

Consumer Law Newsletter

Volume 7, No. 2



State Bar of Michigan Consumer Law Section

National Lending Law Expert to Address Annual Meeting of the Consumer and Elder Law Sections

By Adam G. Taub

Kathleen Keest, a nationally-known specialist in consumer credit and current Assistant Attorney General in Iowa, will address the combined Consumer Law and Elder Law sections at the State Bar Annual Meeting September 26, talking on "*Predatory Mortgage Lending: Tools of Their Trade, and Tools of Your Trade.*" She will focus primarily on identifying predatory loans and how they function and will provide an overview of statutes meant to deal with these loans.

Predatory lending is a particularly important topic for all consumer advocates, as well as those who represent the elderly. The theft of equity from an unwitting person's home can have devastating consequences. On a wide-spread basis, predatory loans facilitate the wholesale transfer of generations of hard-earned wealth out of entire neighborhoods and cities and into the pockets of unscrupulous brokers.

Prior to coming to the Iowa Attorney General's office, Kathleen Keest was a staff attorney at the National Consumer Law Center for eleven years. She co-authored the NCLC publications *Truth in Lending, Usury and Consumer Credit Regulation*, and *The Cost of Credit: Regulation and Legal Challenges*, as well as editing the consumer credit newsletter, and contributed to its volume *Credit Discrimination*. She has been a contributor to *The Business Lawyer*, and *Consumer Finance Law Quarterly*, and co-authored a recent law review article on the two-tiered financial services system. As a member of the Federal Reserve Board's Consumer Advisory Council in 1990 - 1992, she was on the Council's Consumer Credit Committee and chair of its Deposit and Delivery Systems Committee. She is a member and fellow of the Consumer Financial Services Committee of the American Bar Association's Business Law Section, and served as chair of the committee's Interest Rate Subcommittee from 1991 - 1994. She is a charter member of the American College of Consumer Financial Services Lawyers.

She previously worked with the Legal Services Corporation of Iowa for nine years, specializing in consumer matters, and served as an assistant counsel on a subcommittee of the U.S. Senate Judiciary Committee in 1978-1979. She is a graduate of the University of Iowa Law School.

Consumer Law Section Annual Meeting

When: Thursday, September 26, 2002

Where: Amway Grand Plaza, Grand Rapids

Business Meeting: 9:30, Winchester Room
Election of officers and council (see notice on page 5)

Joint Program with Elder Law Section

10:00, Haldane Room

- Presentation of Kelley Consumer Advocacy Award
- Featured Speaker, Kathleen Keest
"Predatory Mortgage Lending: Tools of Their Trade, Tools of Your Trade"



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Assistant Attorney General Skip Pruss Wins Kelley Award

The Consumer Law Section is pleased to announce this year's Frank J. Kelley Consumer Advocacy Award recipient, Stanley (Skip) Pruss. The award, created by the Consumer Law Section of the State Bar of Michigan, is presented each year to honor an outstanding advocate in the protection of Michigan consumers.

Appointed as the Assistant Attorney General In Charge of the Consumer Protection Division of the Department of Attorney General in 1998 by former Attorney General Frank J. Kelley, Mr. Pruss has rapidly gained state and national recognition as an energetic and creative leader in the advancement of consumer protection interests. In 2001, Mr. Pruss was awarded the Outstanding Government Service Award by the ABA Section of Administrative Law and Regulatory Practice.

Mr. Pruss has not only served as a voice for the consumer in the legislature through frequent testimony on issues affecting consumer rights, but has also spearheaded consumer education projects that have helped many thousands of Michigan citizens become wiser consumers. Mr. Pruss has used his talent for public speaking to carry the "consumer beware" message to many groups of citizens around the state and has used his leadership skills to bring out the best in each assistant attorney general assigned to the Consumer Protection Division. Because of the leadership of Mr. Pruss, Michigan consumers benefit from such consumer education initiatives as the consumer protection calendar and consumer alerts that appear on the Attorney General's web site, and many tutorials and presentations that are offered to groups of citizens around the State.

With increased public outreach under the direction of Mr. Pruss, consumer utilization of the resources of the Consumer Protection Division has grown dramatically. Consumer complaint filings have tripled in the past four years, from 11,617 in 1998, to over 33,000 this year. The amount recovered by consumers in 2001 through the informal complaint process utilized by the Division was approximately \$1,761,750.

Under his leadership, Attorney General Granholm's Consumer Protection Division has attacked a wide array of consumer issues, ranging from price fixing in the kidney dialysis business, to travel scams, bad water heaters, gas gouging, privacy encroachment by misuse of consumers' personal information, and deceptive business practices by propane and natural gas suppliers. In the past 3 years, the Consumer Protection Division has pursued anti-trust and price fixing actions resulting in potential settlement payments of over \$25 million to the State. Recovery of costs and civil penalties to the State through Consumer Protection enforcement actions has increased nine-fold over the past three years.

Mr. Pruss has aggressively pursued compliance with Michigan's Item Pricing Act, bringing enforcement actions against leading national retailers such as Walmart, Staples, OfficeMax, Home Depot and J.C. Penney. Enforcement actions handled personally by Mr. Pruss have resulted in recovery of fines and costs of over \$950,000. But while enforcement actions have received the greatest attention, Mr. Pruss has also worked behind the scenes with many business interests to reach agreements regarding advertising and marketing practices, developing a relationship of trust and respect with the business community of Michigan.

The award will be presented to Stanley Pruss during the Consumer Law Section meeting at the State Bar's annual meeting on Thursday, September 26. We invite everyone to attend and hope to see you there.

Preventing Class Action Settlement Abuse: Consumer Attorneys Group Sets Guidelines

By Steve Goren

Class actions are perhaps the most powerful tool available to redress the claims of consumers who have been subjected to unfair and deceptive business practices. Even though the injury to an individual consumer may be small, the damages to the class as a whole can be very significant. Given the power of consumer class actions and the amount of money involved, there is both a high potential for abuse and the need for responsibility on the part of class counsel.

In order to encourage responsible conduct by class counsel, the National Association of Consumer Advocates (NACA) has established a series of standards and guidelines for litigating and settling class actions.¹ The NACA guidelines have been praised for their support of the rights of absent class members and as a “critical first step” in professional self-regulation.² The purpose of this article is to provide the reader with a summary of those standards and guidelines and the potential problems which led to their development.³

One of the principal problems addressed by the NACA guidelines is the unfair or collusive settlement. When faced with a real or potential consumer class action, the defendant’s primary objective is to settle as many claims as possible for the smallest amount of money. In the worst case scenario, the defendant finds a stalking horse to act as class counsel and enters a quick settlement eliminating the maximum number of consumer claims for a negligible payout. In the more likely situation, the defendant finds itself litigating multiple suits and engages in what has been termed a “reverse auction” seeking out the lawyer willing to sell out the plaintiffs’ claims at the cheapest price.⁴

There have been a significant number of class action settlements approved where the class members receive little or nothing of value while class counsel walks away with a great deal of money.⁵ There have even been settlements where class members lost money.⁶ These types of settlements indicting at least an appearance of collusion have engendered a great deal of criticism.⁷ Compounding the monetary incentives to engage in collusion is the fact that courts generally approve class action settlements. While some proposed settlements have been rejected,⁸ one study shows that about 90% of the class actions settlements were approved in the same form proposed by the settling parties.⁹

Consumer Class Actions Issues and Guidelines

Issue 1 - Small individual recoveries in class action suits

The propriety of class actions when individual recoveries are small.

NACA Guideline - The class action device is particularly appropriate in consumer cases where individual recoveries are small, but which, in the aggregate, involve millions of dollars in damages.

Issue 2 - Certificate Settlements

There appears to be an increasing use of certificate settlements, offering relief to the class members in the form of certificates that are redeemable on future purchases from the Defendant. Questions have been raised about the propriety of such settlements.

NACA Guideline - Certificate settlements have many disadvantages and should be proposed by class counsel only in the rare cases.

If (1) the primary goal of the litigation is injunctive, (2) the certificates are freely transferable, and (3) there is a market-maker to insure a secondary transfer market, a certificate settlement might be appropriate.

A few basic positions are clear:

- Certificate-based settlements should never require identifiable class members to purchase major, large ticket items from the defendant as the sole significant relief to the class.
- Certificates should have some form of guaranteed cash value.
- Certificate settlements should never be proposed to the court unless it is apparent that the defendant is providing greater true value ... to class members than would be available from an all-cash settlement.
- A settlement involving certificates should require a minimum level of redemption by the class members within a reasonable period of time.
- Class counsel and defendants should submit to the court and all counsel of record detailed information about redemption rates and coupon transfers during the entire life of the coupon.

Issue 3 - Settlements When Other Class Actions are on File

How should class counsel approach settlement when other class actions, whether putative or certified, have been filed? How can “reverse auctions” be avoided?

NACA Guideline - Class counsel should attempt to learn of any pre-existing cases and to communicate with other plaintiffs’ counsel in such cases prior to or promptly after filing an overlapping case. Counsel should cooperate...

Issue 4 - Additional compensation to named plaintiffs

Is it appropriate to provide additional sums to named plaintiffs, beyond what each class member receives, and, if so, when and in what amounts?

Continued on page 4

Preventing Class Action Settlement Abuse ...

Continued from page 3

NACA Guideline - Awards to named plaintiffs are appropriate compensation for the time and expense they incur in serving as class representatives. The consumers who fight on behalf of an entire class should be reasonably compensated for their efforts when those efforts are successful. For anything more than modest sums in the range of \$2,000 -3,000, the amounts of such awards should be based on the amount of time and money expended in connection with prosecuting the case, or other special circumstances.

Issue 5 - Class member releases

When is it appropriate to release class claims without individual class member signatures? May the scope of releases exceed the scope of the claims certified by the Court?

NACA Guideline - It is often reasonable to release any such alternative claims which could have been asserted, even if not contained in the pleadings or specifically certified. Except in unusual circumstances, counsel should not agree to any settlement which releases non-certified claims unless class members will be given a subsequent opportunity to exclude themselves from the settlement.

Specifically, if the class settlement only provides injunctive benefits that do not result in restitution or other monetary payments to individual class members, the release should provide that individual damages claims are not be released.

Issue 6 - *Cy pres* awards

What happens to the undistributed residue?

NACA Guideline - Class counsel should insist on direct distributions of damages to class members before recommending a *cy pres* remedy for the undistributed residue except in unusual circumstances. These include instances where individual recoveries are unduly costly. Class counsel should recommend *cy pres* remedies which will provide indirect benefit to absent members of the class or which will further the purposes of the underlying litigation.

Issue 7 - Attorney fee considerations

The prime focus of criticism is the size of the fees.

NACA Guideline - Reasonable attorneys fees must be awarded in consumer class actions because fees are the incentive for lawyers to engage in private enforcement of the law, but excessive and unreasonable amounts should not be sought or awarded.

• **Time to discuss fees.**

Class counsel should avoid any conflicts of interest that may increase the danger of an improper *quid pro quo* detrimental to the class.

In statutory fee-type cases, an acceptable alternative is to obtain the defendant's agreement on class relief contingent on successfully negotiating an agreement on fees. In common fund cases, there is no need to discuss fees with the defendant since the class clients, not the defendant, pay the fee from the fund that was created by their counsel, subject to court approval.

• **Percentage benchmarks for most common fund cases**

In the absence of special circumstances, including either an unusually large monetary recovery or a relatively small monetary recovery coupled with very beneficial but difficult to value equitable relief, the courts have recognized percentage benchmarks ranging from 19 percent to 45 percent of the common fund.

• **Recovering fees from the class.**

In a common fund case where the underlying claims are based on fee-shifting statutes, it is generally best to negotiate an additional amount representing the right to fees from the defendant directly, in order to limit the fees paid by class counsel's clients and maximize the total recovery to the class.

• **Non-cash settlements.**

In a case where relief to the class is not paid in cash (or by credit to an existing account), the attorneys' fees should be based solely on a lodestar rate, with a multiplier when appropriate under existing case law.

• **Percentage fee request if cash value of settlement cannot be determined at time of settlement approval.**

The two most common situations where this is true are (1) certificate settlements and (2) "claims made" settlements. In such cases, it is inappropriate for class counsel to seek a percentage fee unless one of the following is true: (a) the settlement provides for a minimum settlement level; and (b) the settlement provides for an initial payment to class members (or as a *cy pres* payment) and the fee is sought based on a percentage of that initial payment; or (c) approval of payment of the fee to class counsel is not requested until such time as the court can accurately assess the actual value of the settlement.

• **Notice of the class of fees.**

The maximum amount of attorneys' fees to be sought must be disclosed to the class members at the time the notice of proposed settlement is sent to them.

Issue 8 - Improved notice of settlement

NACA Guideline - NACA should support a drive for simplified, plain-language, standardized disclosure of the salient aspects of a settlement.

Issue 9 - Approval of settlement classes

NACA Guideline - The preferable method is to obtain class certification prior to entering into settlement negotiations. However, the dynamics of settlement often create situations where settlement is reached early in the proceedings, before class certification. In those cases, as part of the settlement, class determination may be made contingent on finality of the approval of the settlement, as is commonly done when a court certifies a class "for settlement purposes only."

Issue 10 - Interlocutory appeal of class certification

The Rules Committee also proposed a new Rule 23(f), permitting interlocutory appeals of a district court order granting or denying class certification. The right to appeal is discretionary with the court of appeals. The proposed rule provides that such an appeal does not stay the proceedings unless the district or appellate court orders.

NACA Position - Immediate appeal should be allowed only if certification is denied.

Seg Open Files

Class Action Issues & Guidelines

¹ National Association of Consumer Advocates, *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, 176 FRD 375-404 (1998). The NACA guidelines are also available under Resources at the NACA website: www.NACA.net.

² Brian Wolfman, *Forward: The National Association of Consumer Advocates' Standards and Guidelines for Litigating and Settling Consumer Class Actions*, 176 FRD 370-374 (1998).

³ The reader must remember that what is presented here is only a summary of the NACA guidelines. It is hoped that this summary will motivate the reader to examine the guidelines in their entirety.

⁴ See *Weinberger v Great Northern Nekoosa Corp.*, 925 F.2d 518, 524; see also, John C. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum L Rev 1343, 1354 (1995).

⁵ See *Dunk v Ford Motor Co.*, 48 Cal 1 App. 4th 1794, 56 Cal.Rptr.2d 483 (1996); see also *In Camera*, 16 Class Action Rep 369, 485-87 nn 2-8 (1993) (surveying many coupon settlements and demonstrating that most were virtually worthless); Brian Wolfman & Alan Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief* 71 NYU L Rev 439, 472-74 (1996) (describing problem of obtaining value from coupon settlements); Note, *In Kind Class Action Settlements*, 109 Harv L Rev 810 (1996) (same).

⁶ See *Kamilewicz v Bank of Boston Corp.*, 92 F.3d 506 (7th Cir 1996); see also, *Kamilewicz v Bank of Boston Corp.*, 100 F.3d 1348 (7th Cir 1996) (Easterbrook, J., dissenting from denial of rehearing en banc, joined by Posner, Manion, Rovner, & Wood, JJ.).

⁷ See, eg, Hon. Milton I. Shadur, *From the Bench: The Unclassy Class Action*, 23 Litigation No. 2, at 3 (Winter 1997); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 Va L Rev 1051 (1996); and Coffee, *supra* n 4.

⁸ See, eg, *Epstein v MCA, Inc.*, 126 F.3d 1235 (9th Cir 1997); *In re Matzo Foods Prods Litig.*, 156 FRD 600 (D NJ 1994); see also *In re General Motors Corp Pick-up Truck Fuel Tank Prods Liab Litig.*, 55 F.3d 768, 808 (3d Cir.) (criticizing settlement that provided coupon to purchase defendant's product and \$9.5 million counsel fee as marketing scheme for defendant), *cert den* 516 US 824 (1995).

⁹ See *Empirical Study of Class Actions in Four District Courts: Final Report to the Advisory Committee on Civil Rules* 56-58 (Federal Judicial Center 1996); see also Koniak & Cohen, *supra* n 6, at 1106-08 (attributing lack of opposition to lack of resources and sophistication and inadequate notification of class members).

Election Notice

The Consumer Law Section will fill officer slots and Section council seats at its annual meeting September 26, 9:30 am at the State Bar Annual Meeting in the Amway Grand Plaza Hotel, Grand Rapids.

Nominations have been made by the nominating committee, appointed by the Section Chair, John Roy Castillo. Nominating committee members are Kathy Fitzgerald, Adam Taub and Steve Goren.

Nominations are as follows:

Chairperson (automatic elevation of chair-elect):

Kathy Fitzgerald, Assistant MI Attorney General

Chair-elect: **Steve Goren**, Goren & Goren,
Bingham Farms

Treasurer: **Laurin' Roberts Thomas**, UAW-
GM Legal Services, Lansing

Secretary: **Gary Victor**, Professor, Eastern
Michigan University

Open council seats:

Seats expiring 2005:

Peter Bagley, UAW-GM Legal Services Plan,
Saginaw

Dan Andrews, sole practitioner, Plymouth
Lorray Brown, Michigan Poverty Law Program,
Ann Arbor

Carolyn Bernstein, UAW-GM Legal Services
Plan, Saginaw

Seats expiring 2003:

Clarence Constantakis, sole practitioner,
Dearborn Heights

Larry Lacey, sole practitioner, Royal Oak

Steve Lehto, sole practitioner, Farmington Hills

Additional nominations may be made from the floor. If Steve Goren is elected chair-elect, nominations may be made to fill the vacancy created on the council.

Unlicensed Builders May No Longer Collect in Equity

By Gary M. Victor

Introduction

Unlicensed builders are prohibited by statute from using the courts to collect for their services.¹ In fact, engaging in an unlicensed activity is a misdemeanor.² Also, builders must be licensed in order to place a lien on property.³ Despite these laws, unlicensed builders abound and often place liens on homeowners' property when disputes arise.

The question at hand is whether unlicensed builders, through use of these illegal liens, can force homeowners to sue in equity to quiet title and then recover in equity what they are prohibited from collecting at law. In a recent article,⁴ this author explained the case history which led to a "Yes" answer to the question posed. This article will explain how the Supreme Court changed that "Yes" to a "No" in *Stokes v Millen Roofing Co*⁵ decided July 23, 2002.

Background

While the full case history of this issue can be reviewed in the author's previous article,⁶ this article will discuss the three cases considered by the Supreme Court in reaching its current decision. Those cases are: *Kirkendall v. Heckinger*,⁷ *Republic Bank v. Modular One LLC*⁸ and the Court of Appeals decision in the instant case, *Stokes v Millen Roofing Co*.⁹

The Supreme Court case of *Kirkendall v. Heckinger*¹⁰ was the first reported case to examine the question of whether an unlicensed builder can recover in equity. The plaintiffs in *Kirkendall* were Frank Kirkendall and his son Dennis. The elder Kirkendall purchased a lot on which he planned to have a house built for Dennis. Kirkendall owed money on the land purchase and back taxes at the time he approached defendant Heckinger, an unlicensed builder, to construct a house for Dennis. For an amount of money which was later disputed, Heckinger agreed to pay off the money owed by Kirkendall and provide labor and materials toward constructing a house for Dennis.¹¹

Apparently as security, the elder Kirkendall transferred title to the property to Heckinger. Heckinger then built the house with the help of Dennis. When the dispute arose over the amount due Heckinger, he refused to convey the property to Dennis and the Kirkendalls filed suit in equity. Heckinger filed a counterclaim for his labor and materials.¹² The trial court ordered the title be conveyed to Dennis upon plaintiffs' reimbursement of the amount paid by Heckinger to pay off the land contract and back taxes. The Court of Appeals affirmed.¹³

The Supreme Court reversed and remanded. The Court posed the question as follows:

The question before us is whether in an action brought by plaintiffs for equitable relief, § 16 of the residential builders licensing act precludes defendants from obtain-

ing relief in the form of reasonable expenditures for improvement made with the consent of the plaintiffs while defendants had title to the property.

While the Court acknowledged that the trial court was correct in concluding that an unlicensed builder was prohibited from bringing a counterclaim for money damages, it indicated that trial court's decision on that issue did not end the inquiry.¹⁴

The Court agreed with the trial court's conclusion that "the conveyance from Kirkendall to Heckinger while absolute on its face constituted a mortgage"¹⁵ and that plaintiffs' case in equity was one to have that mortgage removed. Citing the equitable maxim that "he who seeks equity must be prepared to do equity,"¹⁶ the Court reached the following conclusion:

The plaintiffs sought an equitable remedy. Before ordering the conveyance to Dennis Kirkendall, the trial court was obliged to determine the amount the plaintiffs were required to pay the defendants in order to do equity. As the equitable mortgagee, Heckinger was entitled as a condition to reconveyance to reasonable expenditures for improvements on the property made with the Kirkendalls' consent (and in fact with Dennis Kirkendall's active participation) while Heckinger had title to the property.¹⁷

The facts of *Republic Bank v. Modular One LLC*¹⁸ are quite different. In *Republic Bank*, the plaintiff bank had purchased eight residential lots at a foreclosure sale. Defendant, an unlicensed builder, had improved each lot with a modular home and had placed liens on each of the lots prior to the foreclosure. Unlike the unlicensed builder in *Kirkendall*, the builder in *Republic Bank* never had title to or an equitable mortgage in the property. The bank filed an action to have the liens removed. The trial court granted the bank summary disposition on the basis that defendant did not possess a builder's license.¹⁹

The Court of Appeals agreed with the trial court that the liens were indeed invalid. However, citing *Kirkendall*, the Court reversed and remanded for a determination of what amount was due defendant to do equity.

Applying these principles, we believe that the trial court incorrectly held that defendant's liens were unenforceable because defendant did not have a builder's license. As a precondition to resolving plaintiff's action to quiet title, the court should have determined if defendant was entitled to payment for the work he performed on the property.²⁰

Next comes the current case's trip through the Court of Appeals—*Stokes v Millen Roofing Co*.²¹ Plaintiffs in *Stokes* had contracted with defendant, an unlicensed roofing contractor, to have a slate roof installed on their house. After a dispute arose, defendant placed a lien on plaintiffs' property. Plaintiffs filed suit against defendant for breach of contract and to have the construction lien removed. Defendant filed a counterclaim. The trial court dismissed defendant's counterclaim and removed the lien, but after a bench trial allowed

defendant equitable relief.²² Plaintiffs appealed. The *Stokes* panel examined the prior line of cases with great disapproval; however, based on the fact that it was bound by *Republic Bank* under MCR 7.215,²³ it reluctantly affirmed.

Even though affirming, the *Stokes* panel engaged in an extensive analysis. First, the Court demonstrated the ways in which *Kirkendall* was distinguishable.²⁴ Then, the Court opined that *Republic Bank* was incorrectly decided²⁵ stating that *Republic Bank* “drew a road map for residential builders and contractors who want to avoid the licensing requirements of the act.”²⁶

Despite the clear conflict between the reasoning of the *Stokes* panel and *Republic Bank*, a polling of the full court did not produce enough votes to convene a special panel.²⁷ The plaintiffs applied for leave and defendant cross appealed the denial of its counterclaim. The Supreme Court granted leave.²⁸

Stokes in the Supreme Court

The Court Reverses and overrules *Republic Bank*

In an opinion of the Court written by Justice Kelly and joined by three other justices, the Court distinguished *Kirkendall*, reversed the trial court’s order, and echoing the Court of Appeals’ analysis,²⁹ overruled *Republic Bank*:

We overrule the holding of *Republic Bank*. If it were allowed to stand, any unlicensed contractor could defy the residential builders act and the Construction Lien Act by refusing to obtain a Michigan residential builder’s license. It could contract with a residential home owner to perform work on the owner’s home. Then, if a dispute arose over money due, it could cloud the title with a lien and wait until the owner brought suit to clear title. It could then recover the amount due in an equity judgment. Such a result violates MCL § 339.2412 (the residential builders act) and ignores key distinctions in *Kirkendall*.³⁰

The Court made it abundantly clear that unlicensed builders can not seek compensation, can not place a valid lien on property and can not look to equity for relief:

We hold that Millen Roofing Company’s failure to obtain a residential builder’s license constitutes a bar to its seeking compensation for installing slate on the *Stokes*’ roof, pursuant to MCL § 339.2412. Also, because Millen was unlicensed, its construction lien was invalid. Finally, Millen cannot have equitable relief because any such relief would allow equity to be used to defeat the statutory ban on an unlicensed contractor seeking compensation for residential construction.³¹

The Court based its decision on its obligation to give deference to the legislative scheme even though it may produce a harsh result. Courts can not turn to equity to defeat a clear statute:

In its bench ruling granting equitable relief to Millen, the trial court stated that a court in equity may provide for nonlegal, equitable remedies to avoid unduly harsh legal doctrines. Its analysis is invalid because, in this case, equity is invoked to avoid application of a statute. Courts must be careful not to usurp the Legislative role under the guise of equity because a statutory penalty is excessively

punitive. As the Court of Appeals stated: “Regardless of how unjust the statutory penalty might seem to this Court, it is not our place to create an equitable remedy for a hardship created by an unambiguous, validly enacted, legislative decree.”³²

The concurring opinions of Justices Weaver³³ and Markman³⁴ provide no significant additional legal analysis. Both support the majority opinion noting the harsh result, but acknowledging that the statute is clear and must be followed. The concurring opinion of Justice Markman is of particular interest, however, since even though he authored the decision in *Republic Bank*, he has now become persuaded by analysis of the majority opinion.³⁵

There was one area of disagreement between the majority and dissenting Justice Cavanagh which could lead to problems in the future. This involves this issue of whether the unlicensed builder’s contract could be bifurcated into one part for supplying materials and one part for installation. Both the majority and Justice Cavanagh recognized that no license is necessary in a contract to supply materials while one is required for the installation.³⁶ The majority held that the contract could not be bifurcated.

The fact that Millen was not required to be licensed to supply slate is of no consequence here. In order for the “supplier” portion of this contract to be enforced, it would have to be severed from the illegal portions of the agreement. . .

Hence, the contract can be bifurcated only if the agreement to install the materials is independent of the agreement to supply them. But, here the agreements were not independent of one another. . .

Even if, normally, the contract could be bifurcated, the statute prohibits it. Section 2412 bars a suit for compensation if a license was necessary for performance of “an act or contract.” The statute requires us to look for either an act or a contract requiring a license. It does not make provision for bifurcating building contracts into separate labor and supply components. Accordingly, it is irrelevant that Millen could have supplied slate without a license.³⁷

Justice Cavanagh, on the other hand viewed the two parts of the contract as separate and distinct.

The contract expressly imposed two separate duties on defendant: to “supply and install” the slate. According to the majority, the installation duty, which requires a license, prevails over the supply duty, which does not require a license. . . I cannot agree that including both an installation and supply duty into one document extends the license requirement necessary to perform the installation duty to the supply duty, thus, generating an unenforceable document.³⁸

While the *Stokes* Court professes a desire to eliminate a road map for unlicensed builders to evade the licensing requirements and still obtain compensation, by making the bifurcation analysis it may have inadvertently provided such a road map. Unlicensed builders may simply start making two separate contracts; one for materials and one for labor. This would avoid the bifurcation issue. When a dispute arises, the unlicensed builder places an arguably legal lien on

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the property for the materials. Facing more complex litigation than he would if the lien were illegal, the home owner might be persuaded to pay to have the lien removed.

Conclusion

Prior to the Supreme Court's decision in *Stokes*,³⁹ case law allowed unlicensed builders to place illegal liens on property and recover in equity when the home owner sued to quiet title. When *Stokes* was in the Court of Appeals,⁴⁰ the panel severely criticized the line of cases allowing this practice, especially *Republic Bank*,⁴¹ but felt constrained to follow that case under MCR 7.215,⁴² With its decision in *Stokes*, the Supreme Court has made it clear that courts can no longer use their equity powers to usurp the legislative scheme established in the Residential Builders Act. While acknowledging that the inability of unlicensed builders to collect even in equity may lead to harsh results, the Court correctly left the solution to such problems to the Legislature.

Despite its show of respect for the Residential Builders Act, the *Stokes* Court may have left some room open for unlicensed builders to evade the requirement of the act and still receive some compensation. The Court discussed the issue of whether this unlicensed builder's contract could be bifurcated into one to supply materials, for which no license is required, and one for installation, which requires a license. With this discussion, the Court left open the question of whether an unlicensed builder that makes two separate contracts can file a valid lien for the materials contract. Whether unlicensed builders will try this two contract approach rather than securing a license remains to be seen. What courts will do in such a case is also a question for the future.

Endnotes

1 The residential builders act, MCL §339.2412(1) states:
A person or qualifying officer for a corporation ... shall not bring or maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article during the performance of the act or contract.

2 MCL § 339.601(3).

3 MCL § 570.1114.

4 Gary M. Victor, *Michigan Cases Allow Unlicensed Builders to Collect: Is this a Usurpation of Legislative Prerogatives or and Attempt to do Equity*, 36 MTLA Quarterly No 1, 30 (2002); reprinted by permission, 7 Consumer Law Newsletter No 1, 4 (2002).

5 Docket No 119074, Slip Opinion, 2002 WL 1614077; ___ Mich ___ (2002).

6 See *supra*, n 4.

7 403 Mich 371 (1978).

8 232 Mich App 444 (1998).

9 245 Mich App 44 (2001).

10 403 Mich 371 (1978).

11 *Id* at 372.

12 *Id*.

13 *Id* at 373.

14 *Id* at 374.

15 *Id* at 373.

16 *Id* at 374 citing *Goodenow v Curtis*, 33 Mich 505, 509 (1876).

17 *Id* at 374.

18 232 Mich App 444 (1998).

19 *Id* at 446.

20 *Id* at 455.

21 245 Mich App 44 (2001).

22 *Id* at 48-49.

23 Under MCR 7.215(I) (1) a Court of Appeals panel is bound by a rule of law established in a prior Court of Appeals decision published on or after November 1, 1990.

24 245 Mich App at 51-53.

25 *Id* at 54-58.

26 *Id* at 57.

27 245 Mich App 801(2001).

28 465 Mich 909 (2001).

29 See 245 Mich App at 57.

30 Docket No 119074, Slip Opinion at 5.

31 *Id* at 6.

32 *Id* at 5.

33 *Id* at 6.

34 *Id* at 7-8.

35 *Id* at 8.

36 See *Id* at 2 and 9.

37 *Id* at 2-3.

38 *Id* at 9.

39 Docket No 119074, Slip Opinion, 2002 WL 1614077; ___ Mich ___ (2002).

40 245 Mich App 44 (2001).

41 232 Mich App 444 (1998).

42 Under MCR 7.215(I) (1) a Court of Appeals panel is bound by a rule of law established in a prior Court of Appeals decision published on or after November 1, 1990.



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