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

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1. BUILDING ORDINANCE VIOLATIONS; CONTEMPT RATHER THAN DIVESTITURE OF TITLE IS THE APPROPRIATE PENALTY:

The ongoing and continual violations of the building ordinances of the City of Quincy by Donald Weinberg over a period of years are the subject of the Fourth District's decision in City of Quincy v. Weinberg, (4th Dist., January, 2006), http://www.state.il.us/court/Opinions/AppellateCourt/2006/4thDistrict/January/Html/4050381.htm. In September 1999, plaintiff, the City of Quincy, filed a complaint seeking an injunction against defendant, Donald L. Weinberg, alleging municipal code violations relating to fire prevention, housing, zoning, together with averments that he maintained a nuisance by storing an assortment of junk and items acquired at auctions on his real property. Weinberg, a licensed attorney, was diagnosed with obsessive/compulsive disorder, attention deficit, hyperactivity, and depression, and the City's core complaint

[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 foundations, 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.

was that his residential property was actually serving as a warehouse or storage facility. In October 1999, the trial court entered a default judgment. After years of monitoring defendant's compliance with its orders, during which Weinberg would, at times, make substantial progress towards compliance only to relapse into further accumulations of yard waste and rubbish which would then overflow to his vehicles parked on the adjacent streets, the court found Weinberg in indirect criminal and civil contempt in October 2004. In April 2005, as the ultimate sanction for his contempt, the court required defendant to divest himself of title to the real estate.

The Appellate Court's decision devotes a good deal of consideration to the issues raised in the trial court below relating to the default judgment entered against Weinberg, his motions for substitution of judge, and indirect criminal and civil contempt, but it is the analysis of the order requiring that he divest himself of the title to the property as a result that is perhaps most noteworthy. Recognizing that while the over the years the accumulation of rubbish and debris on Weinberg's property may have desensitized the trial court, the Fourth District states that "One man's garbage may be another man's treasure, and orders to remove items should clearly point out the reasons for doing so, i.e., to lessen the risks to public health and safety, to allow reasonable access to emergency personnel, or to abate a hazardous or dangerous condition." When, after following many different avenues of sanctions against Weinberg, the trial court finally warned him that his ownership of the property could be in jeopardy and then entered an order directing him to divest himself of the property, this was a matter that would be "carefully scrutinized by any appellate court" and would amount to a "drastic" and "radical" sanction. While the Appellate Court "sympathized" with the trial court's efforts to force defendant's compliance, and even complimented it on its attempt to find professional help for his medical problems, "the forced sale of a citizen's home is the ultimate in judicial sanctions". A court's an inherent power to punish for contempt is essential to maintain its authority, but its use must be tempered: "The inherent power of contempt is a powerful one; it is not to be used lightly nor when other adequate remedies are available; if it is used, it must conform strictly to the dictates of the law." The takings clauses of the United States and Illinois Constitutions prohibit government taking the private property of its citizens without just compensation. The United States Supreme Court has stated that "'in selecting contempt sanctions, a court is obliged to use the "least possible power adequate to the end proposed."'" Spallone v. United States, 493 U.S. 265, 276, 107 L. Ed. 2d 644, 656, 110 S. Ct. 625, 632 (1990), quoting United States v. City of Yonkers, 856 F.2d 444, 454 (2nd Cir. 1988), quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231, 5 L. Ed. 242, 248 (1821). The court was of the belief that jail time and monetary fines had been inadequate sanctions for defendant. However, the Court failed to see how judicial eviction was the "least possible power" adequate to the proposed end. A review of the record does not indicate continued removal by plaintiff of defendant's "illegal" property at defendant's cost could not achieve the necessary result."

2. EMINENT DOMAIN; PRIVATE ROADWAYS, EASEMENTS AND PUBLIC USE PROVISIONS OF HIGHWAY CODE:

The City of Des Plaines sought a declaration in the Circuit Court of Cook County that a private road had become a public highway by prescription pursuant to the 15-year public use provision of section 2-202 of the Illinois Highway Code (605 ILCS 5/202) in City of Des Plaines v. Redella, March 2006), http://www.state.il.us/court/Opinions/AppellateCourt/2006/2ndDistrict/March/Html/1051301.htm, The trial court granted Summary Judgment in favor of the City and the Appellate Court for the First District reversed and remanded. This opinion contains an interesting analysis of the manner in which a private roadway can become a public highway; i.e., by statute, by dedication, and by prescription over time.

The original owners of contiguous improved residential lots had granted an easement over the western edge of the lots as a means of ingress and egress to a dedicated roadway (Ballard Road), which easement was to cease "…at such time as a hard surface roadway [wa]s constructed along either the Western or Northerly boundaries of the real estate." The private road in question (Trailside Lane) was entirely within the boundaries of the easement. The Defendants resided on Trailside Lane and a subdivision plat recorded several years later described Trailside Lane as a "roadway easement". A later conveyance of one of the lots reserved an appropriate easement over the remaining property for access to Ballard Road, and it appeared to be the only means of ingress and egress to and from public roads. During the years that followed, the City plowed and maintained the street, while later the defendants resurfaced Trailside Lane and installed speed bumps.

The City contended that for more than 40 years residents had traversed Trailside to gain access to Ballard Road, thereby making the road a publicly dedicated right-of-way -- essentially by prescription. A city employee averred that for at least 35 years the city had plowed snow, patched pot holes, repaired water mains, trimmed bushes and picked up branches on Trailside. Defendants counterclaimed seeking declaratory judgment that the easement was still in full force and effect, and therefore the area underlying by the easement was still owned in fee by the lot owners, resulting in Trailside remaining a private road. In the alternative, Defendants contended, if the court decided that Trailside was not longer private, they then must receive just compensation for the "taking" by Des Plaines under eminent domain. Defendants further argued that the minutes of City Council meetings even described Trailside as a "private street" while continuing to provide city services to the area over the years and also provided evidence of the expenditures of the owners for paving of the road.

The prescriptive period for public use of a private road is 15 years under section 2-202 of the Highway Code, and the Court found that a public highway can established by way of a prescription in the same manner and under the same requirements necessary to establish a private easement by prescription (the use must be adverse, exclusive, under claim of right, continuous and uninterrupted, with knowledge of the owner but without consent). The Court found that there were questions of fact in this case whether Trailside Lane had been used by the public as a highway for 15 years sufficient to preclude

Summary Judgment; "The establishment of an easement by prescription almost always is a question of fact.", and requires the same elements as a private easement by prescription.

The Court indicated that in order to establish the element of exclusivity it was "…unnecessary to show that only the claimant has made use of the way, because exclusive use means that claimant's right to use the lane does not depend upon a like right in others…" but "…does require that the rightful owner be altogether deprived of possession."

The Court also found that no compensation need be paid by a governmental entity when a roadway becomes a public highway by prescription. "While no case in Illinois has directly addressed this issue, courts in other states have determined compensation is not required when a private road is converted to a public highway by prescriptive easement...the general rule is that acquisition of an easement by prescription is not a taking…".

3. HOMEOWNERS ASSOCIATIONS; THE DUTY TO MAINTAIN COMMON ELEMENTS AND STANDING TO SUE:

The Plaintiffs in Willmschen v. Trinity Lakes Improvement Association, (2nd Dist., December, 2005), http://www.state.il.us/court/Opinions/AppellateCourt/2005/2ndDistrict/December/Html/2050343.htm, brought suit against their homeowners association and board of directors relating to the condition of two lakes which were part of the association's common area. Trinity Lakes was developed in the 1970s and consists of approximately 200 single family homes. The two lakes, Upper and Lower Mayslake, were excavated during development and construction for water retention, detention and drainage. The Trinity Lakes Declaration defined the lakes as common areas and provide that the association is responsible for their maintenance. Over the years, however, the lakes had become a nuisance in the absence of proper maintenance. Although the Board had previously formed a committee to investigate the condition of the lakes, and obtained a plan for remediation, it did not undertake the remediation. The homeowners sought declaratory judgment requiring the association to comply with the maintenance provisions of the declaration and to implement the remediation proposal obtained, including dredging the lakes, removing sediment and undesirable vegetation, and introduce appropriate aquatic plans and erosion control., and the owners sued in four counts. Counts 1 and II alleged breach of the declaration covenants against the association and the board for its failings. Counts III and IV alleged the condition of the lakes was a public and private nuisance. The Association and Board filed combined motions to dismiss pursuant to Section 2-615 and 2-619. The trial court granted the motions to dismiss, finding the homeowners lacked standing to sue because they suffered no injury different than those suffered by other homeowners and the public, the complaints failed to allege that the association and board were responsible for creating the condition of the lakes, and the 'business judgment rule' precluded the actions against the board for failing to undertake the remediation.

Turning first to the business judgment rule, the Second District noted that this presumption that officers and directors of a corporation make decision based on information in good faith and with the best interest of the corporation as their guide can be overcome. "While courts ordinarily will not interfere with management decisions on the basis of their wisdom or lack thereof, the business judgment rule does not afford a corporation carte blanche to behave unlawfully. Hence we agree with the observation of a court from a sister stated that 'it may be good business judgment to walk away from a contract, [but] this is not a defense to a breach of contract claim." While the individual members of the board are immune pursuant to the General Not for Profit Corporation Act, (805 ILCS 105/108), which protects one for acts done in the "exercise of judgment of discretion" by an officer or director of a not-for-profit corporation, unless the acts involve willful or wanton conduct, the corporation itself can still be responsible for breach of contract, or failure to perform duties such as those set forth in the declaration here.

The Court also reversed the trial court's ruling on the motion to dismiss the nuisance counts because there was no "showing of a special injury". A plaintiff must allege a special injury or direct harm to themselves, and here, where the plaintiffs were owners of parcels which either bordered on or had sight lines to the lakes, (which included only 19 or 200 properties in the Association), they met that element of pleading. The particular lots of these plaintiffs "receive[d] the brunt of the unpleasant smell and appearance of the lakes", and while the entire development would be benefited by the action sought, these plaintiff's suffered "uniquely because of their unique position adjacent to the lakes."

Finally, even though the Association was not responsible for the condition of the lakes, (i.e., the condition was caused by runoff from construction sites and fertilized private lawns), the condition was an artificial rather than a natural one. The allegations in the complaint established that the Association knew of the nuisance, had a reasonable opportunity to correct the condition on property which it possessed and for which it was responsible, and failed to do so, establishing a cause of action in the Plaintiffs under the Restatement of Torts.

4. LANDLORD/TENANT; CHICAGO RESIDENTIAL LANDLORD TENANT ORDINANCE AND "OWNER OCCUPIED"

The harshness of the application of the restrictions and requirements of the Chicago Residential Landlord Tenant Ordinance has lead many to question its application as in the recent case <u>Allen v. Lin</u>, 356 Ill.App.3d 405, 826 N.E.2d 1064, 292 Ill.Dec. 628 (1st Dist., March 31, 2005), http://www.state.il.us/court/Opinions/AppellateCourt/2005/1stDistrict/March/Html/1040831.htm. The issue was whether the property rented was exempt from the ordinance because it was an "owner occupied building containing six units or less" as defined in the ordinance. The trial court held the property was within the exemption, but the First District reversed.

Mark Allen, together with three other individuals, rented a townhouse apartment from Edward and Judy Lin for one year. The rent was $1,600 per month and the security deposit $2,400. The Lins lived in a townhouse two units away from the unit they rented. When the lease was terminated at the end of the year, (although it appears that Allen sublet to another person during the year), the Lins returned $2,200 of the security deposit, advising that they were retaining $200 to make repairs to the kitchen floor. Allen did not cash the check immediately, and two days later the landlord sent him a second letter enclosing a second check for only $1,500, requesting that the previous check be returned, and advising that the difference was because of they forgot to deduct $700 they had paid to the person subletting the apartment. The tenant did not cash either check, but filed suit alleging breach of the lease and the Chicago Residential Landlord Tenant Ordinance. The landlord answered, alleged affirmative defenses and counterclaimed. At a bench trial, the Court granted the landlord's motion for a directed verdict on the ordinance violation claims, finding the property was exempt under the Ordinance. The evidence presented established that there were a series of townhouses in the complex consisting of ten to fifteen units. Lin owned two units in one building consisting of six townhomes under a single roof; renting one and residing in the other. This, the trial court held, met the exemption granted to "dwelling units in owner-occupied buildings containing six units or less" found in Section 5-12-020(a).

On appeal, the Plaintiff/tenant argued that townhomes are separate buildings, and that groups of units standing side-by-side, event if "under one roof", do not constitute a "building" so as to qualify for the exemption granted to "owner-occupied buildings" under the ordinance. In agreeing with the tenant's interpretation, the Court begins noting "It is the purpose of [the ordinance] and policy of the city, in order to protect and promote the public health, safety and welfare of its citizens, to establish the rights and obligations of the landlord and the tenant in the rental of dwelling units, and to encourage the landlord and tenant to maintain and improve the quality of housing." The Court found that "each townhouse constitutes a separate building for the purposes of the RLTO". Turning first to the definition of a "building" found in the Chicago Municipal Ordinance, ("Building" means a structure, or part thereof, enclosing any occupancy including residential, institutional, assembly, business, mercantile, industrial, storage, hazardous and miscellaneous uses. When separated by firewalls, each unit so separated shall be deemed a separate building." Chicago Municipal Code Section 13-4-010), the Court then relied upon case law relating to the definition of "building" in the context of smoke detector requirements for townhomes, (<u>Sandstrom v. De Sliva</u>, 268 Ill.App.3d 932, 645 N.E.2d 345, 206 Ill.Dec. 340 (1st Dist., 1994) 268 Ill.App.3d 932, which found each townhome to be a separate building under the ordinance requiring a smoke detector be installed).

Justice Quinn specially concurred, noting his belief was that the City Council crafted the owner-occupied exemption based on the expectation that if an owner lived in the same building as the tenant, there was less likelihood that the landlord would not maintain and operate the rental units appropriately, and that employing this reasoning the "exception" should not be applied to townhomes.

5. LANDLORD/TENANT; COMMERCIAL LEASE ESTOPPEL CERTIFICATE:

In K's Merchandise Mart, Inc. v. Northgate Limited Partnership, 359 Ill.App.3d 1137, 835 N.E.2d 965, 296 Ill. Dec. 612, (4th Dist. Sept. 26, 2005) http://www.state.il.us/court/Opinions/AppellateCourt/2005/4thDistrict/September/Html/4041034.htm , the landlord attempted to force an anchor tenant in a shopping center to pay maintenance expenses, including management fees, based on an estoppel certificate previously executed by the tenant. During a convoluted series of transfers that included the sale of the leasehold by a bankruptcy trustee, the tenant executed an estoppel certificate to a lender and purchaser of the shopping center stating that "All obligations of Landlord under the lease have been performed….[and]…there are no offsets or defenses that Tenant has against the full enforcement of the lease by Landlord." There was no actual statement in the lease requiring the tenant to pay the landlord's management fee, and over the years it appeared that a 5% management fee had been charged to the tenants but not itemized or detailed on the annual statements. The new purchaser from the landlord attempted to support imposing the obligation to pay the management fee on the tenant by invoking the estoppel certificate in conjunction with the prior annual billing/payment conduct of the parties. The trial court rejected the contention finding that there was no express obligation under the lease to pay the landlord's management fee, and holding that "the execution of the estoppel certificate did not modify the terms of the lease."

The Appellate Court agreed that the lease did not provide for the payment of the management fee, and upheld its further reasoning by resorting to the Black's Law Dictionary definition of an estoppel certificate as one which "certifying for another's benefit that certain facts are correct, as that a lease exists, that there are no defaults, and that rent is paid to a certain date.", to hold that this particular estoppel certificate did not impose any additional obligations. To read more into the estoppel certificate would allow it to be used "as a device to make undisclosed changes to the lease". Noting that "It is difficult to be critical of either party in this case. [The purchaser from the landlord] apparently believed that K's had an obligation to pay management fees. In forming that belief, however, Northgate did not rely on what appeared in the lease documents or the estoppel certificate. [It] instead relied on what it was told…" Since neither the lease nor the estoppel certificate *expressly* addressed management fees, the trial court properly found that the estoppel certificate could not be construed to obligate the tenant to pay a management fee. It served only to acknowledge the existence of the lease, the non-existence of any defaults and that rent was paid to a certain date."

6. MECHANIC'S LIENS: HOME REPAIR AND REMODELING ACT:

Central Illinois Electrical Services filed a mechanic's lien foreclosure against Harvey and Rosalee Slepian in Central Illinois Electrical Services, L.L.C. v. Slepian, No. 3-04-0548, 358 Ill.App.3d 545, 831 N.E.2d 1169, 294 Ill.Dec. 844 (3rd Dist., June 23, 2005), http://www.state.il.us/court/Opinions/AppellateCourt/2005/3rdDistrict/June/Html/3040548.htm. Central Illinois alleged an oral contract for electrical work for which it claimed a mechanic's lien in the sum of $14,000, and also alleged unjust enrichment and quantum meruit as a basis for recovery. The Slepians, on their part, alleged as an affirmative defense that Central Illinois had violated the Illinois Home Repair and Remodeling Act, (815 ILCS 513/1 et seq.), Consumer Fraud and Deceptive Business Practices Act, (815 ILCS 505/1 et seq.), and the Home Repair Fraud Act, (815 ILCS 515/1 et seq.), by not providing a written estimate of the cost of work before beginning the project, and added claims based on breach of contract and unjust enrichment to boot.

This slew of claims and counterclaims began when the Slepians began remodeling their home. The project took two years and cost the Slepians approximately $1,000,000. Central Illinois was the second electrical contractor on the job, taking over after the first electrical contractor was paid in excess of $15,000. Central Illinois worked throughout the project without any plans, job specifications or architectural drawings. There were also a number of changes in the work made by Mrs. Slepian as the work progressed based on day-to-day inspection of the work. Central Illinois did not provide a written estimate for the work before beginning the work. Although they paid the bills submitted by Central Illinois a monthly basis for a total of $57,375.00, the Slepians refused to pay the final statement of $14,000 when presented.

At trial and on appeal, the Slepians argued that because Central Illinois did not provide written estimates for the job in violation of the Illinois Home Repair and Remodeling Act, the contract for electrical work was unenforceable, and therefore the electrician could not recover. The Act provides that "Prior to initiating home repair or remodeling work for over $1,000, a person engaged in the business of home repair or remodeling shall furnish to the customer for signature a written contract or work order that states the total cost, including parts and materials listed with reasonable particularity and any charge for an estimate." (815 ILCS 513/5) The Act further provides that "It is unlawful for any person engaged in the business of home repairs or remodeling to remodel or make repairs or charge for remodeling or repair work before obtaining a signed contract or work order over $1,000." (815 ILCS 513/30) Central Illinois responded that because another contractor had begun the project and it took over the work in progress, it did not "initiate" the project as contemplated under the Act. Additionally, inasmuch as there were no plans or drawings, and the Slepians were constantly changing the scope of the project, it was impossible for Central Illinois to provide an estimate of the total costs under the Act at any time. Finding the electrician's interpretation of "initiated" to be "strained and does not comport with a plain reading of the statute", the Third District rejected the exculpatory efforts Central Illinois. Noting "Furthermore, there is no exception under the Act for projects billed on a time and material basis, or projects that become unpredictable in scope or nature…The language of the Act clearly and unambiguously requires anyone engaged in the business of home repair and remodeling to obtain a signed contract before initiating work that will exceed $1,000 in costs", the Appellate Court reversed and remanded the case to the trial court.

Justice Barry dissented in part, opining that it was clear by all accounts that the Slepian remodeling project was not one which was ever predictable in scope or nature from the outset, and therefore it would have been impossible for Central Illinois to provide a written estimate contemplated under the Act. Further, "it is clear that the Slepians do not fall into the class of consumers the legislature was seeking to protect and CIES does not fall into the category of contractors from whom the legislature was seeking to protect consumers." Central Illinois did not employ "door to door salesmen using high pressure tactics", they came on to the job after the first electricians had been terminated, and the Slepians, who "were not naïve or inexperienced consumers in danger of being defrauded" during their $1,000,000 remodeling project, paid their monthly invoices for well over a year. "For the Slepians to now complain that they were somehow disadvantaged by CIES failure to draft a contract at the beginning of the relationship is simply disingenuous."

(Ed. Note: Public Act 94-490 effective January 1, 2006, amends the Home Repair and Remodeling Act to require a contractor to advise the consumer before the contract or agreement is signed if there is a provision requiring disputes be submitted to binding arbitration or which includes a waiver of the right to a jury trial, and that the consumer has the option of accepting or rejecting both provisions. The failure to advise the consumer will void the provisions.)

7. MECHANIC'S LIEN; SECTION 34 DEMAND, TIME FOR FILING SUIT AND MULTIPLE NOTICES:

The trial court held that Gateway Concrete forfeited its mechanic's lien by failing to commence an action on the lien within 30 days of receipt of a demand to sue pursuant to Section 34 in Gateway Concrete Forming Systems, Inc. v. Dynaprop XVIII, 356 Ill.App.3d 806, 826 N.E.2d 1051, 292 Ill. Dec. 615 (1st Dist. Mar. 31, 2005). http://www.state.il.us/court/Opinions/AppellateCourt/2005/1stDistrict/September/Html/1043222.htm . On appeal, the issue was whether the time period to file suit was extended when the owner sent multiple demands to commence suit to the date 30 days from the date of the last received demand notice. The Appellate Court affirmed the ruling that filing within 30 days of the last received demand was not sufficient compliance with the Act. The suit must be filed within 30 days of the first received demand notice.

The owners in this case prepared a notice and demand for suit under Section 34 on March 10, 2004 and served three copies by certified mail sent to three different representatives of Gateway Concrete in three different places. The first notice was received by Gateway at its business office in Wisconsin on March 12, 2004. The second demand was received by Gateway's president on March 15, 2004, in Illinois. Gateway's attorney received the third notice in his office on March 18, 2004. The complaint to foreclose the Gateway mechanic's lien was filed on April 14, 2004, and the owners filed a Section 2-619 Motion to dismiss attacking the jurisdiction of the court because the complaint was filed on the 32^{nd} day after the first notice was received.

The Mechanic's Lien Act permits a contractor to file suit up to two years after completion of the work, (and therefore constitutes a potential cloud on the owner's title during that period), but Section 34 permits the property owner to force the issue of the validity of the claims by requiring suit to be commenced within 30 days. The Court's decision here holds that the notice provision in Section 34 is jurisdictional, but does not imply that only a single notice may be given to a single representative. "Applying these rules of statutory construction, we conclude that the plain language of section 34 in no way limits the number of people who may receive service of the demand notice to enforce the lien." Nonetheless, the wording of the defendant's multiple notices demanding that suit be filed "within thirty (30) days of service of this notice" in each of the notices received on different days was not "misleading". The Act is to be strictly construed relating to jurisdiction and perfecting liens because it creates substantial rights in derogation of the common law. Filing within 30 days of receipt of the demand is a jurisdictional requirement which must be complied with strictly once a demand is made, and failure to file within 30 days of the receipt by the owner removed jurisdiction from the court. "Nevertheless, defendants fulfilled their obligation to effect proper service on March 12 and triggered the tolling of the 30-day period….As in Vernon Hills, we find that defendants were not responsible for educating plaintiff about the operation and effect of the Act and that plaintiff's confusion cannot excuse its failure to file a timely complaint when it was properly notified. Vernon Hills, 287 Ill.App.3d at 309."

8. MECHANIC'S LIENS; SUBCONTRACTOR LIMITED TO SUMS REMAINING DUE STATED IN SWORN STATEMENT:

A material supplier, (Bricks, Inc.,), brought an action against the general contractor, masonry subcontractor, and owner to enforce a mechanic's lien to recover payment for bricks valued at $64,510.22, in Bricks, Inc. v. C&F Developers, 836 N.E.2d 743, 297 Ill.Dec. 12 (1st Dist., September 22, 2005), http://www.state.il.us/court/Opinions/AppellateCourt/2005/1stDistrict/September/Html/1043222.htm . The issue before the trial court was whether Brick's recovery was limited by the amounts set forth in the signed sworn statement of the general contractor. The trial court believed that they were so limited, and granted judgment, but only in the amount remaining due under the sworn statement of $10,000. Bricks appealed, contending that the court erred in limiting its recovery. The First District affirmed the trial court.

The signed sworn statements deposited in accord with Section 5 of the Mechanic's Lien Act did not identify Bricks, but only listed Bricks' customer, G&B Construction, Inc., as the project's masonry subcontractor. The statements also detailed the masonry subcontract total amount as $270,000, of which $260,000 was shown as having been previously paid to G&B, leaving only $10,000 remaining due at the time Bricks filed its notice of claim for lien. Although Bricks complied with the notice requirements of Section 24 as a subcontractor within 90 days after completion of the work, "Many cases have found that a secondary subcontractor seeking to enforce his mechanic's lien, even if in compliance with the notice requirements of Section 24 of the Act, is limited to recovering only that amount which is owed to his immediate contractor at the time the notice of his lien is given." The purpose of Section 5 in requiring the sworn statements is to protect an owner from subcontractors who are not listed or amounts understated unless the omission or understatement is known by the owner, and an owner is entitled to rely upon the contractor's affidavit in making payments if he has no knowledge of false or incomplete information on the statements. Here, since there was only $10,000 remaining unpaid on the masonry subcontract according to the sworn statement when Bricks provided notice, that was the limitation of its recovery. The decision concludes "We empathize with Bricks' plight. We recognize that in the instant case, Bricks filed its notice in compliance with the provisions of section 24 of the Act and yet, despite this compliance, its recovery was limited to less than the full amount of the materials it provided. Though this result seems contrary to one of the Act's goals of protecting materialmen and suppliers who in good faith furnish materials for construction of a building, the Act, in fact, seeks to balance the rights and duties of subcontractors, materialmen, and owners alike…. [Here], the balance is struck in favor of the later."

(An additional, interesting aspect of this case on appeal was the fact that after the trial court ruled, Bricks accepted payment from the lender's insurer in the sum of $12,734.93, (representing the $10,000 judgment plus interest thereon), and executed a release and satisfaction of the judgment. Rejecting the argument that the release rendered the appeal moot, the Court held that Section 12-183 of the Code of Civil Procedure, ("Release of Judgment'), did not preclude the appeal. That section serves to bar further attempts at recovery by the creditor once paid, but does not bar an appeal.)

9. MINERAL RIGHTS; OIL AND GAS LEASES; COALBED METHANE GAS; RULE OF "CAPTURE":

In a case of interest to practitioners in downstate Illinois, the Appellate Court for the First District has decided that the holder of an oil and gas lease does not have the right to explore, drill and produce coalbed methane gas absent a lease or other rights to the coal. In the case of Continental Resources of Illinois, Inc vs. Illinois Methane, LLC and De Mier Company and Royal Talon Company http://www.state.il.us/court/Opinions/AppellateCourt/2006/5thDistrict/June/Html/5030784.htm Justice Donovan provides a thorough review of the mineral-products rule of capture and an extensive analysis of the process of extracting coal and coalbed methane gas.

The Court analyzed the coalification process and determined that the right to coalbed methane gas, (once not a useful by-product of the production of coal but now extremely valuable), remains with the coal and the owner of the rights thereto until its capture, and that control thereof should not change simply by virtue of its increased value. The Court also cited the "container space" doctrine that the holder of the coal rights also holds the rights to the "void" remaining after the coal is mined. Coalbed methane gas found in the mine "voids" after coal is mined must therefore remain as part of the coal estate under the rule of capture. The Court therefore affirmed the grant by the lower court of Summary Judgment in favor of the holder of the coal rights.

10. MORTGAGES; BREACH BY LENDER BASED ON FAILURE TO REFUND ESCROW, CONSUMER FRAUD AND DECEPTIVE PRACTICES:

More and more borrowers are crying "foul" at the practices and failures of their mortgage lenders to respond to inquiries and resolve disputes in a timely manner. A recent, illustrative but unsuccessful, case in this arena is Sklodowski v. Countrywide Home Loans, No. 1-04-1809, 358 Ill.App.3d 696, 832 N.E.2d 189, 295 Ill.Dec. 38 (1st Dist., June 16, 2005) http://www.state.il.us/court/Opinions/AppellateCourt/2005/1stDistrict/June/Html/1041809.htm . Sklodowski brought a class action suite against Countrywide alleging breach of the mortgage note, breach of fiduciary duty, unjust enrichment and violation of the Consumer Fraud and Deceptive Business Practices Act when he did not receive the refund of his escrow account balance "promptly" following his payoff satisfying the mortgage in full. The trial court granted Countrywide's motion to dismiss the breach of fiduciary and consumer fraud counts, entered summary judgment in favor of the lender, and was affirmed on appeal.

The facts leading to the suit began when Sklodowski received an "Amended Payoff Demand Statement" in response to his request of the lender. The Statement indicated he had an escrow balance of $2,343.50, and stated that "Countrywide automatically processes escrow funds 14 days after payoff in order to ensure all outstanding funds have cleared." The standard language in his "Illinois-Single Family-Fannie Mae/Freddie Mac Uniform Instrument" mortgage required the monthly payment of escrow items, including real estate taxes and hazard insurance premiums, as part of the loan payment and stated that "Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender." Sklodowski did not receive the refund of his escrow balance until more than 14 days after receipt of his payoff because of Countrywide's policy of withholding to clear funds as stated in the payoff letter, and brought this suit alleging that the policy violated the "prompt refund" provision of the mortgage, and constituted a breach of fiduciary duty and deceptive trade practice by Countrywide.

The trial court granted Countrywide's Section 2-615 Motion to Dismiss the counts relating to breach of fiduciary, consumer fraud and unjust enrichment, and ruled in its favor on summary judgment relating to the count alleging breach of the mortgage's requirement to "promptly refund". Noting that the FHA's Loan Servicing Guidelines only require the escrow be released "no later than 30 days after the payoff" to qualify as "promptly", and that the FNMA guidelines provide that "The funds in any escrow deposit account should be refunded to the mortgagor within 30 days of the payoff date.", Judge Bernetta Bush granted summary judgment, finding as a matter of law that the refund received within 20 days was "prompt".

The Appellate Court also based its decision affirming on the FNMA guidelines, and recognizing that while "the term 'promptly' may have different meanings in different contexts, here, we must interpret this word within the context of the mortgage industry." Additionally, the Court noted that a number of states which have enacted legislation requiring the return of escrow funds on residential mortgages generally provide payment "within 30 days of payoff" as an acceptable time frame, and "The fact that Countrywide could refund the amounts more quickly is, thus, immaterial." The decision concludes with some very quotable language for attorney's representing lenders in the defense of actions sounding in consumer fraud, ("It is well settled that 'the Consumer Fraud Act was not intended to apply to every contract dispute or to supplement every breach of contract claim with a redundant remedy."), and holding that a "deceptive act or practice involves more than the mere fact that a defendant promised something and then failed to do it."

11. MORTGAGES; RELEASE, NEGLIGENCE and BANKRUPTCY TRUSTEE'S AVOIDANCE POWERS;

In In Re Gilbert V. Johnson, Debtor and Gregg Szilagyi, Trustee v. JPMorgan Chase Bank, N/A, f/k/a Charter One Bank, N.A., (U.S Bankruptcy Court, Eastern Division, 2006), Judge Wedoff held that a trustee in bankruptcy could avoid any interest a mortgagee had in HIS real estate pursuant to a mortgage that had been inadvertently released by the mortgagee.

A mortgagee loaned money to the debtor in 1995 and took back a note and mortgage. In 2000 the mortgage company, under a new name after a merger, executed a Release of Mortgage relating to a loan the debtor had obtained in 1990. The Release further referenced "Also release mortgage document 95403870". The document number refers to the 1995 mortgage in error, because the mortgage company did not intend to release the 1995 mortgage as well as the 1990 mortgage. After the Release was recorded, debtor continued to make payments on the 1995 loan and listed the mortgagee as a creditor in their Bankruptcy schedules with reference to the 1995 loan.

A title commitment issued in 2004 disclosed the 1995 mortgage with the following note: "Release Doc 00100245 purports to release this mortgage, but the release may be an error. The lender asserts that the debt is unpaid and that the release was an error. The borrower agrees."

The Court found that the trustee was entitled to a declaration under Section 544(a)(3) of the Bankruptcy Code that the 1995 mortgage was released. While the mortgagee argued that the Release did not sufficiently identify the 1995 mortgage to constitute a release, the mortgagee could cite no authority in support of its position. The Court found that Illinois law on releases of mortgages specifies no required information that must be contained in the release if it is not to be delivered to the mortgagor prior to recording. To be recorded, a document needs (1) the name and address of the person to whom the instrument is to be returned; (2) the recorder's document number and (3) the book and page number, if applicable, of any instrument referred to in the instrument being recorded or relating to the instrument being recorded. The Court found that the Release at issue here met the requirements of Illinois law for recording.

The mortgagee argued that the release was executed by an entity without actual or apparent authority and noted the corporate merger and name change. The Court, however, found that the Release was executed by the mortgage company while it in fact held the mortgage, and that the officer who prepared and executed the Release did so within the scope of his or her authority, so the question of apparent authority was irrelevant.

The Court also found that the trustee could avoid the lien of the mortgage in the same manner as a bona fide purchaser. The Court found no issue of reliance because the release extinguished the mortgage. To the extent the mortgagee retained some equitable interest in the property, the mortgagee failed to prove the Release would give constructive notice of any such interest. The holder of "…an equitable lien does not take priority over the interest of a creditor or subsequent purchaser without notice…" Interestingly, the Court was not convinced that the "…somewhat ambiguous evidence that a title company apparently made inquiry regarding the Release…" would be sufficient to satisfy the legal standard for inquiry notice, stating "Nor is there any reason to assume that the business practice of a title company establishes the standard of care for a bona fide purchaser."

The Court found that with so many bank mergers and name changes, as is evidenced in the facts this case, it is not at all obvious that the execution of release by an entity with a different name from that of the mortgagee in the original mortgage or by an assignee would put a purchaser on inquiry notice.

Finally, the Court found that the trustee could avoid the lien under Section 544(a)(1) of the Bankruptcy Code, stating that for the same reasons that a bona fide purchaser would prevail over any equitable lien that the mortgagee could assert, so too would a judgment creditor, and here the Bankruptcy Trustee.

[Ed. note - The finding that the title company's notation on the title commitment did not give rise to "inquiry notice" should square with the position of title insurers taken in several recent cases that title companies are not in the business of providing or selling information – see the First Midwest Bank *case and* Midfirst Bank vs. Abney*, above, as well as the decisions* In Re Pak Builders *from last year.]*

12. PREMISES LIABILITY; NATURAL ACCUMULATION; DUTY OF LANDOWNERS:

In Pageloff v. Gaumer, (3rd Dist., April 2006), http://www.state.il.us/court/Opinions/AppellateCourt/2006/3rdDistrict/April/Html/3040533.htm, a case involving potential liability for a campground owner, an experienced camper returned to one of her favorite campgrounds for a Labor Day weekend. She was unable to stay at the particular site she had requested and had stayed in the past visits, but agreed to an alternate site where she experienced walnuts falling off the trees in great numbers. She even attempted to clear the site of walnuts but could not keep up with the number that had fallen; (the Court noted: "as they are prone to do in late summer"). She suffered a severe ankle injury on the third day of her stay after a fall caused by a wayward walnut and sued for damages.

The Court stated the issue as whether the Defendants' duty to maintain the park in a reasonable safe condition included a duty to clear fallen walnuts from the campsite or, in the alternative, to warn of the walnuts.

The Court reviewed the factors to determine whether a duty is owed: (1) likelihood of injury; (2) reasonable foreseeability of such injury; (3) magnitude of the burden of guarding against injury and (4) consequences of imposing that burden on the defendant. Regarding the first two factors, the Court stated that "…the law generally considers the likelihood of injury slight when the condition in issue is open and obvious because it is assumed that persons encountering the potentially dangerous condition of the land will appreciate it and avoid the risks." Plaintiffs agreed that the walnuts did not constitute a latent risk, but were obvious, and that the risks were also foreseeable. The Court also found the magnitude of the burden of guarding against injury extremely onerous because to do so would require the walnut trees be removed from this and most other campgrounds.

The Court refused to apply the "natural accumulation rule" used in snow and ice cases, finding it would be "…no less onerous to require a landowner to remove all walnuts that fall from trees on his or her property than it would be to require all natural accumulations of snow and ice." The Court dryly observed: "Of course, defendants could cut down all of the nut-bearing trees and pave their property. That might make for a safer campground. Most likely one devoid of campers."

The Court found no duty to warn of the danger, stating that such a warning would tell campers what they already know about the risks of an uneven walking surface and therefore a potential trip and fall. The Court also rejected the Plaintiffs' argument that the walnut trees were "an integral component" of the campground's commercial enterprise, the walnuts were inseparable from the trees and therefore placed on the ground by Defendants, causing injury. The case authority cited by Plaintiffs was distinguished by the Court because they involved foreign substances actually placed upon the land, such as floor mats.

The Court found no duty on the part of Defendants that was breached and ignored therefore the Defendants' Assumption of Risk argument, while noting in passing that Plaintiffs clearly assumed any risks associated falling or fallen walnuts, and affirmed the trial court's grant of Summary Judgment in favor of Defendants.

(Ed. Note: As the owner of a campground with lots of walnut trees in north-central Arkansas, I was extremely relieved to read the Court's decision, and only might quarrel with one observation: It is much harder to remove walnuts than snow.)

13. REAL ESTATE BROKERS; RECOVERY DENIED AGAINST LENDER AND PURCHASER BASED ON MORTGAGE ELIGIBILITY LETTER:

Suburban 1, Inc., d/b/a Re/Max Suburban v. GHS Mortgage, LLC, d/b/a Windsor Mortgage, (2nd Dist., July, 2005), http://www.state.il.us/court/Opinions/AppellateCourt/2005/2ndDistrict/July/Html/2040937.htm, involves a complaint filed by a Realtor against a lender alleging fraud and conspiracy in a failed real estate transaction resulting in the Realtor's loss of commission. George and Connie Jiang listed their residential property in Wheaton for sale with Suburban 1, and Karen and Douglas Sullivan made an offer to purchase the home. The Sullivan offer was contingent upon the sale of their existing home, however, and the Jiangs did not accept the offer but continued to list the property. Sullivan then made a second offer at a price $5,000 over the Jiang's listing price and without the contingency relating to the sale of their home. The offer was still contingent upon Sullivan obtaining 90% mortgage financing, but accompanying the offer was a letter from Windsor Mortgage stating the Sullivans were pre-approved for the mortgage without requiring the sale of their existing home, subject only to final approval of their application and the appraisal of the Jiang's home. The Jiangs accepted Sullivan's second offer and then entered into a contract to purchase another home conditional upon the sale of their home to the Sullivans, with Suburban 1 to obtain a commission on that sale as well. The Sullivan's mortgage was not finalized within the contract period, and they requested first a seven day extension, and then a second seven day extension to obtain financing. The Jiangs refused the second extension request, terminated the Sullivan contract, as well as their pending purchase contract, and removed their home from the market -- causing Suburban 1 to lose both commissions.

Casting about to find someone responsible, Suburban 1 sued Windsor Mortgage and the Sullivans in three counts, alleging common law fraud, civil conspiracy, and violation of the Consumer Fraud and Deceptive Business Practices Act against the lender. The trial court dismissed and the Second District affirmed on appeal.

The elements of common-law fraud are (1) a false statement of material fact; (2) the defendant's knowledge that the statement was false; (3) the defendant's intent that the statement induce the plaintiff to act; (4) the plaintiff's reliance on the statement; and (5) the plaintiff's damages resulting from reliance on the statement. Here, there were conclusory statements, but no facts alleged to establish that Windsor intended Suburban 1 to rely on the pre-approval letter or that it did so. The pre-approval letter was not directed to Suburban 1, and, if anyone was intended to be induced to act by the letter, it was the Jiangs not Suburban 1. Further there was no "reliance" by Suburban 1 in its conduct: "What Suburban 1 fails to understand is that these decisions (to accept Sullivan's offer and take their home off the market) were not Suburban 1's to make; they were entirely the Jiangs'…if anyone relied on defendants' allegedly false statements, it was the Jiangs and not Suburban 1." Using the same reasoning, the Court also affirmed the dismissal of the the Consumer Fraud and Deceptive Business Practices Act: "Suburban 1 failed to sufficiently plead that GHS Mortgage [Windsor] made statements with the intent to induce Suburban 1 to rely on its alleged deception. Rather, the allegations can be reasonably read to establish only that GHS Mortgage made the allegedly false statements to induce the Jiangs to rely on them." There also was no action for civil conspiracy because the cause requires two or more persons participate in an "unlawful act or a lawful act in an unlawful manner". Nothing done by either Sullivan or GHS {Windsor] Mortgage was unlawful or handled in an unlawful manner, and therefore Suburban could not establish a basis to recover in conspiracy.

14. REAL ESTATE CONTRACTS: ATTORNEY APPROVAL CLAUSES & GOOD FAITH MODIFICATION:

The provisions of the contract and the facts are a little out of the ordinary in this, the most recent attorney modification case, but Barts v. Domanskis, (1st Dist., March, 2006), http://www.state.il.us/court/Opinions/AppellateCourt/2006/1stDstrict/March/Html/1042332.htm is a noteworthy cautionary tale to transactional attorneys nonetheless.
Barts submitted an offer to purchase real estate to Van Domanskis. The parties met together with the Realtors and Van Domanskis' attorney to negotiate the contract terms; including an attorney modification provision which provided that the terms of the contract, except purchase price, closing date, and possession date, were subject to *good faith modifications* within three business days from the contract date. Within that period, (and although he had participated in the initial negotiation), Van Domanskis' attorney, (whose name was Alexander Domanskis, a brother ??), wrote to request modification of the contract to delete items of personal property, increase the earnest money, shift the cost of the termite inspection from seller to purchaser, reduce the tax proration from

105% to 100%, provide that the house and swimming pool were sold in their "as is" condition, and deleted the representation that all mechanical equipment would be in operating condition at the time of closing. Bart's attorney objected to the modification requests as not made in good faith, and argued that Domanskis' attorney's participation in the negotiation of the contract constituted an exercise of the right to modify at that time, rendering the subsequent attempt to modify inappropriate. The plot thickened when the Realtor, Blount, who had acted as a dual agent for Bart and Domanskis in their transaction was contacted by both Bart and his attorney about the status of the offer, and stated he was unaware of any other offers when, in fact, another offer was made by a purchaser who eventually purchased. Bart sued Van Domanskis for specific performance and Blount for breach of fiduciary duty. The trial court granted Van Domanskis' motion to dismiss and motion for judgment on the pleadings, holding that the modification letter sent by his attorney constituted a counteroffer under the attorney modification clause, which was bargained for and unambiguous, and that the modification was not in bad faith. The trial court also granted the Realtor's motion for summary judgment.

The First District reversed. A genuine issue of material fact existed as to whether the modification was in good faith. While the established law in Illinois is that execution of a real estate contract containing an attorney modification is a "conditional acceptance" subject to the possibility of modification, and exercise of the right to modify the contract within the period constitutes a counter-offer, the familiar cases relied upon by Van Domanskis here, (<u>Olympic Restaurant</u>, <u>Groshek v. Frainey</u> and <u>Anand v. Marple</u>), are inapplicable as precedent because "none of hem involved a contract with an express requirement of good faith in modifying the contract following its execution." Accordingly, the Court rejected that Seller's argument that *any* attorney modification triggered a counter-offer, and held that "To interpret the relevant provisions in the manner suggested by the defendants would strip all meaning from the words "good faith"…the circuit court erred in finding that the vendors modification constituted a counteroffer that was rejected because the existence of 'good faith' is virtually always a question of fact." While noting that the general rule is that it is not necessary for a party to state reasons when rejecting a contract because the attorney's right to disapprove a contract is a proper exercise of professional judgment, (see <u>Olympic Restaurant</u>), the general rule is inapplicable to contracts which limit such actions to a "good faith" exercise. Rejecting the notion that the participation of Van Domanskis' attorney in the initial negotiations somehow exhausted the right to modify , ("Nothing in the language of the modification clause limits the number of or sequence in which modifications can be made."), the Court held that the participation and conduct of the attorney were facts that were relevant to "good faith", especially given the "sequence of events" where Van Domanskis negotiated a contract with his counsel present, received a better offer thereafter, and attempted to modify the contract following the second offer.

The Court likewise rejected Van Domanskis' argument that a condition precedent, (the contract also contained a handwritten condition requiring the sale of an adjacent strip of land owned by Blount to Van Domanskis), to the enforcement of the contract had failed, and therefore the contract could not be specifically performed. Since Van Domanskis controlled the condition, he could not assert it as a basis for non-performance;

“If one party directly causes the condition to fail, however, the contract may be fully enforced against the party; one cannot take advantage of his own conduct.”

Finally, the Court reversed the trial court’s ruling in favor of the Realtor on the issue of breach of fiduciary. While the facts seemed to confirm that Bart’s inquiry of Blount about any competing offers came before the second offer was actually received, Blount’s failure to advise Bart when he subsequently became aware of a competing offer, because he knew of Bart’s desire for the information, violated his duty under the Real Estate License Act to disclose material facts concerning the transaction of which the licensee has actual knowledge. Holding that “a broker must in the exercise of the good faith required of a fiduciary, keep the principal informed on all matters pertaining to the subject matter of the agency, coming to the broker’s knowledge, which are of advantage to the principal or which in any way affect the transaction and subject matter of the agency. “, and the issue is one of fact rather than law, the trial court’s summary judgment in favor of the Realtor was reversed as well

15. REAL ESTATE CONTRACTS; CONSUMER FRAUD AND BUILDER MISREPRESENTATIONS REALTING TO PROJECT:

Distinctive Homes, Ltd. was a builder marketing residential real estate in Orland Park, Illinois between 1996 and 2000. During that period, according to a complaint filed by a number of owners who purchased homes in their development, Distinctive Homes and MGM Development, Inc. represented to them and other prospective buyers that they intended to construct a golf course on the adjacent property. In 2000, however, the adjacent property was rezoned for industrial use. The owners’ suit alleged that the defendants abandoned the plan to construct the golf course as early as 1996, but continued to deceptively represent the golf course was going forward as part of their marketing, resulting in “unjust profits” to defendants and damages to plaintiffs. Throughout a number of motions and amendments, the defendants moved to dismiss, arguing that the allegations that they had abandoned the gold course plans were conclusory and insufficient to support a claim of “knowing deception” necessary for common law or consumer fraud. The Plaintiffs appealed the trial court’s last decision dismissing their complaint pursuant to Section 2-615 of the Code of Civil Procedure.

The First District affirmed in Addison v. Distinctive Homes, Inc., (Sept., 2005), http://www.state.il.us/court/Opinions/AppellateCourt/2005/1stDistrict/September/Html/1040151.htm . In order to plead a cause for common law fraud, a plaintiff must allege (1) a false statement of material fact, (2) knowledge by the defendant (at the time made) that the statement is false, (3) intent that the statement induce the plaintiff to act, (4) reliance on the statement by the plaintiff, and (5) resulting damages. The complaint, to support the cause of action, must also plead particularly and with specificity the facts, including what representations were made, when they were made, who made them, and to whom they were made. In order to plead a cause for Consumer Fraud, a plaintiff must allege (1) a deceptive act or practice, (2) an intent that the deception be relied upon, and (3) that the deception occur in the course of trade or commerce. An omission or concealment of a material fact in the course of the trade or commerce is deceptive conduct under the Act.

A material fact is one which a buyer would reasonably rely upon in making a decision to proceed with a particular transaction.

Most importantly, however is the "timing" of the representation and the transaction. The fact concealed or omitted must be known to be so to the defendant at the time of concealment, the concealment or omission must occur in conjunction with the transaction, and proximately result in the damages complained of. Here, there were no allegations of facts in the pleadings as to exactly when the developers abandoned the golf course plans and when they knew that the course would not proceed. Plans for the development of the area submitted to the Orland Park Village Board in July, 1997, did not indicate whether or not there were plans for the golf course construction, and no definite time was stated as to when the representations relating to the course were made in the pleadings. There were a number of instances in which references were made to the possibility of the golf course construction by defendants, but each of those was accompanied by statements that the plans were still in the process and additional land needed to be acquired for the project. The exhibits attached to the plaintiff's various complaints failed to establish when the plans for the golf course were "abandoned"; only that the defendants were still considering the plan as late as May of 2000. In order to state a cause of action, the owners would have to allege that defendants knew, prior to the sale of each of the properties to them, that they had abandoned the golf course project, at that time, and the merely "vague assertions of fact as to exactly when the plans were abandoned, was conclusory and insufficient…to assert claims for common law fraud and consumer fraud."

16. [REAL ESTATE] CONTRACTS: STRICT COMPLIANCE RULE; OFFER AND ACCEPTANCE; INTENT OF THE PARTIES; MINOR ERRORS:

(Ed. Note: Both Joe Fortunato and I thought this case particularly noteworthy, even thought not a "real estate contact, and each of us wrote a summary of the case. We thought you might enjoy reading our independent thoughts; sort of like "Siskle & Ebert"…I always thought Siskle's reviews were more like my own experience. You decide:)

JOE FORTUNATO'S SUMMARY:

The question of enforceability of a purported written agreement for the sale of an automobile dealership was central to the decision in the case of Finnin v. Lindsay, (3rd Dist., June 29, 2006) http://www.state.il.us/court/Opinions/AppellateCourt/2006/3rdDistrict/JuneAugust/Html/3050428.htm,

After extensive negotiations and apparent verbal agreement on terms, Defendant's attorney's office sent to Plaintiff's attorney a revised agreement of sale that contained two errors that did not conform to the intent of the parties. The sales price was stated correctly in one place but erroneously in an exhibit, and also referred to the sale of goodwill (which had previously been incorporated into the agreement for the sale of stock). When the errors were discovered defendants' attorney requested that the draft be returned do it could be corrected, but Plaintiffs' attorney did not return the draft contract. Then the Defendant received another offer to buy the dealership. Plaintiffs then tried to change the draft to conform to the agreement and send it to the Defendant, but the Defendant refused to sign the corrected draft contract.

Plaintiffs sued, alleging breach of contract. Defendant's attorney, when deposed, admitted that the changes necessary were "minor" and "basically corrected the written agreement to conform with the intent of the parties." Plaintiffs argued that the changes were not significant or material changes but rather corrections of clerical errors, or in the alternative that the strict compliance rule should not be applied because Article 2 of the Uniform Commercial Code governed the transaction. The trial court denied relief, finding that Plaintiffs' corrections constituted a counteroffer and granted summary judgment to Defendant.

The Appellate Court refused to follow the law in other jurisdictions that a modification of an offer constitutes a counteroffer only if the modification is material. Rather, even though the changes were "…non-substantive, typographical modifications…" that were "…minor…" and "…apparently conformed to the agreement of the parties…" the court found that "…Illinois case law clearly mandates that any modification, however slight, prevents the creation of a valid contract. Plaintiffs' attempt to correct or modify the agreement formed a counteroffer that [Defendant] refused to accept."

The Court made short work of the UCC argument proffered by Plaintiffs, stating that article 2 governs the sale of goods between merchants. The case at bar involved the sale of investment securities (stock in Defendant's corporation), which are excluded from the definition of goods, and that the parties were not "merchants" as defined by Article 2.

STEVE BASHAW'S SUMMARY:

Contract formation and the "counter-offer" issue is presented in another context in Finnin v. Lindsay, (3rd Dist., June, 2006), http://www.state.il.us/court/Opinions/AppellateCourt/2006/3rdDistrict/June/Html/3050428.htm. Here, Finnin and his partners, McPherson and Wright, entered into negotiations with Lindsay to purchase his automobile dealership. The negotiations were over a number of months, involved attorneys throughout and resulted in a number of drafts and modifications of an agreement to purchase between March, 2002 and August 2002. A "few final changes" to the agreement were discussed between the attorneys on August 13, 2002, and a revised agreement was signed by Lindsay and sent by his attorney's legal assistance to Finnin's attorney. Upon receipt, however, Finnin's attorney noted that the previously agreed purchase price of $1.1 million for the stock of the dealership was misstated as $700,000, and there was a reference to another agreement for the sale of "goodwill" between the parties. When contacted by Finnin's attorney, Lindsay's attorney suggested that the agreement be returned and the corrections would be made. Before Finnin's attorney returned the document for correction, Lindsay telephoned Finnin and informed him that he had received another offer to purchase which he was going to pursue. Finnin's attorney, of course, thereafter corrected the agreement by striking out the incorrect purchase price and inserting the correct price, removed all references to the sale of goodwill and returned the contract to Lindsay's attorney with Finnin's initials on the corrections and signature. Lindsay refused to sell to Finnin and Finnin brought suit for breach of contract. Both parties moved for summary judgment. Lindsay argued that no contract was ever formed because the last corrections were "material modifications" that constituted a counter-offer. Finnin argued that the changes were not significant or material changes, but simple corrections of clerical errors and, the UCC provisions permitting an acceptance which is not in strict compliance with the offer should control here. The trial court granted summary judgment in favor of Lindsay.

The Third District opinion by Justice Lytton begins with the settled Illinois law that an acceptance must confirm exactly to the offer to form a contract, and that an acceptance requiring any modification or change in terms constitutes a rejection of the original offer and becomes a counter-offer that must be accepted by the original offeror before a valid contract is formed, citing the Illinois Supreme Case of Whitelaw v. Brady, (1954) 3 Ill2d 583, as recently applied by the Seventh Circuit in Venture Associates Corp. v. Zenith Data Systems, Corp., (7th Cir., 1993) 987 F. 429. Agreeing that the changes were minor and appeared to be in conformity with the agreement of the parties, the Court states "Nevertheless, Illinois case law clearly mandates that any modification, however slight, prevents the creation of a valid contract." (emphasis in original) "Plaintiffs attempt to correct or modify the terms of the agreement formed a counteroffer that Lindsay refused to accept." Specifically acknowledging that other jurisdictions hold that immaterial or minor differences or variances between offer and acceptance do not prevent formation of a contact and rejecting the argument that strict compliance may allow parties to "escape their obligations under the contract due to a mistake by the parties", the Court also noted that this was a "one time complex transaction" rather than the daily and continuous transaction of goods that occur on a daily basis in the marketplace and is controlled by the UCC.

[Ed. Note – this case will be appealed to the Illinois Supreme Court. Every day in the meantime, real estate practitioners will deliver "attorney's modification letters" which state that the modifications requested are not to be considered a "counter-offer". The effect of this language has long been questionable, but this case may give the Illinois Supreme Court a basis upon which to establish the law of the State of Illinois in all contract cases. See Finnin v. Lindsay below as well.]

17. **REAL ESTATE CONTRACTS; PROMISSORY ESTOPPEL AS AN ALTERNATIVE VEHICLE FOR RECOVERY:**

In another failed real estate transaction, Dewitt, a would-be purchaser, sued Fleming, a would-be seller, in small claims court to recover the cost of a survey of the would-be seller's land in Dewitt v. Fleming, (5th Dist., April, 2005), http://www.state.il.us/court/Opinions/AppellateCourt/2005/5thDistrict/April/Html/50400

16.htm. The complaint alleged that the parties entered into a verbal contract for the sale of Fleming's farm to Dewitt, and in reliance on the agreement Dewitt paid $2,382.45 for a survey of the farm. Fleming thereafter refused to sell the property, and refused to reimburse Dewitt for the survey expense. Dewitt sued, and Fleming defended the suit by moving to dismiss Dewitt's claim based on the Statute of Frauds, asserting that the purported contract to sell was a verbal agreement and therefore unenforceable in any fashion. The trial court denied the motion to dismiss holding that "Plaintiff is seeking to recover the cost of a survey, not to enforce a contract to sell real estate, the latter being clearly barred by the [s]tatute of [f]rauds. The factual situation at this stage of the proceedings is not sufficiently clear for the purposes of a [s]ection 2-619 [(735 ILCS 5/2-619 (West 2002))] motion to determine if this claim is barred by [section 2 of the Frauds Act (740 ILCS 80/2 (West 2002))]. Accordingly, the [m]otion to [d]ismiss is denied and the [s]tatute of [f]rauds shall be considered as an affirmative defense." At the bench trial, the court ruled again in favor of Dewitt and awarded judgment in the amount of the cost of the survey against Fleming stating: "Plaintiff is bringing an action for the cost of a survey which he obtained to purchase a 16.7[-]acre tract from Defendant for $800 an acre. Plaintiff is not suing to enforce the oral agreement, so the action is not barred by the [s]tatute of [f]rauds. There was no contract to obtain a survey, so if the Plaintiff is to prevail, he must do so on the theory of promissory estoppel. The elements of promissory estoppel are: 1) a promise, 2) reliance on the promise which is reasonable, and 3) a detriment suffered by the party. In this case, Defendant promised to sell the tract to Plaintiff and stated that he had no objection to Tony Hard doing the survey; Plaintiff reasonably relied on that promise in obtaining the survey; and Plaintiff suffered a detriment when he had to pay for the survey but did not get to purchase the real estate."

The majority opinion on appeal reversed, holding that "in Illinois promissory estoppel is available only as a defense (i.e., as a shield), not as a cause of action (i.e., as a sword), and therefore "is not a proper vehicle for direct relief", "cannot be properly pled as a cause of action.", "is meant to be utilized as a defensive mechanism-not as a means of attack", and "does not form the basis for a damages claim." The opinion relies upon the Court's own 2003 decision in EMS Development v. Dawson, and devotes most of the remaining reasoning to responding to the dissent by Justice Hopkins.

The dissent candidly begins stating that "Because I firmly believe that those statements in EMS Development Corp. were not accurate statements of Illinois law when they were made, are not accurate statements of Illinois law now, and are contrary to the Illinois Supreme Court's opinion in Quake Construction, Inc. v. American Airlines, and because I firmly believe that the majority's holding in this case is contrary to the supreme court's opinion in Quake Construction, Inc., I respectfully dissent." The only authority relied upon in EMS Development Corp, Justice Hopkins notes is "That hornbook", D. Dobbs, Remedies (6th ed. 1984), "which was almost 20 years old when the court relief upon it", and he then proceeds to review the Supreme Court's ruling in Quake and Doyle v. Holy Cross Hospital , as well as "numerous Illinois appellate court opinions holding that a plaintiff can state an affirmative cause of action for damages based on promissory estoppel." The majority states that it, "unlike our dissenting colleague, [is] not convinced that the Illinois Supreme Court's opinions…directly contradict our holding in EMS

Development Corp." It is clear that only the Supreme Court is going to clear up this disagreement on the law and determine whether promissory estoppel or detrimental reliance can be plead as a cause of action for damages.

18. REAL ESTATE CONTRACTS; SPECIFIC PERFORMANCE; SUFFICIENCY OF INSTRUMENTS; LAND TRUSTS:

The first line of the opinion by Justice Wolfson of the Appellate Court for the First District, Second Division sends a clear message to the parties in the case of Hoxha v. La Salle National Bank, as Trustee u/t/a/dated July 23, 1958 as trust No. 21785 and Donna Forrest, (1st Dist., March 28, 2006), http://www.state.il.us/court/Opinions/AppellateCourt/2006/1stDistrict/March/Html/1051419.htm,

The opinion begins: "The plaintiffs insist that the beneficial owner of certain real estate should be allowed to reach from the grave to require a subsequent beneficial owner to sell them the property." As enticing as this may be to estate planners and trust thoery, the opinion is actually more worth reading for its discussion of the elements of Specific Performance and implications land trust usage.

Plaintiffs alleged that the former beneficial owner (Doris Robbert) of a land trust contracted with them to sell certain residential property located in Chicago. The successor owner of the beneficial interest (Defendant Donna Forrest) was unaware of the alleged agreement.

Robbert had discussed during her lifetime selling the subject property to the Plaintiffs. Plaintiffs' property was adjacent to the subject property; Plaintiffs had made some repairs to the subject property and had collected rents for Robbert. The document claimed by Plaintiffs to constitute the contract to be specifically enforced stated:

"TO WHOM IT MAY CONCERN: Be it known that upon my demise, the residence …shall be sold to Roger of James Hoxha for …$400,000.00…it is understood and agreed that any expenses incurred by the Hoxhas for the upkeep of the Property during my lifetime shall be reimbursed …Be it further known that for many years, the Hoxha family has been more than friends and are like family, and I love and appreciate them very much." The document was signed "Doris N. Robbert" and notarized.

The trial court found that the notarization actually took place several months after the date on the document, and one of the Plaintiffs admitted that the document was taken to a notary who did not notarized Robbert's signature at the time it was signed because her commission had not then been renewed. The notary refused to testify, asserting her Fifth Amendment rights. The trial court denied Specific performance, holding that the document was in effect a testamentary disposition that failed to satisfy the requirements regulating the making of wills.

The Appellate Court found the circumstances surrounding the creation of the document in question "suspicious" and that the signature was not authentic. The Court also noted that the plaintiffs had not signed the document, that the document did not acknowledge that the property in question was held in trust or direct the trustee to sell the property, that the fact that it was addressed "To Whom It May Concern" evoked a memo or letter rather than a contract and had other deficiencies.

The Court stated that the elements of Specific Performance were: (1) the existence of a valid, binding and enforceable contract; (2) compliance by the plaintiff with the terms of the contract and (3) failure or refusal of the defendant to perform his part of the contract. The Court found that the purported contract lacked specificity in that the terms must be clear, definite and unequivocal. Instead, the document lacked reference to the land trust, financing, defaults, warranties, notices, closing date and tenancy.

The Court next discussed the power of a beneficiary to sell property held in a land trust. The law in Illinois requires that a "…beneficiary must either explicitly or constructively exercise her power to direct the trustee; she cannot contract to convey title as if she were the owner of the property…If a beneficiary … deals with the property as if no trust existed and contracts as an owner to sell the property, the contract is void as being beyond the beneficiary's power to act." Further, the purported contract directs the property to be sold on Robbbert's death, but the land trust agreement provided only for her to sell the property without trustee approval during her lifetime. After Robbert's death she could not direct the successor beneficial owner to sell the property, for her power over the trust, like her interest in the trust *res*, passed to the successor beneficiary upon her death.

19. SELF-STORAGE FACILITY ACT; CONSTITUTIONALITY AND CONSUMER FRAUD FOR NOTICE FAILURE:

Although storage facilities are not the typical "real estate" most of us deal with, having clients who occasionally will have to store things in transit during a transaction or clients who use of storage facilities makes Hill v. PS Illinois Trust, (1st Dist., Sept. 2006), http://www.state.il.us/court/Opinions/AppellateCourt/2006/1stDistrict/September/Html/1054000.htm worth reading. The first notable thing about this case is the Illinois Self-Storage Facility Act (770 ILCS 95/1 et seq.), which authorizes the sale of personal property by a storage facility to satisfy a lien for non-payment of rent, has specific provisions about notice, redemption period, rights of bona fide purchasers, and distribution of surplus. Mr. Hill filed a two count complaint. The first count was a class action suit alleging the Self-Storage Facility Act violated his constitutional right to due process under the Illinois Constitution because his property was sold when his rent payments were overdue without notice to him under the Act. The second count was his individual cause against the storage facility under the Consumer Fraud and Deceptive Business Practices Act alleging unfair and deceptive conduct in selling his property without notice to him and refusing to return any surplus proceeds from the sale to him. The trial court granted the 2-615 motion to dismiss both counts of the complaint. The First District agreed as to the constitutional issue, but reversed on the Consumer Fraud count.

To support a constitutional attack based on due process, there must be "state action" in the violation. (It is also worth mention that Supreme Court Rule 19 requires that notice of the appeal be given to the state agency or Attorney General whenever a challenge is brought to the constitutionality of a statute, ordinance or regulation. This was apparently not done here, and noted, but not relied upon here, although the "ripeness for consideration is dubious".) Here, Mr. Hill alleged that the "state action" consisted of the fact that the storage facility acted pursuant to the procedure set forth in the act, and that the "requisite state action necessary to support a claim under the Illinois due process clause" was the "authorization" of the defendant's conduct in the sale by the statute. The Court rejected this argument noting that the United States Supreme Court decisions relating to "state action" in 14th Amendment and Section 1983 cases have all required "overt, significant assistance by state officials". That level of "overt" involvement occurs "when the state, by its law, has compelled the act", but does not arise when a statute permits conduct. Further, the mere fact that a business is subject to state regulations does not convert its action into that of the State unless "there is a sufficient close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." The "Private use of state-sanctioned private remedies or procedures does not rise to the level of state action" without "overt, significant assistance of state officials.

Perhaps more interesting to less academic-types is the second, shorter analysis of the law of the Illinois Consumer Fraud Act. Here, the First District reverses the trial court's dismissal of Mr. Hill's claim for unfair conduct under the Act. Noting that the Complaint alleged the storage facility may violated the Consumer Fraud Act's prohibition against unfair practices by (a) failing to provide the statutorily required notice of the sale under the act, (b) failing to inform him of the result of the sale or acknowledge that it was required to return any surplus to him at his request, and (c) selling the property without giving his the opportunity to redeem the property, the Court held that this was held to be sufficient to state a cause of action under the Act for "unfair conduct". (Does that raise any concerns or new thoughts about other arenas in which creditors fail to provide sale notices ???)

20. STATUTE OF LIMITATIONS; NONPAYMENT OF HOME IMPROVEMENT CONTRACT DISTINCT FROM SUIT AGAINST CONTRACTOR :

A general contractor brought suit to recover the cost of removal and repair of the defendant/homeowner's roof in Prate Installations, Inc. v. Thomas, (2nd Dist., January 2006), http://www.state.il.us/court/Opinions/AppellateCourt/2006/2ndDistrict/January/Html/2050534.htm. The Thomas' defended by moving to dismiss the complaint as time barred pursuant to Section 2-619. The trial court agreed and granted the motion. On appeal the Second District reversed.

The apparently "competing" statutes of limitation are 735 ILCS 13-206, which provides for a 10 year limitation period for actions on written contracts generally, and 735 ILCS 13-214(a), which provides for a four year period during which a suit must be brought relating to "actions based upon tort, contract or otherwise against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property."

The Appellate Court was not fooled by the Defendant/homeowner's fancy footwork with the statute of limitations. Noting that "Defendants are being sued for their alleged failure to pay a bill rather than for their act or omission in the construction of an improvement to property", the Appellate Court found that the Defendant/homeowners were not within the class defined by the statute; i.e., the Plaintiff, not the defendant, were engaged in the activity covered by the statute's four year limitation, and therefore Defendant could not invoke the limitation. The Defendant/homeowners were not being sued for any act or omission on their part in "a construction-related activity" covered by Section 214(a). The suit was against the Defendant/homeowner for non-payment of a written contract, which has a ten year limitation period.

21. TAX DEEDS; NOTICE TO MORTGAGEE AND PUBLICATION NOTICE:

Green Tree Financial Servicing brought a petition to vacate the tax deed issued in H&H Investments v. Green Tree Servicing, 837 N.E.2d 947, 297 Ill.Dec. 496 (3d Dist. Oct. 2005), http://www.state.il.us/court/Opinions/AppellateCourt/2005/3rdDistrict/October/Html/3040777.htm, alleging that it did not received notice of the petition from H&H Investments prior to the issuance of the deed. The trial court granted Green Tree's petition and vacated the deed, finding that H&H Investments had not given it notice as required by the Property Tax Codes, 35 ILCS 200/22-5. The Majority Decision by the Third District affirmed, but Justice McCade concurred in part and dissented in part.

The record in the trial court contained a purported certificate of publication from the newspaper in which H&H alleged it published notice, but the certificate was not completed by the publisher, was not signed, verified, or notarized, and there was no copy of the publication notice attached. Additionally, H&H's only attempt to provide notice to Greentree of the sale prior to the publication was to send certified mail to the lender at its office in St. Paul, Minnesota; the address set forth on the recorded mortgage. This was despite the fact that Greentree had a registered agent for service within the state of Illinois, and the agent was listed with the Illinois Secretary of State.

Section 22-10 of the Property Tax Code requires that a tax sale purchaser must provide written notice of the sale and the date the redemption period expires to the owners, occupants, and all parties interesting in the property. The purchaser must also publish notice in a local newspaper for three successive weeks pursuant to Section 22-15. Common law in this area mandates strict compliance with the notice provisions, and while tax deeds are generally uncontestable except by direct appeal, where there is a defect in notice, a deed will be vacated upon petition. The Court found H&H Investment's argument that it could comply with the notice provisions of the Property Tax Code by a mailing its notice to the mortgagee's address on the mortgage unpersuasive; especially considering that a registered agent was available. 735 ILCS 5/2-204 provides for service of process on corporations by their registered agent, and H&H Investment's failure to discover and serve Greentree's agent was not the "diligent inquiry" required to support the issuance of a tax deed. The further failings of the purported certificate of publication to set forth a copy of the notice published, a certificate that the newspaper met the requirements of the Code of Civil Procedure, (715 ILCS 5/1), that it was not signed by the publisher, and appeared to have been filed with the trial court clerk three months after the tax deed was issued, all formed a basis for the Court's opinion affirming the trial court's order vacating the deed.

Justice McDade's dissent turned first on law that a certificate of publication is merely prima facie evidence of publication, and that testimony from the publisher could have provided sufficient evidence relating to the proper publication notice. Secondly, the dissent noted that Green Tree went through "multiple name changes [which] might be subterfuge for avoiding notice when it failed to pay its taxes." Most importantly, however, Justice McDade disagreed with the majority's ruling on the mailing of notice to Greentree's Minnesota office. Noting that "Green Tree does not claim that the address to which H&H Investment mailed notice was not one of its offices or a place where it was doing business. The majority does not cite, nor do I believe exists, any authority that a corporation's sole residence is the office of its registered agent."

22. TITLE INSURANCE AND THE MOORMAN DOCTRINE; AN UPDATE:

The First District's decision in First Midwest Bank v. Steward Title, (1st Dist., January, 2005), 355 Ill.App.3d 546, 355 Ill.App.3d 546, 823 N.E.2d 168, 291 Ill.Dec. 158 (1st Dist. Jan. 2005) http://www.state.il.us/court/Opinions/AppellateCourt/2005/1stDistrict/January/Html/1033248.htm, reported earlier this year dealt with to the question of the applicability of the Moorman doctrine to insulate Stewart Title from liability for negligent misrepresentation in the course of its business as a title insurance provider. There the Court, after noting that although the Moorman bars tort recovery for purely economic loss where there is a remedy in contract, (i.e., and action on a title insurance contract), there is exception where one, who is in the business of supplying information for the guidance of others in their business transactions, makes negligent misrepresentations; such as accountants, banks providing credit information, aircraft, inventory and termite inspectors. The majority decision in First Midwest Bank refused to follow the Second District decision in Notaro Homes v. Chicago Title Insurance Company, 309 Ill.App.3d 246, 722 N.E.2d 208, 242 Ill. Dec. 719 (2d Dist. 1999), holding that an exception to Moorman applies to title companies issuing a title commitment because they are in the business of supplying information. Here, in First Midwest Bank, the Court holds that the essence of the business of a title insurance company is accepting a risk in return for the payment of premiums, not supplying information: "The issuance of a title commitment is not a sale of information concerning the state of title."

Thereafter, in June, 2005, the United States District Court came to the same conclusion in First Magnus Financial Corp. v. Dobrowski, (N.D. Il., June 2, 2005), 387 F.Supp.2d 786. First Magnus brought suit for multiple claims arising out of a real estate transaction for which they provided financing against the mortgagors, mortgage brokers, appraisers, and title companies, alleging fraud. At the closing, Guaranty Title, as an agent for Alliance Title, issued a title commitment to First Magnus to insure its first mortgage of $175,000, on the property at 1216 South Avers, Chicago, Illinois, made by Mykolai Ponchko in the course of purchasing the property from Leszek Dobrowski and his co-owner. Ponchko never made a mortgage payment, and inspection of the property by First Magnus' servicer after closing revealed that Ponchko did not live at the property, that City of Chicago inspectors had reported the building vacant, open and in disrepair continually for over four years, and that the city had recently demolished the two flat building that had been located there. Further investigations also revealed that Dobrowski did not own the property at the time of the closing to Ponchko, but had previously conveyed title by quitclaim deed to an investment corporation, Heritage Unlimited, Inc. One of the numerous counts in the complaint which First Magnus filed against the various parties was that the title companies had negligently misrepresented that the title to the property was in Dobroski's name in their commitment, resulting in their loan losses. The title companies responded that under the Moorman doctrine, they could not be responsible in tort for First Magnus' purely economic loss. First Magnus argued in response with the exception to the Moorman doctrine relating to negligent misrepresentations made by those in the business of supplying information for the guidance of others in their business transactions applied.

The Decision by Senior District Judge Moran begins by noting that the Illinois Supreme Court has not yet addressed the conflict between the Second District holding in Notaro Homes v. Chicago Title and the more recent First District holding in First Midwest Bank v. Steward Title, but concludes "We find the court's reasoning in First Midwest Bank persuasive and apply its holding in this case….an insurance company's product is not information, it is insurance." While a title commitment may provide information about the nature of the title, the primary "product" being sold is insurance, not information, and the title commitment is "ancillary to the insurance company's business" Even considering the Illinois Title Insurance Act, (215 ILS 155/1 et seq.), and its regulation of the abstracting, searching and examination of titles, the Court reasons that the information gathering and providing of title is secondary to the issuance of insurance based on those activities.

The decision in First Midwest Bank v. Steward Title is currently pending appeal before the Illinois Supreme Court. In an article appearing in the Chicago Daily Law Bulletin on November 18, 2005, entitled "Lender's recourse turns on role of title insurer", staff writer Brian Mackey noted that at oral argument, Supreme Court Justice Robert R. Thomas directly asked if the information contained in a title commitment is properly viewed as providing information relied upon by the parties to the transaction, or simply ancillary to the main purpose of the issuance of title insurance for the completed transaction. The attorney for First Midwest argued that the title commitment is the documented information that everyone relies upon walking into a closing to determine the status of the title to real estate. "Its not just for the purpose of the insurance company, its for the purpose of everybody in the transaction knowing whether you can proceed." The title company, of course, argued otherwise; that the primary purpose of the title commitment is to lead to the issuance of a title insurance policy as a "product". This decision should be coming down in the near future, and certainly one worthy of review and study.

23. TITLE INSURANCE AND THE MOORMAN DOCTRINE; THE FINAL STATEMENT:

At the time of the last edition of this case law update, the First District's decision in First Midwest Bank v. Steward Title, (1st Dist., January, 2005), 355 Ill.App.3d 546, 823 N.E.2d 168, 291 Ill.Dec. 158 (1st Dist. Jan. 2005) http://www.state.il.us/court/Opinions/AppellateCourt/2005/1stDistrict/January/Html/1033248.htm, was still pending appeal and, as of then, was undecided by the Illinois Supreme Court. Senior District Judge Moran of the United States District Court had come to the same conclusion as the First District on the issue of the application of the Moorman Doctrine to title insurance providers in First Magnus Financial Corp. v. Dobrowski, (N.D. Il., June 2, 2005), 387 F.Supp.2d 786. While noting that the Illinois Supreme Court had not yet addressed the conflict between the Second District holding in Notaro Homes v. Chicago Title and the more recent First District holding in First Midwest Bank v. Steward Title, Judge Moran prophetically concluded that "We find the court's reasoning in First Midwest Bank persuasive and apply its holding in this case….an insurance company's product is not information, it is insurance."

In January, 2006, the Illinois Supreme Court spoke definitively, First Midwest Bank v. Stewart Title Guaranty Co., (January, 2006), http://www.state.il.us/court/Opinions/SupremeCourt/2006/January/Opinioins/Html/100162.htm , holding that while a title commitment may provide information about the nature of the title, the primary "product" being sold is insurance, not information, and any "information" contained in the title commitment is "ancillary to the insurance company's business" Even considering the Illinois Title Insurance Act, (215 ILS 155/1 et seq.), and its regulation of the abstracting, searching and examination of titles, the Court reasons that the information gathering and providing of title is secondary to the issuance of insurance based on those activities. Because a title company is not in the "business of supplying information" when it issues a title commitment for title insurance, the supplier of business exception to the Moorman Doctrine does not apply.

This case and reaction to it was the focus of the "Law Pulse" article by Helen W. Gunnarsson in the March, 2006 ISBA Bar Journal, Vol. 94, No. 3., p. 110.

24. TITLE INSURANCE; SUBROGATION; WARRANTY DEEDS AND BREACH OF WARRANTY; KNOWN DEFECTS IN TITLE: MORTGAGES:

In Midfirst Bank v. Abney, (2nd District, June 2006), http://www.state.il.us/court/Opinions/AppellateCourt/2006/2ndDistrict/June/Html/2050853.htm, defendant Forshay purchased property at a sheriff's sale and transferred the property to defendant and counterplaintiff Abney by way of a warranty deed. Nations Title Agency of Illinois, Inc. ("Nations") did a title search as part of the transaction between Forshay and Abney, but failed to report that plaintiff Midfirst Bank had a priority lien. Midfirst foreclosed. Abney filed a counterclaim against Forshay for breach of warranty of title, which the trial court granted. Lawyers Title Insurance Corporation

("Lawyers") issued a title policy to Abney based upon Nations' faulty search, paid out on its policy and obtained a money judgment as subrogee to Abney against Forshay. Forshay sought damages from Nations for negligent misrepresentation, but Nations motion for directed finding was granted based on the law that a title company is not providing information in issuing a policy of insurance in order to be excepted from the Moorman doctrine.

Forshay appealed, claiming error in the determination that (1) he was liable for breach of warranty when Abney had actual knowledge of the mortgage which was defect in title; (2) he was liable to Lawyers Title in light of the negligence of its agent, Nations, in discovery and report of the mortgage in its commitment and closing; and (3) he was unable to recover from Nations for negligent misrepresentation based on a finding that Nations was not in the business of supplying information to third parties so as to create liability under the Moorman exception. The Appellate Court for the 2nd District affirmed.

The facts, though involved and convoluted, indicated that Abney had once owned the property and had actual knowledge of Midfirst's mortgage and but believed it had been foreclosed by a lender who had a mortgage recorded subsequent to that of Midfirst. He was told by Forshay that the foreclosure action had "taken care of" Midfirst's mortgage, and concluded that Forshay therefore knew about Midfirst's mortgage. Notwithstanding such knowledge, Forshay gave Abney a general warranty deed containing a covenant of good title after Forshay bought the property at sheriff's sale even though the property was encumbered by Midfirst's mortgage.

Abney was granted summary judgment against Forshay for breach of warranty of title. The Appellate Court found that the fact that a purchaser may have knowledge of an encumbrance does not release or discharge the covenant in the warranty deed, which warrants more than failure of title; it also defends title against all who may lawfully claim the same. The court was not impressed by Forshay's contention that a party to a contract may not complain of a breach caused by his own default, and distinguishing cases cited by Forshay because they involved either encumbrances put on the property after sale or covenants not made by the grantee.

The Court, in upholding Lawyers' recovery as subrogee, described the prerequisites of subrogation as (1) a third party must be primarily liable to the insured for the loss; (2) the insurer must be secondarily liable to the insured for the loss; and (3) the insurer must have paid the insured under the policy, thereby extinguishing the debt of the third party. The Court found all necessary elements present here and affirmed.

The Court rejected Forshay's theory that because Nations was at fault Lawyers' claim for subrogation was somehow defeated, finding that it is not a defense to subrogation that someone else may be liable to Forshay. The Court found it significant that Forshay did not protect himself by buying a title insurance policy at the time he acquired the property at sheriff's sale. Also, the Court was unwilling to award Forshay a "windfall" by having Lawyers pay a preexisting obligation without a means to recover. The Court refused to require Lawyers to seek recovery from Nations for its negligence, and there is an implied consideration of the privity and relationship between the parties that surfaces throughout the decision.

The Court then reviewed the elements of negligent misrepresentation, discussed the holding in First Midwest Bank vs. Stewart Title Guaranty Co., 218 Ill.2nd 326 (2006) – *see also the January 2006 Flashpoints* – and refused to hold that a title agent (as opposed to a title insurer) is in the business of supplying information when it issues a title commitment.

(Editor's note – Several commentators in the past have recommended against the use of warranty deeds as unnecessary if not obsolete due to the universality of title insurance. Is it time to use Special Warranty Deeds instead of General Warranty Deeds, in light of the holding in this case? And, of course, does our friend Dick Bales sleep even more soundly with this confirmation that title insurers are not exceptions to the Moorman doctrine ?)

25. TRUTH IN LENDING; RESCISSION DISCLOSURE ERRORS AND RIGHT OF RECISSION:

The Decision in Handy v. Anchor Mortgage Corporation, (7th Cir. April 6, 2006), begins by noting that anyone who has refinanced a mortgage knows that it "requires a strong wrist and a good pen to sign a bevy of forms and documents. Many of these forms are required by the Truth in Lending Act (TILA) 15 U.S.C. Section 1601 et seq.". One of those forms is the right of rescission notice advising the borrower that he/she has 3 days to cancel the transaction and giving an appropriate form to do so. In Ms. Handy's case, she received two different disclosure forms at closing relating to her right to rescind;, one of which was inappropriate to her circumstances. The question before the Court was whether this conduct of providing the incorrect as well as the correct rescission disclosure was a failure by the lender permitting her up to three years, (rather than 3 days had there been no "error" or violation of TILA), to rescind the transaction under the statute. The District Court believed that since both of the forms gave her notice of her right to rescind this was an inconsequential error that did not trigger the longer rescission period. The Seventh Circuit reversed and ruled that she had the longer period to rescind due to the error, and that the right to rescind existed even though Ms. Handy had passed away and the loan been paid in full by her estate.

Noting that "Congress enacted TILA to assure a meaningful disclosure of credit terms so that the consumer will be able to…avoid the uninformed use of credit", which applies to any consumer transaction where a security interest in the debtor's residence is involved, by mandating a 3 day right of rescission, and requiring the creditor to provide borrowers with "appropriate forms…to exercise[their] right to rescind", the Court here reminds us that "RILA does not easily forgive 'technical' errors. Accordingly where more than one form is provided, the confusion undermines the Act's purpose of providing a clear notice of what the right to rescind entails and fails. The decision also includes a discussion of the remedies available under TILA, including actual damages, statutory damages, costs and reasonable attorney's fees.

Despite the logistical difficulties of returning funds (especially here where the loan had been paid off by the debtor's estate after her death), the Court states that "money and property can be just as easily be returned to the borrower after the loan has been paid off as before", and to hold otherwise would "encourage creditors 'to delay for as long as possible'…in hopes that the borrower would payoff" the loan and relieve the creditor of its liability. The remedy of rescission under TILA requires "unwinding" the loan transaction in its entirety at any time prior to the borrower's sale or transfer of all of his/her interest in the property, but this does not limit the remedy where the loan has been paid off and can be exercised even after the loan is paid off if there is a violation of the Act. Handy's estate was simply required to return the principal of the loan to the lender and the lender would have to release the mortgage, relinquish its rights to any interest and return any interest collected, in addition to the statutory damages, costs and fees.

(*Editor's Note – The underlying implication of this case is that the issue relating to the erroneous disclosures was created by the title company providing the wrong from to the borrower, and Dick Bales would like us to see this as a "balancing case" after the rulings in favor of title companies on negligent misrepresentations where the "error" is in missing a lien in the chain of title. I don't think so, though. I think the title companies are way ahead !)*

26. ZONING: AMENDATORY ORDINANCE AND VESTED RIGHT TO CONTINUED ZONING CLASSIFICATION:

In Ropiy v. Hernandez, (1st Dist., February , 2006), http://www.state.il.us/court/Opinions/AppellateCourt/2006/1stDistrict/February/Html/1050283.htm , a property owner sued the City of Chicago Director of the Department of Construction and Permits, requesting a mandamus directing the issuance of a wrecking and building permit to allow him to tear down a single family residence and construct a three-unit residential building in its place. Ropiy purchased the Chicago residence in April, 2003, when the property was zoned R-4, and the existing zoning would have permitted construction of a three unit building. He testified that he would not have completed the purchase of the property on July 15, 2003, had he known that he would not be permitted to proceed with his intended development. Unknown to him, however, on June 4, 2003, after the contract but before closing, an ordinance to change the zoning for this area from R-4 to R-3, (which would not allow construction of a three-unit building), was proposed and introduced in the City Council. The trial court granted the City's Section 2-619 motion to dismiss based on the argument that the amendatory ordinance was introduced before Ropiy had completed the purchase and after he had constructive notice of the proposal. The question on appeal was whether Ropiy had a vested right to the prior zoning classification and whether he had adequate notice of the pending zoning ordinance change at the time he closed. The First District affirmed the dismissal.
Although Ropiy expended $24,350.00 on architects, structural plans, contractors, and mortgage financing costs preparing to construct the three-unit building, he did not have a vested right to the continued zoning classification of the property. "Generally, there is no vested right in the continuation of a zoning classification…A legislative body has the right to amend a zoning ordinance, and a municipality may properly refuse to issue a

permit for construction when an amendatory ordinance is pending that would prohibit the proposed building development." While the Court had previously ruled that a change of position coupled with substantial expenses expended in good faith by an innocent party in reliance on a previously issued building permit would create a vested right to complete construction as originally authorized regardless of a subsequent change in zoning, (See 1350 Lake Shore Associates v. Mazur-Berg, 339 Ill.App.3d 618), there is "no bright line rule" absolutely entitling one to a continued zoning classification, and an owner can not be viewed as having incurred expenses in good faith if he has or should have knowledge or notice of the proposed zoning change. Here, the introduction of the amendatory ordinance occurred after Ropiy entered into the contract, but before he closed the sale. The amendatory ordinance was published in the City Council Journal of Proceedings on July 9, 2003. The ordinance was not passed until March 31. 2004, and in the interim, the City sent notices to taxpayers of record; (including Ropiy's grantor, but not Ropy). The introduction of the ordinance on June 4, 2003 and publication of the proceedings on July 9, 2003, was sufficient to charge Ropiy with constructive notice of the proposed zoning change when he purchased on July 15, 2003. His expenditures of development capital were made after he had "constructive knowledge" that the zoning change had been proposed and were, therefore, outside of the rule in the 1350 Lake Shore Drive case.