REAL ESTATE LAW PRACTICE "KEYPOINTS"

By **Steven B. Bashaw**
Steven B. Bashaw, P.C.
Suite 1012
1301West 22nd Street
Oak Brook, Illinois 60523
Tel.: (630) 472-9990
Fax.: (630) 472-9993
e-mail: sbashaw @bashawlaw.com

(*Those of our 'regular' readers who have noted that there have been no updates of the case law for the last few months are correct. I must admit to having indulged in a well needed (if not deserved) hiatus over the summer. I took my wife fishing, (she caught the biggest fish, thank you), drove around this wonderful country and met more wonderful people, dined on a train, laughed at a "Mystery Tour" in Duluth and had one-too-many drinks a riverboat in LaCrosse, slept in a "haunted" hotel, and contributed to the continued dominance of the Medina Motor Corps as the finest parade unit in the Great Lakes Area. My staff was helpful and clients endured, but you readers were abandoned… With help and encouragement from my friend and fellow case-law-affectionato, Joe Fortunato, (who contributed greatly to this installment and calls me frequently to learn our "status" for the upcoming ISBA lecture), we will be more punctual in the future.)*

In addition to encouragement from the Illinois Institute of Continuing Legal Education and the Illinois State Bar Association's Real Estate Section Council, it should be noted that **Chicago Title Insurance Company** helps underwrite the monthly production of these real estate law "Keypoints". **Chicago Title** is committed to the role of attorneys in real estate transactions and their continuing education in this area. Its staff attorneys are pleased to offer their view points on various developments in the law as set forth below from the perspective of a title company serving the public and the attorneys who represent their clients in real estate transactions.

1. 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 ?)

2. 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 !)*

3. 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 ???)

4. **LOCAL GOVERNMENT; CONDEMNATION; PRIVATE ROADWAYS; EASEMENTS; 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…”.

5. 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.

6. 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, 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 <u>Whitelaw v. Brady</u>, (1954) 3 Ill2d 583, as recently applied by the Seventh Circuit in <u>Venture Associates Corp. v. Zenith Data Systems, Corp</u>., (7^{th} 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 <u>any</u> 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 <u>Finnin v. Lindsay</u> below as well.]

7. BANKRUPTCY; MORTGAGE RELEASE; TRUSTEE'S AVOIDANCE POWERS; NEGLIGENCE:

In <u>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> (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* <u>Midfirst Bank vs. Abney</u>*, above, as well as the decisions* <u>In Re Pak Builders</u> *from last year.]*

8. 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.

9. 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.)

10. 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."