THE HAROLD I. LEVINE MEMORIAL [1]
CASE LAW UPDATE

ISBA LAW ED SERIES
REAL ESTATE LAW SECTION COUNCIL

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1. ATTORNEY MALPRACTICE; "PRESENT VS. FUTURE INJURY"; STATUTE OF REPOSE:

In Snyder vs. Heidelberger (No. 2-08-1061, filed 10-06-2009, 2nd Dist.), Plaintiff sued Defendant, an attorney, for malpractice in the drafting of a deed intended to convey title to real estate to her and her late husband as joint tenants. Title to the property had been in a land trust, so that the quit claim deed prepared by the attorney was ineffective, and the Plaintiff's stepson dispossessed Plaintiff from the real estate. Defendant moved to dismiss the malpractice action under 735 ILCS 5/2-619 (a) (5) as barred by the statute of repose (735 ILCS 5/13-214.3). The trial court granted the motion to dismiss and the 2nd District reversed and remanded.
Plaintiff's late husband had retained Defendant in 1997 to prepare the necessary documentation to make Plaintiff and her husband joint tenants with rights of survivorship in residential real estate. Plaintiff alleged that the deed Defendant prepared and recorded conveyed nothing to her and that Defendant negligently failed to recognize that her husband did not hold title in his own name, but rather in a land trust, and that she suffered additional damage by being evicted from the real estate by her stepson after her husband dies in 2007.

[1] Harold I. Levine was a defender of owners and mortgagors, a prolific writer and continuing education presenter, and, to a few very fortunate lawyers, a mentor and role model who passed away in 2003. He was a long-time volunteer for the Legal Assistance Foundation, the Center for Disability and Elder Law, as well as other legal service providers, and, most importantly, brought others to this important work. On more than one occasion, I had the honor of being on the opposite side of the counsel's table from Harold. He was also formidable opponent, always an advocate for his client, and always a gentleman. On a number of occasions, I had the pleasure of being on the opposite side of a dinner table from Harold. He was always a source of new ideas, a proponent of justice and equity, and…always a gentle friend. His dedication to his clients, worthy causes, and great contribution to the continuing education of attorneys will be sorely missed. He would be so very proud of our Supreme Court and Bar Associations if he had known we would have finally adopted mandatory cle. In some small measure, the work of this man must be undertaken and carried on by those of us in our profession who shared his great caring and love for the law. THIS MATERIAL COPYRIGHT @2009, STEVEN B. BASHAW, ALL RIGHTS RESERVED. LIMITED MATERIAL MAY BE QUOTED FOR REVIEW OR REFERENCE PURPOSES ONLY.

Defendant argued that the 2-year statute of limitations governing legal malpractice claims was supplemented by a 6-year statute of repose, thereby barring the claim as untimely. The Appellate Court noted that the statute of repose contained an exception (d) that provided: "when the injury caused by the act or omission does not occur until the death of the person for whom the professional services were rendered, the action may be commenced within 2 years after the date of the person's death". Plaintiff relied on this exception, claiming that only after her husband died did her stepson "…obtain the beneficial interest in the land trust and thus become able exploit the quitclaim deed's failure to give Plaintiff any interest in the premises." Defendant argued Plaintiff suffered her injury in 1997 when the deed was prepared; the trial court agreed.

The Appellate Court found controlling authority in the case of Wackrow vs. Niemi, 231 Ill. 2nd 418 (2008). In *Wackrow* the defendant attorney prepared an amendment to a living trust for the plaintiff's brother purporting to direct the trustee to convey title to the trustee's real estate to the plaintiff upon the trustee's death. The attorney did not realize that title to the real estate in question was in a land trust. After the death of the trustee 10 years later, the probate court denied the plaintiff's claim against the estate for the property. The plaintiff sued the attorney for malpractice, and while the case was dismissed on unrelated grounds, the Illinois Supreme Court stated: "it is clear that the injury … did not occur until after the death of [trustee] … (b)ecause [trustee] could have revoked the amendment or changed the beneficiary prior to his death…" and found that the exception to the statute of repose applied.

Plaintiff argued that the same reasoning applied to the instant case, while the Defendant attorney argued in the instant case the Plaintiff's husband intended the interest to pass to Plaintiff in 1997 when the quit claim deed was prepared and recorded, rather than after his death, as was the intention of the trustee in *Wackrow*.

The Appellate Court disagreed, finding that Plaintiff did not suffer her injury until after her husband died, stating the "…animating principle … [of] *Wackrow* is that, as long as the client who had intended to convey … was still alive, the attorney's error could be remedied at any time… the problem with the defective amendment was simply that it failed to do something that the client had intended, and that failure could have been remedied by having the client 'do something,' which was possible at any time before he died. We believe [Defendant] confuses the potential for injury with an actual injury for which relief can be granted" and reversed the order of dismissal.

2. CONDOMINIUMS; ASSOCIATION PREMISES LIABILITY PRIOR TO ELECTION OF INTIAL BOARD OF DIRECTORS:

Bridgett Glickman slipped and fell on ice which had accumulated on the stairs and landing on the common area of her condominium building outside of the unit she owned at 4600 South Indiana, Chicago, Illinois. The accident occurred at a time when the builder/developer, Richard Teglia, had not yet turned over control of the association to the unit owner elected board of directors. She filed an action for negligent design of the building's down spouts, gutters and drainpipes that allowed an unnatural accumulation of ice, and failure to remove the ice, against the Association, (4600 South Indiana Condominium Association), the developer, (Richard Teglia, Jr. and 4600 South Indiana Development Corporation), the designer of the building (Elias Pappageorge and Axio Consultants, Inc.) and the snow removal company, (Snobiz, Inc. of Chicago). The Association filed a motion to dismiss pursuant to 735 ILCS 5/2-619, contending that it did not owe a duty to Ms. Glickman at the time of the accident. The trial court granted the motion to dismiss, and Bridgett appealed. The First District reversed in

Glickman v. Teglia, (1st Dist., February 19, 2009), 388 Ill.App.3d 141, 902 N.E.2d 1256, 327 Ill.Dec. 870.

Although the condominium declaration was recorded on July 18, 2003, after which time assessments were collected from Glickman and the other owners and deposited into an account in the name of the association, the developer did not turnover the management of the association until the initial board was elected on March 6, 2005, almost two months after her fall. The association's contention that it did not have a duty to Glickman until the initial board of directors was elected was rejected by the Appellate Court based on the Condominium Property Act provisions that: (a) the association is responsible for the overall administration of the property through its board, (765 ILCS 605/18.3), and (b) in the interim period until the election of the initial board of managers by the unit owners, the developer shall act for the board with the same rights and responsibilities on behalf of the association, (765 ILCS 605/18.2(a)). Section 18.4 of the act vests the powers and responsibilities of the association, including the obligation to maintain the common elements, in the board, and "This does not mean the duties of the association are imposed on the developer in the interim period and the association itself therefore has no duties. Rather the duties of the association that would normally be performed by its duly elected board of managers are to be performed by the developer as the interim board on behalf of the association until the initial board of unit owners is elected…Moreover, the members of the board have a fiduciary duty to the unit owners regardless of whether they are elected by the unit owners or appointed by the developer.". At the time of Glickman's accident, the developer was performing the maintenance duties, but he was performing them on behalf of the association as the appointed board. He collected assessments, contracted for maintenance and services on the property and obtained insurance, all on behalf of the association and not the development company. The accounts into which the assessments were deposited and the bills paid was in the association's name. While case law recognizes that "the composition and interests of the condominium associations fundamentally change upon the turnover" and the developer has specific disclosure and accounting duties at the time of turnover, the interests in and obligation to maintain the property by the association is the same prior to and following the turnover, regardless of whether the board acting in those interests is appointed or elected. Contracts entered into by the developer in the interim period are binding upon the association after the initial election because the developer was acting on behalf of the association and its owners, and accordingly, "If the Association can be held liable for contracts entered into on its behalf before the election of the initial board of managers, it is clear that the Association has obligations in the interim period between the declaration and the first election." This is consistent with the Act's mandate that all condominium associations procure insurance that specifically includes the developer as an additional insured while acting as a manager or board member during the interim period. (765 ILCS 605/12(a)(2))

3. FORGERIES AND NOTARY ACT; LIABILITY OF A LENDER WHOSE EMPLOYEE NOTARIZES FOR 'OFFICIAL MISCONDUCT':

In Bank of America v. Ross E. Bird, (5th Dist., July 8, 2009), 911 N.E.2d 1239, 332 Ill.Dec. 1009, one of the mortgagor/defendants responded to the Complaint to Foreclose Mortgages on the house he and his wife owned jointly with the affirmative defense and counterclaim alleging that his wife forged his signatures on the two mortgage loans, (a $44,000 mortgage and a separate $20,000 home equity line of credit), that an employee of the bank notarized the signatures negligently without evidence that the

signatures were his, and for violation of the Notary Public Act, (5 ILCS 312/1-101). The three-count counterclaim alleging negligence, fraud and violations of the Act were accompanied by a jury demand.

Bank of America moved the trial court to strike Bird's jury demand, for summary judgment on his counts for negligence and fraud (based on the theory that the Notary Act was the sole and exclusive remedy for the forgeries), and for summary judgment on the issue of the Bank's liability under the Act, asserting that an employer is not liable for the acts of its notary/employees unless it consented to the misconduct. The trial court denied both the motion to strike the jury demand and the motions for summary judgment and certified the questions pursuant to Supreme Court Rule 308(a). The Fifth District opinion by Justice James K. Donovan affirmed the trial court's ruling and remanded the case for further proceedings.

Recounting the legislative history of the current Notary Act in repealing the 1872 Act in 1986, and finding that the purpose of the law was to do two things (simplify, clarify and modernize the laws governing notaries and protect the public interest), the Court notes that the notary and the surety are liable for all damages caused by "official misconduct". An employer of a notary, like Bank of America here, is also liable for damages cause by the notary's misconduct if the acts were done within the scope of the erring notary's employment and with the employer's "consent". The word "consent" is not defined in the Act, but "if the employer agreed with, encouraged or approved of the official misconduct" there is liability, and the employer may be liable in an independent action. (See Vancura v. Katris, (1st Dist., 2008). 907 N.E. 2d 814, reported in last year's case law update and for which a Petition for Leave to Appeal to the Illinois Supreme Court has been granted). Nothing in the 1986 enactment states or implies any intent by the legislature to support a finding that the statute was meant to provide an exclusive remedy or abolish the common law that had been accumulating since 1872 under the prior law. In fact, the legislation specifically stated it was enacted in order to "simplify, clarify and modernize" the existing law, implying an intent to continue, not abolish, the applicable common law. Moreover, the liability of an employer for the wrongful misconduct of an employee notary has long been protected by the common law theories of negligence and respondent superior, and can not be viewed as a statutory right unknown at common law. Accordingly, the Constitutional provisions to a jury right only in those cases where the right existed at common law is not violated by Bird's jury demand in an action brought under the Notary Act since those rights are not dissimilar to those long protected at common law. The Notary Act does not preempt the common law remedies for negligence and respondent superior, and a jury trial is available because that right existed at common law when the Illinois Constitution was adopted. The case was sent back to the trial court to continue the proceedings on Bird's affirmative defenses and counterclaims against Bank of America.

4. HOME REPAIR AND REMODELING ACT: FAILURE TO PROVIDE CONSUMER BROCHURE

Ever since the first cases construing the requirements in the Illinois Home Repair and Remodeling Act, 815 ILCS 513/1 et seq., that contractors provide consumers with a written contract or estimate before beginning work, specific disclosures, and a consumer pamphlet revealed that the consequences could be quite harsh, that segment of the bar representing those contactors has been waiting for a tempering

decision like Artisan Design Build, Inc. v. Bilstrom, (2nd Dist., Sept. 22, 2009) 2009 Ill.App. LEXIS 920. This Second District decision includes a review of the prior decisions under the Act: M.D. Electrical Contractors, Inc. v. Abrams, (which held that the Act only applies to contractors, not subcontractors), Central Illinois Electrical Services, LLC. v. Slepian, (which held that even a successor contactor must provide a written contract or estimate to protect its mechanic's lien rights), Smith v. Bogard, (which held that the equitable 'unjust enrichment' as well as the statutory mechanic's lien rights were defeated by failure to comply with the Act), and K. Miller Construction Co. v. McGinnis, (which ruled contrary to the Smith case on the *quantum meruit* issue). In the context of a written contract for improvements and remodeling to the defendants' Hinsdale home, which went through eight change orders that significantly increased the $534,970.00 original contract price, the Bilstroms refused to pay the last draw and locked the contractor out of the job. They defended Artisan's three-count complaint for $208,695.69 (mechanic's lien, breach of contract and unjust enrichment), stating that Artisan failed to provide them with the statutory consumer rights brochure required by the Act, and moved the trial court to dismiss pursuant to Section 2-619. In the midst of the court proceeding, the plaintiff filed an arbitration complaint pursuant to the express provision of the contract (which was not initialed by the defendants) that permitted alternative dispute resolution. The Defendant filed a motion in court to stay and strike arbitration, contending that the arbitration clause was void because the contractor did not disclose and obtain their specific acknowledgment of this provision in writing on the contract as required by the Act. The trial court dismissed the Plaintiff's Amended Complaint with prejudice for failure to provide the consumer brochure, and ruled that Artisan waived the arbitration clause by filing the lawsuit "which requested complete relief".

On appeal, the particular issue in this case relating to providing the statutory consumer brochure and disclosing contract provisions for arbitration are considered together with the arbitration issues. The contract was between Artisan Design and the Bilstroms. There was direct contact, and the Act applied, regardless of the fact that there were no "door-to-door salesmen using high pressure tactics" as described in Justice Barry's partial dissents in the Slepian case and as argued here by the Plaintiff on appeal. The Act requires in Section 30 that there be a signed written contract or work order/estimate before work in excess of $1,000 is begun, that any arbitration provision or waiver of the right to a jury trial be disclosed and acknowledged in the contract, and in Section 20 that a brochure as specifically worded in the Act be given to the consumer at the time of contracting. The failure to provide the brochure served as a basis to dismiss the contractor's complaint in the trial court. The Second District, however, interpreted the brochure as a "tip sheet designed to educate consumers", characterizing it as "purely informational" and the legislature did not intend to allow the consumer to defeat all legal and equitable claims…" of a contractor by virtue of the failure to provide this information. This would "lead to mischief and a result the legislature could not have intended. A consumer could enjoy the fruits of another's labor in the amount of even hundreds of thousands of dollars without paying a penny even where there contractor performed to the complete satisfaction of the consumer. While it is true that the constitutional guarantee of freedom of contract does not withdraw from legislative supervision the power to provide restrictive safeguards in the form of reasonable regulations and prohibitions in the interest of the community, liberty implies the absence of arbitrary restraints." Making a distinction between other provisions of the Act which provide for specific sanctions for failure to follow its mandates, (i.e., failure to advise of the arbitration or jury trial provisions render them null and void), the Court notes that the legislature defined certain acts as "unlawful" (such as beginning work without a contract or estimate signed in writing) but did not provide for any specific consequences for failing to provide the brochure. Therefore failure to

provide the brochure "does not vitiate the contractor's right to recover either in equity or in law, but if certain requirements are met, the failure to furnish the brochure may give the consumer a cause of action under the Consumer Fraud and Deceptive Business Practices Act". Rejecting the argument that Smith holds that any violation of the Act voids the contract and defeats the contractor's claim, Justice Zenoff opines that "to the extent that Smith may be read broadly enough to hold that the failure alone to provide the brochure defeats a contractor's claims, we decline to follow it." The order striking the arbitration proceeding was affirmed, but on the grounds that the failure to disclose and obtain the consumer's acknowledgement of the contract provision for arbitration made that avenue for dispute resolution void under the Act, and the contractor was not entitled to arbitrate in any event.

5. HOME REPAIR AND REMODELING ACT; CONSUMER FRAUD ACT ANDFAILURE TO PROVIDE CONSUMER BROCHURE *REDUX:*

Kunkel v. P.K. Dependable Construction Co., (5th Dist., February, 2009), 387 Ill.App.3d 1153, 902 N.E.2d 769, 327 Ill.Dec. 648, is a case about a defective roof, and had it been just that, it would probably not be worthy of a second read, but in the opinion written by Justice Spomer, the Court went further and discussed the Home Repair and Remodeling Act in a manner that litigators in this area need to note.

The Kunkels hired P.K. Dependable Construction, LLC in 2003 because they were having problems with their roof leaking. A written contract relating to the replacement of the roof for $4,522 was signed that contained a five year warranty of the workmanship. When the existing roof was torn off and issues with the underlayment were discovered, the contract increased to $5,623 to cover the cost of replacing some of the sheeting beneath the old roof. There was also some damage to the stucco siding that occurred in the process of the removal of the roof, which the contractor attempted to repair in the process, but appeared to make the leaking worse as time wore on. A few days after the work was complete and the bill paid in full, the first rain came and the roof began leaking again. Over the next three years repeated calls were followed by 20-25 unsuccessful attempts by the contractor to correct the problem, and the Kunkels eventually filed a two count complaint when another contractor told them that they would have to completely replace the roof and they did. Count I alleged a breach of contract and warranty, and Count II alleged violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, (815 ILCS 505/2Q(c) and 2Z; these two provisions require a home repair provider to return any monies paid within 10 days of receipt of a written demand for a failure to commence or complete home repair work as agreed, (Section 2Q(c)), and incorporates violations of the Home Repair and Remodeling Act (815 ILCS 513/1 et seq.) as violations of the Consumer Fraud Act (Section 2Z).
The trial court heard significant and often contradictory testimony in a bench trial and entered a judgment in favor of the Kunkels for compensatory damages of $6,725, representing the cost of replacing the defective roof and the ceiling damaged by the recurring leakage after P.K. Dependable completed its work, and $6,151.50 for attorneys fees under the Consumer Fraud Act Count II. The compensatory damages award was affirmed summarily: "The measure of damages when a contractor has provided defective performance is generally the cost of correcting the defective condition.", but the trial court's award of attorneys fees was reversed. Noting that the Consumer Fraud Act provision permitting awards for violations of other consumer protection legislation, Section 505/2Z, expressly provides that "Any person who *knowingly* violates the…Home Repair and Remodeling Act…commits an unlawful practice within the meaning of this act." The uncontradicted testimony at trial was that the

contractor did not provide the Kunkels with the "Home Repair: Know Your Consumer Rights" brochure required by the Home Repair and Remodeling Act prior to the execution of the contract or estimate, 835 ILCS 513/20(a), but the Appellate Court notes that there was no evidence in the record that the failure to provide the brochure was a "knowing violation" necessary to support an award of attorney's fees under the Consumer Fraud Act. Further, the Court reasoned there was no evidence that the failure to provide the brochure was the proximate cause of the damages incurred. The other provision of the Consumer Fraud Act found to have been violated by the trial court was Section 2(Q), requiring the return of the payments made by a consumer within 10 days of a demand to a contractor who fails or refuses to commence or complete work. The Appellate Court reversed this finding as well, noting that Mrs. Kunkel's letter to the contractor was limited to requesting warranty work and did not make the demand required by the Act; "equat[ing] a defective-performance situation with a failure to 'complete' work would render every breach of contract for defective performance a consumer fraud. We do not believe that the legislature intended that result, especially in a case such as this, where the defendants make extensive attempts to correct the defective condition." (The Court also discussed whether there was a private cause of action for failure to provide the brochure under the Home Repair and Remodeling Act, but reached a conclusion which was somewhat confusing, and certainly not nearly as compelling as the language and reasoning in <u>Artisan Design Build, Inc. v. Bilstrom</u>.)

6. **HOME REPAIR AND REMODELING ACT; UNJUST ENRICHMENT AND QUANTUM MERUIT**:

The majority opinion in <u>K. Miller Construction Co. v. McGinnis</u>, (1st Dis., Aug. 10, 2009), 209 Ill.App. LEXIS 771, clearly and succinctly stated that "In this appeal, the only open question is whether the legislature's declaration [in the Illinois Home Repair and Remodeling Act, 815 ILCS 513/1 et seq.] that contracts falling under the Home Repair Act are "unlawful" means that the equitable remedy of quantum meruit is foreclosed." McGinnis, the consumer, was a sophisticated lawyer who had a long personal and professional relationship with the contractor. The contractor, Miller, was well established and did not appear to be the "fly-by-night" sort usually referred to in these cases or sought to be curbed by the Act. The contractor obtained a loan to complete the construction after the consumer refused to make further progress payments until completion, and the project was completed and approved by the consumer after a "walk-through".

Justice Garcia's majority opinion begins with an acknowledgment that in <u>Smith v. Bogard</u>, (4th Dist., 2007), 377 Ill.App.3d 842, that Appellate Court held that a quantum meruit claim was barred by the Act as consistent with the result intended where there was no written contract, but nonetheless holds that because it is not clear that the legislature intended to "repeal the common law remedy of quantum meruit in the context of the home repair and remodeling industry", quantum meruit "remains an equitable remedy available…where the nature of the remedy itself provides ample protection against abuses the passage of the Act was meant to address."

Miller Construction Company's Complaint was in three counts - for mechanic's lien, breach of an oral contract, and quantum meruit. Without hesitation, the Appellate Court affirmed the trial court's dismissal of the counts relating to the lien and breach of contract under the provision of Section 15 of the Home Repair and Remodeling Act declaring such oral contracts "unlawful". Without a "lawful" contract, there could be neither a cause of action for breach nor a mechanic's lien claim. Additionally, the Court here had no difficulty rejecting Miller's argument that time and material contracts are exempt

from the Act because such contracts are not susceptible of "total cost" written contract or estimate. Neither did it have any difficulty in rejecting the contractor's argument that full performance of the work "provides a safe harbor" from the application of the Act. Struggling throughout the opinion with the possibility that "a consumer with Mr. McGinnis background [a lawyer] may be inclined to join such a "wrong" to gain an unjust enrichment from an honest, but uninformed, contractor", the majority holds that the use of the "ambiguous" word "unlawful" in the Act does indicate an legislative intent to "repeal the common law remedy of quantum meruit", regardless of the decision in Smith v. Bogard. Further criticizing the Fourth District opinion in Smith, Justice Garcia argues that the *Smith* Court did not explain in its decision how permitting quantum meruit actions "would reward deceptive practices and would be violative of public policy". Accordingly he argues that the purpose of the Act will be served without doing violence to the logic of the purpose of the Act because the contractor will not be able to recover on the "unlawful" oral contract and will be equitably limited to the value of his work under quantum meruit without permitting the consumer to be unjustly enriched. Recounting that quantum meruit has a "long and vigorous history in Illinois jurisprudence" and noting that the doctrine of *stare decisis* does not require the First District to follow the Fourth District decision in Smith, the majority reasoning pivots on the statement that "…outside the context of the [Home Repair and Remodeling Act], no party disputes that a trial on the quantum meruit claim will render justice to both Miller and the McGinnises…and allowing parties to litigate a quantum meruit claim is not inconsistent with promoting fair and honest practices in the business of home repair and remodeling, the public policy declared in the Act….quantum meruit limits a contractor's recovery to no more than he deserves for his work. In fact, to allow a homeowner to be unjustly enriched at the hands of an honest contractor may well be at odds with the public policy behind the Act."

Justice Wolfson's eloquent dissent begins: "Every once in a while a reviewing court has to choose between following the law and reaching a fair result. The majority reaches a fair result, but it does not follow the law." He does "…not agree with the idea that a contractor who acts unlawfully, in violation of the public policy made explicit in the statue, has the right to seek the equitable remedy of quantum meruit..." Citing the opinion in Smith that "Allowing a contractor a method of recovery when he has breached certain provisions of the Act would run afoul of the legislature's intent of protecting consumers, would reward deceptive practices, and would be violative of public policy…", Justice Wolfson's position is that "No authority has been cited, nor have I found any, supporting the proposition that an act declared unlawful by the legislature can be sanitized by filtering it through a court of equity...", and ends with a suggestion that "There is nothing new about the need to suggest the exercise of judicial self-restrain when it becomes tempting to intrude into the legislative field." Clear as it is to even Justice Wolfson that "…in this case it is the contractor who needs protecting…" nonetheless, "we would not be wrestling with this issue if the contractor had done what the statute clearly told him to do—put it in writing."

Justice Gordon adds his voice by "specially concurring in the result but not the judgment." The majority need not resort to the lengthy logic, distinction and history it employs in its opinion to justify its effort to do the right thing, but simply refer to the last line of Section 30 defining "Unlawful Acts", where the legislature states "This conduct is unlawful but is not exclusive nor meant to limit other kinds of methods, acts or practices that may be unfair or deceptive. This, Justice Gordon finds "leaves the door open to equitable remedies, such as the quantum meruit claim in this case. (Interestingly, Judge Robert J. Quinn of the Cook County Mechanics Lien Section authored a 25 page trial court opinion entered on October 6, 2008 in which, following a detailed review of the legislative intent and impact of the law he states" "A far more sensible approach, (than declaring all contracts unlawful and void for failure to

comply with the Act), and one more in line with the intent of the legislature as expressed by the terms of the HRRA, would be to reject the argument that all violations should automatically result in summary dismissal, and allow trial courts to use the full remedial structure provided by the legislature for enforcement of the HRRA. This would necessarily include private actions under the Consumer Fraud Act…This would allow the court to consider the facts, the equities and the proofs to fashion an appropriate remedy. If there is a violation of the HRRRA and it results in damage to the consumer, the consumer will have an opportunity to prove it and be compensated accordingly. If there was no such damage and a technical violation only, the contractor would be allowed to recover fair compensation…As things stand, there can be no guarantee that a mindless application fo the HRRA will not result in a profoundly inappropriate result."

7. LANDLORD TENANT; COMMERCIAL LEASE, TENANT'S OBLIGATION TO REPLACE ROOF and RIGHT OF SETOFF:

In 1994, Kerasotes Showplace Theatres received from Dickinson, Inc. an assignment of a 30 year lease . that originated in 1978 for space to occupy as a movie theatre upon which Dickinson had constructed an additional theater. Quincy Mall v. Kersotes Showplace Theatres, LLC, (4th Dist., 2009), 388 Ill.App.3d 820, 903 N.E.2d 887, 328 Ill.Dec. 227, The landlord was Quincy Malls, Inc. In 2003, Kerasotes inspected the roof of the theatre because of leaks, was advised that the roof would have to be replaced, not repaired, and sent a letter to the Mall requesting that the landlord replace the roof. The Mall rejected Kerasotes' position that the responsibility to replace the roof belonged to the landlord, noting that the lease provided "Tenant agrees during the term hereof to keep and maintain in good condition and repair, the demised premises and every part thereof, including without limitation the foundation, exterior walls, roof…" The tenant's response was that it was clear the roof had to be replaced not repaired, that the lease did not require the tenant to provide a new roof as opposed to making ordinary repairs, and since the landlord had not challenged the necessity of the replacement or estimated cost, but would not undertake the project, Kerasotes would replace the roof and take a setoff against the rent for the $79,298 cost of the roof replacement. The roof was replaced in the spring and between June and December, 2005, Kerasotes set-off $79,298 from its rent. In December, Quincy Mall filed suit to recover the unpaid rent under the lease. The tenant denied that any rent was due, counterclaimed for declaratory judgment that it was entitled to the setoff and requested a finding that the Mall was in breach of the lease for failing to replace the roof. The trial court granted summary judgment in favor of the tenant. On appeal, the Fourth District affirmed. Citing the First District decision in Sandleman v. Buckeye Realty, Inc., (1991), 216 Il.App.3d 226, 576 N.E.2d 1038, holding that "A general covenant of the tenant to repair, or to keep the premises in repair, merely binds him to make the ordinary repairs reasonably required to keep the premises in proper condition; it does not require him to make repairs involving structural changes, or to make renewals and replacements which would last a lifetime.", the Court here notes that in order "To shift this burden from the landlord to the tenant, the warrant for the change must be 'plainly discoverable' in the parties' lease." Like the Court in Sandleman, which held that the lease did not contain a plainly discoverable clause, the lease here in the section entitled "Maintenance of Building, etc." fell short of the clear and unambiguous language required. All that was clear in the Mall's lease was who was to repair the roof, not who was to replace it if necessary. Without a clear and unambiguous shifting of responsibility, the Mall was responsible for replacement. The Court also disagreed with the Mall's assertion that the tenant did not have a right to a setoff and suspense of rent payments when the

landlord breaches a duty to repair or replace. The covenant to repair is separate and independent to the covenant to pay rent. Even though a landlord breaches its duties under the lease, the tenant nonetheless continues to be obligated to pay rent. "In short, the Mall was correct that Showplace's duty to pay rent was independent of the Mall's duty to replace the roof . However, Showplace was also correct that it met its duty to pay rent through the set off." While the duty to pay rent continues, the tenant can satisfy that duty with a setoff of the sums it has paid to correct the landlord's breach. "Thus, when a commercial landlord fails to replace a critical component of the leased premises, which is vital to the operation of its commercial tenant's business—in violation of the landlord's duty to do so, as previously discussed—the commercial tenant may set off such replacement cost provided that (1) the tenant has informed the landlord of the need to replace the necessary component, (2) the landlord failed to replace the necessary component in a timely manner, and (3) the tenant informed the landlord of its intent to set off the reasonable costs of the necessary replacement."

8. LANDLORD TENANT; LIMITATION PERIOD FOR ACTION FOR DAMAGES UNDER THE CHICAGO LANDLORD TENANT ORDINANCE:

In Landis v. Marc Realy LLC, (Il. S. Ct. No. 105568, Filed Decided May 21, 2009, Dissent added on Denial of Rehearing on October 16, 2009), http://www.state.il.us/court/Opinions/SupremeCourt/2009/May/105568.pdf, Ken and Ana Landis filed a suite against their landlord, Marc Realty, LLC and Elliot Weiner, for damages based on the Chicago Residential Landlord Tenant Ordinance for failure to return their security deposit and accrued interest. The case would not be nearly as interesting or remarkable except for the fact that Landis waited more than four (4) years before filing suit. The long chain of events began when Landis reported a leak in their apartment, which the landlord was unable to repair. The parties agreed that Landis would be released from the lease even though their was more than a year remaining on the term, and their security deposit returned. Their monthly rent was $4,500 per month for the first year, and $4,600 per month for the second year. They had tendered a security deposit of $8,400. They surrendered their keys on November 16, 2001, and moved out. On April 25, 2006, Landis filed a two-count suit for damages under the RLTO to recover their security deposit and interest, and defendants moved to dismiss the suit as untimely pursuant to 735 ILCS 5/13-202, which provides that "actions for damages ...for a statutory penalty…shall be commenced within 2 years next after the cause of action accrued." Landis responded that the action, based on the RLTO, was not a "statutory penalty, but was limited by 735 ILCS 2/13-205, (5 years "catch all"), or the 10 year limitation for written contracts in 735 ILCS 2/13-206. The trial court dismissed the action, and the First District affirmed. The Supreme Court granted leave to appeal, noting that the appellate courts are split on the issue of whether Section 13-202 applies to ordinances, and affirmed as well, but not without some significant dissenting opinion.

Justice Burke begins noting that the case turns on the proper interpretation of the "statutory penalty" language contained in Section 13-202, and whether the RLTO is a "statute" as intended to be covered by this limitation period, or something else (i.e., a municipal ordinance not covered). Although the legislature did not include the word "ordinance" in the statute, and the dictionary definitions of "statutory" generally refer to legislature of a state or county, the Court applies the principal of statutory interpretation that gives the "fullest, rather than the narrowest, possible meaning", and concludes that "statutory" encompasses municipal ordinances because "To allow a plaintiff an additional three years to file a claim based on a municipal ordinance would, in the words of the defendants, 'elevate municipal

law over state law." The Court's decision also considered the "consequences" that result from construing the language of the limitation legislation and found it "more reasonable to apply the two-year limitations period uniformly to all claims based on statutory penalties, whether they are imposed by state statute or by city ordinance." Justice Kilbride, joined by Karmeier, dissented: "I submit that the legislature did not intend to include municipal ordinances within the meaning of 'statutory penalty." Reviewing the dictionary definitions, as did the majority, Justice Kilbride concludes that the word "statute" is "unmistakably" understood to refer to the legislative actions of states or counties, and an "ordinance" refers solely to municipal enactments. There is, he reasons, no "ambiguity" as the majority asserts to justify its conclusion otherwise that the legislature intended "a broader meaning". To assure his dissent is clearly understood, Justice Kilbride restated his objections in a 'second dissent' upon the denial of the Landis petition for rehearing.

9. **LANDLORD TENANT; NOTICE BY POSTING ON OCCUPIED APARTMENT AND FAIR DEBT COLLECTION PRACTICES ACT:**

The world changed for attorneys in 1996 when the United States Supreme Court considered whether an attorney attempting to collect a car loan was subject to the Fair Debt Collection Practices Act in George W. Heintz v. Darlene Jenkins, (U.S. 1996), 514 U.S. 291, 115 S. Ct. 1489, 131 L.Ed. 395, and decided that he was, indeed. Since then, a continuing saga of cases and forms have been dealing with FDCPA and its impact. The Third District decision in American Management Consultant, LLC v. Carter , (3rd Dist., 2009), 392 Ill.App.3d 39, 2009 Ill.App. LEXIS 530 , may have been decided on the narrower issue of whether the landlord's five day notice was correctly served, but there is a great deal of discussion about the FDCPA in the decision and another seminal landlord/tenant concept – notice by posting.
The residential apartment lease at issue contained a "monthly discount" of $112.00 off the rent of $675.00 a month if Carter paid on time. If, however, she paid late, (i.e., after the fifth day on the month), the rent was increased by $75.00, and further increased by $5.00 for each day until paid. An error occurred in the monthly statements issued by the property manager in June, 2007, when there was a "relocation credit" of $101.00 improperly reflected on Carter's bill. Carter paid her monthly rent on time, deducted the $112.00 discount and also deducted the $101 relocation credit. The management company sent out another statement which withdrew the relocation credit and charged her the $75 increased rent for failure to pay on time. Things escalated with the management company adding the additional $5 per day charge, posting notices on Carter's door demanding additional sums and then culminating with a 5-Day Notice. 735 ILCS 5/9-211 provides that a 5-Day Notice can be posted rather than personally served, but only "in case no one is the actual possession of the premises". Here Carter was not only in possession on the date the notices were posted, but still in possession on the trial date. "Section 9-211 is an exclusive list of permissible deliver methods and must be strictly enforced…Although we recognize that defendant did receive notice of plaintiff's forcible entry and detainer action, strictly construing the statute, as we must, we hold that the method by which notice was 'served' requires a finding that defendant did not receive property notice and precludes plaintiff from obtaining relief under the statute…Without proper service of notice, the defendant's due process rights were violated and the court could not go forward on the purely statutory proceeding of forcible entry. "

Additionally, the decision recognizes that "no Illinois court has ever applied the FDCPA to a forcible entry and detainer action", and that in 1994, the Northern District of Illinois held that an action for

possession under the Forcible Entry is not "an action to collect a debt" by the attorneys that had filed the suit, and entered summary judgment in an FDCPA action by the tenant in Galuska v. Blumenthal , (N.D. Ill. June 26, 1994). 1994 U.S. Dist. LEXIS 8785 Nonetheless, the Third District decision here "declines" to follow Galuska based on the reasoning that the purpose of the FDCPA applied to the procedures and tactics plaintiff employed here with the "discounts" and "increases" in the rent due. "Despite the FDCPA's failure to include past-due-rent in its explicit definition of "debt", we find that efforts to collect rent may (and in this case did) involve abusive collection practices…Accordingly, we now hold, as a matter of first impression, that lessors are required to comply with the FDCPA in their efforts to collect past due rent from their lessees." (Justice Wright and Schmidt specially concurred with Justice McDade's opinion, but the "thorough and instructive discussion of warranted concerns relating to the Fair Debt Collection Practices Act…are not determinative of the outcome of this appeal. I prefer to reserve an analysis of the merits of the complaint for another day…if and when a 5-day notice is properly served."

10. MECHANICS LIENS; DAMAGES FOR A SUBSTANTIALLY PERFORMED CONTRACT AND ATTORNEYS FEES FOR FAILURE TO PAY WITHOUT JUST CAUSE:

In O'Connor Construction Company, Inc. v. Belmont Harbor Home Development, LLC., (1st Dist., 2009) 391 Ill.App.3d 533, 909 N.E.2d 294, 330 Ill.Dec. 581, the carpenter subcontractor filed a suit against the against the general contractor, B2Bilt, Inc., and developer, Belmont Harbor Home Development, LLC in three counts alleging a mechanic's lien action, breach of contract, and quantum meruit/unjust enrichment. The subcontractor prevailed on its mechanic's lien and contract actions at the trial court, but appealed the trial court's measure of damages and denial of its attorney's fees.

O'Connor was hired by B2Bilt for the construction of a residential condominium project by the general contractor, and the general was to provide O'Connor with the building materials for the carpenter subcontractor to use in completing its work. The original contract was for $320,000, but with change orders increased to $351,989. B2Bilt, however, fell on hard times during the construction, the project fell behind in the work schedule, and the method of completion changed from a "floor-by-floor" to a "unit-by-unit-as-sold-basis", and a newly formed limited liability company, Park Plaza, took over as the general contractor and assumed its rights and duties under the contract. This included the duty to provide O'Connor with carpentry materials as the work progressed. Issues relating to a payment dispute were followed by a failure to provide materials to complete its work, and O'Connor filed a mechanic's lien claim notice. Park Plaza demanded O'Connor remove its lien notice, and terminated it as the carpentry subcontractor when it refused. The trial court found that Park Plaza breached the contract by its failure to provide materials in a timely manner so O'Connor could do its work, and found that O'Connor substantially performed its work under the contract.

On appeal, the First District reversed relating to the measure and calculation of damages. Based on the fact that the trial court found as a matter of fact that O'Connor had substantially performed the contract, its measure of damages employing a quantum meruit rather than the Restatement of Contracts calculation method, (i.e., the amount of the contract, (including profit), less the cost of completion by another party without a profit component), was inconsistent and incorrect. If the amount O'Connor was entitled to upon completion of the contract was $351,989.00, and the trial court determined that the cost to complete the work after it was terminated was $41,200, ($52,800 less profit of $11,600), after credit of previous payments of $175,189.50, so that the balance due on the contract was $176,799.50, and less

a credit of the cost of completion of $41,200, O'Conner, the Appellate Court reasoned, was entitled to damages of $139,599.50, plus interest thereon, on the mechanic's lien claim. The trial court had also awarded $50,876.50, (plus interest) on the second count. On that breach of contract claim, the Appellate Court also took the trial court to task for its award of damages, and characterized its award as an incorrect application of the quantum meruit theory as the basis for its calculation; "Accordingly we hold that the trial court erred in calculating its award of damages and therefore that award must be vacated and the case remanded for a proper calculation of the damages to which O'Connor is entitled under the theory of foreclosure of a mechanics lien and breach of contract." Although a bit veiled, it appears from the math examples used by the Appellate Court that its criticism was that the trial court failed to include a 'profit' component based on the contract in its award, and focused on the actual value of the work (quantum meruit) completed. Additionally, the reversal addressed the trial court's denial of attorney's fees to O'Connor under section 60/17 of the Mechanic's Lien Act. The trial court determined that the defendants had a good faith basis for refusing payment to O'Connor because it "frontloaded" its draw requests with its profit on the contract. This, the Appellate Court holds, was not inappropriate in any way. At trial the defendants admitted that they knew O'Connor was due at least the undisputed amount of $47,562.19, and "offered no reasonable explanation for withholding payment on an amount which was not in dispute". Further, the Appellate Court held that including their profit in the payment requests was not improper: "But in fact O'Connor was properly seeking payment under the formula as we have discussed. That formula was the amount due to O'Connor under the contract, less the amount it would cost to complete the work.", and therefore the refusal "to pay the full amount due under the contract without just cause" entitled the subcontractor to attorneys fees under 770 ILCS 60/17.

11. MECHANIC'S LIEN; DEMAND FOR SWORN STATEMENT;QUANTUM MERUIT; OATH VS AFFIDAVIT:

In Weydert Homes, Inc. vs. Kammes (No. 2-08-0768, filed 09-30-2009, 2nd Dist.), Plaintiff general contractor agreed on January 11, 2007 to build a house for Defendant. On February 28, 2008, Plaintiff recorded a claim for mechanic's lien. Plaintiff's affidavit set forth that its attorney met with Defendant at a title company on March 28, 2008, at which time Defendant's attorney requested a "sworn' contractor's statement showing subcontractors and amounts owed them. On April 8, 2008 the attorney again requested a "current" sworn statement. Plaintiff furnished a sworn statement dated December 18, 2007 signed by Plaintiff's president but not notarized. When Plaintiff sued in 3 counts (mechanic's lien, breach of contract and *quantum meruit*) the trial court granted Defendant's 5/2-619(a)(9) Motion to Dismiss, agreeing that Plaintiff's refusal to provide a sworn statement defeated the lien claim and the breach of contract claim, and also agreeing that the *quantum meruit* count should be dismissed because Plaintiff had pleaded the existence of an express written contract.

The opinion by Justice Zenoff stated that the rights created under the Mechanic's Lien Act are statutory and in derogation of common law, and the technical and procedural requirements necessary to invoke the Act are strictly construed; once procedural requirements are satisfied, "the Act is liberally construed in order to accomplish its remedial purpose." Next the court reviewed Article 5 of the Act and found that the statement referred to therein must be "in writing, under oath or verified by affidavit…" The opinion recites the express language to be provided in the statement (is it merely a "tip sheet"? – *ed.*) and considered Plaintiff's argument that the December 18th statement complied with the Act because it was "under oath" and therefore satisfied the Act's requirement. The court discussed the differences between

oaths (a form of attestation by which a person is bound by conscience to act truthfully or a pledge) and affidavits (a voluntary statement of fact under oath sworn to or affirmed before one with authority to administer oaths and certified under seal of office) and found that the two are not the same and were not intended by the legislature to be used interchangeably. The Court found that the December 18th statement was not an affidavit but also did not constitute an oath, which requires, under the Oaths and Affirmations Act (citation omitted) that whenever a person is required to take an oath it shall be administered by a person so empowered (e.g., a judge, clerk, notary, etc.). Here the oath was not administered as required by statute, and the court rejects Plaintiff's argument that parol evidence be admitted, noting that Plaintiff could have tendered an affidavit in response to Defendant's Motion to Dismiss, agreeing with the trial court that the statement failed to comply with section 5.

The court also rejected Plaintiff's argument that the purpose of section 5 was met because defendant had notice of all subcontractors' claims, refusing to read into the procedural requirements a limitation the legislature did not express and distinguishing Northwest Millwork Co. vs. Komperda, 338 Ill. App. 3rd 997 (2003), where the failure to furnish a sworn statement was held not preclude a breach of contract claim. The court stated that "it is well settled that the creation of a mechanics lien is entirely governed by the Act, and the rules of equity jurisprudence are irrelevant at this stage" (cf. the HRRA - *ed.*). "Courts should not extend mechanic's liens 'to cases not provided for by the language of the Act even though they may fall within its reason'" (citation omitted).

Regarding the breach of contract count, the court cited Ambrose vs. Biggs (156 Ill. App. 3rd 515 (1987) for the proposition that an owner who does not receive a sworn statement and therefore is not protected from potential subcontractor's claims is justified in not paying the contract and thus is not in breach of contract. However, in *Northwest Millwork*, as in the case at bar, by the time the contractor who failed to provide the sworn statement had filed suit it was long after the 90-day period for subcontractors to file lien claims and the owner could not claim actual prejudice or exposure to lien claims, so *Ambrose* is not controlling. Defendant asserted the December 18th statement he received was false and thus he was still subject to lien claims, but the court held that Defendant could not refuse to rely on the unsworn statement to defeat the lien count and then rely on it to defeat the breach of contract count.

Regarding the last count, the court stated that the fact that Plaintiff pleaded the existence of a written contract did not preclude pleading *quantum meruit* in the alternative, and cited Fieldcrest Builders, Inc. vs. Antonucci, 311 Ill.App. 3rd 597 (1999) for the proposition that "a contractor who is not entitled to a mechanic's lien because he did not substantially perform in a workmanlike manner is limited to recovery in *quantum meruit*". Here, the trial court's finding was premature due to the motion that addressed the pleadings and the lack of evidence heard regarding contract formation. Plaintiffs' reliance on cases involving subcontractors' sole remedy under the Act was found misplaced. The court distinguished the facts of another case cited by Plaintiff involving the bad faith of a contractor and summed up its reversal of the dismissal of count III with the observation "[i]f the technicality was not sufficiently egregious to deny plaintiff recovery for breach of contract, it is not sufficiently egregious to deny its claim for *quantum meruit*."

12. MECHANIC'S LIENS; NOTICE/FILING AGAINST PUBLIC FUNDS AND NOTICE OF SUIT:

Mechanic's Liens are technical and complex enough. Add in a lien against public funds and the notice requirements together with a recent change in the statute, and there you have real complexity, as

illustrated in the warning case Speedy Gonzalez Landscape, Inc. v. OCA Construction, Inc., (1st Dist., Oct., 2008), 385 Ill.App.3d 699, 896 N.E.2d 494, 324 Ill.Dec. 708. Speedy Gonzalez was a subcontractor hired to do hauling, disposal and replacement of rock and gravel by OCA for site preparation of the New Westinghouse High School project. OCA was the general contractor on this public funds project administered by the Public Buildings Commission of Chicago, (PBC). When it was not paid timely, Speedy Gonzalez claimed it was due approximately $697,000 and served notice of its mechanic's lien claim on the public funds held by the PBC for payment to OCA in excess of $1.3 on December 20, 2006. Ninety days later, it filed its complaint in the Circuit Court requesting an accounting of the sums due to it under Section 23 of the Mechanics Lien Act *then in effect*. It did not, however, deliver a copy of the complaint it had filed until 30 days thereafter on April 20, 2007, 120 days after serving notice of its lien claim. OCA moved the trial court to dismiss Speedy Gonazalez' complaint under Section 2-619 asserting that the failure to serve the municipal corporation (PBC) within 90 days of the lien notice as required by Section 23 barred the action. The trial court agreed and dismissed the case. Section 23 of the Mechanics Lien Act governs public fund lien claims, and requires that a subcontractor must first provide written notice of his claim to the clerk or secretary of the municipal corporation contracting with the general contractors, furnish a copy of the notice to the general contractor, and then, within 90 days after giving the notice, file a complaint for accounting in the circuit court, make the contractor a party to the suit, and deliver a copy of the complaint to the municipal corporation. (770 ILCS 60/23(b). The Act provides that "failure to commence proceedings within 90 days after giving notice of the lien terminates the lien." Here, Speedy Gonzalez gave its notice of lien and filed the complaint timely, but did not deliver a copy of the complaint to the PBC within the 90 days and only on the 120th day after the notice, and the trial court held this failure caused a termination of the lien, even though the suit was timely filed. The Court noted that the purpose of the procedure relating to the public funds was to provide for the clerk or secretary of the municipal corporation to withhold sufficient funds to pay the subcontractor's claim from the general contractor's funds for a limited period - 90 days. Then, the statute provides, the funds "shall be released for payment to the [general] contractor unless the person claiming the lien shall have instituted proceedings and delivered to the clerk or secretary a copy of the complaint. (770 ILCS 60/23(b). Accordingly, the Court held, when the 90 days after notice is received passes, the municipal corporation is to release the funds unless it receives notice of the filing of the law suit for accounting. That did not occur in this case until the 120th day, 30 days after the funds were released by the municipal corporation according to the statute; "However, if the party claiming the lien does not institute proceedings and deliver to the clerk or secretary a copy of the complaint within that 90-day period, section 23(b) then in effect authorizes the disbursement of the funds to the contractor, effectively terminating the lien claim." (emphasis in original). The failure to deliver a copy of the complaint to the PBC by Speedy Gonzalez, (poetic, eh?) was "fatal to its cause of action."

Moreover, it should be noted that throughout this opinion, the Court refers to Section 23(b) as it was "then in effect"; i.e., in 2006 when the notice was given and 2007 when the complaint was filed. Since then, Public Act 95-274, effective August 17, 2007 re-wrote Section 23(b), and, while keeping the 90 day filing of the complaint following notice of lien limitation, has amended the law to provide for notice to the municipal corporation within 10 days of the filing of the complaint. There are a number of other substantive changes with this amendment, making an already complex are of the law perhaps even more so, and certainly more 'technical'.

13. MORTGAGE FORECLOSURE; MOTION TO DISMISS BASED ON FHA REGULATIONS:

In an recessionary economy, with the resulting volume of mortgage foreclosures, review of a case like Hayes v. M & T Mortgage Corporation, (1st Dist., March 25, 2009), 389 Ill.App.3d 388, 906 N.E.2d 638, 329 Ill.Dec. 440, (leave to appeal to the Illinois Supreme Court denied September 30, 2009, 2009 Ill.LEXIS 1733), is probably a good idea to assure that the claims bantered about on the internet and by earnest but desperate defendants do not sway us too easily.

Hayes borrowed $288,000 from Old Second Mortgage Company to rehabilitate her residential property in Chicago. The mortgage was FHA insured and serviced by M & T Mortgage Company. Loan funds were held in escrow to be disbursed to contractors as the rehabilitation progressed. Hayes filed a suit contending payments to a contractor, Custom Home Built Improvement, were improper because the contractor's work was unsatisfactory. She also alleged that Old Second and Custom Home Built Improvement committed fraud in colluding in a scheme whereby the contractor received payment for its substandard work because the lender did not inspect the contractor's work as required by FHA regulations. She defaulted on the mortgage and M & T Mortgage Company, (to whom the servicing of the loan had been transferred by Old Second), brought a foreclosure action by counterclaim within Hayes' action for damages. Hayes filed a motion to dismiss the counterclaim, alleging that the lender had failed to comply with the FHA regulations, and therefore could not begin foreclosure. The lender filed its motion to dismiss Hayes' complaint. In response to the Hayes' 2-615 motion to dismiss, the lender argued that the alleged breaches of the FHA regulations were not apparent from the face of the pleadings, and therefore the motion was inappropriately brought. In response to Hayes' 2-619 motion, the lender argued that because it was based on factual allegations unsupported by affidavit (i.e., the alleged breaches of FHA regulations), it, too, could not be granted. The trial court denied Hayes' motions to dismiss the foreclosure, and she was eventually defaulted when she failed to answer the counterclaim for foreclosure. She appealed from the order confirming the foreclosure sale.

The First District affirmed the trial court in a decision that reviews the well established rule in Bankers Life v. Denton , (1st Dist., 1983), 120 Ill.App.3d 576, that breaches of HUD regulations are a valid defense to foreclosure. (In Denton, the breached HUD regulations required an effort at a face-to-face interview by a lender before foreclosing an FHA insured mortgage.) The regulations relied upon by Hayes related to an obligation to appoint an inspector to supervise the work of contractors in rehabilitation projects funded by FHA insured mortgages. This was the alleged failure Hayes relied upon as her defense of the foreclosure and basis for an action for damages. The mortgage documents, however, only stated "in many circumstances regulations issued by the Secretary will limit Lender's rights…[and] this Security Instrument does not authorize acceleration or foreclosure if not permitted by regulations of the Secretary." The Court found that this reference fell short of indicating that the parties intended to incorporate the regulations, in their entirety, into their mortgage, and that do have done so, the mortgage would have had to "display an intention to completely adopt that document, not merely require compliance with specified portions.", and not merely acknowledge "that the lender's foreclosure rights under the mortgage are subordinate to applicable HUD regulation; they do not demonstrate an intent to make each loan regulation enforceable under the partie's agreement." Moreover, while the regulations are intended to govern the administration of FHA insured mortgages, it is well established that they do not create a private cause of action, such as Hayes' action for damages. The regulations are the rules HUD imposes on lenders, and "do not control directly the relationship between the mortgagor and mortgagee and may not be invoked by the mortgagor as sword in an offensive cause of action

against the mortgagee, citing a Court of Appeals of Maryland decision. Rejecting the argument that satisfaction of the HUD regulations was a condition precedent to foreclosure, (similar to the theory in Denton), the Court holds that "The issue of the lenders' compliance with federal regulations was thus an affirmative matter not properly raised as a basis for a 2-615 motion.", because the provisions of the Illinois Mortgage Foreclosure Law setting forth the statutory allegations for a complaint (735 ILCS 5/15-1504), do not require a pleading of compliance with federal regulations in the complaint. (This is an argument that will likely be grasped quickly by lender's attorneys responding to the often plead motions to dismiss foreclosure cases for 'standing' under Section 2-615 [*ed*].) The fact that the appeal was very likely not well presented appears from the Court's response to the appellant's argument that the attorney's fees award was unsupported by the evidence. Noting that neither the evidence of the attorney's fee request nor the report of sale were in the appellate record, the Court could not review the sufficiency of the documentation of the fees or the report of sale "and must resolve the doubt created by the inadequacy of the record by affirming the circuit court."

14. REAL ESTATE TAXES; THE TIMING OF BECOMING AN INTERESTED PERSON TO REDEEM:

In order to redeem real estate taxes, the party redeeming must have an interest in the real estate. In the recent case of In re Application of the Country Treasurer v. Ezra Chaim Properties, LLC, (2nd Dist., August 27, 2009, No. 2-08-0755), 2009 Ill.App.LEXIS 809, the Second District considered and ruled on the 'timing' of the acquisition of that interest and found in favor of the redeeming party. A.P. Properties, Inc. bought the delinquent real estate taxes of residential property of Shirley Dietrich in Gurnee, Illinois, when she failed to pay the 2003 taxes. The tax sale was held on December 6, 2004, and the redemption period was set to expire on August 7, 2007. On April 10, 2007, A.P. Properties filed its petition for a tax deed with the Circuit Court. On August 7, 2007, however, at the last possible moment, Ezra Chaim Properties redeemed the taxes. Thereafter, A.P Properties filed a petition to expunge the redemption in the pending tax deed petition proceeding, alleging that Ezra Chaim Properties did not have an interest in the real estate as required by statute, 35 ILCS 200/21-345. Ezra filed a response attaching a contract dated August 6, 2007 by which Shirley Dietrich agreed to sell the property to Ezra for $10,000, provided Ezra redeemed the taxes for $17,833.05, paid the outstanding homeowner's association dues and paid Dietrich the additional sum of $65,000 when Shirley surrendered possession to Ezra nine months later. The response also attached a "declaration of interest" in the premises by Ezra, which was recorded in the Lake County Recorder's Office on August 7, 2007, and a deed from Dietrich to Ezra recorded on August 9, 2007. The trial court granted Ezra's petition for summary judgment finding that there was no material issue of fact that Shirley had conveyed and interest to allow Ezra to redeem, and that the Illinois Mortgage Rescue Fraud Act (765 ILCS 940/5) was not applicable to the transaction. The various depositions and affidavits submitted to the trial court indicated that Dietrich was fully aware of the last date to redeem, contacted AP Properties to request and extension of time so that she could redeem, and met with the principals Ezra Chaim Properties in her home, surrounded by several of her relatives, who witnesses the execution of the contract on August 6, 2007. The next day, Shirley went to Chase Bank where Ezra paid her the $10,000 due on the contract and her signature on the deed was notarized by a bank employee. After leaving the bank, Shirley and the Ezra principals went to the Lake County courthouse where Ezra redeemed the taxes, then Ezra recorded the declaration of interest and paid her past due homeowners' association dues.

The trial court held that because it entered into the contract with Shirley prior to the expiration of the redemption period, it had a right to redeem and granted summary judgment to Ezra Chaim Properties. The Second District affirmed. Noting that "The primary purpose of the tax sales provisions of the Property Tax Code is to coerce tax delinquent property owners to pay their taxes, not to assist tax petitioners in depriving the actual owners of their property.", the Court also enunciates that "A tax certificate holder's right to a deed is subservient to the owner or interested person's right to redeem." The property tax code provides that a redemption can be made only by those persons having an interest in the property, but also presumptively states that "Any redemption shall be presumed to have been made by or on behalf of the owners and persons interested in the property…[and] No redemption shall be held invalid by reason of the failure of the person redeeming to have recorded or filed the document evidencing an interest in the property prior to redemption." Based on these provisions in the Code, the fact that the deed from Shirley to Ezra was not recorded until two days after the redemption on August 9, 2007, did not render the redemption by a person not interested in the property. The interest was created by the contract on the day before the redemption expired, the redemption was timely, and the fact that the deed was later recorded did not create a problem; especially because of the statutory presumption in favor of redemption. Moreover, A.P. Properties' rather creative attempt to employ the Mortgage Rescue Fraud Act (765 ILCS 940/5) to invalidate the transaction between Shirley and Ezra was rejected. The Act only applies to transactions where the owner is offered a right to re-purchase the real estate from the rescuer. Shirley had no option to repurchase here, and the transaction therefore was not a "distressed property conveyance" as defined by the Act. . It was also undisputed that Shirley was not complaining about the transaction, and A.P. Properties had no standing to challenge the conveyance that created an interest under the Act since it was not a consumer/owner of the real estate.

15. REAL ESTATE TAXES; TAX DEEDS AND NOTICE TO SUBSEQUENT TAX PURCHASERS:

In re Application of the County Collector, (Edward Scott, LLC v. Nadine Sackor), (1st Dist., 2009), 391 Ill.App.3d 656, 909 N.E.2d 337, 330 Ill.Dec. 624, the Court was confronted with the competing claims of two separate scavenger tax sales purchasers, (although they were represented by the same attorney…). Green, Inc., (Edward Scott, LLC's predecessor) purchased the 2000 and 2001 taxes at the 2003 scavenger sale on two vacant properties located in Riverdale, Illinois. Thereafter, at the 2005 scavenger sale, Nadine Sackor purchased tax certificates for the same properties relating to the 2002 and 2003 tax years. In May, 2006, a tax deed petition and lis pendens notice was filed on behalf of Sackor by attorney Judd Harris. In July 2006, the same attorney file a petition for tax deed on behalf of Green, Inc. Green served "Take Notices" as required by the statute on a number of persons and entities based on a title search and published a notice in the Chicago Daily Law Bulletin, but did not service a notice on Sackor. Instead, on October 5, 2006, Green redeemed from the Sackor tax sale. When Green thereafter attempted to proceed in the tax deed case, Sackor filed a *pro se* objection to the issuance of the tax deed stating that she had not received a notice as required by 35 ILCS 22-10 through 22-25 as one of the "parties interested in the property". (The petition also alleged that her attorney "intentionally, deceitfully and fraudulently with malice has proceeded on the behalf of Green, Inc.", to which the Appellate Court noted that the Supreme Court and ARDC has exclusive jurisdiction and a complaint had been filed against Harris.) The trial court denied Scott's, (who had then substituted for Green), petition for a tax deed based on Sackor's objection, finding that she was a necessary party entitled to notice within 3 and 5

months prior to the expiration of the redemption period. Failure to give her that notice was a 'fatal defect' in the petition for a tax deed. The Appellate Court affirmed, noting the six statutory requirements for the issuance of a tax deed: (1) expiration of the redemption period without redemption, (2) all subsequent taxes and special assessments have been paid, (3) all subsequent forfeitures and sales have been redeemed, (4) notices required by the statute have been given, (5) all public funds advancements have been paid, and (6) the petitioner has complied with the provisions of the law entitling him to a deed. One of the compliance provisions is the notice of the tax sale and redemption date required by Section 22-10 be given to "the owners, occupants, and parties interested in the property". Scott argued that Sackor's interest was only that of a "certificate holder" of personal property, not an interest in real estate, until the tax deed issued, and therefore did rise to that of a "party interested in the property" under the statute. The Court agreed that in a prior cited case, (<u>In re Petition of Gacki</u>, (1994) 261 Ill.App.3d 982), there was dicta that a tax certificate is a "mere species of personal property and does not give the certificate holder a "real property interest in the land until the certificates have been redeemed and the petition for a tax deed has been granted", but it also noted that a certificate holder has rights in the real estate to petition for the appointment of a receiver, request a sale be declared in error, redeem subsequent taxes and proceed to a tax deed, and therefore "does acquire some interest in the property and the right to take certain actions to protect that interest", including the right to expunge a redemption or objection to the redemption by a persona that does not have a redeemable interest and other rights. Therefore, "a subsequent tax purchaser is a party 'interested in the property' and is entitled to notice pursuant to section 22-10…[and]…the trial court did not err in finding that Green's failure to service notice on Sackor was a fatal defect in its petition for tax deed." Even though Sackor's tax purchase was redeemed by Green, that redemption occurred in October , 2006, and the notice was required to all parties interest in the property between June 21, 2006 and August 21, 2006, based on a November 21, 2006 redemption date, rendering Sackor one of the 'parties interested in the property" at the time the notice was required. Further, and based on the same reasoning, Sackor had standing to object to Green's tax deed petition even though the redemption satisfied her purchase bid and caused the surrender of her certificate because she had the right during the operative notice period and thereby had standing.

16. RESIDENTIAL REAL PROPERTY DISCLOSURE ACT; APPLICABILITY TO 'TEAR DOWNS':

Joseph and Stephanie Ross entered into a contract to sell their Wheaton, Illinois residential real property to Skarin Custom Homes on March 10, 2006. Incident to the sale, Ross completed the required disclosure statement, representing that they were aware of flooding or recurring leakage problems in the basement, and elaborated that there was "some seepage…during heavy rains." After the closing, Skarin discovered that there was a history of severe flooding in terms of several feet of water rather than "some seepage" in the basement and elsewhere on the property, and filed suit alleging breach of contract, common law fraud, and a cause of action under the Illinois Residential Real Property Disclosure Act, (765 ILCS 77/1 et seq.). Ross responded with a motion to dismiss pursuant to 735 ILCS 5/2-619 that since the Amended Complaint acknowledged the intention of Skarin was to 'tear down' the house and build a new custom home for sale, the disclosure act was inapplicable and should not be a source of recovery. The trial court agreed and held that the intention to raze the house and rebuild removed the transaction from the sort contemplated by the Act. . The trial court relied, at least in part, on an earlier

decision in Grady v. Sikorski, (1st Dist., 2004), 349 Ill.App.3d 774, 812 N.E.2d 457, where the Court found that the Act did not require a disclosure report where the sale was for an uninhabitable property that 'would not be made livable in the future', and therefore was not a transaction involving residential real property under the Act.

On appeal, the trial court was reversed. Skarin Custom Homes, Inc. v. Ross , (2nd Dist., February 26, 2009), 388 Ill.App.3d 739, 906 N.E.2d 1, 329 Ill.Dec. 156. Unless one of the nine enumerated exceptions set forth in Section 15 of the Act is present, the Act "unambiguously" applies to any transfer of residential real property. (The nine exceptions are (1) Transfers pursuant to Court Order, (2) Transfers from a mortgagor to a mortgagee, such as a deed in lieu of foreclosure, (3) Transfers by a fiduciary, such as a guardian or administrator of an estate, (4) Transfers from one co-owner to another, (5) Transfers pursuant to testate or intestate succession, (6) Transfers to a spouse, (7) Transfers involving "relocation", (8) Transfers from or to a governmental entity, and (9) Transfers of new construction that has not been occupied.) A plan to tear down the existing residential structure is not one to the "exceptions" set forth in the Act, and here the residential real estate owned by Ross was "within the express language of the Disclosure Act." The facts in the Grady case relied upon by the trial court were "clearly distinguishable" in the Appellate Court's ruling. The Grady building was not in use as a residence and there no intent to use it in the future, whereas the Ross structure was a fully functioning, in use residence, and habitable at the time of the contract. The Ross structure was within the express definition of residential real property in the Act, (765 ILCS 77/5), and did not come within one of the nine exceptions. Ross had to disclose, and that disclosure was inadequate here.

17. ZONING VARIANCES; *LA SALLE* FACTORS; RIGHTS OF ADJACENT OWNERS; SOVEREIGN IMMUNITY; HOME RULE; LEGISLATIVE vs. ADMINISTRATIVE ACTION; BURDEN OF PROOF:

In Dunlap vs. Village of Schaumburg, et al. (No. 1-08-1358, filed 09-25-2009, 1st Dist., 6th Div.), the village granted a request for a variance for the Wehmeier family, owners of residential property, to allow for the construction of a sun roof in their back yard in violation of a 30-foot setback requirement. Plaintiff, an adjacent landowner, sued the Wehmeiers and the Village of Schaumburg, contending that granting the variance was contrary to state statute and local ordinance. The trial court granted summary judgment in favor of the Defendants and the appellate court affirmed in an opinion that had originally issued as a Rule 23 but was subsequently published.

The opinion is interesting as a primer on the type of evidence (expert and otherwise) to be elicited at a zoning hearing, standing to sue and private rights of action by adjacent landowners, burdens of proof relating to the 2006 amendments to the Zoning Enabling Act (65 ILCS 5/11-13-15), standards of review of administrative decisions, the difference between legislative and administrative action (as expressed in the legislative enactments passed in response to Klaeren vs. Village of Lisle, 202 Ill. 2nd 164 (2002) and to nullify the effect of that decision).

While the opinion is lengthy there is not much new law to review. The opinion, however, is a good review of all of those factors that are presented when homeowners seek to prevent adjacent owners from making modifications to their properties, and provides as well a thorough explanation of the 2006 amendments to the Zoning Enabling Act passed in response to *Klaeren*. The holding would apparently be the same if Schaumburg did not enjoy home rule.

The opinion also provides a convenient summary of the constitutionally mandated standards for the validity of variances as set out in *La Salle National Bank of Chicago vs. County of Cook*, 12 Ill. 2nd 40, 46, 145 N.E. 2nd 65, 69 (1957) and commonly referred to as the "La Salle Standards":

> Zoning ordinances are within the discretion of municipalities unless they are "arbitrary, capricious or unrelated to the public health, safety and morals. In making this determination… factors…include: (1) existing zoning and uses of nearby property; (2) extent to which property values are diminished by the zoning restriction at issue; (3) extent to which this diminution, if any, promotes the public health, safety, morals or general welfare; (4)relative gain to the public compared to the hardship imposed on the property owner; (5) suitability of the subject property for the zoned purposes; and (6) length of time the property has been vacant as zoned.

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