

**REAL PROPERTY LAW SECTION
WINTER CONFERENCE
MARCH 13, 2010**

LEGISLATIVE UPDATE

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The high rate of residential mortgage foreclosures continued to dominate the news in 2009. The legislature's sense of urgency is reflected in the plethora of bills introduced to address the mortgage foreclosure problem. Although this update discusses the enactments, even some of the bills that were not enacted warrant brief mention to provide a flavor of what has transpired in Lansing. Also summarized are the bills the Real Property Law Section currently opposes. This update concludes with a brief summary of certain property tax bills to watch in 2010.

Residential Mortgages:

Residential mortgage foreclosure moratorium:

In January 2009, three bills were introduced that would have imposed a one-year moratorium on residential mortgage and land contract foreclosures. **HB 4033**, **HB 4034** and **HB 4046**. **SB 29** would have imposed a two-year moratorium on mortgage foreclosures. **SB 30** would stay the foreclosure of real property taxes if a mortgage foreclosure were ordered. **SB 31** would authorize the Michigan State Housing Development Authority to start a refinancing/loan purchase program. These bills have not progressed after their introduction.

Tenant's rights in the event of a foreclosure:

At the same time bills were being introduced to impose a moratorium on mortgage foreclosures, the legislature was looking out for tenants who might find themselves without a home because the property owner's mortgage has been foreclosed. **SB 32** would allow a tenant to remain in his home for 90 days following notice of eviction once the home is foreclosed. **SB 33** would allow a lease to continue after the property is foreclosed. **HB 4211** would amend the Truth in Renting Act to require rental agreements to provide that the landlord must notify a tenant of a foreclosure action brought against the property at least 30 days after the period of redemption begins and again at least 30 days before the

conclusion of the redemption period. Because this would be an amendment to the Truth in Renting Act, it would apply not only to single-family residences, but also to apartments and other multi-family housing. **SB 32** and **SB 33** have not progressed after their introduction. **HB 4211**, however, passed the House on March 17, 2009 and is now in committee with the Senate.

Change to foreclosure by advertisement:

Even though we did not see the enactment of a moratorium on residential mortgage foreclosures, changes were made to the foreclosure by advertisement process to provide a homeowner the opportunity to negotiate a modification to the loan terms of the homeowner's principal residence mortgage loan that matches the homeowner's ability to repay the loan due to financial changes. In an effort to keep homeowners in their homes, **Public Acts 29 through 31 of 2009**, effective July 5, 2009, requires lenders, before commencing foreclosure by advertisement, to send a notice to the borrower that contains the following: (1) Reasons for the default and amount due under the mortgage; (2) contact information for the mortgagee, mortgage servicer and any mortgagee agent; (3) identification of who has authority to adjust the note terms; (4) list of housing counselors (prepared by the Michigan State Housing Development Authority) and statement that, within 14 days of the notice, the borrower may request a meeting with the lender and a housing counselor to work out a modification; (5) statement that if borrower has requested a meeting, foreclosure proceedings are stayed 90 days; (6) statement that if a modification is agreed to, the mortgage will not be foreclosed if the borrower abides by the term of the modified agreement; and (7) statement that borrower has a right to an attorney along with the contact information for the state bar's referral service and a local legal aid office. The notice must be sent by certified and first class mail, and it must be published within seven days. Financial information may be requested by the lender before the meeting. The lender must prepare and provide the borrower with the modification documents within seven business days after the agreement is reached and then borrower has seven business days to sign and return the documents to the lender.

Public Acts 29 through 31 of 2009 further provide that, if a modification cannot be reached, the lender, housing counselor or borrower shall calculate the modified payment amount under the FDIC workout program; and, if the homeowner meets the criteria, the lender must pursue judicial foreclosure only. Further, a homeowner has the option of converting any foreclosure by advertisement action commenced in violation of this section to a judicial foreclosure. These changes are effective through July 5, 2011.

Once modified under this new program, if a borrower defaults under the previously modified terms within one year of the modification, no further modification is required.

Future legislation:

Legislation affecting the foreclosure of residential mortgages is not finished. **SB 991** has been introduced to amend Chapter 31 (Foreclosure of Mortgages and Land Contracts) and Chapter 32 (Foreclosure of Property by Advertisement) of the Revised Judicature Act to revise the provisions for redeeming property subject to foreclosure. **SB 992** would amend the State Housing Development Authority Act to revise the provisions for redeeming foreclosed property if the Michigan State Housing Development Authority holds the mortgage. If enacted, these bills would require a person who has redeemed foreclosed property by paying the redemption money to the register of deeds, to deliver to the register a notice to the purchaser; require the register of deeds to mail the notice to the purchaser or purchaser's representative; require the purchaser to respond to the notice within 14 days, either by releasing the property or by notifying the payer that the amount was insufficient to redeem the property; establish a \$1,000 fine for a purchaser who fails to respond as required; and increase the liability of a person who refuses to acknowledge payment from \$100 to \$1,000. **SB 993** would amend the Michigan Estate Tax Act by increasing the fee that must accompany any redemption payment made to the register of deeds under the Act from \$1 to \$10. These bills are in the process of being re-written and discussed among the various interest groups; thus, the Real Property Law Section, as of January 24, 2010, has not taken a position on the bills.

Short sales and the federal government help:

Short sales and forgiveness of debt have also dominated the concerns of homeowners. If you do not pay the entire loan balance when you sell your home or your mortgage is foreclosed and sold for less than what you owe, you incur income for the amount of that portion of the debt that is forgiven. The federal government has stepped in to help relieve the burden of having to pay taxes on the forgiven debt. IR Bulletin 2008-17 provides that amounts that were incurred to purchase, construct or improve a home are not taxed if the sale or foreclosure occurs between 2007 and 2012. The amount of forgiven debt is capped at \$2 million, \$1 million for a married person filing a separate return.

Additional Public Acts adopted in 2009:

Rental of mobile homes now subject to governmental inspections:

Act 215 of Public Acts of 2009, effective January 4, 2010, authorizes local units of government to conduct safety inspections of mobile homes being rented by their owners.

Military personnel and self-storage facilities:

Act 177 of Public Acts of 2009, which took effect on December 15, 2009, provides that access to storage units cannot be denied and property sold when rented by certain military personnel.

Uniform trust code:

On April 1, 2010, a variation of the Uniform Trust Code goes into effect. As reported in the September 2009 Real Property Law Section eNewsletter by Steven H. Malach of Lipson Neilson Cole Seltzer & Garin PC, some of the more notable changes to trust documents and trust administration practices include:

- A successor trustee can, without further liability, abandon any real property if in its opinion the property is valueless or so encumbered that it is of no benefit to the trust.
- Creditor claims will be satisfied under a new priority scheme; secured creditors have secondary priority.
- Creditors will be able to attach spendthrift (discretionary) distributions to beneficiaries under limited circumstances.
- Persons found liable for conversion of trust property or who transfer trust property without colorable claim will be subject to double damages under certain circumstances.
- Unless the trust agreement says otherwise, claims against the trust will bear interest at Michigan statutory judgment rates.
- Alternate dispute resolution will be available to interpret trust terms and to resolve administration disputes.
- Successor trustees will be required to send out various notices regarding the trust within sixty-three (63) days of assuming responsibility.

Environmental News:

Effective January 17, 2010, Executive Order 2009-45 issued on October 8, 2009 combined the Michigan Department of Environmental Quality and the Michigan Department of Natural Resources into a new Department of Natural Resources and Environment.

Bills opposed by the Section:

HB 4503 and SB 332: These bills would provide for the recording of affidavits to correct errors in previously recorded documents by persons with knowledge of relevant facts. The Section opposes these bills for the reasons as follows:

1. The bills would permit anyone with knowledge of relevant facts of "errors or omissions" in a recorded document, to file an affidavit

to correct such errors and omissions. This expands the scope of permissible affidavits far beyond the limited scope contemplated by MCL 565.451a, and opens the door to fraud and abuse. Note, however, that a person who knowingly makes a false statement is guilty of perjury. MCL 565.451b.

2. The bills raise questions about what effect such an affidavit has with respect to the recorded documents. MCL 565.453 allows such an affidavit to be used as evidence in court and is prima facie evidence of the facts therein contained. Yet, such an affidavit may not be approved by the parties to the document.

3. The bills state that the register of deeds "may" record such affidavits. It later states that affidavits are not "necessary" if a new document indicating corrective changes is recorded. This seems to imply that re-recording of documents is not permitted (which is the position now taken by some registers of deeds). It has been a long-standing practice to re-record documents as a means to correct scrivener's errors and there is no reason that practice should not continue.

Finally, the Council of the Real Property Law Section further noted that it has also been a longstanding practice to record scrivener's error affidavits, and it would be helpful to have express statutory authority for doing so.

HB 4869: Property managers will be permitted to represent landlords in eviction proceedings if this bill passes. The Council of the Real Property Law Section opposes HB 4869 because it appears, within the context of the summary proceedings act, to extend the right to represent parties (in other words, to act as their lawyers) to property managers. The proposed legislation conflicts with the fundamental public policy reflected in MCL 600.901, which states that "[n]o person is authorized to practice law in this state unless he complies with the requirements of the supreme court with regard thereto." The Section believes that the various obligations imposed upon attorneys by the Rules of Professional Conduct, and their status as officers of the court, bring an important level of professionalism to these proceedings as well as some basic assurance that the fundamental due process requirements of the Michigan Court Rules and the summary proceedings act are being honored. Unrestricted and typically unlicensed management "agents" are not bound by the Rules of Professional Conduct and are not likely to share an attorney's training, experience or concern regarding legal procedure. Eviction actions impact fundamental interests (for example, basic shelter), which in the residential context are subject to extensive statutory regulation. Forfeiture actions may determine legal and equitable title to real estate under land contract. In neither case do the "past due" amounts upon which these cases are commenced reflect the total economic or social value of the interests. These are not simply collection actions; the summary proceedings act and the Michigan Court Rules impose extensive due process requirements on summary proceedings (requirements that do not exist in small claim actions)

because the right to possession is so important. Despite the importance of the summary proceedings process, the HB 4869 actually imposes far less restriction on representation than currently exists in the small claims division. For example, a claim by a corporate plaintiff in the small claims division can only be filed by “a full-time, salaried employee having knowledge of the facts surrounding the complaint.” MCL 600.8407; MCR 4.302(B)(2). No such restriction is imposed on summary proceedings under HB 4869; a part-time “agent” can apparently act in the full capacity of a lawyer (but with none of the corresponding restrictions imposed by the Rules of Professional Conduct). Additionally, MCL 600.8408 expressly precludes the use of collection agencies or agents in small claims actions. Since management companies will effectively be acting as “collection agents” within the eviction and forfeiture context, the legislation significantly expands the scope of layperson representation beyond that allowed in the small claims division. The proposed legislation goes well beyond any prior model and is not justified by any existing problem with the summary proceeding process. The Rules of Professional Conduct provide important restrictions on advocacy and representation, and they should not be circumvented in the summary proceedings context.

HB 5267 and SB 350: These bills will allow the register of deeds in Kent, Oakland and Macomb Counties to calculate the amount required to redeem foreclosed property. The reasons for opposing these bills are as follows:

1. Amendments to MCL 600.3204(4) are inequitable, because in certain circumstances, a purchaser might be required to make insurance, tax or other applicable payments during the last 30 days before the redemption period expires, and in such cases, the property can be redeemed without repayment of such amounts. In addition, the 30-day requirement could discourage purchasers from making such payments because of the increased risk that the payment might not be added to the redemption amount.
2. HB 5267 requires a purchaser to “accept” a redemption amount erroneously calculated by the register of deeds, and the register of deeds has no liability for such erroneous calculations. SB 350 does not expressly require a purchaser to “accept” a redemption amount erroneously calculated by the register of deeds, but because it authorizes the register of deeds to calculate the redemption amount, it creates a statutory reliance argument by the redeeming party. Under either proposed legislation, this would likely result in litigation over title and the appropriateness of redemptions.

SB 610: The Section opposes SB 610, which creates a statutory commercial real estate brokers’ lien. The reasons for opposition are as follows:

1. The proposed legislation provides for a non-consensual lien which interferes with basic property rights.

2. The proposed legislation makes brokers a special preferred class of persons and provides a very extraordinary remedy of a lien against real property.
3. Brokers deal directly with owners, purchasers, landlords and tenants and have adequate remedies at law for the collection of their commissions.
4. Providing lien rights to brokers will encourage other parties dealing with real estate such as appraisers, property managers, property inspectors, lawyers, title companies, escrow agents and accountants to request similar rights.
5. Once broker's liens are granted for commercial property, there will be a substantial risk that lien rights will be subsequently extended to include residential property.
6. The proposed legislation is patterned after the Construction Lien Act, but the justification for protecting artisans who create physical improvements to property does not apply to brokers.
7. The proposed legislation seeks to force parties to a transaction to close the transaction and escrow funds sufficient to satisfy a lien, even though the validity of a lien is in dispute.
8. The proposed legislation is complex, will add substantial costs, expenses, litigation, delays and disruptions to closing real estate transactions.
9. The proposed legislation will result in the filing of more documents affecting property and more problems of timely discovering such documents, and will create additional underwriting risks for title insurance companies.

SB 610 has passed this House and is now in the Senate.

SB 791: Styled after the Uniform Real Property Electronic Recording Act, this bill would allow register of deeds to record legal documents via electronic filings. This bill has been voted out of the senate and is now in the house. The Real Property Law Section opposes the current draft of SB 791 until the following concerns are satisfactorily addressed:

1. Provide for an acknowledgment that, in the absence of standards enacted by the Electronic Recording Commission, a register may effectuate e-recording by virtue of the authority already granted to registers under the federal electronic signatures act ("ENSIGN"), 15 USC 7001, et. seq., and the Uniform Electronic Transactions Act ("UETA"), MCL 450.831, et. seq., and furthermore, that practices of counties which have already initiated e-recording programs, such as Oakland and Macomb, are valid and do not require additional compliance measures for recording events which precede the effective date of any new standards promulgated under URPERA.

2. SB 791 provides that three of the individuals who serve on the Electronic Recording Commission must be people who are engaged in the land title profession; however, there is no definition of the term “land title profession.” The Section proposes that at least two of the three persons in this category must be individuals who are licensed by the State Bar of Michigan, and are either members of the Council of the Real Property Law Section of the State Bar of Michigan or nominated by the Council to serve on the Committee.

3. Finally, consideration should be given to increasing the size of the Commission temporarily during the first three years of its existence to twelve members; with two of the additional members being the registers of Oakland and Macomb Counties, where e-recording is already occurring, and the other two additional members being individuals who are engaged in the land title profession. Most of the hard work of the Committee will occur in these early years while standards are being created and tested. The originally contemplated eight-member Commission should function well in administering the maintenance of the standards after the standards are created.

SB 960: This bill would require a notary public, before performing a notarial act, to determine whether the signer objectively understands the substance of the transaction. Such a determination would also necessarily require a determination of competency. The reasons for opposing this bill are as follows:

1. The statutory change expands a notary's duties far beyond that which exists today. Currently, a notary is only required to confirm that the person signing is in fact the person named in the instrument.

2. The statutory change would require a notary to determine matters which are not easily determinable (i.e., competency and understanding of the substance of the transaction).

3. The statutory change would make it more difficult to find notaries willing to notarize documents, and may lead to notary shopping.

4. The statutory change would lead to inadvertent disclosure of confidential information to a person who is not a party to the transaction.

5. Disabled persons could be subjected to discrimination by a notary who believes that, because of the person's disability (i.e.: blindness or physical limitations), the person is unable to understand the transaction.

Property tax bills:

HBs 5257 through 5265, introduced in August 2009, would provide for the following amendments to the general property tax act:

1. Revise the poverty exemption for property taxes.
2. Allow residents to protest before the board of review by letter without a personal appearance.
3. Require the change in assessment notice to include a statement that qualified taxpayers may be eligible for a full or partial exception by reason of poverty.
4. Revise the first and second notices of forfeiture to state the month, day and year the taxes will be forfeited.
5. Permit the waiver of interest if the property is withheld from the petition for foreclosure for reason of poverty.
6. Change the income level for holding property from foreclosure to 200% or less of the federal poverty guidelines.
7. Change the notice requirements for show cause hearing and foreclosure hearing.
8. Change the requirement for the notice of judgment foreclosing property.

All of these bills have been referred for a second reading and appear to be progressing through the legislative process.