



M I C H I G A N REAL PROPERTY REVIEW

Published by the Real Property Law Section State Bar of Michigan

Summer 2011, Vol. 38, No. 2

Contents

Chairperson's Report	41
<i>by Mark P. Krynski</i>	
Application of Michigan's Uncapping Statute to Transfers Involving Joint Tenancies	42
<i>by Lisa Berden</i>	
15 Pointers, Practice Tips, And Reminders Regarding Easements: Highlights of 2010 Michigan Appellate Decisions.....	48
<i>by David L. Skidmore</i>	
Understanding Electronic Recording: Current Legislation and Trends	55
<i>by Brian Henry and Mary Dunn</i>	
Michigan's Constitution Protects Business Owners Who Relocate Due to Takings by Eminent Domain.....	60
<i>by H. Adam Cohen and Peter H. Webster</i>	
Wolverine Gold Rush? A Primer on the Utica/Collingwood Shale and Gas Lease Issues	64
<i>by Randy M. Awdish</i>	
Judicial Decisions Affecting Real Property	73
<i>by Ronn S. Nadis and Sarah Heisler Gidley</i>	
Legislation Affecting Real Property.....	82
<i>by Ronn S. Nadis and Michael K. Dorocak</i>	
Continuing Legal Education	86
<i>by Gregory J. Gamalski and Melissa N. Collar, Co-Chairs, CLE Committee and Arlene R. Rubinstein, Administrator</i>	



M I C H I G A N REAL PROPERTY REVIEW

Published by the Real Property Law Section State Bar of Michigan

Summer, Vol. 38, No. 2

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 Lynda J. Oswald, Editor, University of Michigan Ross School of Business, 701 Tappan Street, Ann Arbor, Michigan 48109-1234 (ljowald@umich.edu). The publication of articles and the editing thereof are at the discretion of the Publications Committee. A cumulative index of articles is compiled annually and is available on the Section website: www.michbar.org/realproperty/realproperty.cfm in January of each year.

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).

Lynda J. Oswald, Editor in Chief of the Review, Ann Arbor

Publications Committee, Real Property Law Section

Mark P. Krynski, Chairperson of the Section

C. Kim Shierk, Chair-elect of the Section



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 that 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 \$45 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, Michael Franck Building, 306 Townsend Street, Lansing, Michigan 48933-2012.

**Published by the
State Bar of Michigan Real Property Law Section**

Officers of the Section:

Chairperson

Mark P. Krysinski
27777 Franklin Road
Suite 2500
Southfield, MI 48034

Chairperson-Elect

C. Kim Shierk
40701 Woodward Avenue
Suite 235
Bloomfield Hills, MI 48304

Vice-Chairperson

Ronn S. Nadis
32255 Northwestern High-
way
Suite 200
Farmington Hills, MI 48334

Secretary

David E. Pierson
1305 S Washington Ave
Suite 102
Lansing, MI 48910

Treasurer

Ronald E. Reynolds
33493 W. 14 Mile Road
Suite 100
Farmington Hills, MI 48331

Council Members:

Melissa N. Collar
111 Lyon St. NW, Ste 900
Grand Rapids, MI 49503

Richard D. Rattner
380 N. Old Woodward Ave. Suite 300
Birmingham, MI 48009

Gregory J. Gamalski
Representing Continuing Legal Education
101 W. Big Beaver Rd., Floor 10
Troy, MI 48084

Catharine B. LaMont
Representing Land Title Standards Committee
333 W. Fort St., 1750
Detroit, MI 48226

Brian P. Henry
1650 W. Big Beaver Road
Troy, MI 48304

Nicholas P. Scavone, Jr.
1901 St. Antoine St., Floor 6
Ford Field
Detroit, MI 48226

Lorri B. King
140 Paluster St.
Cadillac, MI 49601

Gregg A. Nathanson
39395 West 12 Mile Road, Suite 200
Farmington Hills, MI 48331

Jeffrey D. Weisserman
31440 Northwestern Hwy Ste 200
Farmington Hills, MI 48334

David E. Nykanen
322 W. Lincoln
Royal Oak, MI 48067

Glen M. Zatz
500 Woodward Avenue, Floor 33
Detroit, MI 48226

Patricia Paruch
201 West Big Beaver Road, Suite 600
Troy, MI 48084-4300

Ex-Officio Members (Past Chairpersons of the Section)

G. Norman Gilmore*

Patrick J. Keating*

Ralph Jossman*

Maurice S. Binkow
Detroit

Allen Priestly*

James W. Draper
Detroit

Myron Weingarden*

David S. Snyder
Southfield

William B. Dunn
Detroit

Allen Schwartz
Detroit

Stephen A. Bromberg
Bloomfield Hills

Richard E. Rabbideau
Marshall

Gary A. Taback
West Bloomfield

Peter A. Nathan
Las Vegas, NV

Carl A. Hasselwander*

James M. Tervo
San Francisco, CA

Nyal D. Deems
Grand Rapids

James R. Brown
Grand Rapids

Stephen E. Dawson
Bloomfield Hills

Thomas C. Simpson
Bloomfield Hills

Robert R. Nix II
Detroit

Lawrence D. McLaughlin
Detroit

C. Robert Wartell*

Jack D. Shumate
Bloomfield Hills

James N. Candler, Jr.
Detroit

Gail A. Anderson
Lansing

Carol Ann Martinelli
Troy

Robert A. Berlow
Farmington Hills

Vicki R. Harding
Detroit

Lawrence M. Dudek
Detroit

Mark F. Makower
Farmington Hills

David W. Charron
Grand Rapids

Patrick A. Karbowski
Bloomfield Hills

Lawrence R. Shoffner
Detroit

C. Leslie Banas
Birmingham

Jerome P. Pesick
Birmingham

Commissioner Liaison: James N. Erhart, Petoskey

*Deceased



Chairperson's Report

by Mark P. Krynski

Our next annual meeting will be on July 22, 2011 at the summer conference in Grand Traverse Resort & Spa where (absent a proxy fight and challenge, which, to my knowledge, has never occurred in the history of the Section) C. Kim Shierk will be elected as the next Chairperson of the Section. Kim, one of the true experts in condominium law, is a thoughtful, organized and dedicated leader who will do a fine job orchestrating the personalities and committees that make up the Section.

This Section continues to be financially strong, extremely active and searching for new educational opportunities for its members. Because of our financial strength, we will continue to investigate productive ways in which we can use the funds that have been entrusted to us—scholarships, pro bono work, continued outreach, reduced conference and CLE fees and additional programming. The Section is continuing its current exploration of new programs to attract newer practitioners, including its sponsorship of the Young Lawyers Summit, which was a huge success in Grand Rapids in May, and the continuing commitment to the Quick Hits Program, which offers a small group setting (10-15 attendees) led by three experienced practitioners in an interactive environment to cover the basics—letters of intent, purchase agreements, leasing and financing. The initial programs have been hosted in Southeast Michigan and, if they continue to be successful, we hope to replicate this success in other venues throughout the State.

This Section has becoming increasingly busy in both the legislative and judicial processes. In addition to monitoring new legislation and responding to requests from the Michigan Supreme Court and others to file *Amicus Curiae*

briefs on real estate issues of importance, this Section has initiated a series of meetings with particular legislators to inform them of the Section's mission and expertise so the Section can get involved with legislative real estate initiatives before new legislation is entered. We have already seen some success in this matter and have been recently contacted concerning new legislation for foreclosure, adverse possession and amendment of residential restrictions. In all cases, the Section tries to limit its comments and recommendations to the efficient administration of real estate law in general without a bias toward any constituency. This Section strives to be neither pro-borrower nor pro-lender, pro-developer nor pro-municipality. We strive to explain the ramifications of public policy decisions that legislators and judges have made and express our views as to how they can be efficiently accomplished with a minimal amount of disruption.

Our nominating committee continues to review the demographics of this Section, both geographically and in practice size, in an effort to make sure that council and committee members are representative of the membership as whole. We continue to mine for upcoming leaders outside of Southeast Michigan, which at times has tended to be overrepresented in leadership positions. We will also continue to publish the *Enewsletter* on a monthly basis and try to do a better job of coordinating overlap between the *Enewsletter*, which is extremely current, and the more scholarly *Michigan Real Property Review*, which covers topics in much greater detail but with the attendant time lag.

Lastly, I would like to say thank you to my fellow council and committee members. Their dedication makes this Section a great place to work for the benefit of us all.



Application of Michigan's Uncapping Statute to Transfers Involving Joint Tenancies

by Lisa Berden*

Since Proposal A was adopted in 1994, absent certain transfers of ownership, annual real property tax increases in Michigan have been limited to 5% or the rate of inflation, whichever is less.¹ The general rule is that a conveyance of property uncaps the taxable value, but the law provides multiple exceptions to the general rule. One such exception is provided for certain conveyances creating or terminating joint tenancies. The Michigan Supreme Court's recent decision in *Klooster v City of Charlevoix*,² issued March 10, 2011, provides guidance as to when a transfer of title to property involving the creation or termination of a joint tenancy is a conveyance that constitutes an uncapping event.

Background Proposal A

Public schools in Michigan have traditionally been funded by property taxes. Historically, real property in Michigan was reassessed yearly according to its market value.³ In the mid-1990s, skyrocketing property values and corresponding tax increases left Michigan residents in need of property tax relief. Property taxes had increased 135% since the 1980s,⁴ and Michigan residents paid on average 33% more in property taxes than the typical American taxpayer.⁵

To remedy this situation, voters were presented with two options. The first option, "Proposal A," was to replace most property taxes levied for local school operations with a 2% increase in the sales tax rate, increasing the state sales tax rate from 4% to 6%. The alternative option, which would automatically take effect if Proposal A was not adopted by voters, was to replace most property taxes levied for local school operations with a 1.4% increase in the Michigan individual income tax rate. In March 1994, Michigan residents approved Proposal A. As a result, schools were financed through a higher sales tax. In addition, property tax increases were limited where ownership of the property did not change.

Before Proposal A, property taxes were levied on a property's state equalized value ("SEV"). SEV is equal to 50% of the property's market value.⁶ After the effective date of Proposal A, Michigan property taxes were instead levied on taxable value.⁷ By law, where there is no change in ownership, the taxable value of a property cannot increase in any one year by more than 5% or the rate of inflation, whichever is less.⁸ The purpose of Proposal A was to limit tax increases on property as long as the property remains owned by the same party, even though the actual market value of the property may have risen at a greater rate than the cap of the inflation rate or 5%.⁹ For example, if a property's market value increases by 10%, its SEV also increases by 10%, while its taxable value is capped at either

1 MCL 211.27a.

2 *Klooster v Charlevoix*, 488 Mich 289; 795 NW2d 578 (2011).

3 *School Finance Reform in Michigan Proposal A: A Retrospective*, Office of Revenue and Tax Analysis, Michigan Department of Treasury (2002), available at <http://www.michigan.gov/treasury>, at p 10.

4 *Id.* at 4.

5 *Id.*

6 Mich Const 1963, Art IX, § 3.

7 MCL 211.27a(1).

8 MCL 211.27a(2)(a).

9 *Toll Northville Ltd v Northville Twp*, 480 Mich 6, 12; 743 NW2d 902 (2008).

*Lisa Berden is a real estate attorney with Miller Canfield. While experienced in all areas of traditional real estate transactions, she specializes in tax and economic development incentives. Prior to joining the firm, she served for two years as a law clerk to the Honorable Justice Marilyn Kelly of the Michigan Supreme Court.

5% or the rate of inflation, whichever is lower. (In 2010, the average rate of inflation was 1.6%.) When property is sold, the taxable value is “uncapped” to the then-current SEV.¹⁰ After the uncapping caused by the transfer of ownership, the annual taxable value is capped once again until another transfer of ownership occurs.

Certain transfers of ownership are excluded from the uncapping statute.¹¹ MCL 211.27a(6) defines “transfer of ownership” as “the conveyance of title to or a present interest in property” This subsection sets forth a non-exhaustive list of conveyances deemed by the legislature to constitute a “transfer of ownership” for purposes of uncapping the taxable value of the property.¹² MCL 211.27a(7) describes “transfers of ownership” that are exempt from uncapping. Recently, Michigan courts have had to interpret questions created by the language of MCL 211.27a(7). In particular, courts have interpreted the language of subsection MCL 211.27a(7)(h) regarding whether a transfer of ownership in a joint tenancy triggers uncapping or whether it falls into the exception that prohibits uncapping.

Moshier v Whitewater Twp

*Moshier v Whitewater Twp*¹³ addressed construction of MCL 211.27a(7)(h) where the transfer at issue involved a termination of a joint tenancy. The taxpayer’s parents granted a quitclaim deed to the subject property to themselves and the taxpayer “as joint tenants with rights of survivorship.” The taxpayer’s father subsequently died. Thereafter, the taxpayer’s mother quitclaimed her entire interest in the subject property to the taxpayer. Whitewater Township viewed the quitclaim of the mother’s interest to the taxpayer as a “transfer of ownership” permitting the taxable value of the property to be uncapped and reassessed pursuant to MCL 211.27a(3) and notified the taxpayer that the property’s taxable value would be uncapped and reassessed.

MCL 211.27a(7)(h) provides an exclusion from uncapping for certain transfers creating and terminating joint tenancies. It provides that a “transfer of own-

ership” permitting reassessment of real property pursuant to MCL 211.27a(3) does not include:

[a] transfer creating or terminating a joint tenancy between 2 or more persons if at least 1 of the persons was an original owner of the property before the joint tenancy was initially created and, if the property is held as a joint tenancy at the time of conveyance, at least 1 of the persons was a joint tenant when the joint tenancy was initially created and that person has remained a joint tenant since the joint tenancy was initially created. A joint owner at the time of the last transfer of ownership of the property is an original owner of the property.

The Court of Appeals explained that the plain language of this statute excludes a transfer creating or terminating a joint tenancy from uncapping of the taxable value where at least one person involved in the transfer was an original owner of the property before the tenancy was created, the property was held as a joint tenancy at the time of the transfer, and “*at least 1 of the persons*” involved in the transfer was a joint tenant at the time the joint tenancy was originally created and has remained a joint tenant since that time.¹⁴ The taxpayer’s mother was an original owner of the property and remained a joint tenant since the time the joint tenancy was created. Because the statute expressly requires that only one of the people involved in the transfer in question be a joint tenant at the time the joint tenancy was originally created and that the person remain a joint tenant for the entirety of the joint tenancy, the transfer that occurred in *Moshier* was exempt from uncapping.¹⁵

The *Moshier* Court of Appeals opinion was published and therefore was precedential. On February 5, 2008, the State Tax Commission (“STC”) issued a memo to assessors and equalization directors noting that the decision was law that must be followed, but advising assessors that they should interpret the case narrowly because of the specific facts therein.¹⁶ The memo

¹⁰ MCL 211.27a(3).

¹¹ MCL §211.27a(7).

¹² See MCL 211.27a(6)(a)-(j).

¹³ *Moshier v Whitewater Twp*, 277 Mich App 403; 745 NW2d 523 (2007).

¹⁴ *Id* at 410.

¹⁵ *Id*.

¹⁶ Memorandum from State Tax Commission to Assessors and Equalization Directors, dated Feb 5, 2008, available at https://michigan.michigan.gov/treasury/0,1607,7-121-1751_2228-220522--,00.html.



also indicated that the STC was working with the state legislature to clarify the statute regarding uncapping events involving transfers of interests in joint tenancies.¹⁷ However, the statute remained the same. This was the legal landscape surrounding MCL 211.27a(7)(h) when *Klooster* arrived in the Court of Appeals.

The *Klooster* Decisions

In 1959, James and Dona Klooster, the taxpayer's parents, took title as tenants by the entireties to real property located in Charlevoix, Michigan. On August 11, 2004, Dona quitclaimed her entire interest to James. On the same day, James, as the sole owner, quitclaimed the property to himself and the taxpayer as joint tenants with rights of survivorship. In January 2005, James died and the taxpayer became the sole owner of the property. Later that year, in September 2005, the taxpayer quitclaimed the property to himself and his brother as joint tenants with rights of survivorship.

In 2006, the taxpayer received a notice of assessment from the City of Charlevoix notifying him that there had been a transfer of ownership subject to uncapping. Therefore, the assessor reassessed the taxable value of the property based on its market value and corresponding SEV. This resulted in an increase in the taxable value of the property from \$37,802 to \$72,300.

The taxpayer appealed to the board of review, which adopted the tax assessor's decision without explanation, and the taxpayer appealed to the Tax Tribunal. The Tribunal affirmed the assessor's determination that there had been a transfer of ownership in 2005. The Tax Tribunal reasoned that the death of the father, James, had caused a transfer of ownership and, thus, the taxable value of the property was properly uncapped. The Tribunal did not address the conveyance to the taxpayer's brother later that year.

Klooster-Court of Appeals

The taxpayer appealed to the Court of Appeals, which reversed the Tax Tribunal and held that the death of a joint tenant does not constitute a transfer of ownership within the meaning of MCL 211.27a.¹⁸ MCL 211.27a(7)(h) pro-

vides that a "transfer of ownership" does not include "[a] transfer creating or terminating a joint tenancy between 2 or more persons if at least 1 of the persons was an original owner of the property before the joint tenancy was initially created and, if the property is held as a joint tenancy *at the time of conveyance*" The Court held that "conveyance," when used as a legal term, means the written instrument that affects the title to any real estate; thus, a transfer of ownership subject to the uncapping statute requires a written instrument evidencing the transfer.¹⁹ The Court concluded that James's death did not constitute a "conveyance" because there was no written instrument and the taxpayer became the sole owner by operation of law on his father's death. Accordingly, the Court of Appeals held that there was no transfer of ownership.²⁰ Absent a transfer of ownership, no event occurred that would subject the property to an uncapping of the taxable value. The Court of Appeals did not address the effect of the later transfer to the taxpayer's brother.

Klooster-Supreme Court

The Supreme Court granted leave to appeal to address whether a "conveyance," as the term is used in MCL 211.27a(3), requires a written instrument and whether, under MCL 211.27a(7)(h), the taxpayer's property was uncapped for purposes of property tax reassessment by either: (1) James's death in January 2005 or (2) the creation of a subsequent joint tenancy in September 2005.²¹ After oral argument, the Supreme Court reversed the Court of Appeals, holding that the City of Charlevoix properly issued its 2006 notice of reassessment. The Court found that the Tax Tribunal reached the correct result, but for the wrong reason.

On the first issue, the Michigan Supreme Court held that the Court of Appeals erred in holding that there was not a "conveyance" for purposes of MCL 211.27a. The Supreme Court recognized that definitions of "conveyance" include the written document, but the Court reasoned that a document like a deed is the memorialization of the property interest being conveyed, not the conveyance itself. Therefore, the Court concluded that the vesting of a fee simple in the last surviving cotenant of a joint tenancy with rights of survivorship is a "conveyance" for purposes

¹⁷ *Id.*

¹⁸ *Klooster v Charlevoix*, 286 Mich App 435; 781 NW2d 120 (2009).

¹⁹ *Id.* at 442.

²⁰ *Id.*

²¹ *Klooster v Charlevoix*, 486 Mich 932 (2010).

of the General Property Tax Act.²² In addition, language in MCL 211.27a includes transfers of ownership that do not require a writing, such as conveyances to a trust or by intestate succession.²³ Thus, no additional writing beyond that which created the joint tenancy is required to constitute a “transfer of ownership” under MCL 211.27a.²⁴

On the second issue, the Court held that while the January 2005 termination of the joint tenancy caused by James’s death was within the joint-tenancy exception of MCL 211.27a(7)(h) and was thus not a transfer of ownership that uncapped the property, the September 2005 conveyance from the taxpayer to himself and his brother as joint tenants did uncap the property, because this conveyance did not fall within the joint-tenancy exception. As a result, the Court ruled that the City of Charlevoix properly issued a notice of assessment, taxable valuation, and property classification in 2006.²⁵

In reaching these conclusions, the Court made several observations. First, the Court noted that the terms “transfer of ownership” and “uncapping event” are essentially synonymous. Thus, a transfer of ownership allows property to be reassessed based on its SEV, lifting the cap on the rate of increase provided in MCL 211.27a(2). The Court also noted that MCL 211.27a(7)(h) establishes requirements for excluding three different types of conveyances from the definition of “transfer of ownership,” thereby excluding these conveyances from reassessment based on SEV:

- the termination of a joint tenancy;
- the creation of a joint tenancy where the property was not previously held in a joint tenancy; and
- the creation of a successive joint tenancy.²⁶

With respect to the creation of a joint tenancy, the Court held that to qualify as an “original owner,” a person must have been the owner, either individually or jointly, or the spouse of an owner, of the property *at the time of the last uncapping event* (or, if the interest was acquired prior to Proposal A, an event that would have

been an uncapping event if Proposal A had been enacted at the time the interest was acquired). If the original owner continues as a co-tenant after the joint tenancy was created, then there is no transfer of ownership arising from the creation of the joint tenancy. Thus, where James transferred an interest in the property to himself and the taxpayer as joint tenants, no transfer of ownership occurred because James was an original owner and he continued as a co-tenant after the joint tenancy with taxpayer was created.

Next, the Court clarified that the “conveyance at issue” referenced in MCL 211.27a(7)(h) is either the creation or the termination of a joint tenancy that may or may not uncap the property for reassessment purposes; it is not the previous uncapping event.²⁷ Therefore, the conveyances at issue in *Klooster* were the January 2005 and September 2005 conveyances because these were the conveyances that may or may not have uncapped the property.

With respect to the January 2005 and September 2005 conveyances, the first sentence of MCL 211.27a(7)(h) establishes two requirements for satisfying the joint-tenancy exception: (1) original ownership and (2) continuous tenancy. The original ownership requirement exempts “transfer[s] creating or terminating a joint tenancy between 2 or more persons if at least 1 of the persons was an original owner . . . before the joint tenancy was initially created” from being considered a “transfer of ownership.”²⁸ According to the Court, “[t]his requirement examines ownership of the property both before and after the conveyance at issue to ensure that continuity of original ownership bridges the transfer.”²⁹

The continuous-tenancy requirement is met “if the property is held as a joint tenancy at the time of conveyance, at least 1 of the persons was a joint tenant when the joint tenancy was initially created and that person has remained a joint tenant since the joint tenancy was initially created.”³⁰ The August 2004 conveyance from the father, James, to himself and taxpayer as joint tenants with rights of survivorship was not an uncapping event because MCL 211.27a(7)(h) excludes such conveyances from the definition of “transfer of ownership.”

22 *Klooster v Charlevoix*, 488 Mich 289, 306; 795 NW2d 578 (2011).

23 *Id.*

24 *Id.*

25 *Id.* at 312.

26 *Id.* at 298.

27 *Id.* at 300.

28 MCL 211.27a(7)(h).

29 *Id.* at 301.

30 *Id.*

James was an original owner of the property and created a joint tenancy with taxpayer. Because James did not hold the property in a joint tenancy before creating the joint tenancy with petitioner, the continuous-tenancy requirement of MCL 211.27a(7)(h) was inapplicable. Under the original ownership requirement of MCL 211.27a(7)(h), James “was an original owner of the property before the [August 2004] joint tenancy was initially created.”³¹ James acquired the status of an original owner as a result of the 1959 conveyance to James and Dona because the 1959 conveyance was the most recent “transfer of ownership” that would have uncapped the property had Proposal A been in existence. Under the joint-tenancy exception, an original owner may convey property into a joint tenancy without uncapping the property, provided the original owner is also a cotenant in the resulting joint tenancy. Because James was an original owner and remained a joint tenant after the joint tenancy was created, the 2004 transfer to taxpayer was not an uncapping event.

When James died in January 2005, the joint tenancy terminated by operation of law, vesting taxpayer with sole ownership. This vesting of sole ownership met the original ownership requirement of MCL 211.27a(7)(h) because James was a cotenant and was an “original owner” of the property before the successive joint tenancy between James and the taxpayer was created. However, because the property was held as a joint tenancy at the time of the conveyance resulting from James’s death, the Court was forced to address the continuous-tenancy requirement that “at least 1 of the persons was a joint tenant when the joint tenancy was initially created and that person has remained a joint tenant since the joint tenancy was initially created.” The Court concluded that because the taxpayer was a joint tenant “when” James initially created the joint tenancy in August 2004 and “remained a joint tenant since the joint tenancy was initially created”—until the joint tenancy terminated due to James’s death—the January 2005 conveyance by operation of law was not a transfer of ownership under MCL 211.27a(7)(h) and did not uncap the property.

The Court then considered the September 2005 conveyance that the taxpayer made to himself and his brother as joint tenants. Upon his father’s death, the taxpayer was vested with sole ownership of the property. When the taxpayer conveyed the property to himself and his brother in September 2005, the property was trans-

ferred from sole ownership into a new joint tenancy. The Court concluded that because the taxpayer was not an original owner of the property before he initially created the joint tenancy with his brother, the September 2005 conveyance did not satisfy the joint-tenancy exception of MCL 211.27a(7)(h). The September 2005 conveyance was therefore a transfer of ownership that uncapped the taxable value of the subject property.

In the context of a conveyance creating a non-successive joint tenancy, only the original-ownership requirement of MCL 211.27a(7)(h) needs to be considered because the continuous-tenancy requirement applies only if the property was held in a joint tenancy at the time of the conveyance. As applied to the creation of a non-successive joint tenancy, the joint-tenancy exception provides that “[t]ransfer of ownership does not include . . . [a] transfer creating . . . a joint tenancy between 2 or more persons if at least 1 of the persons was an original owner of the property before the joint tenancy was initially created” Thus, because the taxpayer was not an “original owner” of the property, the September 2005 conveyance was not excluded from the definition of “transfer of ownership.”

The most recent event that would have been an uncapping event was the 1959 conveyance to petitioner’s parents, James and Dona. Only James or Dona could qualify as an original owner until the time of the next uncapping event. Because the August 2004 and January 2005 conveyances were excluded by MCL 211.27a(7)(h) from the definition of “transfer of ownership,” neither conveyance constituted an uncapping event and taxpayer did not acquire original owner status with respect to the property. The September 2005 conveyance was therefore a transfer of ownership that uncapped the subject property. Both the taxpayer and his brother now qualify as original owners of the property for purposes of MCL 211.27a(7)(h) because each is a joint owner and “[a] joint owner at the time of the last transfer of ownership of the property is an original owner of the property.”

Effect of *Klooster*

The STC has issued a memorandum to local assessors³² advising them on how to deal with the assessment

32 Memorandum from Kelli Sobel, Executive Director, State Tax Commission, to Assessors and Equalization Directors, dated March 21, 2011, *available at* http://michigan.gov/documents/treasury/Klooster_v_Charlevoix_032111_348310_7.pdf

31 *Id.* at 302.

issues that may arise due to the Supreme Court's decision in *Klooster*. In its memo, the STC discussed three possible situations. First, if an assessor mistakenly uncapped the taxable value of property, the STC instructed local assessors to correct such mistakes. The STC advised that this correction should be made at the July or December board of review because of questions related to the March board of review's jurisdiction to recap such cases of mistaken uncapping. Furthermore, a mistaken uncapping may require an investigation into the prior transfers to ensure that there was no uncapping event that had previously been unrecognized prior to recapping the property. Therefore, assessors had limited time to deal with this issue while the March board of review was in session.

Where an assessor has not uncapped the taxable value of property after an uncapping event, there are two possible scenarios an assessor might encounter: (1) failure to uncap where no Property Transfer Affidavit (PTA) was filed or a PTA was filed that showed that the property was exempt from uncapping or (2) failure to uncap where a PTA was filed but the assessor did not uncap (possibly in reliance on the Court of Appeals' decision in *Klooster*).

The second scenario involves an assessor's failure to uncap the taxable value of property that should have been uncapped due to a transfer of ownership and such failure was because no PTA was filed or a filed PTA showed an exemption to uncapping, the error must be corrected. The STC explained that such errors are to be corrected without action by either the March, July or December boards of review. Instead, the assessor must file Form 3214, which is used to record changes to taxable value where a transferee did not file a PTA.

The third scenario involves an assessor's failure to uncap the taxable value of property where a transferee did file a PTA, but the assessor mistakenly failed to uncap the taxable value of the property. This situation might have occurred where a transferee reported the transfer but the assessor relied on the Court of Appeals's decision in *Klooster* or *Moshier* to determine that the value should not be uncapped. In this situation, the transferee properly reported the transfer, so filing a Form 3214 is not appropriate. Furthermore, the July and December boards of review do not have the jurisdiction to uncap taxable value for 2011 or prior years. As a result, the only opportunity to correct an error in taxable value for 2011 was to address the error at the March board of review. Given that *Klooster* was published March 10, 2011 and

the STC's memo describing the appropriate actions assessors should take was issued March 21, 2011, this left little time to address these types of cases at the March board of review.

Proposed Legislation

On April 12, 2011, Representative Franz (R) introduced House Bill 4515. The proposed revision to MCL 211.27a(7)(h) introduced in House Bill 4515 would exclude from the definition of "transfer of ownership" a transfer of real property where the transferee is related to the transferor by blood or affinity to the third degree and the use of the property does not change following the transfer. An exception to this exclusion would be provided in the event there is a subsequent transfer to a party unrelated to the transferor within seven years of the prior transfer. In that event, a transfer of ownership will be deemed to have occurred as of the date of the prior transfer and a corrected tax bill would be issued for each tax year being adjusted due to the prohibited transfer.

This legislation would exempt transfers between related parties regardless of whether the transfer at issue involves the creation or termination of a joint tenancy. No analysis would be required into original ownership or continuous tenancy. In its current form, the legislation would simply require an analysis of the relationship between transferor and transferee, whether the use of the property remains the same, and whether the property continues to be held by a related family member and not sold to an unrelated third party for the seven year look-back period.

Conclusion

Klooster has clarified the law related to when a transfer creating or terminating a joint tenancy is a "transfer of ownership" subject to uncapping. However, the decision also left some debris with which assessors must deal regarding assessments of property that may be affected by *Klooster*.

Clarity and certainty in the law is always preferred for planning purposes. The fact that the law on uncapping related to joint tenancies may yet change if the House Bill moves forward creates a certain amount of undesirable uncertainty. However, if the legislation passes, it may be a welcome change for property owners wishing to pass property such as the family cottage on to family members without also passing on a significantly higher property tax bill.



15 POINTERS, PRACTICE TIPS, AND REMINDERS REGARDING EASEMENTS: HIGHLIGHTS OF 2010 MICHIGAN APPELLATE DECISIONS

by David L. Skidmore*

An easement is a right to use another's property for a specified purpose, such as for ingress and egress, utility access, a pedestrian right-of-way, or riparian rights. Easements are frequently found in the chain of title to both residential and commercial property, and so purchasers of realty may succeed to easements that they do not fully appreciate or understand. Where two parties both have rights in the same piece of property, there is a prospect of tension arising between the parties, such as the tension between a developer who wants to improve an ingress/egress easement and the owners of the underlying parcel; the tension between lakefront owners and backlot owners as to whether an easement grants only pedestrian access to the lake or full-blown riparian rights; or the tension between a utility company and the owner of a parcel subject to a utility easement as to what type of equipment may be placed in the easement.

Such tension can often spill over into the courtroom, and litigation concerning easements is both common and multifaceted. The parties may dispute whether an easement was properly created by a written instrument. (E.g., did an express grant of easement comply with the Statute of Frauds?) The parties may dispute whether an easement has come into being by operation of law, such as by prescription. Prescriptive easement cases generally turn on whether all of the elements of adverse possession have been satisfied. (E.g., did the party claiming the prescriptive easement really make adverse use of the property, if he mistakenly believed he had an easement that entitled him to use the property?) Frequently, the parties will dispute the proper burden or duration of the easement. (E.g., did

a driveway easement to access "the garage on the property" last beyond the destruction of the original garage?)

All of these issues appeared in Michigan appellate case law during 2010. Summarized here are 15 of the most interesting and substantive easement law decisions of the past year, which include a number of practical pointers and reminders for transactional and litigation attorneys.

1. **An easement that merely conveys a pedestrian right-of-way does not include riparian rights.** In *City of Novi v Evers*,¹ the parties disputed the proper construction of the following language granting an easement to backlot owners: "Lot 12 of Bentley Subdivision adjoining this Subdivision is to be used for pedestrians' right of way to the lake for all purchasers of lots on Poplar Street and Pine Street, each purchaser to pay his proportion for dock improvements and taxes[.]"² The trial court held that the conveyance granted only a pedestrian right-of-way and nothing more, and the defendants appealed. Defendants argued that the reference to payments for "dock improvements" suggested that the easement included the right to erect docks, which is a riparian right. The Court of Appeals rejected this argument. "The trial court correctly read the conveyance's last words as imposing a limitation on the easement; if there are any taxes or dock improvement fees, the easement holders must contribute their share of these expenses or lose their right to the easement.

1 *City of Novi v Evers*, unpublished opinion per curiam of the Court of Appeals, issued May 6, 2010 (Docket No. 290079), 2010 WL 1818946.

2 *Id.*, 2010 WL 1818946 at *1 (Mich App).

* David L. Skidmore is a partner in the Grand Rapids office of Warner Norcross & Judd LLP. He concentrates in real property litigation as well as trust and estate litigation. Mr. Skidmore can be reached at dskidmore@wnj.com.

The easement conveys only a right-of-way. A right-of-way does not convey riparian rights.”³ This case reflects the perennial tension between lakefront and backlot owners, when it comes to lake access. What the backlot owners wanted was full riparian rights, including the right to erect a dock, permanently moor boats, and sunbathe and picnic in the easement. What the Court of Appeals found the backlot owners had was the right to pedestrian ingress and egress to the waters of the lake only, meaning that they could only use the easement for the purpose of walking to and from the lake. *Evers* is also a good reminder of the duality of easements, which may be acquired permissively or adversely; having determined that riparian rights were not included within the backlot owners’ express grant of easement, the Court of Appeals remanded the case to the trial court for a determination whether any of the backlot owners had gained a prescriptive easement for docking and permanent boat moorage.

2. To achieve the 15-year period necessary to establish a prescriptive easement, a party may tack on the possessory periods of predecessors in interest by showing privity of estate; however, a group of subdivision owners may not tack onto one another’s uses, because there is no privity of estate between them. In order to establish a prescriptive easement, successive periods of adverse possession by different owners may be aggregated, or tacked, to meet the 15-year requirement, but only if there is privity of estate between the successive owners. In *Keiser v Feister*,⁴ defendants—a group of current subdivision owners—claimed a prescriptive easement over an unplatted waterfront parcel. The trial court entered judgment in favor of the defendants. On appeal, the Michigan Court of Appeals held that the trial court had improperly allowed subdivision owners to tack onto one another’s uses to achieve the 15-year period. “[D]efendants and the trial court believed that the neighborhood could collectively use the unplatted waterfront property, to establish the prerequisites for prescriptive easements. Michigan law has never approved such ‘collective tacking[.]’ Tacking has specific requirements, and defendants cannot tack onto one another’s uses, because there is no privity of estate between them.”⁵ Because none of the defendants were able

to show use for the necessary period, the Court of Appeals held that the trial court erred in holding that defendants established the required elements of a traditional prescriptive easement. The Court of Appeals acted appropriately to protect the requirement of privity of estate, which ensures that those successive owners who have adversely used the alleged servient parcel all have the same legal relationship to the alleged dominant parcel. Without privity of estate, then a community could establish a prescriptive easement by showing that any number of people used the servient parcel for different time periods that in the aggregate satisfied the 15-year requirement, but instead of a single dominant parcel there would be a plethora of dominant parcels. Such communal tacking would simply make it too easy to establish a prescriptive easement.

3. Michigan law does not recognize an easement by necessity for utilities. The plaintiffs in *Boyle v Lofgren*⁶ possessed an express easement for ingress and egress over the defendants’ parcel; however, the grant of easement was silent as to utilities. The plaintiffs sought imposition of an easement by necessity for utilities, which the trial court denied. On appeal, the plaintiffs requested that the Court of Appeals re-adopt the reasoning of *Tomecek v Bavas (Tomecek I)*⁷ despite its vacation by the Michigan Supreme Court. In *Tomecek I*, the Court of Appeals held that the common-law doctrine of easement by necessity includes not only physical access to landlocked property but also access to utilities “unless [t]he parties to the conveyance that left the property without such access clearly indicated that they intended a contrary result.”⁸ However, the Michigan Supreme Court subsequently vacated the Court of Appeals’ holding in *Tomecek I* regarding easement by necessity.⁹ In *Boyle*, the Court of Appeals “decline[d] the plaintiffs’ invitation to adopt anew the holding of *Tomecek I*” because the facts of the present case were distinguishable from those in *Tomecek I*. “In *Tomecek*, there was substantial evidence that the original grantors, as well as the plaintiffs, envisioned that the subject parcel would be used for residential purposes and

3 *Id* at *2 (affirming in part and reversing in part trial court’s judgment and remanding for further proceedings).

4 *Keiser v Feister*, unpublished opinion per curiam of the Court of Appeals, issued Mar 2, 2010 (Docket No. 282531), 2010 WL 716095.

5 *Id*, 2010 WL 716095 at *5 (Mich App).

6 *Boyle v Lofgren*, unpublished opinion per curiam of the Court of Appeals, issued Sept 28, 2010 (Docket No. 291818), 2010 WL 3767615.

7 *Tomecek v Bavas*, 276 Mich App 252; 740 NW2d 323 (2007) (“*Tomecek I*”).

8 *Id* at 278 (quotation and alteration omitted).

9 *Tomecek v Bavas*, 482 Mich 484; 759 NW2d 178 (2008) (“*Tomecek II*”).



have utility access.”¹⁰ “However, in the present case, there is no evidence showing any indication that the [original grantors] intended that plaintiffs’ lots would ever be used for residential purposes or have access to utilities.”¹¹ Therefore, the Court of Appeals declined to recognize an easement by necessity for utility access. *Boyle* is significant because it means that owners of parcels lacking access to utilities cannot claim such access rights as a matter of law (“by necessity”); instead, they must obtain additional easements for utility access, which is an added cost of development. The decision is also a good reminder that the terms of an express grant of easement are paramount. The scope of an easement for ingress and egress will not ordinarily be broadened by the Court, and so drafters should ensure that all potentially desired uses are included in an easement conveyance.

4. A platter may grant an easement for riparian rights to backlot owners by dedicating a riparian lake-end road to the use of plat owners. *Kircos v Waslawski*¹² involved a dispute as to whether backlot owners in a platted subdivision had an easement over Highland Avenue, a road within the subdivision which ended at a lake, for riparian purposes. The basis for the alleged easement was the platter’s dedication of all roads and alleys in the plat “to the use of the property owners of said plat.” The trial court entered judgment for defendant backlot owners, ruling that they had a riparian rights easement that permitted them to use Highland Avenue to moor and dock boats, and for lounging, sunbathing, and picnicking. On appeal, the Court of Appeals recognized that a platter could grant such a riparian rights easement in the plat. “Michigan law clearly allows the original owner of riparian property to grant an easement to backlot owners to enjoy certain rights that are traditionally regarded as exclusively riparian.”¹³ The Court of Appeals affirmed the trial court’s finding that the plat’s dedication of all roads and alleys to the use of plat owners was ambiguous as to whether it included Highland Avenue’s riparian rights. “The language of the dedication in the plat is not confined to granting an easement for ingress and egress, i.e., simple access to the lake. By the same token, the language

does not explicitly grant riparian rights either. Therefore, the trial court did not err in finding that the plat dedication was ambiguous. Accordingly, the court was entitled to consider extrinsic evidence concerning the scope of the easement.”¹⁴ The platter’s dedication of all roads and alleys in the plat “to the use of the property owners of said plat” is language typically employed on plats. It is interesting that the Court of Appeals found that such language was facially ambiguous as to whether it included any riparian rights attached to the roads and alleys within the plat. In other words, the dedication was equally susceptible to two different interpretations, one where “use” included riparian rights and one where “use” did not include such rights. This scenario could be replayed in numerous other plats with similar lake-end roads dedicated to public use.

5. A particular use of an easement is not necessarily permissible merely because the easement owner obtained a building permit for the use. In *D’Andrea v AT&T Michigan*,¹⁵ plaintiffs brought a trespass action against defendant utility, alleging that its construction of additional crossbox cabinets on the utility easement overburdened the easement. The trial court granted summary disposition to the utility, finding that “AT&T obtained building permits from the city of Grosse Pointe Farms and Wayne County before it placed the additional crossbox cabinets on the easement” and concluding that “the city and county would only have issued building permits for ‘reasonable’ construction within the easement[.]”¹⁶ On appeal, the Court of Appeals ruled that there was no evidence that the building permit application process considered the proper scope of the utility easement. “However, AT&T provided no legal basis, facts, or documentary evidence to establish that the city or county has the legal authority to decide on the nature, size, or scope of equipment a utility may install in a utility easement or whether the city or county actually considers those questions when it issues a building permit.”¹⁷ *D’Andrea* stands for the proposition that a utility does not have an unlimited right to erect equipment within a utility easement. Instead, the utility’s use of an easement must be confined strictly to

10 *Boyle*, 2010 WL 3767615 at *3 (Mich App).

11 *Id.*

12 *Kircos v Waslawski*, unpublished opinion per curiam of the Court of Appeals, issued May 11, 2010 (Docket No. 288894), 2010 WL 1930947.

13 *Id.*, 2010 WL 1930947 at *4 (Mich App), quoting *Dyball v Lennox*, 260 Mich App 698, 703; 680 NW2d 522 (2004).

14 *Id.*, 2010 WL 1930947 at *5 (affirming trial court’s judgment in favor of defendants).

15 *D’Andrea v AT&T Michigan*, 289 Mich App 70; -- NW2d -- (2010).

16 *Id.*, 289 Mich App 70; 2010 WL 2595015 at *3 (Mich App June 29, 2010).

17 *Id.* (reversing trial court’s judgment and remanding for further proceedings).

the purposes for which it was granted, as determined by the terms of the easement. Activities by the utility that go beyond the reasonable exercise of the use granted by the easement may be found to constitute a continuing trespass against the owner of the burdened parcel.

6. An easement may not be created by operation of the doctrine of acquiescence. The legal doctrine of acquiescence typically applies to the resolution of boundary line disputes. “The theory of ownership to an agreed boundary proceeds upon the ground there has been a *bona fide* dispute as to the true boundary line and the parties have by peaceful agreement made a friendly settlement of this dispute which has been acquiesced in, carried out and performed by the respective parties.”¹⁸ However, in *John Guidobono II Revocable Trust Agreement v Jones*, the Court of Appeals initially ruled that the easement at issue had been created by both the doctrines of acquiescence and prescriptive easement.¹⁹ But on appellants’ application for leave to appeal, the Michigan Supreme Court vacated the Court of Appeals’ judgment in part. “The Court of Appeals erred in concluding that the doctrine of acquiescence applies to easements.”²⁰ The dissimilarity between the creation of an easement and the location of a boundary line makes the application of the doctrine of acquiescence to easements awkward, to say the least, and so the Supreme Court’s decision that the doctrine actually does not apply to easements is a welcome clarification.

7. For purposes of tacking, proof of privity of estate may be dispensed with where the buyers of the disputed realty had been visiting and using the parcel for years and it was always understood that the only means of access to the parcel was to travel across the disputed realty. *Matthews v Dep’t of Natural Resources*²¹ involved the question whether the landlocked property owners could show privity of estate with their predecessors in order to establish the 15-year period necessary to establish a prescriptive easement over the defendant’s property. Ordinarily, “[t]acking requires privity of estate, which can be shown either by (1) proof that the tacker had a description of the disputed acreage in her deed; or (2) proof that an

actual transfer or conveyance of possession of the disputed acreage by parol statements was made, at the time of the conveyance.”²² In *Matthews*, the current owners did not have either type of proof of privity of estate. However, the current owners argued that they did nonetheless have privity of estate because “they had been visiting and using the property since [their predecessors] first purchased it in 1969 and that it was always understood that the only means of access to the landlocked parcel was to travel across the [defendant’s] land.”²³ The trial court ruled that the current owners did have a prescriptive easement, and the Court of Appeals affirmed. “We are [h]olding that the parol transfer requirement can be satisfied in the limited circumstances where the tacking property owners are well acquainted and there is clear and cogent evidence that the predecessors-in-interest undoubtedly intended to transfer their rights to their successors-in-interest, for example, by showing that the successors had visited and remained on the property and had used it for many years prior to their acquisition of the title to the property.”²⁴ On its face, *Matthews* effectively contravenes the parol statement requirement. However, given the unique circumstances of the case, the decision was entirely proper. Where buyers and sellers are so intimately acquainted, it would not be reasonable to expect the sellers to make express parol statements about easement rights that all parties had in fact used for years. Indeed, to rigidly insist on enforcing the parol statement requirement under such circumstances would work to deprive buyers of rights that they believed they were purchasing.

8. An express easement for ingress and egress includes the right to extend a roadway on the servient parcel to connect the roadway to the dominant parcel. In *Irvin v Ville-du-Lac Townhouses Condominium Ass’n*,²⁵ the Court of Appeals concluded that a deed expressly reserved an easement appurtenant for ingress and egress over the “roadways” of the defendant’s parcel for the benefit of the plaintiffs’ parcel. The Court of Appeals reached this conclusion despite the fact that the

18 *Warner v Noble*, 286 Mich 654, 662; 282 NW 855 (1938).

19 *John Guidobono II Revocable Trust Agreement v Jones*, unpublished opinion per curiam of the Court of Appeals, issued June 24, 2010 (Docket No. 290589).

20 *John Guidobono II Revocable Trust Agreement v Jones*, 488 Mich 989; 791 NW2d 288 (2010).

21 *Matthews v Dep’t of Natural Resources*, 288 Mich App 23; 792 NW2d 40 (2010).

22 *Killips v Mannisto*, 244 Mich App 256, 259; 624 NW2d 224 (2001).

23 *Matthews*, 288 Mich App at 39.

24 *Id* at 41-42 (internal quotes and alterations omitted) (affirming in part and reversing in part).

25 *Irvin v Ville-du-Lac Townhouses Condominium Ass’n*, unpublished opinion per curiam of the Court of Appeals, issued Sept 14, 2010 (Docket No. 291534), 2010 WL 3564818.

roadways on the defendant's parcel did not extend all the way to the plaintiffs' parcel. "Although this roadway over the [defendant's] property ends a short distance from the [plaintiffs'] property, we find that the [plaintiffs'] easement rights necessarily incorporate the right to extend the roadway and join the two parcels together."²⁶ The Court of Appeals recognized the principle "that the conveyance of an easement gives to the grantee all such rights as are incident or necessary to the reasonable and proper enjoyment of the easement."²⁷ "In addition, an easement holder can make improvements to the servient estate that are necessary 'for the effective use of the easement' that do not 'unreasonably burden' the servient estate."²⁸ *Irvin* is a classic example of the real powers that attach to a valid easement, including the power to physically alter the servient estate in order to make effective use of the easement consistent with its purposes. The fact that the roadways on the servient parcel did not extend all the way to the dominant parcel did not impede the easement owner's right of ingress and egress; instead, the simple solution was to extend the road. Those drafting easements should bear in mind whether the purpose of the easement may entail alterations to the servient estate. For instance, even an easement that is limited to a pedestrian right-of-way may allow for the construction of steps or a walkway, depending on the grade and surface quality of the underlying realty.

9. For purposes of establishing a prescriptive easement, a party's mistaken belief that an easement exists does not necessarily destroy the adverse or hostile nature of the party's use of the property. In *Bacha v Ross Properties Inc.*,²⁹ the original owner entered into a lease and easement agreement with the owner of the servient parcel for a driveway to reach the dominant parcel. Subsequently, the agreement lapsed because of non-payment of rent and property taxes. Nonetheless, subsequent owners of the dominant parcel believed they had an easement for a driveway across the servient parcel. Plaintiffs (the current owners of the dominant parcel) brought suit to establish a prescriptive easement across the servient parcel. The trial court granted sum-

mary disposition for the defendants, on the grounds that plaintiffs' belief that they were using the driveway permissively (i.e., under the supposed easement agreement) was inconsistent with the adversity required to establish a prescriptive easement. The Court of Appeals held that the trial court had erred, because the adversity or hostility required to create a prescriptive easement "merely means a use that is inconsistent with the rights of an owner."³⁰ Therefore, "a party's belief that an easement exists, where one does not actually exist[,] does not destroy the adverse or hostile nature of the party's use of the property."³¹ The decision in *Bacha* makes a subtle distinction between permissive use (which will not result in a prescriptive easement) and use that is erroneously believed to be permissive (which may result in a prescriptive easement). It is questionable whether this distinction withstands scrutiny, and the logic of the dissent from the case that the *Bacha* court cited as precedent for its decision is persuasive: "Plaintiffs' belief that an easement existed and that therefore their use was lawful is tantamount to use by permission, which can never result in a prescriptive easement[.]"³²

10. The failure of one joint owner to sign an express grant or conveyance of easement will invalidate the easement. In *Nash v Great Lakes Energy Coop.*,³³ plaintiffs brought a quiet title action against defendants, alleging that the easement claimed by defendants was invalid because it was based on an express conveyance that lacked the signature of one of the joint owners of the underlying parcel. After a bench trial, the trial court dismissed the plaintiffs' action, and the plaintiffs appealed. The Court of Appeals held that the easement was invalid under the statute of frauds because it was missing the signature of one of the joint owners. "Plaintiffs argue that because an easement is an interest in property, and as such, must be conveyed by a signed writing in order to be valid, and plaintiff Cheryl Yeck, one of the owners of Parcel 1, did not sign the conveyance of easement, the easement is void under the

²⁶ *Id.*, 2010 WL 3564818 at *4 (Mich App).

²⁷ *Id.*, quoting *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 41; 700 NW2d 364 (2005).

²⁸ *Id.* (reversing trial court's judgment for defendant and remanding for entry of judgment in favor of plaintiffs).

²⁹ *Bacha v Ross Properties Inc.*, unpublished opinion per curiam of the Court of Appeals, issued Feb 4, 2010 (Docket No. 286632), 2010 WL 395652.

³⁰ *Id.*, 2010 WL 395652 at *6 (Mich App) (internal quotation omitted).

³¹ *Id.* (reversing and remanding for trial).

³² *Killips v Mannisto*, 244 Mich App 256, 262; 624 NW2d 224 (2001) (Hoekstra, J., dissenting).

³³ *Nash v Great Lakes Energy Coop.*, unpublished opinion per curiam of the Court of Appeals, issued Feb 9, 2010 (Docket No. 286569), 2010 WL 446916.

statute of frauds. We agree.”³⁴ “[W]hen the property in question is held jointly, all owners must sign, or the contract is void. [I]t is not disputed that there was no writing signed by Yeck, nor is it disputed that she is and at all relevant times was an owner of Parcel 1.”³⁵

11. An easement may not be created by reservation in a deed, in favor of a stranger to the conveyance. *Metropoulos Family Limited Partnership v Eugenio*³⁶ involved four contiguous parcels of land. Historically, the Woodhouse family owned lots 1 and 2, and the Woodhouse Land Company owned lots 3 and 4. When the Woodhouse Land Company deeded lot 4 to the Gralewskis, its conveyance was “subject to [an] easement for roadway purposes in favor of adjoining owners.” The present-day owner of lots 1 and 2 brought suit, seeking to establish that this historical conveyance had reserved an easement over lot 4 for the benefit of lots 1 and 2. The trial court found no cause of action against the plaintiff, and it appealed. The Michigan Court of Appeals noted the rule that “[a]n easement may not be reserved in favor of a stranger to a deed or grant,” and that “[a]t the time a parcel of property is conveyed by its owner, the owner may [only] reserve an easement over it or for the benefit of other property he owns.”³⁷ The Court of Appeals ruled that the historical conveyance could not have reserved an easement in favor of lots 1 and 2 because they were owned by third parties. “[B]ecause members of the Woodhouse family owned [lots 1 and 2] in 1954, the Woodhouse Land Company could not, in conveying [lot 4], reserve an easement in favor of [lots 1 and 2]. At most, the 1954 conveyance of [lot 4] to the Gralewskis created an easement over [lot 4] in favor of [lot 3].”³⁸

12. An easement may be created by an exception in a deed, in favor of a stranger to the conveyance. In *Sneideraitis v Austin*,³⁹ the plaintiffs sought declaratory relief that their property was not burdened by an easement

for the benefit of defendants’ adjoining property. The trial court granted summary disposition for defendants. On appeal, the Michigan Court of Appeals observed the distinction between an easement created by deed reservation and deed exception. “Plaintiffs correctly cite [t]he rule that a grantor cannot by *reservation* create an easement for a third party. However, the law is clear that easements benefiting strangers to the conveyance may be created by *exception*.”⁴⁰ Because the easement language in the conveyances at issue (“Excepting therefrom an easement by right-of-way for ingress and egress...”) created an exception rather than a reservation, the easement was valid.⁴¹

13. For wild and unenclosed lands, a higher burden of notice is required of a party seeking to establish a prescriptive easement because permissive use is presumed. In *Smith v Ciaramitaro*,⁴² the plaintiff sought to establish an easement by prescription over the defendant’s wild and unenclosed property, and the trial court entered judgment for the defendant. The Court of Appeals noted that the case was governed by the wild and unenclosed lands doctrine: “The tacit permission to use wild lands is a kindly act which the law does not penalize by permitting a beneficiary of the act to acquire a right in the other’s land by way of legal presumption, but it requires that he bring home to the owner, by word or act, notice of a claim of right before he may obtain title by prescription.”⁴³ The plaintiff’s evidence showed that he had used and maintained a two-track across the defendant’s land to access his own property, and that he had sometimes used the defendant’s land for hunting. The Court of Appeals held that the plaintiff’s use of the property had failed to give notice to defendant that plaintiff was using the property under a claim of right and therefore that the prescriptive easement claim failed.⁴⁴

14. In order for an easement to be limited to a particular narrow purpose, the language of the grant must be specific and limiting. In *Wootton v Carlson*,⁴⁵

34 *Id.*, 2010 WL 446916 at *1 (Mich App).

35 *Id.* (reversing trial court’s judgment for defendants and remanding for further proceedings).

36 *Metropoulos Family Limited Partnership v Eugenio*, unpublished opinion per curiam of the Court of Appeals issued Oct 12, 2010 (Docket No. 293361), 2010 WL 3984636.

37 *Id.*, 2010 WL 3984636 at *1 (Mich App).

38 *Id.* (affirming trial court’s judgment for defendants).

39 *Sneideraitis v Austin*, unpublished opinion per curiam of the Court of Appeals, issued Nov 23, 2010 (Docket No. 294620), 2010 WL 4774405.

40 *Id.* at *2, 2010 WL 4774405 (Mich App).

41 *Id.* (affirming trial court’s judgment).

42 *Smith v Ciaramitaro*, unpublished opinion per curiam of the Court of Appeals, issued Sept 2, 2010 (Docket No. 291538), 2010 WL 3447916.

43 *Id.*, 2010 WL 3447916 at *2 (Mich App) (internal quotation omitted).

44 *Id.* (affirming trial court’s judgment).

45 *Wootton v Carlson*, unpublished opinion per curiam of the

defendant claimed that the driveway easement was limited to the purpose of accessing the original garages on the parties' respective parcels, and that, because the original garages had been destroyed, the purpose of the easement had terminated. The easement in question read as follows: "It being further understood and agreed that the said spaces shall not be used for parking purposes or obstructed in any way whatsoever and shall be kept free and clear so as to be available at all times for use of the parties herein mentioned, their heirs and assigns, for the purpose of ingress and egress to the respective garages located in the rear of the aforesaid dwellings." The trial court granted summary disposition to the plaintiffs, upholding the continued existence and purpose of the easement. The Court of Appeals recognized that "[a]n easement limited to a particular purpose terminates when the purpose ceases to exist, is abandoned, or is rendered impossible of accomplishment."⁴⁶ However, the Court of Appeals found that the purpose of the easement was not limited to accessing the original garages. "The language of the deed does not support a finding of a 'specific purpose' because it fails to contain any limiting language."⁴⁷ Moreover, reading the grant of easement as a whole supported the conclusion that it was not limited to accessing the original garages. "The trial court correctly determined that, when read as a whole, the easement was plainly created to allow ingress/egress to the burdened properties, while ensuring that neither party used the joint driveway as a parking area. Although both properties originally had

garages, the existence of the easement did not cease upon their removal."⁴⁸

15. An easement may be terminated by adverse possession. In *Bishop v Knox*,⁴⁹ the Court of Appeals held that the defendants had adversely possessed an easement by constructing a fenced, asphalt tennis court that completely blocked the easement and maintaining the court for a period in excess of 15 years. "To establish adverse possession, the claimant must show that his or her possession was actual, visible, open, notorious, exclusive, hostile, under cover of a claim of right, continuous, and uninterrupted for the statutory period of 15 years."⁵⁰ "[U]se of an easement by the owner of the servient estate will not ripen into adverse possession unless such use is inconsistent with the easement, thus leading to application of a heightened level of scrutiny in regard to a claim of adverse possession of an easement."⁵¹ "[T]he deeded easement could not be used for its intended purpose for the statutory period; therefore, it was adversely possessed."⁵²

48 *Id.* (affirming trial court's judgment).

49 *Bishop v Knox*, unpublished opinion per curiam of the Court of Appeals, issued Sept 16, 2010 (Docket No. 292486), 2010 WL 3604741.

50 *Id.*, 2010 WL 3604741 at *1 (Mich App), quoting *Beach v Lima Twp*, 283 Mich App 504, 524; 770 NW2d 386 (2009), lv gtd 485 Mich 1036 (2010).

51 *Id.*

52 *Id.*, quoting trial court's judgment (affirming trial court's judgment granting summary disposition in favor of defendants).

Court of Appeals, issued Oct 19, 2010 (Docket No. 293435), 2010 WL 4106704.

46 *Id.*, 2010 WL 4106704 at *3.

47 *Id.*



Understanding Electronic Recording: Current Legislation and Trends



by Brian Henry and Mary Dunn***

On July 19, 2010, Michigan became the 24th state to enact a version of the Uniform Real Property Electronic Recording Act (“URPERA”).¹ This Model Act incorporates some of the legal concepts regarding electronic transactions set forth in both the Uniform Electronic Transactions Act (“UETA”) and the statute that preempted it, the Electronic Signatures in Global and National Commerce (“E-SIGN”) Act.² Michigan’s version of URPERA creates an Electronic Recording Commission (“Commission”) that will be formed to promulgate the standards and procedures for electronic recording of real estate documents. At the time of the completion of this article, the Commission had not yet been appointed³ and the standards and

procedures for recording had not yet been published. To help real estate practitioners prepare for changes arising from the implementation of URPERA, this article will examine: (1) the language of the Act; (2) the standards and procedures for electronic recording used in other states; and (3) the potential pitfalls associated with the electronic recording of real estate documents.

Summary of the Uniform Real Property Electronic Recording Act

Michigan’s URPERA is a flexible, enabling statute designed to provide guidance for the use of electronic means to record real estate documents in the various county offices located throughout Michigan.

URPERA provides that: (1) an electronic document will satisfy any statutory or other requirement that a document be an original for the purpose of recording;⁴ and

1 The National Conference of Commissioners on Uniform State Laws (“NCCUSL”), available at http://uniformlaws.org/Act.aspx?title=Real_Property_Electronic_Recording_Act (last visited May 18, 2011).

2 15 USC 7001.

3 The Commission will consist of eight members. One member will be the director of the department of technology, management, and budget or his or her designee, who shall be a non-voting member. The other seven members will be appointed by the governor and shall consist of four county registers of deeds, one individual who is engaged in the land title profes-

sion, one individual who is engaged in the business of banking, and one individual who is an attorney licensed to practice law in Michigan and whose practice emphasizes real property matters. MCL 565.845.

4 MCL 565.843(1).

** Brian Henry is Commercial Services Counsel for eTitle Agency with over 29 years experience in real estate law and commercial litigation. Mr. Henry supervises closings for both commercial sale and refinance transactions and identifies business opportunities in the title insurance industry. In addition, he serves as Loan Resolution Counsel for Orlans Associates PC, working with homeowners, lenders and legislators on loan modification processes, short sales and other loss mitigation tools. Mr. Henry is the Secretary of the Real Property Law Section and a past CLE and Membership Committee Chair.*

*** Mary Dunn works as a Law Clerk at Orlans Associates, P.C. Ms. Dunn is a third-year law student at Wayne State University Law School, where she is a member of the Women’s Law Caucus and the Sports and Entertainment Law Society, and serves as a mentor to a first-year law student. She also serves on the Board of her condominium association and is a member of the Real Property Law Section of the State Bar of Michigan.*



(2) an electronic signature will satisfy any statutory or other requirement that states that a document be signed.⁵ Once the Commission is appointed, it must adopt standards for the implementation of processes, practices and technologies that are consistent with the “practices of offices of county registers of deeds” in other states.⁶ Regarding the authentication of signatures, practitioners should note that the Act specifically provides that:

A requirement that a document or a signature associated with a document be notarized, acknowledged, verified, witnessed, or made under oath is satisfied if the electronic signature of the person authorized to perform that act, and all other information required to be included, is attached to or logically associated with the document or signature. A physical or electronic image of a stamp, impression, or seal need not accompany an electronic signature.⁷

Although the county registers of deeds that adopt electronic recording processes must do so in compliance with the standards promulgated by the Commission,⁸ there is no requirement that any county invest in hardware and software technologies that are needed to accept electronic documents. In fact, the Act specifically provides that county registers of deeds that elect to accept electronic recordings must continue to accept paper documents and record them in the same index as the electronic documents.⁹

The URPERA excludes from its scope the electronic delivery of certain notices, including those related to court notices, certain official court documents, notices of default acceleration, repossession, foreclosure or eviction, among others.¹⁰ Practitioners should understand that the federal E-SIGN Act expressly prohibits the use of electronic documents or electronic signatures on documents providing “any notice of default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a

primary residence of an individual.”¹¹ The Michigan version of URPERA reiterates this federal prohibition and reaffirms that these notices cannot be sent electronically.¹²

Historical Background of Real Property Document Recordation

The U.S. system of transferring interests in real property dates back to the English feudal system, where such transfers were accomplished by physical transfer from the grantor to the grantee in the presence of witnesses to provide notice of the transaction to all others. Later, the U.S. system adopted the Statute of Uses¹³ to enable the use of deeds to transfer ownership. Next, the Statute of Enrollments¹⁴ was enacted, which required the sale of freehold estates to be in writing and required the recording of the writing. Finally, the Statute of Frauds¹⁵ was enacted, which required that all transfers of interests in real property be in writing and signed by the grantor. Until 1995, these three model statutes, adopted in most states, were the backbone for the transfer of real estate.

During the 1990s, both federal and state governments passed legislation designed to encourage electronic commerce. From 1995 until 2002, non-uniform statutes permitting electronic signatures, electronic recording and electronic notarization were enacted. However, the lack of uniformity barred adoption of uniform business practices among national lending institutions and title companies doing business across state lines. Congress passed the UETA in 1999 and the E-SIGN Act in 2000. These two federal Acts simply insert the permitted use of electronic records and electronic signatures into any state law that has a writing or signature requirement.¹⁶

Throughout these developments in real estate transfer law, people have focused on whether the source of the information was reliable rather than on the medium through which the information was presented. The official record is comprised merely of copies of documents underlying the transaction that the recorder has reason to believe are accurate representations of the information.

5 MCL 565.843(2).

6 MCL 565.845(10).

7 MCL 565.843(3).

8 MCL 565.844(1).

9 MCL 565.844(3).

10 MCL 565.847.

11 15 USC 7003(b)(2)(B).

12 MCL 565.847.

13 27 HENRY VIII, ch. 10.

14 27 HEN. VIII, ch. 16.

15 29 CAR. II, ch. 13.

16 *URPERA Enactment and eRecording Standards Implementation Guide*, 2006, p 16.

Typically, an instrument is deemed properly recorded if it is duly recorded, acknowledged and indexed in the appropriate record book. Thus, under URPERA, as long as the electronic instruments meet these age-old requirements, notice may be fairly imputed.¹⁷

In January, 2006, the Property Records Industry Association (“PRIA”) promulgated the *URPERA Enactment and eRecording Standards Implementation Guide* (“PRIA Standards”).¹⁸ The PRIA Standards set forth three models for electronic recording of documents with county registers of deeds.

Model 1

Under Model 1, which is an extension of paper-based recording, a paper version of the document is prepared and printed. The parties sign and notarization is completed with ink signatures. The paper document is then scanned and sent electronically to be recorded. The recorder makes the same determination of recordability as with paper documents and determines the recording fees, which are usually paid from the submitter’s escrow account. After recordation, an image of the recorded document containing the recording information is returned to the submitter. Orange County, California and Maricopa County, Arizona use Model 1 and have indicated that the average time elapsed from the time the recorder receives the image until the data is returned to the submitter is under an hour. The average turnaround time for mailed paper documents is about ten days.¹⁹

Model 2

Model 2 recordings may be either paper- or electronic-based. The index information is submitted with the scanned or electronic image, so the recorder does not have to create this information. The process is partially automated, but the image must still be visually inspected by the recorder to determine whether it meets the recording requirements before it is recorded. The recording information is “burned” onto the image and returned to the submitter. Broward County, Florida and Oakland County,

Michigan use this Model and have noted that the average elapsed time from receipt of the document to returning the recorded electronic document is about five minutes.²⁰

Model 3

Under Model 3, documents are signed and notarized electronically and submitted electronically for recording; thus, the documents are never printed. Documents may be submitted for recordation in batches. Once received by the recorder, the documents are checked to determine whether they meet the recording requirements. If so, the recording fees are then collected from the escrow accounts maintained by the respective submitters. Secure access is required for all parties who sign the document because signing is done by electronic signature. Salt Lake County, Utah and Fairfax County, Virginia use this Model.²¹ The average turnaround time for Model 3 recording is about 30 seconds from the time the recorder receives the document until the recorded document is returned to the submitter.²²

Because the Electronic Recording Commission has not yet been appointed in Michigan and the particular Model(s) that will be used have not yet been specified, the next section of this article will examine the implementation of URPERA in other states and provide some insight for the real estate practitioner regarding what the future may hold for implementation here.

Implementation of Electronic Recording in Other States

The following states and territories have enacted an electronic recording act: Alabama, Arizona, Arkansas, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas, Michigan, Minnesota, Mississippi, Nevada, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, U.S. Virgin Islands, Virginia, Washington and Wisconsin. As of March, 2011, an electronic recording act had been introduced in Massachusetts, Pennsylvania and West Virginia.²³

²⁰ *Id* at 18.

²¹ Electronic Financial Services Council, *Standards and Procedures for electronic Records and Signatures* (Carmelo D. Bramante, PPT presenter), April 27, 2004, available at <http://www.spers.org/spers/tools.htm> (click on: “Electronic Recording and Electronic Notarization by Carmen Bramante of CDB Consulting” under “Implementation Tools” heading) (last visited May 17, 2011).

²² *Id*

²³ The National Conference of Commissioners on Uniform State

¹⁷ David E. Ewan & Mark Ladd, *Race to the (Virtual) Courthouse: How Standards Drive Electronic Recording of Real Property Documents*, PROBATE & PROPERTY, Jan/Feb 2008, p 8.

¹⁸ *URPERA Enactment and eRecording Standards Implementation Guide*, available at http://www.pria.us/files/public/Committees/Real_Property_Law/2006_Docs/PRIAURPERAGuide-Certified2006.pdf(last visited May 13, 2011).

¹⁹ *Id* at 17-18.

California

California's Electronic Recording Delivery Act ("ERDA") was enacted in 2004 and arguably has the most stringent standards for e-recording. The state Attorney General must certify and provide oversight for any electronic recording system being developed by a county, and the state Department of Justice is responsible for implementing the Act's requirements.²⁴ Further, a "county recorder may refuse to enter into a contract [for the delivery and recordation of electronic records] or may terminate or suspend access to a system for any good faith reason."²⁵ Most notably, county recorders must receive authorization of a resolution of the board of supervisors and obtain system clarification from the Electronic Recording Delivery System Program. County electronic recording systems must meet specified security standards. Most notably, secure access roles are required, which require users to provide a list of employment positions and are subject to fingerprint criminal records checks.²⁶ The ERDA does not specify which of the three Models are to be used.

Florida

Like the Michigan URPERA, the Florida version also provides for the establishment of a Commission to promulgate standards for implementation and leaves much of the discretion to said Commission. In turn, Florida's Commission has left much of the discretion to the individual counties. The Florida version of URPERA is expressly based on the PRIA Standards and authorizes use of any of the three Models. The county registers of deeds are empowered to establish the manner in which electronic recording will be conducted. Registers of deeds are only required to accept electronic signatures if the county has the technology to support them, and they have no responsibility to authenticate the signatures.

Wisconsin

Wisconsin fits in somewhere in between California and Florida. In Wisconsin, each submitter must be accepted as a Trusted Submitter (which is defined in Wisconsin's electronic recording act as "a party that has a trusted submitter agreement accepted by and on file with the counsel in order to record documents electronically with a register of deeds"²⁷) by the Wisconsin Electronic Recording Counsel. The statute provides a list of obligations of a Trusted Submitter and a Trusted Submitter's privilege of electronic recording may be revoked under certain specified circumstances. Each county may impose certain additional business requirements.²⁸ According to the Wisconsin Register of Deeds Association, satisfaction of mortgage documents is typically done using Model 3, while Subordination Agreements and Assignment of Mortgages are typically electronically recorded using Model 2.²⁹ Wisconsin does not allow Model 1 electronic recording.

Litigated Issues and Risks Related to Electronic Recording

Many of the cases interpreting the UETA, as well as various state versions of the Act, address the issue of whether electronic records bearing electronic signatures satisfy the Statute of Frauds. In *Crestwood Shops, LLC v Hilken*,³⁰ for example, a lessee under a commercial lease sought a declaratory judgment affirming that the lease had not been terminated because the writing manifesting the termination was signed and sent via email. The Missouri Court of Appeals concluded that the email was a signed writing complying with the Statute of Frauds. Although the Missouri UETA gives legal effect to contracts formed by electronic record, its application is limited to transactions in which the parties to the agreement have agreed to conduct transactions by electronic means. The court noted: "Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct."³¹

²⁷ WIS. ADMIN CODE Adm 70.02.

²⁸ WIS. ADMIN CODE Adm 70.01 *et seq.*

²⁹ Wisconsin Register of Deeds Association, *Electronic Recording of Real Estate Documents in Wisconsin Register of Deeds Offices*, available at <http://www.wrdaonline.org/RealEstateRecords/ElectronicRecording.htm> (last visited March 15, 2011).

³⁰ *Crestwood Shops, LLC v Hilken*, 197 SW3d 641 (Mo Ct App 2006).

³¹ *Id* at 651.

Laws, available at http://uniformlaws.org/Act.aspx?title=Real_Property_Electronic_Recording_Act (last visited March 15, 2011).

²⁴ State of California Department of Justice, Office of the Attorney General, Kamala D. Harris, *Electronic Recording Delivery System Program*, available at <http://ag.ca.gov/erds1/> (last visited March 15, 2011).

²⁵ CAL GOV CODE 27391.

²⁶ CAL GOV CODE 27393(9).

This requirement was met because the court determined that the parties manifested intent to conduct business through email. To avoid any such conflict, the practitioner may wish to include a clause in purchase agreements, leases and other similar real estate documents explicitly authorizing the use of electronic signatures, electronic notices and electronic recording of instruments. If this is not the intent of the parties, then well-drafted clauses should prohibit the use of such electronic tools.

Another risk concerns the process for properly preserving the correct priority of electronic and paper recordings. When documents are submitted electronically, they are received and sit in a queue if sent after hours or during the weekend. The risk is that if the queue is not turned on in accordance with established procedure, paper documents could get recorded ahead of those sitting in the queue. For example, one party could submit an electronic document for recording during the weekend when the register of deeds office is closed and a second party could submit a paper document on Monday morning. If the register of deeds procedure does not require that electronic recordings in the queue from the weekend be processed first, it is possible that register of deeds personnel could record the Monday paper submittal in advance of the record sitting in the queue. This issue is similar to a conflict of priority during the week, as electronic documents are potentially being received at the same time that paper documents are submitted. To address this concern, most electronic vendors for the counties have equipped the various electronic recording systems with features allowing the electronic system to be turned on or off in order to record documents in the proper priority order. In addition, the various states have implemented policies and procedures designed to provide guidance on how and when the queue should be turned on and off.

Most procedures require that at the beginning of the business day, authorized personnel examine the electronic recording queue to see if any records are stored there from the previous evening or weekend. Until this is done, none of the paper submittals provided that day would be recorded so that the priority of the electronic documents in the queue is properly preserved. If a county recorder receives a large volume of either paper or electronic documents for recording during the day or evening, the electronic system of recording can be suspended to handle a backlog of documents to prevent later-received electronic documents from being slipped in ahead of the prior-re-

ceived paper documents and vice versa. Michigan's Commission will address the policies and procedures for turning the queue on and off and establishing the priority of paper and electronic recordings in these instances.

The PRIA Standards allow software developers to design a "suspend mode" to enable the queue to be turned off and on. The PRIA Standards further allow for submitters to submit electronic documents while the system is in suspend mode; the system can simply transmit a message to the submitter to notify him that the document has been received but has not yet been processed.

Observations and Practice Pointers for the Michigan Statute

Practitioners must have some basic understanding of the processes used to record documents electronically. These processes and the safeguards to be promulgated by the Commission will establish how the priority of many different real estate documents will be determined. The recording of construction and tax liens, mortgages, leases, easements, broker's liens and condominium documents will all be affected if counties begin to accept a substantial number of these documents electronically. It will require even more care by lenders, title companies and parties to any transaction recording a mortgage or other instrument where proper priority is a fundamental assumption for the transaction to move forward.

It is also important for practitioners to address in their real estate documents the agreed upon guidelines for proceeding forward with the transaction electronically. The provisions regarding notice, termination, signatures, closing and recording must be examined with the understanding that each of these events can now be handled electronically. It is best to avoid any misunderstanding of the parties by addressing these issues initially and discussing them with the parties in advance. When the Commission is appointed and guidelines are published, this task will be easier.

Until the guidelines in Michigan for URPERA are published, practitioners should monitor the progression of this effort, watch for updates in the Real Property Section eJournal and be aware the Michigan will soon join the other states where electronic recording of real estate documents is standard practice. Monitoring these changes will be essential to creating a more efficient option for closing for many busy real estate developers.



MICHIGAN'S CONSTITUTION PROTECTS BUSINESS OWNERS WHO RELOCATE DUE TO TAKINGS BY EMINENT DOMAIN



by H. Adam Cohen* and Peter H. Webster**

Introduction

In *Michigan Dep't of Transportation v Gilling*,¹ the Michigan Court of Appeals decided an issue of first impression under Michigan's law of eminent domain. The *Gilling* court clarified the historically murky relationship between the statutory administrative schemes that establish "caps" on reimbursement for business relocation costs that result from takings, and the broad constitutional right to seek just compensation for those same relocation costs. The principal issue before the court was whether the administrative schemes constituted an exclusive, or supplemental, remedy for condemned business owners seeking recovery of their business relocation costs. In deciding that the administrative recovery schemes supplement, rather than supplant, an owner's right to seek constitutional just compensation for relocation costs, the Court of Appeals answered that question, but also generated new ones.

Background Facts of *Michigan Dep't of Transportation v Gilling*

In *Gilling*, the Michigan Department of Transportation ("MDOT") exercised the State's power of eminent domain to take property owned by Gilling's Nursery &

Landscaping, Inc., a family-owned business, to widen Lapeer Road (M-24). The Gillings owned five acres of land fronting on Lapeer Road where they operated their wholesale and retail nursery and landscape design business. The Gilling family's business was well-known and something of a landmark in the Lapeer community. It was famous for palm trees that lined Lapeer Road, an unusual sight in Michigan.

In 2002, MDOT first told the Gillings that it intended to take their property for the road-widening project, but offered no timeline as to when the taking might actually occur. That uncertainty created significant difficulty for the Gillings, whose business was seasonal and could not be easily moved on short notice. To guard against the risk of a sudden order to move, and the attendant danger of losing an entire season's business, the Gillings rented an inexpensive location to function as a temporary relocation site as they waited—ultimately for three years—for MDOT's taking. Once MDOT took possession of their property, the Gillings moved to their interim location, and then moved again to a permanent site while the condemnation case was still pending. The two relocations proved time-consuming and expensive. Accordingly, in addition to reimbursement for the property taken, the

¹ 289 Mich App 219; 796 NW2d 476 (2010).

* H. Adam Cohen is a shareholder with the Birmingham, Michigan law firm *Steinhardt Pesick & Cohen, Professional Corporation*, where he specializes in representing property owners in eminent domain actions and property tax appeals. Mr. Cohen can be reached at (248) 646-0888, or by email at hacohen@spclaw.com.

** Peter H. Webster is a member of *Dickinson Wright PLLC*. Mr. Webster has represented both condemning authorities and property owners in eminent domain and related takings cases throughout Michigan and the United States. Mr. Webster can be reached at (248) 433-7513 or pwebster@dickinsonwright.com.

The authors thank John E. Scheibelhut for his valuable assistance on this article.

Gillings sought just compensation from MDOT for the relocation costs that they incurred in effectuating both moves, among other expenses.²

In the trial court, the Gillings sought “just compensation” under the Michigan Constitution³ for both the value of their real estate and business interruption damages, including their moving and relocation costs. MDOT argued that the Gillings could not recover such relocation costs in the condemnation action because they were limited to an “exclusive administrative remedy.” MDOT claimed that the administrative process outlined in Michigan and federal legislation capped the available relocation reimbursements. The Gillings argued that the administrative scheme merely supplemented, but did not preclude, a property owner’s constitutional right to receive just compensation. The trial court agreed with the Gillings, permitting them to seek just compensation for their business interruption damages, including relocation costs, at trial.

Before trial, the parties agreed to a partial just compensation award for the value of the Gillings’ building, fixtures, and other site improvements of approximately \$736,000. The remaining contested claims went to verdict, and the jury awarded \$585,000 for the Gillings’ land and \$519,550 for business interruption damages, including relocation costs.

The Court of Appeals Decision

MDOT only appealed the jury verdict relating to the relocation expenses, arguing that the administrative scheme created under the Federal Uniform Relocation and Real Property Acquisition Act of 1970⁴ (the “Uniform Act”), and its Michigan counterparts,⁵ established

an exclusive remedy by which a condemned business owner could seek reimbursement for moving and relocation costs. While MDOT claimed that the Uniform Act’s administrative scheme established various “caps” on the amount of reimbursement that a business owner is entitled to receive, the Gillings argued that those caps often did not even approximate the full damage sustained by a business due to a taking. No Michigan case previously addressed this interplay between the statutory administrative scheme and a property owner’s constitutional right to receive just compensation for business-related damages.

The Administrative Scheme Supplements, Rather than Supplants, the Property Owner’s Constitutional Right to Just Compensation

In arguing that the administrative scheme was an exclusive, rather than a supplemental, remedy, MDOT noted that each of Michigan’s statutes stated that the financial assistance and reimbursement for relocation costs provided therein “shall not be the subject of consideration in a condemnation proceeding.”⁶ MDOT argued that the legislature’s inclusion of this language clearly meant that a property owner was not permitted to seek reimbursement of relocation costs as part of just compensation at trial. The Gillings, conversely, argued that MDOT’s theory misconstrued the relationship between constitutional just compensation and the statutory administrative provisions. They contended that the statutory admonition precluded reference to administrative reimbursements, not relocation costs, at trial.

The Court of Appeals affirmed the trial court’s ruling that the statutory administrative remedies supplement a Michigan business owner’s constitutional right to receive just compensation for relocation costs. In so holding, the court noted that “no act of the Legislature can take away what the Constitution has given.”⁷ Therefore, the *Gilling* court held that the language in the statutory scheme, providing that relocation and moving allowances “shall not be the subject of consideration in condemnation

2 In addition to such relocation costs, the Gillings sought damages for their loss of the condemned property’s capped taxable value, damages for costs incurred at their interim location, reestablishment costs, and other business damages.

3 Const 1963, art 10, § 2.

4 42 USC 61. The Uniform Act was adopted to standardize federal legislation regarding relocation assistance. It provides benefits on a reimbursement basis for persons displaced as a direct result of programs or projects undertaken by a federal agency or with federal financial assistance. While the project at issue in *Gilling* was a state MDOT project, compliance with the Uniform Act was triggered by MDOT’s use of federal funds for the acquisition.

5 Relocation Assistance for Persons Displaced by Acquisition of Property for Highways Act, MCL 252.143; Relocation

Assistance Act, MCL 213.328(1); and Allowances for Moving Personal Property from Acquired Real Property Act, MCL 213.355. These provisions were enacted by the state of Michigan in the late 1960s and early 1970s as Michigan’s counterpart to the Uniform Act.

6 See MCL 252.143.

7 *Gilling*, 796 NW2d at 488 (quoting *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 374; 663 NW2d 436 (2006)).

proceedings,” simply serves to prohibit a business owner who receives reimbursement under these provisions from seeking duplicative payments at trial.

The *Gilling* court’s ruling on the “exclusive administrative remedy” issue resolved an important question in Michigan condemnation jurisprudence. Juries, not the governmental agencies charged with acquiring and paying for business owners’ properties, are the ultimate arbiters of the amount of compensation to be paid for business relocation costs.

The court concluded that, in this instance, there was no real danger of duplicative payments. It expressed significant concern about statutorily limiting a class of damages long recognized as an element of constitutional just compensation, where the goal is to put the landowner in the same position as it would have been had the taking not occurred.⁸

The Court Determines that Inventory Relocation Costs are “Lost Profits”

Having decided that the administrative scheme for relocation reimbursement is not an exclusive remedy, the *Gilling* court also addressed what was an allowable relocation expense. At trial, the Gillings successfully argued that *all* of their relocation costs (which included the costs of relocating their inventory) were properly compensable just compensation. Notably, MDOT did not argue at trial, or on appeal, that the costs of relocating inventory *specifically* were non-compensable. Rather, MDOT argued generally that all relocation costs were subject to an exclusive administrative remedy, and that relocation costs were tantamount to “lost profits,” which are non-compensable in eminent domain.⁹

The Court of Appeals, however, considered whether the trial court properly ruled that the Gillings had a right to recover costs to move their inventory as part of the just compensation award. In its analysis, the court noted that

8 *Id* at 481 (citing *MDOT v Frankenlust Lutheran Congregation*, 269 Mich App 570, 576; 711 NW2d 45 (2006)).

9 Michigan courts have held that damages for lost profits are not recoverable in an eminent domain case. *See In re Slum Clearance*, 332 Mich 485, 486; 52 NW2d 195 (1952) (the loss of a profit is not an interruption of business and is not an element of just compensation); *Detroit / Wayne County Stadium Authority v Drinkwater, Taylor & Merrill, Inc.*, 267 Mich App 625, 658; 705 NW2d 549 (2005).

Michigan case law holds that costs associated with the relocation of “trade fixtures” are properly compensable as part of just compensation.¹⁰ Case law distinguishes “trade fixtures” from “movable” personal property, which can be transported from place to place without impairing its value,¹¹ and which are not compensable in eminent domain. The court observed that “trade fixtures” can include items not physically annexed to the property, as well as other items specially adapted to the full enjoyment of the property.¹² For example, certain categories of property, such as those essential to operating the property owner’s business, can be considered “constructively annexed” to the property, thus entitling the property owner to compensation for expenses associated with the relocation of such items that might otherwise appear to be mere personalty.¹³

The *Gilling* court then framed the issue as a question of whether the Gillings’ inventory of trees, plants, and the like constituted trade fixtures. If trade fixtures, the court reasoned, the associated relocation costs could be compensable, but if personal property, then the relocation costs would not be compensable because the removal would not cause damage to the property and the costs of removal were more akin to lost profits. The court observed that, unlike the nursery’s equipment, which included water pumps, chemical fertilizers and fertilizing equipment used to maintain the business, the Gillings’ inventory constituted the “products” of the business and were specifically intended to be sold and removed from the property.

Based on this reasoning, the court held that the Gillings’ inventory was more akin to personal property than

10 *See In re Slum Clearance*, *supra* note 9.

11 *See Detroit Trust Co v City of Detroit*, 262 Mich 14; 247 NW 76 (1933) (holding that items such as horses, wagons, trucks, automobiles, office furniture and equipment, and other movable property “are of such a character that they can be transported from place to place without impairing their value[]”).

12 *Id* (holding that chemical solutions and molten metal used in an electroplating business could be considered “constructively annexed” to the property since their relocation was “essential to [the property owner’s] business”).

13 *Id*; *see also* Jason C. Long, *Casenote: Eminent Domain - Fixture Qualification - Property Is A Fixture In Condemnation If It Satisfies The Three-Step Analysis, And The Condemnee May Elect To Receive The Value-In-Place Or The Detach/Reattachment Costs For The Fixtures*: Wayne County v. William G., 563 N.W.2d 674 (Mich. 1997), 75 U. Det. Mercy L. Rev. 717, 723 (1998).

trade fixtures,¹⁴ and therefore “any losses arising from the movement of the nursery products fall within the category of non-compensable lost profits.”¹⁵ Consequently, the court held that, while the Gillings were entitled to just compensation for business interruption damages that could be proven with a reasonable degree of certainty, they were not entitled to reimbursement for the particular cost to relocate their inventory.¹⁶

The Court’s Lost Profits Discussion Departs From Precedent

The *Gilling* court also discussed the “lost profits” prohibition as it relates to condemnation law. Michigan case law holds that damages for lost profits are not recoverable in a condemnation action,¹⁷ but the court misapplied that rule to the facts in *Gilling*. The court’s previous application of the “lost profits” rule was limited to situations where property owners sought to recover damages stemming from a *decrease in profit margin* as a result of relocating a business after a governmental taking. For example, in *Detroit/Wayne County Stadium Authority v Drinkwater Taylor & Merrill*,¹⁸ a displaced taxi and delivery business sought damages for increased labor and vehicle costs as a result of its vehicles traveling to and from a new business location that was farther away from the owner’s then-existing clients. The court held that such damages amounted to a claim for decreased profitability and were therefore non-compensable under the “lost profits” rule. Similarly, in *City of Detroit v Larned Associates*,¹⁹ the condemned property owner claimed that the taking caused it to incur a steady decline in sales revenue. The court held that the property owner’s inability to reach its former level of profitability amounted to non-compensable damages under the “lost profits” rule.

The situation in *Gilling*, however, was fundamentally different: the Gillings were not seeking damages for any decrease in profit margin as a result of the taking. Rather, they were seeking to recover the cost to move their inventory from point A to point B. The fact that inventory is naturally “sold” as the means of sustaining a retail or wholesale business does not mean that the cost to move that inventory to a new location—a move necessitated by the government’s total taking of the original business location—is somehow a claim for “lost profits.” On this score, the *Gilling* court’s analysis was factually and legally incorrect.

Irrespective of the *Gilling* court’s analysis, which incorrectly characterized the cost of moving inventory as “lost profits,” the Michigan Supreme Court will likely reexamine the principle that lost profits are non-compensable in eminent domain proceedings. Business owners’ counsel would argue that there is no sound reason to afford such owners fewer rights in the context of eminent domain than that which litigants possess in ordinary contractual and “business tort” commercial litigation in Michigan.²⁰

Conclusion

In *Gilling*, the Court of Appeals provided valuable guidance and certainty by adopting a clear rule that the Uniform Acts regulating reimbursement of business relocation costs merely supplement, and do not supplant, a business owner’s right to seek relocation reimbursement in the form of constitutional just compensation. On the other hand, the *Gilling* court incorrectly analogized the costs to relocate inventory as a claim for “lost profits,” casting additional uncertainty on an area of condemnation law already in need of repair.

14 “This moveable inventory does not fall within the definition of a “trade fixture” under any of the aforementioned cases . . .” *Gilling*, 796 NW2d at 486.

15 *See id.*

16 The court also remanded part of the case on an evidentiary issue that is not germane to this article.

17 *See In re Slum Clearance*, *supra* note 9.

18 *Detroit/Wayne County Stadium Auth v Drinkwater, Taylor & Merrill, Inc*, 267 Mich App 625; 705 NW2d 549 (2005).

19 *City of Detroit v Larned Assocs*, 199 Mich App 36; 501 NW2d 189 (1993).

20 In breach of contract cases, lost profits are a recoverable measure of damages, provided that the litigant can prove damages with a reasonable degree of certainty. *See Lawrence v Will Darrah & Assocs*, 445 Mich 1; 516 NW2d 43 (1994); *see also The Vogue v Shopping Centers, Inc*, 402 Mich 546; 266 NW2d 148 (1978). Likewise, in commercial tort cases, lost profits are a proper measure of damages provided that the profits lost as a result of the injury can be shown with a reasonable degree of certainty. *See Couyoumjian v Brimage*, 322 Mich 191; 33 NW2d 755 (1948). Business owners’ counsel will argue that the same “reasonable degree of certainty” test should be applied to condemnation cases, rather than an absolute exclusion for lost profits.



WOLVERINE GOLD RUSH? A PRIMER ON THE UTICA/COLLINGWOOD SHALE AND GAS LEASE ISSUES

by Randy M. Awdish*

In 2000, natural gas production from shale formations was only one percent of U.S. Production. Currently, it is about ten percent, and the U.S. Department of Energy projects that it will increase to thirty-four percent by 2030. Current media attention has focused on the Marcellus Shale, a large shale formation in the northern Appalachian basin that has seen a lot of activity in recent years. Attention is now slowing being turned to emerging Collingwood Shale opportunities in northern Michigan.

What Sparked the Hype?

Over a two-year timespan, Calgary-based Encana Corp. quietly accumulated about 250,000 net mineral acres in seven Michigan counties, centered in Cheboygan, Kalkaska and Missaukee counties, at an average lease bonus of \$150 per acre (with mineral rights pursuant to seven-year terms).¹ In spring, 2010, Encana's subsidiary Petoskey Exploration LLC revealed that it had successfully tested a well in Missaukee County (commonly known as the "Petoskey Pioneer 1-3 well" or "Pioneer well") in the Collingwood Shale formation. The Pioneer well produced at an average rate of 2.5 million cubic feet equivalent per day (including natural gas liquids constituents and condensate) during the first 30 days of production. This well targeted the Collingwood Shale at 9,500 foot true vertical depth, with a 5,000 foot horizontal penetration, using a process known as hydraulic fracturing (also referred to as "fracking" or "fracing").

1 Encana Corp. News Release dated May 7, 2010, available at <http://www.encana.com/news/newsreleases/2010/0507-michigan-basin.html> (accessed June 27, 2011).

Fresh on the heels of the apparent success of the Pioneer well, a state auction of mineral lease rights on various tracts in May, 2010 netted the state more than \$178 million in bonus payments (breaking the record of \$23.6 million set in 1981). The average price per acre paid at the auction was \$1,507 (as compared to \$26 per acre in previous auctions); the highest price paid was \$5,500 per acre. To highlight the significance of this auction, the Michigan Department of Environmental Quality ("MDEQ") noted that the sum of all previous auctions dating back to 1929 totaled \$190 million.

The follow-up state auction in October, 2010, however, did not produce nearly the interest the May, 2010 auction sale had. Only 273,000 acres of the 450,000 acres offered by the state were leased. The average lease price was \$40 per acre, raising a total of only \$10 million. Moreover, at the following state auction held in May, 2011, the MDEQ sold only 80% of the 44,000 acres of state-owned oil and gas lease rights offered, raising a total of only \$771,944, for an average price of \$19.48 per acre. These average acre prices are a far cry from the average price per acre of \$1,507 paid at the May, 2010 auction.

It can be speculated that sales at these auctions were tempered because the production of the Pioneer well dropped to 800,000 cubic feet per day (as compared to 2.5 million cubic feet for the first 30 days of production).²

2 "Typical" Michigan Oil and Gas Lease Auction Casts Doubt on Collingwood Shale Formation, Circle of Blue November 9, 2010, available at <http://www.circleofblue.org/water->

* Randy M. Awdish is an attorney in Pepper Hamilton LLP's Detroit office with extensive leasing experience for a variety of types of projects. For oil and gas leases, he works with John Carroll, an attorney in Pepper Hamilton LLP's Harrisburg office, who is nationally recognized as an expert on oil and gas lease matters.

According to Jeff Wojahn, Executive Vice President and President of Encana's U.S. division, the Pioneer well was "sub-commercial."³ It is also possible, however, that the oil and gas companies themselves may be trying to cool interest in the Collingwood Shale to drive prices down.⁴ In addition, environmental concerns have been reported in other states where hydraulic fracturing is used, which may have led to speculation that the MDEQ may change the rules regulating this process.

It is not clear, however, whether the October, 2010 and May, 2011 auctions signal a return to the typical sales for a Michigan auction of mineral lease rights or a temporary cooling of interest. As Mary Dettloff, spokeswoman for the MDEQ, stated: "We know that there's still interest in [the Collingwood Shale], given the enormous natural gas capacity in the state. I think we will have to wait a few more auctions to see if a trend emerges."⁵

What is the Utica/Collingwood Shale?

The Collingwood Shale is a natural gas field between 10,000-12,000 feet below much of the northern third of Michigan, in the heart of the Michigan Basin. It is about 40 feet thick and is sandwiched between the Utica Shale (above) and Trenton Black River limestone formation (below).

The Collingwood Shale is sometimes referred to as the Utica Collingwood Shale or Collingwood Utica Shale. The Utica and Collingwood Shales are, however, two separate shale formations, with the Utica Shale overlying the Collingwood Shale. In any event, the Michigan Utica Shale should not be confused with the Utica Shale that underlies the Marcellus Shale in the eastern United States. Some have estimated that the eastern Utica Shale is an even bigger opportunity than the Marcellus Shale, which is currently dominating the headlines. To date, there is no known drilling or production from the Michigan Utica Shale, only the Collingwood Shale.⁶ It is believed, howev-

er, that natural gas produced from the Collingwood Shale will have some contribution from the overlying Utica Shale (as was the case with the Pioneer well).

Interest in Michigan's Collingwood Shale is not limited to Encana. BreitBurn Energy Partners L.P. (33% of which is owned by Quicksilver Resources) and Atlas Energy also seem poised to participate in the Collingwood Shale gas opportunity. BreitBurn owns approximately 470,000 net mineral acres in Michigan, and it believes that approximately 90,000 net mineral acres are prospects for the Collingwood Shale.⁷ Much of BreitBurn's acreage is "held by production" (a provision in the lease that allows the lessee to continue drilling activities on the property as long as it is producing a minimum paying amount of gas or oil, which thereby extends the lessee's right to operate the property beyond the initial lease term). As noted by BreitBurn's COO, not only is BreitBurn the owner of significant acreage, it also has extensive infrastructure in Michigan, owning and operating "more than 150 miles of high pressure gas gathering lines over 1,000 miles of low pressure line, more than 100,000 horsepower of compression, three gas processing plants and four NGL (natural gas liquid) recovery plants."⁸ Atlas Energy approximates that it has 70,000 net mineral acres exposed to the Collingwood Shale and has 83% of the leases held by production.⁹

The Hydraulic Fracturing Process

Natural gas has long been produced from rock formations that have "natural" fractures that enable some movement of gas. Deep subsurface non-permeable "tight" gas shales, however, have small fissures that provide little natural gas movement, which does not permit viable production from these formations using traditional methods. The fissures in these shales require "artificial" fractures to allow the natural gas to move more freely from the rock

news/2010/world/"typical"-michigan-oil-and-gas-lease-auction-casts-doubt-on-collingwood-shale-formation/> (accessed June 27, 2011).

3 EnCana Q2 2010 Earnings Call Transcript, July 21, 2010, available at <<http://seekingalpha.com/article/216690-encana-q2-2010-earnings-call-transcript?part=qanda>> (accessed June 27, 2011).

4 "Typical" Michigan Oil and Gas Lease Auction Casts Doubt on Collingwood Shale Formation, *supra* note 2.

5 *Id.*

6 There is, however, a lag in reporting and updates to Michigan's

online Oil and Gas database, available at <http://ww2.MDEQ.state.mi.us/mir/> (accessed June 27, 2011).

7 BreitBurn Energy Partners LP Q1 2010 Earnings Call Transcript, May 10, 2010, available at <<http://seekingalpha.com/article/204287-breitburn-energy-partners-lp-q1-2010-earnings-call-transcript?find=collingwood>> (accessed June 27, 2011).

8 *Id.*

9 "Say Hello to the Collingwood Shale", Investopedia, May 18, 2010, available at <<http://stocks.investopedia.com/stock-analysis/2010/say-hello-to-the-collingwood-shale-atls-eca-bbep-kwk0518.aspx>> (accessed June 27, 2011).

pores to the production wells. The process of creating these artificial fractures is known as hydraulic fracturing or “fracking.” While fracking has been practiced by the industry for many years, the development of horizontal drilling techniques coupled with fracking has opened up the possibility of extracting natural gas from tight shale formations. The combination of these technologies has led to a boom in these so-called “unconventional” gas plays, such as the Barnett Shale of Texas, the Marcellus Shale in the Appalachians, and the Fayetteville Shale in Arkansas.

Hydraulic fracturing begins with the construction of a vertical well bore—which could range from hundreds to thousands of feet below the surface—to a point above the target formation called the “kick-off” point, at which the vertical well bore is gradually bent to create a horizontal borehole by the point the drill bit enters the productive zone of the shale. Once the well bore has reached the productive zone of the shale, it is then extended horizontally, for a distance ranging from 1,000 to 6,000 feet. For the Collingwood, this exposes up to 6,000 feet of productive shale to the fracking process rather than the 40 feet from which gas could be extracted were the well to penetrate the shale vertically, rather than horizontally. After total depth of the drilling is achieved, a mixture of water and chemical additives (“fracking fluid”) is pumped into the geological formation through the well bore to open or enlarge the fissures in the shale—that is, to create the “artificial” fractures. Along with the fracking fluid, a propping agent (such as sand) is pumped into the well to keep the fractures from closing after the pumping pressure is released. Once the fracturing process is complete, the internal pressure of the shale causes the injected water mixture to rise back up to the surface wellhead along with briny formation water. The mixture that returns to the surface is referred to as the flowback. After the water mixture is removed, the artificial fractures will allow the natural gas to flow through the opened fissures and rise toward the surface to be captured by the producer.

Hydraulic fracturing has been used throughout the United States for more than 60 years (although this process has not been widely used for natural gas development until recently). Michigan has a relatively long history with the use of hydraulic fracturing. Since the mid-1980s, approximately 12,000 wells have been hydraulically fractured in Michigan, with most of these wells in the Antrim Shale formation in the northern Lower Peninsula.¹⁰ For

¹⁰ “Hydraulic Fracturing of Natural Gas Wells in Michigan,”

a typical Antrim gas well, a fracture treatment requires about 50,000 gallons of water since these wells are shallow (typically ranging from 150 feet to 1,500 feet).¹¹ It is estimated that the deeper Collingwood Shale will require about 5 million gallons of water, or 100 times more than used in a typical Antrim well.¹² Presently in Michigan, there are two deep-shale wells in place, 15 active well permits and 12 permits under review.¹³

What Effect Does Hydraulic Fracturing Have On The Environment?

With the increase in the use of hydraulic fracturing, there has also been a rise in the debate associated with potential impact on the environment related to this process—mainly related to potential issues with the contamination of water supplies near the operations.

Notwithstanding concerns that hydraulic fracturing may contaminate the drinking water in areas where this process is being used, this process is currently exempt from federal regulation (unless diesel fuel is included as a component of the fracking fluid). The federal Energy Policy Act of 2005 specifically exempted hydraulic fracturing from the Safe Water Drinking Act and Clean Water Act (the exemption is commonly referred to as the “Halliburton Loophole”). The U.S. Environmental Protection Agency (the “EPA”) is currently studying the risks associated with hydraulic fracturing. On February 7, 2011, the EPA released its Draft Plan to Study the Potential Impacts of Hydraulic Fracturing on Drinking Water Resources. This draft merely announces what the EPA plans to research. The EPA has limited the study to impacts on drinking water resources, prompting outrage from many interest groups, who are also calling on the EPA to expand the study to include air and other impacts. EPA’s proposed research is divided into five broader areas of inquiry (based on EPA’s conception of hydraulic fracturing’s water lifecycle): (1) water acquisition; (2) chemical mixing;

Michigan Department of Environmental Quality, Office of Geological Survey, updated May 31, 2011, page 2, available at <http://www.michigan.gov/documents/MDEQ/Hydrofrac-2010-08-13_331787_7.pdf> (accessed June 27, 2011).

¹¹ *Id.*

¹² *Id.*

¹³ ‘Fracking’ controversies skip Michigan, for now, Midwest Energy News, available at <<http://www.midwestenergynews.com/2011/02/22/fracking-controversies-skip-michigan-for-now/>> (accessed June 27, 2011).

(3) well injection; (4) flowback and produced water; and (5) wastewater treatment and waste disposal. EPA expects to have its initial research results in late 2012 and to publish its final report sometime in 2014.

Because of the lack of federal rules regulating hydraulic fracturing, it is up to each individual state to enact regulations to address concerns that may arise out of this process. Many states are in the process of reviewing their current regulations and considering implementation of additional environmental safeguards. For example, there is currently a moratorium on horizontal fracking in the State of New York that prevents the issuance of new permits for horizontal drilling into the Marcellus Shale until the New York Department of Environmental Conservation conducts a study on hydraulic fracturing's impact on the environment. Moreover, the Delaware River Basin Commission ("DRBC") must approve any drilling for natural gas in the Delaware River Basin. The commission has rarely granted this approval, amounting to a de facto moratorium on natural gas projects in this region. However, the DRBC released a set of proposed regulations in December, 2010 outlining the guidelines for allowing hydraulic fracturing, although these regulations have been met with strong opposition from the governors of two DRBC states: New York and New Jersey.

Michigan has a long history of oil and gas production, dating back to the 1930s. Production of natural gas in Michigan is approximately 400 million cubic feet per day. The Antrim Shale has long been in production in Michigan, with records showing a handful of wells producing as far back as the 1940s.¹⁴ This formation lies in the Michigan Basin, with principal development in Montmorency and Ostego Counties (and to a lesser extent in Kalkaska, Crawford and Oscoda Counties).¹⁵ Antrim Shale gas is currently the most active play in Michigan, with about 9,700 wells producing gas from this formation in 2010.¹⁶ A typical Antrim Shale well

produces about 35 thousand cubic feet per day;¹⁷ this formation has produced more than 2.6 trillion cubic feet of gas since development began.¹⁸

With the long history of oil and gas production in Michigan has come a well-established regulatory scheme. MDEQ regulates hydraulic fracturing, as well as every other aspect related to oil and gas drilling and production, pursuant to Part 615 (Supervisor of Wells)¹⁹ and Part 625 (Mineral Wells)²⁰ of the Natural Resources and Environmental Protection Act, together with the related administrative rules. The Michigan Office of Geological Survey (the "OGS") has stated that Michigan's laws effectively protect Michigan's water supply and other natural resources, as well as the public's health and safety from potential adverse effects of hydraulic fracturing.²¹ The OGS further states that hydraulic fracturing has had a relatively benign history in Michigan and that concerns have been raised in Michigan primarily because of issues raised in other states. As summarized by the OGS, these concerns center on the following five issues: "(1) migration of gas or fracture fluids, (2) water use, (3) management of produced water, (4) surface spills, and (5) identification of chemical additives."²² These issues, and how they relate to Michigan, are summarized by the OGS as follows:²³

Migration of Gas or Fracture Fluids. One of the major concerns regarding natural gas development is the possibility of gas or other fluids from the reservoir migrating into fresh water aquifers. To the extent this has occurred,

14 "About Michigan's Natural Gas Industry: Exploration and Production," Michigan Public Service Commission, available at <<http://www.dleg.state.mi.us/mpsc/gas/about1.htm>> (accessed June 27, 2011).

15 Antrim Shale, available at <<http://oilshalegas.com/antrim-shale.html>> (accessed June 27, 2011).

16 See "About Michigan's Natural Gas Industry: Exploration and Production," *supra* note 14.

17 See *id.*

18 "Encana, several other producers developing Collingwood shale," Oil&Gas Financial Journal, June 22, 2010, available at <http://www.ogfj.com/index/article-display/0885075621/articles/oil-gas-financial-journal/unconventional/utica/encana-several_other.html> (accessed June 27, 2011).

19 MCL 324.61501, et al. See also MAC 324.101, et al. for the administrative rules.

20 MCL 324.62501, et al. See also MAC 299.2301, et al. for the administrative rules.

21 See "Hydraulic Fracturing of Natural Gas Wells in Michigan," Michigan Department of Environmental Quality, Office of Geological Survey, updated May 31, 2011, p 3, *supra* note 10.

22 See "Hydraulic Fracturing of Natural Gas Wells in Michigan," Michigan Department of Environmental Quality, Office of Geological Survey, updated May 31, 2011, p 1, *supra* note 10.

23 See "Hydraulic Fracturing of Natural Gas Wells in Michigan," Michigan Department of Environmental Quality, Office of Geological Survey, updated May 31, 2011, p 2, *supra* note 10.

it is not associated with the hydraulic fracturing process, but is a result of problems with the construction of the well itself. Due to the depth of the Collingwood Shale, the overlying rock layers themselves prevent fractures from extending above the top of the gas reservoir, thus preventing the possibility of gas or other fluids migrating into the fresh water aquifers. Theoretically, there is a greater possibility of contamination of fresh water aquifers arising from Antrim gas well operations because of the proximity of these wells to the fresh water aquifers. In any event, Michigan law requires all oil and gas wells to have a casing and cementing plan to contain gas and other fluids within the wellbore, whether related to fracturing or not. Prior to fracturing or other operations taking place to complete a well for production, an additional string of production casing must be set to the depth of the reservoir and cemented in place, with additional protective casing required depending on the depth. Additionally, Supervisor of Wells Instruction 1-2011 requires the reporting of volumes, rates and pressures, including pressure immediately outside of the pipe used to inject the fracking fluid.

Water Use. As noted above, a typical Antrim gas well requires about 50,000 gallons of water, while a Collingwood gas well is estimated to require about 5 million gallons. For deep horizontal wells, MDEQ imposes a condition on permits that requires the permittee to undertake the same water withdrawal impact assessments that apply to other large volume users of water. It should be noted that while 5 million gallons seems like a lot of water, this is equivalent to the amount of water consumed by: (a) New York City in approximately seven minutes; (b) a golf course in 25 days; or (c) 7.5 acres of corn in a season.²⁴

Management of Produced Water. In order to protect the public health and the environment, it is crucial that there is proper management of flowback water. In Michigan, all flowback water, which includes water produced along with oil or gas during subsequent production operations, is considered oil and gas waste. Accordingly, it must be managed and disposed of according to the strict rules that specifically apply to those fluids. Unlike other states, such as Pennsylvania where flowback fluid is al-

lowed to be stored in ponds on the surface, in Michigan, flowback must be contained in steel tanks at the well site and thereafter transported to disposal wells where they are injected into deep rock layers isolated from fresh water supplies. These disposal wells are licensed by both the MDEQ and EPA. Supervisor of Wells Instruction 1-2011 requires the reporting of flowback water recovered after a hydraulic fracturing operation.

Surface spills. If there is a spill of chemical additives or flowback water, there can be adverse environmental or public health impacts. Accordingly, in those areas where spills are most likely, such as under the steel tanks and wellheads, Michigan requires secondary containment. Any spills must be immediately reported to the MDEQ and remediated according to strict requirements.

Identification of Chemical Additives. Supervisor of Wells Instruction 1-2011 requires oil and gas operators to provide the MDEQ with copies of all Material Safety Data Sheets (“MSDSs”) for additives used in hydraulic fracturing. Additionally, the MSDSs must be posted wherever the additives are stored, transported or used. The MSDSs include information on physical characterizations, toxicity, health effects, first aid, reactivity, storage, disposal, protective equipment and spill response. The MDEQ will post these on its website so that the public may view them. While the details on some of the chemical additives that are proprietary in nature are exempted from disclosure on the MSDSs pursuant to federal law, the MDEQ is confident that the MSDSs will provide enough information to track and monitor spills. Moreover, if there is significant spill or health hazard, the MDEQ has the legal authority to obtain the necessary details on chemical composition and concentrations, regardless of whether the mixture is proprietary in nature.

Even with all of the current regulations in effect, Michigan is considering changes. For example, the Michigan House of Representatives has proposed a bill that would provide for a presumption of liability if groundwater in the vicinity of a well using hydraulic fracturing contains one or more hazardous substances injected into that well while conducting hydraulic fracturing.²⁵ Moreover, the state is considering changing the well density for such drilling to 640 acres per well (as opposed to 40 to 80

²⁴ “Water Use in Deep Shale Gas Exploration Fact Sheet,” Chesapeake Energy, July 2010 at 2, available at <http://www.chk.com/Media/CorpMediaKits/Water_Use_Fact_Sheet.pdf> (accessed June 27, 2011).

²⁵ House Bill No. 4736, June 14, 2011.

acre spacings for more conventional wells).²⁶ Finally, the MDEQ is closely watching the study that the EPA is preparing and has pledged to make changes to its laws based on the study's results.²⁷

Lease Issues from a Lessor's Perspective

As a result of these recent developments, many owners of land in areas known for their shale formations are receiving inquiries. Agents for gas companies, commonly referred to as "landmen," approach owners of rights to the gas-containing shale deposits with a proposal to lease these rights. While an oil and gas lease may look like a form document that is non-negotiable, the person that owns the mineral rights (the lessor) should know that gas companies are often willing to compromise on many provisions in the form lease that are otherwise unfavorable to the lessor.

When a lessor negotiates its lease, in addition to focusing on the monetary rewards (i.e., royalty and per-acre lease payments), it should be sure to focus on other equally (or more) important provisions in the lease (e.g., provisions to protect the lessor from potential negative consequences that arise from the exploration and production activities taking place on its property). Lessors in areas where the gas play is considered "hot" will have the ability to negotiate more favorable terms than those lessors in areas where unproven reserves are more speculative in nature.

Unfortunately, there is no standard "form" lease that all gas companies will use, with gas companies using a form that suits them—which often contains provisions to the detriment of the lessor. If possible, prior to entering into any lease, the lessor should attempt to gather as much information as it can about the gas company. If leases are being acquired in the name of landmen, the lessor should insist on finding out the identity of the lessee so as to have a better understanding of the experience of the company and any issues the company may have

had in the past. Once the lessor has made the decision to lease its gas rights, a lessor will want to review the lease to address the following types of issues:

Description of the Surface and Subsurface Rights to be Leased. It is important that the lease accurately describes the surface and subsurface rights that are to be leased to the gas company. With respect to surface rights, many leases will generally describe the surface to be leased with reference to adjoining property owner lines. If it is the intention of the parties that only a portion of the surface is to be leased, the lease should accurately describe this area. Correspondingly, the lessor should at all costs negotiate the removal of any so-called "Mother Hubbard" clause, the effect of which is to cover any errors in the description of the entire property so as to include missing land. In situations where only a portion of the property is to be leased, this provision must be stricken as it is not appropriate. Similarly, the lessor should consider addressing the depth of the subsurface rights to be leased to the gas company if there is the potential for production from formations that are beyond the means, or agreement of the parties, for development by the present lessee.

Granting Clause. The granting clause describes the substances that can be explored and produced from the land. Generally, a form lease will be broad and cover all "oil, gas and other minerals." The lease should accurately describe those substances that the parties agree can be explored and produced. While the economics of the lease may be good for the substances identified by the parties, the lessor may be selling itself short for other substances that were not intended to be part of the original deal (i.e., the "other minerals"). The lessor may have been able to command a higher royalty payment for these other substances, either now or in the future. Accordingly, if the parties intend to limit the lease to natural gas and related hydrocarbons, the lease should reflect this agreement. In any event, the lessor should request that the lease require the lessee to release all rights to depths below the deepest producing perforation at the end of the primary term.

Term of the Lease and Shut-In Provisions. The primary term of the lease is generally a stated number of years, during which the lease stays in effect so long as the lessee continues to make the required rental payments. Rental payments paid during the primary term are referred to as "delay rental" because the payment is only made until production is obtained from the premises, at which time

26 A hearing on this item was to take place on August 31, 2010. However, all of the parties agreed that there was not enough information to make a decision at that time. The next status report is due at the end of June 2011. At that time, a decision will be made as to whether there is enough information to hold hearings on this item.

27 See 'Fracking' controversies skip Michigan, for now, *supra* note 13.

royalty payments will compensate the lessor and delay payments will no longer be required. Modern day leases will generally provide that if “drilling operations” are not commenced within a stated amount of time (such as one year from the date the lease is entered into), the lease will terminate “unless” the lessee pays delay rental to the lessor. It is important to make sure that the lease includes an “unless” clause (which most modern leases do), as opposed to older leases, which generally provided that the lease would continue if a well had been drilled “or” lessee otherwise received delay rental. The “unless” clause allows the lease to automatically terminate if the delay rental is not timely received by lessor. Accordingly, the lease should specifically provide for the time, manner and basis for payment of the delay rental. The lessor should also be mindful that acceptance of a delay rental payment after the date set forth in the lease could be construed as agreeing to extend the lease. It is also important to clearly identify what constitutes “drilling operations” and when operations are completed so that the parties are able to determine when a delay rental payment must be paid. Furthermore, in negotiating the lease, a lessor should attempt to keep the primary term as short as possible (which will force earlier explorations by the lessee). Alternatively, the lessor should try to negotiate a favorable delay rental payment, and in any event, should keep a mindful eye as to the date the delay rental payment must be made.

It should be noted that many lessees prefer to negotiate a “paid-up” lease, in which there are no delay rentals due each year because the lessee has paid a lease bonus calculated on a per acre basis at the inception of the lease to represent the delay rental that would otherwise have been paid during the primary term of the lease.

The lease will also provide for a secondary term, which typically will provide that the lease will continue in effect after the primary term for so long as oil or gas is produced, thus making the lease effectively perpetual during the period of active gas production.

During the secondary term, the term of a lease can be extended contractually by what is known as a shut-in provision. This provision provides that payment by a lessee of a shut-in royalty is construed as production in paying quantities. Accordingly, this has the effect of classifying the well as a producing well so that the lease will not terminate.

Royalty/Consideration. From an economic perspective, the royalty provision is the most important provision in the lease for the lessor. Typically, the lease will provide that a lessor is paid a fraction or percentage of the oil and gas produced from the premises. A one-eighth share is a common royalty amount, but this amount will vary depending on the expectation of lessee’s return (with a potentially lower amount in undeveloped areas where the risk is high or a higher amount in areas where significant production is likely to be found). A factor that should be considered in connection with the royalty payment is whether any costs can be deducted (e.g., transportation, marketing and treating costs). Care should be given to prohibiting or limiting these costs and whether these costs are to be shared or borne solely by the lessee. Once the royalty amount is determined, the parties must agree on the basis on which the royalty payment will be calculated. Typically, there are two common methods: (1) value based on the “proceeds” or (2) the “market value.” Royalties based on the “proceeds” will tie the value of the royalty payment to the actual sales price received from the sale of the gas (which may not necessarily reflect the actual market value of the gas). This method may provide less income than royalty that is calculated on the “market value” of gas. Market prices are generally calculated considering the market price of the gas based on the following factors: the market price is first determined at the well head, and if there is no such market, then the market price prevailing in the field, and if there is no such market, the value as determined by sales of marketing outlets, and finally if no such market exists, based on the actual value of the substance. If possible, the lessor should require that royalties will be based on the higher of market value or proceeds received by the lessee at the point of sale (not net proceeds at the well). If the lessor has a good bargaining position, the lessor can attempt to provide that royalties are paid either in “proceeds” or “in kind.” This type of royalty payment option provides lessor the option of being paid royalties in kind, which the lessor will elect to employ when the market price of the gas rises above any commitment price in the lease. If this is the case, lessor will take its share of the gas “in kind” and thereafter seek an alternative market outlet to sell the gas.

Pooling and Pugh Clauses. A typical lease will contain a provision allowing the lessee the right to consolidate or “pool” the leased premises with adjoining premises. If adjoining properties are pooled, this allows the lessee to operate these pooled properties as a “unit.” This pooling

arrangement makes sense from both a lessor's and lessee's perspective. From a lessor's perspective, a pooling arrangement allows each adjoining landowner to share in the production of oil and gas from the reservoir regardless of the location of the well (which makes sense given the fact that oil and gas do not obey property lines and adjoining landowners have a common interest in the underground reservoir). From a lessee's perspective, the lessee can avoid unnecessary drilling, thus preventing waste. These pooling arrangements are sometimes necessary to meet minimum acreage requirements for a drilling permit under state regulations. For example, in Michigan, a typical drilling operation requires that there be a minimum of 40 acres for each well head for the issuance of a permit.

There are two types of pooling arrangements: (1) voluntary or (2) compulsory. A voluntary arrangement will require the consent of the lessor, which is generally provided for in most lease forms. A compulsory arrangement is one that is put in place by the applicable regulating agency in accordance with a state's regulatory scheme. There is little that a lessor can do to avoid a statutory pooling arrangement. Lessors, however, should carefully negotiate their lease with respect to voluntary pooling arrangements, and should exercise great caution in granting to the lessee unrestricted rights to pool the leased premises. This is because the inclusion of only a fraction of the premises covered under a lease may have the effect of continuing the lease indefinitely. This results in the lessor being paid a small royalty, but causing the remainder of the lessor's property that is not being pooled to be underdeveloped. Accordingly, the lessor should require the lease: (a) to provide voluntary pooling in the lease only to the extent necessary to obtain a drilling permit from the state; (b) to provide that the pooled lands be contiguous (to avoid the lessee gerrymandering unit lines to keep as many leases in force as possible); (c) to require pre-approval of the lessor prior to any pooling arrangement; (d) to provide the pooling area be limited to certain producing strata or any producing formation that may be encountered; and (e) to require all pooling to occur prior to drilling operations.

In any event, lessors should insist on the inclusion of the so-called "Pugh" clause. A Pugh clause provides that inclusion of acreage from the leased premises in a pooling unit extends the lease term only to the extent of the included acreage, which effectively provides for a severance of the lease into separate tracts.

Surface Issues. If the lessor owns the surface rights, or otherwise has obligations to the owner of these rights, the lessor will want to limit the types of operations and structures that are constructed on the surface. Moreover, the lessor will want to protect the surface area from impacts arising out of the operations of the lessee. Regardless of whether the lessee is responsible for any surface damage, the lessor should consider addressing the following issues in the lease: (a) restrictions on the location of the wells (for example, requiring a minimum distance from any structure or dwelling); (b) restricting the right to construct permanent facilities (e.g., storage tanks and compressor stations); (c) attaching a map identifying where roads, pipelines, storage tanks and wells should be located or otherwise requiring that the lessor be consulted on the location of these items; (d) in rural areas, requiring pipelines to be buried below plow depth; and (e) addressing whether the lessee's structures and equipment must be removed at the end of the lease.

With respect to minimizing impact on the surface area arising out of the lessee's operations, the lessor will be concerned with the following types of issues: (a) compensation for all damages to the surface arising out of the lessee's operations; (b) liquidated damages for breach of various covenants (e.g., locating wells, roads and pipelines in areas other than agreed to by the parties); (c) restoring the surface to the condition prior to the commencement of operations; (d) providing for the method(s) to be used to determine the amount of damage suffered, and if the parties are unable to agree, providing for how the dispute will be resolved (e.g., arbitration); (e) requiring a bond or other form of security for potential surface damage claims; and (f) prohibiting lessee's use of water from lessor's wells and otherwise restricting the use of subsurface fresh water for drilling operations only (and not secondary recovery operations).

Assignment Rights. Especially if the lessor has taken the time to learn about the lessee it entered into a lease with, the lessor should consider restricting the lessee's ability to assign the lease. In any event, the lessor should require that the lease cannot be assigned without the lessor's written consent, and if the lessee will not agree to this restriction, at the very least provide that the assignment is not binding on the lessor until it has received written notice of the assignment. Moreover, the lease should provide that an assignment by the lessee will not relieve the lessee of any liability under the lease, before or after the assign-

ment, so that the lessee will be jointly and severally liable with the assignee for all lease obligations.

Warranty of Title. Most leases will contain a warranty of title provision, which requires the lessor to defend title to the interest leased if a dispute ever arises concerning the ownership of such rights. Lessors should seek to delete this language in order to avoid costs associated with potential disputes relating to the leased interests. In any event, landmen or gas companies will have done their due diligence as to who owns the gas rights, so the warranty clause should not be necessary.

Access to Information. The lease should require the lessee to furnish copies of all information that is relevant to the drilling operations, such as permits and meter readings, so that lessor is able to verify compliance with the lease terms.

Limitation on Force Majeure Events. Force majeure clauses in leases should be revised to: (a) require lessee to provide notice to lessor upon the commencement of a force majeure event, and (b) limit the number of days beyond the end of the primary term that a force majeure event will keep the lease in force.

Although regulatory developments in other states will be of interest and activity at the federal level will certainly have an impact, Michigan's history of dealing with similar issues should make it a relatively stable regulatory environment for developing the Collingwood Shale notwithstanding the issues with hydraulic fracturing. Depending on results of future test wells in the Collingwood Shale, Michigan may soon be experiencing its own gold rush.



Judicial Decisions Affecting Real Property

by Ronn S. Nadis and Sarah Heisler Gidley



The Section is active in the judicial process in a variety of ways, such as preparing *amicus curiae* briefs and monitoring cases of interest to real estate lawyers. This Article provides a quarterly report designed to inform Section members about the Section's efforts to maintain the integrity of the law and to advise Section members about published decisions that may impact real estate practice.

Special Thanks. The Section extends its sincere appreciation to the SBM and the e-Journal staff. The original drafts to these case summaries were prepared for and published in the e-Journal. The e-Journal is a daily publication that provides case summaries organized by areas of practice, legal news and updates, public policy information, a calendar of events, and classified and fields of practice listings. The e-Journal is an invaluable tool for keeping current on Michigan law. Subscriptions to the e-Journal are free. You can subscribe by visiting the State Bar of Michigan website at www.michbar.org, and selecting the publications and advertising tab.

The Following Cases Involving Real Property Issues Have Been Published Since The Last Issue Of *The Review*

Klooster v. City of Charlevoix
488 Mich 289; 795 NW2d 578 (2011)

March 10, 2011

Issues: The General Property Tax Act (GPTA)(MCL 211.1 et seq.); Whether a “conveyance” as that term is used in MCL 211.27a(3) must be by means of a written instrument; Proposal A amending article 9, § 3 of the Michigan Constitution; The “joint-tenancy” exception; The “transfer of ownership” and “uncapping event”; The “original owner of the property”; The “conveyance

at issue”; The “original-ownership requirement” and the “continuous-tenancy requirement”; Whether under MCL 211.27a(7)(h) the petitioner’s property was uncapped for purposes of property-tax reassessment by either the death of the other joint tenant in January 2005 or the creation of a subsequent joint tenancy in September 2005; “When”; How MCL 211.27a(7)(h) *would* apply to the creation of a successive joint tenancy

Judge(s): Cavanagh, Young, Jr., M. Kelly, Markman, Hathaway, M.B. Kelly, and Zahra

At issue in this case was whether, under the GPTA, the petitioner’s property was uncapped for purposes of property tax reassessment, by either the death of his joint tenant in January 2005 or the creation of a subsequent joint tenancy in September 2005. The Court held that a “conveyance” for purposes of MCL 211.27a does not require a written instrument and therefore the January 2005 termination of the joint tenancy caused by the death of a cotenant was within the joint-tenancy exception created by MCL 211.27a(7)(h) and was not a transfer of ownership that uncapped the property value; however, the September 2005 conveyance from the petitioner to himself and his brother as joint tenants did uncap the property value, because the conveyance did not fall within the joint-tenancy exception. Thus, the Court reversed the judgment of the Court of Appeals and held that the respondent-city properly issued its 2006 notice of reassessment and that the Tax Tribunal reached the correct result, albeit for the wrong reason. In 1959, James and Dona Klooster acquired title to the property and held it as tenants by the entirety. On August 11, 2004, Dona quitclaimed her interest in the property to James, leaving James as the sole owner. On that same day, James quitclaimed the property to himself



and his son, petitioner, as joint tenants with rights of survivorship. On January 11, 2005, James died, leaving petitioner as the sole property owner by operation of law. On September 10, 2005, petitioner quitclaimed the property to himself and his brother, Charles, as joint tenants with rights of survivorship. In 2006, the city assessor issued petitioner and Charles a notice of assessment, taxable valuation, and property classification, indicating that, because of a transfer of ownership, the property's taxable value had been reassessed using the true cash value of the property. The notice did not state whether the termination of the joint tenancy caused by James's death in January 2005 or the September 2005 creation of the joint tenancy between petitioner and Charles constituted the transfer of ownership. As a result of the reassessment, the taxable value of petitioner's property increased from \$37,802 to \$72,300. Petitioner challenged the reassessment, because MCL 211.27a(7)(h) excludes certain transfers creating or terminating joint tenancies from the definition of a "transfer of ownership" that uncaps property tax reassessments. The Tax Tribunal affirmed, ruling that James' death resulted in a "conveyance" that uncapped the property value. The Court of Appeals reversed, holding that a "conveyance" under the GPTA requires a written instrument, and thus James' death was not a transfer of title that would uncap the property tax. The Supreme Court granted leave to address whether a "conveyance" under MCL 211.27a(3) must be by means of a written instrument and whether, under MCL 211.27a(7)(h), the property was uncapped by either the death of James in January 2005 or the creation of the subsequent joint tenancy in September 2005. First, the Court held that a "conveyance" does not require a written instrument, and the Court of Appeals' decision was in error. The plain text of MCL 211.27a indicates that the Legislature did not intend that conveyances must be effectuated by means of a written instrument for purposes of the GPTA. Thus, the Court held that the vesting of a fee simple in the last surviving cotenant of a joint tenancy with rights of survivorship is a "conveyance" for purposes of the GPTA and requires no additional writing beyond that which created the joint tenancy. Second, the Court held that the termination of joint tenancy caused by James' death in January 2005 falls within the exception of MCL 211.27a(7)(h) and was not a transfer of ownership that uncapped the property, but the creation of a joint tenancy between petitioner and his brother in September 2005 did not fall within the exception, and thus was a transfer of ownership that uncapped the property tax assessment. MCL 211.27a(7)(h) estab-

lishes two requirements for the joint-tenancy exception. The "original-ownership requirement" excludes "transfers creating or terminating a joint tenancy ...if at least 1 of the persons was an original owner...before the joint tenancy was initially created"; an "original owner" is someone who was an owner (or spouse of an owner) at the time of the last uncapping event. The "continuous-tenancy requirement" applies only in the context of successive joint tenancies, and requires that "if the property is held as a joint tenancy at the time of the conveyance, at least 1 of the persons was a joint tenant when the joint tenancy was initially created and that person has remained a joint tenant since the joint tenancy was initially created." Thus, the January 2005 conveyance is exempt because it fulfills both requirements; James was an "original owner" and petitioner "was a joint tenant when the joint tenancy was initially created" in August 2004 and remained a joint tenant until the tenancy was terminated by James' death. However, the September 2005 creation of a joint tenancy between petitioner and his brother is not exempt, because petitioner was not an original owner of the property before he initially created the joint tenancy with his brother. Therefore, the Court reversed the Court of Appeals and reinstated the decision of the Tax Tribunal, which reached the correct result, but for an incorrect reason.

President Inn Props. LLC v. City of Grand Rapids
--- Mich App ---; --- NW2d --- (2011)
2011 WL 561478
February 17, 2011

Issues: Claims related to the true cash value (TCV), the state equalized value (SEV), and the taxable value (TV) of two parcels on which the petitioner operates a hotel; Whether the tribunal used the correct valuation method and independently determined the value of the property at issue; MCL 211.27(1); MCL 211.10; Whether the tribunal should have used the "income capitalization method" of valuation because the properties were income producing; Whether the tribunal correctly held that the properties' assessed valuation on the tax roll was also the TCV; Whether the tribunal erred in not using separate sections in its written opinion and did not comply with MCL 205.751(1) and MCL 24.285; Whether the tribunal properly admitted the respondent-City's Exhibit E as impeachment evidence; Deference to the credibility determinations by the fact-finder; § 26 of the Tax Tribunal Act (MCL 205.726); Review of proposed decisions; The Administrative Procedures Act (MCL 24.271 to 24.287)

Judge(s): Per Curiam - Owens, Markey, and Meter

The court held, *inter alia*, that the Tax Tribunal did not abdicate its responsibility to independently determine the properties' TCV when it adopted the assessed valuation on the tax rolls. The properties' assessed valuations on the tax rolls were in evidence based on the parties' stipulation. Because the tribunal's valuation was within the range of valuations in evidence, it was supported by competent and material evidence. Thus, the court affirmed but remanded to the tribunal for correction of clerical errors. The petitioner appealed the final opinion and judgment of the tribunal establishing for the tax years 2004-2006 the TCV, the SEV and the TV for two parcels of property on which petitioner operated a hotel. Petitioner contended on appeal, *inter alia*, that the tribunal erred by using an incorrect valuation method and should have used the income capitalization method. The court noted that the Legislature has not specified methods of valuation that assessors must use. A valuation methodology is wrong only if it does not lead to the most accurate determination of the taxable property's true cash value or market value. Here, the parties each presented expert witnesses who testified in the tribunal proceedings. The tribunal was under no obligation to accept the figures or the valuation approaches advanced by the parties. The tribunal may correlate, reconcile, and weigh valuations derived under various approaches with the ultimate goal of considering all factors under the circumstances in determining the FMV of the property. There was expert testimony and appraisals placing the properties' TCV above and below their assessed valuations on the tax rolls. The court held that the tribunal's valuation was within the range of valuations in evidence. The court also held that, *inter alia*, the tribunal did not err by reconsidering the petitioner's appraiser's credibility and the weight of the evidence he provided. In fulfilling its statutory responsibility under MCL 205.726, the tribunal may make its own determinations as to the witnesses' credibility and the weight of the evidence.

City of Bay City v. Bay County Treasurer
--- Mich App ---; --- NW2d --- (2011)
2011 WL 1272889

April 5, 2011

Issues: "Public purpose" under MCL 211.78m(1); Writ of mandamus; Enforcing clear and unambiguous statutory language as written; Whether the county treasurer has the authority to make an independent assess-

ment of public purpose under MCL 211.78m(1); Separation of powers; Effect of the statute's use of the word "shall"; Statutory interpretation; Whether the issues in the case were rendered moot by defendant's offer of settlement; Whether there was a "case or controversy" between the parties.

Judge(s): Per Curiam – Borrello, Fort Hood, and Stephens

The Court held that the trial court erred by adding conditions on a "public purpose" that are not found in the clear and unambiguous language of MCL 211.78m(1). Thus, the trial court abused its discretion in denying the plaintiff-City mandamus relief. The Court further held that the determination of a proper purpose for the purchase of a tax delinquent property is a legislative function, and the statute did not empower the defendant-county treasurer to make an independent determination as to a municipality's professed public purpose. Under the statutory tax foreclosure scheme, the state has the right of first refusal to purchase any tax-foreclosed properties in the state. If the state declines, the municipality within whose limits the property is located may purchase it "for a public purpose." MCL 211.78(m)(1). The purchase price is the statutory minimum. In 2008, defendant foreclosed on 16 parcels within plaintiff's limits. Plaintiff informed defendant that it wished to purchase four of the parcels, and forwarded a check to defendant in the amount of the total of the minimum bids for the four parcels. Defendant determined that he was not obligated to sell the parcels to plaintiff unless he was satisfied that plaintiff would be returning the property to a position in which the property would generate tax revenue. Plaintiff later filed this action against defendant for declaratory and mandamus relief. Plaintiff sought a declaration that its stated public purpose for the parcels was valid and a writ of mandamus directing defendant to transfer title to the parcels. The trial court ruled in favor of plaintiff as to two properties and in favor of defendant as to two properties. Only one property remained at issue on appeal. Defendant refused to convey the property because he did not believe that the public purpose could be accomplished "efficiently and expeditiously." Plaintiff asserted that the statute only requires a public purpose and not these additional conditions. Plaintiff contended that the trial court's conclusion in this case that plaintiff's plan to construct a new home on the property was too "speculative to constitute a proper public purpose" essentially

incorporated the requirements that a public purpose must be executed efficiently and expeditiously. The Court noted that the terms “efficiently,” “expeditiously,” and “speculative” are not found in MCL 211.78m(1). “The statute clearly and unambiguously provides that if the ‘state elects not to purchase the property under its right of first refusal, a city, village, or township may purchase’ the property ‘for a public purpose’” The Court noted that if statutory language is clear and unambiguous, the statute must be enforced as written. It was “not for the courts to read into MCL 211.78m(1) restrictions or conditions on what constitutes a public purpose that are not within the language of the statute itself and which essentially usurp the Legislature’s authority to determine what constitutes a public purpose.” The Court concluded that there was no basis for the trial court to find in the defendant’s favor as to the property at issue. The Court also held that the “determination of public purpose is an essentially legislative function,” and plaintiff’s council was a legislative body. The “trial court erred to the extent that it implicitly held that defendant had a right to review plaintiff’s determination of public purpose, and it abused its discretion by denying plaintiff mandamus relief.” Reversed.

Michigan Properties LLC v. Meridian Township
--- Mich App ---; --- NW2d --- (2011)
2011 WL 1273519
April 5, 2011

Issues: Whether the MTT committed legal error in holding that it was permissible to “uncap” the 2007 and 2008 taxable values of petitioner’s real property where the transfer of those parcels occurred three years before the uncapping; “Substantial evidence”; Statutory interpretation; MCL 211.27a; MCL 211.29(2); MCL 211.30(4); The General Property Tax Act (GPTA)

Judge(s): Per Curiam – Fort Hood, Borrello, and Stephens

The MTT committed legal error in holding that it was permissible to “uncap” the 2007 and 2008 taxable values of petitioner’s real property where the transfer of those parcels occurred three years before the uncapping. The court held that the legal error was the result of a misinterpretation of several statutory provisions, including MCL 211.27a and MCL 211.30. Petitioner was the taxpayer for several parcels for which ownership was transferred in December 2004. Under the Michigan

Constitution and statutes, a transfer of ownership allows the taxable value of a parcel of real estate, normally allowed to increase no more than 5% a year, to be set at the SEV for the next tax year - “uncapping.” It is triggered by the owner filing a property transfer affidavit, which notifies the assessor of the transfer. Here, property transfer affidavits were timely filed in January 2005, but respondent failed to “uncap” the taxable values of the property for the 2005 tax year. In October 2006, respondent sent petitioner letters stating the taxable values should have been uncapped for 2005 and that petitioner would be getting revised tax bills for 2005. They also stated that the 2006 taxable values would be adjusted by the December Board of Review. However, the December Board of Review took no action. Petitioner appealed to the MTT, arguing that respondent had unlawfully uncapped the 2005 value. The parties agreed to consent judgments in February 2007, in which they stipulated that the 2005 taxable values of the parcels would be returned to their pre-transfer rates and that the 2006 taxable values would not be adjusted. Respondent filed appeals with the March Board of Review, which then “uncapped” the taxable value of the parcels for tax year 2007, based on the 2004 transfer. Petitioner again appealed to the MTT and both parties moved for summary disposition. Petitioner essentially argued that when a taxpayer correctly files a property transfer affidavit, the relevant authority has one year to uncap the property for tax purposes and if the property is not timely uncapped, it may not be uncapped until the next time it is transferred. The court concluded that the GPTA unambiguously provides the method for calculating a property’s taxable value. Where statutory language is clear and there is no ambiguity, the court is not permitted to engage in judicial construction. Since the property was not transferred in 2006, the unambiguous language of MCL 211.27a(2) provides that the 2007 taxable value is determined by ascertaining the lesser of the property’s 2006 taxable value, minus any losses, multiplied by the lesser of 1.05 or the inflation rate, plus all additions and the 2007 SEV. The court held that the MTT erroneously concluded that MCL 211.30 permitted the uncapping of petitioner’s property for the tax years at issue. The court acknowledged that MCL 211.29 and 211.30 grant broad power to the March Board of Review to ensure that the assessment roll complies with the provisions of the GPTA. However, “while the March Board of Review possesses broad power, that power must be limited by the other express provisions of the GPTA.” The court also held that its decision was limited to the specific facts of this case. Reversed.

In re Estate of Darryl Houston Price
--- Mich App ---; --- NW2d --- (2011)
2011 WL 1376682

April 12, 2011

Issues: The intervening defendant/appellant-Dart Bank's appeal of the trial court's order granting the receiver/appellee-Woods a lien over the real property at issue; Whether the trial court properly imposed the costs of the receivership on the bank by granting the lien where the bank neither consented to nor objected to the receivership; Receivership order (RO)

Judge(s): O'Connell, K.F. Kelly, and Ronayne Krause

The Court held that the bank could be held responsible for the receivership expenses, even though it became a party only after appointment of the receiver/Wood and did not consent to the receivership, because the bank ultimately established its right to the property, and thus benefitted from the receivership. The issue on appeal was whether the trial court erred by imposing the costs of the receivership on the bank and granting the lien, when the bank neither consented to nor objected to the receivership. The original parties stipulated to the appointment of Woods as receiver over certain property. The RO authorized Woods to take immediate possession of the property in order to sell it and to make any expenditure necessary for its upkeep and repair. The property needed about \$20,000 in repairs which Woods borrowed. Market conditions prevented him from selling the property. The RO also prohibited anyone with actual notice of the RO from interfering with Woods' possession and management of the property. The bank was not a party to the case at the time of the order and did not stipulate to the RO. The bank foreclosed on the property and was not aware of the RO before beginning the process, but it received a copy of the amended RO before the sale. The bank was the only bidder at the foreclosure sale and purchased the property for \$169,312.50. The bank appraised the property at \$245,000. Woods filed a motion to void the foreclosure and hold the bank in contempt for violating the RO's prohibition on interfering with his possession of the property. The trial court denied the motion but extended the redemption period giving Woods more time to sell the property at a better price than the bank paid. After concluding he could not find a buyer for any amount close to \$245,000, Woods moved to dissolve the receivership and order the bank to pay the receivership

costs. The trial court essentially granted the motion by placing a lien on the property to be paid whenever the property was sold. The trial court noted that it had ordered Woods to sell the property and that the bank did not ask it to set that order aside. Both parties cited *Bailey v Bailey*, 262 Mich 215 (1933), where the Supreme Court ruled that the mortgagee was liable for receivership expenses where it consented to the receivership and benefited from the receivership. In *Attica Hydraulic Exch v Seslar*, 265 Mich App 577 (2004), the court found that *Bailey* held that mortgagees could not contest the receivership expenses where they benefitted "as the parties ultimately entitled to the property." Here, the bank established its right to the property. Therefore, it benefitted from the receivership and may be held responsible for the expenses. Affirmed.

Kubicki v. Mortgage Electronic Registration System
--- Mich App ---; --- NW2d --- (2011)
2011 WL 668118

April 12, 2011

Issues: Action to set aside a sheriff's foreclosure sale; Whether the trial court properly granted summary disposition for defendants; MCL 600.3216; Appointment of deputy sheriffs by the sheriff; MCL 51.70 and MCL 51.73; Whether the oath was required to be filed with the county clerk's office

Judge(s): Per Curiam - Talbot, Sawyer, and M.J. Kelly

[This opinion was previously released as an unpublished opinion on 2/22/11.] The court held in this action to set aside a sheriff's foreclosure sale that the plaintiff failed to show the requisite "strong case of fraud or irregularity, or some particular exigency" so as to overturn the foreclosure sale. Further, there was no genuine issue of material fact as to whether C was properly appointed pursuant to the Agreement, or whether the foreclosure sale and sheriff's deed were valid. Thus, the court affirmed the trial court's order granting summary disposition for defendants under MCR 2.116(C)(10). On appeal, plaintiff contended that the Sheriff's Deed executed by C fraudulently misrepresented that C was a "deputy sheriff." Plaintiff claimed that C was not a sheriff, an undersheriff, or a deputy sheriff, as required by the Mortgage Foreclosure Statute because he did not request to be, and was not actually properly appointed by the Sheriff, and no appointment was filed

with the county clerk's office, as required by the Michigan Sheriff's Statute. The court disagreed. Under MCL 600.3216, a sheriff's foreclosure sale "shall be made by a person appointed for that purpose in the mortgage, or by the sheriff, undersheriff, or a deputy sheriff of the county, to the highest bidder." MCL 51.70 provides that persons may be deputed by a sheriff, in writing, to do a "particular act," and shall be known as a "special deputy." MCL 51.73 requires that appointments of an undersheriff or deputy sheriff be recorded in the county clerk's office; however, this section specifically does not apply to appointments of a special deputy for a "particular act only." The court concluded that C was "properly deputed" as a special deputy pursuant to MCL 51.70 where there was a written Agreement to Serve and/or Execute Civil Process for the Oakland County Sheriff's Office, signed by the county sheriff. Although the Agreement was between the sheriff and a corporation, C was the president of the corporation and signed the Agreement; furthermore, the Agreement requires all individuals performing a duty of the sheriff's office to be a special deputy, and an addendum to the Agreement requires all employees of the corporation to request appointment as a special deputy. The defendant argued that C was a special deputy charged with a specific task and qualified to carry out acts under MCL 600.3216. The Court agreed. Therefore, his acts of conducting the foreclosure sale and executing the Sheriff's Deed are valid under the foreclosure statute. Plaintiff failed to show the "strong case of fraud or irregularity, or some peculiar exigency" required to overturn the statutory foreclosures. Affirmed.

Residential Funding Co., LLC v. Saurman
--- Mich App ---; --- NW2d --- (2011)
2011 WL 1516819

April 21, 2011

Issues: Whether Mortgage Electronic Registration System (MERS) qualified under MCL 600.3204(1)(d) to foreclose by advertisement; What being the "owner . . . of an interest in the indebtedness secured by the mortgage" requires; Whether having an "interest in the mortgage" is sufficient; Whether MERS was a contractual owner of an interest in the notes based on its agreement with the lenders; Whether MERS had authority to foreclose by advertisement as the "agent" or "nominee" of the lender; Statutory interpretation

Judge(s): Shapiro and Servitto; Dissent – Wilder

Holding that MERS does not meet the requirements of MCL 600.3204(1)(d) and thus, could not foreclose by advertisement, the court reversed the circuit courts' orders affirming the district courts' decisions to proceed with eviction based on the foreclosures of the defendants' properties in these consolidated cases. Each defendant purchased property and obtained financing from a financial institution. The transactions involved a promissory note and a mortgage security instrument. Each note provided for the loan amount, interest rate, methods and requirements of repayment, the identity of the borrower and lender, etc. The mortgage instrument provided for the mortgagee's rights of foreclosure in the event of default on the loan. Although the lender was named as the lender in the mortgage instrument, MERS was designated as the mortgagee. Defendants defaulted on their notes. MERS began non-judicial foreclosures by advertisement, purchased the properties at the sheriff's sales, and quit-claimed the properties to the plaintiffs as successor lenders. When the plaintiffs began eviction actions, defendants challenged the foreclosures as invalid, arguing, *inter alia*, that MERS did not have authority under MCL 600.3204(1)(d) to foreclose by advertisement because it did not fall within any of the three categories of mortgagees allowed to do so under the statute. The issue on appeal was whether MERS, as mortgagee but not noteholder, could exercise its contractual right to foreclose by means of advertisement. Under the statute, a party may foreclose a mortgage only if it is "either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage." The parties conceded that MERS was neither the owner of the indebtedness nor the servicing agent of the mortgage. Therefore, MERS lacked authority to foreclose by advertisement on the defendants' properties unless it was "the owner . . . of an interest in the indebtedness secured by the mortgage." The court concluded that "reasonably construing the statute according to its common legal meaning," the defendants' indebtedness was only based on the notes because they owed monies pursuant to the terms of the notes. Thus, "in order for a party to own an interest in the indebtedness, it must have a legal share, title, or right in the note." The court held that plaintiffs' assertion that an "interest in the mortgage" is sufficient under MCL 600.3204(1)(d) lacked merit. The indebtedness (the note) and the mortgage "are two different legal transactions providing two different sets of rights, even though they are typically employed together." It was "the plaintiff lenders that lent defendants money pursuant to the terms of the

notes. MERS, as mortgagee, only held an interest in the property as security for the note, not an interest in the note itself.” The evidence established that “MERS owned neither the notes, nor an interest, legal share, or right in the notes.” Since the mortgages and the notes were separate documents, reflecting separate interests and obligations, “MERS’ interest in the mortgage did not give it an interest in the debt.” The fact that the lender gave MERS authority to take “any action required of the Lender” did not transform MERS into an owner of an interest in the notes. Further, the lender could not grant MERS authority to take action where the statute prohibited it. The “Legislature specifically requires ownership of an interest in the note before permitting foreclosure by advertisement.” The court vacated the foreclosure proceedings and remanded.

Licavoli v. Licavoli
--- Mich App ---; --- NW2d --- (2011)
2011 WL 1565975
April 27, 2011

Issues: Divorce; Whether the trial court properly attached real property jointly owned by the plaintiff-ex-husband and his new wife as tenants by the entireties in order to provide payments of spousal support to the defendant-ex-wife; MCL 600.2807; Whether the trial court properly entered an income withholding order in the amount of 50% of plaintiff’s salary

Judge(s): Saad, Meter, and Wilder

Holding that the real property owned jointly by the plaintiff-ex-husband and his new wife as tenants by the entireties could not be attached by judgment lien to satisfy the parties’ divorce judgment, the court reversed the trial court’s order granting the defendant-ex-wife’s motion to attach the property in order to provide payments to her as spousal support. However, the court affirmed the trial court’s income withholding order in the amount of 50% of plaintiff’s salary. The parties were divorced on 9/13/05. The divorce judgment contained a provision setting child and spousal support. Plaintiff acquired the property at issue (a home) during the divorce proceedings, and the divorce judgment awarded the home to him. He remarried in 2005 and filed a quit claim deed deeding the property jointly to his new wife and himself. Plaintiff later filed for Chapter 7 bankruptcy. He stopped making child and spousal support payments, and defendant moved to enforce the divorce judgment. The trial

court entered orders on 6/22/07 and 9/25/07 ordering the release of funds from plaintiff’s IRA accounts to pay the support he owed to defendant. Plaintiff remained delinquent in his payments to defendant, and she filed another motion to enforce the judgment. In a 4/3/09 order, the trial court directed the liquidation of plaintiff’s 401(k) account and ordered that the proceeds be paid to defendant. The trial court’s opinion and lien ordering the attachment of the house followed, along with the order that 50% of plaintiff’s current income be withheld to pay his spousal support obligation. In ordering attachment of the house, the trial court relied on *Wood v Savage*, 2 Doug 316 (1846), which predates the applicable statute, MCL 600.2807(1) providing “A judgment lien does not attach to an interest in real property owned as tenants by the entirety unless the underlying judgment is entered against both the husband and wife.” Thus, while “Michigan law grants the trial judge in a divorce case broad discretion to do equity regarding the disposition of property,” the Legislature “made it clear in MCL 600.2807 that a judgment lien does not attach to property owned as tenants by the entirety unless the judgment is against both the husband and wife.” The underlying judgment here, the divorce judgment, was not entered against plaintiff and his current wife. Therefore, the property could not be attached to satisfy the divorce judgment. As to the withholding order, the court noted that under the FCCPA, the federal limit on withholding is usually 50% of disposable income, but may be increased to as much as 65%. Affirmed in part, reversed in part, and remanded.

Michigan Pipe & Valve-Lansing, Inc. v. Hebel
Enterprises, Inc.
--- Mich App ---; --- NW2d --- (2011)
2011 WL 1004660
May 3, 2011

Issues: Action to foreclose on construction liens; Whether the liens had priority over a mortgage; Statutory interpretation; Whether the trial court properly held that the well was an “actual physical improvement” (MCL 570.1103(1)); The Construction Lien Act (CLA)(MCL 570.1101 et seq.); MCL 570.1119(3); Whether the well fell within the exception of MCL 500.1103(1) for labor provided in preparation for the change or alteration; Whether the exception encompasses the “due diligence process”; Whether the construction lien could include any sums for a “service charge” specified in a contract; MCL 570.1107(1); A “time-price differential”; MCL



570.1107(7); Reading statutory provisions as a whole; “Interest”; “Includes”; Michigan Pipe & Valve-Lansing, Inc. (MPV); Grand River Infrastructure, Inc. (GRI)

Judge(s): Per Curiam – Shapiro, Hoekstra, and Talbot

[This opinion was previously released as an unpublished opinion on 3/22/11.] The trial court properly entered a judgment of foreclosure, granting summary disposition to plaintiff-MPV and defendant-GRI on MPV’s and GRI’s claim that their construction liens had priority over the defendant-bank’s mortgage.

Windy Pines View, LLC owned property it intended to develop into a residential subdivision. To secure financing for the project, Windy Pines granted a mortgage on the property to the bank, which recorded the mortgage on 2/10/05. Two days earlier, a drilling company drilled a 245-foot deep well on the property. The well, which was used to obtain a water sample from the aquifer below the property, was capped after Windy Pines decided that the subdivision would be serviced by the municipal water supply. In 2007, Windy Pines contracted with defendant-Hebeler to build the “[i]nfrastructure and roads.” Hebeler purchased materials from MPV and GRI. Hebeler’s contract with MPV contained a provision stating that a “service charge of 1-1/2% per month or any lesser charge reflecting the maximum amount legally permissible will be added to all past due accounts.” While it was paid in full by Windy Pines, Hebeler failed to pay MPV and GRI the total amounts due under its contracts with them. GRI filed a claim of lien against the property in 2/08 and MPV filed a claim of lien in 5/08. The trial court held that the drilling of the well was an “actual physical improvement” to the property and, therefore, under MCL 570.1119(3), the liens had priority over the mortgage. The date of the “first actual physical improvement” is the date that construction liens attach to the property for determining priority among competing liens and encumbrances. The trial court also found that the amount of MPV’s lien did not include any amounts for the “service charge.” On appeal, the bank argued that the trial court erred in holding that the well was an “actual physical improvement.” The bank cited a law dictionary for the proposition that improvements to real property are generally thought to increase the value of the property. However, the bank’s reliance on a dictionary definition was unavailing because the CLA defined “actual physical improvement” and nothing therein requires that the improvement add

value to the property. MCL 500.1103(1). The bank also asserted that the well fell within an exception for “labor which is provided in preparation for that change or alteration” The bank contended that this exception encompasses what it called the “due diligence process.” The bank argued that the well was only a test well and thus, not an “actual physical improvement.” As defined in MCL 570.1103(1), an “actual physical improvement” does not “include that labor which is provided in preparation for that change or alteration, such as surveying, soil boring and testing, architectural or engineering planning, or the preparation of other plans or drawings of any kind or nature.” The court did not dispute that these acts may suggest that the definition in effect recognizes a “due diligence process” that involves the specific procedures stated in the definition. The plain language of the statute, which states “such as,” also does not suggest that the list is exhaustive. “However, none of the procedures stated in the definition equates to the digging of a well, or any other act, which makes a ‘readily visible’ ‘physical change’ to the property. To the contrary, the acts identified in the statute are all of a nature that none of them will leave a permanent presence on the property.” Thus, the court found the bank’s claim that the exception encompassed all acts done in the “due diligence process” was not supported by the plain and unambiguous language of MCL 570.1103(1). Because the bank’s mortgage was recorded after the digging of the well, which was the “first actual physical improvement” to the property, MPV’s and GRI’s construction liens had priority over the mortgage. The court also held that the trial court erred in ruling that MPV’s construction lien could not include any amounts for the “service charge” specified in its contract with Hebeler. Pursuant to MCL 570.1107(1), the amount of the lien is determined by the terms of the contract. Affirmed in part and reversed in part.

Florence Cement Co. v. Vetrriano
--- Mich App ---; --- NW2d --- (2011)
2011 WL 1681414s

May 5, 2011

Issues: Whether the trial court erred by refusing to pierce defendant-Shelby LLC’s “corporate veil”; “Distribution”; MCL 450.4102(1)(f); “Joint and several” liability; MCL 450.4307(1)(a)-(b); MCL 450.4308(1) and (3); Defendant-Essad’s claim the trial court violated his due process rights when it entered judgment against him because plaintiff-Florence did not plead a statutory claim for distributions; Amendment of complaints at trial; MCR

2.118(C)(1); Whether plaintiff's claim was time barred; MCR 2.111(F)(3)(a); Whether the trial court properly held that plaintiff could recover for Essad's violation of MCL 450.4307; Whether § 4308 provides direct relief to a LLC's creditor.

Judge(s): Per Curiam - Whitbeck, O'Connell, and Wilder

In this dispute arising from a construction contract between plaintiff-Florence and defendant-Shelby LLC, which was formed to own, develop, and sell vacant lots for residential construction (and was unsuccessful), the court held that the trial court erred by finding that piercing the corporate veil was unwarranted. The trial court also erred by granting judgment on only the \$19,000 distributions to defendants-Essad and -Bencivenga, erred by concluding the judgment amount be paid directly to Florence, and the members' liability to Shelby for the amount of the unlawful distributions should be joint and several based on MCL 450.4308. The court reversed and remanded. In 7/06, Florence contracted with Shelby to perform concrete and asphalt work on Shelby's development. Shelby was able to pay all of the contractors and subcontractors on the job, except one - Florence. To finance the project, Shelby obtained a loan

from the private banking department of defendant-Comerica for \$700,000. Shelby's members provided unlimited personal guarantees that the loan would be repaid. Later Essad and Bencivenga personally borrowed \$300,000 from Comerica, which they then "loaned" to Shelby to invest in the project. There was no promissory note. When asked whether Shelby paid the interest on the \$300,000, Essad testified that Shelby "reimbursed" him and Bencivenga. In 2/05, Shelby made payments of \$97,350 to Essad and \$124,000 to Bencivenga as pre-construction carry costs, reimbursement for earnest money, and for two parcels acquired for the project. In 11/05, Shelby's members concluded it was short \$226,000 in capital, so they obtained another loan from Comerica, which was invested in the project. In 11/06, Essad signed a sworn statement (SS) to Comerica stating the amounts owed the contractors. The SS indicated that Shelby owed Florence \$142,000, but the actual amount owed was \$256,557.27. Essad admitted the other contractors were paid in full via the final draw of \$142,000 provided by Comerica, leaving a shortfall to Florence of \$142,557.27. The court held, *inter alia*, the trial court should have pierced the corporate veil because all the elements for piercing the corporate veil were satisfied where defendants, using Shelby as a "mere instrumentality," committed fraud and caused loss to Florence.



Legislation Affecting Real Property

by Ronn S. Nadis and Michael K. Dorocak



The Section is active in the legislative process in a variety of ways, such as appearing before House and Senate committees, lobbying for and against bills, and monitoring legislation of interest to real estate lawyers. This Article provides a quarterly report designed to inform Section members about new legislation affecting real property, the Section's efforts regarding legislation that may become law, and bills that may have an impact on real estate practice.

The Section has taken a Formal Position on the Following Pending Legislation

Positions adopted by the Section: The Real Property Law Section is not the State Bar of Michigan, but rather a Section that members of the State Bar choose voluntarily to join based on common professional interest. The positions expressed are those of the Real Property Law Section. The Real Property Law Section's total membership is 3,152. The positions were adopted by vote of the Section Council which has a total of 18 voting members.

HB 4364: This bill would eliminate an adverse possession claim if the title holder (party against whom the adverse possession claim is made) paid the real property taxes during the prescriptive (15 years) period. The Section opposes this bill for the following reasons:

1. Adverse possession is already a difficult claim on which to prevail and the proposal in this bill would make it effectively impossible for anyone to prevail on an adverse possession claim because the adverse possession claimant will typically not have paid the real property taxes on the disputed land during the 15 year prescriptive period.
2. It is often difficult to determine which party paid the real property taxes on a disputed strip of land

because the tax record legal descriptions are often imprecise and not intended to establish legal boundaries.

3. The existing required elements to establish an adverse possession claim already provide a difficult burden of proof for the claimant and ensure that adverse possession will only be found in clear situations.
4. The elements of a prescriptive easement claim are almost identical to an adverse possession claim yet the prescriptive easement holder will not have paid real property taxes on the property. Therefore, it is inconsistent for the legislature to impose this additional requirement on an adverse possession claim when it does not impose the same requirement on a prescriptive easement claim.

Bills Of Interest That Have Become Law Since The Last Issue Of The Review

HB 4227 and HB 4228 (2011 PA 34; 2011 PA 35) – Acts to prohibit certain covenants and fees upon transfer of real property (MCL 565.881; MCL 565.891). These two new Acts effectively nullify and prohibit any transfer fee covenants (also known as “capital recovery fees” or “private transfer fees”) from attaching to title to real property involving transfer of commercial (HB 4227; MCL 565.881) or residential (HB 4228; MCL 565.891) property and void any lien purporting to secure payment of any transfer fee. The Acts also allow a person aggrieved by the imposition of a transfer fee to bring an action to clear title to the real property, void the transfer fee, recover the costs and attorney fees incurred in bringing the action and seek other equitable relief.

Bills Of Interest That Have Been Introduced Since The Last Issue Of The Review

HB 4263: This bill would provide that a landlord would not be liable to a tenant for wrongful ejection, detainer or interference with a tenant's possessory rights if the landlord can establish the following: (i) that he or she believed in good faith that the last surviving tenant had been deceased for at least 30 days; (ii) that the landlord had not received written notice of the existence of a probate estate or the name and address of a personal representative; (iii) that current rent on the premises has not been paid; and (iv) at least seven days before re-entry, the landlord placed a notice on the door of the premises indicating landlord's intent to re-enter and take possession of the premises. Amends Sec. 2918 of 1961 PA 236 (MCL 600.2918).

HB 4264: This bill would provide that in an appeal before the Michigan Tax Tribunal, each subsequent year (after the year being appealed) would be automatically added to the petition without motion or filing fee and that the Michigan Tax Tribunal would be required to notify the petitioner of the addition of each subsequent year. Petitioner may move to exclude or amend the appeal of any subsequent year at the time of the hearing on the petition. Amends Sec. 37 of 1973 PA 186 (MCL 205.737).

HB 4319: This bill would amend the Home Rule City Act and would allow cities, in lieu of publication of a legal notice in a newspaper of general circulation, to satisfy the notice requirement by providing notice via city websites and other local alternatives (such as radio and/or television). Amends 1909 PA 279 by adding a section (MCL 117.1-117.38).

HB 4370: This bill would amend the General Property Tax Act by revising the provisions of the Property Tax Poverty Exemption. Amends Sec. 7u of 1893 PA 206 (MCL 211.7u).

HB 4404 and HB 4405: These bills would amend the State Housing Development Authority Act of 1966 and provide for a one (1) year moratorium on mortgage and land contract foreclosures. Amends Sec. 48d, 49 and 49i of 1966 PA 346 (MCL 125.1448d, 125.1449 and 125.1449i).

HB 4422: This bill would amend the General Property Tax Act by revising the provisions of the Property Tax

Poverty Exemption. Amends Sec. 7u of 1893 PA 206 (MCL 211.7u).

HB 4423: This bill would amend the General Property Tax Act by requiring the notice for assessment changes regarding property taxes to include a statement from the assessor notifying the taxpayer that the taxpayer may be eligible for a full or partial exemption by reason of poverty. Amends Sec. 24c of 1893 PA 206 (MCL 211.24c).

HB 4425: This bill would amend the General Property Tax Act by requiring a township or city to include a statement in a notice of assessment informing taxpayers of their option to protest to a Board of Review by letter without a personal appearance being required. Amends Sec. 30 of 1893 PA 206 (MCL 211.30).

HB 4426: This bill would amend the General Property Tax Act by requiring the contents of a first notice of forfeiture in connection with a property tax forfeiture to include the month, day and year on which property will be forfeited to the county treasurer for unpaid delinquent taxes. Amends Sec. 78c of 1893 PA 206 (MCL 211.78c).

HB 4427: This bill would amend the General Property Tax Act by requiring the contents of a second notice of forfeiture in connection with a property tax forfeiture to include the month, day and year on which property will be forfeited to the county treasurer for unpaid delinquent taxes. Amends Sec. 78f of 1893 PA 206 (MCL 211.78f).

HB 4428: This bill would amend the General Property Tax Act to permit a waiver, under certain circumstances, of additional interest in connection with a property tax forfeiture. Amends Sec. 78g of 1893 PA 206 (MCL 211.78g).

HB 4429: This bill would amend the General Property Tax Act to revise the eligibility requirements for withholding property from a petition for foreclosure based on claims of poverty. Amends Sec. 78h of 1893 PA 206 (MCL 211.78h).

HB 4430: This bill would amend the General Property Tax Act to modify the notice requirements in connection with a show cause hearing and a foreclosure hearing in connection with a property tax foreclosure. Amends Sec. 78i of 1893 PA 206 (MCL 211.78i).

HB 4431: This bill would amend the General Property Tax Act to amend the requirements for a notice of judgment in connection with a property tax foreclosure to require the foreclosing governmental unit to send a notice of judgment to the occupant of the property and each person with a legal interest therein stating the last date on which the property may be redeemed. Amends Sec. 78k of 1893 PA 206 (MCL 211.78k).

HB 4432: This bill would require a local unit of government to be first provided notice before a mortgage foreclosure proceeding could be commenced. Amends Sec. 3204 of 1961 PA 236 (MCL 600.3204) and adds Sec. 3104.

HB 4436: This bill would amend the General Property Tax Act by requiring a township office to remain open on certain days for tax payments. Amends Secs. 44 and 44a of 1983 PA 206 (MCL 211.44 and 211.44a).

HB 4446: This bill would amend the General Property Tax Act by adding provisions relating to the filing deadline and proration exemption for the principal residence exemption. Amends Sec. 7cc of 1893 PA 206 (MCL 211.7cc).

HB 4462: This bill would amend the Michigan Penal Code by prohibiting the forging or alteration of a deed, discharge of mortgage, power of attorney or other documents affecting an interest in real property with intent to defraud and make any such action a felony punishable by imprisonment for not more than 14 years. Amends Secs 248 and 249 of 1931 PA 328 (MCL 750.248 and 750.249).

HB 4515: This bill would amend the General Property Tax Act by providing that a transfer of any real property to a transferee related to the transferor by blood or affinity to the third degree is not to be considered a transfer of ownership so long as the use of the real property does not change following the transfer and there is not a subsequent transfer to a person not related to the transferor by blood or affinity to the third degree within seven years. Amends Sec. 27a of 1893 PA 206, as amended by 2008 PA 506 (MCL 211.26a).

HB 4536: This bill would restrict the application of certain statutory prohibitions against the commence-

ment of foreclosures by advertisement to those in which the first notice was published between July 5, 2009 and July 5, 2013 and provide that Sections 3205 through 3205(d) be repealed effective July 5, 2013. Amends Secs. 3204 and 3205(e) of 1961 PA 236 (MCL 600.3204 and 600.3205(e)).

HB 4542, HB 4543 and HB 4544: These bills would provide that foreclosure by advertisement proceedings shall not be commenced against property claimed for principal residence exemption until the time for the mortgagor to submit documents under Sec. 3205b(2) has expired. These bills further limit the application of the amended statute to foreclosure by advertisement proceedings in which the first notice was published between July 5, 2009 and July 5, 2012. The bills would also require a mortgage holder or servicer to designate an individual who will serve as a contact person to, among other things, facilitate negotiations and attend meetings with the borrower. Amends Secs. 3204, 3205, 3205a, 3205b, 3205d, 3205e and 3240 of 1961 PA 236 (MCL 600.3204, 600.3205, 600.3205a, 600.3205b, 600.3205d, 600.3205e and 600.3240).

HB 4566: This bill would amend the General Property Tax Act by requiring an assessor to provide notice of an increase in the tentative equalized value or a tentative taxable value of property by mail not less than 30 days before the meeting of the board of review. Amends Sec. 24c of 1893 PA 206 (MCL 211.24c).

SB 251: This bill would amend the Code of Criminal Procedure to increase the statute of limitations period from six to ten years for false pretenses involving real property, mortgage fraud or forgery or uttering and publishing of an instrument affecting an interest in real property. Amends Sec. 24 of 1927 PA 175 (MCL 767.24).

SB 283 and SB 284: These bills would amend the General Property Tax Act by requiring that, following an appeal, the newly established assessment constitute a baseline for calculating the following year's taxable value. Amends Sec. 30c of 1893 PA 206 (MCL 211.30c).

SB 322: This bill would amend the General Property Tax Act by allowing the collection of winter tax levies as part of the summer tax levy if the total amount of all individual taxes levied in the winter tax bill is \$100 or less

and a resolution authorizing the summer collection is approved by both the county board of commissioners and the local tax collecting unit. A county that approves such a resolution shall establish a restricted fund to be known as the "Other Levies Reserve Fund" for mills previously billed as part of the winter property tax levy. Amends Sec. 44a of 1893 PA 206 (MCL 211.44a).

SB 349: This bill would amend the General Property Tax Act to allow a taxpayer to claim a principal residence exemption by filing an affidavit on or before May 1 for taxes levied before January 1, 2011 or for taxes levied after December 31, 2010 at any time after tax day in a tax year provided that when an affidavit is filed after May 1, the tax liability for the tax levied by the local school district for school operating purposes be calculated based on the number of days remaining from the date the affidavit is filed until December 31 of that tax year and that, if granting the exemption results in overpayment of the tax, a rebate shall be made to the taxpayer. Amends Sec. 7cc of 1893 PA 206 (MCL 211.7cc).

As a member of the Real Property Law Section, you can have a voice in commenting on proposed legislation that impacts real property law issues. Each of the Spe-

cial Committees of the Section covers a substantive area of real estate law. Membership in a Special Committee offers the opportunity to network with your fellow practitioners and learn about your areas of practice. Special Committee chairs are encouraged to seek member input on proposed legislation. Your active involvement and participation as a committee member is highly recommended and most welcome.

Non-members of a Special Committee are also welcome to comment on any proposed legislation affecting real property. Written comments should be forwarded to:

Ronn S. Nadis, Esq.
Taubman, Nadis & Neuman, P.C.
32255 Northwestern Hwy., Ste. 200
Farmington Hills, MI 48334
rnadis@tnnlaw.com

Consult the Michigan Legislature web site for current information regarding pending legislation: www.michiganlegislature.org.

Continuing Legal Education



*by Gregory J. Gamalski and Melissa N. Collar, Co-Chairs, CLE Committee
and Arlene R. Rubinstein, Administrator*

STATE BAR OF MICHIGAN REAL PROPERTY LAW SECTION

36th Annual Summer Conference

Finding the Silver Lining: Real Estate Opportunities Arising from the Economic Crisis

Grand Traverse Resort & Spa, Near Traverse City, Michigan

July 20–23, 2011

The Section would like to thank our generous sponsors!

Patron Sponsor

First American Title Insurance Company
National Commercial Services

Wednesday Reception Sponsor

Stewart Title National Title Services
Stewart Title Guaranty Company
Stewart Title Company

Golf Sponsor

eTitle Agency

Thursday Reception Sponsor

Commonwealth Land Title
a Part of Fidelity National Title Group
National Commercial Services - Troy

Conference Level Sponsor

Fidelity National Title Insurance Company
National Title Services—Great Lake Regions

Breakfast Sponsor

Liberty Title Agency
Stout Risius Ross, Inc.

QUICK HITS

The next Quick Hits program will be held August 4, 2011. The program will take place at the law offices of Jaffe Raitt Heuer & Weiss PC in Southfield. The topic will be “Purchase Agreements in Real Estate Transactions Part II—Representations, Warranties, Conditions, and Indemnities and Holdbacks.” Space is limited. For further information contact Karen Schwartz lawa2@rocketmail.com.

Homeward Bound

The Continuing Legal Education Committee is pleased to announce its 36th season of “Homeward Bound” seminars. This season’s series is under the direction of Margaret Van Meter of Margaret Van Meter PLLC in Birmingham. The section will be working with ICLE in producing the 2011-2012 Homeward Bound series. If you belong to the ICLE partnership, there will be no separate charge for attending the seminar series. (Section members who are not ICLE partners will still be able to sign up for any or all Homeward Bound programs at the low section price of \$80 per seminar). The seminars will run from 2 to 5 p.m. and will be held at The Inn at St. John’s in Plymouth. All seminars will be webcast.

Please look for the brochure on the Homeward Bound series elsewhere in this issue, or you can call ICLE at (877) 229-4350.

The “Groundbreaker” programs are not included in the Homeward Bound series or the ICLE partnership. Further Groundbreaker information will be available this summer.

Save the Date!

STATE BAR OF MICHIGAN REAL PROPERTY LAW SECTION

2012 WINTER CONFERENCE

MARCH 15–17, 2012

Loews Portofino Bay Hotel at Universal Orlando, Florida

Melissa Papke of Varnum LLP in Grand Rapids and Nicholas P. Scavone, Jr. of Bodman PLC in Detroit are planning the winter conference. Further information will be available in the fall.

Urban Farming Symposium

On May 20th, the RPLS sponsored an Urban Farming Symposium in conjunction with the University of Detroit Mercy Law School. The event was held at the beautiful UAW-GM Training Facility on Walker Street in Downtown Detroit. The half-day event drew about 50 attendees from the legal and academic community, including students, professionals and non-profit volunteers. The content of the Symposium focused on the role urban farming would play in re-shaping and re-purposing the city of Detroit, and the coordinate legal problems and solutions. Among the speakers were Dan Carmody, President of the Eastern Market Corporation; Professor John Mogk, advisor to the city of Detroit on a number of land use issues; Professor Dan Pitera of the Detroit Collaborative Design Center; and attorney Leslie Butler, who is in private practice.

The event co-Chairs, Gregory Gamalski and Paul Thursam, both of the law firm Giarmarco, Mullins & Horton, P.C., are already sketching out the details for a Second Annual Urban Farming Symposium. Dean Lloyd Semple and Professor Jackie Hand of the University of Detroit Mercy Law School are assisting in the planning as well. If you would like to contribute to next year's event, you can contact Mr. Gamalski or Mr. Thursam at (248) 457-7000. The section is looking forward to another successful program!

Course Calendar

Set forth below is a schedule of continuing legal education courses sponsored or co-sponsored by the Real Property Law Section through September 2011.

Key: RPLS—Real Property Law Section ICSC—International Council of Shopping Centers
 HB—Homeward Bound ICLE—Institute of Continuing Legal Education
 SC—Summer Conference

Date	Location	Program	Topic
August 4	Law Offices of Jaffe Raitt Heuer & Weiss PC Southfield	RPLS/Membership/Quick Hits	Purchase Agreements Part 2

Further information on all Homeward Bound seminars and the summer conference can be found on the Internet at <http://www.michbar.org/realproperty/summerconf.cfm> and ICLE courses at <http://www.icle.org/>