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

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REAL ESTATE LAW SECTION COUNCIL

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Steven B. Bashaw
Steven B. Bashaw, P.C.
Tel. (630) 322-9990
e-mail: sbashaw@bashawlaw.com

Joseph R. Fortunato, Jr.
Momkus McCluskey, LLC
Tel. (630) 434-0400
e-mail: jfortunato@momlaw.com

1. ADVERSE POSSESSION -- ABANDONMENT AND PERMISSIVE USE:

In McNeil vs. Ketchens, et al. (4th District, January 6, 2010) 397 Ill.App.3d 375, 931 N.E.2d 224, the issue of Adverse Possession of a "wedge" of land used as a driveway by successive owners for a period in excess of 20 years presented an interesting twist. The trial and appellate courts had to deal with the question of when the 20-year period started to run and whether the temporary vacancy of the property between owners interrupted the necessary "continuous" element. In this case, a strip that allowed access for a driveway was used continuously by a series of owners, but the legal description of the strip was left off a series of conveyance deeds in the chain of title, and was further complicated by a series of less than exact will devises. Then Ketchens parked his car in the McNeil's driveway. He put a cover over it to signal an intention to keep it there, blocking the driveway, for an extended period of time, and invited McNeil to sue him. An action was brought by McNeil and they asserted their rights to the strip under the theory of Adverse Possession. The assertion was disputed on two grounds: abandonment and permissive

[1] Harold I. Levine was a defender of owners and mortgagors, a prolific writer and continuing education presenter, and, to a few very fortunate lawyers, a mentor and role model who passed away in 2003. He was a long-time volunteer for the Legal Assistance Foundation, the Center for Disability and Elder Law, as well as other legal service providers, and, most importantly, brought others to this important work. On more than one occasion, I had the honor of being on the opposite side of the counsel's table from Harold. He was a 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 is 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 minimum continuing legal education. In some small measure, the work of this man must be undertaken and carried on by those of us in our profession who shared his great caring and love for the law. THIS MATERIAL COPYRIGHT @2010, STEVEN B. BASHAW, ALL RIGHTS RESERVED. LIMITED MATERIAL MAY BE QUOTED FOR REVIEW OR REFERENCE PURPOSES ONLY.

use. The court held first that a one-month period between the time when one of the subsequent purchasers vacated the property and the next owner took possession did not constitute "abandonment" sufficient to disrupt the "continuous" period of the required elements for Adverse Possession. The Appellate Court referred to the trial court's reliance on the temporary vacancy to deny adverse possession as "misguided". Also, in a situation where a titleholder may not be aware that a holding of possession is adverse because the use is as was intended by the legal title holder, the court noted that "…the 20-year period should not start to run until a title holder has a visible, objective reason to know that someone is trespassing. The period cannot run on the sly." Therefore, the court reasoned, while it could be argued that the use of the strip as a driveway in the same manner as had the title holder was not "hostile", (another of the essential elements of adverse possession), to the true owner, it could not be deemed to be used with permission. "Possession cannot be permissive if neither the owner nor the possessor knows there is an encroachment. One cannot sensibly give another permission to use land unless one believes that the land belongs to oneself." Therefore the heirs of the holder of legal title were subject to the claim of Adverse Possession asserted by the current title holder of the residence that used the driveway. The existence of the driveway was sufficient "dominion over the land" to satisfy the element of possession. There was no need to specifically exclude anyone else; "All they had to do was perform public acts of ownership, the kinds of acts one would perform on property of that character only if one claimed the property." The decision also analyzes the impact of the failure to name all of the necessary parties to quiet title, (here, the heirs of various decedents who may or may not have held title and may or may not have affected by the adversely possession), holding that "Reversal [of the trial court's ruling on adverse possession] seems to be warranted only if the judgment materially affects the absentee's interests. [cite] Because the judgment does not bind the beneficiaries, [because they were not a party to the litigation] it poses no threat to their interests, and we do not find their absence to be cause for reversal." Finally, this case deals at length with issues relating to recusal of counsel and motions for sanctions in a lengthy and contentious series of hearings which are "a case within a case".

2. CONDOMINIUMS: ACCESS TO BOOKS AND RECORDS CHALLENGED:

The Condominium Property Act and the Illinois Non already provide for a unit owner's right to access books and records of his or her condominium association. (See Taghert v. Wesley, (343 Ill.App.3d 1140, 799 N.E.2d 377, a case presented and discussed in prior case law update.) The City of Chicago Condominium Ordinance, (Chicago Municipal Code Section 13-72-080, 2009), has a similar provision. In Palm v. 2800 Lake Shore Drive Condominium Association, (1st Dist., May 28, 2010), 929 N.E.2d 641, 340 Ill.Dec. 999, unit owner Gary Palm sought production of various books and records from the association in which he was a unit owner and past board member. The Association refused the request to provide the books and records, and claimed that the Chicago Ordinance under which the request was made was invalid because it "conflicted with existing Illinois law"; i.e., the Condominium Act and Illinois Non. The trial court rejected this argument and granted Mr. Palm's motion for summary judgment, ordered the documents be produced, and awarded prevailing party attorney's fees under the ordinance. Palm argued that he had a "proper purpose" in requesting the documents based on various "improprieties" of the association officers, (a condition set forth in the Illinois Condominium Property Act), and survived the Association's motions to dismiss, motions to reconsider, and a change in trial judge, to finally prevail with a finding that neither the Condominium Property Act nor the General Not for Profit Corporation Act pre-empts or invalidates the Chicago Ordinance, that the Association was

required to produce the requested documents, and an award of attorney's fees. The First District Appellate Court affirmed.
The City of Chicago is a 'Home Rule" political unit, and as such, any "conflict" with State Statutes are not invalid unless expressly so indicated in the State legislation. Home Rule ordinances are to be liberally construed under the Illinois State Constitution in recognition of the importance of giving the "broadest powers possible to regulate matters of local concern." Often, local home rule ordinances are more restrictive or inclusive than state enactments because of those local concerns. While it might have appeared to be a "conflict" between the Ordinance's mandate that association records be provided within three business days of the written request when compared with (a) the Condominium Property Act's provision that the request must be made with particularity, "for a proper purpose", to examine the documents at the association office, at a reasonable time, and provide for a 30-day compliance period, and (b) the General Not for Profit Corporation Act limitations of merely "for any proper purpose at any reasonable time", the Court found the Ordinance provisions are valid exercise of the home rule unit's right to govern matters of local concern more rigorously; "Our supreme court has instructed that, to limit home rule powers, the legislature must say specifically the "statute constitutes a limitation on the power of home rule units to enact ordinances that are contrary to or inconsistent with the statute." Neither the Condominium Property Act nor the General Not for Profit Corporation Act include such a statement limiting home rule ordinances affecting the subject matter, and therefore, did not pre-empt or invalidate the Chicago Ordinance. Accordingly, having exercised the right to access under the local ordinance, Palm did not need to comply with or be limited by the State legislation. The Court also upheld the fee-shifting provision of the Ordinance and the trial court's award, presenting a good discussion of the issues of fees, costs, and declaratory matters in very contentious litigation.
(Ed. Note: A Petition for Leave to Appeal to the Supreme Court was allowed on September 29, 2010, 2010 LEXIS 1137.)

3. CONDOMINIUMS; LIMITED COMMON ELEMENT REPAIRS, ASSESSMENTS AND RESERVES:

The Condominium Association in Ridenour v. Carol Sandburg Village No. 7 Condominium Association, (1st dist., May 19, 2010), 931 N.E.2nd 692, 341 Ill.Dec. 793, consists of 616 units in two buildings. "James House" is a 43-story building with 520 units, and "Kilmer House" is a 6-story building with 96 units. In 2000, the Association approved window replacement for Kilmer house, and the $752,000 cost was paid out of the capital reserves of the association. Then, in 2004 repairs were made to the balconies and concrete, also funded from capital reserves. In 2008, however, when the Association decided that the windows in the James House needed to be replaced at a cost of $14 million, unit owners from the Kilmer house filed a declaratory action alleging that the windows in the James House were "limited common elements", and as such, the Association could only pay the costs for the repairs by a special assessment levied against the James House unit owners who were being benefited by the repairs, and not the entire association of unit owners, common expenses of the entire association or reserves of the entire association. The Kilmer House owners prevailed on summary judgment in the trial court found that since the repairs were to limited common elements, the costs should be paid solely by the unit owners who benefited and only 83.3% of the capital reserves, (the percentage of the James House units to the entire association), could be used for the project.

The First District affirmed. Reviewing both the Condominium Property Act and the specific declaration of this association confirmed that the windows were "limited common elements"; i.e., areas designated in the declaration as being reserved for the use of certain unit owners to the exclusion of others. Section 605/9(e) of the Act provides "for the assessment, in connection with expenditures for the limited common elements, of only those units to which the limited common elements are assigned.", and case law had notes that "The purpose of permitting the designation of limited common elements is to prevent the owners of certain units from being forced to pay a proportionate share of maintenance expenses for amenities from which they derive no benefit." Further, the particular Declaration of Condominium at issue consistently defines limited common elements as those intended to serve exclusively a certain Unit or Units, "including …shutters, awnings, doorsteps, porches, balconies, patios, perimeter doors, windows in perimeter walls and any other apparatus designed to serve a single Unit…", and relating to repair of those elements provides for maintenance, repairs and replacement "and the cost thereof shall be assessed in whole or in part to the Unit Owners benefitted thereby". Based on this same reasoning, only that portion of the reserves attributable to the units with limited common elements being repaired (83.3%) could be used for the repairs or as a pledge of collateral for financing.

In response to the argument that the Kimber House windows had been replaced through access to the reserves of the entire association rather than a special assessment of the particular units, the Court stated: "However, per the Association, it has been the practice of the Association to assess all unit owners equally for all repairs, maintenance and improvements to limited common areas without regard to the unit owners directly benefited by any improvements. The Association has employed the same practice in using reserves for limited common areas. These practices are incorrect applications of the Act and Declaration….[the costs] should be assessed only to those unit owners directly benefiting from any such improvements."

4. FAIR DEBT COLLECTION PRACTICES; FORECLOSURE ALTERNATIVES AND THIRD PARTY COLLECTORS:

It is clear that the sheer volume of mortgage defaults and foreclosures is transforming the landscape of lender collection efforts. The question in Gburek v. Litton Loan Servicing , (7th Cir., July, 2010) 2010 U.S. App. Lexis 15346, was whether the borrowers lawsuit alleging a violation of FDCPA should have been dismissed because the conduct of Litton did not fall within the scope of the act where the correspondence to the borrower did not contain a specific demand for payment. The District Court granted Litton's motion, Gburek appealed, and the Court of Appeals reversed.

When Gburek became delinquent on her mortgage payments, Litton send a letter proposing a loan work-out as a foreclosure alternative and requesting her current financial information. At about this same time, Gburek also received a letter from a company by the name of Titanium Solutions stating that it was contacting her on behalf of Litton relating to avoiding foreclosure and also requesting her financial information. The Litton letter requested an extensive financial statement, proof of income, tax, returns, paystubs, copies of her bank statements and a "hardship letter" explaining the cause for her default. Although neither of the letters contained an explicit demand for payment, the Litton letter contained the standard FDCPA warning language, and the Titanium Solutions letter stated it was "not a debt collector and is not involved in the collection of any of the amounts due". Gburek's class action lawsuit alleged that this conduct (1) employed a deceptive means to obtain a borrower's personal information, (2) was a direct communication with an borrower known to be represented by an attorney, and (3) violated

Gbureks rights by communicating with a third person about her debt without her consent, all in violation of the FDCPA. Noting that FDCPA prohibits "abusive, deceptive or unfair debt-collection practices", as well as regulating when, where and with whom a debt collector may communicate, the Court rejected the notion that case law firmly established the rule that an explicit demand for payment is necessary to qualify the communication under FDCPA, and held that "a communication made specifically to induce the debtor to settle her debt will be sufficient to trigger the protections of the FDCPA." The communications here met this criteria, and the Gburek complaint ought not to have been dismissed.

5. HOME REPAIR AND REMODELING ACT; BALANCING THE MECHANIC'S LIEN ACT AND LEGISLATIVE TEMPERING:

The first cases construing the requirements in the Illinois Home Repair and Remodeling Act, 815 ILCS 513/1 et seq., that contractors provide consumers with a written contract or estimate before beginning work, specific disclosures, and a consumer pamphlet revealed that the consequences could be quite harsh. Then tempering decisions in Artisan Design Build, Inc. v. Bilstrom, (2nd Dist., Sept. 22, 2009) 397 Ill.App.3d 317, 922 N.E.2d, K. Miller Construction Co. v. McGinnis, (1st Dis., Aug. 10, 2009), 394 Ill.App.3d 2487, 913 N.E.2d 1148, and Kunkel v. P.K. Dependable Construction Co., (5th Dist., February, 2009), 387 Ill.App.3d 1153, 902 N.E.2d 769, 327 Ill.Dec. 648 brought some hope to contractors that all might not be lost if they failed to comply with the Act.
Universal Structures, Ltd. v. Buchman, (June 30, 2010), 210 Ill.App. LEXIS 656, begins with an overview of the numerous opinions construing the Act from Slepian to Smith v. Bogard, Kunkel and McGinnis, and specifically reviewing the most recent case of Fandel v. Allen, (3rd Dist., 2010), 398 Ill.App.3d 177. Noting the steady stream of arguments finding that a contractor could recover for quantum meriut or under the Mechanic's Lien Act regardless of a failure to comply strictly with the provisions of the Act, the First District here reverses the Section 2-619 dismissal granted in favor of the consumer and against the contractor dismissing the Mechanic's Lien foreclosure. Buchman had previously requested demolition work on their home from Universal Structures. The parties entered into a valid oral contract, and Universal provided detailed itemized work orders to Buchman prior to work being performed in several stages. Based strongly on the reasoning in Fandel that the contractor's right to a lien is derived from performance of a valid contract and the failure to provide a written contract and consumer rights brochure, while 'unlawful', does not act to automatically invalidate an otherwise valid agreement between the parties, the Court in Buchman held that the contact created a right to a mechanic's lien upon performance which could not be avoided based on the Home Repair and Remodeling Act: "Nowhere does the Act state that a contract that does not strictly comply with the statute is void or otherwise unenforceable. Rather, Section 30 of the Act specifically declares it to be 'unlawful'…[and] Section 20, which sets forth the requirement of the consumer rights brochure, does not provide that a failure to furnish the brochure constitutes an 'unlawful act'…Instead, as the court noted in Artisan Design, the proscribed contents of the brochure instruct the homeowner to contact the State's Attorney or Attorney General if the homeowner thinks he or she has been defrauded by a contractor." In closing, the opinion by Justice Quinn notes that "our decision is supported by recent proposed legislation, enacted by the Illinois Senate, to amend Section 30 of the Act to provide that "Any person who suffers actual damage ass a result of violation of this Act may bring an action pursuant to Section 10a of the Consumer Fraud and Deceptive Business Practices Act…This amendment also eliminates the language in Section 30 making "unlawful"…"

6. HOME REPAIR AND REMODELING ACT FINAL WORD; THE SUPREME COURT SPEAKS AND LISTENS TO THE LEGISLATURE:

In what surely has to be the "final word" in what Joe Fortunato has referred to as the "continuing Home Repair and Remodeling Act saga", the Illinois Supreme Court considered the mechanic's lien, oral contract claim, quantum meruit theory, and most recent legislative enactment in K. Miller Construction Company v. McGinnis, (September 23, 2010), 234 Ill. 2d 523, 920 N.E.2d 1073, 336 Ill. Dec. 483. The underlying complaint filed by a contractor, Keith Miller, to enforce his oral contract to remodel a three-flat building in Chicago into a single family residence for Attorney McGinnis alleged three counts: (1) foreclosure of mechanic's lien, (2) breach of oral contract, and (3) quantum meriut. The parties had been "friends" and done remodeling work together before. Mr. McGinnis had practiced law for over 30 years and been counsel for a title company. This project began with a cost of $187,000 that "vastly increased" to approximately $500,000.00. McGinnis paid the first invoices of $65,000 when submitted, but then refused to pay further invoices until the construction was done. Miller financed the completion of the project with a line of credit he obtained from his own bank for $150,000. Attorney McGinnis or his wife visited the site weekly and approved all of the work, except some minor flooring with a cost of correction of $300.00. At completion, Miller demanded over $300,000.00 for labor and materials, and then filed suit. McGinnis filed a 2-615 Motion to Dismiss based on the theory that the oral contract without a written estimate signed by him as the owner and without tender of a brochure required by the Home Repair and Remodeling Act "violates Illinois law and is therefore not enforceable." Section 30 at the time of the filing of the complaint provided that such contracts, made without compliance with the Act were "unlawful".
Different Appellate Districts, the Supreme Court recognized, had declared breach of the Act a bar to any recovery under contact, mechanic's lien, or quantum meriut theories, (Smith v. Bogard, (2007), 377 Ill.App.3d 842, allowing a contractor to recover "would run afoul of the legislature's intent or protecting consumers, would reward deceptive practices, and would be violative of public policy"), and also had held contrarily that "the contractor's right to a lien is derived from performance of a valid contract and the failure to provide a written contract and consumer rights brochure, while 'unlawful', does not act to automatically invalidate an otherwise valid agreement between the parties", or the contractor's right to recover. (Fandel v. Allen, (3rd Dist., 2010), 398 Ill.App.3d 177). Making it abundantly clear that "bad facts", (i.e., homeowner attorneys in a number of cases asserting the Act as a defense to work they had otherwise accepted and benefited from), will not always support permitting the use of technical defenses to thwart recovery, the Court recites decisions in which it had held that the use of unlicensed plumbers in violation of the Illinois Plumbing License Laws and violations of municipal ordinances did not necessarily bar enforcement of a contract, and turned to the Restatement (Second) of Contracts, Corbin and Williston on Contracts for the law that: "To assert, however, as some courts have, that all unlawful agreements are ipso facto void is opposed to many decisions unfortunate in its consequences, for it may protect a guilty defendant from paying damages to an innocent plaintiff." "The decision of whether and how to enforce a contract involving a prohibited performance is and must be based on policy choices and a balancing of relevant factors." Finding that the Appellate Court below erred in holding that a statutory violation or "unlawful" act by the contractor rendered the contract unenforceable, the Court first noted with favor that the Fandel decision had held that the legislature had not expressly stated that failure to comply with the written estimate and disclosure requirements of the Act rendered

the contract unenforceable, (only the conduct 'unlawful'), and that Section 30 provided that failure, while being unlawful was "not exclusive nor meant to limit other kinds of methods, acts or practices", which, as Justice Gordon had opined below, "leaves the door open to equitable defenses, such as the quantum meruit claim".
Moreover, the General Assembly's enactment of Public Act 96-1023, effective July 12, 2010, and the legislative comments in debate, clarified that the Act was not intended by the legislature to be a total bar as found by the Court in Smith v. Bogard. The re-written Section 30 in Public Act 96-1023 removed the word "unlawful" from the damages provision, leaving only an "Action for actual damages", and the remedy of "an action pursuant to Section 10a of the Consumer Fraud and Deceptive Business Practices Act." Noting that this "subsequent amendment to a statute may be an appropriate source for discerning legislative intent", the Court highlighted that during the debate in the Senate its sponsor had noted that "what the courts have found is that some consumers are using the Act to get out of paying the balance due …So the courts are asking for clarification…what we are doing through this bill is saying that, unless there's actual damages, a consumer cannot get out of paying the balance due…by using these two technical provisions in the Act of requiring a pamphlet to be given and requiring a written contract before work…" Interpreting Public Act 96-1023 as a "clarification of the prior statute", the Court finds the enactment a declaration of the legislative intent relating to the original Act and supportive of its decision.

(The Second District reviewed these same issues in Fleissner v. Fitzgerald, (2nd Dist., August 6, 2010), 2010 Ill.App.Lexis 817, and came to essentially the same conclusions with a review of most of the decisions on the Act and the legislative statement by enacting Public Act 96-1023)

7. LANDLORD TENANT; CHICAGO RLTO "OWNER OCCUPIED EXEMPTION" APPLIED TO COACH HOUSE:

The efforts of landlords to avoid the application of the harsh Chicago Residential Landlord Tenant Ordinance, (Chicago Municipal Code, Section 5-12-010 et se.), continue in Bervin v. Marquette National Bank & Trust No. 14662, (1st Dist., August 11, 2009), 394 Ill.pp.3d 22, 915 N.E.2d 84, 333 Ill.Dec. 563. (Previous Case Law Updates have reviewed Detran v. Such, (1st Dist., 2006), 368 Ill.App.3d 861, where the argument that the owner must "exercise control" over the property rather than simply be a 80 year old owner with his name on the mailbox was rejected to refute the owner occupied exemption, Allen v. Lin, (1st Dist., 2005), 356 Ill.App.3d 405, holding an owner who lived at one end of a townhouse complex which had a separate address in a separate building was not entitled to the exemption, and Meyer v. Cohen, (1st Dist., 260 Ill.Ill.App.3d 351, where the requirement that the owner-occupied unit be limited to six-unit or less building was not met in a seven-unit building because only three of the units were occupied at the time.) This case deals with the application of the owner-occupied exemption of the Chicago RLTO to the lease of a coach house behind an owner occupied dwelling. While the coach house was a separate building, under a separate roof, the trial court agreed that since both the main building in which the landlord lived and the coach house had the same address, same tax id number, and was assessed as a single "dwelling", the lease was exempt as "owner-occupied". Finding that the issue was one of "first impression" in Illinois, the First District affirmed. The RLTO defines a "dwelling unit" as a home "together with common areas, land and appurtenant buildings thereon…including garage and parking facilities." The record disclosed that a non-rented portion of the

coach house was used by the landlord for storage and parking, and therefore was part of the landlord's "dwelling unit" as an appurtenance, regardless of the fact that it was a separate building.

8. LANDLORD-TENANT; PREVAILING PARTY FEES AND COSTS*:*

The Housing Authority of Champaign County filed a forcible entry and detainer action against its tenant, Elaine Lyles, based on its assertion that she breached the lease "as a result of keeping her unit in an unsanitary and unsafe condition", and sought possession, holdover rent, attorney's fees and costs pursuant to the provisions of the lease. Attached to the Complaint was a 30 Day Notice to terminate the tenancy, but following a bench trial, the Court held sua sponte that it did not have any proof that the tenant was served with the notice. The case was continued to address whether the Plaintiff could proceed without proof of the service of the 30 Day Notice. When the trial re-convened, the court entered judgment in favor of defendant, finding that strict compliance Section 9-211 of the Forcible Entry and Detainer Act required evidence of the service personally, by member of household or by posting a demand (the 30 Day Notice). Thereafter, the tenant filed a petition for attorneys fees and costs based on section 3 of the lease providing that "In the event one party to this lease defaults in fulfilling any of the provisions of this lease, the non-defaulting party may recover all costs and reasonable attorney fees incurred in enforcing this lease, whether or not suit shall be required." The trial court, noting that section 12 of the lease provided that any notice was deemed effective "if given by delivery in person…or by mailing by first class United States mail.." found that the tenant was entitled to $5.089.50 in fees and $145.00 in costs based on the Plaintiff's failure to provide evidence of proper service of the 30 Day notice.
The Fourth District reversed in The Housing Authority v. Lyles, (4th Dist., November 20, 2009), 395 Ill.App.3d 1036, 918 N.E.2d 1276, with an opinion that every attorney who represents landlords should read. Noting first that "A forcible entry and detainer action is a limited proceeding that determines the issue of who is entitled to immediate possession. [citation] Forcible entry actions are summary, statutory proceedings, and a court hearing a forcible entry and detainer claim is considered 'a court of special and limited jurisdiction. [citation] Matters not germane to the issue of possession may not be litigated in a forcible entry and detainer action." Then, reviewing the "American Rule" and noting that a statute or contract that will support the recovery of attorneys' fees must do so by specific language, the Court applied the law of contract interpretation to find that here, the lease language provision for recovery of prevailing party fees "incurred in enforcing this lease" was not supportive of the award in favor of the tenant; "this court finds as a matter of law that the lessor or lessee would be entitled to attorneys fees only if that party was suing to compel or make effective the covenants of the lease. In this case, the defendant was defending against plaintiff's claim that she breached the terms of the lease 'as a result of keeping her unit in an unsanitary and unsafe condition. Defendant never sued to enforce any covenant of the lease. Defendant was not enforcing anything, but merely defending against the charge that she had breached the lease. We will not 'torture ordinary words until they confess ambiguity. [citation] Defendant was not entitled to an award of attorneys' fees in this forcible entry and detainer action."

9. LANDLORD TENANT; COMMERCIAL LEASE, PURPOSE CLAUSE AND RELOCATION:

The importance of a well drafted lease "purpose clause" in a commercial lease is well illustrated in Bright Horizons Children's Centers, LLC v. Riverway Midwest II, LLC, (1st Dist., June 25, 2010), 931 N.E.2d 780, 341 Ill.Dec. 883. This declaratory action was brought by the tenant, Bright Horizons Children's Centers, against the landlord, Riverway Midwest II, for a determination by the court that the relocation provision in the parties' lease did not require the tenant to move to other space which would violate Illinois law relating to its business as a daycare center. Bright Horizons operated a children's day care which used a facility on the first floor commercial space and an adjacent playground in Riverway's building on River Road in Rosemont, Illinois. Operating under a ten year lease, the sole "permitted use" for the lease is a "Child-care center", (including infants and toddlers), and the lease provided that the facility was to be licensed by the Illinois Department of Children and Family Services pursuant to DCFS regulations and in a manner "substantially consistent with Day Care Industry Standards". The lease also had a provision for relocation of tenants to other buildings owned by the landlord with 180 day prior written notice, provided the new space was "in the vicinity…equal in quantity and quality", at terms mutually satisfactory and agreed upon, and the landlord reimbursed tenant for all reasonable third party expenses in the move. In the event a mutual agreement and satisfaction on the relocation space was not reached within 30 days of the notice, the landlord had the right to terminate the lease on the 180th day upon payment of $125,000 to the tenant. When Riverway gave notice to Bright Horizons of its intent to relocate the child care facility, it stated it would relocate it to a second-floor space in a building on nearby Higgins Road in Park Ridge. Bright Horizons rejected this proposed space because it was not on the first floor and did not have an adjacent playground space similar to the Rosemont property. Riverway then gave Bright Horizons a second notice of intent to relocate it to a first floor space in the same building, but withdrew that offer and gave a third notice for another second floor space at a different building. Bright Horizons sought an exception to the Illinois Child Care Act, (225 ILCS 10/1 et seq), and the DCFS "Licensing Standards for Day Care Centers" requiring that infants and toddlers be cared for at ground level, but the Illinois State Fire Marshall denied the request. When Bright Horizons notified Riverway that if could not relocate to the second floor space, Riverway declared that it would hold the tenant in default, terminate the lease and enforce the lease's accelerated rent provisions.

Bright Horizons' argument to the trial court for declaratory judgment was that the relocation notice was not effective because it failed to offer alternative space that was consistent with the purpose and permitted use provisions of the lease as a child care facility conducted in conformity with the DCFS regulations and industry standards. Accordingly, Bright Horizons argued, Riverway, and not it, was in default relating to the relocation effort and notice. Riverway's position was that the first floor location of the space was not explicit in the lease, there was no discussion of that issue at the time the lease was made, and no express requirement that the space be at ground level. The trial court, noting that there was only one permitted use under the lease, (operating a day care center pursuant to the regulations of the DCFS and industry standards), and that the lease required the landlord offer a mutually satisfactory substitute space in the event of relocation, granted summary judgment to the tenant, finding that "A space in which [Bright Horizons] cannot operate the one use permitted under the lease, can't as a matter of law be mutually satisfactory. It just can't. So I believe the lease is unambiguous, incorporating as it does the DCFS regulations.", and granted summary judgment and Bright Horizon's request for attorney's fees under the lease terms.

The First District affirmed, finding that the lease was unambiguous, ("An ambiguity is not created simply because the parties do not agree upon an interpretation".), and that since requiring the tenant to relocate to any space other than a ground-floor area permitted for day care of infants and toddlers by the DCFS and the State Fire Marshall would not allow the continuation of the only permitted use under the

purpose clause, the notice of relocation was ineffective, rendering the declaration of the termination of the lease like-wise ineffective, and entitling Bright Horizons to continue its lease for the remaining term. The lease provision for an award of attorney's fees was not the ordinary "prevailing party" language, but stated that "the defaulting party agrees to reimburse the non-defaulting party for reasonable attorneys' fees." Accordingly, the award of fees to Bright Horizon was predicated upon a finding that Riverway had defaulted under the lease by ineffectively demanding relocation. This was accomplished based on a specific provision in the lease that the landlord would be in default for failure to perform any term, condition, covenant or obligation under the lease. Finding that "The landlord in this case defaulted in its fundamental obligation under the lease to offer substitute space that was usable for the sole activity provided for in the lease…[and it is] a reasonable interpretation of [the relocation section] that constitutes a default by the landlord…", thereby allowing the award.

10. LANDLORD-TENANT; FIXTURES; TRADE FIXTURES; PRIORITY

In Southwest Bank of St. Louis vs. Poulekefalos, et al. (1st District 2010), 931 N.E.2d 235, 341 Ill.Dec. 677, the Court had to determine the issue of whether a landlord or tenant's bank had priority interest in the tenant's distrained property consisting of several large pieces of equipment such as 12 plastic extruding machines and 3 silos that were bolted to the floors, ceilings and ductwork, supported by heavy duty electrical and piping systems. The trial court found that the property left behind by the tenant was permanently affixed to the real estate and therefore a fixture. Because of the status of the property, the landlord's interest was superior to a bank's UCC lien. The First District Appellate Court affirmed the trial court's holding in favor of the landlord. Illinois law grants a landlord a common law lien on a tenant's property for the non-payment of rent that is perfected by the filing of a distress warrant and inventory with the clerk of the court. 735 ILCS 5/9-302. The court reviewed the difficulty in removing the distrained property, the damage to the landlord's property that would have been occasioned by such removal, the fact that the UCC filing only generically described "fixtures", the fact that the property in question was permanently affixed to the property and that such fixtures were "trade fixtures", noted the importance of the fact that the bank did not do a "fixture filing". The issue of priority between a common-law landlord's lien and a bank's UCC lien are determined by non-UCC principles. Applying those principals, generally a lien which is first in time has priority, and the court found the landlord's distress lien filed by way of a distress warrant predated the bank's UCC lien, which was filed with the Missouri, rather than the Illinois, Secretary of State, thereby granting the landlord priority. The Bank failed to properly perfect its lien in the fixtures, and the landlord's distress warrant perfecting gave it a priority.

11. MORTGAGE FORECLOSURE; COMMERCIAL REAL ESTATE AND APPOINTMENT OF RECEIVER:

One of the primary distinctions made the treatment of residential versus non-residential property in the Illinois Mortgage Foreclosure Law is the differing statutory presumptions relating to possession and the appointment of a receiver or mortgagee in possession during the foreclosure proceeding. The statutory presumption relating to non-residential property is that under 735 ILCS 5/15-1701(b)(2), the lender is to be granted possession or the appointment of a receiver/mortgagee in possession on request if (a) the mortgage documents so provide upon a default and (b) there is a reasonable probability of the lender

ultimately prevailing upon a final hearing; i.e., that there is a default. In that event, the burden shifts to the borrower to establish "good cause" why it should remain in possession in an evidentiary hearing. In Centerpoint Properties Trust v. Olde Prairie Block Owner, LLC (1st Dist., February, 2010), 398 Ill.App.3d 388, 923 N.E.2d 878, the borrower appealed the trial court's decision to appoint a receive at the request of the Plaintiff lender. The mortgage being foreclosed secured a one year promissory note in excess of $32,000,000.00, that had matured relating to real estate that was to be developed for retail and hotel use near McCormick Place in Chicago. Upon the filing of the motion to appoint a receiver, the defendant filed a response alleging that the appointment would hamper the Defendant's efforts to refinance and develop the property, and would interfere with a pending condemnation suit by the Metropolitan Pier and Exposition Authority that would presumably result in proceeds which would allow the redemption and resolution of the mortgage indebtedness. Additionally, the Defendant filed a counterclaim alleging that the mortgage was entered into under duress and that the lender had violated the Consumer Fraud Act in the inception of the loan. The Appellate Court opinion, in a detailed analysis, rejected each of the borrower's arguments. "First [Plaintiff] is authorized by the terms of the mortgage to take possession of the property in the event of a default…Second, because a proven default establishes a reasonable probability of success in a mortgage foreclosure action (citations), and [Defendant] has admittedly defaulted on its note, there is a 'reasonable probability that [Plaintiff] will prevail on a final hearing in this case. Therefore [Plaintiff] is entitled to possession…unless [Defendant] can establish good cause for permitting it to retain possession." The allegation that the borrower could more efficiently mange the property than the lender was rejected as insufficient 'good cause' under the statutory presumption scheme and "such a requirement would be tantamount to shifting the burden of showing good cause onto the mortgagee." Likewise, a plea to weigh the harm caused to the borrower by the appointment of the receiver (due to the impact on the ability to refinance, develop and obtain tenants), against the harm that would inure to the lender if a receiver were not appointed (the property was largely vacant), was not "sufficient to overcome the statutory presumption in favor of placing the mortgagee in possession…If we were to hold that a mortgagor can establish good cause simply by showing that a receiver will make it more difficult to attract investors, lenders or buyers, it is likely that the exception would swallow the rule. " The only circumstance the Court could envision which would establish sufficient good cause to overcome the statutory presumption in favor of the lender was if "the mortgagor presents evidence to the trial court that it has a commitment from an investor to provide funds for development of the property or it has obtained a loan from another lender to refinance…the transaction must be imminent and not merely a possibility at some unknown time in the future" The Court's decision also includes a discussion of the rules of interpretation of statutory presumptions and provisions and concludes with a finding that holding that trial court, under these circumstances did not err in denying the borrower's request for an evidentiary hearing relating to the appoint of the receiver.

12. MORTGAGE FORECLOSURE; DECEASED MORTGAGOR, JURISDICTION AND SPECIAL REPRESENTATIVES:

In ABN AMRO Mortgage Group, Inc. vs McGahan, et al, (Ill. S. Ct., June 4, 2010), 231 Ill.2d 577, 910 N.E.2d 1126, the Illinois Supreme Court held that a mortgagee must name a personal representative for a deceased mortgagor in a mortgage foreclosure proceeding in order for the trial court to acquire subject

matter jurisdiction to enter a judgment in that proceeding. The Court reversed the First District Appellate Court, and upheld the reasoning set forth by Judge Simko in Cook County in two mortgage foreclosure cases, (ABN AMRO v. McGahan and Charter One Bank v. Hunter), which was originally espoused in the trial court's decision in the 2006 decision in Wells Fargo v. McQueen. The trial court's holding was that a mortgage foreclosure action is not an action *in rem*, in which the action is brought only against "property", but an action *quasi in rem,* in which an action is brought against a defendant personally "…with jurisdiction based upon an interest in property, the objective being to deal with the particular property or to subject the property to the discharge of the claims asserted." One of the pivotal differences between the two actions is whether the "defendant" is the property or a named person. A circuit court has jurisdiction *in rem* against real property by virtue of the location of the property in the county. In mortgage foreclosure cases, however, it is a person's rights in the property that are being foreclosed, based upon a default under the mortgage, and a person is the "instrumentality of the wrong…" Accordingly, a foreclosure is a *quasi in rem* proceeding, and the trial court must obtain jurisdiction over the mortgagor as a necessary party under the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1501(a)(1)) Because a mortgagor is a "necessary party", personal service of process is necessary over the mortgagor in order for the court to obtain subject matter jurisdiction. If the mortgagor is deceased, and no jurisdiction is obtained over a representative of the decedent, the court lacks subject matter jurisdiction, and the action is void. (In order to obtain jurisdiction in these circumstances, Judge Simko suggested appointing a "special representative" pursuant to 735 ILCS 5/13-209(c). The Illinois Supreme Court reviewed the history of *in rem* versus *quasi in rem* proceedings going back to 1886, treatises ranging from 1882, and Black's Law Dictionary to conclude that "Prior decisions from this court have inconsistently characterized a foreclosure as both *in rem* and *quasi in rem actions."* Noting that "None of these cases analyze the rationale for characterizing a foreclosure action as either *in rem* or *quasi in rem*. We do so now. Coming to the conclusion that the action is *quasi in rem,* because "In a foreclosure action, the property is not the defendant. Rather, the mortgagor, the person whose interest in the real estate is the subject of the mortgage, is a necessary party defendant", the Court reversed the decision of the Appellate Court below and specifically overruled the case law it relied upon, Financial Freedom v. Kirgis, (2007) 377 Ill.App.3d 107.

(The implications of this decision in the current recession and extraordinary volume of pending foreclosure cases, (some of which are certainly involving deceased mortgagors), are dealt with in a forthcoming article by Kevin Hudspect in the October, 2010 Illinois Bar Journal, and emphasized by Helen Gunnarsson's sidebar "LawPulse" analysis. The author, a law clerk in the Cook County Chancery Division, dealing with mortgage foreclosures on a daily basis, opines that a judgment of foreclosure in a case in which a mortgagor is deceased and a special representative is not appointed is void for lack of subject matter jurisdiction under the McGahn decision. The impact on the foreclosure procedure is obvious, but the resulting defect in the title to foreclosed property is potentially devastating. Foreclosed property is often bought at a sale and/or re-sold based on a perhaps mistaken belief that the title has been 'cleared' by the foreclosure. If the title coming out of the foreclosure, however, is void for lack of subject matter jurisdiction, a fatal flaw will result. Coping with the issue of whether there was a decedent mortgagor in the chain of title and lack of subject matter jurisdiction in the foreclosure thought to have extinguished liens on the property making it marketable may make many sleepless nights for our friends at the title companies.)

13. MORTGAGE FORECLOSURE; EVIDENCE OF OWNERSHIP OF THE ORIGINAL NOTE:

The Internet is awash with commentaries and blogs suggesting that desperate homeowners in foreclosure defend by demanding the Plaintiff be required to admit the original note into evidence at the time of judgment. The Illinois Mortgage Foreclosure Law, (735 ILCS 5/15-1506(b) even requires that "In all cases the evidence of the indebtedness and the mortgage foreclosed shall be exhibited to the court and appropriately marked and copies thereof shall be filed with the court." Trial courts throughout the State have routinely ignored or misunderstood this aspect of foreclosure, but the recent Seventh Circuit Court case of Patrick L. Cogswell v. Citifinancial Mortgage Company, (7th Cir., October 5, 2010), 08-2153, 2008 U.S. Dist. LEXIS 33334, may well change this attitude and should have a significant impact in the world of foreclosure litigation.

The case is not actually a foreclosure proceeding, but an action for breach of contract by an investor against a lender to recover damages for breach of contract after an unsuccessful attempt to foreclose a mortgage without a note. Citifinancial began foreclosure proceedings in state court to foreclose a mortgage and note on residential real estate that it had acquired from Home Equity, (although there was a gap in the chain of the mortgage assignments that failed to indicate how Home Equity acquired the mortgage). Patrick L. Cogswell, d/b/a The Patrick Group, offered to purchase the mortgage and note from Citifinancial, and an agreement was fashioned. At the closing of the transaction, Citifinancial did not have either the original mortgage or note to tender to The Patrick Group, and only provided a copy of the mortgage and assignment of the mortgage. The Patrick Group then took up the foreclosure case in Citifinancial's place as Plaintiff, only to be denied in the state trial court when it could not provide it was the holder of the note. The trial court entered a directed verdict in favor of the borrowers and against The Patrick Group. The Appellate court affirmed noting that "under Illinois law only the holder of a note may foreclose on property; transferring a mortgage is not enough by itself to confer the right to foreclose upon property. See, e.g. Moore v. Lewis, 366 N.E.2d 594, 599, (Ill.App.Ct. 1977". As a result, The Patrick Group filed the instant proceeding against Citifinancial for breach of contract and damages. (The case, although initially filed in state court, was transferred to federal court based on diversity jurisdiction.) The District Court granted summary judgment in favor of Citifinancial, finding as a matter of law that The Patrick Group failed to prove that the agreement of the parties included the transfer of the original note, and that the fact that the note was not turned over was not the proximate cause of the damages; the District Court held that Illinois law permitted foreclosure regardless of whether the Plaintiff is the holder of the note. The Seventh Circuit Court of Appeals reversed on both grounds.

First, what the parties intended to have transferred as their agreement that The Patrick Group would purchase the note was an issue of fact, not law, and summary judgment was improper when the issue was whether the parties' agreement required the surrender of the note or a copy of the note. Whether the parties intended the physical transfer of the note was a question of fact, not law, and therefore summary judgment was improper and reversed. The fact that Patrick Cogswell's affidavit stated that he requested the original note on several occasions after the agreement did not permit the Court to necessarily find that there was no agreement the note would be transferred. "Again, this is one possible interpretation of Cogswell's testimony, but it is not the only reasonable one; Cogswell might simply have been reminding Citifinancial of its promise."

The more important, (from a practicing attorney's point of view in this area), holding of the Court was that the failure to turn over the original note was, indeed, the cause for The Patrick Group's damages

because they were unable to foreclose as a result; leading to the logical conclusion that the case may be cited for that without the note, or at least a copy supported by a lost note affidavit, a Plaintiff can not foreclose. The Patrick Group argued that the directed verdict in the foreclosure case would not have occurred had it had the original note or a copy of the note as it believed Citifinancial had agreed to provide to it. "These courts [the state trial and appellate courts] concluded that The Patrick Group failed to make out a prima facia case because it had not shown it was the 'note holder'." Noting that "This question turns on principals of Illinois mortgage foreclosure law. Generally speaking, only a mortgagee can foreclose on property and a mortgagee must (at a minimum) be "the holder of an indebtedness…secured by a mortgage. 735 ILCS 5/15-1208. Under the Uniform Commercial Code, which Illinois has adopted, 810 ILCS 5/1-101 et seq, a key requirement to being a holder is physical possession of the note secured by the mortgage. See id. 5/1-201(b)(21)(a)), defining a holder as 'the person in possession of a negotiable instrument that is payable either to bearer or an identified person that is the person in possession….It follows, then, that Citifinancial's failure to deliver the note or a copy to The Patrick Group caused the foreclosure action to fail." Additionally, although Citifinancial argued that The Patrick Group failed to mitigate its damages by providing the trial court with a lost note affidavit, the Seventh Circuit noted that "A lost-note affidavit from Citifinancial would not have conclusively established The Patrick Group's ability to foreclose on the mortgage." Rejecting the presumption that a plaintiff can meet its burden of proof as long as it can produce a lost note affidavit, the Court observed that in those cases where there was a lost note affidavit accepted, the affidavits attach a copy of the note, something the Patrick Group could not do because Citifinancial did not provide even a copy of the note. "We are not aware of any case in Illinois in which a lost-note affidavit by itself was enough to prove ownership of the underlying debt…Thus, Citifinancial's ability to provide a lost-note affidavit if The Patrick Group had asked is simply a red herring…there remained the possibility that the note was actually held by another who would be entitled to enforce it against the property owners…Illinois law is clear that a mortgage may not be transferred unless the underlying debt is also transferred…and the normal rule under the Uniform Commercial Code is that a party may not enforce a negotiable instrument unless it has physical possession of the note."

14. MORTGAGES OUTSIDE OF THE CHAIN OF TITLE; RECORDING IN THE WRONG COUNTY:

In In Re Bulgarea, (N.D. Il. BK, September 9, 2010), 2010 Bankr LEXIS 2811, a trustee's motion to avoid the mortgage of National City Mortgage Company on the debtor Bulgarea's residence provides some excellent analysis of the law that applies where a mortgage is improperly recorded. Here, the Trustee, Goldstein brought a motion for summary judgment on her adversary complaint alleging that because the real estate was located in McHenry County, but was mistakenly recorded in Lake County it did not constitute a lien on the real estate. The Bankruptcy Code provides, importantly, that the Trustee has the status of a bona fide purchaser against all other persons in the situation where the Trustee seeks to avoid a transfer by application of state law. The Court here notes that "Under Illinois law, a mortgage is ineffective against a purchaser or creditor who lacks actual or constructive notice of it." There was not "record" notice here of National City's mortgage under the Illinois Conveyances Act, (765 ILCS 5/30), because the mortgage was recorded in the wrong county; i.e., Lake rather than McHenry County, where the property was located.) The other form of notice analyzed, "Inquiry Notice", (which puts the burden of further investigation upon a purchaser or creditor) did not exist here because there was no

indication in the correct public records in McHenry County that would suggest the National City Mortgage and even Bulgarea's deed was not recorded in McHenry County. Although an unrecorded deed is effective between the parties to the transaction upon deliver of the deed, other parties are only charged with notice of conveyances in the chain of title. The deed to Bulgarea was not in the chain of title, neither was the National City Mortgage, (both having been recorded in a different county) and "Because nothing would have put a judicial lien creditor or bona fide purchaser on inquiry notice of National City's mortgage, sections 544(a)(1) and (3) of the Code make Goldstein's interest in the property superior…" .

15. REAL ESTATE CONTRACTS; FINANCING, RECISSION AND IMPOSSIBILITY OF PERFORMANCE:

YPI 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC, (1st Dist., July 19, 2010), 1-09-1797, 2010 Ill.App. LEXIS 720, is a case that will first make you wonder "Why didn't I think of that?", and then realize "Nah, that won't work". At issue was a real estate contract for the purchase of the office building at 180 North LaSalle Street, Chicago, an address familiar to most practicing attorneys. Younan Properties, Inc. entered into a contract to purchase the building from 180 N. LaSalle, II, LLC for $124 million. Younan deposited $2.5million as earnest money immediately following execution of the contract, and increased that fund to $6 million as three amendments to the contract were agreed upon, and then assigned the contract to YPI 180 N. LaSalle Owner, LLC, the Plaintiff in this cause. The contract did not close over the next six months, despite the agreement by the parties to three additional amendments to the contract extending the closing date and releasing the earnest money to the seller as "non-refundable", and the seller declared a breach, terminated the contact, and retained the earnest money as its damages for the breach under the contract terms. YPI's clever argument was the doctrine of impossibility of performance. Alleging that the closing was rendered impossible when YPI's lender, Allied Irish Bank, declared that it would not finance the purchase due to "economic conditions in Ireland beyond the bank's control or anticipation", the buyer's argument was that the "global credit crisis" prevented it from obtaining the "commercially practical financing contemplated when the contract was originally formed." The trial court granted the seller's Section 2-615 motion to dismiss and struck YPI's complaint, and it appealed.

Affirming the trial court's dismissal, the First District opinion by Judge Hall gives a good overview of the equitable remedy of rescission as one, first, within the sound discretion of the trial court. Noting that while generally "Because of the equitable and personal character of the right to sue for rescission, mere naked claims for rescission are not generally assignable", the right of rescission would transfer from Younan to YPI with the assignment of the contract here based on the fact that the assignment was acknowledged by the parties in the post contract amendments, and YPI did have standing to bring a suit for rescission. Nonetheless, the theory of impossibility of performance as a ground for rescission was rejected. The theory is a common law doctrine which has risen as an affirmative defense to breach of contract actions, and allows a party to rescind or abandon a contract based on impossibility of performance. It is clear that the doctrine is applicable where the object of the contract is destroyed or rendered impossible by operation of law. The test for impossibility is "objective" rather than "subjective" and is narrowly applied only in extreme circumstances due to "judicial recognition that the purpose of contract law is to allocate risks that might affect performance" in the first place. An essential

element of the affirmative defense of impossibility of performance is that the event upon which the claim is based was not reasonable foreseeable at the time of contracting. "The potential inability to obtain commercial financing is generally considered a foreseeable risk that can be readily guarded against by inclusion in the contract of financing contingency provisions." Here, "Even without the global credit crisis of 2008, it was foreseeable that a commercial lender might not provide Younan and YPI with the financing they sought." There was no financing contingency provision in this contract. "Where a contingency that causes the impossibility might have been anticipated or guarded against in the contract, it must be provided for by the terms of the contract or else impossibility does not excuse performance….[and] gives rise to the inference that the risk was assumed." Additionally, impossibility of performance is not a defense where the obstacle to performance is within the control or realm of the party seeking rescission. Here, the obstacle was the availability of financing. The contract, however, was not contingent on financing, and the record did not indicate that YPI and/or Younan did not have sufficient assets to purchase without financing. The complaint alleged that Younan's current assets exceeded $1.6 billion, far more than the $124 million purchase price, and there was no indicating that the purchase could not have proceeded without financing.

16. REAL ESTATE CONTRACTS; SPECIFIC PERFORMANCE AND EARNEST MONEY LIQUIDATED DAMAGES:

In Berggren vs. Hill, (1st District, May 18, 2010), 401 Ill.App.3d 475, 928 N.E.2d 1225, a Seller brought suit for Specific Performance of a contract for the sale of a condominium unit for $1,650,000.00. The terms of the form agreement required initial earnest money in the amount of $1,000.00, to be increased to 10% of the sales price within two business days after the expiration of the attorney approval period. The parties amended the form language to require 5% rather than 10% of the sales price as the earnest money amount. The agreement contained a clause providing that in the event of default by Buyer, the earnest money would be forfeited to Seller. Buyer failed to perform the agreement. Seller filed suit for specific performance and argued that the liquidated damages clause (limiting Seller's to forfeiture of the earnest money) did not establish an exclusive remedy and sought actual damages, which greatly exceeded the earnest money amount. Part of the argument relating to the extent of the damages revealed that after the trial court granted Buyer's motion to dismiss, finding the clause regarding disposition of the earnest money to constitute a liquidated damages clause, Seller further prejudiced herself by selling the property to a third party. This, the Appellate Court, reasoned rendered the request for Specific Performance of the sale "abandoned" because performance of the contact was no longer an available option. On the issue of liquidated damages, Buyer argued that the contract was ambiguous because the parties disagreed as to the interpretation of the clause in question, and therefore the dispute should not have been decided on a motion to dismiss. The reviewing Court began with the general rule that "(i)n absence of an express provision to the contrary, a provision for the forfeiture of earnest money will be construed as a liquidated damages clause… Liquidated damages provisions are enforceable unless they are determined to be a penalty". The factors in determining whether a liquidated damages clause is valid are (1) intent of parties (2) amount provided as damages was reasonable at time of contracting and bears some relation to actual damages that may be sustained and (3) actual damages would be difficult to prove. The fact that the amount of liquidated damages does not equal a party's subsequent damages is not determinative of validity of the provision. Here, the fact that the parties amended the provision in question and determined an amount that differed from the amount set forth in the form contract

evidenced an intention on the part of the parties to establish the amount of 5% of the sales price to be liquidated dames, the amount was reasonable at the time it was determined and at the time of contracting the amount of damages was uncertain and could not be determined until the property was sold; therefore the clause was enforceable and the exclusive remedy available to the Seller.

17. REAL ESTATE CONTRACTS AND OPTIONS DISTINGUISHED; RESIDENTIAL REAL PROPERTY DISCLOSURE ACT:

In The Terraces of Sunset Park LLC vs. Chamberlin et al, (2nd District 2010), No. 2-09-0269, The Terraces entered into an agreement to purchase property from defendants for $1,750,000.00; the agreement required $50,000.00 earnest money and a $50,000.00 down payment on a specific date; if the down payment was not made on the agreed date, the earnest money would be forfeited. Both installments were considered non-refundable and were to be deducted from the price at closing. If the buyer failed to close on the agreed closing date, the down payment would be forfeited and the transaction deemed null and void. The Terraces never signed the contract, but did make the scheduled payments of $100,000.00. The sale did not close. The Terraces first sought declaratory judgment on the grounds that Sellers failed to provide a Residential Real Property Disclosure Report and, in the alternative, that the agreement was not valid and enforceable. The trial court found that the agreement constituted an option on the part of The Terraces to purchase the property, that the payments were nonrefundable when paid and that because the agreement was an option and not a contract for sale, the Residential Real Property Disclosure Act (the "Act") did not apply. The appellate court agreed that the agreement was not a contract for sale. The Sellers could never have enforced the agreement because The Terraces could have walked away after the payment of the $100,000.00 and Sellers could not require the Buyer to pay the balance of the price term. All the parties had was an agreement that Sellers would sell only to Buyer until the agreed date for making the down payment. Buyer had the right, but not the obligation, to buy the property, and the fact that the agreement did not contain the word "option" was not determinative. Finally, the Act applied only to "transfers", and none of the nine exceptions to the requirement of disclosure in the Act apply to options. The fact that "options" are not specifically included in the list of exempt transfers is of no consequence because options are not included in the definition of "transfers" and therefore the Act does not apply to this case.

18. REAL ESTATE CONTRACTS; SPECIFIC PERFORMANCE OF CONTRACT FOR SELLER TO FINANCE WITH A 'STANDARD FORM MORTGAGE':

In Schilling v. Stahl,. (2nd Dist., November 5, 2009), 395 Ill.App.3d 882, 918 N.E.2df 1007, 335 Ill.Dec. 264, (Appeal denied, 235 Ill. 2d 605), Jeffrey and Nancy Schilling brought an action for specific performance of a contract to purchase real estate against Patricia Stahl, Matthew Stahl, Gerald Howell and U-Sell We Buy Enterprise, Inc. The property was located on Main Street in Poplar Grove, Illinois, and, at the time of the Schilling contract, was being purchased by Stahl from U-Sell We Buy under articles of agreement for warranty deed dated August 3, 2007 for $313,500.00. In December of 2007, the Schillings and Stahl met and discussed Schilling purchasing the property, culminating in January with a contract. The purchase price to Schillings was $675,000.00, including an addendum to the contract reflecting that the Stahls would complete the articles of agreement with U-Sell We Buy on or

before January 30, 2007. The Schillings would pay $435,000 of the $675,000 purchase price in cash at the closing, and provide a promissory note and mortgage to Stahl for the balance of $240,000. The note was to provide for 4% interest per annum for a period of 5 years, the first interest only payment was due each month beginning one month after closing, and the entire balance being due five years from the closing. The mortgage was to be a "standard form mortgage", and Schilling was granted the right to substitute other property that was equal in value to the balance of the note and had a cash flow equal or greater than the interest only monthly payments. Schilling was also grated a right of first refusal to purchase the note if the Stahls decided to sell it during the term. Two days before closing, on January 28, 2007, Gerald Howell of U-Sell We Buy advised the Schillings that their contract with Stahl was cancelled because Stahl had "decided not to sell". The Schillings nonetheless attended the previously scheduled closing on January 30, 2007. U-Sell We Buy was present, together with the Schillings, but Stahl did not attend the closing.

Schilling filed a complaint against Stahl seeking specific performance, alleging a breach of the contract, (as well as a separate count against Gerald Howell and U-Sell We Buy for tortuous interference with contract). Schilling appealed the trial court's grant of summary judgment in favor of the defendants based on its finding that the contract for sale was too indefinite to be enforced because the parties agreed only to execute a "standard form mortgage", and did not come to an agreement on the actual terms of the mortgage; including such things as prepayment privileges or penalties, foreclosure procedures, attorneys fees and costs in the event of foreclosure, or a grace period before default. The Stahls enumerated 12 or 13 "missing terms" of a "standard mortgage" that were not resolved by agreement or included in the addendum, leaving the contract, they argued, unenforceable by specific performance. The trial court noted that the term used in the addendum, "standard form mortgage" was "not definitive and contemplates different terms to different persons", that the parties had different understandings of the terms of a "standard mortgage", and that the court felt that it could not supply the missing terms of the mortgage and therefore denied specific performance, citing Lencioni v. Brill, 50 Ill.App.3d 802, which also dealt with a "standard form mortgage" . The Appellate Court reversed on appeal by the Schillings.

Specific performance requires (1) a valid, binding and enforceable contract, (2) compliance with the terms of the agreement by the party seeking specific performance and proof that he is ready, willing and able to perform, and (3) the refusal of the other party to perform the contact. Case law requires that the contract be unambiguous and without doubt or uncertainty as to the terms, and the method or manner of payment is an essential part of the agreement to be enforced. Here, however, the Court was not convinced that the "missing terms" of the mortgage created ambiguity, doubt or uncertainty. Noting that "As the Stahls failed to show up at the closing and present a mortgage, it would be difficult for anyone to dispute the "missing terms" of a document that the Stahls failed to present.", the Court distinguished Lencioni and cited J.L. Watts Co. v. Messing, 111 Ill.App.3d 937 (1982), as "More on point with this case". The opinion by Justice McLaren, notes that the contract identified the parties, the property, the price and earnest money, the exact amounts to be paid at closing and to be financed, specifically gave notice to the parties that they were entering into a binding legal agreement which included all agreements and excluded oral representations in bold capital letters, and specified the amount of the note, interest rate, method of calculation, the date from which interest was to accrue, the term of the note, payment schedule and address to which payments were to be sent, with the first right of refuse and option of prepaying principal. "The parties, price, and terms of payment are clear and unambiguous…The "missing" terms listed by the Stahls, like those in J.L. Watts Co. are a list of "what ifs" that could arise at some future date, not terms that are essential to the creation of [a mortgage]."

While many mortgages provide for payment of taxes and insurance, condemnation, assignment of rents, environmental issues, and lien priorities, "However, it does not follow that the lack of such terms renders the agreement in this case ambiguous and unenforceable. To the extent that any such rights are not included, those rights do not exist; the noninclusion of those rights does not signal a dispute as to what rights exist…We conclude that the contract and addendum were so certain and unambiguous in their terms and in all their parts that the Schillings were entitled to specific performance of the contract."

19. REAL ESTATE CONTRACTS: SPECIFIC PERFORMANCE AND MONETARY DAMAGES:

In Mandel v. Hernandez, (1st Dist., Sept. 23, 2010), 2010 Ill.App. LEXIS 1015, Hernandez was 80 years old at the time of the contract he entered into with Mandel to sell his property 731 West 61st Place, Summit, Illinois. The property had been vacant for some time, and Hernandez stated he had "hoped to get rid of it" when Mandel asked him what he would sell the property for. Hernandez stated he would sell it to the first person who offered him $50,000, and Mr. Mandel responded "sold". The Mandels were in the business of buying, renovating and selling property, and expected to complete the rehab projection on this property and sell it for a range of $210,000 to $240,000 within 90 days. The parties signed a "standard form real estate contract" at Hernandez' home. Hernandez later stated he did not recall seeing the contract and did not remember signing it. The earnest money presented a problem. Mandel testified she sent the earnest money check to Hernandez by U.S. Mail. When Hernandez said he hadn't received the check in response to Mandel's follow-up inquiry, she sent him a second check, which was returned to her by Hernandez. Hernandez' daughter testified that Hernandez did receive the second check, but that it was received late, and he returned based on his decision to not sell. When Mandel contacted Hernandez, he advised her that he was not willing to complete the transaction. Mandel testified she was ready, willing and able to close, and had deposited the cash and closing documents into escrow. At trial each party presented testimony relating to the property's value; Hernandez offering Michael Kaput who valued the property between $139,000 and $149,000 based on comparables, and Mandel offering a real estate broker and certified appraiser who placed an $80,000 value on the premises. Mandel also presented expert testimony that the renovation costs for the property would have totaled $50,000. Hernandez offered affirmative defenses that (1) he was elderly and ill at the time of the contract and did not understand the meaning of the contract, (2) Mandel failed to disclose that she was a licensed Real Estate Broker as required by the License Act, and took advantage of her superior knowledge of real estate, (3) the terms of the contract were unconscionable, and (4) Mandel's failure to deliver the earnest money. The trial court found that the contract was valid and enforceable, that Mandel was ready willing and able to close, and that Hernandez breached by no closing. Mandel was awarded a judgment of specific performance against Hernandez, but the court refused to award money damages for the delay in performance and lost profits. Holding that "an award of money damages is inconsistent with the award of specific performance.", the trial court ruled that Mandel could not recover those money damages and obtain specific performance. Mandel appealed. The First District affirmed, noting that "The decision to award or deny monetary damages in addition to specific performance rests within the sound discretion of the trial court…Although we agree with Mandel that monetary damages incidental to a delay in performance may be awarded in addition to specific performance, we conclude that the trial court did not abuse its discretion in finding that the lost resale profits that Mandel seeks here are not recoverable…As established in Rostogravure and Talerico, when a

decree of specific performance does not provide complete relief, the injured party is entitled to those damages that will make him whole, including monetary damages incidental to and caused by a delay in performance. (citations) The injured part is entitled to damages incurred between the time of the breach and the time of performance if those damages arose naturally from the breach or were reasonably foreseeable at the time the contract was executed. (citations) Lost profits may be recovered as damages resulting from a breach of contract if both parties at the time of entering into the contract contemplated that such profits would be lost if the contract was breached." Here, the Court reasoned, Mandel's profits were speculative and the result of speculation, and "contingent upon a string of uncertain collateral transactions, such as the renovation of the property within budget, the placement of the property on the market within 90 days of purchase, the fortuitous appearance of a prospective buyer, an agreement to pay the projected resale price and the completion of the resale transaction." The trial court was correct in not holding Hernandez responsible for lost profits which were dependent upon collateral transaction which he did not know of at the time of the contract and could not have anticipated.

20. TITLE INSURANCE; CLOSINGS; CLOSING PROTECTION LETTERS

In <u>Cauthorne vs. American Home Mortgage Corp.</u>, 2008 WL 4316123 (2008), the issue was whether in a refinance transaction an owner/borrower who refinanced a mortgage loan was a third party beneficiary of a Closing Protection Letter ("CPL") issued by the title insurance company to the lender. Borrower relied on language in the CPL stating: "If you are a lender protected under the foregoing paragraph, your borrower in connection with a loan secured by a mortgage on a one-to-four family dwelling shall be protected as if this letter were addressed to your borrower." Borrower argued that the obligation of the title company to compensate the insured lender "inures to the benefit of [plaintiff]." The court decided otherwise, citing the strict language of the policy in describing those entitled to protection under the policy: (1) the lessee or purchaser of land or (2) a lender secured by a mortgage (including any other security instrument) of an interest in the land. While the plaintiff was an owner in fee simple in the land, plaintiff was not a lessee, a purchaser or a lender, and therefore not afforded protection under the language of the CPL. The court found it "…unusual, if not illogical and inequitable, that the CPL does not provide protection to the borrower in a refinance scenario, it appears that such is mandated by the language of the CPL". Summary Judgment was therefore granted to the defendant title insurance company.