

# M I C H I G A N REAL PROPERTY REVIEW

Published by the Real Property Law Section State Bar of Michigan

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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](http://www.michbar.org/realproperty/realproperty.cfm) in January of each year.

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## Chairperson's Report

by C. Kim Shierk

We have all seen someone in volunteer organizations step up to the challenge of going above and beyond the minimum. The Real Property Law Section first recognized that person when it created the C. Robert Wartell Distinguished Service Award in 2002. Bob Wartell was a leader in every sense of the word by serving not only as chairperson of the Section, but in so many other ways, including sharing his legal expertise as a frequent writer and speaker, and serving on many Section committees. Since the inception of the C. Robert Wartell Distinguished Service Award, the Section has recognized the dedication and contributions of seven other members of the Section: Gary A. Taback, Robert R. Nix II, Carol Ann Martinelli, Robert D. Mollhagen, Robert A. Berlow, Vicki R. Harding, and George J. Seidel, the long time editor of the *Michigan Real Property Review*.

At the Summer Conference this year, the Section added another one of its members to this distinguished list of recipients. Lawrence R. Shoffner was recognized for his years of service to the Section as member, officer and chairperson of the Section's Council; member and chairperson of the Section's special committee for Commercial Leasing of Real Estate; member and chairperson of the Section's Nominating Committee; contributing author to the *Review*; speaker and moderator for Homeward Bound; and continuing proponent for the adaptation and use of technology to enhance the Section's mission and outreach. Larry is responsible for raising the level of my involvement in the Section. I often look at Larry in awe because he has never permitted his standard for excellence waiver nor his professional commitments in any way diminish his dedication and service to the Section. Larry, thank you for setting the bar yet another notch higher.

Now is your opportunity to become involved in the Section. Whether you are new to the legal profession or have an established practice, the Section offers many opportunities. Join a committee (see the State Bar's website for information about the Section's various committees [www.michbar.org/realproperty](http://www.michbar.org/realproperty)) or attend a continuing legal education seminar (see the State Bar's website for the Section's upcoming programs). If you are a law student or new to the profession, consider one of the many programs that the Section's Membership Committee has scheduled for this coming year; i.e.: "Pizza and Property" with law students, and other networking opportunities. An exciting opportunity introduced last year by the Membership Committee is the "Quick Hits" program which is available to new attorneys and provides an overview of basic types of real estate contracts and transactions. Mark Krynski, Brian Henry and Nick Scavone recently presented part II of a series that focuses on commercial purchase agreements. The August program covered provisions in the commercial purchase agreement, including representations and warranties, as-is clauses, conditions precedent, and indemnities and holdbacks. The "Quick Hits" programs are extremely successful. These programs limit the number of attendees so that participants can freely ask questions, something that is not always possible at continuing legal education seminars at which over a hundred attendees are present, or when such programs are presented in webcast format only.

And, if none of the above opportunities interest you, consider giving back to the community by volunteering your time and expertise. One such organization to consider is Habitat for Humanity of Oakland County, Inc. (HFHOC) headquartered at 150 Osmun Street in Pontiac, Michigan. HFHOC seeks to eliminate substandard



housing and homelessness from Oakland County and to provide decent shelter as a matter of conscience and action. HFHOC has built or rehabbed over 115 houses in Oakland County, with the vast majority of those houses located in Pontiac. HFHOC is seeking additional attorney volunteers not only to provide leadership through service on its Board of Directors, but also to serve on committees which handle matters such as site selection, closings, mortgage issues, and other legal issues. If you think volunteering for HFHOC is something that you might find rewarding, contact William C. Hanson at 248-253-1100. Bill will be able to answer any questions you have and provide a more complete description of HFHOC's activities and opportunities.

The State Bar of Michigan Pro Bono Initiative has many more suggestions for how you can volunteer your time and expertise to the community. The State Bar's standing committee, Committee on Justice Initiatives, oversees this effort. Whether you serve as a mentor or you are a new attorney looking for an opportunity to gain experience, pro bono work is not only valuable to the individuals and community organizations directly benefiting from these services, but also provides substantial benefits to the lawyers. Opportunities await you.

Before closing, I want to say a special "thank you" to Mark Krysinski. Mark's list of contributions to the Section is lengthy, including his service as officer, chair of numerous committees, and advisor to ICLE. Most importantly, Mark is the person who termed the recently created "Quick Hits" program and has been a presenter at each of the programs. His firm, Jaffe Raitt Heuer & Weiss, P.C., has also been a gracious host of the "Quick Hits" programs. I am sad to see Mark leave as chairperson of the Section, but we will all benefit from his dedication to the Section in the future. We will see Mark at the next "Quick Hits" program, and he has also agreed to co-chair with Larry Dudek the effort to update the Section's Long Range Plan. I'm not going to let Mark ride off into the sunset.

Don't forget, you can follow the Section's activities on Facebook and LinkedIn. All program information is also found on the Section's website at [www.michbar.org/realproperty](http://www.michbar.org/realproperty).



## New Developments in Michigan's Construction Lien Law:

### What Attorneys Advising Contractors, Developers, and Construction Lenders Need to Know in the Wake of the Latest Economic Downturn



by Sean P. McNally\* and Thomas J. Vitale\*\*

During 2008 and 2009, real estate values across the State of Michigan experienced a severe decline. This erosion of value resulted in an unprecedented owner insolvency crisis. As a corollary, the shrinking Michigan economy had a major, negative financial impact on the construction industry, which resulted in a similar contractor insolvency crisis. As a result, a flurry of construction lien litigation has ensued relating to troubled or over-leveraged projects, insolvent owners, and/or insolvent contractors. Although market values have stabilized, and in many instances are increasing, construction concerns, owners, and lenders have been pitted against each other as they attempt to invalidate or subordinate each other's respective interest or security in projects where there is insufficient equity to satisfy the outstanding debts.

This article will survey recent significant Michigan decisions relating to the Michigan Construction Lien Act ("CLA")<sup>1</sup> and how these decisions and the recent economic downturn may shape or impact future practices for construction companies, owners, and construction lenders. This article will also examine some shortcomings of the CLA that have been exposed and that may require corrective legislative action. For those attorneys advising companies and individuals involved in the real estate development, construction, and banking industries, proactive compliance with the CLA is critically important to ensure the major benefits of the CLA are enjoyed. These ben-

efits include: (1) protecting lien claimants' possessive right to payment for labor and materials; (2) protecting project owners or lessees from paying twice for improvements; and (3) protecting mortgagees from unknown lien claimants.<sup>2</sup>

#### Judicial Developments in Michigan Construction Lien Priority Cases

##### Priority: Construction Lien v. Mortgage

One of the most frequently litigated issues in CLA cases is priority between the mortgagee and construction lien claimant(s). This is especially true where a troubled or over-leveraged project has insufficient equity to satisfy combined debt of the construction lien claimants who furnished improvements to the project and mortgagees who provided construction financing in connection with the acquisition and/or the construction of the project.

As a starting point, the CLA provides that all construction liens have priority over interests in the property that are recorded "subsequent to the first actual physical improvement."<sup>3</sup> An "actual physical improvement" is:

the actual physical change in, or alteration of, real property as a result of labor provided, pursuant

<sup>2</sup> *M D Marinich, Inc v Michigan Nat'l Bank*, 193 Mich App 447, 453-56; 484 NW2d 738 (1992).

<sup>3</sup> MCL 570.1119(3).

<sup>1</sup> MCL 570.1101 *et seq.*

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to a contract, by a contractor, subcontractor, or laborer which is readily visible and of a kind that would alert a person upon reasonable inspection of the existence of an improvement.<sup>4</sup>

The CLA further defines an “improvement” as:

the result of labor or material provided by a contractor, subcontractor, supplier, or laborer, including, but not limited to, surveying, engineering and architectural planning, construction management, clearing, demolishing, excavating, filling, building, erecting, constructing, altering, repairing, ornamenting, landscaping, paving, leasing equipment, or installing or affixing a fixture or material, pursuant to a contract.<sup>5</sup>

Finally, § 103 of the CLA provides:

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. Actual physical improvement does not include supplies delivered to or stored at the real property.<sup>6</sup>

Section 119(4) provides that a “mortgage, lien, encumbrance, or other interest recorded before the first actual physical improvement to real property shall have priority over a construction lien arising under this act.”<sup>7</sup> Priority only exists if the mortgage is recorded *prior* to the *first actual physical improvement*.<sup>8</sup> Thereafter, disbursements made pursuant to a mortgage *after the first actual physical improvement* shall only have priority over a construction lien if, “for that advance, the mortgagee has received a contractor’s sworn statement as provided in section 110, has made disbursements pursuant to the contractor’s sworn statement, and has received waivers of lien from the contractor and all subcontractors, laborers, and suppliers who have provided notices of furnishing.”<sup>9</sup>

4 MCL 570.1103(1).

5 MCL 570.1104(5).

6 See MCL 570.1103(1).

7 MCL 570.1119(4).

8 See *id.*

9 *Id.*

These priority battles have been the subject of several significant cases. For example, in *Abonmarche Consultants, Inc v Macatawa Bank Mortgage Co\**,<sup>10</sup> construction lien claimants brought an action against a construction lender claiming their construction liens had priority over the lender’s mortgage.<sup>11</sup> Abonmarche Consultants (“Abonmarche”) and Dan Vos Construction Company (“Dan Vos”) appealed the trial court’s grant of summary disposition to Macatawa Bank Mortgage Company (“Macatawa”) in a dispute over the priority of encumbrances on property owned by Newwaygo Riverbank, LLC (“Newwaygo”).<sup>12</sup> Abonmarche and Dan Vos argued that work they performed on a project to construct a mixed-use development for “high-end hunting, fishing and resort purposes” on 214 acres owned by Newwaygo related back to earlier road repair work performed by Terry Afton & Sons on an existing logging road on that same property.<sup>13</sup> Historically, the Court of Appeals explained, “the commencement of construction on a project affords to all liens resulting from work performed as part of that project priority over any subsequently recorded encumbrances.”<sup>14</sup> Further, the court noted that its earlier decision in *M D Marinich, Inc v Michigan Nat’l Bank*<sup>15</sup> “observed that the only limits on construction liens it could ‘discern from the [CLA] are that the amount of a claim cannot exceed the amount of a contract, MCL 570.1107(1), (6), and the improvements made *must relate to the project* as referred to in the notice of commencement, MCL 570.1109(1) . . . .”<sup>16</sup>

The *Abonmarche* court, applying *Marinich*, held that Abonmarche and Dan Vos failed to submit sufficient evidence to create a genuine issue of material fact as to whether the road repair work was part of the same construction project for which these parties performed work

10 No 285281, 2009 WL 3930020 (Mich Ct App Nov 19, 2009).

The “\*” symbol following a textual case citation in this Article denotes the opinion is unpublished.

11 *Abonmarche Consultants, Inc*, No. 285281, 2009 WL 3930020, \*1 (Mich Ct App Nov 19, 2009).

12 *Id.*

13 *Id.*

14 *Id.* at \*3 (citing *M D Marinich, Inc v Michigan Nat’l Bank*, 193 Mich App 447, 453; 484 NW2d 738 (1992)).

15 193 Mich App 447, 453; 484 NW2d 738 (1992).

16 *Abonmarche Consultants, Inc*, No. 285281, 2009 WL 3930020, \*3 (emphasis added) (citing *Marinich*, 193 Mich App at 457) (internal citations omitted).

for Newaygo.<sup>17</sup> In so holding, the court found that no reference to road repair work could be found in any documentation, the road was not going to serve as the construction entrance for the project, and the plaintiffs' only proffered assertion was that the repaired road corresponded to approximately 1000 feet of the road layout for the finished project.<sup>18</sup> Because of the insufficient nexus between the road repair work and the project for which Abonmarche and Dan Vos were hired by Newaygo, the Court of Appeals found Macatawa's mortgages had priority over the construction liens.<sup>19</sup>

Other recent decisions have also focused on "project" in analyzing priority issues. A recent Michigan opinion makes it clear that attorneys need a sound understanding of what constitutes the "same project" to advise participants in the construction industry. In *First Community Bank v Mountaineire LLC*,<sup>20</sup> a priority dispute arose from the failure of a multi-parcel mixed use development project, which had changed owners after the commencement of the project.<sup>21</sup> Pioneer, a construction lien claimant, submitted unrefuted evidence that "actual physical improvements" to the property began in April and May, 2004.<sup>22</sup> Mountaineire, the original owner of the project, filed its Notice of Commencement and concurrently recorded First Community's mortgage on June 30, 2004.<sup>23</sup> On August 30, 2005, Mountaineire transferred ownership of the property to the Yacht Club. First Community continued funding the project rather than exercising its option to demand payment of the mortgage loan.<sup>24</sup> Subsequently, Pioneer was hired as general contractor and recorded a notice of commencement on September 19, 2005.<sup>25</sup>

Plaintiff First Community argued that Pioneer's work for the Yacht Club, after its change in ownership, was part of a separate project, did not relate to the 2004 commencement filed by original owner, Mountaineire, and

therefore, First Community's June 30, 2004 mortgage had priority over Pioneer's construction lien.<sup>26</sup>

The Court of Appeals "disagree[d] that the change of ownership signaled the commencement of a new project."<sup>27</sup> The court recognized that pursuant to § 106(2) of the CLA, a "project" is "the aggregate of improvements contracted for by the contracting owner."<sup>28</sup> Because the project was conceived as a whole, presented to First Community as a whole, and First Community continued funding the project after the transfer of ownership, the Court of Appeals concluded there was no question of fact that the "Yacht Club assumed Mountaineire's role as the 'contracting owner' and continued the same plan of improvements that was presented to and approved for financing by First Community."<sup>29</sup>

In addition, based upon § 107(3),<sup>30</sup> the Court of Appeals explained that a "lien is not *destroyed* when the entity with whom the lienholder contracted loses title to the relevant property."<sup>31</sup> Since a change of ownership does not cut off priority where all of the improvements were part of a single multi-phase project, the Court of Appeals found by analogy that "a change of general contractors does not signal the commencement of a new project or alter the priority of liens."<sup>32</sup> The Court of Appeals further discussed policy reasons against holding First Community's mortgage had priority, noting First Community's failure to take steps under § 119(4) to ensure its priority by obtaining sworn statements and waivers of lien from the contractors working on

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26 *Id.*

27 *Id.* at \*5.

28 *Id.*

29 *Id.*

30 "MCL 570.1107(3) states that '[t]he forfeiture, surrender, or termination of any title or interest held by an owner or lessee who contracted for an improvement to the property, an owner who subordinated his or her interest to the mortgage for the improvement, or an owner who has required the improvement does not defeat the lien of the contractor, subcontractor, supplier, or laborer upon the improvement.'" *First Comm Bank*, 2010 WL 4137525, \*5.

31 *Id.* (quoting *Stocker v Tri-Mount/Bay Harbor Bldg Co*, 268 Mich App 194, 199; 706 NW2d 878 (2005)) (emphasis in the original).

32 *First Comm*, 2010 WL 4137525, \*5.

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17 *Abonmarche Consultants, Inc.*, 2009 WL 3930020, \*4.

18 *Id.*

19 *Id.* at \*5.

20 No. 293005, 2010 WL 4137525 (Mich Ct App Oct 21, 2010).

21 *Id.* at \*3.

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

the project.<sup>33</sup> For these reasons, the Court of Appeals affirmed the trial court's holding that Pioneer's construction liens related to the original notice of commencement, and thus had priority over First Community's mortgage.<sup>34</sup>

In a departure from this project-specific analysis, the Court of Appeals in *Komisar & Sons Inc v Gubbini*<sup>35</sup> found that the construction liens at issue had priority over the lender's mortgages regardless of whether the construction lien claimants' improvements, pursuant to § 119(3) and (4), related to the same project in which the "first actual physical improvement" was made.<sup>36</sup>

*Komisar & Sons*\* involved a priority dispute over work relating to Armond Gubbini's ("Gubbini") acquisition and subsequent division of a parcel of land. On or around May 5, 2005, which was before Gubbini divided the parent parcel, Bush & Sons Grading & Excavating, Inc. ("Bush & Sons") made improvements to the parent parcel.<sup>37</sup> In September, 2005, Gubbini sold a portion, which created two separate parcels, and thereafter subdivided the parent parcel into six parcels (the "Gubbini Parcel").<sup>38</sup>

On October 19, 2005 and December 14, 2005, Appellant Real Estate 3000, Inc. ("Real Estate 3000") loaned Gubbini \$80,000 and \$45,000, respectively, in exchange for a first and second mortgage on the Gubbini Parcel.<sup>39</sup> Meanwhile, in October, 2006, Gubbini contracted with Trucking Specialists and Komisar to develop several residential homes on parcels of land within the Gubbini Parcel.<sup>40</sup> Komisar then subcontracted with Michigan Pipe and Stoneco to perform a portion of the work.<sup>41</sup>

On appeal, Appellant Real Estate 3000 argued that, pursuant to § 119(4), "the relation back principle only applies where the later liens arise from work performed on the same project as that in which the 'the first actual phys-

ical improvement' was made."<sup>42</sup> In rejecting this argument, the Court of Appeals stated: "[Section 119(4)] does not mention the term, 'project,' nor does it in any manner indicate that a construction lien can only attach to the 'project' to which the improvements related."<sup>43</sup> Further, the court explained, MCL § 119(3) expressly provides that "[a] construction lien arising under this act shall take priority over *all* other interests, liens, or encumbrances which may attach to the building, structure, or improvement, or upon the real property on which the building, structure, or improvement is erected . . ." <sup>44</sup> Because there was no dispute that Real Estate 3000 recorded its mortgages after Bush & Sons had begun the first actual physical improvement to the property secured by the mortgages, the Court of Appeals found that the construction liens had priority over Real Estate 3000's mortgages.<sup>45</sup>

The relatively lenient interpretation by *Komisar & Sons*\* of the "relation back principle" pursuant to § 119(4) suggests that this is an area of the CLA that is ripe for corrective legislative action. Correcting this gap in the CLA is almost certain to involve establishing some limit to the scope of the relation back principle. Perhaps the most workable approach would be legislative clarification requiring that the relation back principle only be applied where the later liens arise from work performed on the "same project," as set forth in the Notice of Commencement.<sup>46</sup> Such corrective legislative action would provide a more predictable landscape for construction priority disputes and may even reduce such litigation. The present uncertainty as to the outer reaches of the relation back principle requires that construction law practitioners be aware of the current breadth of the interpretation of the CLA as stated in *Komisar & Sons*\*.

Recently, in *Jeddo Drywall, Inc v Cambridge Investment Group, Inc*,<sup>47</sup> the Court of Appeals had an opportunity to further highlight the application of *Marinich* and the CLA. Cambridge Meadows, LLC ("CM LLC") failed to pay Jeddo Drywall, LLC ("Jeddo") and Stock Building

33 See *id* at \*6 (citing MCL 570.1119(4)).

34 *Id*.

35 No. 292060, 2010 WL 3718876 (Mich Ct App Sept 23, 2010).

36 *Id* at \*2 (citing MCL 570.1119(3) and (4)).

37 *Komisar & Sons Inc*, 2010 WL at \*1.

38 *Id*.

39 *Id*.

40 *Id*.

41 *Id*.

42 *Id* at \*2 (citing MCL 570.1119(3)).

43 *Komisar & Sons Inc*, 2010 WL at \*2.

44 *Id* (emphasis in original) (quoting MCL 570.1119(3)).

45 *Komisar & Sons Inc*, 2010 WL at \*2.

46 *Id*.

47 No. 295726, 2011 WL 3299812, (Mich Ct App Aug 2, 2011), approved for publication Aug 2, 2011, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (2011).

Supply, LLC (“Stock”) for labor and materials furnished in relation to a residential project on lot 204 in the Cambridge Meadows subdivision (the “CM subdivision”) in Brownstown Township.<sup>48</sup> Clearing, grading, paving, and utility work had been completed as early as October 4, 2002.<sup>49</sup> On March 17, 2005, CM LLC executed a construction mortgage with AmTrust in exchange for a \$757,500 loan, secured by the CM subdivision, which included lot 204.<sup>50</sup> On March 25, 2005, the mortgage was recorded.<sup>51</sup>

On February 3, 2006, Stock first supplied material to lot 204 for the construction of a single family home.<sup>52</sup> In September, 2006, Jeddo supplied materials and labor to the house on lot 204.<sup>53</sup> When Jeddo and Stock were not paid, both filed construction liens under the CLA. In the fall of 2008, AmTrust foreclosed its mortgage. A sheriff’s sale was held on December 3, 2008, and the property was not redeemed.<sup>54</sup> Jeddo and Stock subsequently filed lawsuits against, among others, CM LLC, AmTrust, Jeffrey and Rodney Walker, Cambridge Meadows Investment Group, and Fountain Homes to foreclose on their construction liens.<sup>55</sup> Because the residential project had several delays, Stock had previously filed a notice of lien, “amended” claim of lien, “second amended” claim of lien, and “third amended” claim of lien for materials furnished to the home on lot 204 on April 12, 2006, August 22, 2006, January 24, 2007, and July 3, 2007, respectively.<sup>56</sup> Each lien listed was filed within 90 days of the last day Stock had provided materials for the lot 204 project.<sup>57</sup>

AmTrust argued on appeal that the trial court erred because “no actual physical improvements were made to lot 204 before AmTrust recorded its mortgage.”<sup>58</sup> The Court of Appeals initially noted that AmTrust’s mort-

gage covered the entirety of the CM subdivision, which specifically included lot 204.<sup>59</sup> Because Jeddo and Stock submitted evidence to the trial court to establish improvements and development as anticipated by permits relating to, among other things, underground utilities, clearing, and grading as early as October 4, 2002, the Court of Appeals found this work was “sufficient to visibly place others on ‘notice there may be outstanding liens against the property because construction work is in progress.’”<sup>60</sup> Thus, the court found that the lien claimants’ evidence establishing “that actual physical improvements were made to the [CM subdivision], including specifically lot 204,” coupled with AmTrust’s failure to produce any evidence necessary “to raise a genuine issue of material fact on this issue,” satisfied the lien priority issue relating to an actual physical improvement pursuant to MCL 570.1103(1).<sup>61</sup>

AmTrust alternatively argued that any actual physical improvements were part of a different “project,” owned and managed by different entities.<sup>62</sup> The Court of Appeals rejected this argument, and held that “notwithstanding the change in ownership of the property, the actual physical improvements made in 2002 were related to the same project for which Jeddo and Stock provided labor and materials in 2006.”<sup>63</sup> In so holding, the Court of Appeals expressly reaffirmed *Marinich*, stating:

The Court in *Marinich* ruled that a change in general contractors does not establish the existence of a new project if the work that is subject to the lien was part of a single project. We hold that the same rule obtains when the first actual physical improvement is made under the direction of a different developer if, as here, the work was performed as part of a single project.<sup>64</sup>

Thus, the *Jeddo Drywall* court, like the *Marinich* court, has focused the inquiry on the singularity of the project, even though multiple owners or developers may

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48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.*

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59 *Id.*

60 *Id.* (citing *Marinich*, 193 Mich App at 455).

61 *Jeddo Drywall, Inc v Cambridge Investment Group, Inc*, No. 295726, 2011 WL 3299812, (Mich Ct App Aug 2, 2011), \_\_\_Mich\_\_\_; \_\_\_NW2d\_\_\_ (2011).

62 *Id.*

63 *Id.*

64 *Id.* (citing *Marinich*, 193 Mich App at 455-58) (internal citations omitted).

be involved.<sup>65</sup> Although the Court of Appeals also determined that the owners and developers of the project were related entities based on the evidence submitted to the trial court, the *Jeddo Drywall* court highlighted that a change in ownership “does not alter the validity of a lien” under the CLA.<sup>66</sup> Rather, the court found the evidence established that the project was “conceived as a whole and the development continued as planned from the time of the first actual physical improvements through the time when Jeddo and Stock provided labor and materials for lot 204.”<sup>67</sup>

AmTrust further argued that Stock’s “third amended” lien could not recover the amounts accumulating from its previous liens and “amended” liens based on the language in § 111(1), which covers work within the previous 90 days.<sup>68</sup> The Court of Appeals rejected this argument, relying principally on § 111(1) in conjunction with § 302(1).<sup>69</sup> Because § 302(1) requires a liberal construction “to secure the beneficial results, intents, and purposes of this act,” the court held that Stock’s “third amended” lien (which clearly stated Stock’s first and final provision of materials) was valid and the current action was filed within the statute of limitations.<sup>70</sup> In fact, as to the multiple “amended” liens, the Court of Appeals stated “it was *logical* for Stock to record its liens as time elapsed between deliveries when progress on construction was erratic.”<sup>71</sup>

*Jeddo Drywall* is an important case for construction practitioners for several reasons. First, it is a published opinion reaffirming *Marinich’s* relation-back principle. Second, the opinion focuses the priority issue on whether the actual physical improvement relates to the “same project” involved in the underlying construction lien even when a change in ownership is alleged. Third, the opinion encourages construction participants to take logical, proactive steps to preserve their rights under the CLA. Nonetheless, legislative corrective action may still be necessary in order to provide total clarity relating to the definition of “actual physical improvement” under § 103(1) and

whether this term relates solely to the “same project” for purposes of establishing priority under the CLA. These recent cases, including *Jeddo Drywall*, may be sufficient to force the Legislature to reexamine and clearly establish the boundaries of an “actual physical improvement” under § 103(1) for purposes of establishing priority.

#### “Actual physical improvement” v. Preparatory Work – Michigan Pipe & Valve-Lansing

Attorneys advising construction lenders and owners have further reason to take notice of the recent opinion by the Court of Appeals in *Michigan Pipe & Valve-Lansing, Inc v Hebler Enterprises, Inc.*,<sup>72</sup> which dealt with the distinction between a “first actual physical improvement” and preparatory work for purposes of the priority analysis under § 119(4).

In *Michigan Pipe & Valve-Lansing*, Firstbank-St. Johns (“Firstbank”) contested a finding that two construction lien claimants’ claims of lien had priority over its mortgage.<sup>73</sup> In this case, Windy Pines View, LLC (“Windy Pines”) secured financing in order to develop property in St. John’s, Michigan by granting a mortgage on the property to Firstbank.<sup>74</sup> Firstbank recorded the mortgage on February 10, 2005.<sup>75</sup>

On February 8, 2005, F&W Well Drilling, Inc. drilled a well on the property, placed a plastic casing in the well, which extended one foot above grade and later capped the well after Windy Pines decided that the Bingham Township municipal water supply would service the subdivision.<sup>76</sup>

In 2007, Windy Pines contracted with Hebler Enterprises, Inc. (“Hebler”) to build “[i]nfrastructure and roads.”<sup>77</sup> Michigan Pipe & Valve-Lansing, Inc. (“MPV”) and Grand River Infrastructure, Inc. (“GRI”) supplied

65 *Jeddo Drywall, Inc.*, 2011 WL 3299812.

66 See MCL 570.1107(3).

67 *Jeddo Drywall*, 2011 WL 3299812.

68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.* (emphasis added).

72 No. 294530, 2011 WL 1004660 (Mich Ct App March 22, 2011), approved for publication May 3, 2011, \_\_\_ Mich. \_\_\_, \_\_\_ N.W.2d \_\_\_ (2011).

73 *Id.* at \*1.

74 *Id.*

75 *Id.*

76 *Id.* The well was used to obtain a water sample from the acquirer below the property. *Id.*

77 *Id.*

Hebeler with pipe and other materials.<sup>78</sup> Although Windy Pines paid Hebeler in full, Hebeler failed to pay MPV and GRI the total amounts due under the contracts, and as a result, MPB and GRI each filed claims of lien, respectively.<sup>79</sup> These liens led to the litigation to foreclose the liens, and subsequently to the court's determination of priority between the lien claimants and Firstbank.<sup>80</sup>

The trial court held that the drilling of the well on February 8, 2005 was an "actual physical improvement" to the property, and thus, pursuant to § 119(1), the construction liens of MPV and GRI had priority over Firstbank's mortgage.<sup>81</sup>

On appeal, Firstbank argued that the trial court erred in holding that the well was an "actual physical improvement."<sup>82</sup> Under § 103(1), "actual physical improvement" means:

(T)he actual physical change in, or alteration of, real property as a result of labor provided, pursuant to a contract, by a contractor, subcontractor, or laborer which is readily visible and of a kind that would alert a person upon reasonable inspection of the existence of an improvement. 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. Actual physical improvement does not include supplies delivered to or stored at the real property.<sup>83</sup>

Initially, Firstbank argued that the well "did not add any value to the property," in contravention of Barron's Law Dictionary, which indicates "that improvements to real property are generally thought to increase the value of

property."<sup>84</sup> The Court of Appeals rejected this argument in part because "the CLA definition of 'actual physical improvement' controls."<sup>85</sup> Further, the court explained that the definition was unambiguous and therefore did not require that "the improvement add value to the real property."<sup>86</sup>

Firstbank's next argument addressed the exception under § 103(1) for "labor which is provided in preparation for that change or alteration . . . ."<sup>87</sup> Firstbank asserted that "the exception provided for in the definition encompasses . . . the 'due diligence process.'"<sup>88</sup> Based on this interpretation, Firstbank argued that the well "was only a test well and therefore not an 'actual physical improvement.'"<sup>89</sup>

The Court of Appeals reiterated the frequently-cited principle that "[t]he 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."<sup>90</sup> Further, the court noted that Firstbank's argument did not "suggest that the well was not an 'actual physical change in . . . real property . . . which [was] readily visible and of a kind that would alert a person upon reasonable inspection of the existence of an improvement.'"<sup>91</sup>

The court did not dispute that the definition of "actual physical improvement" under § 103(1) in effect recognized a "due diligence process" involving specific procedures stated in the definition, which, according to the plain language of the definition, do not suggest an exhaustive list.<sup>92</sup> The court, however, found that "none of the procedures stated in the definition equates to the digging of a well, or any other act, which makes a 'readily

78 *Id.*

79 *Id.*

80 *Id.* The Court of Appeals also considered whether MPV could recover service charges as provided for in the contract with Hebeler, but this issue is beyond the scope of this Article. *See id.*

81 *Id.*

82 *Id.* at \*2.

83 *See* MCL 570.1103(1).

84 *Michigan Pipe & Valve-Lansing, Inc v Hebeler Enterprises, Inc*, No. 294530, 2011 WL 1004660, \*3 (Mich Ct App March 22, 2011), approved for publication May 3, 2011, \_\_\_ Mich. \_\_\_, \_\_\_ N.W.2d \_\_\_ (2011).

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.* (quoting MCL 570.1103(1)).

92 *Michigan Pipe & Valve-Lansing, Inc., No. 294530, 2011 WL 1004660, \*3.*



visible' 'physical change' to the property."<sup>93</sup> In support of this finding, the Court of Appeals stated that "the acts identified in the statute are all of a nature that none of them will leave a permanent presence on the property."<sup>94</sup> Thus, the Court of Appeals rejected Firstbank's argument that the exception "encompasses all acts done in the 'due diligence process,' based on the plain and unambiguous language" of § 103(1).<sup>95</sup>

Since Firstbank's mortgage was recorded after the digging of the well, which was found to be the "first actual physical improvement" to the property, the Court of Appeals held that "the construction liens of MPV and GRI had priority over Firstbank's mortgage."<sup>96</sup>

### **Actions For Foreclosure of Liens After Asphalt Specialists**

In *Asphalt Specialists, Inc v Steven Anthony Dev Co*\*,<sup>97</sup> Wells Venture Corporation ("WVC") challenged a trial court's decision to foreclose WVC's entire interest in a golf course after granting construction lien claimants a judgment for possession.<sup>98</sup> On March 14, 2005, WVC and GTR Glacier Golf Holdings ("Golf Holdings") entered into a land contract for the purchase of a golf course.<sup>99</sup> In April, 2006, Lakeview contracted with GTR Glacier Club, L.L.C. to provide labor and materials for infrastructure improvements, including water, sanitary sewer, and storm sewer lines, at the golf course.<sup>100</sup> In June, 2006, ASI contracted with GTR Companies for the construction and asphalt paving of the golf paths at the golf course.<sup>101</sup> In July, 2006, A & R also contracted and began performance of a contract to provide Golf Holdings with asphalt paving labor and materials for the golf course.<sup>102</sup> Thereafter, Lakeview, ASI, and A & R were not fully compensated. They filed claims of lien on the golf course in 2007 and

began actions in circuit court for breach of contract, unjust enrichment, and foreclosure on their liens.<sup>103</sup> Both Golf Holdings and WVC were among the defendants to these actions: Golf Holdings as land contract vendee, and WVC as land contract vendor.<sup>104</sup>

At the circuit court, WVC argued that pursuant to § 119(4), its interest as a land contract vendor had priority over the liens.<sup>105</sup> Meanwhile, by 2008, as a result of Golf Holdings' failure to make payments to WVC on the land contract, WVC filed a cross-claim to accelerate the remaining amount due.<sup>106</sup> Additionally, WVC filed an action in the district court to obtain a judgment of possession after land contract forfeiture.<sup>107</sup>

On October 1, 2009, the circuit court issued an opinion and order rejecting WVC's argument that its interest had priority over the liens, and instead found that Lakeview, ASI, and A & R "were entitled to unpaid compensation, contractual interest, statutory attorney fees, and taxable costs, and that these amounts would be paid pursuant to a final order of distribution of sale proceeds from the golf course" pursuant to § 121(4).<sup>108</sup> On October 5, 2009, WVC obtained from the district court a judgment of possession after land contract forfeiture.<sup>109</sup> Finally, on November 2, 2009, the circuit court entered three judgments in favor of Lakeview, ASI, and A & R, finding that "these parties have liens on the golf course that are superior to all other claims."<sup>110</sup> The circuit court ordered, among other things, that the golf course be sold to satisfy the liens in accordance with § 121, although the court did not address the intervening judgment of possession by the district court.<sup>111</sup>

On appeal, the Court of Appeals considered whether the circuit court's order of foreclosure of WVC's entire interest in the golf course was in error.<sup>112</sup> Specifically, WVC

93 *Id.*

94 *Id.*

95 *Id.* (quoting MCL 570.1103(1)).

96 *Michigan Pipe & Valve-Lansing, Inc.*, No. 294530, 2011 WL 1004660, \*3.

97 No 295182, 2011 WL 1485327 (Mich Ct App April 19, 2011).

98 *Id.* at \*1.

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.*

106 *Id.*

107 *Id.*

108 *Id.* at \*1.

109 *Id.* at \*2.

110 *Id.*

111 *Id.*

112 *Id.*

argued that, after the district court's judgment of possession, the construction liens attached "to the improvements of the property *only*."<sup>113</sup>

The Court of Appeals initially recognized that "[u]nder a land contract, although the vendor retains legal title until the contractual obligations have been fulfilled, the vendee is given equitable title, and that equitable title is a present interest in realty that may be sold, devised, or encumbered."<sup>114</sup> For its first step in determining the status of the underlying construction liens, the court considered § 107(1) – (3).<sup>115</sup> Under § 107(2), "[a] construction lien under this act attaches to the entire interest of the owner or lessee who contracted for the improvement, including any subsequently acquired legal or equitable interest."<sup>116</sup> Section 105(3) provides that "[o]wner" means a person holding a fee interest in real property or an equitable interest arising out of a land contract."<sup>117</sup> Even though Lakeview, ASI, and A & R did not contract directly with WVC, and none of the parties the lien claimants contracted with remained "owners" with an "interest" in the golf course after WVC obtained a forfeiture of Golf Holdings' interest and judgment of possession, the Court of Appeals found that "according to the plain language of [107(3)], the construction liens *upon the improvements* for which [the lien claimants] provided labor and materials were *not defeated by the forfeiture*."<sup>118</sup>

The more contentious part of the court's analysis was its discussion of § 121(1), which addresses the circuit court's power with respect to a judgment of foreclosure. Section 121(1) provides:

If the court finds that a lien claimant is entitled to a construction lien upon the real property to which he or she furnished an improvement, and the amount adjudged to be due has not been paid, the court may enter a judgment ordering the sale of any interest in the real property, or a part of the real property, to which the construc-

tion lien attaches. If the construction lien attaches only to the improvement furnished, the court may order a sale of the improvement. If the court finds that there is an interest in or encumbrance against the real property which is superior to the construction lien being foreclosed, the order for sale shall indicate that fact. The court may order a construction lien satisfied out of the rents, profits, and income from the real property to which the construction lien has attached.<sup>119</sup>

The Court of Appeals found that "[t]he discretion to order the sale of 'any interest in the real property,' . . . is conditioned upon the court's finding that lien claimants are entitled to construction liens upon the real property."<sup>120</sup> In contrast, the Court of Appeals found that "[w]here lien claimants are only entitled to construction liens on the improvements furnished, the court [only] has *discretion to order a sale of the improvement*."<sup>121</sup> As a result, the court concluded that the circuit court erred by ordering the sale of the golf course when the construction lien claimants were "not entitled to construction liens upon the real property."<sup>122</sup>

ASI countered by arguing that "WVC's 'entire interest' should be subject to the construction lien" and relied on § 107(5), which provides:

For purposes of this act, if the real property is *owned or leased by more than 1 person*, there is a rebuttable presumption that an improvement to real property under a contract with an owner or lessee was consented to by any other co-owner or co-lessee. *If enforcement of a construction lien through foreclosure is sought and the court finds that the improvement was consented to by a co-owner or co-lessee who did not contract for the improvement, the court shall order the entire interest of that co-owner or co-lessee, including any subsequently acquired legal or equitable interest, to be subject to the construction lien. A deficiency judgment shall not be entered against a noncontracting owner, co-owner, lessee, or co-lessee.*<sup>123</sup>

113 *Id.*

114 *Id.* (quoting *Graves v Am Acceptance Mtg Corp*, 469 Mich 608, 614; 677 NW2d 829 (2004)).

115 *Asphalt Specialists*, 2011 WL 1485327, \*2.

116 MCL 570.1107(2).

117 *See Asphalt Specialists*, 2011 WL 1485326, \*2 (quoting MCL 570.1105(3)).

118 *Id.* (emphasis added) (citing MCL 570.1107(3)).

119 MCL 570.1121(1).

120 *See Asphalt Specialists*, 2011 WL 1485327, \*4 (citing MCL 570.1121(1)) (emphasis in original).

121 *Id.*

122 *Id.*

123 MCL 570.1107(5) (emphasis added).



The court rejected this argument based on the nature of the relationship between WVC and Golf Holdings under the land contract.<sup>124</sup> Section 103(6) defines “Co-owner” as “a person having an interest in real property, the nature of which is identical to that of the interest of the owner who contracted for the improvement to the real property, whether the extent of such interest is identical or not.”<sup>125</sup> The Court of Appeals stated “[a]lthough Golf Holdings had an equitable interest in the property at the time the contracts for improvements were created, it did not have an interest identical to WVC—the legal title holder.”<sup>126</sup>

Further, ASI and Lakeview argued that foreclosure of infrastructure improvements to the golf course, their only remedy absent the ability to foreclose the golf course, was not possible since such improvements are not severable, and thus, cannot be sold.<sup>127</sup> Further, ASI and Lakeview argued that “such an outcome is contrary to the remedial nature of the [CLA] intending to protect the rights of lien claimants to payment for expenses.”<sup>128</sup> In a footnote, the Court of Appeals addressed this latter concern, stating:

Contrary to ASI’s claim on appeal, *our interpretation of MCL 570.1107* will not preclude all contractors who deal with equitable titleholders from seeking remedy under the [CLA], but *only limits that remedy to a lien upon the improvement under the particular circumstances presented here where forfeiture of the equitable titleholder’s [interest] preceded enforcement and foreclosure.*<sup>129</sup>

Nonetheless, the Court of Appeals rejected the lien claimant’s arguments finding that “foreclosure of an improvement is not a lien claimant’s only avenue for payment under these circumstances.”<sup>130</sup> The court provided, as an example, § 107(4), which allows construction participants with rights arising out of a contract with a land contract vendee or a lessee to “subrogate to the rights of the contracting vendee or lessee” so long as such lien claimant provides a notice of furnishing “or is excused

from providing a notice of furnishing under section 108, 108a, or 109” and who *performs the covenants contained in the land contract or lease within 30 days after receiving actual notice of the forfeiture, surrender, or termination.*<sup>131</sup> Further, the Court of Appeals stated that “Lakeview, ASI, and A & R could arguably pursue a claim against WVC outside the [CLA] for unjust enrichment.”<sup>132</sup>

In conclusion, the Court of Appeals held that “following the forfeiture and judgment of possession, the liens attached to the lien claimants’ improvements and it was an error to order foreclosure of the golf course to satisfy those liens.”<sup>133</sup>

In addition, the *Asphalt Specialists*\* court held that attorney fees should not be included in the judgment of foreclosure as part of the security of the lien. After acknowledging that attorney fees are recoverable to the prevailing party under §118(2), the Court of Appeals reasoned that adding attorney fees to the lien amount would violate § 107(1), which provides, in relevant part: “A construction lien acquired pursuant to this act shall not exceed the amount of the lien claimant’s contract less payments made on the contract.”<sup>134</sup>

*Asphalt Specialists*\* limitation against including attorney fees in the judgment of foreclosure is another area that may require legislative action. It is interesting to note that the CLA provides the following relating to what is supposed to be equivalent replacement security of a bond to discharge a lien:

The claim of lien of a contractor, subcontractor, supplier, or laborer may at any time be vacated and discharged if a bond, with the lien claimant as obligee, is filed with the county clerk for the county in which the property covered by the lien is located and a copy is given to the obligee lien claimant. *The bond shall be in the penal sum of twice the amount* for which the lien is claimed and shall be conditioned on the payment of any sum for which the obligee in the bond may obtain judgment on the claim for which the claim

124 *Asphalt Specialists*, 2011 WL 1485327, \*4.

125 MCL 570.1103(6) (emphasis added).

126 *Asphalt Specialists*, 2011 WL 1485327, \*4.

127 *Id.*

128 *Id.*

129 *Id.* at \*4, n4 (emphasis added).

130 *Id.* at \*4.

131 *Id.* (quoting MCL 570.1107(4)).

132 *Id.* at \*5; see generally *Morris Pumps v Centerline Piping, Inc.*, 273 Mich App 187, 729 NW2d 898 (2006).

133 *Asphalt Specialists*, 2011 WL 1485327, \*5.

134 See MCL 570.1107(1).

of lien was filed. The bond may be either a cash bond executed by a principal, or a surety bond executed by a principal and a surety company authorized to do business in this state.<sup>135</sup>

The Legislature clearly contemplates the lien may include attorney fees to a prevailing lien claimant. Otherwise, why would the bond need to be “in the penal sum of twice the amount”? Additionally, it has long been recognized that a construction lien serves as security for the claim. The Legislature clearly indicated that attorney fees are part of a lien claimant’s claim. As such, *Asphalt Specialists\** result is a good indication that the Legislature needs to clarify the CLA and explicitly state the attorney fees awarded to a prevailing lien claimant shall be included in the judgment of foreclosure, secured by the lien.

Under *Asphalt Specialists\**, arguably, the circuit court’s power pursuant to the CLA to provide an appropriate remedy when a lien attaches *only* to the improvement, and such improvement is not severable from the property, is greatly limited. The dilemma this presents in priority cases is that such a limitation is in stark contrast to the remedial nature of the CLA.

Admittedly, the Court of Appeals accurately reflects the limited category of cases its holding in *Asphalt Specialists\** affects when noting that its interpretation of § 107 only limits that remedy under the CLA “to a lien upon the improvement . . . where forfeiture of the equitable titleholder’s [interest] preceded enforcement and foreclosure.”<sup>136</sup> Regardless, *Asphalt Specialists\** provides an interesting incentive for future multi-owner projects to structure the project as a land contract. Although it is too early to tell whether *Asphalt Specialists\** is a game-changer in lien disputes, the decision by the Court of Appeals indicates a divergence from prior courts’ general willingness, based on the remedial nature of the CLA, to fashion an appropriate remedy once a lien claimant has established priority.<sup>137</sup>

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135 MCL 570.1116(1) (emphasis added).

136 See *supra* note 129 and accompanying text.

137 *M D Marinich, Inc v Michigan Nat’l Bank*, 193 Mich App 447, 455-56; 484 NW2d 738 (1992); see *Vugterveen Sys v Olde Millpond Corp*, 454 Mich 119, 121, 560 NW2d 43 (1997) (stating the CLA “was intended to protect the interests of contractors, workers, and suppliers through construction liens, while protecting owners from excessive costs”).

## The Michigan CLA v. The Michigan Condominium Act

When a construction project involves a condominium, there are potentially overlapping provisions between the CLA and the Michigan Condominium Act.<sup>138</sup> As a result, there are several issues that arise with respect to determining which provision controls. One such issue is how the CLA’s substantial compliance provision relates to the Michigan Condominium Act’s requirements regarding the procedure for recording deeds relating to condominium units. In *Contract Supply Company, Inc v ADCO Stratford Village North\**,<sup>139</sup> the Michigan Court of Appeals held that: (1) Contract Supply Company, Inc. (“CSCI”) was not required to comply with § 64 of the Condominium Act; (2) CSCI’s lien filed pursuant to § 301 of the CLA substantially complied; and (3) therefore CSCI’s lien had priority over the mortgage by assignment held by Lehman Brothers Bank, FSB (“Lehman”).<sup>140</sup>

ADCO Stratford Village North, LLC (“ADCO”), the developer and owner of a three-phase condominium project, obtained a \$2.5 million purchase money loan from Lehman’s predecessor in interest, Charter One Bank (“Charter One”), along with a subsequent \$3.2 million line of credit in June, 2002.<sup>141</sup> This indebtedness was secured by a mortgage on Phases I-III, which was recorded on August 15, 2002.<sup>142</sup> Subsequently, in November, 2003, ADCO obtained site approval for Phase IV of the development and borrowed an additional \$787,000 from Charter One, as evidenced by a November 18, 2003 mortgage, which was recorded on December 1, 2003.<sup>143</sup> Meanwhile, another contractor began work on Phase IV in December, 2003.<sup>144</sup> On November 1, 2004, Charter One and ADCO recorded their modification agreement, which rendered the earlier loan a second mortgage on Phase IV subordinate only to the \$787,000 mortgage.<sup>145</sup>

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138 MCL 559.101 *et seq.*

139 No. 289172, 2010 WL 1873006 (Mich Ct App May 11, 2010).

140 *Contract Supply Company, Inc v Adco Stratford Village North*, No. 289172, 2010 WL 1873006, \*3 (Mich Ct App May 11, 2010).

141 *Id* at \*1.

142 *Id.*

143 *Id.*

144 *Id.*

145 *Id.*

On December 10, 2004, pursuant to an April 5, 2004 contract with ADCO, CSCI began working on Phase IV and last provided material on August 19, 2005.<sup>146</sup> A Notice of Commencement issued by ADCO included a metes and bounds description of Phase IV and had been recorded on April 12, 2004.<sup>147</sup> The master deed, which created the individual units in Phase IV, was recorded on January 19, 2005.<sup>148</sup> On November 7, 2005, ADCO filed a lien, which included a metes and bounds description of the realty included in Phase IV.<sup>149</sup> CSCI filed suit against ADCO on March 22, 2006 and amended its complaint to foreclose its lien in September, 2006, on the same day ADCO filed its counter-claim for breach of contract.<sup>150</sup>

The trial court ruled that “[t]he [CLA] specifically addresses liens and would govern issues of compliance rather than the Condominium Act” and concluded that CSCI was entitled to summary disposition because it substantially complied with the CLA.<sup>151</sup>

Lehman argued that the Condominium Act controlled this matter and that summary disposition was improper because the Condominium Act does not allow for substantial compliance.<sup>152</sup> Lehman also asserted that the notice purpose of the Condominium Act would be “frustrated if metes and bounds descriptions like those in the CSCI lien” were upheld as valid.<sup>153</sup>

In framing the issue, the Court of Appeals stated:

As our Supreme Court has recognized, the Construction Lien Act only requires substantial compliance. *Big L Corp v Courtland Const Co*, 482 Mich 1090, 757 NW2d 852 (2008). Lehman does not contest that CSCI’s lien substantially complies with the [CLA]. However, Lehman now asserts that because the lien in this case relates to a condominium development, it

must also comply with § 64 of the Condominium Act.<sup>154</sup>

The court subsequently directed the parties’ attention to § 132 of the Condominium Act, which each of the parties acknowledged explicitly limited the operation of the CLA.<sup>155</sup> Because the Condominium Act provided “no indication that the legislature intended [the court] to supplant the clear requirements of the [CLA],” the Court of Appeals found the CLA controlled.<sup>156</sup>

The Court of Appeals additionally upheld the metes and bounds description of the entirety of Phase IV. Because § 111 of the CLA requires that “the lien must incorporate the legal description that appears in the Notice of Commencement” and the Notice of Commencement filed by ADCO, Lehman’s mortgagee, was a metes and bounds description of the entirety of Phase IV, the Court of Appeals found that CSCI was “compelled by the [CLA] to use that same description in its lien.”<sup>157</sup>

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<sup>154</sup> *Id* at \*3. Sec. 64 of the Condominium Act provides: “Conveyances and other instruments affecting title to any condominium unit in a condominium project shall describe the same by reference to the condominium unit number of the condominium subdivision plan and the caption thereof, together with a reference to the liber and page of the county records in which the master deed is recorded. The conveyances and other instruments are recordable.”

*See also* MCL 559.164.

<sup>155</sup> *Contract Supply Co, Inc*, 2010 WL 1873006, at \*3-4 (quoting MCL 559.232). Sec. 132 of the Condominium Act provides:

A construction lien otherwise arising under the construction lien act, 1980 PA 497, MCL 570.1101 to 570.1305, is subject to the following limitations: (a) Except as provided in this section, a construction lien for work performed upon a condominium unit or upon a limited common element may attach only to the condominium unit upon which the work was performed or to which the limited common element is appurtenant. (b) A construction lien for work authorized by the developer, residential builder, or principal contractor and performed upon the common elements may attach only to condominium units owned by the developer, residential builder, or principal contractor at the time of recording of the statement of account and lien.

*See also* MCL 559.232.

<sup>156</sup> *Contract Supply*, 2010 WL 1873006, \*4.

<sup>157</sup> *Id*.

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<sup>146</sup> *Id*.

<sup>147</sup> *Id*.

<sup>148</sup> *Id*.

<sup>149</sup> *Id*.

<sup>150</sup> *Id*.

<sup>151</sup> *Id* at \*2.

<sup>152</sup> *Id*.

<sup>153</sup> *Id*.

## Warranty Work is Not an “improvement” For Purposes of Extending the Time in Which to Record a Construction Lien

As many construction practitioners know, the substantial compliance standard of the CLA does not apply to the requirement that construction liens must be recorded within ninety (90) days of last work.<sup>158</sup> In *Stock Building Supply LLC v Parsley Homes of Mazuchet Harbor*,<sup>159</sup> the Court of Appeals decided a case involving a plumber’s priority claim on its construction lien relating to warranty work.<sup>160</sup> The Court of Appeals held that the plumber’s warranty work did not qualify as an improvement to the property under the CLA and thus could not cause the 90-day filing period to recommence.<sup>161</sup>

On August 31, 2005, Weimer Plumbing, Inc. (“Weimer”) performed underground and rough plumbing work on Lot 47 Mazuchet Harbor. Thereafter, Weimer performed finish plumbing work on August 4, 2006 and/or September 29, 2006, which included installing the kitchen sink, garbage disposal and faucet, one standard bathtub with shower and faucet, one whirlpool bathtub with shower and faucet, three toilets, four bathroom sinks with faucets, a hot water heater, a laundry tub, and a laundry water box. On August 5, 2006, Weimer sent its final invoice to the general contractor.<sup>162</sup> Weimer returned to repair a leak at the kitchen sink on December 20, 2006, and returned again to repair a small leak in the whirlpool tub on May 29, 2007.<sup>163</sup> In his discovery requests, Weimer identified this work as “Warranty Service Calls.”<sup>164</sup>

Weimer filed its lien on Lot 47 on August 23, 2007 for \$9,646 approximately one month after Stock Building Supply, L.L.C. (“Stock”) filed the original complaint, which included a lien for foreclosure count on Lot 47.<sup>165</sup> As an intervening plaintiff, Weimer filed its own complaint, which also included a lien for foreclosure count

on Lot 47.<sup>166</sup> As of October 24, 2008, the redemption period on Lot 47 had ended and it was agreed that Stock had become the owner of Lot 47.<sup>167</sup> The trial court found that Weimer had completed its construction work in either August, 2006 or September, 2006, and as a result, “Weimer’s construction lien was invalid because it was not filed within 90 days of its completion of the original installation work.”<sup>168</sup>

The primary issue that the Court of Appeals considered was whether Weimer’s May 29, 2007 repair work “constituted an ‘improvement’ under the [CLA],” and therefore permitted Weimer 90 days from that date in which to file its lien.<sup>169</sup>

Under §§ 111(1) and 104(5), the court explained, “a repair completed pursuant to a contract is an ‘improvement’ and the last furnishing of an improvement commences the 90-day filing period.” According to the court, under *Woodman v Walter*.<sup>170</sup>

the performance of “warranty work” to correct deficiencies in work performed, or defects in fixtures installed, by the contractor does not constitute an “improvement” under the [CLA] because “[i]t does not confer any value beyond the value furnished at the time the initial installation work was completed. . . . [t]he ninety-day filing period commences on the date of completion of the original installation work and is not extended by the later performance of warranty work.”<sup>171</sup>

The Court of Appeals therefore reasoned that “[t]he distinguishing factor between a repair constituting an improvement . . . , which allows for the commencement of the 90-day filing period, and warranty work, which does

158 See MCL 570.1111(1).

159 No. 294098, 2011 WL 222143 (Mich Ct App Jan 25, 2011).

160 *Stock Bldg Supply, LLC v Parsley Homes of Mazuchet Harbor*, No 294098, 2011 WL 222143 (Mich Ct App Jan 25, 2011).

161 *Id.*

162 *Id.*

163 *Id.*

164 *Id.*

165 *Id.*

166 *Id.*

167 *Id.*

168 *Id.* See also MCL 570.1111(1) (providing “the right of a contractor, subcontractor, laborer, or supplier to a construction lien created by this act shall cease to exist unless, within 90 days after the lien claimant’s last furnishing of labor or material for the improvement, pursuant to the lien claimant’s contract, a claim of lien is recorded . . .”).

169 *Stock Bldg Supply, LLC v Parsley Homes of Mazuchet Harbor*, No 294098, 2011 WL 222143 (Mich Ct App Jan 25, 2011).

170 204 Mich App 68; 514 NW2d 190 (1994).

171 *Woodman v Walter*, 204 Mich App at 69-70.



not . . . , is whether the work in question conferred any value beyond the value furnished by the completion of the original work.”<sup>172</sup>

Weimer argued its service work subsequent to its initial installation conferred a benefit on the general contractor by providing functional indoor plumbing for the new homeowner and thus qualified as an improvement under the CLA.<sup>173</sup> The Court of Appeals rejected this argument, stating: “Weimer’s May 2007 repair work did not ‘confer any value beyond the value furnished at the time the initial installation work was completed’”<sup>174</sup> Because Weimer’s service work “merely provided that which was originally contracted for,” the Court of Appeals found “Weimer’s May 2007 repair work did not add any value to the original contract.”<sup>175</sup> Thus, the Court of Appeals found Weimer’s lien untimely and therefore invalid.<sup>176</sup>

### Conclusion

For individuals and companies developing, constructing, or financing construction projects in Michigan and the lawyers representing those concerns, this latest economic downturn should have instilled in them the critical importance of proactive compliance with the CLA and risk mitigation to avoid the consequences of owner and/or contractor insolvency.

#### General Contractors/Construction Managers

There are several proactive steps that construction companies who are prime with the owner or the owner’s representative can implement to ensure construction lien rights are protected and to potentially avoid disputes altogether:

- Prepare and record a Notice of Commencement. If the owner, lender, or title company has done so, request in writing a copy of the Notice of Commencement in accordance with the requirements of § 108a(5).
- Execute a written contract on residential construction projects and verify the contract has required CLA language regarding licensing.
- Ensure whoever contracts and performs work is

properly licensed if the work involves a residential project.

- Maintain records relating to the first actual physical improvement or the condition of the site when the contractor begins work. Since the critical issue on whether the contractor would realize a benefit from its lien is usually priority vis-à-vis a mortgage, good record-keeping will be very helpful in the case of a dispute. These records should include, but not be limited to, photographs, video, daily reports, subcontractor invoicing, employee time sheets, inspection records, and/or supplier delivery slips.
- Develop and maintain a job information sheet for each project, which should be completed before any work commences. Typically, these sheets should include identifying and contact information for the owner, owner’s representative/contract administrator, project architect and/or engineer, construction lender, titlecompany, and any bonding company.
- Serve a Notice of Furnishing in accordance with the requirements of § 109, even though not required for a party holding a direct contract with the owner. As a practical matter, it is often beneficial to provide as much notice as possible, so parties will also serve copies on any involved construction lender and title company.
- Obtain appropriate lien waivers for each subcontractor and/or supplier in connection with each application for payment and each disbursement of payment. Additionally, require each subcontractor to furnish a Sworn Statement under § 110 in connection with each application of payment. Upon receipt, the contractor should proactively contact sub-subcontractors and suppliers to make sure payments have been distributed consistent with the information disclosed on the Sworn Statement.
- Timely record the construction lien. The construction lien must be recorded within ninety (90) days of the last work on the project. As seen in recent cases, warranty work is not sufficient to revive lien rights or extend the time in which a contractor may record a lien. Likewise, contractors should not consider demobilization sufficient to extend the time to record a lien.

<sup>172</sup> *Stock Bldg Supply*, 2011 WL 222143 (emphasis added).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

## Subcontractors and Suppliers

Subcontractors, whether they are first tier or below, and suppliers can also take similar steps to those outlined above to protect their construction lien rights.

- Request in writing a copy of the Notice of Commencement in accordance with the requirements of 570.1108a(7). On residential projects, a copy of the written contract with the owner should also be requested and should be received before commencing any work.<sup>177</sup>
- Serve the contractor and owner or owner's designee with a Notice of Furnishing via certified mail within twenty (20) days of commencing work on the project. Make sure to maintain a proof of service of the Notice of Furnishing with the proof of mailing in the project file. As a practical matter, it is often beneficial to provide as much notice as possible, so parties will also serve copies upon any involved construction lender and title company.
- If the work is sequenced at the commencement of the project, maintain records relating to the first actual physical improvement or the condition of the site as discussed above.
- As disbursements are processed by the title company and/or construction lender, request and actually inspect contractor Sworn Statements pursuant to § 110(6) upon receipt of notice that the title company and/or lender has received a Sworn Statement regarding an improvement to a residential structure. Many title companies and lenders are not following the mandatory procedure established by the 2007 amendments to the CLA requiring them to give notice to subcontractors or suppliers listed on the Sworn Statement, relating to residential improvements, if they provided a Notice of Furnishing or are excused from the requirement. A lawyer representing a subcontrac-

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<sup>177</sup> MCL 570.1114 provides that "[a] contractor does not have a right to a construction lien on the interest of an owner or lessee in a residential structure unless the contractor has provided an improvement to the residential structure pursuant to a written contract between the owner or lessee and the contractor and any amendments or additions to the contract are also in writing." A construction attorney's ability to preserve a contractor's rights to an interest in a residential structure differs dramatically depending on whether a written agreement for such improvements between the contractor and the owner or lessee, in fact, exists. Thus, it is imperative to request the written agreement before any improvements to the residential structure are made.

tor or supplier should not hesitate to request the title company or lender to comply with § 110(6) if construction funds are being disbursed pursuant to contractor Sworn Statements without adhering to the notice requirements.

- Use the job information sheet as outlined above.
- Serve a Notice of Furnishing in accordance with the requirements of § 109(1) and (4). As a practical matter, it is often beneficial to provide as much notice as possible, so parties will also serve copies upon any involved construction lender and title company.
- Timely record the construction lien as discussed above.

### Construction Lenders and Title Companies:

- Obtain and carefully document a pre-closing physical inspection of the property before closing any acquisition or construction loan to verify that no visible construction work exists on the property, which would potentially prime the lender's first secured position in the property. Additionally, lenders and title companies can mitigate risk by entering into indemnity or subordination agreements with the developer and contractor/construction manager.
- Obtain a certification, in the form of an affidavit, and a corresponding indemnity from the owner and/or contractor that no construction work has occurred on the property prior to the closing of the construction loan.
- Immediately record the mortgage(s).
- Do not disburse any construction funds absent receiving a fully completed and verified contractor Sworn Statement and all appropriate corresponding lien waivers. Upon receipt of each Sworn Statement make sure to provide the notice required by § 110(6) to each person who served a Notice of Furnishing relating to the project or who is listed on the Sworn Statement, but is excused from the Notice of Furnishing requirement.



## Deed in Lieu of Foreclosure and Foreclosure Transactions:

### Cancellation of indebtedness income may be excluded by solvent taxpayers under the qualified real property business debt exclusion

by William B. Acker\*

An owner of commercial real property (“Owner”)<sup>1</sup> that defaults on a mortgage debt obligation secured by real property often does so due to a true decline in the economic value of the real property. Income producing properties may yield reduced cash flow that is insufficient to meet mortgage debt service requirements and other expenses of owning, operating and maintaining the real property. If debt restructuring is not feasible, the reduced value may leave the Owner little or no economic incentive to maintain ownership of the real property. The Owner may prefer to stop paying the mortgage debt obligation that exceeds the diminished value of the property. If the mortgage debt is recourse, the Owner may seek to negotiate a means of escaping or otherwise minimizing the Owner’s or the Taxable Persons<sup>2</sup> financial obligations under the mortgage, mortgage note and other loan agreements. An important additional consideration is to obtain the least detrimental income tax treatment resulting from the inevitable end to the Owner’s ownership of the real property.

A defaulting Owner may transfer the subject real property to the mortgage lender (or other mortgage debt

holder) (“Lender”) by negotiating a voluntary deed in lieu of foreclosure transfer or forfeit ownership of the property in a foreclosure proceeding initiated by the debt holder. Real property that has been sold in a foreclosure sale, and that has not been redeemed by the Owner during the period of the Owner’s equity of redemption, changes ownership through involuntary process, although some foreclosures are not more adverse to the Owner than the alternatives. Regardless of whether they are voluntary or otherwise, both deed in lieu transfers and forfeitures of the real property by foreclosure are treated as a taxable sale or exchange of the real property for federal income tax purposes.<sup>3</sup> The Owner may have capital gain (or loss), Section 1231 gain (or loss), depreciation recapture and/or other income, and, if the mortgage debt is recourse, the Owner may also incur cancellation of indebtedness (“COD”) income which is taxed as ordinary income, unless a specific exclusion is available to the Owner or its Taxable Persons.

#### General Rules for Tax Treatment of a Deed in Lieu or Foreclosure Transaction

##### Nonrecourse Debt

If real property that is subject to a nonrecourse mortgage debt is transferred in a deed in lieu transaction or by a foreclosure, the full amount of the outstanding indebtedness at the time of the deed in lieu transfer or expiration

1 For purposes of this article, the Owner is presumed to be a passthrough entity that is a limited liability company, taxable for federal income tax purposes as a partnership. The Owner entity’s taxpaying member(s), referred to in this article as a “Taxable Person(s),” would be allocated all or a share of the Owner’s income or other gain realized and recognized on any deed in lieu transfer or foreclosure, and bear any federal income tax burden that may result, unless, for example, the income is excluded or otherwise offset by losses.

2 “Taxable Person(s)” is defined in note 1 *supra*.

3 Section 1001 of the Internal Revenue Code of 1986, as amended (“Code”).

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of the equity of redemption is included in the amount realized.<sup>4</sup> The Owner's income tax basis in the real property is subtracted from the amount realized to determine the amount of taxable gain or loss. For real property that was a capital asset to the Owner, the gain or loss would generally be capital gain or loss subject to currently favorable long term capital gain or unfavorable capital loss treatment, respectively. For real property that was depreciable property or land used in a trade or business for more than one year by the Owner, the gain or loss would be a Section 1231 gain or loss. Section 1231 is a taxpayer-favorable Code section because any Section 1231 gain is taxed at the reduced long term capital gain rate and the Section 1231 loss is treated as an ordinary loss.<sup>5</sup> However, capital gain treatment is trumped by depreciation recapture rules that tax gain at higher income tax rates for any income tax recapture (ordinary income tax rates)<sup>6</sup> and any "unrecaptured Section 1250 gain" (25% income tax rate).<sup>7</sup> These rules, in combination, essentially apply higher income tax rates to the full amount of depreciation "allowed or allowable" for the building and other depreciable components of the real property since acquisition.<sup>8</sup> If the Owner is a C corporation, there is no favorable long term capital gain rate but other tax treatment may apply.<sup>9</sup>

### Recourse Debt

If the mortgage debt is recourse to the Owner, the tax resulting from the deed in lieu transfer or the foreclosure forfeiture is computed after determining whether any mortgage debt was discharged and COD taxable income<sup>10</sup>

was realized. The recourse mortgage debt is an obligation owed by the Owner that allows the Lender recourse against both the subject real property and the Owner's other assets. In effect, if the Owner has recourse liability to the Lender, two taxable transactions may have occurred as a result of the Owner's transfer or forfeiture of the mortgaged real property to the Lender.

First, if the debt is fully discharged in the deed in lieu transaction or foreclosure,<sup>11</sup> the debt is treated as having been paid to the extent of the fair market value of the real property transferred or forfeited to the Lender (and/or the value of other consideration provided to the Lender), and treated as not paid to the extent the mortgage debt exceeds the fair market value of the real property (and/or the value of other consideration provided to the Lender). The amount of discharged and unpaid debt is treated as COD income to the Owner that is taxable<sup>12</sup> unless excluded for federal income tax purposes. If instead, the amount of unpaid debt is not fully discharged in the foreclosure,<sup>13</sup> presumably COD income would not be realized by the Owner to the extent that the debt was not discharged, until and to the extent the debt was later discharged.<sup>14</sup>

4 *Comm'r of Internal Revenue v Tufts*, 461 US 300 (1983); Treasury Regulation ("Reg") §§ 1.1001-2(a)(1) and (a)(4)(i). Even though the nonrecourse liability is treated as discharged, no COD income is realized, and the full amount of the liability is included in the amount realized.

5 Code § 1231(a). Code § 1231(c)(1) contains a recapture rule. If the Taxable Persons of an Owner claim a § 1231 loss, then any other § 1231 gains recognized by the Taxable Person in the year of the § 1231 loss, or in the five subsequent years, will be subject to tax at ordinary income rates to the extent of the § 1231 loss claimed.

6 Code § 1250. For depreciable real property, depreciation in excess of straight line depreciation is recaptured at ordinary tax rates.

7 Code § 1(h) imposes a 25% tax rate on "unrecaptured section 1250 gain."

8 Code § 167; Code § 1016(a)(2).

9 Code § 291(a)(1).

10 Code § 61(a)(12).

11 For example, full discharge of the mortgage debt may occur if the mortgage creditor successfully bids in at the sale the full amount of the debt in a foreclosure of a mortgage by advertisement, or other arrangement for discharge of the debt is made. Even if the full amount of the debt is not bid at a foreclosure by advertisement sale by the Lender, the amount by which the "true value" of the real property exceeds the amount bid by the Lender may be set off by the mortgage debtor. However, the mortgage debtor has the burden of proving that the "true value" of the foreclosed property was different than the amount bid at the foreclosure sale. Also, if another person agrees to pay the mortgage debt liability, the mortgage debtor is treated as discharged, even if the mortgage debtor is not relieved of liability. Reg § 1.1001-2(a)(4)(ii).

12 Code § 61(a)(12).

13 For example, if in a foreclosure by advertisement sale the mortgage creditor acquires the real property subject to the mortgage for a bid of less than the full amount of the debt and no other arrangement for discharge of the debt is made, the mortgage debtor may seek a judgment to determine the remaining deficiency. *See Schram v Coyne*, 45 F Supp 1021 (ED Mich 1940), judgment aff'd, 127 F2d 205 (CA6 1942). In a judicial foreclosure, the lender may seek a court order determining the deficiency for which the mortgage debtor remains liable.

14 *Freidman v Comm'r*, 216 F3d 537 (CA6 2000) (no identifying event that debt was discharged), aff'g TC Memo 1998-196; *Aizawa v Comm'r*, 99 TC 197 (1992). COD income is generally realized when the debt becomes worthless or is discharged



Second, taxable gain or loss is calculated from the sale or exchange resulting from the deed in lieu transfer or foreclosure. The fair market value of the real property is included in the amount realized from the transfer or forfeiture of the real property, and the Owner's income tax basis is subtracted to determine taxable gain (or loss).<sup>15</sup> Generally, the sale price at a foreclosure sale is presumed for federal income tax purposes to be the fair market value of the real property. However, if the actual fair market value of the consideration received by the Lender is less than the outstanding balance of the mortgage debt, the excess amount of the debt is discharged and will result in COD income to the mortgage debtor.<sup>16</sup> Thus, an arbitrary bid by the Lender, even if successful and accepted by the Lender as sufficient to satisfy the debt, is not dispositive in determining that the sale price was the fair market value of the property. The actual fair market value of the real property will determine if the debt was discharged, to what extent it may have been satisfied by the forfeiture of the real property to the Lender, and to what extent the mortgage debt may have been discharged for no consideration and COD income may have been realized. In such a case, to the extent that the debt exceeds the fair market value of the real property (and any other consideration provided to the Lender), the Owner will be treated as having been discharged from the mortgage debt and have COD income to the extent of that excess. With respect to the deemed sale or exchange of the real property by the foreclosure, the character of the gain (or loss) is determined as discussed in the preceding section regarding nonrecourse debt. The amount realized will be the actual fair market value of the property, if shown to be other than the amount agreed to by the Owner and Lender in a deed in lieu agreement, or other than the Lender's bid at the foreclosure sale.<sup>17</sup>

## Exclusion of COD Income

An Owner of real property subject to a recourse mortgage who realizes COD income on a deed in lieu transfer or foreclosure often seeks to exclude the COD income under several available permitted federal income tax exclusions. Generally, these exclusions do not permit permanent forgiveness of tax, but rather allow the deferral of income and resultant income tax, because in order to exclude COD income, the Owner or its Taxable Persons must reduce certain income tax attributes, which may include the income tax basis of other assets. A bankrupt or insolvent Owner may exclude COD income, and make the adjustments required. A bankrupt mortgage debtor who is discharged in a Title 11 bankruptcy may exclude COD income.<sup>18</sup> A mortgage debtor who is insolvent (with liabilities in excess of the fair market value of assets immediately before the discharge)<sup>19</sup> may exclude COD income to the extent of the insolvency.<sup>20</sup> The Owner's Taxable Person would bear the income, gain (or loss) and any resultant income tax from the Owner's deed in lieu transfer or foreclosure of the real property, unless the Owner's Taxable Person qualifies for an exclusion of COD income<sup>21</sup> or has other available losses to offset such COD income. If the Owner is a partnership or limited liability company, and the Owner's Taxable Persons are not bankrupt or insolvent (or all of the Taxable Persons are not bankrupt or insolvent), the most favorable exclusion available may be the federal income tax exclusion for COD income from "qualified real property business indebtedness."<sup>22</sup>

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under the identifiable facts and circumstances, which indicate that the debt will not be repaid. *Cozzi v Comm'r*, 88 TC 435 (1987) (substance of the transactions and facts clearly indicating when debt would not be paid determine when COD income is realized, not settlement agreement); *Salva v Comm'r*, TC Memo 1993-90 (discharge based on facts and circumstances), *aff'd* without opinion, 75 AFTR 2d ¶ 95-691. *US v Ingalls*, 399 F2d 143 (CA5 1968), *rev'g* 272 FSupp 10 (ND Ala 1967) (substance over form determined COD income realization, agreement disregarded).

15 *Frazier v Comm'r*, 111 TC 243 (1998).

16 See *Frazier*, *supra*, and Reg § 1.1001-2(c), Example 8.

17 *Frazier*, *supra* note 15.

18 Code §§ 108(a)(1)(A) and 108(d)(2).

19 Code § 108(a)(1)(B) and 108(d)(3).

20 Code § 108(a)(3).

21 The tests for bankruptcy and insolvency are determined at the partner level for partnerships, and possibly at the member level for limited liability companies, although an argument can be made for testing at the limited liability company level because the limited liability company members are not liable for the limited liability company's debts. Code § 108(d)(6). This Article assumes that bankruptcy and insolvency testing is done at the limited liability company member level. The bankruptcy and insolvency tests for S corporations and C corporations are applied at the entity level. Code § 108(d)(7).

22 Code §§ 108(a)(1)(D) and 108(c).

## Exclusion of COD Income from Discharge of Qualified Real Property Business Indebtedness

The qualified real property business indebtedness exclusion (“QRPBIE”) is available for certain solvent Owners or their Taxable Persons to permit the exclusion of COD income.<sup>23</sup> The QRPBIE applies to real property used in a trade or business and to certain mortgage debt secured by such real property. Generally, for post January 1, 1993 mortgage debt, the debt must have been incurred or assumed by the Owner to acquire, construct, reconstruct or substantially improve the real property.<sup>24</sup> The Owner must have sufficient tax basis in the depreciable real property (and/or other real properties) because one of the QRPBIE’s limitations is that the amount of COD income excluded cannot exceed the Owner’s depreciable basis<sup>25</sup> in the subject real property and other real properties.<sup>26</sup> In effect, the QRPBIE basis limitation serves to prevent permanent forgiveness of income tax and requires basis adjustments.<sup>27</sup> The Owner seeking to claim the QRPBIE must elect to apply the QRPBIE and make (or elect to make) income tax basis adjustments.<sup>28</sup> The income tax basis adjustments that must be made are different for the QRPBIE than for the bankruptcy and insolvency exclusions because the QRPBIE rules require adjustment to the basis of specific property. The QRPBIE basis adjustment requires that the Owner reduce the basis of the real property that secures the mortgage debt by the amount of the COD income, before the calculation of gain or loss on the deed in lieu transfer or foreclosure.<sup>29</sup> This means that

23 Code §§ 108(a)(1)(D) and 108(c). Code § 108(a)(2)(B). This exclusion of COD is not available to a C corporation.

24 Code § 108(c)(3) and (4).

25 Reduced by current year depreciation.

26 The QRPBIE is limited to the lesser of: a) the amount by which the outstanding balance of the debt exceeds the fair market value of the property (determined at the Owner entity level), and b) the amount of the Owner’s depreciable basis (excluding land) of the real property (and other real properties, excluding real properties acquired in contemplation of the discharge) in the year of disposition. In the case of the QRPBIE, this is applied at the Taxable Person’s level as described in the balance of this Article.

27 The basis adjustments generally defer taxation and result in reduced depreciation deductions, and/or increased gain on disposition of the subject real property.

28 Code § 108(c)(3)(C).

29 Reg § 1.1017-1(c); Code § 1017(b)(F)(iii). The mechanics of the QRPBIE basis adjustment rules present unanswered ques-

an Owner with substantial basis in the real property may have more taxable gain (or less loss), and often more taxable ordinary depreciation recapture income from the sale or exchange resulting from a deed in lieu transfer or a foreclosure sale of real property subject to recourse mortgage debt, and/or other income specially taxed at a higher tax rate than if a QRPBIE election<sup>30</sup> was not made and this basis adjustment was not made. Nonetheless, claiming a QRPBIE and making this basis adjustment may be preferable in comparison to recognizing the COD income in the year of taxability of the deed in lieu transfer or foreclosure.

## Planning for Exclusion of Cancellation of Debt Income by the Qualified Real Property Business Indebtedness Exclusion

Upon determination of the COD income resulting for a Taxable Person from a deed in lieu transfer or foreclosure of real property subject to recourse debt, comparison of the tax resulting from a calculation assuming an election to exclude COD income and a calculation not excluding COD income must be made to determine which is better for that Taxable Person. Of course, the Taxable Person’s other tax circumstances will influence the conclusion.<sup>31</sup>

Assume that an Owner or Taxable Person prefers to exclude any COD income incurred on a deed in lieu transfer or foreclosure of the real property. If the mortgage debt involved is nonrecourse, no COD income will be recognized, and planning for COD income exclusion may be unnecessary. However, if the mortgage debt is recourse, COD income may be recognized by the Owner

tions for Taxable Person(s) who own interests in an entity that is the Owner of the real property. Regulations require that the Taxable Person(s) treat the Taxable Person’s member (partnership) interest as depreciable property, to adjust the Taxable Person’s basis in the member interest, and request the entity Owner’s consent to adjust the Owner’s income tax basis in the subject real property by the Taxable Person notifying the Owner entity. Reg § 1.1017-1(g). Depending on the ownership interest of the Taxable Person, the Owner entity must or may adjust the income tax basis of the subject real property immediately before the deed in lieu transfer or foreclosure forfeiture.

30 Code § 108(c)(3)(C) requires that the taxpayer elect to have the indebtedness secured by the real property be treated as “qualified real property business indebtedness.”

31 The Taxable Persons may have different circumstances that make available different COD exclusions: bankruptcy, insolvency or QRPBIE. This may lead to different preferences concerning basis adjustments.

if the debt has been discharged, and the COD income would be allocable to the Taxable Persons. The Taxable Persons may choose to exclude any COD income, by seeking to qualify for the QRPBIE.

Care and communication in planning to claim the COD income exclusion under the QRPBIE by the Taxable Person is important because the QRPBIE regulations require an election<sup>32</sup> to reduce basis, and impose other prerequisites<sup>33</sup> that must be complied with before the due date (including extensions) for filing the Taxable Person's federal income tax return for the taxable year in which the COD income would be excluded under the QRPBIE.<sup>34</sup> In the case of a deed in lieu transfer or a foreclosure, a preferable time for planning and communicating with all involved concerning the QRPBIE election is substantially sooner than the tax return filing deadline, because the QRPBIE requires that the Owner's income tax basis in the subject depreciable real property be reduced by the amount excluded from the COD income. This basis reduction occurs before the calculation of the tax consequences of the deed in lieu transfer or the foreclosure, and requires that the Taxable Person provide a notice to the limited liability company Owner "requesting" that the Owner adjust the Owner's income tax basis in the real property. The amount of the reduction to the Owner's basis in the depreciable real property will be specially allocated to the Taxable Person electing this QRPBIE.<sup>35</sup> The notice is required by IRS regulation to be provided before the Taxable Person's federal income tax return is filed for the year in which the COD income would be realized by the Owner. If the Taxable Person owns more than 50% of the capital and profits of the Owner, the notice places the limited liability company Owner in a position of being required to adjust the income tax basis of the real property before the deed in lieu transfer or foreclosure disposition tax consequences are determined for federal income tax purposes.

<sup>32</sup> Code § 108(c).

<sup>33</sup> Reg § 1.1017-1(g) requires notices, adjustment to the income tax basis of the Owner entity interest owned by the Taxable Person(s), and requires the Owner entity to adjust basis of the real property if the Taxable Person owns more than 50% of the capital and profits of the Owner entity, *or* if basis reduction(s) are made with respect to the Taxable Person's distributive share of COD of the Owner entity.

<sup>34</sup> Reg § 1.1017-1(g)(2)(ii).

<sup>35</sup> Reg § 1.1017-1(g)(2)(i).

Assume that the Owner is a limited liability company with more than one Taxable Person. A Taxable Person who is bankrupt or insolvent and qualifies for COD income exclusion without the QRPBIE or who has available ordinary losses (e.g., NOLs or NOL carryovers) may be indifferent to COD income exclusion tax planning for the QRPBIE that may be important to another Taxable Person who would rely on the QRPBIE. A Taxable Person not reliant on the QRPBIE may oppose the required basis adjustment to the disposed property, because the basis adjustment may result in greater fees for partnership tax planning and tax return preparation, if for no other reason. Further, if the Taxable Person seeking to rely on the QRPBIE owns directly or indirectly more than 50% of the capital and profits interests in the limited liability company Owner,<sup>36</sup> then the Taxable Person must request that the Owner consent to adjust the "inside" basis of the real property with respect to the Taxable Person, and the Owner is required to make the basis adjustment to the real property before the Owner's determination of federal income tax consequences on the sale or exchange involved in the deed in lieu transfer or foreclosure.<sup>37</sup>

In effect, the Taxable Person who controls the Owner may control the availability of the QRPBIE and the Owner's basis adjustment. The Taxable Person should consider discussing the election and basis adjustments with the manager of the Owner and Owner's other Taxable Persons before giving the notice to the Owner, and provide early notice in order to afford the Owner and all Taxable Persons sufficient time to adjust their individual tax planning and encourage consistent reporting positions. The Owner will need to calculate the income tax consequences of the

<sup>36</sup> The Owner must consent to reduce "inside" basis of the real property if Taxable Persons owning either more than 80%, or five or fewer Taxable Persons owning more than 50%, of the capital and profits of the entity request. Reg § 1.1017-1(g)(2)(ii)(C). A Taxable Person who is a partner or member of the Owner must request consent if that Taxable Person owns more than 50% of the capital and profits of the Owner, or if reductions to the Taxable Person's income tax basis in the Taxable Person's other depreciable property are being made due to the COD income of the Owner. Reg § 1.1017-1(g)(2)(ii)(B).

<sup>37</sup> Exclusion of COD income under the QRPBIE may not be permitted, unless basis adjustments are made to the Owner's depreciable real property or other depreciable real property of the Taxable Person. Code §§ 108(c)(1)(A) and 1017(a). *See* PLR 9426008.

deed in lieu transfer or foreclosure soon after the receipt of tax information from the Lender (e.g., any Form 1099-C) and before tax reporting to each Taxable Person for the taxable year in which the deed in lieu transfer or foreclosure disposition occurs. Preferably, all interested parties will be able to cooperate to plan and report the transaction consistently.

Additionally, if the Owner consents to reduce the basis of the depreciable real property that is subject to the deed in lieu transaction or foreclosure (or is forced to consent), the Taxable Person who elects to exclude COD income under the QRPBIE must reduce the Taxable Person's basis in his, her or its ownership interest in the entity Owner by the amount of the Owner's COD income that is excluded under the QRPBIE.<sup>38</sup>

### Conclusion

Recourse debt that secures mortgaged real property will result in COD income upon discharge of the Owner's obligations to pay the debt. The Owner may be discharged from the mortgage debt in a deed in lieu or foreclosure transaction, or at a later time. Exclusion of the COD income may be available for solvent real property Owners, or solvent Taxable Persons of Owners, under the QRPBIE. If the Taxable Persons control sufficient interests in the capital and profits of the Owner (under certain tests), the debt is wholly or partially discharged and COD income is incurred, exclusion under the QRPBIE requires that specified basis adjustments must be made, which may result in increased tax on the sale or exchange involved in the deed in lieu or foreclosure. Tax planning is required to determine if the QRPBIE is preferable to the Taxable Persons who would otherwise report taxable COD income.

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<sup>38</sup> Reg § 1.1017-1(g).



## Sales of Receivership Assets Free and Clear of Liens and Interests

by Patrick E. Mears\* and Dustin Daniels\*\*



Since the onset of the world financial crisis in Fall, 2008, the commercial real estate market has steadily deteriorated, resulting in a multitude of mortgage loan defaults. In Michigan and throughout the nation, portfolio lenders and special servicers have increasingly sought the assistance of courts in appointing receivers with the power to sell real estate collateral once attempts to restructure voluntarily defaulted real estate loans have failed. Receiver sales of real estate often prove to be faster and cheaper than disposing of the property through foreclosure sales under state law and sales of real estate in bankruptcy cases under section 363 of the Federal Bankruptcy Code.

Although Michigan law supporting receivership sales is fairly clear and well-established, the legal foundation for receiver sales of property free and clear of liens and other interests, including rights of redemption, is less certain. In order to bring clarity and certainty to this area of Michigan law, to reduce the transactional costs of disposing of real estate collateral and to make the real estate

market more efficient and responsive, the Michigan state legislature should consider adopting legislation that specifically authorizes receivers to sell property free and clear of interests, including rights of redemption.

### The Use of Receivers to Preserve and Sell Distressed Commercial Real Estate

#### A Brief History of Receivers in Anglo-American Law

Some of the earliest recorded references to receivers appointed by English courts appeared during the forty-five year reign of Queen Elizabeth I (1558-1603). These early decisions involved the appointment of sequestrators and receivers of rents and profits generated by real estate, which were collected and held by those persons subject to the orders of the courts.<sup>1</sup> Under early English law, only the chancery courts could appoint receivers but this power

<sup>1</sup> Ralph E. Clark, 1 *A Treatise on the Law and Practice of Receivers* § 4 (3d ed 1992) (hereinafter cited as “Clark on Receivers”).

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was granted to other courts by the Judicature Act of 1873, which permitted all divisions of the high court, the court of appeals and every inferior court having jurisdiction in equity, law and equity, and admiralty.<sup>2</sup>

On the other side of the Pond, chancery courts were first established in the American colonies in the early 1700s. Virginia and New York created these courts in 1700 and 1701 respectively, with most other colonies/states falling in line thereafter.<sup>3</sup> These courts, however, did not begin to appoint regularly receivers to take possession of property until the period of the American Revolution and shortly thereafter.<sup>4</sup> On the federal level, the United States Constitution, adopted in 1789, provided that the judicial powers of the federal government extended to all cases at law and equity arising under the Constitution, the laws of the United States and foreign treaties. The Judiciary Act of 1789 confirmed the English equity jurisprudence and custom that an action in equity will not lie when there exists an adequate remedy of law; this statute reflected “the general tenor of the federal legislature at that time as willing to adopt English precedents in chancery.”<sup>5</sup> The power of federal courts to appoint receivers “dates back to the inception of our federal courts.”<sup>6</sup>

Michigan was admitted to the Union as a state on January 26, 1837, the voters having approved a state constitution two years earlier. Although the 1835 Constitution did not contain a specific recognition of the state circuit court’s equity powers, these early courts exercised them. In Michigan’s 1850 Constitution, section 5 of Article 6 abolished “distinctions between laws and equity proceedings” and prohibited the “office of master in chancery.”<sup>7</sup> Thus, receivers were appointed by the Michigan circuit courts from an early date after Congress granted statehood.<sup>8</sup>

2 *Id.*

3 *Id.* § 5.

4 *Id.* § 7.

5 *Id.* § 6.

6 *Id.*

7 See generally Charles W. Joiner & Ray A. Geddes, *The Union of Law and Equity: A Prerequisite to Procedural Revision*, 55 Mich L Rev 1059 (1957); Clark F. Norton, *Judicial Reform in Michigan Between Two Constitutions 1835-1850: Influence of the New York Reforms*, 51 Mich L Rev 203 (1952).

8 See, eg, *Michigan Minerals, Inc v Williams*, 306 Mich 515, 525-27; 11 NW2d 224 (1943); *Brown v Vandermeulen*, 41 Mich

## The Appointment and Powers of Michigan Receivers to Manage and Dispose of Real Estate

Michigan law contains numerous statutory provisions governing the appointment of receivers in diverse contexts, such as in connection with cemeteries,<sup>9</sup> credit unions,<sup>10</sup> dissolving corporations<sup>11</sup> and construction lien litigation.<sup>12</sup> This Article, however, focuses on the powers of a receiver for a financially troubled commercial real estate project subject to a mortgage lien, when the receiver has been appointed pursuant to MCL § 600.2926, Michigan’s general receivership statute, and/or MCL § 600.2927, the statute permitting the appointment of a receiver when the mortgagor fails to pay real estate taxes or insurance premiums and has agreed in the mortgage that such failure constitutes waste.<sup>13</sup>

### Judicial Mortgage Foreclosure in Michigan

In Michigan, a creditor secured by a mortgage on a failed commercial real estate project may foreclose its mortgage by judicial action, which will cause that property to be sold at a public sale conducted by the county clerk of the county in which the mortgaged real estate is situated. The statutory provisions governing judicial foreclosures are set forth in MCL §§ 600.3101, *et seq.* In seeking this relief, the mortgagee will file and serve a complaint requesting: (i) the entry of a money judgment on the secured debt, (ii) the entry of a judgment of

418; 49 NW 920 (1879); *Montgomery v Merrill*, 18 Mich 338 (1869); *Petitpren v Taylor School Distr*, 104 Mich App 283, 294, n 9; 304 NW2d 224 (1981). See generally Mark A. Goldsmith & Gregory J. DeMars, *Receiverships in the Real Estate Setting*, 23 Mich Bus L J 36 (Summer 2008) (hereinafter cited as “Goldsmith & DeMars”).

9 MCL § 600.2926a.

10 MCL §§ 490.231, *et seq.*

11 MCL § 600.3505.

12 MCL § 570.1122.

13 For excellent, broad overviews of the use of receivers in this context, see Lawrence A. Dudek, *Strategic Use of a Real Estate Receiver or Bankruptcy as an Alternative to Foreclosure*, 30 Mich Bus L J 17 (Spring 2010); Morris A. Ellison, Lawrence M. Dudek & Samuel H. Levine, *‘Tis Better to Receive - - The Use of a Receiver in Managing Distressed Real Estate*, <http://www.acrel.org> (Fall, 2009). See also Patrick E. Mears & C. Kim Shierk, *Workouts, Receiverships, and Foreclosures on Michigan Residential Condominium Projects: A Road Map for Mortgage Lenders*, 36 Mich Real Prop. Rev 177 (Winter 2009).

foreclosure of the mortgage and scheduling of a sale, and (iii) in some cases, additional relief. The defendants in the action will normally be the defaulting mortgagor and all holders of interests in the real estate that are junior to the mortgage lien being foreclosed on, *e.g.*, holders of junior mortgages, construction lienors and even tenants of the mortgagor.<sup>14</sup> Judicial foreclosure actions are preferred vehicles for mortgagees when there are lien priority disputes, such as disputes between the mortgagee and construction lienors, or title issues that can only be resolved via a quiet title claim. However, judicial foreclosure actions will take, at a minimum, 13½ months to complete from the commencement of the action through the end of the six-month redemption period. If there are disputed issues in the litigation, this thirteen-month period may be lengthened considerably.

Judicial mortgage foreclosure sales will be conducted by the county clerk at a court-ordered public sale, the order for which may be entered only after a minimum period of six months, elapses as measured from the date the foreclosure action was commenced, plus any additional period ending with the date by which the judgment must be paid.<sup>15</sup> Notice of the foreclosure sale must be prepared, published and posted as prescribed in MCL §§ 600.6052 and 600.6091. This notice must be published for six successive weeks and the sale may not be conducted until 42 days have expired since publication commenced.<sup>16</sup> Although not required to, the circuit court supervising the litigation may fix an upset price for the sale and, at the sale, the mortgagee may credit bid all or a portion of its debt.<sup>17</sup> The property will be sold free and clear of junior liens and interests but will be subject to the six-month redemption rights of the mortgagor and any holders of junior interests.<sup>18</sup> If the mortgaged realty is purchased at

the foreclosure sale for cash, those funds will be first applied to the mortgage debt and lien being foreclosed upon plus any awarded costs, with any surplus “being brought into court for the use of the defendant, or of the person entitled to it, subject to the order of the court.”<sup>19</sup>

#### Nonjudicial Mortgage Foreclosure in Michigan

If the defaulted mortgage in commercial real estate contains a “power of sale,” *i.e.*, a contractual grant by the mortgagor to the mortgagee to sell the mortgaged realty by means of a nonjudicial sale conducted pursuant to MCL §§ 600.3201, *et seq.*, the mortgagee may avoid the courts and commence nonjudicial foreclosure proceedings. In doing so, the mortgagee must publish and post a notice of sale containing the information specified in MCL § 600.3212 and must comply with the applicable provisions of MCL § 600.3204.<sup>20</sup> The notice of foreclosure must be published “for 4 successive weeks at least once in each week” in a newspaper published in the county where the mortgaged realty, or a portion of it, is situated.<sup>21</sup> Within 15 days after first publication of the notice, a true copy of the notice of foreclosure must be “posted in a conspicuous place upon any part” of the realty.<sup>22</sup>

After the publication period expires, the real estate may be sold “at the place of holding the circuit court within the county in which the premises to be sold, or some part of them,” are located.<sup>23</sup> The sale is normally conducted by a deputy sheriff of the county, who is directed by statute to sell “to the highest bidder.”<sup>24</sup> The foreclosing mortgagee may purchase the encumbered property at the sale by means of a credit bid made “fairly and in good faith.”<sup>25</sup> In the event that any cash surplus results from the foreclosure sale after payment of the foreclosing mortgagee’s debt and the costs and expenses of the foreclosure and sale, the person conducting the sale must pay that surplus to the mortgagor unless, at the time of the sale or before turnover of the surplus to the mortgagor, a written claim is delivered by a person asserting an interest in the

14 The complaint need not “set out in detail the rights and interests of the defendants who are purchasers of, or have liens on,” the mortgaged realty subsequent to the date on which the mortgage was recorded. MCR 3.410(B)(1). The complaint will be sufficient if it sets forth the mortgagee’s interest in the realty and states “generally that the defendants have or claim some interest in the premises as subsequent purchasers.” *Id.*

15 MCL § 600.3115; MCR 3.410(C)(1).

16 MCL § 600.6052; MCR 3.410(C).

17 MCL § 600.3155.

18 MCL § 600.3140(1) (“The mortgagor . . . or any person lawfully claiming from or under the mortgagor . . . may redeem the entire premises . . .”). *See, eg, Titus v Cavalier*, 276 Mich 117; 267 NW 799 (1936).

19 MCL § 600.3135(1).

20 *See generally* Lawrence M. Dudek, *Mortgage Foreclosure and Related Remedies*, 30 Mich Real Prop Rev 173 (2003).

21 MCL § 600.3208.

22 *Id.*

23 MCL § 600.3216.

24 *Id.*

25 MCL § 600.3228.

surplus to the conductor of the sale.<sup>26</sup> Upon timely receipt of such a claim, the person conducting the sale must pay the surplus to the circuit court clerk in the county where the sale is held.<sup>27</sup> Thereafter, the circuit court will conduct a proceeding akin to an interpleader action to determine which of the competing claimants is entitled to the surplus and, at the hearing's conclusion, enter an order directing a distribution.<sup>28</sup>

The real estate sold at the foreclosure sale will be made free and clear of junior liens and other interests but is nevertheless subject to the redemption rights of the mortgagor and the holders of junior interests.<sup>29</sup> Unlike judicial foreclosure, the redemption period applicable in nonjudicial foreclosures is not uniform but will depend upon: (i) the date the mortgage was executed; (ii) the percentage of debt paid as of the date of the foreclosure notice; and (iii) the character of the real estate, *e.g.*, whether it is "commercial or industrial property, or multi-family residential property in excess of four units."<sup>30</sup>

#### Use of Receivers in Conjunction With Mortgage Foreclosures

##### *Judicial Foreclosures*

As stated above, the plaintiff in a judicial mortgage foreclosure action may plead in its complaint claims other than for the entry of a money judgment and a decree of judicial foreclosure. One potential additional claim is the appointment of a receiver to take possession of the mortgaged real estate, to operate any business of the mortgagor conducted thereon, and to sell that property pursuant to court order. Plaintiffs pleading this claim, properly characterized as one "ancillary" to the foreclosure count in the complaint,<sup>31</sup> often file a motion with the circuit court re-

questing the appointment of a receiver for the property at the same time the complaint is filed or shortly thereafter. Upon receipt of this motion, the circuit court will then schedule a hearing thereon which may require the submission of testimonial and documentary evidence to the court.

The motion to appoint a receiver should describe with specificity the grounds for the requested appointment. Thus, if there is physical "waste" on the real estate<sup>32</sup> (*e.g.*, housing code violations in a residential apartment project), the details of the condition sought to be remedied should be described in detail in the motion and supporting affidavits. If the waste results from the mortgagor's failure to pay real estate taxes assessed against the mortgaged realty or insurance premiums on policies covering that property, then unpaid tax bills, evidence of tax forfeiture proceedings and copies of insurance policy lapses or cancellations should accompany the motion to satisfy the requirements of MCL § 600.2927.

The motion to appoint a receiver should also recite the identity of the proposed receiver, his or her qualifications and relevant experience. These are often described in an affidavit of the proposed receiver filed concurrently with the motion. The proposed receiver will often attend the hearing on the motion to testify and to answer any questions that the court may address to the receiver candidate. Although the court may decide to appoint a receiver, the circuit judge may select a receiver of his or her own choosing and will not be bound by the mortgagee's selection.<sup>33</sup>

This motion will almost always have attached to it as an exhibit a proposed order appointing receiver ("OAR"), which will typically contain: (i) recitals of the lending relationship between the mortgagor and the mortgagee;

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a claim for the appointment of a receiver is ancillary has been recently the subject of conflicting judicial decisions, arising in the context of federal receiverships. *Compare* Federal National Mortgage Ass'n v Wellington Investments, LLC, 2011 WL 2787270 (ED Mich July 15, 2011) (Battani, J.) with Federal National Mortgage Ass'n v Mapletree Investors Limited Partnership, 2010 WL 1753112 (ED Mich April 30, 2010) (Murphy, J.). Stated otherwise, the issue is whether there is a close enough nexus between the claim for the appointment of a receiver and at least one other claim asserted by the mortgagee in the subject litigation.

32 *See, eg, Nusbaum v Shapero*, 249 Mich 252; 228 NW 785 (1930); 1 *Clark on Receivers* § 180.

33 *See, eg, Ypsilanti Fire Marshal v Kircher*, 273 Mich App 496, 528; 730 NW2d 481 (2007).

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26 MCL § 600.3257.

27 *Id.*

28 *Id.*

29 MCL §§ 600.3236, 3240.

30 MCL §§ 600.3240(7)-(12).

31 Michigan law, as well as the law of most other jurisdictions, requires that a claim to appoint a receiver in a complaint must be "ancillary" to other claims asserted in that pleading. In other words, it cannot stand alone. *See, eg, Marshall v Ullman*, 335 Mich 66; 55 NW2d 731 (1952); *National Lumberman's Bank v Lake Shore Machinery Co*, 260 Mich 440; 245 NW 494 (1932). Under the federal law of receiverships, discussed *infra*, this "ancillary" rule of pleading is also present. *See, eg, Gordon v Washington*, 295 US 30, 36 (1935). Whether or not

(ii) a description of the mortgagor's default under the loan documents; (iii) the property subject to the receivership; (iv) the factual bases for the appointment of a receiver; and (v) the proposed receiver's identity and qualifications. The OAR will also prescribe the various powers and duties of the receiver and the method of determining its compensation. One of the most important powers described in the OAR is the receiver's authority to sell receivership property. The provisions that relate to and enhance this authority normally include the following:

1. the receiver is entitled to retain property appraisers and real estate brokers to value and list the realty for sale;
2. the receiver may market the property for sale at the highest possible price obtainable;
3. the receiver may sell the realty in bulk or in separate parcels to the highest bidder or bidders subject, however, to the mortgagee's consent;
4. any proposed sale of the real estate must be approved by the plaintiff/foreclosing mortgagee, must be sold at auction featuring competitive bidding, and must be approved by court order entered after a hearing on notice to all defendants and other entities holding interests in the realty; and
5. the real estate will be sold free and clear of all liens and interests including any redemption rights of the mortgagor and holders of other interests.

In preparing the OAR, a plaintiff will often present it in draft form to the title company representing the plaintiff for comments, suggestions and approval, especially when the plaintiff desires a sale of the mortgaged realty by the receiver. It is the authors' experience that most title insurance companies in Michigan will insure a receiver sale of real estate free and clear of liens and interests where: (i) the OAR clearly authorizes it, and (ii) the sale has been approved by a final court order entered after proper notice to the mortgagor and all holders of interests in the realty and after a hearing is conducted on the motion. Upon entry of such a final order of sale, the receiver will then be able to close the sale to the mortgagee or a third party purchaser by delivering to it a "clean" title policy with no exceptions for redemption rights or liens.

#### *Nonjudicial Foreclosures*

In Michigan, a mortgagee may elect to foreclose on

its mortgage in commercial realty nonjudicially but nevertheless desire the appointment of a receiver for the realty during the period prior to the foreclosure sale and during the running of the redemption period.<sup>34</sup> The mortgagee may also seek a receiver with the power to sell the realty free and clear of liens and interests as a quick alternative to a foreclosure sale. In order to achieve this end, the mortgagee will file a complaint in the circuit court for the county in which the real estate is located containing a count for the appointment of a receiver and other counts (*e.g.*, a claim for money judgments against guarantors and a claim to enjoin the mortgagor from collecting and using rents subject to a recorded rent assignment for the benefit of the mortgagee). In order to avoid possible dismissal of the complaint, the claim for appointment of the receiver must be ancillary to other claims in the complaint.<sup>35</sup>

The existence of a rent assignment granted by the mortgagor to the mortgagee as additional security for the mortgage indebtedness within the scope of MCL § 554.231, *et seq.* may constitute additional grounds for the appointment of a receiver. MCL § 554.231 permits an assignment of rents generated by "commercial or industrial realty other than an apartment building with less than 6 apartments or any family residence" that is subject to a mortgage held by the rent assignee. The rent assignment "is binding upon the assignor/mortgagor only upon the occurrence of a default under the mortgage and will be enforceable against the mortgagor's tenants only after: (i) the mortgagee/assignee records a notice of default with the register of deeds office in the county where the real estate is situated; and (ii) the notice of default is served on those tenants." This statute enacted by the Michigan legislature in 1953 had as its model similar legislation enacted in 1925 applying only to trust mortgages.<sup>36</sup>

In 1960, the Michigan Supreme Court in *Smith v. Mu-*

34 Early decisions of the Michigan courts adopted the rule that a mortgagor could not be dispossessed from the mortgaged realty against its will during the foreclosure process and before the mortgagor's redemption period expired. *See, eg. Hazeltine v Granger*, 414 Mich 503; 7 NW 74 (1880). *See also* Myron A. Keys, *Appointment of Receivers in Mortgage and Land Contract Cases*, 2 Det L Rev 157 (1931-1932). This rule was altered by the Michigan legislature in 1925 for trust mortgagees holding rent assignments and again in 1953 for mortgagees holding rent assignments in certain commercial and industrial real estate. *See discussion infra.*

35 *See* note 31 *supra*.

36 Goldsmith & DeMars, *supra* note 8, at 38-39.

*tual Benefit Life Ins Co*<sup>37</sup> declared that a mortgagee holding an assignment of rents may be entitled upon the mortgagor's default to the appointment of a receiver to collect the rents from the tenants in a proper case, in order to aid the mortgagee in the enforcement of the rent assignment. In many circumstances, a court-appointed receiver may be more effective in collecting rent from the mortgagor's tenants. As the authors of a recent article have written:

As a practical matter, in the absence of a demand from a court-appointed receiver for payment of rent, tenants may not pay rent at all. A receiver, as a court-appointed official, carries the court's official imprimatur and promotes payment in accordance with the law. Thus, a lender may determine that the expense of a court action, as well as the receiver's compensation and expenses, can be justified by the increased cash flow that the receiver will produce, or that such action is necessary to stop the "milking of rents."<sup>38</sup>

In litigation for the appointment of a receiver commenced by a mortgagee who is requesting the court's assistance in enforcing a rent assignment and who may also be foreclosing on its defaulted mortgage nonjudicially, the plaintiff will normally file and serve its motion to appoint a receiver concurrently with or shortly after publishing and posting its notice of foreclosure sale. The contents of the motion and supporting papers, the language of the proposed OAR and the procedure at the hearing on the motion should not be appreciably different from the procedure on similar motions filed in judicial foreclosure actions.<sup>39</sup>

## Receiver Sales of Real Estate Free and Clear of Redemption Rights and Liens

### The Dilemma

Sales of distressed commercial real estate in Michigan by court-appointed receivers free and clear of redemption rights and liens in most circumstances should be less ex-

<sup>37</sup> 362 Mich 114; 106 NW2d 515 (1960).

<sup>38</sup> Goldsmith & DeMars, *supra* note 8, at 39.

<sup>39</sup> See discussion *supra*.

This is not to suggest that the filing of a motion to appoint a receiver to enforce the mortgagee's rent assignment may only be made in civil actions not involving judicial foreclosure. Those grounds for a receiver's appointment may also be asserted in judicial foreclosure actions.

pensive and more expeditious and efficient than foreclosure sales. Unlike judicial foreclosure sales, there is no seven and one-half month minimum waiting period before a receiver sale can be scheduled and conducted. In addition, there should be no six-month or, in some cases, one-year redemption period that must expire before a sale closing can occur. Potential purchasers of this distressed property at a mortgage foreclosure sale may be unwilling to delay their purchase of the foreclosed-upon realty until the redemption periods of the mortgagor and junior lienors expire and may therefore elect to pass on a purchase of this property. If the distressed real estate cannot be sold free and clear of liens and redemption rights by a receiver, the only alternative available to the potential purchaser not involving the mortgagor's bankruptcy is to wait for the expiration of all redemption periods after a mortgage foreclosure or other judicial sale. This alternative may deter many interested purchasers and thereby further depress prices in Michigan commercial real estate markets.

### The Current State of Michigan Law

#### Receiver Sales Free and Clear of Redemption Rights

Although there are persuasive arguments based on extant Michigan statutes and case law that support court-approved receiver sales of real estate free and clear of redemption rights and liens, uncertainty still remains as to the power of a Michigan court to sell free and clear of redemption rights. With respect to redemption rights, Michigan courts adopted the rule early in the last century that, where the assets of a "quasi public corporation" in possession of a receiver could not be operated by the receiver except at a substantial loss, a receiver could sell those assets in their entirety free and clear of parties' redemption rights. Otherwise, any judicially approved sale of real estate by a receiver would be subject to redemption rights. The 1915 decision of the Michigan Supreme Court in *Webber v Miner*,<sup>40</sup> illustrates the application of this principle. There, the operations of a public service lighting company owning a plant in Fenton, Michigan were assumed by a court-appointed receiver. The chancellor authorized the receiver to sell all of the company's assets free and clear of redemption rights whereupon the holder of those rights appealed that decree to the Michigan Supreme Court. In its opinion, the Supreme Court stated the general rule that property sold by a receiver pursuant to court order may not be sold free of redemption rights. The

<sup>40</sup> 184 Mich 112; 150 NW 305 (1915).

limited exception to this rule involved the sale of all assets of a “quasi public corporation” suffering unabated losses. Although the Supreme Court upheld the authority of the court below to order the sale of the lighting company’s assets free and clear of redemption rights, the Supreme Court remanded the case with directions to consider the offer of a third party to lease the company’s assets from the receiver for a specified period of time as an alternative to the asset sale.

Only seven years later, the Michigan Supreme Court appeared to expand the exception for receivers’ bulk sales of assets of quasi-public corporations to receivers’ bulk sales of assets owned by private business entities where those assets were intertwined and mutually dependent upon one another in the operation of the business and could not be sold separately without resulting in substantial loss. *National Bank of Commerce v Corliss*,<sup>41</sup> concerned a creamery business with operations in two towns in Michigan. In the proceedings below, a receiver was appointed to preserve the creamery properties and to “avert the danger of a ruinous loss.”<sup>42</sup> The chancellor rejected the defendants’ argument that the receiver should not be permitted to sell the properties in bulk as a going concern without giving effect to redemption rights. The defendants had argued that, in circumstances not involving the assets of a quasi public corporation, any sale must be made via foreclosure, which would preserve the defendants’ redemption rights.

On appeal, the Michigan Supreme Court affirmed the ruling of the chancellor below, holding that because of the character of the property involved, the property fell within the exception and so the receiver could sell the creamery’s assets free of redemption rights. In so holding, the Supreme Court declared that it was “unable to see any reason for the exception to the rule, unless it is the necessity which arises from the character and complexity of the property . . . . It appears to us that, instead of being a rule applicable only to quasi public utilities, it is applicable to [the creamery] because [its] property is so intermixed that it would be impracticable to make a sale any other way.”<sup>43</sup> At the close of its opinion, the Supreme Court also posited that the “exigency which permits a receiver to be appointed to keep the plant in

operation also furnishes a reason for selling the property as an entirety upon a short sale without redemption.”<sup>44</sup>

In 1933, the Michigan Supreme Court had occasion to address some of the issues raised earlier by that court in *Weber and Corliss*. In *Detroit Trust Co v Detroit City Service Co*,<sup>45</sup> two separate receivership actions were commenced against a Michigan corporation that sold ice and fuel to consumers in the City of Detroit and its vicinity, both of which actions were thereafter consolidated and in which co-receivers were appointed.<sup>46</sup> The corporation owned a large number of plants in the Detroit area for ease of distribution of its products to local customers by horses and wagons and motor trucks.<sup>47</sup> A third action against Detroit City Service Co. was commenced in 1931 in Wayne County Circuit Court by the trustee of the first mortgage bonds seeking foreclosure of the mortgage and the sale of all collateral subject to the lien of the mortgage.<sup>48</sup> Thereafter, the trustee filed a petition to establish an equity receivership over the service company’s assets, seeking consolidation of the two cases and consenting to the appointment of the same co-receivers in the resulting consolidated action. The relief requested in the petition was thereupon granted by the circuit court.<sup>49</sup>

A few days later, the trustee filed its bill to compel that the property of the service company be sold via foreclosure as a going concern. This motion was opposed by the second mortgagee on various grounds including: (i) that the service company was not a “quasi public utility” and, consequently, its property could not be sold as a unit nor as an operating concern; and (ii) the company’s property could not be sold free and clear of the equity of redemption applicable under Michigan law.<sup>50</sup>

At the resulting hearing on the trustee’s bill, the Wayne County Circuit Court judge entered a decree finding that the service company was a “quasi public corporation” and, as such, holding that the property used solely in the ice and fuel business could be sold via foreclosure free

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44 *Id.*

45 262 Mich 14; 247 NW 76 (1933).

46 *Id.* at 25-27.

47 *Id.* at 20-21.

48 *Id.* at 26.

49 *Id.* at 26-27.

50 *Id.* at 26-28.

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41 217 Mich 435; 186 NW 717 (1922).

42 *Id.* at 437.

43 *Id.* at 440.

and clear of any equity of redemption. At the foreclosure sale, the first mortgagee would be permitted to bid in its bonds and coupons to buy the property provided that the costs and expenses for foreclosure were paid in cash.<sup>51</sup>

One of the issues addressed on appeal from this decree to the Michigan Supreme Court was whether the circuit court properly ordered a strict foreclosure sale free and clear of redemption rights. On appeal, the court held that an ice manufacturing and supply business operating in a large community did not fall within the definition of a “quasi public utility” and, therefore, its property could not be sold free of redemption rights.<sup>52</sup> According to the Michigan Supreme Court, the “right to redeem from a foreclosure sale is a statutory right that has been strictly protected except under the unusual circumstances arising [in connection with a quasi public utility]. The right can neither be enlarged nor abridged by the courts.”<sup>53</sup> The Michigan Supreme Court distinguished *Corliss*, which permitted the sale of the insolvent creamery’s property without right of redemption, by characterizing it as involving a foreclosure of a land contract, for which there was at that time no statutory right of redemption.<sup>54</sup> However, later in its *Detroit Trust Company* opinion, the Supreme Court authorized the co-receivers to sell the equity of redemption in addition to the operating assets themselves.<sup>55</sup>

Since the last of this trio of cases was decided in 1933, there have been no subsequently reported appellate decisions in Michigan addressing the “general rule” that receiver sales of real estate must be subject to redemption rights, and the exception to that rule made in the *Weber* line of cases involving quasi public businesses, which exception was arguably expanded in the *Corliss* decision. Nor has the holding in *Corliss* been overruled although, as discussed above, its validity was questioned by the Michigan Supreme Court in *Detroit Trust Co.*<sup>56</sup> If the broader *Corliss* exception to the general rule that judicial sales of assets will be subject to statutory redemption rights is good law in this state, then receivers and mortgagees seeking court approval of receiver sales free and clear of redemp-

tion rights should be prepared to establish at hearings on sale motions that the *Corliss* exception is satisfied by the following relevant facts, *viz.*, (i) that the business assets operated by a special purpose borrower on the mortgaged real estate, such as an apartment complex, condominium project, manufacturing facilities or a hotel, are interdependent and any piecemeal sales of those assets would be impracticable; and (ii) that the substantial and continuing losses suffered by the business need to be quickly stanchd by a quick sale free and clear of redemption rights. This argument, however, may be less persuasive when the business operations have ceased and there are few assets of value that require the immediate protection of a receiver. As discussed in Part III below, this uncertainty in the case law should be resolved by clearly drawn legislation.

#### Receiver Sales Free and Clear of Liens and Other Interests

Although there are two reported decisions of the Michigan Supreme Court that involved sales by a receiver of real estate free and clear of liens with those liens attaching to the proceeds of sale, neither of these decisions contained a detailed judicial determination that these sales were made in accordance with state law. In *Campau v Detroit Driving Club*, decided in 1902,<sup>57</sup> the Wayne County Circuit Court appointed a receiver for all of the assets of the Detroit Driving Club, which consisted of a race track and grounds in the City of Grosse Pointe and associated personal property upon the petition of two judgment creditors. After this appointment, the Wayne County sheriff sold the race track and grounds under the execution levy of a third judgment creditor to the receiver and two other individuals. Later, the sheriff sold the related personalty to those same parties. After extensive litigation commenced by holders of competing executions challenging the validity of these execution sales, the Michigan Supreme Court held that those sales were “illegal and void” since they were made after the receiver’s appointment and “in contempt of court.”<sup>58</sup> After setting aside those sales, the Supreme Court decreed that the real and personal property of the receivership would be sold by the Wayne County Circuit Court Commissioner “free and clear of all encumbrances, and the proceeds of the sale [deposited into court] for distribution among the secured and unsecured creditors of the club, according to their respective priorities.”<sup>59</sup> In its opinion, the Supreme Court

51 *Id* at 28-29.

52 *Id* at 46.

53 *Id* at 47.

54 *Id* at 46.

55 *Id* at 49-53.

56 *Id* at 46.

57 130 Mich 417; 90 NW 49 (1902).

58 *Id* at 422.

59 *Id* at 426.

did not discuss the court's authority to conduct such a sale free and clear of liens.

Twenty five years later, the Michigan Supreme Court issued its decision in *In re Field Body Corp.*,<sup>60</sup> which involved a sale by a court appointed receiver of all of Field Body's assets "as a unit, free from all liens, and that any existing liens be transferred to the fund."<sup>61</sup> Although notice of the sale was sent to all "stockholders, creditors and lien claimants,"<sup>62</sup> no one objected to the sale or appealed from the order authorizing the sale. Thereafter, a judgment lien creditor receiving such prior notice filed a petition with the court requesting that the petitioner be authorized to sell real property subject to its lien or, alternatively, that the creditor be paid the amount of its judgment by the receiver from the proceeds of sale. The trial court denied the petition but its order recognized that the petitioner held a lien on the realty. Sometime thereafter, the sale proceeds were distributed to creditors. As a result, the petitioner received no distribution at all; distributions to senior creditors such as taxing authorities and administrative expenses exhausted the proceeds before any distributions could be made to the petitioner. The receiver nonetheless appealed from this order denying the petition because it recognized that the petitioner held a lien. On appeal, the Michigan Supreme Court first held that, because there was personal property of Field Body available at the time of the levy to pay the judgment, the sheriff, who was charged with enforcing the judgment, should have proceeded against that property first. Because he failed to do so, the levy by the sheriff on the real estate was improper under Michigan law and, therefore, the petitioner's lien was invalid. The Supreme Court cited *Campau* favorably, stating that the sale free and clear adopted below in the *Field Body* litigation was "substantially the same order" entered in *Campau* and that "the order was clearly within the power of the court to make."<sup>63</sup>

## Court Decisions in Other Jurisdictions

### Early Decisions

At least since the turn of the twentieth century, state courts have been granted the authority to allow receivers to sell real property free and clear of liens and encum-

brances in appropriate circumstances.<sup>64</sup> This authority was derived from both statutory authority and the courts' inherent equitable powers. For example, a former New Jersey statute allowed a receiver to sell real property free and clear of encumbrances provided that two conditions were satisfied.<sup>65</sup> First, the validity and enforceability of the prior liens must have been brought into question by the parties to the litigation. Second, the real property must have been of a character that would materially deteriorate in value pending the litigation.<sup>66</sup>

In *Passaic Plumbing Supply Co v Eastside Holding Corp.*,<sup>67</sup> the New Jersey Court of Chancery addressed the issue of whether to allow a receiver to sell an unfinished apartment complex free and clear of all encumbrances when it was subject to three mortgages and numerous lien claims. In determining whether New Jersey's statutory requirements were satisfied, the court first examined whether the validity and enforceability of the liens were in question.<sup>68</sup> The court determined that the receiver statute should be liberally construed and that questions concerning validity and enforceability of the liens will arise whenever the parties' disputes concern the extent of their liens and/or their relative priority.<sup>69</sup> The issue of validity and enforceability of liens was satisfied when "numerous suits at law and in equity" were pending relative to the validity and priority of the encumbrances.<sup>70</sup> The court further concluded that the apartment complex would materially deteriorate in value during litigation because of its unfinished state--the property's prolonged exposure to the elements would likely cause substantial damage to the premises.<sup>71</sup> In holding that the receiver's sale free and clear of all encumbrances had been properly authorized by the court below, the appellate court noted that the operating expenses of the apartment complex were generating a

60 240 Mich 28; 215 NW 6 (1927).

61 *Id.* at 30.

62 *Id.*

63 *Id.* at 31.

64 2 *Clark on Receivers, supra* note 1, § 500(b); David L. Abney, *Selling Equity Receivership Property Free and Clear of Liens and Encumbrances*, 16 Real Estate L J 364 (1988).

65 NJ Stat § 14:14-20. *See, eg, Sullivan v James Leo Co*, 124 NJ Eq 317, 326; 1 A2d 400 (NJ 1938).

66 *See, eg, Passaic Plumbing Supply Co v Eastside Holding Corp.*, 105 NJ Eq 485, 487; 148 A 637 (Ch 1930).

67 *Id.*

68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.*

net loss of more than \$2,000 per month and such losses should not be permitted to continue.<sup>72</sup>

Other jurisdictions have recognized that a court possesses the inherent power to authorize receivers to sell real property free and clear of all encumbrances where the lienholders are parties in the litigation.<sup>73</sup> In *Chapman v Schiller*,<sup>74</sup> the Supreme Court of Utah reviewed the lower court's order authorizing a receiver to sell real property of a public utility free and clear of all liens and rights of redemption where a mortgage bondholder challenged on appeal the court's power to authorize such a sale.<sup>75</sup> The Utah Supreme Court first concluded that the district court below possessed the judicial power to authorize such a sale as a result of its inherent authority of "preserving and administering" the debtor's property for the benefit of the parties to the proceeding.<sup>76</sup> Further, the district court properly authorized the sale free from rights of redemption because, as a judicial sale, the right of redemption conferred by the foreclosure statutes in connection with execution sales was not applicable.<sup>77</sup> Consequently, the lower court was authorized to prescribe the terms of the judicial sale, including the absence of redemption rights.<sup>78</sup> Finally, the Utah Supreme Court held that a court has the power to sell property at a receiver's sale free from all encumbrances so long as all of the lienholders are made parties to the proceeding.<sup>79</sup>

Not all courts have authorized receivers' sales of real property free and clear of all liens, however. One common exception involves situations where the total amount

of the debt secured by the liens exceeds the value of the encumbered property.<sup>80</sup> In *Melrose v Industrial Associates, Inc.*,<sup>81</sup> the Supreme Court of Connecticut held that a court does not have the power to authorize a receiver's sale of real property free and clear of junior lienholders where it would result in a loss to those lienors.<sup>82</sup>

### Recent Decisions

There appears to be a recent trend developing in litigation on the issue of whether courts have the authority to sell real property free and clear of all encumbrances. In *Park National Bank v Cattani, Inc.*,<sup>83</sup> the Ohio Court of Appeals reasoned that because the Ohio receivership statute "does not contain any restrictions on what the court may authorize when it issues orders regarding receivership property," that statute permits the sale of real property free and clear of all liens and encumbrances.<sup>84</sup> In *Cattani*, the defendant, an insolvent corporation, argued that the court's order authorizing the receiver to sell its real property free and clear of all encumbrances was contrary to law because the sale did not adhere to the process for foreclosure sales contained in the Ohio Revised Code.<sup>85</sup> The Ohio appellate court disagreed and held that such receivership sale was appropriate where all interested parties were properly served with the sale motion and where "urgent exigent circumstances exist[ed]," making a swift sale necessary. In addition, the sale price represented the highest and best offer for the property; selling it at a sheriff's sale would not generate a greater price.<sup>86</sup>

72 *Id.*

73 *State v Superior Ct*, 128 Wash 253, 256; 222 P492 (1924) ("Unquestionably, in insolvency proceedings the court has power to direct a sale of the insolvent's property, and if the court in the exercise of its sound discretion finds it to be the best interest of all concerned that the real property be sold free from [e]ncumbrances, there would seem to be no substantial reason why the court may not so direct."); *Chapman v Schiller*, 95 Utah 514; 83 P2d 249, 251 (1938) (holding that the court has the judicial power to dispose of real property in its custody by means of an insolvency proceeding).

74 95 Utah 514; 83 P2d 249 (1938).

75 *Id.*

76 *Id.*

77 *Id.*

78 *Id.*

79 *Id.*

80 See, eg, *Melrose v Industrial Associates, Inc.*, 136 Conn 518, 528; 72 A2d 469, 473 (1950).

81 *Id.* See also *Clark on Receivers*, *supra* note 1, § 500(b).

82 *Melrose*, 136 Conn at 528 ("We have found no authority in our law which authorizes a court so to deal with the property in receivership as to subject holders of prior liens to loss.")

83 *Park National Bank v Cattani, Inc.*, 187 Ohio App3d 186, 189; 931 NE2d 623, 625-26 (2010).

84 *Id.* The relevant Ohio statute involved in *Cattani* was Ohio Rev Code § 2735.04, which states: "Under the control of the court which appointed him, as provided in section 2735.01 of the Revised Code, a receiver may bring and defend actions in his own name as receiver, take and keep possession of property, receive rents, collect, compound for, and compromise demands, make transfers, and generally do such acts respecting the property as the court authorizes."

85 187 Ohio App at 188.

86 *Id.* at 191.

Further evidence of this developing trend in favor of providing courts the power to authorize receivers to sell real property free and clear of all encumbrances is found in *Matter of Valley Road Sewerage Co.*<sup>87</sup> In this case, the New Jersey Board of Public Utilities revoked the sewerage company's franchise and operating authority and ordered the appointment of a receiver to manage the utility's business and negotiate its sale. The owners of the company objected to the court's power to appoint a receiver of its property.<sup>88</sup> However, the New Jersey Appellate Court held that courts have the inherent equitable authority to sell property in its custody free and clear of liens and encumbrances.<sup>89</sup>

### Conclusion and a Proposal for Statutory Reform

"Nothing is permanent except change."<sup>90</sup> A number of states other than Michigan and legal commentators<sup>91</sup> have recently contemplated legislative initiatives to clearly and firmly establish the power of court-appointed receivers to sell real property free and clear of liens and interests including redemption rights. For example, in Minnesota, proposed legislation presently before the state legislature would authorize receivers to sell real estate free and clear of liens and interests.<sup>92</sup> In 2004, the state of Washington adopted its Receivership Act in which similar powers were granted to court-appointed receivers; this Act was amended in April, 2011.<sup>93</sup> As demonstrated above, courts in a number of states have recently permitted these types of sales in the absence of similar, clearly defined legislation.

The current state of the American commercial real estate market is weak, if not atrophied, and demonstrates few signs of vitality. This weakness was recognized in the Report on Commercial Real Estate Losses and the Risk to Financial Stability issued on February 10, 2010, by the Congressional Oversight Panel, which examined in detail the effects of the current financial crisis on commercial real estate, the resulting threats to lending institutions and, by extension, to the overall American economy. In its conclusion to this report, the Congressional Oversight Panel aptly summarized the risks involved:

There appears to be a consensus, supported by current data, that commercial real estate markets will suffer substantial difficulties for a number of years. Those difficulties can weigh heavily on depository institutions, particularly mid-size and community banks that hold a greater amount of commercial real estate mortgages relative to total size than larger institutions, and have—especially in the case of community banks—far less margin for error. But some aspects of the structure of the commercial real estate markets, including heavy reliance on CMBS (themselves backed in some cases by CDS) and the fact that at least one of the nation's largest financial institutions holds a substantial portfolio of problem loans, mean that the potential for a larger impact is also present. There is no way to predict with assurance whether an economic recovery of sufficient strength will occur to reduce these risks before the large-scale need for commercial mortgage refinancing that is expected to begin in 2011-2013.<sup>94</sup>

One means of ameliorating the impact of our current crisis in the commercial real estate markets is to make the market for the sale of distressed commercial properties more predictable and efficient. In Michigan, one aspect of this task should be to amend Michigan's general receivership statute to permit sales of commercial real estate subject to a pending receivership action free and clear of all liens and interests including redemption rights. Although the authors believe that the existing statutory and case law permit these sales, there remains some element of uncertainty in the reported case law that should be banished once and for all. The authors submit that the Michigan

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87 295 NJ Super 278; 685 A2d 11 (1996).

88 *Id.* at 289-90.

89 *Id.* See also *LaSalle Bank National Ass'n v Phoenix Kingdom I, LLC*, No. CV2009-007743, 2010 WL 5056250 (Ariz Super Aug 2, 2010), in which the court authorized a receiver sale free and clear of liens over the objection of the defaulting mortgagor.

90 "Nichts ist dauernd als der Wechsel." Karl Ludwig Börne (1786-1837) from *Denkrede auf Jean Paul* (1826).

91 See, eg, M. Collette Gibbons & Jason D. Grimes, *A Model Statute for Free-and-Clear Sales by Equity Receivers*, 28 Am Bankr Inst J 28 (March 2009).

92 For a text of this bill, see [www2.mnbar.org/committees/legislative/2010-11Proposals/Ch-576-577.pdf](http://www2.mnbar.org/committees/legislative/2010-11Proposals/Ch-576-577.pdf).

93 RCW 7.60.260 of Washington's Receivership Act grants to receivers broad authority to sell real estate free and clear of liens and redemption rights.

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94 Congressional Oversight Panel, *February Oversight Report: Commercial Real Estate Losses and the Risk to Financial Stability*, p138 (Feb 10, 2010).

legislature should consider such an amendment similar to the legislation adopted earlier by the State of Washington, the text of which is attached hereto as *Appendix A*.

## Appendix A

RCW 7.60.260

Receiver's disposition of property — Sales free and clear.

- (1) The receiver, with the court's approval after notice and a hearing, may use, sell, or lease estate property other than in the ordinary course of business. Except in the case of a leasehold estate with a remaining term of less than two years or a vendor's interest in a real estate contract, estate property consisting of real property may not be sold by a custodial receiver other than in the ordinary course of business.
- (2) The court may order that a general receiver's sale of estate property either (a) under subsection (1) of this section, or (b) consisting of real property which the debtor intended to sell in its ordinary course of business be effected free and clear of liens and of all rights of redemption, whether or not the sale will generate proceeds sufficient to fully satisfy all claims secured by the property, unless either:
  - (i) The property is real property used principally in the production of crops, livestock, or aquaculture, or the property is a homestead under RCW 6.13.010(1), and the owner of the property has not consented to the sale following the appointment of the receiver; or
  - (ii) The owner of the property or a creditor with an interest in the property serves and files a timely opposition to the receiver's sale, and the court determines that the amount likely to be realized by the objecting person from the receiver's sale is less than the person would realize within a reasonable time in the absence of the receiver's sale.

Upon any sale free and clear of liens authorized by this section, all security interests and other liens encumbering the property conveyed transfer and attach to the proceeds of the sale, net of reasonable

expenses incurred in the disposition of the property, in the same order, priority, and validity as the liens had with respect to the property immediately before the conveyance. The court may authorize the receiver at the time of sale to satisfy, in whole or in part, any allowed claim secured by the property out of the proceeds of its sale if the interest of any other creditor having a lien against the proceeds of the sale would not thereby be impaired.

- (3) At a public sale of property under subsection (1) of this section, a creditor with an allowed claim secured by a lien against the property to be sold may bid at the sale of the property. A secured creditor who purchases the property from a receiver may offset against the purchase price its allowed secured claim against the property, provided that the secured creditor tenders cash sufficient to satisfy in full all secured claims payable out of the proceeds of sale having priority over the secured creditor's secured claim. If the lien or the claim it secures is the subject of a bona fide dispute, the court may order the holder of the claim to provide the receiver with adequate security to assure full payment of the purchase price in the event the lien, the claim, or any part thereof is determined to be invalid or unenforceable.
- (4) If estate property includes an interest as a co-owner of property, the receiver shall have the rights and powers of a co-owner afforded by applicable state or federal law, including but not limited to any rights of partition.
- (5) The reversal or modification on appeal of an authorization to sell or lease estate property under this section does not affect the validity of a sale or lease under that authorization to an entity that purchased or leased the property in good faith, whether or not the entity knew of the pendency of the appeal, unless the authorization and sale or lease were stayed pending the appeal.



## Judicial Decisions Affecting Real Property



by Ronald E. Reynolds and Joseph M. Rogowski, II

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](http://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

Beach v Township of Lima  
\_\_\_ Mich \_\_\_ (2011)  
June 3, 2011

**Issues:** Quiet title; Whether a plaintiff who seeks to establish an adverse possession claim that would affect property in a recorded plat must file a claim under the Land Division Act (LDA) (MCL 560.101 *et seq.*) if the plaintiff is not expressly requesting that the plat be vacated, corrected, or revised.

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

The court held that an action that seeks to establish a substantive property right arises independently of an LDA action to vacate, correct, or revise a recorded plat. It is only after such a property right is recognized that the need arises under the LDA to revise a plat that does not reflect the newly recognized property right. Until that property right is legally recognized, the LDA is inapplicable. The language of the LDA and cases analyzing the LDA establish that an LDA action is appropriate when a party's interest arises from or is traceable to the plat or the platting process. An action to quiet title by adverse possession confers judicial recognition that the possessor acquired marketable title of record to the property. A successful quiet title action also establishes a substantive property right that was not previously shown within the plat. Without possessing record title to the property, no one, including plaintiffs, had a basis on which to request an alteration of the plat under the LDA. Thus, plaintiffs were not required to file their action under the LDA.

The dissent believed that since plaintiffs' quiet-title action necessarily sought to "vacate, correct, or revise" the plat, they should have been required to bring their cause of action pursuant to the LDA. If plaintiffs wished to proceed under the LDA, they should be allowed to amend their complaint and to add all necessary parties. The dissenting justices believed that the majority's contrary interpretation undermined "the primary purpose of the LDA, which is to ensure that plats on file remain accurate" and its holding "will introduce greater uncertainty and insta-

bility into this state's property law, while incentivizing artful pleadings and gamesmanship. Under the law of this case, Michigan plats are destined over time to become increasingly more inaccurate and increasingly less reflective of actual property interests in this state." Thus, they respectfully dissented and would reverse the judgment of the Court of Appeals.

Pageant Homes, Inc v Bradley  
— Mich \_\_\_\_ (2011)  
July 13, 2011

**Issues:** Whether the trial court properly dismissed plaintiff's construction lien foreclosure case; Whether the trial court properly denied the defendant-bank's motion for summary disposition; Whether the issue of the priority of the liens was "entirely hypothetical."

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

**In an order in lieu of granting leave to appeal the court reversed the Court of Appeals judgment** (see Court of Appeals Docket No. 293359, January 20, 2011). The record below reflected that plaintiff-Pageant Homes' arguments on appeal encompassed the issue of whether its lien was discharged because an affidavit of payment was filed under MCL 570.1203(1) (repealed by 2010 PA 147, codified as MCL 570.118a(1)). The Court of Appeals erred in holding otherwise. The court noted, in this regard, that the statutory qualification contained in § 1203(1), "to the extent payments have been made," has been held to protect the property owner only up to the amount of the payment. The court remanded the case to the Court of Appeals for further proceedings consistent with its order, and for consideration of the issues raised by the parties but not addressed by that court during its initial review of the case.

Khan v City of Flint  
— Mich \_\_\_\_ (2011)  
July 29, 2011

**Issues:** Whether the plaintiff had constitutionally adequate notice his property was to be demolished; Whether summary disposition was appropriate under the Michigan Constitution; Plaintiff's 42 USC § 1983 claim against the defendant-city; Whether a single constitutional violation can be the basis of a § 1983 claim against a municipality; Plaintiff's claim for tortious interference with a contract.

**Judge(s):** Young, Jr, Cavanagh, Markman, M.B. Kelly, and Zahra; Dissent - M. Kelly; Separate Dissent - Hathaway

**In an order in lieu of granting leave to appeal, the court reversed that part of the Court of Appeals judgment** (see Court of Appeals Docket Number 293991, December 7, 2010 ) **addressing plaintiff's federal constitutional claim.** The trial court correctly granted summary disposition on this claim, and the court agreed with that court's reasons for doing so, as stated on the record. Plaintiff's complaint did not mention § 1983, which is the exclusive remedy for alleged federal constitutional violations, including those pertaining to the deprivation of due process under the Fourteenth Amendment nor did it allege that the injury was caused by the city's "policy or custom." Further, the complaint made no mention of the federal and state "takings" clauses. Finally, plaintiff has admitted (possibly in error) that he had actual notice of the demolition, yet has undertaken no steps to set aside the admission. Thus, the court remanded the case to the trial court for reinstatement of the order granting the defendant-City summary disposition.

In her dissent, Justice M. Kelly would deny leave to appeal and opined that the Court of Appeals was correct that a jury question existed as to whether plaintiff's constitutional rights were infringed. Plaintiff was entitled to due process of law before the City demolished his property. The City was required to give him notice of the planned demolition "reasonably calculated under all the circumstances, to apprise [him] of the pendency of the action and afford [him] an opportunity to present [his] objections." The City acknowledged that it never gave plaintiff notice, and it disciplined the employee whose responsibility it was to give him notice for neglect of duty. The City argued the plaintiff had actual notice. What occurred here was at best constructive notice. It did not meet the requirements of due process, and neither the court nor the City could find case law that treated constructive notice as adequate to establish actual notice and avoid the opportunity for a hearing. Summary disposition was inappropriate and the reasons the majority gave for refusing to reverse and for rejecting the Court of Appeals decision were inconsistent with the law.

Dissenting separately, Justice Hathaway would grant leave to appeal.

Edw C. Levy, Co v Marine City Bd Of Zoning Appeals  
\_\_\_ Mich App \_\_\_ (2011)  
July 19, 2011

**Issues:** Zoning; Certification that the proposed use was allowed under the zoning ordinance (ZO) or constituted a “prior nonconforming use”; Interpretation of MCL 125.3603(2); Whether the zoning board of appeals’ (ZBA) decision to deny the plaintiffs’ (collectively SCA) appeal was supported by “substantial evidence”; Deference to an agency’s findings of fact; Nonconforming uses.

**Judge(s):** Per Curiam – Wilder, Whitbeck, and Fort Hood

**On remand from the Michigan Supreme Court, the court held that the trial court did not err in interpreting MCL 125.3603(2).** The intervening appellee-CRC owned the parcel, which it used for storage and distribution of aggregate, rock salt, and calcium chloride. The city rezoned the property in 1999 from I-2 to Waterfront Recreation and Marine. However, the parcel retained its industrial status as a prior nonconforming use. SCA owns a deep water port adjacent to the parcel. In 2007, SCA approached the CRC with a proposal to purchase the parcel. The CRC rejected the proposal, but determined that it could obtain revenue by leasing the parcel to a commercial operator. It published a request for proposals, and received proposals from SCA and others. The CRC accepted a proposal from intervening appellee-DBS and entered into a five-year lease of the parcel. A condition of the lease was that DBS obtain a business license from the city. This required the CM to certify that the proposed use was allowed under the ZO or constituted a prior nonconforming use. The CM certified that the proposed use was allowed, and the city commission granted DBS a conditional business license. SCA appealed to the ZBA, which denied the appeal and affirmed the CM’s decision by a three-to-two vote. SCA appealed to the trial court. The trial court did not address the merits of the appeal, but found that the one of the ZBA’s members (who was also a member of the city commission) should have recused himself from voting. The trial court vacated the ZBA’s decision and remanded to the ZBA for a new vote based on the same record made before the ZBA at the original hearing. Only three ZBA members were present at the meeting where the new vote occurred. The ZBA voted two-to-one to reverse the CM’s decision and to grant SCA’s appeal. SCA filed an amended claim of appeal in the trial court, incorporating the ZBA’s latest ruling. The trial court ruled

that under MCL 125.3603(2), to prevail in their appeal of the CM’s decision SCA had to obtain votes from a majority of all the ZBA members, not just those present when the vote was taken. Since SCA only received two votes, and not the required three, the CM’s decision was still effective. The court held that the unambiguous language of MCL 125.3603(2) requires a majority of the ZBA’s members to reverse the CM’s certification. Thus, three of the five members had to vote to reverse the certification - the vote of two members to reverse was insufficient. Affirmed.

Redmond v Van Buren County  
\_\_\_ Mich App \_\_\_ (2011)  
July 21, 2011

**Issues:** Land dispute and claims related to access to lots in a subdivision; Whether the trial court properly dismissed the plaintiffs-Tibbles’ case; “Public and private dedications”; Use of an easement.

**Judge(s):** Per Curiam - Sawyer, Whitbeck, and Owens

**Deciding an issue of first impression addressing private dedications that are not in a plat (a common law private dedication), the court held that the trial properly applied the requirements for a public common law dedication and found the Porters’ failed conveyance to the defendant-SHVA created an irrevocable easement in Lots 1-4 of Block 21 by virtue of a private dedication. The court concluded their intent was to benefit the lot owners in the subdivision who could only access their lots by a right of way over Lots 1-4. Thus, the plaintiffs-Tibbles had an easement in Lots 1-4 by virtue of the Porters’ private dedication and the defendants could not prevent them from using their easement.** The court noted that the facts and circumstances of the case illustrated that the Porters intended to dedicate the use of Lots 1-4 to all the lot owners of the subdivision whose only means of accessing their property by land was through Lots 1-4. The court opined that this was the most equitable solution. The private drives originating on Lots 1-4 were (and still are) the only means to access Blocks 19-22. Further, the Tibbles’ predecessor had a key to access through the gate and they were provided access from 1995 until either 2002 or 2003. This evidence indicated that all landowners in the subdivision - regardless of their membership status with the SHVA - used Lots 1-4 until the SHVA required members to pay dues in 2002 or 2003. Thus, the Porters did not appear to have intended the exclusion of any lot owners in the subdivi-

sion from using Lots 1-4 to access their properties. The court reversed and remanded.

Jeddo Drywall, Inc v Cambridge Inv Group, Inc  
— Mich App — (2011)  
August 2, 2011

**Issues:** Whether the construction liens recorded by plaintiff-Jeddo and defendant-Stock Building Supply (SBS) had priority over a mortgage lien recorded earlier by defendant-Am T CADC Venture/AmTrust Bank (ATB); The Michigan Construction Lien Act (CLA)(MCL 570.1101 *et seq.*); “Relation back” to the first actual physical improvement; Effect of a change in ownership of the project on which the actual physical improvements are made; Stock’s amended liens

**Judge(s):** Saad, Wilder, and Donofrio

**In this dispute whether the construction liens recorded by plaintiff-Jeddo and defendant-SBS had priority over a mortgage lien recorded earlier by defendant-ATB, the court held, *inter alia*, that since the first actual physical improvement on the project occurred before ATB recorded its mortgage in 2005, the liens recorded by Jeddo and SBS had priority over the mortgage.** On appeal, ATB argued, among other things, that the trial court erred because no actual physical improvements were made to lot 204 before ABT recorded the mortgage. However, the record indicated that lot 204 was part of phase 3 of the subdivision. The mortgage itself covered the entirety of the subdivision, including lot 204, regardless of whether the first actual physical improvement was made to other parts of the property covered by the mortgage. Jeddo and SBS submitted evidence to show that actual physical improvements were made to areas including lot 204. On 8/1/02 the county issued a permit for the developer to perform “mass grading, proposed utility construction and paving” for a land area that included lot 204. Prior to that permit the state DEQ issued a permit for construction of various water mains throughout the subdivision. Pursuant to MCL 570.1103(1), clearing, grading, paving, and the installation of utilities clearly constituted actual physical improvements to the land because the work was an “actual physical change in, or alteration of, real property.” This work was sufficient to visibly place others on “notice that there may be outstanding liens against the property because construction work is in progress.” Because ATB failed to present evidence to counter Jeddo and SBS’s showing that actual physical

improvements were made to the disputed property before its mortgage was recorded, it failed to raise a genuine issue of material fact on the priority issue. Affirmed.

Richard v Schneiderman & Sherman, PC  
— Mich App — (2011)  
August 25, 2011

**Issues:** Foreclosure; Retroactivity of *Residential Funding Co. v. Saurman*; Full or limited retroactivity; Whether *Saurman* established a new principle of law; Case law limiting the application of *Saurman*; Requirement that a mortgagor challenge the validity of a foreclosure by advertisement “promptly and without delay”; Rule that the validity of a foreclosure by advertisement cannot be challenged after the property is sold to a *bona fide* purchaser.

**Judge(s):** Per Curiam – Borrello, Meter, and Shapiro

**The court held that *Saurman* should be given full retroactive effect. Further, since the plaintiff filed his claim challenging the foreclosure by advertisement during the redemption period and there was no evidence of a *bona fide* purchaser, he was entitled to relief under *Saurman*. Thus, the court reversed the trial court’s order granting the defendants summary disposition, vacated the foreclosure proceeding, and remanded the case for further proceedings.** The case arose from plaintiff’s efforts to challenge the foreclosure and sale of his property. He purchased the property in part via a loan that was secured by a mortgage with defendant-MERS, as nominee of the lender. Later, defendant-Schneiderman & Sherman acting as defendant-GMAC Mortgage’s agent mailed plaintiff a notice stating that his mortgage was in default and informing him of his rights. MERS began non-judicial foreclosure by advertisement and purchased the property at the sheriff’s sale. Plaintiff sued during the redemption period, alleging, *inter alia*, that MERS did not hold any rights to the debt. The court concluded that while many of his claims lacked merit, it was “clear that the sheriff’s sale was invalid because, although MERS was only a mortgagee, MERS foreclosed on plaintiff’s property utilizing non-judicial foreclosure by advertisement.” The court held in *Saurman* that MERS is not entitled to use foreclosure by advertisement where it does not own the underlying note. Since application of *Saurman* was dispositive, the court had to determine whether *Saurman* was retroactive and if so, whether it had full or limited retroactivity. The general rule is that judicial decisions are given complete retroactive effect. It was



clear that the holding in *Saurman* had been given at least limited retroactivity. Cases “given limited retroactivity apply ‘in pending cases where the issue had been raised and preserved,’” while cases given full retroactivity “apply to all cases then pending.” The distinction made a difference because plaintiff did not specifically raise and preserve the issue of whether MERS had the authority to foreclose by advertisement. Thus, *Saurman* only applied if it was given full retroactivity. The threshold issue was whether *Saurman* clearly established a new principle of law. The court in *Saurman* interpreted MCL 600.3204(1)(d). There was no existing case law and thus, “it did not overrule any law or reconstrue a statute.” The court concluded that the decision in *Saurman* was not tantamount to a new rule of law and should be given full retroactive effect. The court noted that “given the unique nature of foreclosure by advertisement,” long-standing case law exists limiting the application of *Saurman*. The Michigan Supreme Court has held that “a mortgagor must challenge the validity of a foreclosure by advertisement promptly and without delay.” The Supreme Court also held in *Hogan* that the validity of a foreclosure by advertisement cannot be challenged after the property is sold to a *bona fide* purchaser. “Thus, *Saurman* does not apply in an action to recover title or possession of property if the mortgagor failed to challenge the foreclosure by advertisement during the redemption period or any proceedings seeking an order of eviction, or if the foreclosed property has been sold to a bona fide purchaser.”

Price v High Pointe Oil Co, Inc  
\_\_\_ Mich App \_\_\_ (2011)  
August 25, 2011

**Issues:** Whether the plaintiff was entitled to seek “non-economic damages” for mental anguish caused by the destruction of her home from fuel oil pumped into her house; Trespass; Breach of contract; Whether plaintiff’s claim for non-economic damages was barred because she did not suffer fear of physical harm and was not present when the fuel oil was pumped into her house; Whether plaintiff was required under *Daley* to show that her mental anguish manifested itself physically; Whether plaintiff presented sufficient evidence of her claim for damages; JNOV; Remittitur.

**Judge(s):** Beckering, Fort Hood, and Stephens

**In an issue of first impression as whether the plaintiff was entitled to seek non-economic damages**

**for mental anguish caused by the destruction of her home, the court held that in negligence actions, a plaintiff may seek recovery of mental anguish damages naturally flowing from the damage to or destruction of real property. Thus, the court affirmed the trial court’s order denying the defendant summary disposition on the issue of non-economic damages and its motion for JNOV and remittitur.** Plaintiff was awarded \$100,000 for non-economic damages she sustained when defendant filled the basement of her home with nearly 400 gallons of fuel oil. Defendant argued on appeal that under current Michigan law, plaintiff was not entitled to seek non-economic damages for mental anguish caused by the destruction of her home. Defendant argued that plaintiff was limited in her recovery to the difference between the market value of her house before and after the damage, and since she was paid the difference in market value, she was fully compensated. In so arguing, defendant relied on *Strzelecki* and *Baranowski*. In both *Strzelecki* and *Baranowski*, however, the court addressed the measure of damages for *economic* loss suffered as a result of the destruction of real property. Neither case includes a discussion of non-economic damages. Thus, defendant’s reliance on *Strzelecki* and *Baranowski* was misplaced. Defendant further argued that recovery for emotional distress or mental anguish caused by damage to or the destruction of real property is not permitted under common law. In support of its argument, it cited *Koester* and *Bernhardt*. Defendant acknowledged that both *Koester* and *Bernhardt* involved the loss or destruction of personal property, while this case involved the destruction of real property. Nonetheless, defendant asserted that the holdings in those cases should be applied here. The court disagreed and declined to extend that exception to real property. Defendant did not present the court with any authority requiring such a holding. Further, contrary to defendant’s claim, the law has historically distinguished between personal property and real property. Affirmed.

Northridge Church v Charter Twp of Plymouth  
\_\_\_ F.3d \_\_\_ (CA 6 2011)  
July 28, 2011

**Issues:** Motion to modify or set aside the consent judgment allowing the plaintiff-Northridge to build its church with limitations; Relief under Fed.R.Civ.P. 60(b)(4); Whether the consent judgment was legally void for violating the Religious Land Use & Institutionalized Persons Act (RLUIPA)(42 USC § 2000cc *et seq.*); Whether “[a] consent judgment that violates federal law or consti-

tutional rights must be vacated as void even when the parties have agreed to its entry”; The Religious Freedom Restoration Act (RFRA)(42 USC § 2000bb *et seq.*); Whether changed legal and factual circumstances required modification of the consent judgment under Rule 60(b)(5); Whether the RLUIPA’s enactment was a changed legal circumstance; Changed factual circumstances; Jurisdiction; 28 USC § 1331; 28 USC § 1291; Whether review should be for abuse of discretion under *Warfield v. Allied-Signal TBS Holdings, Inc.*; *De novo* review.

**Judge(s):** Cole, Clay, and Gilman

**Since the consent judgment was not void when entered and the plaintiff-Northridge did not show that the factual or legal landscape had unexpectedly and dramatically changed since that time, the court affirmed the district court’s judgment denying Northridge’s motion to modify or set aside the consent judgment.** Seventeen years ago, Northridge sought a special permit from defendant-Plymouth Township to build its church and related structures in the Township. Fearful of the impact Northridge would have on the community, the defendant-Township Planning Board denied Northridge’s application. Northridge filed this case and wrestled a partial victory. It reached a consent judgment with Plymouth allowing Northridge to build its church with limitations. Nearly 16 years later, due to the expansion of its membership and desired services, Northridge moved to reopen this case and modify or set aside the consent judgment under Rule 60(b). Northridge primarily argued that the consent decree was void because it was invalid under RLUIPA. However, Northridge overlooked the Supreme Court’s recent decision in *Espinosa*. The court held that the fact that a consent judgment may violate a federal statute, let alone a subsequently enacted federal statute, does not render the judgment “void” under Rule 60(b)(4). Northridge did not rely on either of the two bases that would allow it to challenge the consent judgment under Rule 60(b)

(4) - a lack of jurisdiction or a violation of due process in the judgment’s issuance - so the consent judgment was not void. Northridge also contended that “[a] consent judgment that violates federal law or constitutional rights must be vacated as void even when the parties have agreed to its entry.” However, “such an argument is cognizable only to the extent that the district court improperly entered the consent judgment or the subsequent enactment of a new law invalidated it.” Perhaps realizing this, Northridge suggested in its reply brief that its contention fell in the former category, and that the consent judgment was void because it “violated RFRA in the first place.” While Northridge relied on *Crosby, Shelley*, and *Safeco*, the court held that none of those cases were on point. Thus, the court rejected Northridge’s argument that the consent judgment was void. Northridge also argued that changed legal and factual circumstances required modification of the consent judgment under Rule 60(b)(5). The Supreme Court has explained that “[a] consent decree no doubt embodies an agreement of the parties and thus in some respects is contractual in nature. But it is an agreement that the parties desire and expect will be reflected in, and be enforced as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees.” The consent judgment here was a prime example of this fact, as it imposed ongoing restrictions on Northridge’s ability to build or undertake various activities, all of which were supervised by the district court. Thus, Rule 60(b) is just as applicable to motions to modify or vacate consent judgments as it is to motions to modify or vacate other judgments. However, the court rejected Northridge’s claim that the enactment of the RLUIPA constituted a changed legal circumstance warranting modification of the consent judgment. Further, the changed factual circumstances, individually and cumulatively, failed to satisfy the “heavy burden” of convincing the court that the district court abused its discretion in declining to modify the consent judgment.



## Legislation Affecting Real Property

by Ronald E. Reynolds

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 (Agema):** This bill would eliminate an adverse possession claim if the title holder (party against whom adverse possession claim is made) paid the real property taxes during the prescriptive (15 years) period. The Section opposes this Bill generally, because the payment of taxes is not reliably related to the issues raised in an adverse possession claim. A more detailed policy position is available on the Section's website.

### Bills of Interest That Have Become Law Since The Last Issue of the Review

**HB 4347 (2011 PA 119):** The Act authorizes the transfer of moneys from the general fund of a county government to the county road fund for road improvements.

**HB 4436 (2011 PA 126):** The Act requires that the township treasurer's office remain open to accept summer tax payments, and to clarify the date on which interest begins to accumulate on a delinquent property tax levy.

**SB 0046 (2011 PA 97):** The Act amends the Michigan Zoning Enabling Act to provide that a biofuel production facility with a maximum annual production capacity of 100,000 gallons would be a permitted use of property and would not be subject to special land use approval if were on a farm, met setback requirements, and met criteria regarding the farm's production of feedstock and use of the biofuel or byproducts. The bill also would do the following: (a) Provide that a biofuel production facility with a capacity of up to 500,000 gallons would be a permitted use if it were on a farm, met setback requirements, and received special land use approval; (b) Prescribe special land use approval application requirements, require a public hearing, and prescribe conditions of approval; (c) Provide that the bill's requirements for special land use approval would not apply if a facility were subject to different criteria under a zoning ordinance; (d) Permit a local unit to authorize a facility as a permitted use not subject to special land use approval.

**SB 0077 (2011 PA 162):** The Act amends the Revised Judicature Act to make actions against an architect, engineer, or surveyor subject to the two-year period of limitation for an action charging malpractice, and would make the period of limitation subject to the applicable period of repose established in Section 5839 of the act. Effective 1/1/2012.

**SB 0398 (2011 PA 72):** The Act amends Chapter 32 (Foreclosure of Mortgages by Advertisement) of the Revised Judicature Act to delay for six months, until January

5, 2012, the sunset on sections that provide for the modification of residential mortgage loans.

### **Bills of Interest That Have Been Introduced Since The Last Issue of the *Review***

**HB 4860:** This bill would amend the General Property Tax Act by imposing penalties for failure to notify assessing office of transfer of ownership of property. Amends sec. 27b of 1893 PA 206 (MCL 211.27b).

**HB 4861:** This bill would amend the General Property Tax Act. It prohibits local governments from imposing back taxes, interest, and penalties on a property owner because of an assessor's or local government's error in granting a principle residence homestead property tax exemption. Amends sec. 7cc of 1893 PA 206 (MCL 211.7cc).

**HB 4864:** This bill would amend the Michigan penal code to create an explicit crime of obtaining a service or property by fraud or deception, and authorize penalties that depend on the value of the property or service. Amends 1931 PA 328 (MCL 750.1 - 750.568) by adding sec. 296.

**HB 4865:** This bill would establish sentencing guidelines for the explicit crime of obtaining a service or property by fraud or deception proposed by House Bill 4864. Amends sec. 16o, ch. XVII of 1927 PA 175 (MCL 777.16o) TIE BAR WITH: HB 4864'11

**HB 4870:** This bill would amend the General Property Tax Act to prohibit a local government from placing a property tax millage renewal on the ballot more than 18 months before the expiration of the current tax. Amends sec. 24f of 1893 PA 206 (MCL 211.24f).

**HB 4871:** This bill would amend the General Property Tax Act to increase from \$15 to \$75 the fee tacked onto a delinquent property tax bill after it enters the tax foreclosure process, and earmark the fee revenue collected to pay for administrative expenses related to clearing title and liquidating abandoned property. Amends secs. 78d & 78g of 1893 PA 206 (MCL 211.78d & 211.78g).

**HB 4875:** The bill would amend Part 115 (Solid Waste Management) of the Natural Resources and Environmental Protection Act to eliminate a requirement that

a landfill research, development, and demonstration project (RDDP) have a secondary liner and leachate collection system. Amends secs. 11511 & 11511b of 1994 PA 451 (MCL 324.11511 & 324.11511b).

**HB 4887:** The bill would amend Section 204 of the Zoning Enabling Act to provide that the planting and harvesting of fruits and vegetables at a residence for personal consumption or transfer is a lawful use and is not subject to a special use or conditional use permit, provided the residence itself is a lawful use under a zoning ordinance. Amends sec. 204 of 2006 PA 110 (MCL 125.3204).

**HB 4891:** This bill would amend the General Property Tax Act to allow all contiguous property owned by an agricultural property landowner to also be classified as agricultural real property, regardless of its actual use. This qualifies the land for property tax breaks. Amends sec. 34c of 1893 PA 206 (MCL 211.34c).

**HB 4892:** This bill would amend the Stille-DeRossett-Hale Single State Construction Code Act to exempt government construction projects from building permit requirements if the value of material and labor in the job is less than \$10,000. Amends secs. 10, 12 & 13 of 1972 PA 230 (MCL 125.1510 et seq.).

**HB 4896:** This bill would amend the Natural Resources and Environmental Protection Act to prohibit a multisource commercial hazardous waste disposal well from being located where more than 100,000 people live within a 10 mile radius. Amends sec. 11118a of 1994 PA 451 (MCL 324.11118a).

**HB 4901:** This bill would amend the Natural Resources and Environmental Protection Act to establish a process whereby a relative handful of individuals could force the state to create and impose an "action plan" for addressing claims that various human activities affecting the environment have a "disparate impact" on an identified minority or low-income population. This plan potentially could include imposing more rigid environmental regulations and standards in a particular community than apply in the rest of the state. The bill would create a number of new state government "environmental justice" boards and positions. Amends 1994 PA 451 (MCL 324.101 - 324.90106) by adding pt. 12.

**HB 4903:** This bill would amend the General Property Tax Act to grant a homestead property tax exemption after May 1 to a person who acquires and occupies a homestead for which an exemption was not already on the tax roll on May 1. Under current law, if an owner has not filed the principal residence (homestead) property tax exemption for a residence by May 1, then the property tax exemption does not apply until the following year. The bill would prorate the tax exemption based on how much of the tax year has passed since the May 1 date. Amends sec. 7cc of 1893 PA 206 (MCL 211.7cc).

**HB 4913:** This bill would require the Department of Natural Resources to grant an application for withdrawal from the Commercial Forest program without payment of the withdrawal application fee or penalty for land that was exempt from the ad valorem property tax at the point of entrance into the program. Amends sec. 51108 of 1994 PA 451 (MCL 324.51108).

**HB 4916:** This bill would amend the General Property Tax Act to allow local governments to require bidders on tax-foreclosed property to submit an affidavit affirming they do not owe delinquent property taxes on any other property. Amends sec. 78m of 1893 PA 206 (MCL 211.78m).

**HB 4928:** This bill would allow local recorders of deeds to accept affidavits to correct errors or omissions relating to previously recorded documents. Amends 1915 PA 123 (MCL 565.451a - 565.453) by adding sec. 1d.

**HB 4930:** This bill would amend the Natural Resources and Environmental Protection Act to require a person who is required to have a state license to build, manage or operate a hazardous waste treatment, storage, or disposal facility to disclose any past environmental-law related criminal convictions. Amends sec. 11123 of 1994 PA 451 (MCL 324.11123).

**HB 4933:** This bill would mandate that if sidewalks are installed on 80 percent of the building sites in a new development, the developer must install sidewalks on the remaining sites within three years. Creates new act.

**HB 4969/4970:** House Bill 4969 would amend the Natural Resources and Environmental Protection Act (NREPA) to add a new section for Qualified Forest Property and make various changes to the Commercial Forest program. In general, the bill provides a new framework

for the Department of Natural Resources (DNR) to operate the Qualified Forest program, which is currently contained in the General Property Tax Act. House Bill 4970 makes various amendments to the General Property Tax Act concerning qualified forest property. Among other things, the bill removes the process and administrative responsibilities of the Qualified Forest program from the General Property Tax Act to allow it to be re-established in NREPA. The bill also removes the cap placed on the total number of acres of land allowed to be exempted under the program. Additionally, the bill expands the definition of qualified agricultural property to include parcels where 50% of the acreage is devoted to a combination of agricultural use and use as qualified forest property, provided that no more than 25% of the acreage is qualified forest property. Amends secs. 7dd, 7jj & 27a of 1893 PA 206 (MCL 211.7dd et seq.).

**HB 4975:** This bill would amend the "Occupational code to impose new regulations on appraisal management companies. Amends 1980 PA 299 (MCL 339.101 - 339.2919) by adding art. 26A.

**HB 4981:** This bill would amend the General Property Tax Act to allow an individual who moves into an assisted living facility to retain the principal residence property tax exemption on his or her own residence. Amends sec. 7cc of 1893 PA 206 (MCL 211.7cc).

**HB 4990:** This bill would exclude the portion of a parcel of real property that is unoccupied and classified as agricultural when calculating the taxable value of property for purposes of eligibility for the credit. This provision is considered a follow-up and clean-up bill to the recently enacted tax changes so as not to prevent farmers from receiving a homestead credit on their homes because of the value of related unoccupied agricultural property. Amends sec. 520 of 1967 PA 281 (MCL 206.520).

**HB 4994:** This bill would repeal Section 3111 of the Natural Resources and Environmental Protection Act (NREPA), which requires any person doing business in Michigan that discharges wastewater that contains wastes (in addition to sanitary sewage) to the waters of the state or to any sewer system to file an annual report with the Department of Environmental Quality (DEQ). Repeals sec. 3111 of 1994 PA 451 (MCL 324.3111).

**HB 4998:** This bill was introduced to revise details of procedures for serving notice of a summons and complaint in evictions cases. Amends secs. 5732 & 5739 of 1961 PA 236 (MCL 600.5732 & 600.5739) & adds sec. 5736.

**HB 5020:** This bill was introduced to require that if the party foreclosing a mortgage “by advertisement” is not the original lender; a record chain of title containing each assignment of the mortgage must be recorded with the register of deeds before the foreclosure can proceed. Amends secs. 3204 & 3212 of 1961 PA 236 (MCL 600.3204 & 600.3212).

**HB 5021:** This bill was introduced to establish certain procedural deadlines for property foreclosure redemptions. Amends sec. 3240 of 1961 PA 236 (MCL 600.3240).

**HB 5022:** This bill was introduced to revise the wording of a law that allows a register of deeds to determine the amount necessary for a borrower to redeem a foreclosed property, but only in Oakland, Macomb and Kent Counties. The bill may be a “vehicle” for substantive changes to be added later. Amends sec. 3240 of 1961 PA 236 (MCL 600.3240).

**HB 5031:** This bill was introduced to add a new property classification to the state “personal property tax” regime, which imposes property tax on business tools and equipment. The new classification would include “gas, steam, or coal fired turbines used in the generation of electricity”. Amends sec. 34c of 1893 PA 206 (MCL 211.34c).

**HB 5035:** This bill was introduced to clarify the language of a provision that exempts nonprofit organizations from the property tax imposed on business tools and equipment (“personal property tax”). Amends sec. 7o of 1893 PA 206 (MCL 211.7o).

**HB 5047:** The bill would allow a local tax collection unit to transmit its settlement tax roll to the county treasurer either in a computer printed format or a disk, external drive, or other electronic data processing format. Amends sec. 42a of 1893 PA 206 (MCL 211.42a).

**HB 5052:** This bill would allow a partner, employee or contracted rental manager to represent a landlord in

an eviction-related small claims court security deposit or similar dispute. Amends 1961 PA 236 (MCL 600.101 - 600.9947) by adding sec. 916a.

**SB 562:** This bill would amend the General Property Tax Act to exempt machinery used to install land tile on farm property from the personal property tax, which is a tax on the tools and equipment used by businesses. “Land tile” is defined as “fired clay or perforated plastic tubing used as part of a subsurface drainage system”. Amends sec. 9 of 1893 PA 206 (MCL 211.9).

**SB 563:** This bill would amend the General Property Tax Act to exempt machinery used to install government-approved “soil and water conservation techniques” from the personal property tax, which is a tax on the tools and equipment used by businesses. Amends sec. 9 of 1893 PA 206 (MCL 211.9).

**SB 573:** This bill was introduced to prohibit a lender or mortgage holder from foreclosing by the common “foreclosure by advertisement” method if the mortgage holder does not participate in a government “help for hardest hit” program that gives subsidies to certain residential homeowners who have mortgages larger than they can afford. A lender or mortgage holder could still undertake judicial foreclosure proceedings, which are more costly and time consuming than foreclosure-by-advertisement. Amends secs. 3204, 3205, 3205a & 3205c of 1961 PA 236 (MCL 600.3204 et seq.).

**SB 634:** This bill was introduced to clarify the application of certain agricultural property tax breaks for partnerships. Amends sec. 51 of 1893 PA 206 (MCL 211.51).

**SB 646:** This bill was introduced to require a person who is required to have a state license to build, manage or operate a hazardous waste treatment, storage, or disposal facility to disclose any past environmental-law related criminal convictions. Amends sec. 11123 of 1994 PA 451 (MCL 324.11123).

**SB 684:** This bill was introduced to allow local recorders of deeds to accept affidavits to correct errors or omissions relating to previously recorded documents. Amends 1915 PA 123 (MCL 565.451a - 565.453) by adding sec. 1d.

**SB 690:** This bill was introduced to revise a 2009 law that forces mortgage lenders to attempt to negotiate revisions in the terms of loans held by delinquent borrowers before they can proceed to a “foreclosure by advertisement” (instead of the more costly judicial foreclosure process). The bill would mandate that lenders produce and submit a specific “workout” plan for delinquent borrowers. Amends sec. 3205c of 1961 PA 236 (MCL 600.3205c).

**SB 695:** This bill was introduced to lower the interest rate charged on delinquent property taxes for individuals whose income is below a certain dollar amount. Amends secs. 78a, 78g & 78h of 1893 PA 206 (MCL 211.78a et seq.).

**SB 696:** This bill was introduced to give tax-reverted property “fast track” authorities the discretion to exempt certain property they sell from a particular property tax levied on the property they sell, if they pitch the selective tax break as helping to create jobs or investment. Amends sec. 5 of 2003 PA 260 (MCL 211.1025); adds sec. 5a & repeals sec. 6 of 2003 PA 260 (MCL 211.1026).

**SB 705:** This bill was introduced to restrict judges from imposing “deficiency judgments” on residential mortgage foreclosures, which make the debtor liable for full payment of “underwater” mortgages, in which the value of the property when sold does not equal the amount owed on the mortgage. Amends secs. 3150 & 3280 of 1961 PA 236 (MCL 600.3150 & 600.3280).

**SB 725:** This bill was introduced to establish that a landowner does not lose the lower property taxes that apply to agricultural land because of having a “wildlife risk mitigation plan” that restricts access of wildlife to livestock, livestock waste products and livestock feed. Amends secs. 7dd & 34c of 1893 PA 206 (MCL 211.7dd & 211.34c).

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 Special 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:

Ronald E. Reynolds, Esq.  
Berry Reynolds & Rogowski, P.C.  
33493 W. 14 Mile Rd., Suite 100  
Farmington Hills, MI 48331  
ron@brrlawyers.com

Consult the Michigan Legislature web site for current information regarding pending legislation: [www.michiganlegislature.org](http://www.michiganlegislature.org).

## Continuing Legal Education



*by Melissa N. Collar, and Clay B. Thomas Co-Chairs, CLE Committee  
and Arlene R. Rubinstein, Administrator*

### 2011 Summer Conference

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

The 2011 Summer Conference was a great success! We had 200 registrants plus their families attend. The Section would like to thank our co- chairs Clay B. Thomas of Clay B. Thomas PLLC in Plymouth and Monica J. Labe of Dickinson Wright PLLC in Bloomfield Hills for planning the conference. A special thanks to our sponsors for their generous commitment to our programming. Please view our pictures on the Section Facebook site at [facebook.com/RPLSMI](https://www.facebook.com/RPLSMI).

## Thank You 2011 Summer Conference Sponsors!

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For more information on sponsorship opportunities please contact Karen Schwartz at [lawa2@rocketmail.com](mailto:lawa2@rocketmail.com)

## 2011 RPLS Scholarship Awards

The Section would like to congratulate the 2011 RPLS Scholarship Award Program recipients. These students, selected by the faculty of each Michigan Law School, excelled in their advance real property related courses. The award is a cash prize and a stipend to cover the recipient's attendance at the 2012 Summer Conference.

**Randy Pistor, University of Michigan Law School**

**Michael Bakotich, University of Detroit Mercy School of Law**

**Nicholas McElhinny Wayne State University Law School**

**Stephanie Schnelz, Michigan State University College of Law**

**Bobby Jean Bartlett, Thomas M. Cooley Law School**

### State Bar of Michigan Real Property Law Section “Groundbreaker” Breakfast Roundtable Programs

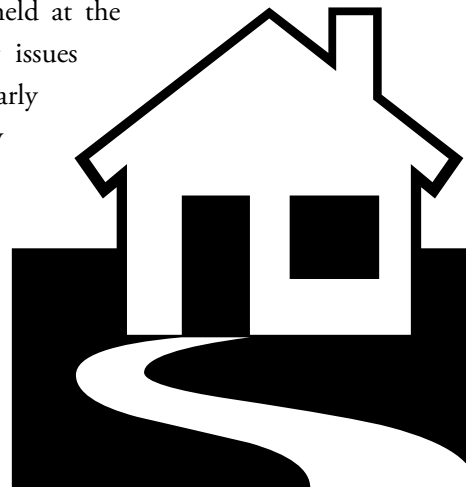
The first “Groundbreakers” Breakfast Roundtable program of 2011-2012 was held on October 6, 2011 at the Townsend Hotel in Birmingham. Entitled *Risks and Rewards of Residential Real Estate: Navigating the Road to Buying, Selling or Otherwise Owning Residential Real Estate in a Challenging Market*, This program explored many of the issues that arise when trying to buy and sell residential real estate during tough economic times. The Section would like to thank Thomas A. Kabel of Butzel Long in Bloomfield Hills for planning this program.

The second “Groundbreaker” program will be held on January 19, 2011 at the Townsend Hotel. *The Lawyers Role in New Commercial Financing* is the title of the program. Topics to be discussed include lender requirements, SBA Loans, Fannie Mae, MEDC - \$100 million grant program, changes in construction lien coverage, incentives, title issues, fair lending, lenders new equity requirements and opinion letters

On April 19, 2012 our program on *Commercial Leasing* will be held at the Detroit Athletic Club. Topics of interest include green leasing, broker issues (leasing commissions and new broker lien law), litigation, surrender and early termination, exit strategies (during lease negotiations – assignment, early termination, etc.), renegotiating the lease, rights of first refusal, rights of first offer and options to extend.

If you are interested in leading a discussion roundtable at either Section program, please contact Thomas A. Kabel at [Kabel@butzel.com](mailto:Kabel@butzel.com).

Further information on the January and April program will be available late fall.



## Homeward Bound

The Continuing Legal Education Committee is pleased to announce its Thirty-seventh 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. This year’s topics include Strategies & Pitfalls Associated with Loan Workouts, Purchases of Distressed Assets, and Foreclosures; Real Estate Brokerage – Basics & Beyond; Title Insurance in Turbulent Times; and Commercial Lease Defaults and The Remedies of Landlords, Tenants and Lenders.

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 p.m. to 5 p.m. and will be held at The Inn at St. John’s in Plymouth. All seminars will be webcast.

Further information can be found on the Section website at [www.michbar.org/realproperty/](http://www.michbar.org/realproperty/) or [www.icle.org/hb](http://www.icle.org/hb)

### **RPLS Goes to Universal Orlando® Resorts!**

**2012 Winter Conference • March 15 – 17, 2012**

**Loews Portofino Bay Hotel at Universal Orlando® • Universal Orlando® Resort, Florida**

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**First American Title Insurance Company  
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The Real Property Law Section is pleased to announce that the 2012 Winter Conference will be held at Loews Portofino Bay Hotel at Universal Orlando® at Universal Orlando® Resort in Florida. This is a great opportunity learn and network with other Section members. All registrants are responsible for making their own room reservations and flight arrangements. Rooms are limited!

**Guest Room Rates:**

All rooms reserved at the hotel are Run of the House. Upgraded rooms may be offered at the time of reservation for an additional fee.

*Single Rate: \$235 Double Rate: \$235 Triple Rate: \$260 Quad Rate: \$285*

Room Rates do not include the state and local taxes – Current tax rate is 12.5% (sales tax 6.5%, occupancy tax 6%) per occupied room rate. Rates will apply 3 days prior and three days after the conference dates based on availability of group rooms at the time requested.

To reserve a room and for further information on the resort go to: <http://www.loewshotels.com/en/Portofino-Bay-Hotel/GroupPages/RPLS>

We are in the process of planning our program. The Section would like to thank Melissa B. Papke of Varnum Law in Grand Rapids and Nicholas P. Scavone, Jr. of Bodman PLC in Detroit.

## Mark Your Calendars!

### 37<sup>th</sup> Annual Summer Conference

July 18-21, 2012

Boyne Mountain Mountain Grand Lodge & Spa  
Boyne Falls, Michigan

#### Presenting Sponsor

**First American Title Insurance Company  
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Program Co-Chairs - Monica J. Labe of Dickinson Wright PLLC and John D. Gaber Williams Williams Rattner & Plunkett Further information will be available late fall.

## Course Calendar

Set forth below is a schedule of continuing legal education courses sponsored or co-sponsored by the Real Property Law Section through January 2012.

Key: RPLS—Real Property Law Section  
HB—Homeward Bound  
ICLE—Institute of Continuing Legal Education

Date	Location	Program	Topic
December 1	The Inn at St. John's Plymouth	HB/ICLE	Real Estate Brokerage Basics and Beyond
January 19	The Townsend Hotel Birmingham	Groundbreaker Breakfast Roundtable	The Lawyers Role in New Commercial Financing

For further information on all Homeward Bound Seminars and the Summer Conference can be found on the Internet at: <http://www.michbar.org/realproperty/> and ICLE Courses at <http://www.icle.org/>