



## Report on Public Policy Position

**Name of Section or Committee:**

Real Property Law Section

**Contact Person:**

David W Charron

**Email:**

dwcharron@charronhanisch.com

**Regarding:**

Amicus brief on Bankruptcy Court certified question

**Date position was adopted:**

December 4, 2006

**Process used to take the ideological position:**

Discussion and vote of the Council of the Section

**Number of members in the decision-making body:**

18

**Number who voted in favor and opposed to the position:**

17 voted in favor; none were opposed

**FOR SECTIONS ONLY:**

- ✓ This subject matter of this position is within the jurisdiction of the section.
- ✓ The position was adopted in accordance with the Section's bylaws.
- ✓ The requirements of SBM Bylaw Article VIII have been satisfied.

*If the boxes above are checked, SBM will notify the Section when this notice is received, at which time the Section may advocate the position.*

**Position:**

Please see attached amicus motion and brief.

**The text (may be provided by hyperlink) of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report:**

Please see attached.

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN

GOLD

Plaintiff

Adversary Proceeding  
No. 04-5113

v

MILA, Inc.,

Defendant

---

**REAL PROPERTY LAW SECTION'S  
MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF ON  
CERTIFIED QUESTION**

THE REAL PROPERTY LAW SECTION IS NOT THE STATE BAR OF MICHIGAN ITSELF, BUT RATHER A SECTION WHICH MEMBERS OF THE STATE BAR CHOOSE VOLUNTARILY TO JOIN, BASED ON COMMON PROFESSIONAL INTEREST.

THE POSITION EXPRESSED IS THAT OF THE COUNCIL OF THE REAL PROPERTY LAW SECTION ONLY AND IS NOT THE POSITION OF THE STATE BAR OF MICHIGAN. TO DATE, THE STATE BAR OF MICHIGAN DOES NOT HAVE A POSITION ON THIS MATTER.

THE TOTAL MEMBERSHIP FOR THE REAL PROPERTY LAW SECTION IS APPROXIMATELY 3,400. THIS POSITION WAS ADOPTED BY A VOTE OF THE COUNCIL OF THE REAL PROPERTY LAW SECTION AS REQUIRED BY THE BYLAWS OF THE STATE BAR OF MICHIGAN.

The Real Property Law Section of the State Bar of Michigan respectfully requests that it be allowed to intervene with respect to the certified question as set forth in the Court's Notice of Hearing, dated November 14, 2006, and asks the Court to accept its *amicus* brief:

1. As set forth in its bylaws, the purpose of the State Bar of Michigan Real Property Law Section is to study the laws and procedures pertaining to Michigan real property law and to promote its fair and just administration.

2. The certified question raises issues that are critical to the proper functioning of the Michigan's real property recording system.

3. The Real Property Law Section has been actively involved in seeking to resolve problems with the recording system through participation as an *amicus* in litigation and working with other interested constituencies in seeking potential legislative and administrative solutions.

WHEREFORE, the Real Property Law Section Michigan requests that it be allowed to intervene with respect to the certified question and that the Court accept its *amicus* brief.

Respectfully submitted,

REAL PROPERTY LAW SECTION OF  
THE STATE BAR OF MICHIGAN

By: /s/ Vicki R. Harding

Vicki R. Harding (P39879)  
Pepper Hamilton LLP  
100 Renaissance Center, 36th Floor  
Detroit Michigan 48243  
(313) 293-7324  
[hardingv@pepperlaw.com](mailto:hardingv@pepperlaw.com)

By: /s/ David W. Charron

David W. Charron (P39455)  
Charron & Hanisch PLC  
4949 Plainfield Ave NE  
Grand Rapids, MI 49525  
(616) 363-0300

Dated: December 4, 2006

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN

GOLD

Plaintiff

Adversary Proceeding  
No. 04-5113

v

MILA, Inc.,

Defendant

---

**REAL PROPERTY LAW SECTION'S  
AMICUS CURIAE BRIEF ON CERTIFIED QUESTION**

THE REAL PROPERTY LAW SECTION IS NOT THE STATE BAR OF MICHIGAN ITSELF, BUT RATHER A SECTION WHICH MEMBERS OF THE STATE BAR CHOOSE VOLUNTARILY TO JOIN, BASED ON COMMON PROFESSIONAL INTEREST.

THE POSITION EXPRESSED IS THAT OF THE COUNCIL OF THE REAL PROPERTY LAW SECTION ONLY AND IS NOT THE POSITION OF THE STATE BAR OF MICHIGAN. TO DATE, THE STATE BAR OF MICHIGAN DOES NOT HAVE A POSITION ON THIS MATTER.

THE TOTAL MEMBERSHIP FOR THE REAL PROPERTY LAW SECTION IS APPROXIMATELY 3,400. THIS POSITION WAS ADOPTED BY A VOTE OF THE COUNCIL OF THE REAL PROPERTY LAW SECTION AS REQUIRED BY THE BYLAWS OF THE STATE BAR OF MICHIGAN.

Vicki R. Harding (P39879)  
Pepper Hamilton LLP  
100 Renaissance Center, 36<sup>th</sup> Floor  
Detroit Michigan 48243  
(313) 293-7324  
[hardingv@pepperlaw.com](mailto:hardingv@pepperlaw.com)

David W. Charron (P39455)  
Charron & Hanisch PLC  
4949 Plainfield Ave NE  
Grand Rapids, MI 49525  
(616) 363-0300

**TABLE OF CONTENTS**

**INDEX OF AUTHORITIES**.....i  
**STATEMENT OF QUESTION PRESENTED**.....i  
**ARGUMENT** .....1  
    I. *Introduction – Michigan Real Property Law* ..... 1  
    II. *A Mortgage is Deemed Recorded Upon Receipt by the County Register of Deeds, Regardless of Whether an Entry is Made in an Entry Book*..... 1  
        A. Recording Statutes: Entry Books and Recording.....2  
        B. Recording Statutes: Sources of Recording Information .....3  
        C. Michigan Case Law .....4  
    III. *Conclusion*.....5

**INDEX OF AUTHORITIES**

Cases Page  
*Central Ceiling & Partition, Inc. v. Department of Commerce*, 249 Mich.App. 438;  
    642 N.W.2d 397 (2002) *affirmed* 470 Mich. 877, 683 N.W.2d 142 (2004) ..... 4, 5  
*Sinclair v. Slawson*, 44 Mich. 123, 6 N.W. 207 (1880) ..... 4  
Statutes  
MCL 565.24..... 2  
MCL 565.25..... 2  
MCL 565.27..... 3  
MCL 565.28..... 3

**STATEMENT OF QUESTION PRESENTED**

1. When a county register of deeds does not maintain an “entry book” as identified in MCLA 565.24 and 565.25, when, if ever, is a mortgage deemed “recorded”?

Amicus Real Property Law Section would answer:

A mortgage is deemed recorded at the time of receipt by the register of deeds regardless of whether an “entry book” is maintained or not.

## ARGUMENT

### I. Introduction – Michigan Real Property Law

For more than a century, the system of recording documents with a county register of deeds has provided the foundation under Michigan law for creating and maintaining the relative rights and interests of mortgagees and others in real property.

The failure of some counties to properly note the time and date that documents are received for recording and/or to maintain records regarding receipt, as required by statute, impacts the ability of parties to determine and prove the exact time that a document was received. However, it does *not* invalidate the fact that the document has been received by the register of deeds, and thus has been recorded, for purposes of establishing rights with respect to the affected real property.

A decision by this Court that a document is not recorded if information is not entered in an entry book (1) is inconsistent with the recording statutes – which identify the time of receipt as opposed to the time of entry of information in the entry books as the relevant event, and (2) would create an immediate crisis in Michigan real property law – since thousands of documents have been recorded in counties that do not maintain entry books.

### II. A Mortgage is Deemed Recorded Upon Receipt by the County Register of Deeds, Regardless of Whether an Entry is Made in an Entry Book.

As framed, the question suggests that a possible result of the Court’s consideration is a decision that a mortgage that is (i) received by a county register of deeds but (ii) not documented by entry of information in an “entry book,” is not “recorded” for purposes of Michigan statutes; and thus would be subject to the interests of a subsequent *bona fide* purchaser, and consequently could be avoided in a bankruptcy proceeding.

However, this conclusion would be flawed because it improperly assumes that entry of information in the entry book (as opposed to receipt of the mortgage by the register of deeds) is the operative event, and that entry in the entry book is a necessary condition precedent for recording to occur. To the contrary, under the recording statutes, a mortgage is deemed recorded upon its receipt by the register of deeds. The mortgage entry book maintained by the register of deeds is merely one source of evidence of the time of receipt; and in fact, it is not the only evidence.

#### **A. Recording Statutes: Entry Books and Recording**

MCL 565.24 provides detailed instructions regarding the form of entry books:

“Every register of deeds shall keep an entry book of deeds and an entry book of mortgages, each page of which shall be divided into 6 columns, with title or heads to the respective columns, in the following form, to-wit: Date of Reception – Grantors – Grantees - Township where the land lies - To whom delivered (after being recorded) and date (of delivery) - Fee (Fees) Received.”<sup>1</sup>

MCL 565.25(1) further instructs the register regarding entry books as follows:

“In the entry book of mortgages the register shall enter all mortgages and other deeds intended as securities, and all assignments of any mortgages or securities. ... noting in the books, the day, hour, and minute of receipt, and other particulars, in the appropriate columns in the order in which the instruments are respectively received.”

MCL 565.25(4) provides:

“The instrument *shall be considered as recorded at the time so noted* and shall be notice to all persons except the recorded landowner subject to subsection (2), of the liens, rights, and interests acquired by or involved in the proceedings. All subsequent owners or encumbrances shall take subject to the perfected liens, rights, or interests.” (emphasis added).

---

<sup>1</sup> This section also specifies an alternate format with nine specified headings where entry books of deeds and mortgages are consolidated with books of levies.

Thus, the Michigan recording statutes provide that (i) entry books should be used to identify key information regarding documents submitted for recording – including the “Date of Reception,” with the day, hour and minute of receipt, and (ii) a document is considered recorded at the “time so noted” – which refers to the time when the mortgage was *received* for filing by the register of deeds, *not* the time when the related mortgage information is *entered* into the entry book. The plain language of the statutes mandates that a mortgage is “recorded” at the time it is received by the register of deeds. Whether the mortgage is then entered into an entry book is irrelevant to the determination of whether the mortgage was recorded.

#### **B. Recording Statutes: Sources of Recording Information**

Consistent with the concept that entry books are merely a source of information, as opposed to a substantive step required for recording, it should be noted that the entry books are only an *interim* source of key information, such as the identity of grantors and grantees and the date and time of receipt.

Specifically, MCL 565.27 requires:

“The register shall certify upon every instrument recorded by him, the time when it was received, and a reference to the book and page where it is recorded.”

Similarly, MCL 565.28 requires:

“Each register of deeds shall keep a proper general index to each set of books in which he or she shall enter alphabetically the name of each party to each instrument recorded by the register of deeds, with a reference to the book and page where the instrument is recorded.”

Thus, even if a county register of deeds does not maintain an entry book, the date and time stamped on the mortgage, as required by MCL 565.27, provides an alternate means for establishing the time of receipt of the mortgage, and thus a record of the time of recordation, that is both more permanent and more accessible than information in the entry books. Similarly, the entry books are only an interim source of information regarding the identity of grantors and

grantees. The statutes contemplate that this information should be maintained in the grantor-grantee index, confirming the temporary role of the entry books.

### C. Michigan Case Law

Consistent with this interpretation of the Michigan recording system, the Michigan Supreme Court in *Sinclair v. Slawson*, 44 Mich. 123, 6 N.W. 207 (1880) stated that:

“Under the statutes of Michigan ***a mortgage is considered as recorded when it is filed for record***, and the register is required to make an entry, in what is called an entry book, of the date of reception, the names of the mortgagor and mortgagee, and the township in which the land lies.” (emphasis added).

The Court goes on to say that “[the register] shall note in such [entry] books the ***day, hour and minute of the reception***...and every such instrument shall be considered as recorded at the time so noted.” *Id.* at 126 (emphasis added). Finally, the Court noted that “This mortgage, then, ***was recorded*** for the purposes of notice ***when it was filed***...” *Id.* at 127 (emphasis added).

The issues presented in *Central Ceiling & Partition, Inc. v. Department of Commerce*, 249 Mich.App. 438; 642 N.W.2d 397 (2002), *affirmed* 470 Mich. 877, 683 N.W.2d 142 (2004), turned on the question of when documents were “recorded.” Under the Construction Lien Act, claims of lien must be recorded within a 90-day time limit in order to remain valid liens. *Central Ceiling* dealt with whether certain claims of lien were timely recorded where the claims of lien were submitted and accepted by the country register of deeds within the 90-day time limit, but were not formally processed by the register of deeds until after the 90 days had expired.

The Court of Appeals noted that attributing delays within the register of deeds office to the construction subcontractors would lead to absurd and unfair results, and ruled in favor of the lien claimants, finding that filing a claim of lien within the 90-day statutory period with acceptance by the register of deeds constituted substantially compliance with the Construction Lien Act recording requirements, and noting that the Legislature could not have intended “an

arbitrary reduction of a ninety-day deadline to fifty-six or forty-three days or less, to allow for the internal office time involved in recording each particular claim of lien [by formally processing them and assigning a liber and page number]. Such idiosyncratic calculations would wreak chaos on the construction lien system.” *Id.* at 445.

Although the Court of Appeals did not attribute the delays of the register of deeds office to the lien claimants, it appeared to conclude that recording did not occur until a document is formally processed by the register of deeds. However, in affirming the result, the Michigan Supreme Court noted that it reached its conclusion on different grounds than the Court of Appeals, concluding: “On the limited facts of this case, we conclude that the liens presented to the Wayne County Register of Deeds were timely recorded.” *Id.* at 470 Mich. 877. Thus, to the extent that the Michigan Supreme Court has provided guidance on the issue of recording, its opinion is that recording occurs upon receipt of the document, not entry in the entry books or other formal processing by the register of deeds.

### **III. Conclusion**

To hold that a mortgage is not considered recorded until entered into an entry book, or is not recorded at all if a county does not maintain an entry book, would wreak havoc on Michigan’s real property system, and is supported by neither the structure of the recording statutes nor available guidance from the Michigan Supreme Court.

Accordingly, the Real Property Law Section respectfully urges that this Court conclude that a mortgage is recorded at the time it is received by the register of deeds, and that failure of a register of deeds to maintain entry books does not affect the status of a recorded document, pursuant to the plain language of MCL 565.25(4) and applicable state law precedent.

Respectfully submitted,

THE STATE BAR OF MICHIGAN  
REAL PROPERTY LAW SECTION

By: /s/ Vicki R. Harding

Vicki R. Harding (P39879)  
Pepper Hamilton LLP  
100 Renaissance Center, 36th Floor  
Detroit Michigan 48243  
(313) 293-7324  
[hardingv@pepperlaw.com](mailto:hardingv@pepperlaw.com)

By: /s/ David W. Charron

David W. Charron (P39455)  
Charron & Hanisch PLC  
4949 Plainfield Ave NE  
Grand Rapids, MI 49525  
(616) 363-0300

Dated: December 4, 2006