tactical considerations and responses, the financial consequences arising from employment procedures, advising clients, as well as the time periods and delays which are attendant to and can normally be expected in completing such procedures. Relevant forms will also be introduced and discussed.

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