

# MICHIGAN REAL PROPERTY REVIEW

---

Vol. 19, No. 2

Summer, 1992

---

## CONTENTS

Remedies of the Subcontractor or Supplier When the Owner or General Contractor Files for Bankruptcy . . . . .	49
by Lawrence M. Dudek	
Fraudulent Public Works Bonds: No Right, No Remedy . . . . .	53
by Sheryl A. Collins	
Legislative Status Report . . . . .	57
by Gregory L. McClelland and Gail A. Anderson	
Recent Decisions . . . . .	61
by Joseph A. Lloyd	
Continuing Legal Education . . . . .	63
by Lawrence D. McLaughlin and Arlene R. Rubinstein	
Notice Regarding Amendment of By-Laws . . . . .	68
Notice Regarding Compendium of Michigan Environmental Statutes and Regulations . . . . .	Inside Back Cover

Published by the  
Real Property Law Section  
State Bar of Michigan

# MICHIGAN REAL PROPERTY REVIEW

---

Vol. 19, No. 2

Summer, 1992

---

The **Michigan Real Property Review** is the official journal of the Real Property Law Section of the State Bar of Michigan. The **Review** is published quarterly and is a significant part of the Section's program of publications, seminars, conferences, legislative liaison and other undertakings for the professional education and development of its members and the Bar.

The Section encourages interested members of the Bar to contribute articles and other publishable material relating to real property law and of interest to the profession. Manuscripts are reviewed by attorneys experienced in the subject matter covered by each article.

Readers are invited to submit articles, comments and correspondence to George J. Siedel, Editor, 5211 Business Administration Building, University of Michigan, Ann Arbor, Michigan 48109-1234. The publication of articles and the editing thereof are at the discretion of the Editor. A cumulative index of articles is printed annually in the Winter issue of the **Review**.

Articles in the **Review** may be cited by reference to the volume number, abbreviated title of the publication, the appropriate page number and the year of publication as, for example, 14 Mich Real Prop Rev 35 (1987).

Publications Committee, Real Property Law Section  
George J. Siedel, Editor, Ann Arbor  
Stephen E. Dawson, Bloomfield Hills  
James R. Brown, Grand Rapids  
William B. Dunn, Detroit  
Carl A. Hasselwander, Troy

Copyright • 1992  
Real Property Law Section  
of the State Bar of Michigan

The views, opinions and conclusions expressed in the **Michigan Real Property Review** are those of only the respective authors and do not necessarily reflect the position or opinion of the State Bar of Michigan, the Real Property Law Section, the **Michigan Real Property Review**, its editor or the Publications Committee of the Section. The publication in the **Review** of articles, letters and other materials does not constitute and should not be construed to be an endorsement of any views, opinions or conclusions which may be expressed or implied. The **Review** is prepared and published as a part of the legal education activities of the Real Property Law Section, for the benefit of its members and the Bar. In publishing the **Review**, the Real Property Law Section does not purport to engage in or to render legal or professional services. If legal advice or services are desired or appropriate, an attorney should be consulted.

The **Michigan Real Property Review** is published by the Real Property Law Section of the State Bar of Michigan. An annual subscription to the **Review** commences in September of each year and ends in August of the following year. Four issues are published each year. The subscription price is \$20 annually, payable in advance. Orders for subscriptions should be sent, with the above-stated payment, to **Michigan Real Property Review**, Real Property Law Section, State Bar of Michigan, 306 Townsend Street, Lansing, Michigan 48933.

# MICHIGAN REAL PROPERTY REVIEW

Published by the  
Real Property Law Section  
State Bar of Michigan

## OFFICERS OF THE SECTION:

### CHAIRPERSON

**JAMES R. BROWN**  
Suite 700  
200 Ottawa Ave., N.W.  
Grand Rapids 49503

### CHAIRPERSON-ELECT

**STEPHEN E. DAWSON**  
525 N. Woodward Ave.  
P.O. Box 509  
Bloomfield Hills 48303-0509

### VICE-CHAIRPERSON

**THOMAS C. SIMPSON**  
Suite 200  
100 W. Long Lake Rd.  
P.O. Box 541  
Bloomfield Hills 48303-0541

### SECRETARY

**RICHARD W. PENNINGS**  
401 S. Washington Sq.  
P.O. Box 30044  
Lansing 48909-7544

### TREASURER

**SANDRA L. MEYER**  
35th Floor  
400 Renaissance Center  
Detroit 48243

## COUNCIL OF THE SECTION:

**DAVID W. BERRY**  
32270 Telegraph  
Suite 200  
Birmingham 48010

**JACK D. SHUMATE**  
150 W. Jefferson  
Ste. 900  
Detroit 48226

**JAMES N. CANDLER**  
800 First National Bldg.  
Detroit 48226

**C. ROBERT WARTELL**  
28400 Northwestern Hwy.  
Essex Centre, 3rd Floor  
Southfield 48034

**CAROL ANN MARTINELLI**  
900 Wilshire Drive  
Ste. 305  
Troy 48084

**SHELDON P. WINKELMAN**  
2290 First National Bldg.  
Detroit 48226

**LAWRENCE D. McLAUGHLIN**  
2290 First National Bldg.  
Detroit 48226

**RONALD T. BARROWS**  
P.O. Box 36958  
Grosse Pointe 48236  
(Representing Title Standards Committee)

**ROBERT D. MOLLHAGEN**  
222 Washington Sq. N.  
Suite 500  
Lansing 48933

**GEORGE J. SIEDEL**  
5211 Business Administration Bldg.  
Ann Arbor 48109-1234  
(Editor, Real Property Review)

**ROBERT R. NIX, II**  
2100 Comerica Bldg.  
Detroit 48226

**Real Property Law Section  
State Bar of Michigan**

**STANDING COMMITTEES OF THE REAL PROPERTY LAW SECTION**

**1991 - 1992**

**BUDGET AND FINANCE**

**Stephen E. Dawson, Chairperson**  
525 N. Woodward Ave.  
P.O. Box 509  
Bloomfield Hills 48303-0509

**MEMBERSHIP**

**Richard W. Pennings, Chairperson**  
401 S. Washington Sq.  
P.O. Box 30044  
Lansing 48909

**COMMITTEES**

**Stephen E. Dawson, Chairperson**  
525 N. Woodward Ave.  
P.O. Box 509  
Bloomfield Hills 48303-0509

**NOMINATIONS**

**James W. Draper, Chairperson**  
35th Floor  
400 Renaissance Center  
Detroit 48243

**CONTINUING LEGAL EDUCATION**

**Lawrence D. McLaughlin, Chairperson**  
2290 First National Bldg.  
Detroit 48226

**PUBLICATIONS**

**George J. Siedel, Co-Chairperson**  
5211 Business Admin. Bldg.  
Ann Arbor 48109-1234

**DECISIONS**

**Joseph A. Lloyd, Chairperson**  
201 E. Washington  
Ann Arbor 48104

and

**Stephen E. Dawson, Co-Chairperson**  
525 N. Woodward Ave.  
P.O. Box 509  
Bloomfield Hills 48303-0509

**LEGISLATION**

**Gregory L. McClelland, Co-Chairperson**  
215 S. Washington Sq.  
Suite 200  
Lansing 48933

and

**Gail A. Anderson, Co-Chairperson**  
215 S. Washington Sq.  
Suite 200  
Lansing 48933

**Real Property Law Section  
State Bar of Michigan**

**EX-OFFICIO MEMBERS  
(PAST CHAIRPERSONS OF THE SECTION)**

**PATRICK J. KEATING**  
Detroit

**MAURICE S. BINKOW**  
Detroit

**JAMES W. DRAPER**  
Detroit

**DAVID S. SNYDER**  
Birmingham

**WILLIAM B. DUNN**  
Detroit

**ALLEN SCHWARTZ**  
Detroit

**STEPHEN A. BROMBERG**  
Birmingham

**RICHARD E. RABBIDEAU**  
Bloomfield Hills

**GARY A. TABACK**  
Southfield

**PETER A. NATHAN**  
West Palm Beach, Florida

**CARL A. HASSELWANDER**  
Troy

**JAMES M. TERVO**  
Chicago, IL

**NYAL D. DEEMS**  
Grand Rapids

**Real Property Law Section  
State Bar of Michigan**

**SPECIAL COMMITTEES OF THE REAL PROPERTY LAW SECTION**

**1991 - 1992**

**BANKRUPTCY, DEBTOR/  
CREDITOR RIGHTS**

**Patrick E. Mears, Chairperson**  
248 Louis Campau Promenade, N.W.  
Suite 200  
Grand Rapids 49503

**BROKER AND MORTGAGE SERVICES**

**Gail A. Anderson, Chairperson**  
215 S. Washington Sq., Suite 200  
Lansing 48933

**COMMERCIAL LEASING AND  
MANAGEMENT OF REAL ESTATE**

**Michael W. Maddin, Chairperson**  
28400 Northwestern Hwy.  
3rd Floor Essex Center  
Southfield 48034

**CONDOMINIUMS, PUDS  
AND COOPERATIVES**

**Jeffery R. Jones, Chairperson**  
1400 N. Woodward Ave.  
Suite 101  
Bloomfield Hills 48304

**CONSTRUCTION AND  
CONSTRUCTION LIENS**

**Ronald P. Strote, Chairperson**  
100 W. Long Lake Rd., Suite 200  
Bloomfield Hills 48304

**EMINENT DOMAIN**

**Frederick D. Steinhardt, Chairperson**  
4000 Town Center  
Suite 1500  
Southfield 48075

**ENVIRONMENTAL LAW AND ENERGY**

**Gary A. Trepod, Chairperson**  
1400 Michigan National Tower  
Lansing 48933

**FEDERAL TAX ASPECTS OF  
REAL ESTATE TRANSACTIONS**

**William B. Acker, Chairperson**  
Ste. 600, Columbia Center  
201 W. Big Beaver Rd.  
P.O. Box 4300  
Troy 48099-4300

**MORTGAGES AND RELATED  
FINANCING DEVICES AND  
SECURITY INTERESTS**

**Vicki R. Harding, Chairperson**  
36th Floor  
100 Renaissance Center  
Detroit 48243-1002

**OIL, GAS AND NATURAL RESOURCES**

**Paula K. Manis, Chairperson**  
2400 Lake Lansing Rd.  
Suite B  
Lansing 48912-3618

**PARTNERSHIPS, JOINT VENTURES  
AND OTHER INVESTMENT VEHICLES**

**Michael D. Mulcahy, Chairperson**  
1600 First Federal Bldg.  
Detroit 48226

**PROFESSIONAL RESPONSIBILITY**

**William C. Roush, Chairperson**  
100 E. Big Beaver Rd., Suite 900  
Troy 48083

**RESIDENTIAL TRANSACTIONS**

**Howard A. Lax, Chairperson**  
611 Woodward Ave.  
P.O. Box 331789  
Detroit 48232-7789

**STATE AND LOCAL TAXATION**

**Julianna B. Miller, Chairperson**  
150 W. Jefferson, Ste. 2500  
Detroit 48226

**Real Property Law Section  
State Bar of Michigan**

**SPECIAL COMMITTEES OF THE REAL PROPERTY LAW SECTION**

**1991 - 1992**

**TITLE EXAMINATION AND  
CONVEYANCING**

**Willard G. Moseng, Chairperson**  
401 S. Washington Sq.  
P.O. Box 30044  
Lansing 48909

**TITLE STANDARDS**

**Russell A. McNair, Jr., Chairperson**  
800 First National Bldg.  
Detroit 48226

**WATER LAW**

**Robert C. Davis, Chairperson**  
150 W. Jefferson  
Suite 900  
Detroit 48224

**ZONING AND LAND USE;  
LAND SALES REGULATIONS AND  
HISTORICAL PRESERVATION**

**David W. Berry, Chairperson**  
32270 Telegraph Rd.  
Suite 200  
Birmingham 48010

## REMEDIES OF THE SUBCONTRACTOR OR SUPPLIER WHEN THE OWNER OR GENERAL CONTRACTOR FILES FOR BANKRUPTCY

by *Lawrence M. Dudek*\*

The Michigan Construction Lien Act, MCL 570.1101 *et. seq.*, provides the party who supplies labor or material in the improvement of real property with the right to file a construction lien upon the interest of the owner or lessee who contracted for the improvement. The procedure for perfecting and enforcing the lien is set forth in the Construction Lien Act.

If an owner or general contractor experiences financial difficulties, the result may be the filing of a petition for relief under Chapter 11 of the Bankruptcy Code. The owner in a Chapter 11 may seek to stave off an imminent foreclosure sale and restructure its mortgage and other debt while retaining ownership of the project.

If the owner is unsuccessful in obtaining the approval of the Bankruptcy Court to a Plan of Reorganization in the Chapter 11 proceedings, the case may be converted to a Chapter 7 bankruptcy, where a trustee is appointed to liquidate the owner's assets and to distribute the assets to creditors pursuant to the priorities of payment set forth in the Bankruptcy Code.

The filing of a bankruptcy proceeding will result in the imposition of an automatic stay of certain actions by creditors under Bankruptcy Code Section 362(a), 11 U.S.C. 362(a). The subcontractor or supplier must consider the effect of the automatic stay upon the ability to perfect and enforce a construction lien. The following issues require consideration:

1. May the claimant record a construction lien against real property owned by the debtor for labor or materials provided prior to the bankruptcy filing?
2. May the lien claimant proceed with foreclosure of a construction lien against property owned by the debtor?
3. What is the effect of a bankruptcy filing by a general contractor on the ability of a subcontractor or supplier to enforce a construction lien?
4. What is the effect of the bankruptcy filing on the ability of the construction lien claimant to recover interest on the principal balance owed?

\* © 1992 by Lawrence M. Dudek. All rights reserved. This article is not intended as a step-by-step description of how to perfect and enforce a claim of lien. For that purpose, the Construction Lien Act should be consulted.

5. How does the bankruptcy filing affect the time limits set forth in the Construction Lien Act with respect to the foreclosure of a construction lien?
6. What remedies for collection are available to the lien claimant in addition to those set forth in the Construction Lien Act?

### 1. Creation and perfection of lien post bankruptcy filing.

Section 362(a) of the Bankruptcy Code, 11 U.S.C. 362(a), provides for an automatic stay against certain actions by creditors to assert claims against the debtor. Section 362(b), 11 U.S.C. 362(b), sets forth exceptions to the automatic stay.

Section 362(a)(5), 11 U.S.C. 362(a)(5), operates as a stay of "any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title." In order to perfect a construction lien, the claimant is required to record a claim of lien with the register of deeds within 90 days after the last furnishing of labor or materials. MCL 570.1111(1).

A claimant, who records a construction lien against property owned by the debtor for labor or materials provided prior to the filing of the bankruptcy petition, is seeking to perfect a lien which "secures a claim that arose before the commencement of the case." The action of recording and serving the Claim of Lien is prohibited by the automatic stay imposed by Section 362(a) unless one of the enumerated exceptions set forth in Section 362(b) is applicable. Such an exception is set forth in Section 362(b)(3) of the Code, 11 U.S.C. 362(b)(3).

In **Sears, Roebuck & Co. v Hamlin**, 34 B.R. 673 (Bankr. E.D. Mich. 1983), the court held that Bankruptcy Code Sections 362(b)(3) and 546(b) operate to permit the post-bankruptcy recording and service of the claim of lien for work performed prior to the filing of the bankruptcy petition, without the need to obtain an order lifting the automatic stay. The court further held that the trustee (or the debtor in possession) could not avoid a claim of lien, under Section 544 of the Code, in the capacity as a hypothetical bona fide purchaser for value. The basis for the holding was that under Section 119(3) of the Construction Lien Act, MCL 570.1119(3), a bona fide purchaser for value would take title subject to a construction lien recorded after the transfer of title if the first actual physical improvement on the property took place prior to the transfer.

### 2. Ability to foreclose where the owner files for bankruptcy.

After perfecting the lien by recording and service, the claimant is required to file suit for foreclosure and record a notice lis pendens within one year of the recording of the claim of lien. MCL 570.1118(1). While the automatic stay imposed by 362(a) does not prohibit the perfection of the claim of lien by recording and service, the automatic stay does prohibit the filing of an action to foreclose the lien. 11 U.S.C. 362(A)(3)-(5). 3 Stein. Construction Law, § 16.03[4][a] (1990).

In order to proceed with foreclosure of a claim of lien against property owned by a debtor in bankruptcy proceedings it is necessary to obtain an order from the bankruptcy court lifting the automatic stay prior to filing any action for foreclosure. Relief from the automatic stay is available under the provisions of Section 362(d) of the Code, 11 U.S.C. 362(d).

Section 362(d)(2) of the Code, 11 U.S.C. 362(d), provides that the court shall grant relief from the automatic stay to permit taking action against property of the estate if "(A) the debtor does not have an equity in such property; and (B) such property is not necessary to an effective reorganization." The lien creditor has the burden of establishing that the debtor has no equity in the property, and the debtor has the burden of establishing that it can effectively reorganize. Section 362(g).

In order to establish that the debtor does not have an equity in the property it may be necessary to obtain an appraisal of the property and to determine the amount of liens existing against the property. The total amount of all outstanding liens against the property, and not just the lien of the party seeking to lift the automatic stay, should be considered by the court in determining whether the debtor has an equity in the property. **Stewart v Gurley**, 745 F.2d 1194 (9th Cir. 1984).

The debtor will often argue that the stay should not be lifted because the property is necessary to an effective reorganization. However, the Supreme Court held in **United Sav. Ass'n of Texas v Timbers of Inwood Forest Associates, Ltd.**, 484 U.S. 365, 376 (1988), that the debtor is required to establish that "the property is essential for an effective reorganization **that is in prospect**," and that "there must be 'a reasonable possibility of a successful reorganization within a reasonable time.'" 808 F.2d at 370-371.

Section 362(d)(1) of the Code, 11 U.S.C. 362(d)(1), provides that the stay may be lifted, modified or continued "for cause, including the lack of adequate protection" of the creditor's interest. If the property is properly preserved and insured by the debtor and has value in excess of the debt owed to the secured creditor, the court will probably find that adequate protection exists, and decline to lift the automatic stay. **Federal Land Bank v Carson**, 34 Bankr. 502 (Bankr. D. Kan. 1983).

### 3. Ability to foreclose where the general contractor files for bankruptcy.

If the general contractor files a bankruptcy proceeding, the subcontractor or supplier seeking to foreclose a construction lien against property owned by a third party must consider the need to lift the automatic stay for the purpose of joining the general contractor as a party to the lien foreclosure proceedings.

Case law under the predecessor statute to the Construction Lien Act holds that the general contractor is a necessary party to an action by a subcontractor to enforce a claim of lien. Similarly, a third tier supplier or subcontractor would be required to join the party with which it stood in contractual privity. **Godfrey Lumber Co. v Kline**, 160 Mich. 565 (1910); **Kerns v Flynn**, 51 Mich. 573 (1883). These cases hold that it is necessary to join these parties in order to inquire into the contract relations and state of accounts between the owner, the general contractors, and the subcontractors. The remedy of foreclosure afforded to a subcontractor with a claim of lien implies a determination by the court that the owner is indebted to the general contractor.

The applicability of this case law to an action for foreclosure under the current Construction Lien Act is questionable. Section 117(5) of the Construction Lien Act, MCL 570.1117(5), provides: "In connection with an action for foreclosure of a construction lien, the lien claimant also may maintain an action on any contract from which the lien arose." This language suggests that a claim for relief under the contract is not a prerequisite to enforcement of the claim of lien by a subcontractor and that the general contractor may not be a necessary party in an action by a subcontractor or supplier to enforce a construction lien under the Construction Lien Act. In addition, the existence of modern discovery procedures questions the continuing viability of the proposition that the presence of the general contractor as a party is necessary to establish the existence of the contracts and accounts between the parties.

The prudent lawyer will probably want to join the general contractor so as to avoid a defense of a failure to join a necessary party. If the bankrupt general contractor has a potential lien claim against the property, joinder may be required under Section 117(4) of the Construction Lien Act which requires the joinder of all persons having an interest in the property "which would be divested or otherwise impaired by the foreclosure of the lien."

If the debtor general contractor is to be named as a party, it will be necessary to obtain an order from the bankruptcy court lifting the automatic stay. It may be helpful to request the bankruptcy court to lift the stay for the limited purpose of permitting an adjudication of the claims against the general contractor with a provision that, after the amount of the claim is adjudicated, any payment from the general contractor debtor will be sought only through the pending bankruptcy proceeding.

### 4. Right of the construction lien claimant to recover interest post bankruptcy filing.

A construction lien claimant will be entitled to recover interest on the lien after the filing of a bankruptcy by the owner only if the lien claimant is oversecured and the value of the security exceeds the amount of the indebtedness owed to the lien claimant. Under Section 506(b) of the Code, 11 U.S.C. 506(b), an oversecured creditor is entitled to recover interest which accrues on its claim subsequent to the filing of the bankruptcy petition. The oversecured creditor is entitled to recover interest even in the absence of an express agreement for the payment of interest. **United States v Ron Pair Enterprises, Inc.**, 489 U.S. 235 (1989) (interest accrues on a non-consensual tax lien which existed prior to the bankruptcy filing).

If the lien claimant is undersecured, there is no right to recover interest subsequent to the date of the filing of the bankruptcy petition. The debtor owner is not required to compensate an undersecured creditor for the delay in enforcement of a security interest caused by the automatic stay. **United Savings Ass'n of Texas v Timbers of Inwood Forest Associates Ltd.**, *supra*. The requirement of "adequate protection" does not include the right of an undersecured creditor to interest, and the remedy of an undersecured lien claimant is to move for relief from the automatic stay under Section 362(d)(2) to permit enforcement of its construction lien and thereby to avoid the damages caused by unreasonable delay.

An oversecured creditor is also entitled to seek recovery of "any reasonable fees, costs, or charges provided for under the agreement under which such claim

arose." **In re Astro-Netics, Inc.** 28 Bankr. 612 (Bankr. E.D. Mich. 1983). If the lien claimant's contract provides for an award of costs of collection and reasonable attorneys' fees, the lien claimant should also seek recovery of those charges if the claimant is an oversecured creditor. In a foreclosure action, the court has discretion to make and award of reasonable attorneys' fees to a lien claimant who is a prevailing party. MCL 570.1118(2). The Bankruptcy Code, however, limits an award of collection costs and attorneys' fees to those provided for "under the agreement" under which the claim arose. In the absence of an express agreement, attorneys' fees would appear not to be collectible in a bankruptcy proceeding by a construction lien claimant.

#### 5. Effect of a bankruptcy filing on the one-year statute of limitations.

A construction lien is foreclosed by bringing an action in a circuit court for the county where the real property described in the claim of lien is located. MCL 570.1118(1). The action for foreclosure must be filed within one year of the date of the recording of the construction lien. MCL 570.1117(1). At the time of filing the action for foreclosure, the plaintiff is required to record a notice lis pendens with the register of deeds. MCL 570.1117(2).

If the owner of the property is a debtor in bankruptcy proceedings, and the statute of limitations has not expired as of the date of the filing of the bankruptcy petition, the statute of limitations will be tolled. Section 108(c) of the Bankruptcy Code, 11 U.S.C. 108(c), provides in pertinent part that "if applicable nonbankruptcy law . . . fixes a period for commencing . . . a civil action in a court other than a bankruptcy court on a claim against the debtor . . . and such period has not expired before the date of the filing of the petition," then the period will be extended. The statute for filing an action to foreclose a construction lien will expire at the later of the one-year statute of limitations set forth in the Construction Lien Act, pursuant to 11 U.S.C. 108(c)(1), or "30 days after notice of the termination or expiration of the stay . . . with respect to such claim." 11 U.S.C. 108(c)(2). Any number of events can result in the termination of the automatic stay and will commence the running of the 30-day period. These events may include the court's grant of a motion for relief from the stay, closing of the case, dismissal of the case, the granting or denial of the debtor's discharge, or the fact that the property in-

involved is no longer property of the estate. 2 Collier on Bankruptcy, §108.04 (15th ed. 1992).

The statute of limitations will only be tolled where the property owner files bankruptcy. The filing of a bankruptcy by a general contractor will not operate to toll the statute of limitations with respect to a claim for foreclosure of a construction lien against property owned by a party which is not in a bankruptcy proceeding.

#### 6. Remedies in addition to the Construction Lien Act.

In addition to the remedy afforded by the Construction Lien Act, the unpaid subcontractor or supplier may have claims under the Michigan Building Contract Trust Fund Act, MCL 570.151., **et seq.** Under the Trust Fund Act, any money paid by an owner to a contractor on a private project for a specific improvement is deemed to be a trust fund to be used to pay the lower tier suppliers and subcontractors on the project. **James Lumber Co., Inc. v J & S Const., Inc.**, 107 Mich. App. 793 (1981). Violation of the Act is a felony. There is a private cause of action for violation of the Act. **B.F. Farnell Co. v Monahan**, 377 Mich. 552 (1966). A corporate officer who participates in the diversion of funds will have personal liability for corporate violations of the Act. **Au Bon Pain Corp. v Arctect. Inc.**, 653 F.2d 61 (2d Cir. 1981) (construing Michigan law).

Any funds paid by an owner to a general contractor who is in bankruptcy will be held by the general contractor as trust funds for the benefit of subcontractors and suppliers and will not become property of the estate of the debtor. **Selby v Ford Motor Co.**, 590 F.2d 642 (6th Cir. 1979).

A violation of the Trust Fund Act may also give rise to an obligation which is nondischargeable in the personal bankruptcy of an individual who was responsible for the violations. Section 523(a)(4) of the Bankruptcy Code provides that the debtor does not receive a discharge from a debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." The Sixth Circuit held in **Carlisle Cashway, Inc. v Johnson**, 691 F.2d 249, 251 (6th Cir. 1982), that a breach of the Trust Fund Act creates a non-dischargeable obligation because it amounts to fraud or defalcation while acting in a fiduciary capacity.

## FRAUDULENT PUBLIC WORKS BONDS: NO RIGHT, NO REMEDY!

by *Sheryl A. Collins\**

This article addresses a perceived unfairness in the treatment of subcontractors, laborers and suppliers on public projects arising from case law developments under the Contractor's Bond for Public Works Act of 1963<sup>1</sup> ("Bond Law"). The original bond law was enacted in 1883 and, similar to its current version, required "[s]ufficient security, by bond, for the payment by the contractor, and all sub-contractors, for all labor performed or material furnished in the erection, repairing, or ornamenting of [public] building [or other public works]."<sup>2</sup> While the statutory provisions have been variously amended, repealed and reenacted over the last century, this basic protection, the right of proper claimants to recover for non-payment from the surety, has remained constant. One fundamental aspect of this protection, however, has not remained constant, that is, the rights provided to unpaid subcontractors, suppliers and laborers in the event that a valid bond is not available for recovery.

### STATE OF THE LAW, 1883-1963

From 1883 to 1963, the statutory provisions placed a duty on the agents contracting on behalf of the governmental entity to require a payment bond, stating clearly that "[i]t shall be the duty of the board of officers or agents, contracting on behalf of the state, county, city, village, township or school district, to require sufficient security by bond . . ." for payment of materials and labor furnished to the public construction project.<sup>3</sup> Under this language and similar predecessor provisions, the Michigan Supreme Court extended **personal** liability to members of the contracting bodies in the event that valid payment bonds were not required. Between 1887 and 1920, the Supreme Court decided eight cases holding public officials personally liable for damages sustained by unpaid suppliers and materialmen on projects where those officials had failed to meet their statutory duty to require valid payment bonds.<sup>4</sup> Thus,

---

\* Sheryl A. Collins (formerly Sheryl A. Moody of Clark, Klein & Beaumont) is an associate with the Bloomfield Hills law firm of May, Simpson & Strote, P.C., where her primary areas of practice are construction and commercial litigation. Mrs. Collins was appointed Vice Chairperson of the Construction Law Committee in 1991. She has written articles on construction law published in the *Michigan Real Property Review* and lectured in the areas of construction liens, construction contracts and construction law for ICLE, the Real Property Law Section and the Cambridge Institute.

the parties intended to be protected by the statute were provided the promised protection from the bond or from those failing to secure the bond, in the event payment was not made by the contractor from money it collected from the governmental agency.

### STATE OF THE LAW, 1963-1988

No further case law is recorded on this issue between 1920 and 1988. In 1963, however, the Michigan Legislature enacted the Bond Law, applying it to public contracts in excess of \$5,000.<sup>5</sup> Although the original House bill proposed repeal of the existing bond law, amendments prior to the Bond Law's enactment restricted the predecessor law to only those construction and maintenance contracts entered into by the state highway commissioner.<sup>6</sup> Both laws remain on the books today, although the Bond Law now applies to contracts in excess of \$50,000, except those awarded under the Drain Code of 1956.<sup>7</sup>

As enacted, the Bond Law did not include the language of its predecessor statute which expressly imposed a duty upon the governmental body to require a payment bond.<sup>8</sup> The new language states that the contractor "shall furnish" the bonds rather than stating that the governmental entity "shall require" a payment bond, providing, in pertinent part, as follows:

Before any contract, exceeding \$50,000.00 for the construction, alteration, or repair of any public building or public work or improvement of the . . . "governmental unit" is awarded, the proposed contractor, hereinafter referred to as **the "principal contractor," shall furnish** at his or her own cost to the governmental unit a performance bond and a **payment bond** which shall become binding upon the award of the contract to the principal contractor. (*emphasis supplied*)<sup>9</sup>

This legislative change (query: oversight?) is the critical element in the case law developments analyzed below. Between 1963 and 1988, there is no case law recorded that examines what duty, if any, the Bond Law creates on the part of the governmental entity to require its contractor to furnish a valid payment bond.

### STATE OF THE LAW, 1988

In 1988, the Michigan Court of Appeals was presented with a variation of the basic issue in **Barnes & Sweeny Enterprises, Inc v City of Hazel Park**.<sup>10</sup> In **Barnes**, the contractor posted a valid bond that expired

during the course of defendant Hazel Park's construction project. The subcontractor's original suit against the contractor, its bonding company and the city for nonpayment was stayed due to the bankruptcy proceedings of both the contractor and its bonding company. The subcontractor successfully severed its claims against the city, alleging, **inter alia**, that the City breached its "[s]tatutory duty of insuring that the performance [sic] bond was still valid while materials were being supplied to the project."<sup>11</sup> The city was granted summary disposition for failure to state a claim upon which relief can be granted and the subcontractor appealed.

Correctly noting that it faced an issue of first impression, the court framed the issue as "[w]hat duty, if any, the statute creates on the part of a governmental unit to inform those supplying labor and materials that the required bond has expired or to take steps to insure that an expired bond is renewed. . . ."<sup>12</sup> The court concluded that no such duty exists, based on its analysis of the change in legislative language described above. After identifying the change, the court simply stated "[t]he language of the current statute places the duty to furnish the bond on the contractor. We believe that this change in language reflects an intent by the Legislature to remove any duty on the governmental unit and place it upon the contractor."<sup>13</sup> The court further concluded that its decision was consistent with three other provisions of the statute which, in the court's opinion, limited the governmental unit's involvement to "[a]n essentially clerical role."<sup>14</sup>

### STATE OF THE LAW, SUBSEQUENT DEVELOPMENTS

In 1989, the Court of Appeals was again confronted with the issue of governmental duty in **Lenny Fischer, d/b/a Contract Installers v City of Negaunee, et al.**<sup>15</sup> Unlike **Barnes & Sweeny**, however, where a valid bond was filed but expired, the City of Negaunee completely failed to obtain a payment bond from its contractor. In **Fischer**, the contractor breached its contract with the city and the city withheld payment of \$35,000.<sup>16</sup> Plaintiff subcontractor, however, completed its portion of the project but had an unpaid balance of \$13,816 on its \$22,112 contract sum. The opinion states that "since it appeared that [the contractor] was insolvent," the subcontractor first filed a claim of lien against the city for unpaid balance.<sup>17</sup> Plaintiff's amended complaint alleged that "[t]he city was negligent in failing to assure that [the contractor] had secured a performance [sic] bond to protect subcontractors as required by MCLA 129.201 **et. seq.**; MSA 5.2321(1) **et. seq.**"<sup>18</sup>

In its analysis, the **Fischer** court first reiterates the holding in **Barnes**, concluding that “[t]he statute imposes no duty on the contracting governmental unit to ensure that payment bonds **are furnished** or kept current . . . (*emphasis added*). In **Barnes**, however, a valid bond was furnished, the holding only addressing the question of whether the governmental entity had an ongoing duty to monitor the status of the bond as a vehicle for recovery.<sup>19</sup> Citing **Barnes**, the court stated that the burden is on the subcontractors to determine the existence of the bond and that “the role imposed on the contracting governmental unit by the statute is essentially clerical.” The court held that “as a matter of law, the city of Negaunee was under no duty to ensure that [the contractor] furnished or maintained a performance [sic] bond.” The Michigan Supreme Court subsequently denied the subcontractor’s leave to appeal.

The unpublished **Fischer** opinion was the cornerstone of a further development when, on January 18, 1990, the Circuit Court for the County of St. Clair issued an opinion in the case of **East China Township Schools v Dougherty Contractor, Inc, et al** (Consolidated Case No. C88-002394CK). In this case, the parties conceded that the contractor filed fraudulent payment and performance bonds from a non-existent surety company with the East China Township Schools. The opinion states that the school district conceded that “[t]he bonds at all times were a nullity.” When the general contractor disappeared without making payments to subcontractors of monies received from the school district, several subcontractors sued the school district alleging, *inter alia*, negligence under the Bond Law.

The issue addressed by the court’s opinion was whether the school district had a duty to verify the validity of the statutorily-required bonds. The court held that the **Barnes** opinion governed the issue despite the acknowledged difference “that **Barnes** involved a failed bond, rather than a fraudulent, non-existent bond.” The court’s view that the **Barnes** question of duty was the same was supported, the court declared, by the unpublished opinion of **Fischer v Negaunee**, discussed above. No analysis of **Fischer** was presented; the court simply held that “the government, it is clear, is merely the repository of the bond, and it is the duty of anyone relying on the bond to determine its existence and viability.” The court also dismissed the subcontractors’ claims for breach of contract, estoppel, constructive trust and unjust enrichment.

The **East China** court did not address the statutory

requirement in section 4 that the bond be issued by a surety authorized to do business in the state. Presumably, the governmental entity was even excused from performing the “clerical duty” of checking with the state insurance licensing division to confirm whether the surety met the statutory requirements that it was “authorized to do business in this state”. Who bears this clerical responsibility? Generally, subcontractors and other claimants under the bond have not yet entered into contracts when the bond is required to be posted.<sup>20</sup> Does this rest with the only other participant in the process, i.e., the contractor? If the contractor in **East China** was trustworthy or the contractor in **Negaunee** was willing and able to honor its contracts, the bonds would never have been necessary. Is it reasonable to interpret the legislative change to place the burden on contractors (against whom the claimants are to be protected) to police themselves?

The **East China** court further failed to address the purpose of the payment bond, i.e., to protect those furnishing material or labor to the public project.<sup>21</sup> How can this purpose be served by removing liability from those failing to ensure that a bond is deposited in their “repository” as in **Negaunee** or from those accepting a worthless piece of paper in performance of “clerical functions”? In either event, the effect is to send subcontractors to recover from the fraudulent contractor who has disappeared, financially and/or physically.

## CONCLUSION

The legislative change instituted in 1963, without fanfare or recorded discussion, has been interpreted to remove both governmental and personal liability of governmental officials for failure to secure a valid payment bond. Entities to be protected by the bond can look only to the contractor for recovery.

The **East China** case is presently on appeal as of right in the Michigan Court of Appeals. While **Barnes & Sweeny** may be a proper interpretation of the legislative change in language, perhaps the court will address the unfairness of the subsequent developments in the law. If in fact the Legislature intended the above results when it enacted the 1963 legislation (less than 90 days after its introduction), no legislative or judicial change in the law is warranted. One wonders, however, whether some discussion would have taken place or clarification made to the abbreviated bill if such a dramatic change in the rights of subcontractors, suppliers and laborers was intended.

The representatives who introduced the bill, the committee chairs and members who considered it, and the

sole dissenters to the passage of the bill, Senator Rahoi and Representative Hellman, have long since left office. The State Archives did not collect legislative documentation such as committee notes or reports until the mid-1960s; nor do they have bill analyses before 1968. The author is attempting to contact all participants still living to obtain any insights available on the legislative intent. However, as with the subcontractors in **East China**, it is likely that this effort will produce few rewards.

#### ENDNOTES

1. MCLA 129.201 *et. seq.*; MSA 5.2321(1) *et. seq.*
2. PA 1883, No. 94.
3. MCLA 570.101; MSA 26.321.
4. **Lake Shore Stone Co v Westgate**, 211 Mich 540 (1920); **Michaels v McRoy**, 148 Mich 577 (1907); **Smith v Hubbell**, 142 Mich 637 (1906); **Huebner v Nims**, 132 Mich 657 (1903); **Staffon v Lyon**, 110 Mich 260 (1986); **Wells v Board of Education of West Bay City**, 78 Mich 260 (1889); **Plummer v Kennedy**, 72 Mich 295 (1888), **Owen v Hill**, 67 Mich 43 (1887).
5. MCLA 129.201 *et. seq.*; MSA 5.2321(1) *et. seq.*
6. MCLA 129.211; MSA 5.2321(11).
7. MCLA 129.212; MSA 5.2321(12).
8. Note that those contracting with the state highway commission still have the right to hold the officials personally liable under MCLA 570.101 *et. seq.*
9. MCLA 129.201; MSA 5.2321(1).
10. 169 Mich App 422 (1988).
11. *Id.*, at 424.
12. *Id.*, at 425.
13. *Id.*, *Id.*, at 426.
14. *Id.*, examining section 3 (“[t]he governmental unit shall specify the amount of the payment bond . . .”), section 5 (“[t]he bonds shall be filed in the office of the governmental unit awarding the contract”), and section 8 (“[requiring] that the appropriate agent of the governmental unit . . . furnish . . . a certified copy of the bond and the contract for which it is given . . .”).
15. Michigan Court of Appeals unpublished opinion no. 109102 (June 9, 1989), **leave denied**, 434 Mich 887 (1990).
16. The facts are unclear as to whether plaintiff alleged any theory of recovery related to the withheld sums such as unjust enrichment.
17. Since 1885, the Michigan Supreme Court has deemed it “unquestionable” that public property cannot be the subject of construction [“mechanics’”] liens. **Knapp v Swaney**, 56 Mich 345 (1885).
18. The court’s unpublished two-page opinion is replete with semantic errors. If plaintiff did mistakenly allege that a performance bond rather than a payment bond was in dispute, plaintiff made the wrong allegation and the court failed to address it. A performance bond is given for the protection of the governmental unit to secure the faithful performance of the contract (MCLA 129.202; MSA 5.2323(2)) whereas a payment bond is given for the protection of claimants (i.e., persons furnishing labor, material or both) to secure payment in the event the principal contractor defaults on payment obligations (MCLA 129.203; MSA 5.2321(3)).
19. While the **Fischer** court’s statement may be an arguable extension of the **Barnes** analysis, it is not, in the author’s opinion, an accurate restatement of the holding.
20. MCLA 129.201; MSA 5.2321(1) states “[b]efore any contract . . . is awarded . . . the principal contractor shall furnish . . . a payment bond . . . .”
20. MCLA 129.203; MSA 5.2321(3).

## LEGISLATIVE STATUS REPORT ACTION ON LEGISLATION OVER THE LAST THREE MONTHS

by **Gregory L. McClelland** and **Gail A. Anderson**

**HB 4148** - Allows state to place lien on an abandoned dwelling defined as a dwelling that remains unoccupied and unlisted for 180 days (unless registered as provided in the act) — 2/7/91, Committee on Housing & Urban Affairs; 5/29/91, second reading with substitute; 6/6/91, third reading with substitute; 6/10/91, passed; 6/12/91, Committee on Economic & Urban Development; 8/1/91, referred to Committee on Local Government & Urban Development; 5/21/92, general orders with substitute; 5/26/92, third reading with substitute.

**HB 4527** - Amends the housing law of Michigan to include an abandoned dwelling within the definition of "dangerous building" and to allow municipalities to maintain or demolish an abandoned dwelling and to provide procedures for reimbursement to municipalities — 3/11/91, Committee on Housing & Urban Affairs; 5/29/91, second reading with substitute; 6/6/91, third reading with substitute; 6/12/91, passed; 6/13/91, Committee on Economic & Urban Development; 8/1/91, referred to Committee on Local Government & Urban Development; 5/21/92, general orders with substitute; 5/26/92, third reading with substitute.

**HB 4657** - Transfers authority for buying and selling property for public use from electors to township boards — 3/27/91, Committee on Towns & Counties; 11/21/91, second reading; 12/4/91, third reading; 12/11/91, passed; 12/17/91, Committee on Local Government & Urban Development; 2/19/92, general orders; 2/20/92, third reading; 2/25/92, passed; 2/25/92, ordered enrolled; 3/2/92, presented to Governor; 3/16/92, approved by Governor as Public Act No. 16.

**HB 4726** - Amends the occupational code to change references to "land surveyor" to that of "professional surveyor" and broadens the description thereof — 4/18/91, Committee on State Affairs; 6/19/91, second reading; 6/24/91, third reading; 6/25/91, passed; 6/27/91, Committee on State Affairs & Military/Veteran

Affairs; 3/17/92, general orders with amendment(s); 3/18/92, referred to Committee on State Affairs & Military/Veteran Affairs; 5/12/92, general orders; 5/19/92, third reading with amendment(s).

**HB 4739** - Amends the tax tribunal act to remove from the property tax tribunal jurisdiction over drain assessment appeals thereby clarifying that appeals of drainage assessments are to be made under the provisions of the drain code — 4/23/91, Committee on Agriculture, Forestry & Minerals; 6/4/91, second reading; 6/17/91, third reading with amendment(s); 6/18/91, amended, passed; 6/27/91, Committee on Agriculture & Forestry; 5/21/92, general orders with substitute; 5/27/92, third reading with substitute as amended.

**HB 4857** - Provides for general revisions to inland lake level act of 1961 — 5/22/91, Committee on Conservation, Recreation & Environment; 3/18/92, second reading with substitute; 3/23/92, third reading with substitute; 3/24/92, amended, passed; 3/25/92, Committee on Natural Resources & Environmental Affairs; 4/28/92, general orders; 4/29/92, third reading; 4/30/92, passed; 4/30/92, ordered enrolled; 5/6/92, presented to Governor; 5/20/92, approved by Governor as Public Act No. 52.

**HB 4988** - Amends occupational code provisions dealing with real estate brokers and salespersons to prohibit certain advertising; to provide that the code shall not be deemed to create a private cause of action for violation of licensing standards; to prohibit the payment of referral fees; to limit liability for nondisclosure of certain occurrences on real property; and to provide clarification regarding the employment relationship between brokers and salespersons — 6/24/91, Committee on State Affairs; 4/8/92, second reading with substitute; 5/7/92, third reading with substitute; 5/11/92, amended, passed; 5/12/92, Committee on State Affairs & Military/Veteran Affairs.

**HB 5310** - Amends liquor control act to provide for the issuance of additional resort licenses in 1992 and 1993 — 11/5/91, Committee on Liquor Control; 4/2/92, second reading With substitute; 4/13/92, third reading with substitute; 5/14/92, amended, passed; 5/19/92, Committee on State Affairs & Military/Veteran Affairs.

**HB 5315** - Amends scrap tire regulatory act to exempt certain businesses where tires are used as bumpers for safety purposes — 11/16/92, Committee on Conservation, Recreation & Environment; 2/18/92, second reading with substitute; 2/20/92, third reading with substitute; 2/26/92, passed; 3/4/92, Committee on Natural Resources & Environmental Affairs; 3/24/92, general orders with substitute; 3/26/92, third reading with substitute; 3/31/92, passed; 4/2/92, Senate substitute concurred in, ordered enrolled; 4/7/92, presented to Governor; 4/16/92, approved by Governor as public Act No. 33.

**HB 5341** - Amends the environmental response act to revise procedures for operation of science advisory counsel — 11/21/91, Committee on Conservation, Recreation & Environment; 3/31/92, second reading with substitute; 4/6/92, third reading with substitute; 4/7/92, passed; 4/21/92, Committee on Natural Resources & Environmental Affairs; 4/28/92, general orders; 4/29/92, third reading; 4/30/92, passed; 4/30/92, ordered enrolled; 5/6/92, presented to Governor; 5/20/92, approved by Governor as public Act No. 60.

**HB 5403** - Amends liquor control act to allow the possession or consumption of alcoholic liquor in public parks, public places of amusement or publicly owned areas unless prohibited by municipality or other public authority or a state department or agency — 12/12/91, Committee on Towns & Counties; 5/21/92, second reading; 5/27/92, third reading with substitute as amended, passed; 5/28/92, rules suspended, general orders.

**HB 5407** - Amends the Michigan liquor control act to allow and provide for licensure of brewpubs upon compliance with certain requirements — 12/12/92, Committee on Liquor Control; 2/13/92, second reading with amendment(s); 2/19/92, amended; 3/19/92, third reading with amendment(s); 3/23/92, amended, passed; 3/25/92, Committee on State Affairs & Military/Veteran Affairs.

**HB 5428** - Provides for the re-use of certain real property for economic development purposes to reduce urban sprawl and to aid the revitalization of property that is served by existing infrastructure — 1/8/92, Committee on Conservation, Recreation & Environment; 3/18/92, referred to Committee on Economic Development & Energy.

**HB 5462** - Amends the environmental response act to provide that, within ten (10) working days after report of release, the owner or operator shall submit a written report to the department outlining more detailed information regarding the release — 1/29/92, Committee on Conservation, Recreation & Environment; 2/25/92, second reading with amendment(s); 3/4/92, third reading with amendment(s); 3/9/92, referred to Committee on Conservation, Recreation & Environment; 3/18/92, second reading with amendment(s); 3/24/92, third reading with amendment(s); 3/25/92, passed; 3/31/92, Committee on Natural Resources and Environmental Affairs.

**HB 5465** - Provides that the 1992 state equalized value equal the 1991 state equalized value, with certain permitted adjustments — 1/29/92, Committee on Taxation; 3/11/92, second reading; 3/16/92, third reading; 3/17/92, passed; 3/18/92, Committee on Finance; 3/24/92, general orders; 3/26/92, third reading; 3/31/92, passed; 3/31/92, ordered enrolled; 4/7/92, presented to Governor; 4/16/92, approved by Governor as Public Act No. 32.

**HB 5498** - Amends statute permitting future advance mortgages to require that a residential future advance mortgage be labeled as such and that it contain a maximum principal amount that may be secured by such mortgage — 2/11/92, Committee on Corporations & Finance; 3/4/92, second reading with substitute; 3/11/92, third reading with substitute; 3/12/92, passed; 3/17/92, Committee on Corporations & Economic Development; 3/31/92, general orders; 3/31/92, third reading; 4/1/92, passed; 4/1/92, ordered enrolled; 4/7/92, presented to Governor; 4/20/92, approved by Governor as Public Act No. 35.

**HB 5500 (Same as SB 628)** - Provides general amendments to the environmental response act — 2/11/92, Committee on Conservation, Recreation & Environment; 3/31/92, second reading with substitute; 4/6/92, third reading with substitute; 4/7/92, passed; 4/21/92, Committee on Natural Resources & Environmental Affairs; 4/28/92, general orders; 4/29/92, third reading; 4/30/92, passed; 4/30/92, ordered enrolled; 5/6/92, presented to Governor; 5/20/92, approved by Governor as Public Act No. 61.

**HB 5604** - Amends act regulating gas and oil drilling to provide protection for surface owners and to provide other general amendments — introduced by Rep. Dolan on 3/4/92 and referred to Committee on Conservation, Recreation & Environment.

**HB 5605** - Allows counties control over gas and oil drilling — introduced by Rep. Munsell on 3/4/92 and referred to Committee on Conservation, Recreation & Environment.

**HB 5606** - Allows charter townships control over gas and oil drilling — introduced by Rep. Goss on 3/4/92 and referred to Committee on Conservation, Recreation & Environment.

**HB 5607** - Eliminates requirement of approval of state tax commission for return of property to tax role if no longer exempt — 3/4/92, Committee on Taxation; 3/11/92, second reading; 3/17/92, third reading; 3/18/92, passed; 3/25/92, Committee on Finance; 4/30/92, general orders; 5/5/92, third reading; 5/6/92, passed; 5/6/92, ordered enrolled; 5/12/92, presented to Governor; 5/22/92, approved by Governor as Public Act No. 62.

**HB 5712** - Provides for application of certain millage reductions — introduced by Rep. Keith on 3/24/92 and referred to Committee on Taxation.

**HB 5715** - Amends general property tax act to accelerate tax sale process for certain abandoned residential property — 3/24/92, Committee on Taxation.

**HB 5725** - Amends general property tax act to reduce assessment of certain property in close proximity to a landfill or compost site — introduced by Rep. Profit on 4/1/92 and referred to Committee on Taxation.

**HB 5768** - Provides that prior to filing lien on property, tax commissioner shall, if possible, compare social security numbers of property owner and taxpayer — introduced by Rep. Hoffman on 4/28/92 and referred to Committee on Taxation.

**HB 5774** - Requires state to immediately remove liens placed on taxpayer's assets when tax liability is satisfied and to reimburse any fees paid by taxpayer if lien was placed in error — introduced by Rep. Martin on 4/28/92 and referred to Committee on Taxation.

**HB 5787** - Revises exemption from licensure requirements for architects, professional engineers and land surveyors to encompass residential buildings not exceeding 6200 square feet of habitable space — introduced by Rep. Leland on 4/30/92 and referred to Committee on State Affairs.

**HB 5792** - Amends general property tax act to revise foreclosure process for certain abandoned residential property — introduced by Rep. Hertel on 4/30/92 and referred to Committee on Taxation.

**HB 5795** - Amends mobile home commission act to require mobile home park owner to arrange for snow removal from streets — introduced by Rep. Porreca on 4/30/92 and referred to Committee on Taxation.

**HB 5816** - Amends real estate broker and salesperson's section of occupational code to require agency disclosure statement under certain circumstances — introduced by Rep. Ostling on 5/11/92 and referred to Committee on State Affairs.

**HB 5852** - Amends township rural zoning act to prohibit restrictions by township on location of houses of worship in residential areas — introduced by Rep. Horton on 5/20/92 and referred to Committee on Towns & Counties.

**SB 139** - Amends the housing law of Michigan to allow cities, townships and villages to maintain or demolish abandoned residential property and to provide procedure for reimbursement from property owners for such maintenance or demolition — 2/28/91, Committee on Local Government & Reapportionment; 8/1/91, referred to Committee on Local Government & Urban Development; 5/21/92, general orders with substitute; 5/26/92, third reading with substitute; 5/28/92, passed.

**SB 522** - Prohibits local wetland ordinances — 3/7/91, Committee on Natural Resources & Environmental Affairs; 10/23/91, general orders; 11/5/92, Committee on Local Government & Urban Development; 3/19/92, general orders with substitute; 3/24/92, third reading with substitute; 3/25/92, passed; 3/25/92, Committee on Conservation, Recreation & Environment.

**SB 582 (Same as HB 4692)** - Amends the act authorizing the redevelopment of principal shopping areas of certain municipalities to allow the municipality to promote economic activity in a district and to allow the municipality to levy special assessments to defray the costs of the principal shopping district project — 10/31/91, Committee on Corporations & Economic Development; 5/12/92, general orders with substitute; 5/19/92, third reading with substitute as amended; 5/20/92, passed; 5/20/92, Committee on Towns & Counties.

**SB 584 (Same as HB 4745)** - Amends mobile home commission act to provide that where zoning ordinance or park rule prohibits attachment of television antennae to exteriors of mobile homes, the mobile home park shall provide a central television antennae that tenants may hook up to — 10/31/91, Committee on Local Government & Urban Development; 4/29/92, general orders with substitute; 5/5/92, third reading with substitute; 5/6/92, amended, passed; 5/6/92, Committee on Housing & Urban Affairs.

**SB 598** - Creates land reclamation and improvement authority act — 11/12/91, Committee on Local Government & Urban Development; 11/13/91, general orders with amendment(s); 11/20/91, referred to Committee on Local Government & Urban Development; 3/5/92, general orders with substitute; 3/11/92, third reading with substitute as amended; 3/12/92, passed; 3/12/92, Committee on Towns & Counties.

**SB 619** - Amends property tax act to revise jurisdictional amounts for the tax tribunal and provides other general amendments — 11/19/91, Committee on Finance; 3/24/91, general orders with substitute; 4/1/92, third reading with substitute as amended; 4/2/92, amended, passed; 4/2/92, Committee on Taxation.

**SB 659** - Provides for the reuse of certain real property for economic development purposes to reduce urban sprawl and to aid in the revitalization of property that is served by infrastructure — 12/17/91, Committee on Local Government & Urban Development; 5/21/92, general orders with substitute; 5/26/92, third reading with substitute; 5/28/92, passed.

**SB 662** - Creates the neighborhood enterprise zone act to provide for the development and rehabilitation of residential housing in certain enterprise zones — 12/17/91, Committee on Local Government & Urban Development; 3/26/92, general orders with substitute; 3/31/92, third reading with substitute, as amended; 4/1/92, passed; 4/2/92, Committee on Taxation; 5/28/92, referred to Committee on Housing & Urban Affairs with substitute.

**SB 677** - Amends the local development financing act to extend sunset for high technology activity qualifying as "eligible property" through December 31, 1996 — 1/14/92, Committee on Corporations & Economic Development; 5/12/92, general orders with amendment(s); 5/19/92, third reading with amendment(s); 5/20/92, passed; 5/20/92, Committee on Economic Development & Energy.

**SB 727-735** - Authorizes special assessments for parks and public parking facilities — 12/19/92, Committee on Local Government & Urban Development; 3/5/92, general orders with amendment(s); 3/10/92, third reading; 3/17/92, amended, passed; 3/18/92, Committee on Taxation.

**SB 779** - Excludes certain commercial real estate transactions from default interest rate limitation — introduced

by Sen. Dingell on 3/4/92 and referred to Committee on Corporations & Economic Development.

**SB 807** - Provides regulatory criteria for local wetland ordinances — introduced by Sen. Honigman on 3/17/92 and referred to Committee on Local Government & Urban Affairs; 3/19/92, general orders; 3/24/92, third reading; 3/25/92, passed; 3/25/92, Committee on Conservation, Recreation & Environment.

**SB 808** - Amends recreational trespass act to increase penalty for trespassing on property of another person, to provide for entry on property with oral or written permission of property owner and to provide that property owner shall not be liable for injuries to such a person under certain circumstances — introduced by Sen. Faust on 3/18/92 and referred to Committee on Natural Resources & Environmental Affairs.

**SB 822** - Provides amendments to the uniform statutory rule against perpetuities act — introduced by Sen. Honigman on 3/25/92 and referred to Committee on Judiciary.

**SB 845** - Amends Goemaere-Anderson wetland protection act to provide for replacement of wetlands in certain circumstances — introduced by Sen. DeGrow on 3/31/92 and referred to Committee on Natural Resources & Environmental Affairs.

**SB 846** - Amends the occupational code to revise the continuing education requirements for real estate licensees — introduced by Sen. DiNello on 4/2/92 and referred to Committee on State Affairs & Military/Veteran Affairs.

**SB 861** - Amends subdivision control act of 1967 to revise procedures for revision of routes of public highways that border certain waterways — introduced by Sen. Cherry on 4/28/92 and referred to Committee on Transportation & Tourism.

**SB 917** - Provides general amendments to enterprise zone act — introduced by Sen. Cisky on 5/12/92 and referred to Committee on Local Government & Urban Development; 5/21/92, general orders with amendment(s); 5/26/92, third reading with amendment(s).

**SB 957** - Exempts property acquired by the state through eminent domain from liability under the environment response act — introduced by Sen. Carl on 5/27/92 and referred to Committee on Natural Resources & Environmental Affairs.

## RECENT DECISIONS

by *Joseph Lloyd*  
**Chard & Lloyd**  
**201 E. Washington**  
**Ann Arbor, Michigan 48104**

**People of the State of Michigan v Keeth**, \_\_\_\_\_ Mich App \_\_\_\_\_; \_\_\_\_\_ NW2d \_\_\_\_\_ (No. 136054, April 16, 1992)

Wetlands - Criminal Charges - Equitable Relief

Defendants owned 1.5 acres of property on Horseshoe Lake in Washtenaw County. They were convicted in District Court of filling wetlands on that property without first obtaining a permit. The Court fined them \$1,500 and ordered to "restore" the wetland. The Circuit Court affirmed the conviction and fine, but reversed the order of restoration. Both parties appealed.

The Court of Appeals affirmed the defendants' conviction but reversed the circuit court on the issue of restoration. The defense raised by the Defendants was based on the argument that the DNR had not timely acted on their application for a permit to fill. The Court found that the application had actually been denied within the required time period though they had not received notice of that denial. With regard to the order of restoration, the question was whether the District Court had the authority to order what was essentially injunctive relief. Based on MCLA 281.714(4); MSA 18.595(64)(4), the court held that the District Court did have such power.

**Great Lakes Gas Transmission Co. v MacDonald**, \_\_\_\_\_ Mich App \_\_\_\_\_; \_\_\_\_\_ NW2d \_\_\_\_\_ (No. 133113, April 7, 1992)

Easement - Triable Issue of Fact

The Plaintiff had an easement for laying gas pipeline over the Defendant's property. The easement agreement contemplated laying more than one pipe across the property, but when the Plaintiff sought to lay the second pipe, the Defendants objected. The Plaintiffs brought an action to quiet title and the trial court granted summary disposition in favor of the Plaintiff, allowing the laying of addi-

tional pipe. The question on appeal was whether summary disposition was proper and whether there were triable issues of fact. The Court of Appeals reviewed the terms of the easement agreement and found them clear and unambiguous. It held that there were no triable issues of fact and affirmed.

**M. D. Marinich, Inc. v Michigan National Bank**, \_\_\_\_\_ Mich App \_\_\_\_\_; \_\_\_\_\_ NW2d \_\_\_\_\_ (No. 131193, April 6, 1992)

Priority of Construction Lien Over Mortgage Loan

The question before the court was whether the general contractor's construction lien had priority over the construction mortgage where actual work on site had begun before recording the mortgage, but the general contractor's agreement postdated the mortgage. The trial court held that the construction lien related back to the date of the first actual improvement to the property, regardless of the date of the contract under which the improvements were made by the liening contractor. The Court of Appeals affirmed, finding that the Construction lien had priority.

**Emmons v Lake States Insurance Company**, \_\_\_\_\_ Mich App \_\_\_\_\_; \_\_\_\_\_ NW2d \_\_\_\_\_ (No. 125869, April 6, 1992)

Foreclosure - Fire Damage

The fire at Plaintiff's home occurred in May, 1988. In November, the note being in default, her lender began foreclosure and bid the full amount of her debt at the foreclosure sale. The period of redemption expired and the lender resold the property. The question before the court was whether the bank, by virtue of its assignment clause, had the right to the insurance proceeds. The trial court granted summary disposition in favor of the bank and the Court of Appeals reversed with regard to the claim of the

bank. The Court held that when property is purchased at the foreclosure sale, the debt is satisfied. Generally, a mortgagee is not entitled to insurance proceeds where the loss occurs before a foreclosure sale in which the bid extinguishes the mortgage debt.

The second question before the court concerned the impartiality of the appraiser-umpire retained by the court to assess the amount of the insurance award. The Plaintiff objected that the appraiser had long-standing ties to the insurance industry and acted improperly, but, upon review, the Court of Appeals disagreed and affirmed the amount of the award.

**Gibbs v Sun Exploration & Production Co.**, \_\_\_\_\_ Mich App \_\_\_\_\_; \_\_\_\_\_ NW2d \_\_\_\_\_ (No. 132853, April 7, 1992)

#### Oil and Gas Lease - Dormant Minerals Act

The question before the court was whether an order assigning residue of a probate estate which was recorded with the Register of Deeds but which does not describe the property constitutes a transfer of rights under Section 1 of the Dormant Minerals Act sufficient to preclude abandonment. The trial court held that it was sufficient, but the

Court of Appeals reversed. In reviewing the case, the Court of Appeals revisited and limited its pronouncement in **Oberlin v Wolverine Gas & Oil**, 181 Mich App 506; 450 NW2d 68 (1991), that “the legislative purpose of the act can be achieved by the filing of virtually any document which identifies the holder of the mineral rights”. The court concluded that the Legislature intended to require that the recorded instrument describe the land in which the mineral rights lie.

**Michigan Department of Transportation v Robinson**, \_\_\_\_\_ Mich App \_\_\_\_\_; \_\_\_\_\_ NW2d \_\_\_\_\_ (No. 126338, April 20, 1992)

#### Condemnation - Expert Witness and Attorney Fees

The question before the court concerned the propriety of awards of attorney fees and expert witness fees at the conclusion of a series of condemnation cases. The arguments made by the MDOT were that it had made multiple pre-complaint offers, and the attorney fee cap should be based on the later and higher such offer. The trial court based its award on the lower amount and the Court of Appeals affirmed.

## CONTINUING LEGAL EDUCATION

by

**Lawrence D. McLaughlin, Chairperson**

and

**Arlene R. Rubinstein, Administrative Assistant**

### SEVENTEENTH ANNUAL SUMMER CONFERENCE Grand Hotel, Mackinac Island • July 22 - 25, 1992

Limited accommodations are still available for registrants to attend the Seventeenth Annual Summer Conference at the Grand Hotel on Mackinac Island. The conference, entitled "Opportunities and Issues Created by the Current Economic Climate — 1992" will commence at 6:30 p.m. on Wednesday, July 22, with a cocktail reception on the front porch overlooking the beautiful Straits of Mackinac and will conclude at 11:30 a.m. on Saturday, July 25.

Dan M. Challa of McShane and Bowie has planned a terrific conference! Thursday's seminars begin with a discussion on Alternative Financing Strategies — Public Sources of Financing, Access to Equity Markets, Availability of Conventional Mortgage Loans, Financing of Affordable Multifamily Housing and Refinancing of Tax Exempt Bonds are all current topics sure to be of interest to all real estate attorneys. Friday's seminars include Commercial Leasing Considerations in the Current Market and State of the Law. On Saturday, July 25th, our program will end with our "Hot Tips" session. Topics to be discussed: Americans with Disabilities Act, Liability for Rents in Foreclosure, Tax Free Exchanges — New Rules, Real Estate Brokers: Independent Contractors or Employees, Impact of New Storm Water Regulations, Bankruptcy — Status of Hotel Rents, Checklist of Reporting Requirements in Real Estate Transactions, and 12 USC 1823 (e) — D'Oench, Duhme & Co. Revisited.

To register, please send \$200 to Real Property Law Seminars, P.O. Box 473, Birmingham, MI 48012. Grand Hotel reservation forms will be sent on receipt of your registration fee. A registration form is elsewhere in this issue.

## HOMeward BOUND

The 1992-93 Homeward Bound Series under the direction of Dennis M. Gannan of Dykema Gossett will begin in Grand Rapids on Tuesday, October 20, 1992 at the L.V. Eberhard Center, 301 W. Fulton and Thursday, October 22, 1992 in Troy at the MSU Management Education Center, 811 W. Square Lake Road. The October seminar entitled "Structuring, Negotiating and Financing the Build-To-Suit Transaction" will be presented by Robert R. Nix, II of Kerr, Russell & Weber in Detroit and Brian J. Page of Dykema Gossett in Grand Rapids. Other topics to be discussed during the '92-'93 Series include: Current Issues in Leasing, Dealing with your Landlord Lender; Real Estate Tax Issues; Considerations in Structuring Deed-in-Lieu of Foreclosure Transaction; Residential Building Contracts; The New DNR, Emergency Standards Under Act 307 and other Recent Environmental Developments; Bankruptcy Hazards for the Real Estate Practitioner; and Guarantys, Letters of Credit and other Non-Real Estate Collateral. Registration for individual seminars is \$50 for members of the Section and \$65 for non-members. A substantial savings can be made by purchasing a "Series Subscription": \$250 for Section members and \$340 for non-members. Section members register for the full Series and save \$150! A registration form is elsewhere in this issue. For more information, please call Arlene Rubinstein at (313) 644-7378.

## COURSE CALENDAR

Set forth is a schedule of continuing legal education courses sponsored or co-sponsored by the Real Property Law Section through September, 1992.

Key: HB = Homeward Bound ICLE = Courses sponsored by the Institute of Continuing Legal Education

Date	Location	Program	Topic
July 22 - 25	Grand Hotel Mackinac Island	Summer Conference	Opportunities and Issues Created by the Current Economic Climate 1992
September 16	Radisson Hotel Lansing	State Bar Meeting	Real Estate and Environmental Considerations in Financing Commercial Real Estate Acquisitions

**STATE BAR OF MICHIGAN  
REAL PROPERTY LAW SECTION**

**SEVENTEENTH ANNUAL SUMMER CONFERENCE**

**OPPORTUNITIES AND ISSUES CREATED BY THE  
CURRENT ECONOMIC CLIMATE 1992**

**GRAND HOTEL • MACKINAC ISLAND**

**JULY 22 - 25, 1992**

**Thursday, July 23, 1992 • 9:00 a.m. - Noon**

- Introductions — Lawrence D. McLaughlin, Esq., CLE Chairperson  
Honigman Miller Schwartz and Cohn
- General Information — Dan M. Challa, Esq., Conference Chairperson  
McShane & Bowie

**Alternative Financing Strategies**

- Public Sources of Financing — Cynthia B. Faulhaber, Esq.  
Miller, Canfield, Paddock & Stone
- Access to Equity Markets — Lionel S. Margolick  
The Margolick Financial Group Limited Partnership
- Availability of Conventional Mortgage Loans — Mark D. Wiedelman  
Midland Mortgage Investment Corp.
- Financing of Affordable Multifamily Housing — Mark D. Wiedelman
- Refinancing of Tax Exempt Bonds — David L. Smith, Esq.  
McShane & Bowie

**Friday, July 24, 1992 • 9:00 a.m. - Noon**

- Commercial Leasing Considerations  
in the Current Market — Robert A. Berlow, Esq.  
Perry Drug Stores, Inc.
- Michael W. Maddin, Esq.  
Maddin, Hauser, Wartell, Roth, Heller & Pesses
- State of the Law — Thomas C. Simpson, Esq.  
May, Simpson & Strote

**SEVENTEENTH ANNUAL SUMMER CONFERENCE  
OPPORTUNITIES AND ISSUES CREATED BY THE  
CURRENT ECONOMIC CLIMATE 1992**

**(CONTINUED)**

**Saturday, July 25, 1992 • 8:30 a.m. - 11:30 a.m.**

**HOT TIPS**

Americans with Disabilities Act  
Robert W. Scott, Esq. — Miller, Johnson, Snell & Cummiskey

Liability for Rents in Foreclosure  
Vicki R. Harding, Esq. — Pepper, Hamilton & Scheetz

Tax Free Exchanges — New Rules  
Wayne P. Bryan, Esq. — McShane & Bowie

Real Estate Brokers — Independent Contractors or Employees  
Kevin I. Green, Esq. — Honigman Miller Schwartz and Cohn

Impact of New Storm Water Regulations  
David H. Fink, Esq. — Cooper, Fink & Zausmer, PC

Bankruptcy — Status of Hotel Rents  
Patrick E. Mears, Esq. — Dykema Gossett

Checklist of Reporting Requirements in Real Estate Transactions  
Mary S. Kershner, Esq. — Dykema Gossett

12 USC 1823 (e) — D'Oench, Duhme & Co. Revisited  
Lawrence D. McLaughlin, Esq. — Honigman Miller Schwartz and Cohn

*(tear off here and mail)*

**SEVENTEENTH ANNUAL SUMMER CONFERENCE REGISTRATION FORM**

Name \_\_\_\_\_

Firm \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_ Phone \_\_\_\_\_

Section Members: \$200.00; Non-members: \$225.00

Please mail with your check to: Real Property Law Seminars, P.O. Box 473, Birmingham, MI 48012

For further information, call Arlene Rubinstein at 313-644-7378.

**HOMeward BOUND • CONTINUING LEGAL EDUCATION  
REAL PROPERTY LAW SECTION • STATE BAR OF MICHIGAN  
1992-1993 SERIES**

*(Continued)*

April 30, 1993 (GR)                      April 22, 1993 (T)

**BANKRUPTCY HAZARDS FOR THE REAL ESTATE PRACTITIONER**

Donald F. Baty, Jr. of Honigman Miller Schwartz and Cohn

May 18, 1993 (GR)                      May 20, 1993 (T)

**GUARANTYS, LETTERS OF CREDIT AND OTHER NON-REAL ESTATE COLLATERAL**

Russell A. McNair, Jr. of Dickinson, Wright, Moon, Van Dusen & Freeman

Stephen E. Dawson of Dickinson, Wright, Moon, Van Dusen & Freeman

*(tear off here and mail)*

**“HOMeward BOUND” SERIES SUBSCRIPTION – REGISTRATION FORM**

**Grand Rapids** — Mail to ICLE, 1020 Green, Ann Arbor, MI 48109

**Troy** — Mail to Real Property Law Seminars, P.O. Box 473, Birmingham, MI 48012.

- I am a member of the Real Property Law Section and my check for \$250 is enclosed.
- I am not a member of the Real Property Law Section and my check for \$340 is enclosed.
- I would like to become a member of the Section. Enclosed is my \$20 membership fee, please send an application.

Name \_\_\_\_\_

Firm \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_ Phone \_\_\_\_\_

Single Registration fee schedule will be as follows:

Section Members:	\$50
Non-Section Members:	\$65

For further information, please call Arlene Rubinstein at (313) 644-7378.

**NOTICE OF MEETING OF MEMBERS  
OF THE REAL PROPERTY LAW SECTION  
FOR THE PURPOSE OF CONSIDERING  
AND VOTING ON A PROPOSED AMENDMENT  
IN THE BY-LAWS OF THE SECTION**

TO ALL MEMBERS OF THE REAL PROPERTY LAW SECTION OF THE  
STATE BAR OF MICHIGAN:

PLEASE TAKE NOTICE that a meeting of the members of the Real Property Law Section of the State Bar of Michigan will be held on September 16, 1992, at 9:00 a.m. at Lansing Center, Lansing, Michigan, on the occasion of the Annual Meeting of the State Bar of Michigan, for the purpose of considering and voting on an amendment in Section 1 of Article II of the By-Laws of the Section. Such amendment, if adopted, would increase the annual dues for membership in the Section from \$20.00 to \$25.00 (except as to members exempt from the payment of dues) effective as of October 1, 1992.

All members of the Section may attend such meeting and consider and vote on the proposed amendment in the By-Laws.

This Notice is given in accordance with Article X of the By-Laws of the Section, this 16th day of March, 1992.

Richard W. Pennings, Secretary

**MICHIGAN ENVIRONMENTAL STATUTES AND REGULATIONS**

*PREPARED BY THE ENVIRONMENTAL LAW AND REAL PROPERTY SECTIONS  
OF THE MICHIGAN BAR ASSOCIATION*

- TWO VOLUME HANDBOOK (OVER 1200 PAGES)
- COVERS ALL MICHIGAN ENVIRONMENTAL STATUTES AND REGULATIONS
- FIRST RELEASED IN SEPTEMBER 1990
- SECOND PRINTING DUE TO EXCEPTIONAL DEMAND
- SUPPLEMENT ANTICIPATED IN OCTOBER 1991

\$ 150.00 SHIPPING & HANDLING

6.00 4% TAX

12.00 SHIPPING & HANDLING

---

\$ 168.00

MAKE CHECKS PAYABLE TO: THE STATE BAR OF MICHIGAN  
AND SEND TO: 306 TOWNSEND STREET  
LANSING, MI 48933-2083  
ATTENTION: DIANE LOTRE