International Council of Shopping Centers

February 9, 2017

Continuing Legal Education

Novi, Michigan

State of the Law

Mark P. Krysinski
Jaffe Raitt Heuer & Weiss PC
27777 Franklin Road, Suite 2500
Southfield, MI 48034
Telephone: (248) 351-3000
mkrysinski@jaffelaw.com

Melissa N. Collar
Warner Norcross & Judd LLP
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, MI 49503-2487
Telephone: (616) 752-2209
mcollar@wnj.com

Richard D. Rattner
Williams Williams Rattner & Plunkett PC
380 N Old Woodward Avenue #300
Birmingham, MI 48009
Telephone: (248) 642-0033
rdr@wwrplaw.com
I. Michigan Supreme Court Cases

A. Bank of America, NA v First American Title Ins Co, No. 149599 (Mich. Apr. 13, 2016)

**Holding:** If the mortgage-lender bids the full amount of the debt in a foreclosure sale, the lender can still sue third parties for any loss caused by the fraud or breach of contract in closing on the defaulted loan. Called a “full credit bid,” giving full credit for the debt in exchange for the property satisfies the underlying debt and bars any claim against the mortgagor-debtor for a deficiency. However, a “full credit bid” does not bar a claim by a lender/mortgagee against nonborrower third parties who wrongfully induced the loan for loss, if the properties at issue were not worth the amount bid. That is, the “full credit bid” rule only benefits the debtor; it does not eliminate claims against third parties.

**Facts:** In 2005 and 2006, Bank of America agreed to finance a percentage of four borrowers’ loan packages in exchange for mortgages on four properties. The closing instructions required that a closing protection letter (CPL) be issued in connection with each closing. First American Title Insurance Co. insured title on all four sales and issued closing protection letters to reimburse Bank of America for actual losses arising out of fraud or dishonesty of the closing agents in connection with the closing. Unbeknownst to Bank of America, the values of the properties at the time of closing were inflated by fraudulent appraisals and straw buyers who flipped the properties (sometimes the same or next day) to obtain loans that exceeded the properties’ true values. The values of the properties had been inflated resulting in a loss of approximately $7 million on the deals. Soon after closing, all four borrowers defaulted. Bank of America foreclosed by advertisement and then purchased all four properties at sheriffs’ sales for the full amount of the unpaid principal and interest plus foreclosure costs.

Bank of America sued First American Title Insurance Company, the title agencies, the appraisers, and the closing agents for fraud and breach of contract to recover its $7 million in losses, claiming it was duped into issuing these loans as a result the closing agent’s fraud and failure to follow through with the closing instructions. The Court of Appeals, bound by its prior case law, ruled that Bank of America’s claims were mostly barred by the “full credit bid” rule, as it extinguished substantially all of the debt. After questioning whether the closing instructions were truly contracts, the Court further held that the closing agents could not be held liable for violating closing instructions because they were modified by the closing protection letters.

**Analysis:** The Michigan Supreme Court held that the full-credit-bid rule merely resolves the question of value for determining whether the mortgage debt is satisfied. The rule does not cut off all remedies a mortgagee might have against third-parties. The Court further held that the closing instructions issued from Bank of America to the title agency included all of the elements of a valid contract and were enforceable contracts. The closing instructions could not be unilaterally modified by the title insurer’s credit protection letters because the closing agents were not parties to the closing protection letters.
B. **Ronnisch Construction Group, Inc v Lofts on the Nine, LLC, No. 150029**  
(Mich. July 26, 2016)

**Holding:** A lien claimant who succeeds on a breach of contract claim may be a “prevailing party” entitled to attorney fees under the Construction Lien Act, MCL 570.1191 et. seq.

**Facts:** The plaintiff lien claimant contracted with the defendant to build condominiums. A dispute arose resulting in a payment deficiency of approximately $600,000, and the plaintiff filed a lien and sued for breach of contract and foreclosure of the lien. The parties agreed to stay the action to pursue contractually mandated arbitration. The arbitrator issued a net award in the plaintiff’s favor in the amount of $450,000, reserving the issue of attorney fees and costs for the trial court.

The defendant paid the arbitration award in full. The plaintiff then filed a motion asking the trial court to lift the stay of proceedings, confirm the arbitration award, and award plaintiff its actual attorney fees and costs under the construction lien act, MCL 570.1118(2). The trial court rejected the request for attorney fees and costs, finding that the plaintiff was not a “prevailing party” under the CLA (and therefore was not eligible to recover attorney fees thereunder), based on findings that (1) the lien foreclosure claim had not been adjudicated by the arbitrator, (2) the lien was satisfied when plaintiff accepted the defendant’s tender of payment.

**Analysis:** The CLA allows a trial court to award attorney fees to “a lien claimant who is the prevailing party” in “an action to enforce a construction lien through foreclosure.” First, the Supreme Court held that the plaintiff is a “lien claimant,” because it had a valid claim of lien that attached to the defendant’s interest in the property.

Second, the Court held that the plaintiff was the prevailing party “in an action to enforce a construction lien through foreclosure.” The language of the statute does not limit the trial court’s ability to award attorney fees to a lien claimant who is the prevailing party on the actual lien claim. Rather, the CLA as a whole makes clear that “a lien claimant who is the prevailing party” may seek attorney fees “in an action to enforce a construction lien through foreclosure.” Because a lien foreclosure claim and a claim for breach of contract are “integrally related,” if plaintiff is able to establish that it prevailed on its breach of contract claim, it will have prevailed in its “action to enforce a construction lien through foreclosure.”
II. Sixth Circuit Cases (Published)

A. Burniac v. Wells Fargo Bank, N.A., No. 15-1230 (6th Cir. 2016)

**Holding:** A request for entry of default judgment is not itself a default judgment. Further, a preliminary injunction does not preclude a subsequent entry of summary judgment. Finally, under Michigan law, to prevail on a claim for violation of Michigan's foreclosure-by-advertisement statute, a plaintiff must show that he was prejudiced by the violations by showing that he or she would have been in a better position to preserve his or her interest in the property absent defendant's noncompliance with the statute.

**Facts:** Due to unpaid monthly mortgage payments, Donald C. Burniac's residence in Plymouth, Michigan became subject to foreclosure. Burniac filed suit in state court against Wells Fargo Bank, N.A., to prevent the foreclosure sale. Burniac's complaint alleged, in part, that the assignment of his mortgage from Washington Mutual Bank to Wells Fargo was invalid. The state court purportedly entered a default judgment against the Bank and preliminarily enjoined the foreclosure sale. Wells Fargo removed the case to the United States District Court for the Eastern District of Michigan, which subsequently denied Burniac's motion to remand. The district court later granted Wells Fargo's motion for summary judgment. Burniac appealed, arguing that the district court committed procedural errors and misapplied state substantive law governing the case.

**Analysis:** Burniac argued that the district court lacked the authority to grant summary judgment where Wells Fargo never moved to set aside the purported state court default judgment. However, the court rejected this argument because the state court never actually entered a default judgment; Burniac's request for the default judgment was not itself the entry of a default judgment. The state court's entry of a preliminary injunction also did not preclude summary judgment. Because the summary judgment was a final order, its issuance immediately extinguished the state court's preliminary injunction. Thus, Wells Fargo had no procedural obligation to first move to set aside the preliminary injunction before the district court issued its grant of summary judgment. The same conclusions applied to Burniac's claims regarding the denial of his motion for removal—a default judgment was never entered, and a preliminary injunction does not preclude removal. His challenges to the district court's application of Michigan's foreclosure-by-advertisement statute also failed because he did not show that he was prejudiced by the violations. The court further noted that it lacked the authority to overrule the Michigan Supreme Court's precedent on this issue. Burniac failed to demonstrate that the alleged assignment irregularities (1) will subject him to double liability, (2) placed him in a worse position to keep his property, or (3) prejudiced him in any other way. Thus, his objections to the district court's application of Michigan foreclosure law failed.
III. Michigan Court of Appeals Cases (Published)


**Holding:** A municipality may enact an ordinance that allows the municipality to place delinquent water service charges on municipal tax rolls.

**Facts:** Pursuant to a local ordinance, the City of Livonia placed the taxpayer’s delinquent water service charges on the City’s tax rolls. The taxpayer sued, challenging the water service charges being placed on the tax rolls. The taxpayer also claimed tortious interference and civil conspiracy against the city, claiming that the City interfered with a lease with its tenant.

**Analysis:** The Court of Appeals noted a lack of published case law, and looked to statutory enabling language. Under MCL 123.161 *et seq.*, governing municipal water and sewage liens, a municipality can collect water service charges and provide a lien on the property to which the water was supplied. A municipality also has discretion in the manner it utilizes to collect on these liens. MCL 141.101 *et seq.* (the Bond Revenue Act) prohibits free service furnished by public improvement to a person or corporation and gives discretion to a municipality to adopt ordinances to provide for adequate operation of a public improvement. Reading these statutory schemes together, the City of Livonia had statutory authority to enact its ordinance, which allows the City to take a water/sewage lien and place it on the City’s tax roll. The Court of Appeals read these statutory schemes together and found the City’s ordinance proper.

The Court of Appeals also dismissed the tortious interference and civil conspiracy claims on the basis of governmental immunity, because the City was engaged in the governmental function of attempting to collect water charges.


**Holding:** An owner of land is presumed to have notice of the statutory ramifications of his or her land being designated as a wetland. As a result, when a court orders a landowner to cease all activity on land properly designated as a wetland, the order does not constitute a taking.

**Facts:** The Department of Environmental Quality (DEQ) filed a complaint against Jack Morley seeking an injunction and civil fines for Morley’s dredging, filling, and draining of property alleged to be a wetland. The trial court entered judgment in favor of the DEQ, finding that a majority of the property was a wetland, and that Morley had violated the Natural Resources and Environmental Protection Act on the wetland. Accordingly, the court ordered Morley to remove 4 acres of fill material, restore the land to its prior condition, cease farming on all acreage designated as a wetland, and pay a statutory fine of $30,000. Morley appealed.

**Analysis:** On appeal, Morley first argued that the trial court erred in granting the DEQ’s motion to strike his demand for a jury trial. The Court of Appeals affirmed the trial court’s ruling, holding that because wetland protection is not a cause of action known to the common law, there is no constitutional right to a jury trial, even though the statute also provides for monetary damages and criminal liability.
Morley also argued that the trial court’s order requiring him to cease all actions on the wetland constituted a judicial taking. The Court of Appeals disagreed with Morley, holding instead that Morley should have been aware of these regulations, which were in effect long before he purchased the property. Because Morley was presumed to know of these regulations and because there was no evidence to show that the property had no economically viable use, the trial court’s order did not constitute a taking.

Finally, the Court of Appeals rejected Morley’s arguments that the trial court erred in admitting certain testimony and evidence. The Court further concluded that Morley had waived any argument that the DEQ improperly relied on the existence of an agricultural drain to determine that the property was a regulated wetland. As a result, the Court affirmed the judgment in favor of the DEQ.


**Holding:** Michigan’s foreclosure by advertisement statute requires that a party seeking to redeem a property from foreclosure actually pay the redemption amount, in accordance with the statute, before expiration of the redemption period. A mere tender during that time is not enough.

**Facts:** Homeowners defaulted on their mortgage in 2013. Their home was purchased at a foreclosure sale by the defendants. The purchaser filed an affidavit of purchaser, declaring the redemption amount and per diem interest rate.

The homeowners found a purchaser, and had several communications with an employee of the purchaser regarding a potential payoff. On the last day of the redemption period, the homeowners sent a fax to that person indicating that they intended to pay off the loan that day, and asking for a payoff amount and wiring instructions. The employee failed to respond, so the money was not wired. The homeowners were then evicted pursuant to the expiration of the redemption period.

**Analysis:** MCL 600.3240 provides that a sheriff’s deed is void if the mortgagor timely redeems the property by paying the redemption amount to either the purchaser, or to the register of deeds. The Court of Appeals observed that even though the mortgagors purported to make a tender to the sheriff’s deed purchaser, they failed to make an actual payment. Under the plain language of the statute, tender alone is insufficient and actual payment must be made.


**Holding:** A landlord’s failure to comply with a local ordinance requiring written notice to the municipality that a tenant has occupied the premises and is responsible for utilities will not prevent utilities liens from arising by operation of law on the subject property at the time that services are furnished, regardless of actual notice.
Facts: Sau-Tuk Industries (“STI”) leased property to Michigan Wood Pellet, LLC (“MWP”). MWP assumed the obligation to pay all utilities under the lease. The property was furnished with electric and water by the City of Holland’s Board of Public Works (“BPW”). When MWP started its tenancy, it contacted BPW to provide utilities to the property. But because of MWP’s nonexistent credit history, BPW required it to provide a surety bond or cash deposit first. MWP complied with that request, and received utilities services. After it established a good payment history, the bond was released.

Eventually, MWP fell behind on payments, and the Allegan County Treasurer served the owner, STI, with a notice of forfeiture based on those delinquent charges. STI failed to pay the charges, and the Allegan treasurer filed a petition for foreclosure.

STI filed a complaint seeking declaratory relief that the liens were invalid and improper. STI relied on Section 9.6 of the Holland Code, which prevents a utilities lien from attaching where the owner provides written notice, with a copy of the lease, showing that a tenant is responsible under the lease for the payment of those charges. Although STI did not send a written notice, it alleged that BPW had actual notice that MWP was renting and responsible for paying utility charges.

Analysis: The City of Holland was authorized under the Revenue Bonding Act, MCL 141.121(3), to create utilities liens to secure the payment of utilities charges. Its ordinance also tracked the Revenue Bonding Act’s provision stating that if the governing body is provided written notice from the landlord (STI in this case) that a tenant (MWP in this case) is responsible for payment of the charges along with a copy of the lease, then charges after the date of the notice will not become a lien against the premises.

The City of Holland’s ordinances were consistent with the Revenue Bonding Act and here it was undisputed that STI failed to provide the required written notice to qualify for the exception until after the utilities at issue had been provided. The Court rejected STI’s “actual notice” argument, on the basis that it would render the plain and unambiguous language of the bonding act and the ordinance at issue nugatory.


Holding: The Court affirmed a trial court’s authority to order a receiver sale of mortgaged property, free and clear of liens and encumbrances.

Facts: Church was one of many contractors hired by a developer to construct a condominium project. Church performed work on a number of units in the project – Church asserted construction liens on two of the units, and for four units church was provided separate mortgages in the amount of $20,000 each.

This litigation commenced when another unpaid contractor initiated an action to foreclose its construction liens. Citizens Bank, as a senior mortgage holder, filed a cross-complaint seeking to foreclose all of the mortgages on the project, including those held by Church. Citizens also moved for appointment of a receiver, which the trial court granted.
The receiver sold the four condominium units in which Church held an interest between 2009 and 2010, conveying by a fiduciary deed. The court approved each sale in an order stating that the conveyance was to be free and clear of all liens and encumbrances. Church’s attorney signed the order without objection.

Church challenged these sales nearly three years later, filing a motion to reopen the case, and arguing that it still maintained mortgages on the four units. Church argued that its mortgages were not discharged, and that the trial court lacked the authority to discharge a mortgage other than through foreclosure. Church moved to amend its complaint to include foreclosure of the four units in question. The trial court granted that motion, but later granted Citizens summary disposition, finding that the church mortgages were discharged by the Court’s previous orders.

**Analysis.** The Court of Appeals addressed two questions: whether the trial court had the power to discharge the Church mortgages via sale by a receiver, and whether the language of the court’s orders selling the property free and clear of encumbrances included Church’s mortgages.

The Court answered the first question by analyzing the facts of this case and the language in MCL 570.1123(2), which provides that a receiver can petition the court for authority to sell a real property interest under foreclosure. The Court held that although no statute specifically grants the court the power to sell property under foreclosure free and clear of liens, case law from other jurisdictions supports the proposition that a trial court should not authorize the sale of property free and clear of all liens unless the proceeds of the sale would be applied to the liens. Here, Church’s mortgages were subordinate to the senior lien held by Citizens Bank, and the Court ordered that the proceeds from the sales would be “distributed in accordance with the same priorities as held prior to consummation of such sale.” It was undisputed that even after all the units in the project were sold, Citizen Bank’s mortgage remained unsatisfied and therefore, as a junior lienholder, Church would not have received any proceeds in any event. The Court of Appeals held that under these circumstances, the court’s orders constituted a proper exercise of its authority under MCL 570.1123(2).

As to the second question, Church’s argument was that the language in the court’s prior order – “free and clear of all claims, liens and encumbrances” – did not discharge the Church mortgages, because mortgages are not “liens.” The Court rejected this rather absurd argument.


**Holding:** The fact that a township failed to enforce its zoning ordinance for two decades with respect to a commercial use in a residential zone will not preclude an enforcement action, absent a showing of substantial prejudice.

**Facts:** The Hoskin and Petty families had commercial operations on their lots (which were five and thirteen acres, respectively), going back to the 1970s. The Hoskins stored landscaping equipment and material in a pole barn on their property, and the Pettys ran a trenching and power washing company from their property, storing trucks, commercial equipment, and landscaping materials on-site. It was undisputed that these families operated their businesses in this manner “for several decades” without interference from the township, despite the fact that their use was unlawful under the residential designation in the zoning ordinance.
As the neighborhood around these properties were developed over the decades, neighbors started to complain about noise and early morning activity at these businesses. In 2013, the township sent zoning enforcement letters to the Hoskins and Pettys, and litigation ensued.

**Analysis:** Under Michigan law, a court will not interfere with zoning enforcement decisions “absent extraordinary circumstances.” These can include the existence of a nonconforming use (not present here because both commercial uses were unlawful at the time they commenced), or circumstances warranting laches or estoppel.

Here, the primary defense was laches/estoppel. The Court of Appeals held that “a historic failure to enforce a particular zoning ordinance, standing alone, is insufficient to preclude enforcement in the present.” Instead, the landowner must prove that the lack of enforcement prejudiced them in some substantial way.

Here, there was no evidence of substantial prejudice. The Petty defendants submitted no evidence that they made any expenditure or took any action to adapt or improve their property to suit their business. The Hoskins family presented evidence that they spent approximately $10,000 in constructing a pole barn, but this was found to be insufficient. The Court of Appeals noted that there was no evidence that the township was aware of the anticipated commercial use of the pole barns at the time building permits were issued, and pole barns are commonly used with residences. Thus, the construction of the pole barn could not establish substantial prejudice, because the Hoskins could not prove that “their expenditures were wasted or that their property is unfit for any use within the zoning classification.”

**G. Trinity Health-Warde Lab, LLC v. Charter Twp of Pittsfield, No. 328092**


**Holding:** An LLC set up on a for-profit basis that is wholly-owned and controlled by a nonprofit hospital does not qualify for a tax exemption under MCL 211.7r or 211.7o(1).

**Facts:** Trinity Health-Warde Lab, LLC (the “Lab”), is a wholly owned subsidiary of Trinity Health Michigan. The Lab owns and operates a building in Pittsfield Township, used solely as a medical laboratory. Trinity and other nonprofit hospitals use the Lab’s facilities under a co-tenancy laboratory agreement.

The Lab filed a petition with the tax tribunal alleging that it was exempt from taxation, on the basis that Trinity, a charitable institution, has complete control over the Lab and that the Lab is also therefore a charitable institution. The Tax Tribunal agreed.

**Analysis:** The Court of Appeals held that the plain language of MCL 211.7r and 211.7o(1) precluded the Lab from claiming an exemption as a charitable institution. Both exemptions require the taxpayer to be a nonprofit institution, and the Lab was not. The Court of Appeals refused to ignore corporate formalities for purposes of recognizing an exemption, noting language in a prior Michigan Supreme Court case cautioning against treating entities as alter egos for tax exemption purposes.

**Holding:** A neighbor falsely telling another neighbor’s realtor that their property is subject to deed restrictions does not meet the publication requirement for a slander of title claim, because a representation made to an agent is not a third-party communication. Also, Defendants failed to establish that the deed restrictions were binding, because the restrictions at issue were not in the Plaintiff’s chain of title, and Defendants could not meet the elements of the reciprocal negative easements doctrine.

**Facts:** Twin Creeks Development, LLC owned all of the lots in a development in 2000. In 2002, most of the lots at issue were conveyed by Twin Creeks Development to Carla Wolterstoff, with the remainder of the lots conveyed in 2004. In 2006, Twin Creeks, LLC recorded a document entitled “deed restrictions” covering all of the lots in the development. The date on the document suggests that it was executed in 2002. Carla Wolterstoff lost the lot to tax foreclosure in 2011, and Plaintiff purchased the property at a foreclosure sale in September 2011.

Plaintiff was unaware of any deed restrictions on the property at the time of purchase. When Plaintiff listed the property for sale, one of the neighbor defendants sent an email to the Plaintiff’s real estate agent notifying the agent that the property was subject to deed restrictions, and followed up with several phone calls advising the agent that the neighbor intended to enforce those restrictions against the property. Plaintiff filed suit for slander of title. Defendants counterclaimed to enforce the deed restrictions.

**Analysis:** Slander of title requires proof that a defendant maliciously published false statements that disparaged a plaintiff’s right in property, causing special damages. Here, the Court of Appeals held that the publication requirement wasn’t met, because making statements to the Plaintiff’s real estate agent was the equivalent of making statements to Plaintiff as the principal. The Court rejected Plaintiff’s argument that under MCL 565.957, a plaintiff as seller had a legal obligation to disclose a number of things to potential buyers, including whether there is “a homeowner’s association that has any authority over the property.” The Court rejected this argument, reasoning that it didn’t change the fact that Defendant making the claim to Plaintiff’s real estate agent was the equivalent of making the claim directly to Plaintiff.

As to the quiet title claim, the Court affirmed the finding in favor of Plaintiff, for several reasons. First, the majority of the lot was conveyed to Plaintiff’s predecessor in title before the deed restrictions were recorded, or even executed. Second, the remainder of the lot was conveyed to the predecessor in title before the deed restrictions were recorded. Finally (and perhaps most importantly), the deed restrictions were executed and recorded by Twin Creeks, LLC, which the parties stipulated never held an interest in Plaintiff’s lot at any point in time. Because the deed restrictions were recorded outside of Plaintiff’s chain of title, they were not enforceable.

The reciprocal negative easement doctrine did not apply either. That doctrine requires (1) a common owner, (2) a general plan, and (3) the common owner must have conveyed other lots with express deed restrictions before conveying the lot at issue. Here, there was a common owner at one point in time, and possibly a general plan. However, there was no evidence that the common owner conveyed other lots with express restrictions. For negative reciprocal easements to apply, the “scheme of restrictions must start with a common owner; it cannot arise and fasten upon one lot by reason of other owners conforming to a general plan.” Here, there was no evidence that any lots in the development were conveyed with express deed restrictions prior to
Carla Wolterstoff obtaining title to the property. Furthermore, the scheme did not start with a common owner, because the developer entity (Twin Creeks Development) conveyed lots before a different entity—which never had any interest in the property at issue—executed and recorded a document purporting to contain deed restrictions, outside of Plaintiff’s chain of title. The mere fact that other owners later agreed to conform to self-imposed restrictions cannot satisfy the negative reciprocal easement doctrine.


**Holding:** A senior mortgage that is discharged and replaced with a new mortgage does not retain its priority position over the junior mortgage with respect to any excess money loaned, where junior mortgagee conditioned its own discharge and replacement on no new money being lent and recordation of the replacement mortgage.

**Facts:** Wells Fargo held a senior mortgage, and SBC held a junior. In 2005, the homeowners refinanced the senior mortgage. Of the loan proceeds, approximately $458k was used to pay down the original mortgage, and $34k was distributed to the homeowners. The junior mortgage was to be discharged and replaced under a subordination agreement.

The subordination agreement with the junior lienholder was conditioned on (1) no new money being loaned, and (2) recordation of the replacement mortgages. Neither condition was met; as mentioned, the homeowners pocketed $34k, and the junior lender failed to properly record the original discharge of the junior mortgage (it was faxed to the title company in connection with closing, while unaware of the increase in the principal amount on the senior mortgage). Accordingly, the record reflected that the original junior mortgage was now the senior mortgage.

SBC foreclosed, and Wells Fargo sued, seeking to enforce the unrecorded discharge, or to use the doctrine of equitable subrogation to elevate its interest above SBC’s despite its record priority.

**Analysis:** The Court of Appeals agreed that the junior lienholder’s faxed discharge was neither valid nor enforceable, because the increase in the principal amount prevented the junior’s promise to discharge the mortgage from becoming enforceable.

However, the Court of Appeals did apply equitable subrogation to give the senior lienholder (Wells Fargo) some relief. The doctrine is available in a quiet title action to place a new mortgage in the same priority as a discharged mortgage, if the new mortgagee was the original mortgagee and holders of any junior liens are not prejudiced as a consequence. Here, the Court of Appeals reasoned that SBC was only prejudiced by equitable subrogation to the extent that money was added to an otherwise ordinary refinancing situation. So, the Court held that Wells Fargo’s interest should be placed in senior priority, but only as to the loan amounts not encompassing new or additional monies.

**Holding:** The lakeward boundary of a critical dune area located in Port Sheldon Township extends to the water’s edge, thereby subjecting the boundary to the Sand Dune Protection and Management Act (the “SDPMA”).

**Facts:** This case arose out of the Port Sheldon Beach Association’s (the “Association”) attempt to remove dune grass from a portion of the lakeward boundary of a critical dune area (“CDA”) due to the shoreline of Lake Michigan moving westward by 150 feet. The Association wanted to groom that portion of the property, but was advised by the Department of Environmental Quality (“DEQ”) that it could not do so because it was within the CDA. The Port Sheldon CDA map in the 1989 atlas showed a lakeward boundary that was precisely the same as the shoreline of Lake Michigan. The Association filed suit, and both parties moved for summary disposition. The Association argued that the lakeward boundary of the CDA was fixed, and therefore the dry area of land to the left of that boundary was not subject to the SDPMA because it was not part of the CDA. The DEQ asserted that the boundary extended to the shore of the lake, thereby subjecting the dry area to DEQ control under the SDPMA, and the trial court agreed, granting summary disposition in the DEQ’s favor.

**Analysis:** The Court of Appeals agreed with the trial court’s determination that the lakeward boundary in dispute depicted a meander line along the lake, not a fixed line. It reasoned that there were areas other than this one within the map that contained fixed boundary lines. Thus, if the Legislature intended for the disputed area to contain a fixed boundary line, its intent would be evidenced by the map. The court therefore affirmed the DEQ’s and the trial court’s conclusion that the Association could not remove dune grass from, nor groom that portion of, the Association’s property.
IV. Michigan Court of Appeals Cases (Unpublished)


**Holding:** The developer, as owner of several lots within a subdivision, was required to pay a proportionate share of dues and assessments under the terms of the relevant declaration of easements, covenants and restrictions, and the developer’s attempt to unilaterally amend the original declaration to exempt itself from those assessments was invalid under the language set forth in the original declaration regarding amendment procedures. The developer was also not immune from liability under the Michigan Consumer Protection Act (MCPA) as a licensed residential builder, because he did not have an agreement with any of the plaintiffs to build them a home.

**Facts:** The developer and its two officers (Lawrence and Terri Sant) developed a 20-lot residential development. Lawrence had an initial declaration of easements, covenants and restrictions recorded in May 2006. He then had an amendment prepared on June 6, 2006, and recorded on June 9, 2006. Article VIII of the original declaration purported to give the developer the unilateral right to amend the declaration. However, Article IX of the original declaration provided that the agreement could only be amended by following the voting procedure in the Association’s bylaws.

The plaintiffs bought property in the development. The Pedinellis bought their property from the developer and closed on May 2, 2006. The Whites bought from a third party owner and closed on June 17, 2008. The Mazzas also bought from a third party owner, closing on September 29, 2006. Thus, the Pedinellis closed on their lot before the amendment was recorded.

The plaintiffs received various invoices for association dues from 2006 to 2011, which indicated that the dues were divided between 4 homeowners. The invoices included charges for the preparation of tax returns, even though the association didn’t file a tax return until 2012. Indeed, the developer had dissolved the association entity in 2009, incorporating it as a for-profit corporation in 2011.

Plaintiffs sued for breach of contract, violations of the MCPA, fraud, and breach of fiduciary duty. Plaintiffs asked to have the amended declaration declared void.

**Analysis:** The Court first analyzed whether the Pedinellis were subject to the terms of the amended declaration, and held that they were not. The amended declaration provided that it did not take effect until it was recorded, and it was undisputed that the Pedinellis closed on their property before the amended declaration was recorded.

Next, the developer argued that the original declaration did not require the developer to pay any expenses for the association, because it stated that “Each Owner of property ... by delivery of a deed transfer, ownership of a lot ...” must pay their proportional share of costs. Noting that “Owner” is defined to refer to the record owner of fee simple title, the Court rejected the developer’s argument that it was exempt from paying a proportional share because it didn’t
receive its property “by delivery of a deed transfer.” Accordingly, the developer was required to pay association dues.¹

The Court then analyzed whether the Whites and Mazzas, who obtained their properties after the amendment was recorded, were subject to the amendment. The Court compared Article VIII and Article IX, and held that because Article IX contained amendment procedures pertaining specifically to maintenance of private roads and common areas, those procedures controlled any amendment regarding the division of maintenance assessments. Because it was undisputed that the developer failed to follow the amendment procedures in Article IX, the amended declaration was invalid to the extent that it purported to alter the division of maintenance assessments for the private roads and common areas.

The Court then turned to whether the developer could be liable under the MCPA. Under existing precedent, a residential home builder is often exempt from the MCPA, because the general transaction of residential home building is “specifically authorized” by the Michigan occupational code. But here, the developer did not form an agreement with any of the plaintiffs to build homes for them. Although the developer formed an agreement to sell the Pedinellis the property, he then, in a separate capacity, served as their construction manager. Although Lawrence was the construction manager, Pedinelli served as his own general contractor. With regard to the Whites and Mazzas, the only agreements they had with the developer were in the form of the covenants and restrictions. The Court held that “the mere fact that Lawrence is a residential home builder does not exempt him from the MCPA in all of his activities,” and found the Plaintiffs’ MCPA claims actionable.

Finally, the Court analyzed whether the claims for fraud/misrepresentation and breach of fiduciary duty were barred by the relevant statutes of limitation. These claims were largely based on the invoicing by the developer.

B.  


**Holding:** Filing a lawsuit before the expiration of the one-year redemption period following a foreclosure sale does not toll the redemption period. A plaintiff lacks standing to challenge or set aside a foreclosure sale if he or she fails to redeem the property within the applicable time. Even if a plaintiff is successful in establishing standing, in order to set aside a foreclosure by advertisement, plaintiff must demonstrate a causal connection between alleged fraud or irregularity and the alleged prejudice.

**Facts:** Plaintiff purchased property located in Taylor, Michigan in 2011. Plaintiff financed the $540,000 purchase by obtaining a purchase money mortgage from Defendant. The mortgage contained a power of sale authorizing defendant to commence foreclosure proceedings in the event of default. The note secured by the mortgage contained a clause stating that “the terms and conditions of this Note may not be amended, waived or modified except in a writing signed by

¹ The relevant part of the amendment that the plaintiffs objected to was a provision that clarified that each owner was responsible for paying a proportionate share of dues “upon deed transfer from the developer.”
the Lender expressly stating that the writing constitutes an amendment, waiver or modification of the terms of this Note.”

Plaintiff defaulted on the mortgage in 2012 and never cured the default. Defendant followed the proper procedures in order to foreclose on the mortgage by advertisement. Defendant purchased the property at the foreclosure sale on January 16, 2014 for $576,596.08. Plaintiff never attempted to redeem the property during the one-year redemption period. Rather, Plaintiff filed a complaint and sought to set aside the foreclosure less than one month before the expiration of the redemption period. Plaintiff alleged that Defendant orally promised a loan modification and that it would not exercise its right to foreclose on the property, but later proceeded with the sheriff’s sale. The trial court granted Defendant’s motion for summary disposition in which Defendant argued that Plaintiff lacked standing to challenge the foreclosure after the expiration of the redemption period and that Plaintiff’s claims were barred by the statute of frauds.

Analysis: The Court of Appeals affirmed the trial court decision, noting that Plaintiff’s failure to redeem the property during the statutory redemption period was dispositive of the issues on appeal. By failing to redeem the property within the statutory redemption period, Plaintiff’s rights to the property were extinguished. The filing of a lawsuit prior to the expiration of the redemption period does not toll the redemption period. Thus, Plaintiff lost standing to bring the claim. Furthermore, even if Plaintiff could establish standing, its claims would fail because in order to set aside a foreclosure by advertisement, a Plaintiff has to show that fraud or irregularity in the foreclosure procedure prejudices the mortgagor. However, Plaintiff failed to allege or establish prejudice and failed to allege that it could have redeemed the property. Accordingly, because all of plaintiff’s claims were essentially an attempt to set aside the foreclosure sale, summary disposition in favor of Defendant was appropriate.


**Holding:** The terms in a lease control a dispute where: 1) the lease expressly provides that any repairs to the property are “at tenant’s expense” and alterations and improvements “shall be maintained in place upon the termination or non-renewal” of lease; 2) the lease contains an integration clause; and 3) evidence indicates that the provisions at issue were negotiated. Estoppel cannot be applied to impose a land contract as an exception to the statute of frauds because title to real estate may not be created by estoppel.

**Facts:** A dispute arose over land and a building (the “Property”) located in Mattawan, Michigan. According to Plaintiff’s owner, the parties agreed to enter a rent-to-own contract for the Property, but Defendant asked him to sign a commercial lease agreement so they could avoid paying realtor fees. Plaintiff’s owner said that Defendant promised to execute a land contract in the future, so he agreed to sign a one year lease.

The lease provided that the tenant would, at its own expense, make all necessary repairs. Further, the tenant could, at its own expense, make improvements with the landlord’s consent. The lease contained an integration clause. Plaintiff made several improvements and frequently inquired about the status of the land contract. Defendant continually insisted the land contract was being reviewed by an attorney. Upon expiration of the one year lease, Plaintiff initially refused to sign a new lease agreement but later signed a new one year lease with identical clauses. Above his
signature, Plaintiff wrote that the contract was “being signed with the knowledge and understanding that a new contract will be drafted and executed prior to the current contract expiration.”

After signing the lease, Plaintiff retained counsel in an attempt to negotiate and finalize a land contract for the Property. However, the parties never signed a land contract agreement and the lease expired. When the new lease expired, Plaintiff began paying rent into an escrow account. Defendant served a notice to quit on plaintiff, asserting a right to repossess the Property based on an expired lease and failure to pay rent. Plaintiff filed suit, alleging claims of promissory estoppel and unjust enrichment due to the improvements made on the property and inability to enter a land contract. The trial court concluded that plaintiff could not prevail because express contracts governed the subject matter of the controversy. The lease indicated that any improvements to the Property would remain after the leases expired. Further, no land contract existed between the parties. Thus, Defendant was entitled to repossess the Property and collect back rent.

**Analysis:** The Court of Appeals affirmed the trial court decision, reasoning that the leases were valid, written contracts. The leases governed the subject matter of the controversy, and they expressly provided that any repairs to the Property would be “at Tenant's expense,” and stated that any alterations and improvements “shall be maintained in place upon the termination or non-renewal of said Lease.” Furthermore, Defendant testified that the parties negotiated for these provisions, and that rent would have been higher if they were not included in the leases. The leases also contained integration clauses, which are conclusive evidence that a contract is complete.

Additionally, even if the leases were invalid, estoppel could not be applied to impose a land contract as an exception to the statute of frauds because Michigan courts have consistently held that title to real estate may not be created by estoppel. Therefore, Plaintiff’s estoppel claim failed as a matter of law because plaintiff could not satisfy the requirement of a signed and written document conveying an interest in the Property. Thus, the trial court did not err by refusing to grant plaintiff equitable relief under the doctrines of promissory estoppel and unjust enrichment.


**Holding:** The court affirmed the trial court’s finding that the insurance agency did not have a duty to plaintiff. Defendant therefore could not be held liable for loss from plaintiff being underinsured under its policy.

**Facts:** Chemical Technology, Inc., the plaintiff, brought a negligence suit after a fire occurred in a building owned by Chemical. Chemical sustained damages of over $5.3 million, plus an undetermined amount of “business income interruption damages.” It was not fully compensated by its insurance, so it brought suit against its insurer. Berkshire Agency, Inc. Berkshire failed to “properly advise Plaintiff regarding the types and amount of commercial insurance that should be purchased for its building and for its business personal property,” Chemical alleged. Berkshire’s “duty” to do so, Chemical said, gave rise to its claim for damages. The circuit court found that no such duty existed, and it granted summary disposition in favor of Berkshire.
Analysis. The Court of Appeals considered each of Chemical’s four arguments on appeal and rejected each. First, Chemical claimed that the insurance agent established a duty by admitting that advising Chemical to get better insurance was his responsibility. This “subjective admission,” the court said, does not give rise to a legal duty. Second, the court rejected Chemical’s argument that Berkshire admitted a duty in its reply brief. Berkshire said in a reply brief that the circuit court “could assume . . . that Berkshire had a duty to advise Chemical Technology to obtain adequate coverage,” presumably replying to another argument. Noting that the issue of “duty” had been expressly and heatedly contested, the Court of Appeals rejected the argument that an apparent admission gives rise to a legal duty. The court said, “[W]e discern no value in reversing the circuit court’s summary-disposition order” based on that admission.

Third, Chemical argued that Berkshire owed a duty as an “independent insurance agency.” In Harts v. Farmers Ins. Exch., 461 Mich. 1, 6 (1999), the Michigan Supreme Court examined the duty owed by insurance agents. At issue in this case was whether that duty applies to captive/exclusive agents only or also to independent agents. Berkshire, as an independent agency, argued that Harts applied equally to independent agents. It therefore did not have a duty to adequately advise Chemical. Chemical, of course, argued that Hart applies only to captive/exclusive agents, and Berkshire may therefore be held liable. The Court of Appeals recognized that Hart could support such a conclusion but ultimately rejected the argument. The no-duty-to-advice rule, it said, applies to both independent and non-independent agents. Essentially, the court said that there is no reason why the court’s analysis in Hart should not apply to both agents. If the legislature would like to impose such a duty, it may do so.

Finally, Chemical argued that Berkshire has a duty because the parties have a “special relationship.” The court rejected this argument, saying that Chemical had provided no authority for it. It is “both abandoned and meritless.” Without more support for Chemical’s argument, the court affirmed the circuit court’s finding that Berkshire owed Chemical no duty and was therefore not liable for Chemical’s losses.


Holding: The Court affirmed the trial court’s findings that: 1) a lessee’s obligation to the assignee of a mortgage terminates at the end of the original mortgagor’s redemption period; 2) the assignor and assignee of the mortgage owe each other nothing after taking into account surpluses received through rental income.

Facts: Three parties are relevant in this appeal: Lennard Ag Company, Sturgis Building, L.L.C., and Kirsch Industrial Park. Sturgis provided Kirsch a loan to purchase property, and Lennard Ag leased part of that property from Kirsch. In addition to a personal guarantee, Kirsch provided Sturgis with an assignment of rents and a security interest in leases in the event of a default on the loan. Kirsch did eventually default, and its tenants (including Lennard Ag) began forwarding rent payments to Sturgis.

Sturgis sought and received a judgment of foreclosure which, among other things, provided Kirsch with six months to redeem the property. Lennard Ag notified Sturgis that the foreclosure order converted its leases into month-to-month leases and that it intended to terminate its leases
at the end of the following month. Lennard Ag continued paying rents for the remainder of the time required and then vacated the premises. The circuit court agreed with Lennard Ag, allowing it to vacate the premises, but Sturgis appealed that decision.

Finally, the circuit court found that the rents collected from Lennard Ag during the redemption period “would be deducted from the judgment amount and left the parties to battle regarding the remaining items to be calculated.” Because the rents collected covered Sturgis’s attorney fees, and because Kirsch had no claim to the rents, the circuit court ultimately found that neither party owed a surplus to the other. Both parties appealed.

**Analysis.** The court first addressed Sturgis’s argument that Lennard Ag was still bound to its lease obligation. Interpreting both Michigan statutes and the contract language pertinent to the assignment of the lease, the court found that Lennard Ag’s obligation did not continue beyond the redemption period. Both the statutes (MCL 554.231 and MCL 600.3130) and the contract language control the assignment of rents, not the assignment of leases. In other words, Lennard Ag was required to make payment to Sturgis while in the lease, but the contract did not continue to bind Lennard Ag to Sturgis as a lessee after foreclosure on the mortgage. Further, the court rejected Sturgis’ argument that the common-law doctrine of merger required Lennard Ag to continue leasing. Sturgis argued that the deed obtained by the foreclosure gave Sturgis rights as a lessor. The court disagreed, saying again that this doctrine applied only to the receipt of rents and not to the lease obligation.

Next, the court examined the surplus provided to Sturgis by rents collected. Kirsch argued that the “full credit bid rule” extinguished Sturgis’s interest in the rent payments. This rule applies in foreclosure by advertisement and sheriff’s sales, the court said, but not in judicial foreclosures. Therefore, even if Sturgis made a full credit bid at the foreclosure, it could still be entitled to rent payments. And, because those rent payments provided Sturgis with a surplus, Sturgis could not collect further costs and attorney’s fees from Kirsch. Therefore neither party was entitled to additional fees, and the court upheld the circuit court’s ruling.


**Holding:** The court reversed the trial court’s finding in favor of the Village of Sanford. The court found that the plaintiff did, in fact, have a prescriptive easement and granted partial summary disposition in favor of plaintiffs.

**Facts:** Mid-Valley Agency, Inc. owned two parcels of land adjacent to one another. The first housed Mid-Valley’s business building, and the second was a vacant parcel. This parcel was an “access parcel” that provided access to the rear of the building on the third parcel. This third parcel was owned by the plaintiffs and housed a photography studio. In 2011, the Village of Sanford began a project to improve its downtown. As part of that process, it put a curb in front of the access parcel that restricted the plaintiff’s use of the parcel to access the back of plaintiff’s building. After no response from the city, the plaintiffs filed a complaint alleging that they had a prescriptive easement in the access parcel. The Village of Sanford’s project interfered with that easement.

The trial court granted summary disposition in favor of defendants, ultimately ruling that the easement was not hostile as required by Michigan law. Plaintiffs appealed.
Analysis. The Court of Appeals examined the record and found that the trial court misapplied the law. Based on testimony from the access parcel’s previous owner, the plaintiffs established that the easement had been in use for about 60 years—well beyond the statutorily required time period. To establish the easement, however, the plaintiffs needed to establish hostile use. Mid-Valley’s owner said that he had given the previous owner permission to use the parcel at one point. However, the court found that this permission was given long after the prescriptive period had run in favor of the plaintiffs. And, during that prescriptive period, the plaintiffs use had been hostile. Mid-Valley therefore simply acquiesced to the use; it did not give permission for the use. With the statutory requirements for the easement satisfied, the court overturned the trial court and found in favor of the plaintiffs, thereby granting the prescriptive easement.


Holding: A plaintiff may not rely on the fraudulent concealment statute to toll the statute of limitations for a breach of contract claim, where plaintiff could have discovered the facts giving rise to the claim by examining a readily discoverable warranty deed.

Facts: An easement agreement gave the Pesolas a right of first option to purchase the Goldens’ real property, which housed an ice cream shop. The Goldens received an offer for the purchase of the property for $485,000. The Goldens disclosed that offer to the Pesolas, but did not specifically reveal that the price included $274,000 for inventory, goodwill, and a non-compete agreement, with the remaining $211,000 reflecting the offer for the real property alone. The Pesolas failed to file suit within the six-year period of limitations applicable to a breach of contract claim, but alleged that the Goldens fraudulently concealed the facts giving rise to the breach of contract claim, and that the two-year discovery rule under MCL 600.5855 should operate to toll the statute of limitations. The trial court found that the Goldens’ communications regarding the offer did not constitute a pretense designed to hinder the discovery of a potential claim, and that the $211,000 offer for the real property was readily discoverable through the warranty deed, which was recorded at the time of the transaction.

Analysis: The Court of Appeals agreed with the trial court. To benefit from the tolling of the statute of limitations, plaintiff must exercise reasonable diligence to discover facts pertinent to the existence of a cause of action, including the examination of public records. The Pesolas failed to examine those discoverable records. Moreover, they knew the property contained an operating business, yet nevertheless failed to make a simple inquiry to determine how much of the $485,000 offer included non-realty business assets. Thus, there was no fraudulent concealment by the Goldens, and the Pesolas’ action was therefore time-barred.


Holdings: First, a plaintiff who owns the dominant estate of an easement in a park has a substantial interest that would be detrimentally affected in a manner different from the general public, and thus has standing to sue a property owner who overburdens the park. Second, the defendant property owners’ tenants do not, by merely using the walk, impose an unreasonable burden on the servient estate and therefore should not be precluded from using the walk to access the lake. Finally, because plaintiff had a fee interest to the midpoint of the walk and was entitled to access it from all points along the boundary between his property and the walk, and
defendants’ fence impeded his access to the walk, plaintiff was entitled to summary disposition on that issue.

**Facts:** Richard Morse and the Colittis live in a platted development with the “streets, alleys, and parks” dedicated to “the use of the present and future lot owners.” In 2009, the Colittis decided to improve their property by creating a pathway on the lake access walk, building a stairway along the walk, and erecting a wooden fence on the walk within six inches from Morse’s home. The Colittis also rented out a home on a lot in the back of the development and told their tenants they could use the walk to access the lake.

Mr. Morse filed suit in 2013, for a declaration that he owned the fee interest to the center of the walk, an order to remove the dock and structures the Colittis built in the walk, and an order enjoining access by the back-lot tenants. The court later granted summary disposition in favor of the Colittis on Morse’s trespass, nuisance, and ordinance violation claims, reasoning that the claims were time-barred under the applicable statute of limitations. After a bench trial, the court held that the dock should be removed but the fence should stay. Both parties appealed.

**Analysis:** On appeal, the Colittis asserted that the trial court erred when it determined that Morse had standing to challenge the neighbors’ construction of a dock because such use constituted riparian rights, and a Park lay between Morse’s land and the water. The Court of Appeals disagreed, holding that Morse had a substantial interest in determining the others’ right to build a dock and moor a boat at the shore of the Park because he had an easement across the Park. Regarding the tenants’ rights in the walk, the Court of Appeals held that the back-lot property included part of the development, giving the tenants a right to use the walk. The court also affirmed the trial court’s dismissal of an ordinance violation claim, reasoning that the ordinance did not prevent the neighbors from erecting a fence on the walk.

As for the fence, under Michigan law, landowners abutting a private walkway that is contiguous to the water are presumed to own the fee entirely. Therefore, Mr. Morse owned half of the walk, and the Colittis trespassed on his land when they built their fence on his side of the walk. The court also determined that the trial court erred when it failed to determine whether the fence was necessary for effective use of the parties’ easement in the walk. Finally, the Court reversed the trial court’s ruling that Mr. Morse’s trespass and nuisance claims were fully time-barred. The trespass claim was only time-barred as to damages, not injunctive relief, since an action to recover property may be brought within 15 years of the claim accruing. And there was at least a genuine issue of material fact as to whether the injury giving rise to the nuisance claim occurred less than three years before the claim was brought, making it timely.


**Holding:** It is constitutional to apply a statute of limitations to an inverse condemnation claim, and the six-year limitations period applies because the master deed for a condominium project clearly encompassed the property at issue as a common element, owned by the unit-owners and not the plaintiff developer.

**Facts:** Woodland Estates (“Woodland”) purchased a parcel of property in 2003 through a land contract, which was recorded. Woodland applied to the City of Sterling Heights and Macomb County (“Sterling Heights” and “Macomb,” respectively) to develop the property into
condominiums. Sterling Heights and Macomb approved the application but reserved a 92 foot-wide tract of land across one edge of Woodland’s property for the extension of a road (the “right-of-way property”). The legal descriptions in the recorded 2003 land contract and in the 2006 master deed for the condominium project (and a related consent to submission) did not include the right-of-way property.

Woodland sued Sterling Heights and Macomb, alleging that the reservation of that tract of land amounted to a governmental taking without adequate compensation—and inverse condemnation claim. The trial court ruled that Woodland’s ownership interest in the right-of-way property was extinguished when it recorded the master deed and consent to submission for the condominium project, thereby requiring the application of a six-year statute of limitations, which had expired. The trial court also ruled that the application of the statute of limitations to bar Woodland’s action was constitutional.

Analysis: The Court of Appeals agreed with the trial court. As to the constitutionality of barring an inverse condemnation claim by operation of a statute of limitations, the court cited precedent from both the Michigan Supreme Court and the United States Supreme Court holding that a constitutional claim can become time-barred like any other claim.

Regarding which limitations period to apply to Woodland’s claim—fifteen years where the plaintiff maintains an ownership interest in the property, or six years where it does not—the court found that Woodland’s ownership interest had been extinguished. Despite receiving a warranty deed that undisputedly covered only the right-of-way property in 2005, Woodland nevertheless recorded a master deed and consent to submission in 2006 that covered the entire parcel and made no specific reference to the right-of-way property. The master deed and the Michigan Condominium Act make it clear a condominium project is made up of only condominium units and common elements, unless the developer explicitly reserves portions of the land for a limited time. Without such a reservation here, the project encompassed the entire parcel and thus extinguished Woodland’s ownership interest in the right-of-way property. Thus, the six-year limitations period was proper.


Holding: A contract to make a subsequent contract for the sale of land was enforced because the facts indicate an intent to be bound, the writings identified the property, the parties and the consideration, and the condition of a satisfactory survey and legal description could not be rejected by the seller because the seller failed to offer a good-faith basis for its refusal to agree to the survey-generated by the surveyor it hired.

Facts: Daniel Artibee and his wife leased land in the U.P. for their home and garage. UP Hydro, LLC, the owner of the land, sent the Artibees a letter offering to sell the land “your home and garage occupy (subject to survey and creation of a legal description acceptable to both parties)” for $10,000 pursuant to the terms of a “separate offer agreement to be signed by us . . . .” The Artibees accepted the offer in writing and UP Hydro hired a surveyor who prepared a survey and legal description. Although the survey description was somewhat different from what the Artibees expected, they accepted it. However, a separate purchase agreement was not signed, UP Hydro refused to consummate the sale, and brought an action to evict the Artibees. The Artibees counterclaimed to enforce the agreement to agree. The trial court granted UP Hydro’s motion for
summary judgment finding that there was no valid agreement to sell because the subsequent agreement was never signed. The Artbees appealed and the Court of Appeal reversed.

**Analysis:** The Court of Appeals agreed with the trial court. Based on the seminal Michigan Supreme Court case of *Opdyke Investment Co. v Norris Grain Co.*, 413 Mich. 354, 359 (1982), the Court of Appeals ruled that “[a] contract to make a subsequent contract is not per se unenforceable; in fact, it may be just as valid as any other contract” if the writing indicated an intent to be bound and the writings expressed all the essential terms for a contract for the sale of land. The Court of Appeals held that they did. It was undisputed that the writings identified the “parties (plaintiff and defendant), the consideration ($10,000), and a general description of the property, i.e., ‘the land [defendant’s] home and garage occupy.’” UP Hydro argued that because the writings stated that the contract was subject to reaching agreement on the legal description of the land, the property had not been identified. The Court of Appeals agreed with the Artibees that the general description of the property was sufficient to identify it in order to form a binding contract. The final issue raised by UP Hydro was that there was a condition precedent that failed to occur – the existence of an acceptable survey and legal description. The Court of Appeals found that the description had been accepted by the Artibees and that because UP Hydro had not offered “a good-faith basis for its refusal to agree to the survey-generated property description,” the Court of Appeals held that UP Hydro “has no basis to invoke this condition precedent of agreement on a survey-generated property description to nix the agreed upon sale of the property.”
V. Other Jurisdictions

A. *In re Deepwater Horizon*, 470 S.W.3d 452 (Tex. 2015).

**Holding:** The incorporation by reference doctrine allows underlying transactional documents to alter the existence and scope of insurance coverage if the insurance policy manifests the parties’ intent to include the document as part of the policy.

**Facts:** In April 2010, the BP oil spill occurred, claiming eleven lives and causing extensive environmental damage. After the explosion, litigation ensued between the oil developer, BP, and the insurers of the oil-drilling rig owner, Transocean. The central issue disputed was whether and to what extent an underlying Drilling Contract between BP and Transocean limited the scope of insurance coverage available to BP as an additional insured under Transocean’s insurance policies.

In the Drilling Contract, BP and Transocean agreed to a “knock for knock” allocation of risk. Transocean agreed to indemnify BP for above-surface pollution regardless of fault, and BP agreed to indemnify Transocean for all pollution risk Transocean did not assume, i.e., subsurface pollution. Transocean also agreed to acquire various types of insurance, and add BP as an additional insured in each of its policies “for liabilities assumed by [Transocean] under the terms of [the Drilling] Contract.” In turn, Transocean acquired a $50 million commercial general liability (“CGL”) policy and four layers of excess coverage amounting to $700 million. The policies’ additional insured provisions did not specifically list BP as an additional insured, but extended that status to any third-party Transocean was obligated under an “insured contract” to provide insurance to.

Facing numerous personal-injury and environmental claims due to the explosion, BP made a demand for coverage. However, Transocean’s insurers denied it, asserting that BP’s additional insured status was limited under the Drilling Contract solely to liability assumed by Transocean, i.e., above-surface pollution.

**Analysis:** While the insurance policies on their faces expressed no limitation to BP’s coverage as an additional insured, the policies additional insured provision incorporated the Drilling Contract by reference. Because the Drilling Contract’s indemnity provisions limited Transocean’s scope of liability in this instance, BP was not covered for the damages at issue.
VI. Legislative Updates

A. Recovery of Land by Local Unit of Government – PA 52 (HB 4747) (Rep. Hughes): This bill amended the Revised Judicature Act to clarify that in an action for recovery of any land to which the state—including municipalities, political subdivisions of the state, or county road commissions—is a party, the state is not subject to statutes of limitation, laches, claims for adverse possession or prescriptive easements.

B. Repeal of Dower Rights – PA 378 (HB 5520, SB 558, SB 560) (Rep. Kesto, Sen. Jones): This package of bills repeals dower rights. Thus, transfers of real estate are no longer subject to potential dower claims (with the exception of property owned by men who die before the effective date). Previously, a widow was entitled to take a life estate in one-third of all of the real property the husband possessed during the marriage. With dower rights repealed, the widow now must choose between only two options: take what was provided her under the decedent’s will, or take the statutory elective share.

HB 5520, effective Dec. 22, 2016, eliminates the requirement in marriage and divorce law that a judgment of divorce contain provisions for a wife’s dower rights. SB 558, effective April 6, 2017, repeals dower rights. SB 560 revises sections of the Michigan’s Estates and Protected Individuals Code to reflect the abolition of dower.

C. Electronic Signatures for Covenants – PA 355 (HB 5591) (Rep. Cole): This law amends the Uniform Electronic Transactions Act to allow the owner of a lot or parcel that was subject to restrictive covenants to consent to amend, reaffirm, or repeal them, in whole or in part, by an electronic signature, if the covenants applied to more than 250 lots or parcels in a single development and state law allowed the owners to amend, reaffirm, or repeal them.

D. Recording and Filing Fees – PAs 224–232 (SB 599–603, 737, HB 5164–5165) (Sens. MacGregor, Zorn, Booher; Reps. Chatfield, Moss): This package of bills enacted changes to recording fees—specifically, it modified the amounts of recording and filing fees (i) under Section 2567 of the Revised Judicature Act, (ii) relating to the recording of a lien against oil and gas wells, (iii) under the Uniform Federal Lien Registration Act, (iv) under the State Tax Lien Registration Act, (v) under the Michigan Employment Security Act, (vi) under Article 9 of the Uniform Commercial Code, (vii) under the Land Division Act, and (viii) for recording of judgments affecting titles to realty. The bills also amend the Revenue Act to allow the state treasurer or the treasurer’s authorized agent to recover recording or filing fees and other costs when it sells property to satisfy a tax deficiency.

E. Domestic Asset Protection Trusts - PAs 330–331 (SB 597, HB 5504): With these bills on March 8, 2017 (the effective date) Michigan will become Michigan one of fifteen States to permit Domestic Asset Protection Trusts (a “DAPT”). A DAPT will permit a person to create a trust, transfer some of their assets to the DAPT and have those assets for used for their own benefit but NOT be subject to the claims of the claims of their creditors. This reversal of prior law and common law. One important limit is that the conveyance to the DAPT may not be done with “actual intent to hinder, delay or defraud any creditor.”
F. Improved Brownfield Funding - PA 471-476 (SB 908-913): These bills will improve brownfield funding for cleanups using grants, loans and TIF financing. The changes are intended to streamline, simplify and speed up the process for loans, grants and TIF approvals and permit a greater range of eligible funding activities.
VII. Pending Legislation

A. Broker Licensing and Regulation – SB 26 (Sen. Kowall) (enrolled by legislature, unsigned by governor) (proposed effective date: Jan. 1, 2017)

Article 25 of the Occupational Code regulates real estate brokers, real estate associate brokers, and real estate salespersons. Among other things, these professionals must be licensed by the Department of Licensing and Regulatory Affairs (LARA), must successfully complete pre-licensure courses, and must comply with continuing education requirements. The State’s Office of Regulatory Reinvention has made an ongoing effort to examine each occupational license, and has found various rules to be outdated or in conflict with the statute, or found that the subject of a rule already is in the Code. The bill would amend Article 25 of the Occupational Code to do the following:

- Rescind various administrative rules and incorporate them in Article 25 with some modifications.
- Regulate advertising associated with a licensee’s purchase, sale, lease, or mortgaging of real property or a business opportunity.
- Require any advertising after January 1, 2018, that included the name of an associate broker, a salesperson, or a group of associate brokers or salespersons employed by the same broker, to include, in equal or larger type size, the business name and telephone number or address of the employing broker.
- Require a branch office maintained more than 25 miles from the limits of the municipality where a broker maintained a main office to be under the direct supervision of an associate broker, who would have to be physically present on a regular basis.
- Require LARA to establish the term of a license cycle, and delete the current three-year term.
- Require pre-licensure courses to meet criteria established by LARA, and authorize LARA to promulgate rules to establish the criteria.
- Permit pre-licensure courses to be taken by distance learning.
- Require a license applicant to complete pre-licensure courses within a certain period of time.
- Revise provisions for the renewal of a license within three years after it has expired, and require pre-licensure course to be completed within 12 months before the application.
- Permit LARA to contract with a statewide real estate association to review pre-licensure courses and make recommendations to the Department.
- Allow a pre-licensure course to be conducted by a Department-approved provider that met requirements LARA established by rule.
- Allow LARA to give credit toward pre-licensure courses for possession of a law degree, a bachelor's or master's degree in finance or business, or another equivalent educational credential.
- Require continuing education requirements to meet standards that LARA established by rule.
- Revise provisions concerning a written examination or reexamination.
• Revise provisions concerning re-licensure after a license has expired.
• Require LARA to grant an individual credit toward the experience required for a license, for experience in certain professions.
• Require an individual who was the owner of real estate to obtain a license as a real estate broker in order to engage in the sale of that real estate as a principal vocation.
• Require a business entity applying for a broker's license to designate which individuals who were control persons of the entity would be performing acts regulated by Article 25 as principals; and require a designated person to be licensed as an associate broker.
• Require a real estate broker or associate real estate broker to supervise the work of a real estate salesperson.
• Prohibit an individual from acting as a broker, associate broker, or salesperson if he or she had not received his or her license and pocket card or received a temporary license.
• Require the return of a license and pocket card to LARA if the license was suspended or revoked.
• Require the disclosure of licensure in situations in which a licensee bought or acquired an interest in property.
• Allow a broker to maintain more than one trust account, and to deposit up to $2,000 of its own money in each trust account for certain purposes.
• Establish a time limit on filing a complaint seeking a penalty for an alleged violation.
• Prohibit LARA from issuing a license to an individual younger than 18 years of age.
• Require a licensee to allow an authorized representative of LARA to inspect the licensee's records at its place of business.

In addition, the bill would amend Article 2 of the Code to do the following:
• Allow LARA to deliver a notice or other communication to a licensee or registrant by email if certain conditions were met.
• Require a licensee to report a change of name, mailing address, or email address within 30 days.
• Delete provisions that allow LARA to renew the license of a person who does not meet requirements for renewal, except a continuing education requirement.
• Allow a board to waive a continuing education requirement for license renewal under certain circumstances.