MAY 2009

Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

Please Route to:

__ _____
__ _____
__ _____
__ _____
__ _____
__ _____
__ _____

Inside This Issue

3
Sheriff's Sale

4
Real Estate Contracts

8
Disclosure/ Misrepresentation

12
Condominiums

15
Lake Access

19
Boundary Dispute

20
Landlord/Tenant Law

21
Property Assessments

Case Law Update

In the ever-changing real estate industry, it is important for REALTORS® to keep abreast of new developments in the courts. Reviewing recent court decisions allows REALTORS® to see if the courts are interpreting real estate laws and administrative rules as we understand them to be intended. The common law, that is, the law that comes from the courts over time, shifts and changes as standard legal principles are applied to the new situations presented in our rapidly changing world.

Accordingly, this *Update* reviews recent real estate-related decisions from the Wisconsin Supreme Court and the Wisconsin Court of Appeals. The cases discussed in this issue cover topics such as commissions, buying a property at a sheriff's sale, real estate contract issues, disclosure/misrepresentation issues, condominiums, lake access, easements and boundaries, landlord/tenant issues and property assessments. Most of the case summaries are followed by one or more REALTOR® Practice Tips.

Case Law Summaries

The following Wisconsin case law summaries overview some of the most interesting decisions primarily from mid-2007 through early 2009. Although the cases that were not published generally may not be cited as legal precedent, they give insight into how issues of interest to REALTORS® are treated in the judicial system. The cases with a citation beginning with the year, i.e., "2009 WI 28," are published opinions that will have precedential value. The cases with the docket number and year in parentheses, i.e., "(No. 2007AP002923, Ct. App. 2008)," are unpublished decisions from the Court of Appeals. When a case is a legal precedent, it means that other Wisconsin courts that later decide similar issues generally are obligated to follow the holding of that case. A link to the court's opinion in each case is embedded in the case name.

Commissions

The case in this section involves a broker who sued for commission in circuit court and lost, only to win the commission based upon a sale to a protected buyer before the Court of Appeals.

Broker Wins Commission in Protected Buyer Case:

Burkett & Associates, Inc., Century 21 v. James M. Teymer, 2009 WI App 67.

The Teymers signed a WB-1 Residential Exclusive Right-to-Sell Listing Contract (1999) with the broker in July 2003. The property did not sell and the listing expired. Before relisting with the broker in September 2004, Mrs. Teymer attended an open house held by the American Transmission Company, which was looking to acquire property in order to expand a substation near the Teymer property. At a second ATC open house after the property was relisted, the Teymers spoke with the owner of ATC's real estate acquisition company who noted in his contact diary that the Teymers were still interested in selling to ATC. He later contacted the Teymers regarding the consent forms needed before ATC could negotiate directly with them.

The listing broker first learned of

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ATC's interest in the Teymer property while attending a town meeting about the ATC expansion project. The broker indicated that the property ATC was interested in belonged to the Teymers, was listed with his company and he would be happy to sell it to ATC. The next day an agent from the listing company called an ATC representative and provided property and listing information such as the acreage, price, surveys and maps, and an easement. She was referred to the acquisition company owner who contacted the Teymers to confirm that the property was listed and ask permission to contact the broker directly. This consent was granted, so he contacted the real estate agent and asked for property information. The agent faxed various information including survey maps, the real estate condition report (RECR) and the listing sheet that included the list price.

Shortly thereafter, the Teymers asked the broker to cancel the listing contract. They met with the broker who agreed to draw up a termination agreement amending the listing contract to expire at midnight that night. He sent two copies of this amendment to the Teymers by certified mail and included a cover letter that listed ATC and other protected buyers. The Teymers signed the amendment and returned it to the broker. The broker asked the Teymers to contact his company upon any further contact by ATC, but the Teymers negotiated directly with ATC to sell their property and they closed in August 2005.

The brokerage sued the Teymers for its commission due under the listing contract because ATC was a protected buyer. At trial, the circuit court disagreed and found in favor of the Teymers because the broker had not negotiated with ATC and because there had been no "meeting of the minds" between the parties regarding ATC's status as a protected buyer. The broker appealed to the Court of Appeals.

The three issues before the Court were:

1. whether the broker negotiated with ATC,
2. whether the Teymers needed to agree that ATC was a protected buyer and
3. whether the broker timely notified the Teymers that ATC was being named as a protected buyer.

1. Broker Negotiation with ATC

According to the WB-1 listing contract, the listing broker is entitled to commission if the property is sold to a protected buyer within one year after the contract terminates. A protected buyer is defined by the listing contract to include someone with whom the broker "negotiated to acquire an interest in the Property" during the term of the contract. The contract defines "negotiate" as "to discuss the potential terms upon which buyer might acquire an interest in the Property or to attend an individual showing of the property." ATC did not attend an individual showing, so the only question is whether the listing broker/agents and ATC discussed the potential terms upon which ATC might acquire an interest in the Teymers' property.

The Court found that the standards for determining whether negotiation has occurred are found in ***Sonday v. Dave Kohel Agency, Inc.***, 2006 WI 92 (see a case summary and link to the case opinion on Page 12 of the August 2006 *Legal Update*, "2006 Legislative Update," at www.wra.org/LU0608). The Court noted that the listing agent provided property information and the list price to an ATC representative on the telephone and later faxed the property data sheets, RECR, survey maps and other information to the acquisition company owner at his request. This two-way communication was enough to constitute negotiation for the purposes of the listing contract definition, the Court concluded.

The Court also remarked that, "We are not suggesting that a broker negotiates by unilaterally sending information to other parties. Here, ATC expressed an interest in the property and asked for sales information. Burkett then provided that information. This two-way communication fulfills the contract's definition of negotiate."

2. Buyer Protection is Unilateral Act

Although the circuit court found that the broker had not successfully protected ATC because the Teymers did not concur, the Court of Appeals said that, under the terms of the listing contract, buyer protection is a unilateral function that does not require the consent of the seller.

3. Delivery of Protected Buyer List

The Teymers argued that no letter naming ATC as a protected buyer was delivered within three days of the listing contract termination and thus there was no valid listing protection. The Teymers claimed that no cover letter listing protected buyers was sent with the amendment terminating their listing while the broker's agent said the letter was included in that mailing. The Court of Appeals deferred to the circuit court's finding that the cover letter was included.

The Teymers asserted that even if there was a cover letter it was sent too late because they did not receive the listing amendment until seven days after the listing terminated. The Court of Appeals, however, held that the date of mailing, not receipt controlled, citing the definition of "delivery" in the 1999 WB-1. Since the record included the broker's certified mail receipt that showed the letter was sent within the three-day deadline, the Court held that the broker had successfully complied with the listing contract deadline for delivery of the names of protected buyers.

Accordingly, the Court of Appeals reversed the circuit court's decision and awarded the commission and attorneys fees to the broker.

REALTOR® Practice Tips: The activities that were found to suffice as negotiation in the ***Sonday*** case and in this case are the bare bones minimum. REALTORS® are best served by engaging in as much back and forth dialog as possible when discussing a prospect's possible purchase. Sending the MLS data sheet, RECR, survey maps and other information to the prospect with a follow-up discussion in writing may be one good way to leave "tracks." If the list price and listing information are forwarded to the prospect, and if the follow-up back-and-forth exchange occurs via fax and e-mail, there will be a good record establishing there was sufficient discussion to comfortably meet the "negotiation" standard.

REALTOR® Practice Tips: Just sending unsolicited property information to a prospect is not enough to establish listing protection. Such unilateral action does not constitute the two-way communication the Court clearly required in its opinion.

REALTOR® Practice Tips: As the Court astutely discerned, when the a notice relating to a listing is delivered by mail, it is considered to be mailed and the delivery is considered done on the date that the mail is deposited in the U.S. Mail as long as it is properly addressed and has the appropriate postage, regardless of when the mail is received by the recipient.

REALTOR® Practice Tips: The broker in this case was wise to send the amendment and protected buyers list via certified mail. Having evidence from the post office confirming the date of mailing was a crucial component in this broker's success in winning the commission due in court.

Sheriff's Sale

The case in this section illustrates what happens if a buyer at sheriff's sale changes his mind before the sale is confirmed in court.

Forfeiture of Deposit at a Sheriff's Sale:

Chase Home Finance v. Pearson (No. 2008AP2591-FT, Ct. App. 2009).

Chase foreclosed on a property that was then sold at sheriff's sale in "as is" condition. Richard Pearson had the highest bid at $265,000 and was required to pay 10 percent of the purchase price to the sheriff with the remaining balance due no later than 10 days after the confirmation of sale, or the 10 percent deposit would be forfeited.

At the confirmation hearing, Pearson asked the court not to confirm the sale, order a resale and refund his entire deposit. Pearson said after the sale he had discovered problems with the property, noting that the home was poorly constructed, was severely damaged, had an exposed 2-foot square opening in an exterior wall where an air conditioner had been removed, had an estimated value of $140,000 and "possibly could be a complete knockdown."

Chase responded that Pearson could not get out of the sale because he purchased the property "as is" and "bore the risk of purchasing at sheriff's sale." The circuit court did not confirm the sheriff's sale and ordered the property to "be re-sold ASAP." Chase argued that Pearson should forfeit the deposit as the cost of canceling the sale. At the resale confirmation hearing, the court awarded 10 percent of Pearson's deposit to Chase for the resale costs and returned the remaining portion to Pearson. Chase appealed.

The Court of Appeals held the circuit court acted properly by not confirming Pearson's sale and by ordering

a resale of the property. Under Wis. Stat. § 846.17, a purchaser forfeits his or her deposit if the purchaser does not pay the remainder of the purchase price within 10 days after the confirmation of sale, but is allowed to have the deposit returned if the sale is not confirmed. The Court found that since Pearson's sale was not confirmed, the deposit was properly returned. The Court also noted that by receiving 10 percent of the deposit, Chase actually got more than what it was entitled to under the statute.

REALTOR® Practice Tips:
Buyers should be made aware it is a risk to purchase a property at sheriff's sale without prior viewing or inspection.

Real Estate Contracts

In this section there are cases regarding square footage miscommunication, attorney approval contingency, rules for the unilateral waiver of contingencies for the benefit of the parties and right of first refusal.

Square Footage Discrepancy Defeats Commercial Condominium Buyer:

Franck v. C.B.L. Partners (No. 2008AP791, Ct. App. 2009).

Franck negotiated to purchase a commercial condominium unit with Feia, a member of CBL Partners, LLC, the commercial condominium developer. The parties worked with architectural drawings because there were no condominium documents drafted at that time. The dimensions used to compute each unit's square footage on the drawings were measured from the outside of the exterior walls.

Franck and Feia filled in portions of a commercial offer to purchase form. The contract provided that Franck would select one of two units and the architectural plans were attached and incorporated by reference. The unit was to be 1,375 square feet and a wall would be moved to adjust unit sizes if need be. The term "unit" was not defined in the offer. The offer included the standard Property Dimensions and Surveys provision that cautioned the buyer, among other things, to verify square footage because the measurements and formulas used to calculate square footage may vary.

Franck later selected a 1,386 square-foot unit based upon the architect's plans. When the condominium declaration and plat were later drafted and recorded, "unit" was defined in the declaration to exclude exterior walls, which were common elements. Thus, the condominium plat reflected Franck's unit as only 1,232 instead of 1,386 square feet. An addendum later added to the offer identified the unit being purchased and indicated that it would have 1,386 square feet. Franck walked through the unit but never measured it. When Franck received the declaration and plat, he realized that the square footage was much less than that portrayed on the architect's drawings and refused to close at the price in the offer.

Franck sued CBL and Feia for breach of contract, misrepresentation and a declaratory judgment; the developer counterclaimed against Franck for breach of contract. After a jury trial, the court concluded that Franck was in breach of contract, not CBL and Feia. Franck appealed to the Wisconsin Court of Appeals.

The Court did not accept Franck's argument that CBL breached the contract as a matter of law because it did not produce a 1,386 square-foot unit as stated in the offer. The Court found that the offer was ambiguous and open to more than one reasonable interpretation as to what was to be included in a unit: the exterior walls, as in the architect's drawings, or only the area within the exterior walls, as defined in the declaration. The contract could reasonably be interpreted as giving Franck a unit that was 1,386 square feet including the exterior walls or 1,386 square feet excluding the exterior walls. Thus, the Court held, the issue was appropriately one for the jury and not a judgment as a matter of law. The evidence supported the verdict so the original judgment was affirmed.

REALTOR® Practice Tips:
This case illustrates the traps involved when an offer to purchase is prepared without the benefit of at least a proposed condominium or subdivision plat. Any offer drafted without the final plat should be amended to precisely identify the unit or lot being purchased once the final plat is available because preliminary plans are often modified.

REALTOR® Practice Tips:
Make sure that buyers are clear about the dimensions of the property they are purchasing. Ideally they should have a plat, certified survey map or other reliable map showing the property dimensions as well as building interior dimensions from a reputable, objective source.

Attorney Approval Provision with a Five-Day Deadline Does Not Make the Offer Illusory:

Devine v. Notter, 2008 WI App 87.

Herman J. and Marie T. Notter accepted Patrick B. Devine's offer to purchase their residential property. The parties signed a document called the "Buyers and Sellers Attorney's Approval," which said,

> *This Offer to Purchase is contingent upon buyer(s)/seller(s) attorney's approval of the terms and conditions, other than price, within 5 days of the acceptance of this offer. If buyer/seller does not submit notice of attorney's disapproval within 5 days of the acceptance of this offer, it shall be deemed that there are no conditions to which the buyer(s)/*

seller(s) attorney disapproves. If written disapproval is timely submitted and an agreement to the terms in writing cannot be reached by the buyers and sellers within 5 days of submittal, this offer shall be null and void and all earnest money will be returned to buyer.

The parties satisfied their contingencies and prepared for the sale until 10 days before the scheduled closing date when the Notters notified the listing agent that they would not go through with the sale. Devine sued for breach of contract and the court granted judgment to Devine for specific performance. The Notters appealed to the Court of Appeals. The only issue on appeal was whether the attorney approval provision made the offer to purchase illusory.

Whether an attorney-approval clause like the one in this case renders a contract illusory was a question of first impression in Wisconsin, the Court of Appeals remarked. An illusory promise, the Court explained, is a promise in form only because its maker can keep the "promise" without subjecting him or herself to detriment or restriction. For example, "I promise to do as you ask if I please to do so when the time arrives." The promise maker can keep that promise by either doing as the other person asks or not, and so the maker maintains total freedom and is not "out anything." Since the maker of an illusory promise assumes no detriment or obligation, an illusory promise is not consideration and therefore no contract exists. If no contract exists, neither party has a cause of action for breach of contract.

The Notters contend that the attorney-approval clause rendered the entire contract with Devine illusory and unenforceable. By allowing either party to walk away from the deal, the clause left both parties free to do just as they wished. The Court reviewed the ***Gerruth Realty Co. v. Pire***, 17 Wis. 2d 89, 115 N.W.2d 557 (1962) and ***Nodolf v. Nelson***, 103 Wis. 2d 656, 309 N.W.2d 397 (Ct. App. 1981) cases that involved financing contingencies. Although the court in each case commented on illusory contracts, they ultimately refused to enforce the contracts because they were indefinite. The Court believed that neither case involved a contract clause that, while providing a right to walk away from the deal, strictly limited that right to a short period.

The Notters asserted that the clause gives both parties a nearly unlimited right to walk away from the deal within five days. The language of the clause gives the parties two options: go ahead with the contract as negotiated or consult with an attorney who may object to any term other than price. Where the review period is strictly limited, the Court explained, such clauses do not make a real estate contract illusory. The law of illusoriness includes a rule about contracts containing alternatives for a party: such a contract is not illusory so long as one of the alternatives would be consideration "and there is a substantial possibility that before the promisor exercises his [or her] choice events may eliminate the alternatives which would not have been consideration." The Court remarked, "Even assuming that consulting with an attorney is not a sufficient detriment to serve as consideration, the five-day limit here serves to eliminate this alternative very quickly, so that the party is left with the remaining option: performance of the deal as written."

An attorney-approval clause may also be analyzed as a right of cancellation. An unlimited right to cancel can make a contract illusory, at least as to future performance, since a party can always avoid any obligations by simply invoking the cancellation right.

But if the right to cancel is limited even in slight ways, courts have found this enough of a detriment to the cancelling party to save the contract from illusoriness. "If the party may only cancel upon dissatisfaction, for good cause shown upon the giving of reasonable notice, or upon any other condition not within the promisor's control, the promise is nevertheless enforceable." In this case, the party wishing to cancel the deal was required, at minimum, to consult with an attorney and provide notice within five days. These obligations, although not onerous, are enough to save the deal from being illusory.

Thus the Court of Appeals held that the contract was not illusory. The attorney review period was strictly limited and, since the time elapsed without objection, the Court saw no reason both parties should not be bound to the contract. As a result, the Court held that the contract remained in force and Devine was entitled to specific performance.

REALTOR® Practice Tips:
The law regarding illusory contracts is very confusing and seemingly contradictory. While the courts' opinions in some cases indicate that contingencies without objective standards are subject to satisfaction and considered illusory because one party has total control over deciding whether the contingency succeeds, this opinion seems to reach an opposite conclusion. See the discussion of illusory contract provisions on Pages 2-3 of the September 2006 *Legal Update* at www.wra.org/LU0609, and Pages 3-4 of *Legal Update 01.11* at www.wra.org/LU0111.

Unilateral Waiver of a Contingency Benefiting Both Parties:

Baldwin v. Land (No. 2008AP1374, Ct. of App. 2009).

Frank Baldwin and F.C. Land, LLC, entered into a contract for sale of vacant land with a closing date of September 15, 2004. The "Property" was identified as two lots – Lot 1 and Outlot 1 – on the proposed

Certified Survey Map (CSM) attached to the offer. The contract included the contingency, "[O]ffer to purchase is contingent upon Certified Survey Map approval by the City of proposed use prior to closing." Baldwin planned on constructing an office building on the property.

As of the April 15, 2005, closing date, the city had not approved the CSM to create the lots being conveyed under the contact. Baldwin informed F.C. Land that he wanted to either close on April 15 or extend the closing date another 30 days. F.C. Land returned the Baldwin's earnest money and did not close the transaction.

Baldwin filed an action seeking specific performance and monetary damages. Baldwin alleged F.C. Land breached the duty of good faith implied in the contract by not promptly applying for and obtaining approval of a CSM before the deadlines, and breached the contract by not obtaining approval of a CSM and by not closing.

The circuit court dismissed the claim for breach of duty of good faith. Baldwin appealed. On appeal, Baldwin presented evidence to assert the breach of the duty of good faith claim, however the Court of Appeals was not persuaded.

To determine if F.C. Land breached the contract, the circuit court analyzed whether the contingency was solely for the benefit of Baldwin, and could be unilaterally waived by him, or whether it benefited both parties and therefore could not be unilaterally waived. Baldwin asserts he was able to waive the CSM contingency without any part from F.C. Land. The circuit court concluded the contingency benefited both parties and could not be unilaterally waived by Baldwin, found F.C. Land did not breach the contract, and dismissed Baldwin's claim. Baldwin appealed.

The circuit court determined the contingency benefitted both parties. The court found the contingency benefitted F.C. Land because without its fulfillment the contract would have been void. Conveyance of the lots with the city's approval of the CSM would have violated the city's land division ordinance. It also benefitted Baldwin as he would be able to construct an office building. Baldwin asserted that even if a contingency benefits both parties, the party who inserted the contingency may unilaterally waive it.

The Court of Appeals found Baldwin was not entitled to unilaterally waive the contingency and F.C. Land was not required to convey the property.

REALTOR® Practice Tips:
A party may not unilaterally waive a contingency in a contract that is for the benefit of both parties.

Transferability of Rights of First Refusal:

The Nature Conservancy v. Altnau (No. 2007AP1752, Ct. App. 2008).

The land involved was once a single property owned by Dwight and Laura Clausen. In 1967, the Clausens created four parcels out of the single property and sold three of the parcels to three different buyers. The sales agreement for each parcel described the property and the price paid and established an easement for access to each that included maintenance responsibilities for the easement. The agreement also included a clause entitled "Hunting Privileges," which read in the relevant part: The grantors hereby grant to the grantees and all of them, their respective heirs, successors and assigns, the right to hunt, fish, etc., on all lands of the grantors …. Provided, however, that in the event the grantors shall sell any portion of said lands under which the hunting rights are herein granted, then and in such event, said hunting rights shall terminate forthwith on the portion so sold. Provided further, however, that the grantors hereby give and grant to the first, second and third grantees, their heirs, successors and assigns, an option to purchase any or all of said land which may be offered for sale by the grantors at a purchase price equal to the highest bonafide offer received by said grantors…

This agreement shall be binding upon the heirs, successors or assigns of the parties hereto."

The Clausens transferred their parcel

in 1988, and that owner later transferred it to the Nature Conservancy.

Eugene and Marion McEssey were one of the three original purchasers as per the 1967 agreement. In 2003, the McEsseys executed and recorded an "Assignment" by which they "assign[ed] to Ronald L. Altnau all option to purchase rights and privileges previously granted to Mr. & Mrs. McEssey by means of the [1967 agreement]." However, the McEsseys did not actually sell Altnau their property and still owned it.

While the 1967 agreement and the McEsseys' 2003 agreement refer to an "option to purchase," it is more accurately called a "right of first refusal."

In 2005, the Nature Conservancy wished to transfer its parcel to the Department of Natural Resources and brought an action to quiet title against the owners of the parcels and Altnau. The Nature Conservancy attacked the continuing validity of Altnau's acquisition of the right from the McEsseys because the right ran with the parcel still owned by the McEsseys and could not be separated. Thus the Nature Conservancy claimed Altnau had no rights because he did not own the land. The circuit court agreed with the Nature Conservancy. Altnau appealed.

The main issue was whether the right of first refusal runs with the land or is freely transferable to non-owners of adjoining property.

The parties agree the right of first refusal created in the 1967 agreement is a servitude: "a legal device that creates a right or obligation that runs either with the land or with the interest in land." RESTATEMENT (THIRD) of PROPERTY: SERVITUDES §1.1(1) (2000). The parties' main dispute is the nature of the benefit – whether it is in gross or appurtenant. Essentially a benefit is appurtenant if the right can only be enjoyed if you own the land. A benefit is in gross if a right may be enjoyed even if you do not own the land. RESTATEMENT (THIRD) § 1.5 (2000).

Altnau contends the right of first refusal is in gross and may be transferred by the original purchasers to anyone they choose, without regard to the ownership of the parcels. The Nature Conservancy argues the right of first refusal is appurtenant to the land and may only be transferred when the McEsseys actually sell their parcel.

The 1967 agreement did not contain the words "in gross" or "appurtenant." Altnau argues the word "assigns" makes the right of first refusal a right in gross because the provision gives the grantees the ability to assign that right. The Nature Conservancy argues it is not whether the right may be assigned, but how it may be assigned.

The Court looked to the language of the contract to see what the contracting parties intended. The Court commented that the drafter of the agreement created a right and specified the right belonged to purchasers and their "heirs, successors and assigns," and such phrasing is most commonly meant to create an appurtenant servitude. Therefore the Court found Altnau's "assigns" argument did not create a right in gross.

The Court also noted there was not any specific Wisconsin case law that created a test to determine whether the right in this case was in gross or appurtenant. The Court adopted a test provided by the RESTATEMENT (THIRD). Based on this system, the Court first looked to the language of the instrument, the circumstances surrounding the creation of the servitude and the purpose for which it was created. If the information does not provide a clear answer if it is a servitude in gross or appurtenant, the RESTATEMENT (THIRD) provides a resolution: would the benefit be of more use to someone holding the property interest or to the original beneficiary. If this does not yield a clear answer, the benefit should be construed as appurtenant."

The Court also looked at the right of first refusal in the context of the agreement as a whole. At the time of the 1967 agreement, the purchasers of the three parcels received land, an access easement and hunting rights on the adjoining land still held by the Clausens. The

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Court found that the hunting rights were the greatest benefit given to the adjacent owners and recognized in order for the Clausens to retain the ability to sell their land whenever they desired, they intended the hunting rights to cease when they sold because potential purchasers might not want others to have the right to hunt on their land. However, the Court did conclude the Clausens gave the purchasers of the three parcels the right of first refusal to purchase the land from the Clausens to keep their hunting rights on the property.

The Court found that it was unlikely that the right of first refusal and hunting rights were "separately assignable" and that the 1967 agreement did not create a freely transferable interest in gross giving any stranger rights to the land without regard to the other adjacent property owners. Thus, the Court found the right of first refusal was appurtenant and Altnau did not have any rights because he did not own the land.

REALTOR® Practice Tips: Wis. Admin. Code § RL 24.12(2) requires any licensee in a transaction who has knowledge of a right of first refusal to disclose that fact in writing, in a timely manner, to all interested prospects.

REALTOR® Practice Tips: If the agent is unsure as to whether or not the party has a right of first refusal, an attorney should be consulted.

Disclosure/Misrepresentation

The extent of a party's obligation to disclose the reassessment of a new construction property, a buyer's broker's failure to disclose bats in the attic and false advertising misrepresentation comprise this section.

Seller Not Responsible to Explain Property Tax Impact of New Construction to Buyer:

Flint v. Noble (No. 2007AP002923, Ct. App. 2008). Flint entered into a WB-11 Residential Offer to Purchase to buy a new construction home from Noble, the builder/seller, on September 20, 2005. Both parties were working with real estate brokers.

The offer used the default provision relating to the closing proration of net real estate taxes, namely that the proration would be based upon "the net general real estate taxes for the current year, if known, otherwise on the net general real estate taxes for the preceding year." The 2005 tax assessment was known at that time, but the mill rate and tax amount were yet to be determined. The WB-11 also contains a blank line for inserting an alternative proration formula and a caution in bold type that warns, "CAUTION: If proration on the basis of net general real estate taxes is not acceptable (for example, completed/pending reassessment, changing mill rate, lottery credits), insert estimated annual tax or other formula for proration."

When Noble accepted Flint's offer, Noble represented that he had disclosed any "completed or pending reassessment of the Property for property tax purposes" as of the day the offer was accepted. See lines 53-62 of the WB-11.

The transaction closed on November 21, 2005, and Flint received a $1,411 credit based upon the 2004 property taxes of $1,590. The 2005 property tax turned out to be almost $6,200. Flint's efforts to negotiate a tax proration adjustment with Noble were unsuccessful, so she filed a small claims court action and won a $4,199.28 judgment against Noble in circuit court.

The circuit court found that Flint was aware of the 2005 assessment of $345,000 for the newly constructed home and that the 2004 tax had been $1,590. The court, however, also found that Noble breached his duty to disclose any completed or pending reassessment because he did not explain that the 2004 taxes were based on a substantially lower assessment and that the taxes would likely significantly rise with the new assessment for 2005. Noble appealed to the Court of Appeals.

Noble argued that the circuit court erred in its interpretation of the WB-11 provision that obligated Noble to disclose any "completed or pending reassessment." The Court of Appeals agreed, observing that the circuit court apparently imposed an obligation on Noble not only to disclose to Flint that there was a "completed or pending reassessment," which he did, but also to explain that the 2005 real estate taxes were likely to be significantly higher than the 2004 real estate taxes. The WB-11 does not, the Court concluded, require the seller to explain the likely consequences of the reassessment with regard to the property taxes.

The Court observed that Flint apparently had assumed that the 2005 taxes would not differ significantly from the 2004 taxes and that she failed to understand that the 2004 assessment had been substantially lower. Noting that Noble was not legally responsible for Flint's misunderstanding, the Court indicated that, "One wonders why Flint's own real estate agent did not advise her regarding the property tax situation. We do not determine what Flint's agent was obligated to do, but if the agent represented Flint throughout the transaction, the agent would have been in a good position to spot the issue and advise Flint accordingly." The Court reversed the $4,199.28 judgment against Noble and sent the case back to the circuit court.

REALTOR® Practice Tips: Be sure that the parties in a new construction transaction understand that the property taxes will likely increase dramatically if the property was assessed as a vacant lot in the prior year and as a new

home in the present year.

REALTOR® Practice Tips: Carefully review the Closing Prorations provisions in the offer with the parties and heed the warning to use a different proration formula if the current year's taxes for a new construction property are not available.

REALTOR® Practice Tips: Review the *Wisconsin Real Estate Magazine* articles addressing property tax prorations for new construction properties, including "Property Tax Proration; What is Fair?" in the February 2007 edition at http://news.wra.org/story.asp?a=655, and "Tax Proration for New Construction and Divided Parcels," in the June 2005 edition at http://news.wra.org/story.asp?a=196.

Buyer's Broker Liable for Failing to Disclose Bats in the Attic:

W.E.D. Development v. A.B.C. Insurance (No. 2008AP977, Ct. App. 2009).

WED Development, LLC (WED) listed a residential property with the listing broker. A prospect working with a buyer's broker wrote an offer that was accepted and a home inspection was conducted. The home inspector encountered a bat in the attic and he told the buyer. The buyer's agent's assistant was also present for the home inspection but said he heard no mention of a bat in the attic. The buyer still closed and later discovered the home was infested with bats and the attic was covered in bat dung. The buyer sued WED and the listing broker, claiming that they had knowledge but failed to disclose the bat infestation. The lawsuit was mediated and settled for $40,000.

WED then sued the buyer's broker for failing to tell them about the bat the home inspector saw in the attic. A jury found that the buyer's broker was causally negligent while WED and the listing broker were not. WED won a $57,000 judgment, representing the $40,000 settlement and $17,000 in attorneys' fees.

The buyer's broker appealed the $57,000 judgment to the Wisconsin Court of Appeals. The buyer's broker argued that the listing broker was negligent in her duty to conduct a reasonable and diligent inspection of the premises to detect observable, material adverse facts per Wis. Admin. Code § RL 24.07(1)(a)-(b). However, areas only accessible by a ladder do not need to be inspected according to § RL 24.07(1)(d). There was competing evidence regarding whether or not the listing broker was required to inspect the home's attic and the listing broker denied any prior knowledge of bats in the attic.

The buyer's broker also argued that the Economic Loss Doctrine (ELD) barred the buyer's claims for intentional misrepresentation against WED, as stated in ***Below v. Norton***, 2008 WI 77 (see the discussion of this case and the ELD beginning on Page 1 of the August 2008 *Legal Update*, "2008 Supreme Court Decisions Affecting Real Estate," at www.wra.org/LU0808). Consequently, the buyer's broker argued, WED needlessly settled the suit against them. The Court agreed with regard to the application of the ELD, but noted that the buyer had also sued WED for false advertising based on Wis. Stat. § 100.18 (false advertising claims are discussed on Pages 6-8 at www.wra.org/LU0808). This claim, the Court observed, was cause enough for entering the $40,000 settlement.

WED's claims against the buyer's broker, however, are not barred by the ELD because there is no contract between these parties. The ELD does not bar WED's claim against the buyer's broker for breaching the Wis. Stat. § 452.133 duties owed by real estate brokers to all parties in the transaction.

Finally the buyer's broker argued that the $17,000 in attorneys' fees included in WED's $57,000 judgment should not be allowed because Wisconsin follows the "American Rule" with regard to attorney's fees. Under this rule, the parties to litigation are generally responsible for their own attorney's fees unless recovery is expressly allowed by either contract or statute, or "where the wrongful acts of the defendant have involved the plaintiff in litigation with others, or placed him in such relation with others as to make it necessary to incur expense to protect his interest." In this instance, the jury decided that the buyer's broker committed a wrongful act that caused WED to be sued by the buyer and incur attorney's fees. Therefore the $17,000 was properly allowed.

REALTOR® Practice Tips: Disclose, Disclose, DISCLOSE! Licensees must always disclose material adverse facts and information suggesting the possibility of material adverse facts to the parties in writing in a timely manner. The duty to disclose material adverse facts is a duty owed to all parties under Wis. Stat. § 452.133(1)(c). Review *Legal Update 02.07*, "Duty to Disclose," at www.wra.org/LU0207.

REALTOR® Practice Tips: While the ELD does bar many negligent, intentional and strict liability misrepresentation lawsuits, the doctrine does not apply if there is no contractual relationship between the parties. The doctrine also does not apply to all intentional misrepresentations in residential transactions under the new Wis. Stat. § 895.10, which permits buyers to bring intentional misrepresentation and fraud actions in residential real estate transactions that close on or after April 22, 2009.

False Advertising:

Berard v. Schertz (No. 2007AP2131, Ct. App 2008).

James and Barbara Berard purchased

Brian and Pamela Schertz's home in 2006. The listing broker's advertisements stated the home had been "totally remodeled inside & out," had been "completely remodeled," included a four-season gazebo, had "new…windows," and had "[a]ll new plumbing and electrical[,]." The Berards read the advertisements and reviewed the RECR, which stated the Schertzes were unaware of any defects in the home. The Berards wrote an offer including a home inspection that was accepted by the Schertzes. The Berards did not have the inspection performed.

At closing, the parties signed an amendment to the WB-11 Residential Offer to Purchase that included an "as is" clause: "Notice is given that: Buyers and sellers are aware that the buyers were given full opportunity to inspect the property and are hereby satisfied. Buyers are aware that they are purchasing the property in 'where is' and 'as is' condition with no warranties from sellers, sellers agents, or [the listing broker] … Seller hereby certifies to Buyer and Broker that Seller knows of no change in the structure or mechanical components of the premises, or the operability thereof, since the premises were last shown to Buyer, other than those previously disclosed and that the premises are as stated in [the] contract and the Real Estate Property Condition Report."

After closing, the Berards discovered a number of defects and filed action against the Schertzes for breach of contract warranty, false advertising under Wis. Stat. § 100.18 and theft by fraud under Wis. Stat. § 943.20(1)(d), a criminal statute made actionable by § 895.446 based on failure to disclose known defects in the RECR. The Berards also claimed false advertising against the listing broker for untrue, deceptive or misleading statements. The circuit court dismissed the claims on summary judgment, concluding they were barred by the "as is" clause in the amended offer. The Berards appealed.

The elements of a breach of contract warranty include: 1) an affirmation of fact, 2) inducement to the buyer and 3) reliance by the buyer. The contract warranty in the WB-11 provides: "PROPERTY CONDITION REPRESENTATIONS: Seller represents to Buyer that as of the date of acceptance Seller has no notice or knowledge of conditions affecting the Property or transaction … other than those identified in Seller's Real Estate Condition Report … which was received by Buyer prior to Buyer signing this Offer and which is made a part of this Offer by reference…."

To prepare for the case, the Berards hired a home inspector. The home inspection report indicated the following concerns: "The second floor windows have advanced rot/weathering and will need attention soon. I would recommend complete replacement." There was "water staining… on a finished portion of the wall… [and] a black substance visible that may be a type of mildew on the wall," "[T]hese symptoms are the result of poor drainage around the entire foundation that has gone on for years."

The Berards had to tear out carpet and portions of interior walls and noted mold on drywall and baseboard after the finished portion of the basement leaked. Cracks in the crawl space were wide enough to see the neighbor's house, walls were breaking away from the house and a portion of foundation was sinking. The inspection report noted insulation stuffed into the cracks of the crawl space wall and a crack was running the full length of the slab. When it rained, water leaked through the utility chimney door and the Schertzes left a pan under it to collect the water. "[C]rumbling cement and exposed rebar" on part of the exterior foundation had a flower pot intentionally placed in front of it. The enclosed gazebo shifted in frost causing the windows to crack and heaved on one side due to uneven weight distribution.

The Court of Appeals reversed and remanded finding evidence showed the Schertzes were aware of the following defects and failed to disclose them in the RECR: rotted upstairs windows, foundation problems and basement leaks, water leaking from a chimney utility door, exterior foundation surface defects and gazebo foundation issues.

Wis. Stat. § 943.20(1)(d) makes it illegal to: "Obtain[ ] title to property of another person by intentionally deceiving the person with a false representation which is known to be false, made with intent to defraud, and which does defraud the person to whom it is made." The Court held that the Schertzes' failure to disclose the known defects defrauded the Berards and induced them to buy the home.

A Wis. Stat. § 100.18 false advertising claim was made against both the Schertzes and the listing broker. The Berards argued the broker's advertisements were untrue, deceptive or misleading because not all of the windows and electrical were new, the gazebo was a three-season, not a four-season, room and the home was not "totally" or "completely" remodeled. While § 100.18 generally does not require that an advertiser know its representations are untrue, deceptive or misleading, that knowledge must be proven to hold a real estate broker accountable. The Court determined the testimony of the listing agent suggested he knew not all the windows and electrical were new, but found the evidence did not support any knowledge of the true condition of the gazebo. The Berards also tried to rely on the RECR as an advertisement by the listing broker, claiming the broker knew of the undisclosed defects, but the Court was not convinced.

To support the claim against the Schertzes, the Berards point to the

failure to disclose the defects in the RECR. Representations in a condition report can form the basis of a Wis Stat. § 100.18 claim because, until a contract is formed, the potential buyers are members of the public. See ***Below v. Norton***, 2007 WI App 9. The Court did not expand further; however, the Berards did receive the RECR before writing the offer, making them a member of the public.

The circuit court held the amendment containing the "as is" clause signed at closing barred the Berards' claims. The Court of Appeals disagreed, finding while the "as is" clause states buyers are purchasing the property with no warranties, the language subsequently contains a certification from the Schertzes "that the premises are as stated in [the] contract and the Real Estate Property Condition Report." Because the Schertzes stated they were unaware of any conditions affecting the property except for those disclosed in the RECR, the Court held the amendment reaffirmed the original warranty. The circuit court also found the Berards' failure to inspect barred the claim. The Court of Appeals opinion noted case law history shows reliance on the RECR is unreasonable when the general nature of the defect is disclosed and the party waives the right to inspection and to investigation. However, the Court noted the Schertzes did not disclose any defects, so the Berards had no notice of defects to investigate.

Lastly, the Court discussed the Entire Contract provision as a disclaimer of fraudulent misrepresentation. "ENTIRE CONTRACT. This Offer, including any amendments to it, contains the entire agreement of the Buyer and Seller regarding the transaction. All prior negotiations and discussions have been merged into this Offer." The Court found the provision does not create a disclaimer of liability for the Schertzes' representation on their RECR that they were unaware of defects or the broker's untrue, deceptive or misleading advertisements. Thus, the Court of Appeals sent the case back to the circuit court for a trial on the Berards' claims.

REALTOR® Practice Tips: Article 12 of the Code of Ethics provides: REALTORS® shall be careful at all times to present a true picture in their advertising and representations to the public.

Seller's MLS Statements Support Claim of False Advertising:

Richardson v. Davis (No. 2007AP1926, Ct. App. 2008).

Robert and Darlene Davis sold their home to Latanya Richardson and Bryan Brabender (referred together as Brabender). In the MLS, their home was described as: "Cream puff! This house has been overimproved & kept in immaculate condition by fastidious owners. You'll love the hardwood floors, large eat-in kitchen & updated space has been maximized with lower level rec room/playroom and office area. With all the work done, you enjoy your time relaxing and playing. Fenced private yard. Joint garage agreement. See it now before this house disappears!" The Davises personally completed extensive remodeling including the bathroom, which involved moving the tub, toilet and a wall. Brabender was looking for a home requiring little to no remodeling and found it a key selling point when the Davises told them about the extensive remodeling. The Davises also represented in the RECR they were "not aware" of remodeling done without required permits.

After purchasing the home in 2000, Brabender began noticing problems with the bathroom including defective tub plumbing; damage to a wall, wood molding and floor tiles due to improper caulking; and substandard installation of the floor tiles. Brabender sued the Davises for negligent misrepresentation, strict liability misrepresentation and Wis. Stat. § 100.18 false advertising.

The circuit court ruled for Brabender on the claims of negligent misrepresentation and false advertising, finding the Davises' remodeling was not of the quality they represented. The trial court awarded Brabender $5000 in damages and $3000 in attorney's fees. The Davises appealed. The misrepresentation claims are not addressed in this discussion due to the 2008 holding in ***Below v. Norton*** that the ELD stops buyers from asserting misrepresentation claims. The proof of damages argument made by Davis is also not addressed.

For Brabender to prevail on a Wis. Stat. § 100.18 false advertising claim they needed to prove three elements: 1) the Davises made a representation to "the public" with the intent to induce a purchase; 2) the representation was untrue, deceptive, or misleading; and 3) the representation caused Brabender a pecuniary loss. There was no dispute as to whether Brabender was "the public." Brabender claimed the Davises made false, deceptive and misleading statements 1) in the MLS, 2) in the RECR and 3) orally.

The Davises' arguments against the inclusion of the MLS statements were as follows:

1. The Buyer Reliance provision in the accepted offer was an admission by Brabender that they did not rely on any statements outside the contract, including statements in the MLS.

   "BUYER'S RELIANCE: Buyers acknowledge that in purchasing the subject property they have relied solely on their own independent inspection…and analysis of the property and upon the warranties and representations of the Seller contained in the Offer to Purchase and in the Seller's Property Condition Reports. Buyers further acknowledge all of the following: 1) all representations, disclosures, and warranties which have been made to Buyers are

stated in writing in this contract or in the Seller's Condition Reports…"

The Court held this argument failed because generally a Wis. Stat. § 100.18 claim does not require the purchaser to prove reliance for a successful claim as opposed to a common law misrepresentation claim.

2. The MLS is mere "puffery" and cannot be used for the basis of liability. Puffery has been defined as "the exaggeration reasonably to be expected of a seller as to the degree of quality of his product, the truth or falsity of which cannot be precisely determined." ***Tietsworth v. Harley-Davidson, Inc.***, 2004 WI 32. While the Court noted it was a close call, the Court found the Davises' statements were beyond mere puffery, citing the MLS statements that the house had been "overimproved" and "kept in immaculate condition."

3. Because they did not "create or contribute to the wording" of the MLS, they should not be held liable. The Court held this argument failed, citing ***Grube v. Daun***, 173 Wis. 2d 30. The WRA notes, ***Grube*** would not apply in a present day analysis because Wis. Stat. § 452.139(2), enacted after this case, states a client is not liable for misrepresentation by a broker in connection with brokerage services unless the client knows or should have known of the misrepresentation or the broker is repeating a misrepresentation made to him or her by the client.

The Davises assert the RECR statement that they were not "aware" of remodeling without the required permits was true because when they made the statement they mistakenly believed the remodeling did not require permits. However, the Davises did acknowledge later that the bathroom remodeling was done without the required permits and inspections. Unfortunately, the Court did not address this argument, noting the circuit court relied on more than the RECR to support its finding that the seller made false, deceptive and misleading statements.

The Davises argued the "defects" Barbender sought damages for did not exist at the time of the sale and therefore could not be disclosed. The Davises point to Barbender's home inspection report that rated the construction of the house as "Quality Built" and maintenance of the house as "Building Reflects Pride of Ownership." The Court did not agree and reasoned that it is not whether the defects existed at the time of the sale, but whether they could have been reasonably detectible by the buyer or his home inspector. "For example, the Davises characterize detached and cracked bathroom floor tiles as defects that did not exist at the time of the sale, but fail to account for evidence supporting a finding that the damage resulted from substandard bathroom caulking or substandard internal plumbing done by the Davises."

The Court of Appeals, in support of Brabender's claim, concluded the Davises' oral statements were part of the "sales pitch" and made to assure the buyers that they "wouldn't have to really do anything, that [Mr. Davis] had done all this extensive work," and that the buyers were "getting [the house] for a steal" because of the quality of the remodeling.

REALTOR® Practice Tips:
An advertisement may "violate WIS. STAT. § 100.18(1) without making 'untrue' statements as long as those statements can be properly characterized as deceptive or misleading." (***Meyer v. Laser Vision Inst. LLC***, 2006 WI App 70)

REALTOR® Practice Tips:
The statements made by seller orally and in the MLS were used to support the buyer's argument that the seller advertised in a false, deceptive or misleading manner. Listing agents may consider encouraging sellers to provide only the facts, and thus limit their exposure, and to consult legal counsel with questions regarding the completion of the RECR, particularly if the seller has completed the home remodeling personally and without permits.

Condominiums

The three cases in this section explore the trials and tribulations of condominium unit owners wrestling with restrictions on unit rentals; requirements to report contact, voting and mortgagee information to the association; and the allocated responsibility for payment of water, fence painting and ant extermination expenses.

Condominium Unit Use Restrictions May be Imposed in Declaration or Bylaws:

Apple Valley Gardens v. MacHutta, 2009 WI 28.

Steven MacHutta developed the Apple Valley Gardens Condominium complex. The declaration recorded in 1979 provided, among other things, that the units were restricted to single-family residential use, and that any rental or lease agreement shall not relieve an owner from his or her obligation to pay common expenses. There were no stated restrictions on unit rentals in the declaration or other condominium documents until the Apple Valley Gardens Association, Inc., the condominium association for the complex, amended the bylaws on December 18, 2002, to require owner occupancy and prohibit rentals of the condominium units. Existing tenants were allowed to finish their lease terms, but no new tenants were allowed effective January 1, 2003.

A 1988 dispute between MacHutta and the Association had been resolved by an agreement requiring MacHutta to sell all but four units. He later sold one of his units to his wife. The agreement gave MacHutta the right to rent his units, but that right was not extended to his wife. When she rented

her unit to a new tenant in 2004, the Association filed a lawsuit seeking a declaratory judgment that the owner-occupancy bylaw amendment prohibiting unit rentals was enforceable.

MacHutta asserted that the reference in the declaration to rental and lease agreements gives unit owners the affirmative right to rent their units, and that the owner-occupancy requirement was invalid because it was in a bylaws amendment instead of in the declaration. The Association contended that the reference granted no such right but merely states, in a negative manner, that if a lease is allowed, an owner is not relieved from paying common expenses.

The circuit court granted summary judgment in favor of the Association and the Court of Appeals affirmed. MacHutta appealed to the Wisconsin Supreme Court.

Rental Prohibition May Appear in Bylaws Amendment

The Court addressed three questions. The first issue was whether a condominium association may prohibit the rental of condominium units through a bylaws amendment or whether such a restriction must be placed in the declaration.

MacHutta argued that unit rental restrictions must be in the declaration. The Court, however, held in a 6-1 decision that it is permissible to prohibit condominium unit rentals with a bylaw amendment. While Wis. Stat. § 703.09(1)(g) requires that a declaration contain a "statement of the purposes for which the building and each of the units are intended and restricted as to use," nothing in the Wisconsin Condominium Ownership Act requires that all use restrictions be stated in the declaration. Wis. Stat. § 703.10(3) expressly permits restrictions and requirements pertaining to the use and maintenance of units in the bylaws. Wis. Stat. § 703.10(1) requires that every unit owner strictly comply with all provisions of the declaration, bylaws and any rules adopted under the bylaws or suffer the monetary or injunctive penalties provided in the condominium documents.

Thus, the statutes allow the rights of individual unit owners to be limited or changed by Association action. As the Court observed, "Condominium ownership is a statutory creation that obligates individual owners to relinquish rights they might otherwise enjoy in other types of real property ownership."

No Right to Rent in Common Expense Payment Provision

The second issue was does the Apple Valley Gardens condominium declaration create a right to rent that precludes the enforcement of a bylaws amendment prohibiting unit rentals?

MacHutta asserted that the reference in the declaration to rental and lease agreements gives unit owners the affirmative right to rent any of the units owned. Accordingly, the declaration conflicts with the bylaws prohibition on unit rentals, rendering the bylaws provision unenforceable. Wis. Stat. § 703.30(4) states, "If there is any conflict between any provisions of a declaration and . . . any provisions of the bylaws, the provisions of the declaration shall control." The dissenting opinion was in agreement with this analysis.

The Court majority, however, found that the declaration provision grants no affirmative right to rent. Rather it emphasizes that a unit owner must still meet his or her financial obligation to pay condominium common expenses and other fees regardless of whether the unit is rented or owner-occupied. Therefore the Court held that there was no conflict between the declaration rental reference and the 2002 bylaws amendment.

Rental Prohibition Does Not Affect Title or Marketability

The third issue was whether a unit rental prohibition rendered the title to units unmarketable in violation of Wis. Stat. § 703.10(6).

Wis. Stat. § 703.10(6) provides, "Title to a condominium unit is not rendered unmarketable or otherwise affected by any provision of the bylaws or by reason of any failure of the bylaws to comply with the provisions of this chapter." MacHutta argued that the unit rental restriction made them less appealing to investors and others and thus reduced the marketability of the units. "Marketable title," as that phrase is used by the Wisconsin courts, refers to title that can be held in peace without judicial doubt or the need for litigation, the Court noted. The rental prohibition affects the use of the unit but does not impact the owner's right and ability to convey title to the unit. The bylaw amendment merely restricts the use of the condominium units but does not affect unit title or marketability. As a result, the Court held that bylaws enacted in accordance with federal and state law and the declaration do not impair title or render it unmarketable.

REALTOR® Practice Tips: Condominium purchasers should be reminded that use restrictions may appear in either the declaration or the bylaws. Keep in mind that the bylaws generally are easier to amend than the declaration.

REALTOR® Practice Tips: Condominium purchasers should be made aware that the provisions of the declaration, bylaws or rules may be changed, according to the procedures provided in those documents. They must realize that features, benefits or rights that are particularly attractive may be changed by the vote of the required number of unit owners. Condominium purchasers should study not only the property and the condominium documents but should also try to get a feel for whether the other unit owners are similarly minded and unlikely

to change those aspects of the condominium that the purchaser finds desirable.

Requirements of Condominium Association Members:

Manchester Village Owners Association, Inc., v. Kalguin, (No 2007Ap1376, Ct. App 2008).

Vladimir and Izolda Kalugin, Russian immigrants with limited English speaking ability and no capacity to read English, purchased a condominium unit in the Manchester Condominium Village in 2006. As members of the Manchester Village Owners Association (Manchester), they were required to follow the condominium Declaration and Bylaws, which required the completion of an Owner Information form, Certificate of Voting form and a form indentifying the holder of the mortgage on their unit. These forms included identification of the owner of record and the people living in the unit, vehicle information, emergency contact numbers, designation of a representative for voting purposes, the unit owner's name and current mailing address, and any mortgage holders of the unit.

Manchester sent several letters to the Kalguins. The letters included references to the Declaration and Bylaws, an explanation of the required information to be supplied, a deadline date to complete and return the form and an indication that if the deadline was not met, legal action would be taken and the Manchester attorney fees, court costs and other fees would be the Kalguins' responsibility. The Second Amendment to Restatement of Declaration was also attached, which stated the Kalguins would be responsible for the legal fees Manchester incurred while attempting to enforce the reporting requirements.

The Kalguins failed to respond, so Manchester filed suit, asking for judgment ordering the Kalguins to file the paperwork and for costs and attorney fees pursuant to the Declaration. The day after the Kalugins were served they completed and returned the paperwork to Manchester leaving only the issue of the attorney fees.

A motion filed by the Kalguins' attorney included statements as to why the Kalguins failed to respond. The explanation stated the Kalguins did not speak or read English, Izolda Kalguin was very ill and unable to leave her home and Manchester should have given the documents in Russian considering a number of the Kalguins' condominium neighbors speak Russian.

When the case was called in court, neither the Kalguins nor their legal counsel was present. The trial court found it did not believe the Kalguins' language barrier was a sufficient reason for not answering, and that the burden was on the Kalugins "to take appropriate measures to understand what's happening to them legally, in spite of their language barrier." The trial court granted judgment for Manchester and awarded them $4,288.50 in actual attorney fees, costs and disbursements. The Kalguins appealed.

While there was more legal discussion than represented in this summary, the Court of Appeals concluded the merits of the default judgment and the Kalugins' motion would not be addressed. On appeal, Manchester asserted they were entitled to the appellate attorney fees based on the Declaration.

The Kalugins sought reversal under Wis. Stat. § 752.35, which permits the Court to grant relief if there was a miscarriage of justice. "The Court is sympathetic to the practical problems faced by immigrants to our country who do not, on their arrival, understand, speak, read or write English. The parents and grandparents of many current residents of Wisconsin fit into that category. But coming to a new country does not absolve our immigrants from the responsibility for taking reasonable steps to understand the meaning of documents they receive in the mail, or which are hand delivered to them."

The Court found the Kalguins were notified in numerous letters they would be responsible for attorney fees associated with any legal action compelling them to sign the condominium documents. The case was remanded to determine Manchester's appellate attorney fees.

REALTOR® Practice Tips: REALTORS® should encourage buyers to seek legal counsel when reviewing condominium documents prior to purchasing to ensure the buyers fully understand the responsibilities and requirements of members of the condominium association.

REALTOR® Practice Tips: When representing or working with buyers that have a limited ability to speak or read English, a REALTOR® should recommend the purchaser contact an attorney to review the paperwork, translate it and answer any questions.

Interpreting and Applying a Condominium Declaration:

Zabler v. Coachlight Village Town Houses (No. 2007Ap2534, Ct. App. 2008).

Coachlight Village Town Houses Condominium IV (Coachlight) is a condominium consisting of four buildings with four individual units. Coachlight is governed by an association that is governed by a board of directors. Charles Zabler owns a Coachlight condominium unit.

The Association historically divided water costs into 16 equal payments; some residents felt this was unfair, so at a 2005 Association meeting, the majority of owners present at the meeting voted to allocate the costs for each building among the residents of that building, rather than equally among all owners. This change

significantly increased Zabler's water costs.

Each building is surrounded by "limited common areas" that include fences. The Association would repair the fences but required the unit owner to pay for the painting. Also, Zabler notified the Association there were carpenter ants around his building to which the Association said it would split the cost of extermination with that building.

Zabler brought an action against the Association contending that requiring him to pay for the new allocation of water costs, painting the fence and extermination of the carpenter ants was in excess of what was provided for by the condominium Bylaws and Declaration. He argued the Association violated its own rules by changing the allocation of water costs, fence painting is a common expense shared equally by all owners, and the extermination of carpenter ants was a common expense for which the entire Association should be responsible. The circuit court granted a judgment to Zabler. Coachlight appealed.

Coachlight argued the circuit court improperly applied a city ordinance regarding water, salt and sewage costs because the Association is governed by Wis. Stat ch. 703, the Declaration and Bylaws. The Court found that under the city ordinance, billings to condominiums were considered a common expense of the condominium association under Wis. Stat. § 703.02(3), which provides common expenses are expenses of the association. The Court concluded that water, salt and sewage costs are common expenses. The Declaration provided that each unit was liable for an equal share of the common expenses, which includes expenses for water, sewage and salt.

Also, Coachlight argued the court improperly interpreted the condominium documents when concluding the maintenance of the fences was the responsibility of the Association and considering limited common areas to be a subset of "common areas." The Declaration defines "limited common areas," but does not distinguish between common areas and limited common areas when establishing the maintenance responsibility. The Court of Appeals agreed with the circuit court that a "limited common area" is a specific type of common area and the Coachlight Declaration provides that each unit owner shall be liable for an equal share of the common expenses that include maintenance of common areas. Accordingly, the Court found the fence is a common area, maintenance is a common expense and the responsibility for the maintenance of the common areas includes the costs associated with extermination of the carpenter ants.

The Association argued it is authorized by statute to allocate assessment and make changes to the day-to-day operations without amending the Declaration. The Court of Appeals was not convinced and found the Declaration provides each unit owner is liable for an equal portion of common expenses. Therefore, the Court determined when the Association decided to change the allocation of the particular common expense to be shared equally by the building and not equally by all unit owners, the Declaration needed to be amended.

The Court found that for the Declaration to be amended, the Association needed the majority of all the condominium owners, but instead only had the majority of the 2005 meeting attendees; thus the Declaration was not properly amended. The Court determined the Association had to either allocate the costs equally among all unit owners for common expenses or correctly amend the Declaration.

REALTOR® Practice Tips:
Purchasers need to carefully review condominium documents and have a clear understanding of the condominium unit, limited common elements and common elements as well as the maintenance responsibilities as to each.

Lake Access

This section features a conflict between public lake access dedicated on a plat and a private easement conveyed to the property owner, the struggles of developers trying to provide water access to their restaurant properties but failing based on Wis. Stat. § 30.133 and the interpretation of a pier easement granted and recorded before December 31, 1986, under Wis. Stat. § 30.131.

Private Interests Cannot Be Granted in Dedicated Public Lake Access:

Vande Zande v. Town of Marquette, 2008 WI App 144.

Under Wisconsin law, great deference is accorded to the public trust doctrine whereby the state holds title to the beds of navigable lakes, streams and rivers in trust for the public. It should come as no surprise, then, that those areas intended to provide public access to Wisconsin waterways are also protected under the law and not easily claimed by private individuals. Since 1923, Wisconsin law has required developers of waterfront (riparian) land to provide a 60-foot-wide public access to the water at least every one-half mile along the shore.

The property disputed in this case is a 60-foot-wide strip of land running from Marine Drive to Lake Puckaway. The strip was designated as "Public Access" on Stamm Marine Plat approved by the town and recorded in 1974. However, when several adjacent parcels were conveyed to purchasers, those deeds included a purported one-thirtieth interest in the strip. The deeds were accompanied by an agreement requiring the property owners to make certain improvements to the strip, which they have done. When the town advised the property owners in 2006 that any claimed

private ownership interest in the strip was invalid, Vande Zande and other owners filed a declaratory judgment suit against the town. The town moved for a declaratory judgment in its favor, which was granted while a judgment in Vande Zande's favor was denied. Vande Zande appealed to the Wisconsin Court of Appeals.

Vande Zande argued on appeal that the strip is not a public lake access because public lake access was never created, and that if a public lake access was created, it was abandoned and no longer exists.

A Public Lake Access was Properly Dedicated

When property is subdivided, streets, roads, parks and other public areas are created by dedication to the public. Statutory dedications are created by conformance with the platting statutes while common law dedications require an offer to dedicate the land and an acceptance by the municipality or by general public use. Intent to dedicate is the key component in both varieties. The Stamm Marine Plat labeled the strip as "Public Access," but Vande Zande claimed that because it did not use the verbiage "Dedicated to the Public," it did not strictly comply with the statutes in effect at that time and thus failed to create public access. Vande Zande relied upon a prior case where the plat label "Community Beach" was found to not have successfully dedicated the beach to the public under the then-applicable statute that required language stating "dedicated to the public for use as a beach."

The Court of Appeals disagreed, observing that in the prior case, "community" might refer to the public, the community in the subdivision or municipality, or some other group; it was not a clear reference to the public. "Public," on the other hand means the public. In addition, in 1974 and now, Wis. Stat. § 236.16(3) requires subdivisions to include a route from the public road to navigable water that is at least 60 feet wide, and the statute refers to this route as "public access." Thus the Court held that the strip labeled "Public Access" on the Stamm Marine Plat substantially meets the requirement for a "clear dedication to the public."

Vande Zande also argued that the town failed to accept the dedication, but Wis. Stat. § 236.29(2) provides that a municipality that approves a plat thereby accepts street dedications and other dedications to the public. They also argued that certain town highway statutes in Wis. Stat. Chapter 80 at that time indicated that a second town acceptance was needed for highways and that the public access was really a highway. However, another statute that became what is now Wis. Stat. § 236.29(2) had been enacted, providing that, "When a final plat of a subdivision has been approved by the governing body of the municipality or town in which the subdivision is located and all other required approvals are obtained and the plat is recorded, that approval constitutes acceptance for the purpose designated on the plat of all lands shown on the plat as dedicated to the public including street dedications." Thus plat dedications to the public are conclusively accepted by final plat approval, and the dedication of the strip on the Stamm plat as public access and the town's approval of the plat created a valid statutory dedication of a public lake access.

Public Lake Access Has Not Been Discontinued

Vande Zande points to Wis. Stat. § 80.32 that provides that a highway may be discontinued if it has not been "opened, traveled or worked" within four years of having been laid out or if it has been abandoned as a route of travel and no highway funds have been spent for it for five years. This argument assumes that the public access strip is a "highway." The town, however, points to Wis. Stat. § 236.43, which governs the vacation of areas dedicated to the public on a plat. That statute, as well as § 80.32, had been revised by the Legislature in 1997 in response to a case where a platted public access had been vacated. Specifically, "the legislature changed the law to make several things clear: a local government has no obligation to improve a lake or stream access, regardless of when that access was created; a lake or stream access may not be 'discontinued' under Wis. Stat. § 80.32; and, relatedly, a lake or stream access may be 'vacated' under Wis. Stat. § 236.43 only, and only if the governing municipality agrees."

Public Property Interests Not Easily Defeated

Vande Zande also claims that the town should be equitably estopped from claiming the public access strip 31 years after the Stamm Marine Plat was recorded. Vande Zande purchased their properties with the understanding that they had lake access and could install a pier, and the elimination of private access rights was diminishing the value of their properties, making them harder to sell. The Court, however, indicated that an equitable argument seeking to take away property interests dedicated to the public would need to be based on something stronger than a municipality's delay in taking action. Vande Zande's real remedy, the Court noted, was against the property owner who sold them interests in the public access strip and not the town or the public. The Court of Appeals accordingly rejected Vande Zande's claims and affirmed the circuit court's decision.

REALTOR® Practice Tips:
Be alert to any streets, public lake access or other areas dedicated to the public on plat maps because the rights of the public are not easily defeated.

REALTOR® Practice Tips:
Wis. Stat. § 236.16(3) and Wis. Admin. Code §§ NR 1.90-1.93

address public access to Wisconsin navigable waters.

Wis. Stat. § 30.133 Prohibits Severing Riparian Rights Whether by Easement or Reservation:

Anchor Point v. Fish Tale Properties, 2008 WI App 133, and Berkos v. Shipwreck Bay, 2008 WI App 122.

This pair of cases involves residential condominiums developed along a lake shoreline. Both developers attempted to secure rights for the patrons of their adjacent restaurants to use the piers abutting the condominium shoreline. In the ***Anchor Point*** case, the developer created a "Declaration of Driveway, Walkway and Parking Easement and Agreement" (Agreement) that created easements for shared driveways and parking lots between the restaurant on Lot One and the adjacent Lot Two lakefront property, which was the site of Anchor Point Condominiums. The Agreement also granted an 8-foot ingress-egress easement to the restaurant over the condominium property and gave the restaurant property the right to use some of the condominium's piers, boat slips and docks. In the ***Berkos*** case, the developer reserved rights for the developer to regulate and limit the placement and use of piers and docks in the declaration of condominium of Shipwreck Bay Condominium for the benefit of the developer's adjacent restaurant property.

Both cases turned on whether the developer's efforts to secure pier privileges and lake access for their restaurant patrons violated Wis. Stat. § 30.133(1) (2005-2006), which provides that,

> Beginning on April 9, 1994, no owner of riparian land that abuts a navigable water may convey, by easement or by a similar conveyance, any riparian right in the land to another person, except for the right to cross the land in order to have access to the navigable water. This right to cross the land may not include the right to place any structure or material in the navigable water.

Easement Agreement Gives Restaurant Right to Use Condominium Piers

In the ***Anchor Point*** case, the condominium association sued Fish Tale Properties, the restaurant property owner, for a declaratory judgment and an injunction prohibiting Fish Tale from using the condominium association's piers. The trial court found in favor of Fish Tale and the condominium association appealed to the Court of Appeals.

The association argued that the Agreement was invalid because it transfers riparian rights to a nonriparian owner and thus violates Wis. Stat. § 30.133(1), which prohibits a riparian owner from transferring any riparian right to a nonriparian owner "except for the right to cross the land in order to have access to the navigable water." Fish Tale claimed the right to use the condominium piers and boat slips is not a riparian right and thus not subject to § 30.133(1). Fish Tale also argued that even if use of a pier is a riparian right, it is included in the § 30.133(1) exception for transfers of the right to cross the land and access navigable water.

Riparian Rights Defined

The Court first examined whether the right to use the association pier was a riparian right, subject to § 30.133. The Court noted that Wisconsin case law teaches that, "riparian owners are those who have title to the ownership of land on the bank of a body of water. Riparian owners enjoy specific property rights based on owning land abutting water, including the right to use the shoreline and have access to the waters, the right to reasonable use of the waters for domestic, agricultural and recreational purposes, and the right to construct a pier or similar structure in aid of navigation."

Examining the Agreement, the Court observed that it appeared to convey part of the condominium owners' right to use the pier and boat slips to the non-riparian restaurant property owner. Fish Tale contended that while pier placement is a riparian right, the Wisconsin courts have never specifically recognized use of a pier as a riparian right and thus, there must instead be a public right to use private property in the public water. The Court acknowledged that boating, swimming, fishing, hunting and recreation are open to the public pursuant to the public trust doctrine and that Wisconsin navigable waters belong to the state, but found no support for a nonriparian owner's right to use a riparian owner's pier. If placement of a pier is a riparian right subject to state regulation, it makes no sense, the Court observed, that the use of such a pier placed into the public waters would not also be regulated as a riparian right.

Fish Tale also argued that even if pier use is a riparian right, that right may be transferred under the exception to § 30.133(1) that allows a riparian owner to grant "the right to cross the land in order to have access to the navigable water." Fish Tale asserted that use of a pier and boat slip is encompassed within a right to cross land to access water, but the Court disagreed, finding that using a pier and crossing land to access the public waters are two different things. If the Legislature had intended to include pier use as an exception to the § 30.133 prohibitions, it would have so specified. When a person crossing the land crosses the ordinary high water mark, that person can enjoy the public waters; the condominium's pier is not necessary to achieve access to the lake.

Fish Tale then asserted that only transfers "by easement or similar conveyance" are prohibited under § 30.133(1) and that the Agreement was a different kind of contract establishing rights for the parties.

The Court, however, said that the statute prohibits a transfer of a riparian right apart from the riparian land. The technical type of the transfer is not the deciding factor. Accordingly, the Court of Appeals reversed the circuit court's decision and found in favor of the Anchor Point Condominium Association.

Condominium Declaration Reserves Right to Regulate Condominium Piers

In the ***Berkos*** case, the developer, Daniel M. Berkos d/b/a C & B Investments (C&B), created Shipwreck Bay Condominiums along the lakeshore of its property. C&B also owned a bar and restaurant adjacent to the condominium property. The condominium declaration provided that pier placement was subject to C&B's approval and could not interfere with C&B's ability to develop and operate other facilities outside of the condominium. The declaration gave C&B the right to regulate pier placement and the use of the piers, docks and other shoreline facilities.

DNR Denies Marina Permit to Non-Riparian

When C&B applied to the Wisconsin Department of Natural Resources for a marina permit, the DNR denied the permit because C&B was not the riparian owner. However, the DNR said that it would accept C&B's application if C&B obtained either the signatures of the association and the condominium owners on the application or a court judgment declaring C&B to be the riparian owner of the shoreline. The association would not consent so C&B sued the association and the condominium owners for a judgment declaring it to be the owner of riparian rights in front of the condominium and an order enjoining the association and condominium owners from refusing to permit C&B to place and use piers in the waters in front of the condominium per the declaration provisions. The circuit court granted judgment in favor of the association, finding that the declaration provision reserving pier placement rights for C&B to be invalid in violation of Wis. Stat. § 30.133. C&B appealed to the Court of Appeals.

The Court noted that riparian owners have certain rights, known as riparian rights, based on their ownership of shorefront property. These rights include the right to install a pier or similar structure, but these rights are subject to the public's right to use navigable waters under the public trust doctrine. Wis. Stat. § 30.133 serves to prohibit the alienation of riparian rights apart from the associated riparian land.

C&B asserted that Wis. Stat. § 30.133 (2005-06) prohibits only the sale or conveyance of riparian rights by a riparian owner to another person, not the reservation of such rights upon the transfer of the riparian land. The Court of Appeals, however, concluded that a reservation was void because § 30.133 plainly prohibits the reservation by easement or similar instrument of riparian rights upon the transfer of title to riparian land. Riparian rights are not severable from riparian lands under Wisconsin common law, which the Legislature confirmed when it enacted § 30.133. While § 30.133 does not explicitly refer to reservation of riparian rights by easement, the Court of Appeals found that Wis. Stat. § 30.133 prohibits the severing by easement or similar conveyance of riparian rights from the associated riparian lands. Accordingly, the Court held that the easement provisions in the condominium declaration reserving C&B's right to control pier placement are void in violation of § 30.133. Thus, the Court found for the association and affirmed the circuit court's decision.

REALTOR® Practice Tips:
These cases make it clear that any attempt after April 9, 1994, by a riparian owner to transfer any riparian rights to another person will very likely be found void. The Court's generous interpretation in ***Berkos*** makes it clear that the § 30.133 prohibition is not limited to easements and conveyances. Rather, any giving of riparian rights to a non-riparian owner, regardless of the technical means of transfer, will not be allowed.

Scope of a Nonriparian Property Easement:

Partridge v. Georges (No 2008AP1052, Ct. App. 2009).

Chris Georges owns two of three parcels of land near or adjacent to Powers Lake. One is the nonriparian dominant estate and the other is the riparian servient estate. The Tamara L. Partridge Revocable Trust (Partridge) owns the other nonriparian dominant estate. Georges and Partridge, via their dominant estates, have a 19-foot-wide access to the lake over Georges' servient estate.

All three properties were originally owned by Casimir and Anna Fec. In 1949, the Fecs sold one of the nonriparian parcels to Doener. The warranty deed included an easement that granted a "right of access to…the waters of Powers Lake, for the purpose of fishing and bathing…more particularly described in Warranty Deeds to the grantors…." From 1949, the Doener's seasonally placed and maintained a pier and moored a boat on the easement until 1960 when the owners of the servient estate moved the easement to the opposite side of the riparian property. In 1974, the Doerners sold to the Beamesderfers, who subsequently sold to Partridge in 2006.

The other nonriparian parcel was sold by the Fecs in 1949 to Jaszkowski. The warranty deed granted an easement for "the right of ingress and egress…for the purpose of boating and bathing." In 1960, after the easement relocation, Jaszkowski began installing and maintaining the pier that the Doeners were not excluded from using. In 2003 Jaskowski sold

the property to another who, in 2005, sold it to Georges. Neither party to the suit disputes the original easements passed with each conveyance.

The third parcel, the riparian servient estate, serves both Partridge's and Georges' easement needs. In 1959, the Fecs sold the riparian estate to Ochocki, who in 1960, relocated the easement, as per the express terms of the easement, and set the width at 19 feet.

In 1979, Ochocki sold the servient parcel to Pytko, who, in 1985, created Lakeshore Condominiums. The Declaration of Condominium noted the rights of the condominium owner were subject to existing easements created in the Fec-Doener and Fec-Jaszkowski deeds and that the easements granted the right of "ingress and egress to and from the waters of Powers Lake for the purpose of boating, fishing and bathing." During the trial, Pytko testified that Jaszkowski and the Beamesderfers placed a pier every year, keeping their boats there and storing the pier in the easement in the off-season. He also said he knew about the easement and did not object.

Georges purchased unit 2 of the condominiums in 1988 and testified he knew of the easements but believed Partridge's rights were limited to ingress and egress from the lake for fishing and bathing only. Georges destroyed the pier installed by the Beamesderfers and told Partridge their easement did not include boating or pier rights. He then replaced the pier with one about half as long as the previous with the boat lift on the wrong side and in such shallow water that the pier was rendered "totally unusable."

Partridge sued to restrain Georges from obstructing their installation and use of a pier. The trial court found Partridge's easement entitled them to place and maintain a 56- to 64-foot pier on the easement for boating, bathing and fishing, and to moor boats overnight and seasonally. Georges appealed.

Georges argued the easement provided access for ingress and egress only for fishing and boating. However, Partridge argued the easement language along with the previous owners' actions granted them the right to place and maintain a pier. They also noted that when the condominium Declaration was created in 1985, a pier had been placed and maintained each year for 35 years without protest.

The Court of Appeals found the easement language was ambiguous and looked to extrinsic evidence – the actions of the parties. The Court pointed to the trial court's findings that in 1950 a pier was seasonally placed upon the easement, repaired and painted, and was stored off-season in the easement. The Court also noted that since the easement's relocation, a pier customarily 56 to 64 feet long was placed on the easement every year, and Partridge's predecessors, the Beamesderfers, used the pier for boating, bathing and fishing from 1974 to 2006. The Court found that the condominium declaration stated the easements created by the Fecs were to run with the property and provide easement owners with the right to ingress and egress to the water for boating, fishing and bathing.

Georges also argued that even if the Court found Partridge has rights, the pier would still be unlawful under Wis. Stat. § 30.131. First, the proposed pier does not meet Wis. Stat. § 30.131(1)(b), which requires that the person who places and maintains the pier is also the person to whom the easement was granted or that person's successor in interest. The Court found Partridge is the successor in interest to the Doerners, the original grantees. Secondly, Georges contended Partridge's proposed pier does not satisfy Wis. Stat. § 30.131(1)(d), which requires the pier to have been placed seasonally in the same location at least once every four years since the easement was first recorded. The Court determined the Doerners placed the first pier in 1950 at the site of the original easement and after the easement relocation, a pier was placed seasonally at least once every four years since 1949. Thus the trial court judgment in favor of Partridge was affirmed.

REALTOR® Practice Tips:
A REALTOR® cannot provide legal advice. When involved in a transaction that includes an easement, the parties should have an attorney review the language for a full legal interpretation of their rights under the agreement.

Boundary Dispute

Adverse Possession and Disclosure of Boundary Line Disputes:

The case in this section illustrates the impact of an adverse possession and boundary dispute on REALTORS®' ability to engage in successful sales transactions.

Thorn v. Olson (No.2006AP2063, Ct. App 2008).

In 1980, Norbert and Edna Nuttelman deeded a lot from a section of their West Salem farm to their son and his wife, John and Vicki Nuttelman. John and Vicki built a home and, in 1982, sold the property to the Bradways. The Bradways later sold to the Larsons who then, in 1991, sold to Mark and Ellen Thorn.

In 1987, Norbert and Edna rented their farm to Rod and Pam Olson, who purchased it in 1993. In 2000, the Olsons divided their property into two residential lots. The surveyor discovered part of the Thorns' backyard was property to which the Olsons held record title. The surveyor mapped the area as .18 acres and named it "Outlot #1."

The Olsons' REALTOR® informed the Thorns of the survey. In 2000, the Thorns began negotiations to purchase Outlot #1, but did not reach

an agreement. The Olsons then sold the two lots to two different parties. The Olsons kept Outlot #1, and the Thorns continued to maintain Outlot #1 as part of their backyard until 2005. In February 2005, the Thorns put their property up for sale. The Olsons contacted the Thorn's REALTOR® to inform him they had record title to Outlot #1. Later that spring, the Olsons placed a light-duty fence around Outlot #1 to make a visual statement they were the true owners.

In July 2005, the Thorns brought suit, seeking adverse possession of Outlot #1 and damages for both trespass and intentional interference with contract. The circuit court held the Thorns owned Outlot #1 by adverse possession and awarded damages for both trespass and intentional interference with contract in the amount of $9,535.97, $17,420.42 in attorney fees and $514.16 in interest. The Olsons appealed the holding that the Thorns owned Outlot #1 by adverse possession and the determination that the Olsons intentionally interfered with the Thorns' attempts to sell.

Adverse possession requires proof of hostile, open and notorious, exclusive and continuous physical possession of land for 20 years. The party claiming adverse possession must give notice of the party's intent to exclude the record titleholder by visible means, by erecting a substantial enclosure or by cultivating or improving the land (§ Wis. Stat. 893.25). The burden of proving a claim of adverse possession is on the party asserting claim to the property, in this case the Thorns.

The period of adverse possession began in 1980 with John Nuttelman's maintenance of Outlot #1. He said he kept the same property lines from 1980 to 1987, first as the owner of the property and then as the operator of his parents' farm, and he maintained an elliptical or "half-moon" shape, which included Outlot #1. The circuit court noted the shape was different than the "angular, polygon-shape lot described in the deed."

After 1987, trees and shrubs were planted on Outlot #1; the lawn was mowed; a garden was planted and a holding tank, a septic tank and a structure for storing wood were added. A neighbor testified the boundary was the same from 1979-2000. Thus the Court of Appeals found there was sufficient evidence for the Thorns to establish adverse possession.

To prove a claim for intentional interference with contract, the Court of Appeals indicated that Thorn must show: 1) he had a contract or prospective contractual relationship with a third party; 2) the defendant interfered with that relationship; 3) the interference was intentional; 4) a causal connection exists between the interference and damages; and 5) the defendant was not justified or privileged to interfere. During 2005, the Thorns had two accepted offers and a lease with an option to purchase, which all fell through because of concerns regarding the Outlot #1 dispute. The Olsons had contact with each of the buyers before they cancelled their respective contracts.

The Olsons claimed they were only providing truthful information about the dispute when contacted by the three buyers. The Court, however, concluded the Olsons intentionally interfered with the Thorns' attempts to sell the home and intended to disrupt the buyers' agreements. The Court cited the instance of the second buyers. In their agreement they had agreed to purchase without Outlot #1, conditioned on the septic system and LP tank being moved from Outlot #1 to a portion of the property not in dispute. The Thorns moved the tank and septic as agreed. Meanwhile, Pam Olson alerted the local municipality the Thorn's sunroom was too close to the Olson's property (Outlot #1), which violated a setback requirement. The Thorns were granted a variance, which the Olsons appealed. The buyers cancelled the agreement because they could not wait for the matter to be resolved and feared if the Olsons won it would mean expensive modifications for the buyers. The Court found the Olsons' timing by raising the zoning issue when the sale was pending supported the claim.

The third buyers signed a lease with option to purchase. Shortly after moving in, the Olsons fortified the fence they had placed earlier on Outlot #1 with wooden fence posts and affixed "no trespassing" signs. The buyer testified he called the Olsons and discovered the dispute over Outlot #1 was more intense than he originally thought. The buyers also found an inspection report in their mailbox that indicated the house had unacceptable levels of radon and a note accusing them of trying to steal someone else's property. While the Court did not have clear evidence that the Olsons were the source of this information, it did determine the circumstances reasonably inferred they authored them. The Court also found the purpose of the notes and fortifying the fence with "no trespassing" signs was to intimidate the buyers from exercising the option to purchase. Consequently, the Court of Appeals held there was sufficient evidence to uphold the Thorns' intentional interference with contract claims.

REALTOR® Practice Tips: A known or possible boundary line dispute is a material adverse fact and must be disclosed by a licensee in writing to all parties to the transaction, even if the client would direct the licensee not to disclose.

Landlord/Tenant Law

The case featured in this section involved a circuit court that evicted a deaf tenant without allowing him the chance to remedy the default identified in the five-day notice.

Tenant Evicted Despite Having Remedied the Default Cited in the Five-Day Notice:

Greenfield Senior Housing v. Tannehill (No. 2006AP003162, Ct. App. 2007).

Tannehill was evicted from the apartment he leased at a housing complex for persons who are deaf and for senior citizens. The complex was owned by the Greenfield Senior Housing V, LLC (Greenfield). Tannehill, who is deaf, was evicted because of an incident he was involved in while-boarding a bus on June 23, 2006.

When Tannehill got on the bus that was taking housing complex residents to Polish Fest, he stopped to tell the bus driver that a person with a walker was waiting to get on the bus. During this conversation, he felt someone pushing him from behind. He turned, saw another deaf resident behind him and told her to stop pushing him. She left the bus and told others, using sign language, that Tannehill was angry with her. When she got on the bus she sat in front where she proceeded to "sign" to the person next to her that Tannehill was an "asshole." Seeing this, Tannehill came up behind her and slapped the back of her head, causing the female resident's glasses to fly off of her head. When the bus returned four hours later after the outing, she called the police and told them what Tannehill had done, leaving out the part where she had been signing profanity. She asked the police to call an ambulance for her, was seen at the hospital and referred to a doctor. The police gave Tannehill a municipal citation for battery.

A few days later, Tannehill received a five-days' notice from Greenfield indicating he had five days to remedy his default or to vacate the premises. Greenfield later filed an eviction action, indicating that Tannehill had breached the terms of his lease, with reference to the bus incident, by violating the following rules:

- Tenant shall not make excessive noise or engage in activities which unduly disturb neighbors or other Tenants in the building where the premises are located.
- All residents agree not to engage in or permit unlawful activities. This includes under age drinking and illegal drug-related activities in the apartment, hallways, common areas or grounds.

Tannehill's answer to the eviction complaint challenged Greenfield's claim that he had failed to remedy the situation. At trial, the court determined that it was impossible for Tannehill to remedy the situation because it was a quasi-criminal act and that the statute did not require that Tannehill be given the opportunity to correct the breach. The trial court did, however, stay the writ of assistance and Tannehill filed an undertaking pursuant to Wis. Stat. § 799.445 so that Tannehill could appeal to the Court of Appeals.

Tannehill challenged the trial court's determination that no remedy was possible for the alleged breach of the lease, and argues that Wis. Stat. § 704.17(2)(b) requires that he be allowed to try to remedy the breach before he could be evicted.

Wis. Stat. § 704.17(2)(b) requires the landlord to give a tenant, like Tannehill, with a lease for one year or less, "a notice requiring the tenant to remedy the default or vacate the premises." Greenfield's five-day notice advised Tannehill of the breach and suggested how Tannehill could rectify the breach: he was to have no future contact with the victim. § 704.17(2)(b) provides that a "tenant is deemed to be complying with the notice if promptly upon receipt of such notice the tenant takes reasonable steps to remedy the default and proceeds with reasonable diligence." The Court of Appeals concluded that Tannehill was not given the chance to remedy the situation, even though the record showed that he had been avoiding the victim, that a medication he had been taking that sometimes causes aggression had been adjusted and that Tannehill had been behaving properly since the incident. As a result, Tannehill's eviction was reversed.

REALTOR® Practice Tips: The five-day notice to pay or vacate the premises works quite well, but a five-day notice to remedy the default or vacate may not be very helpful for landlords when the default was bad behavior by the tenant. The tenant need only behave properly for five days or until the trouble blows over and then can resume his disruptive ways. If it is within a year of the first notice, however, at least the landlord can give the tenant a 14-day notice to terminate the tenancy under Wis. Stat. § 704.17(2)(b).

Property Assessments

One case summary in this section examines the process used to value lakefront properties while the other case explores the valuation of leased retail properties.

Lake Michigan Properties Assessed Based on Beach-Front Foot Formula:

Anic v. Board of Review, 2008 WI App 71.

The owners of 18 beach-front properties along Lake Michigan claimed that the circuit court erred in upholding the valuations set by the town Board of Review because the property assessments determined by the town assessor were based on a formula. The property owners appealed to the Court of Appeals.

The town assessor apparently had difficulty finding comparable sales for the lakefront properties, but eventually found four suitable comparable sales in the town of Wilson and 10 suitable comparable sales in the town of Holland. He evaluated these comparable sales and concluded that the

size and shape of the individual lots had no measurable impact on the price per beach-front foot except in extreme cases. He determined that the average price of these properties was $4,000 per beach-front foot regardless of lot size or configuration; the only variable was beach quality. The town assessor verified the quality of the beach-front properties by walking the beaches and then made adjustments to the formula on a case-by-case basis for beach quality.

The owners' real estate appraiser, on the other hand, found that lot size and beach frontage play an important role in determining value. He employed a "regression analysis" to determine the impact of what he presumed to be excess frontage and excess acreage. The appraiser concluded that as the size of the property increases, the per-acre value of the land decreases. Applying this analysis to the owners' properties yielded reduced unit values for those properties that exceeded what he deemed to be the standard size and amount of beach frontage.

The Board of Review adopted the assessor's valuations and rejected the appraiser's regression analysis, concluding it was formulaic and did not use comparable sales. However, the Board accepted the appraiser's recommendations to make adjustments to the assessor's valuations for properties located north of Kohler-Andrae State Park or located adjacent to public access to Lake Michigan.

Property Assessment Appeals Difficult to Win

The Wisconsin Court of Appeals noted that the assessor's valuation is presumed to be correct so anyone challenging a property tax assessment must fight an uphill battle. The Court does not have jurisdiction to disturb the Board's findings unless the Board acted in bad faith, exceeded its jurisdiction or failed to make the assessment on an appropriate statutory basis. If there is a conflict in the testimony respecting the value of the property, the Court does not substitute its opinion of the value for that of the Board of Review. If there is credible evidence before the Board that may be reasonably viewed to support the assessor's valuation, then the valuation must be upheld.

Proper Assessment Methodology

Real property assessment in Wisconsin is governed by Wis. Stat. § 70.32(1) and the *Wisconsin Property Assessment Manual.* § 70.32(1) provides that real property shall be valued by the assessor in the manner specified in the *Wisconsin Property Assessment Manual* based upon an actual viewing of the proprty or the best information that the assessor can practicably obtain, at the full value that could ordinarily be obtained for the property at private sale. An assessor must consider recent arm's-length sales of the property if, according to professionally acceptable appraisal practices, those sales conform to recent arm's-length sales of reasonably comparable property. Assessors also consider all other factors that, according to professionally acceptable appraisal practices, affect property value.

In addition, the Wisconsin Supreme Court has ruled that the best indicator of value is a sale of the property. If there has been no such sale, then sales of reasonably comparable property are to be considered. In the absence of such sales, the assessor may consider all the factors collectively that have a bearing on value of the property in order to determine its fair market value.

The fundamental issue on appeal was whether the town assessor's valuation was formulaic. A Board of Review considers witness testimony and all books, inventories, appraisals, documents and other data that may throw light upon the value of the property, but cannot rely upon a formula.

The Court of Appeals noted that the town assessor's analysis was based on valid comparable sales data. He looked at the sales and made comparisons on a per-foot basis. He looked at new, old, unkempt, well-kept, year-round and summer homes, and he found that the only factors that had any material impact on price were beach length and beach quality. The town assessor considered a relevant number of sales over a considerable period of time, looking for patterns and trends. After analyzing prevailing market conditions, he determined that the market for lakefront property had grown so strong that factors other than beach length and beach quality were ignored in the marketplace. His analysis was not a perfunctory application of an unfounded mathematical formula, but rather was a methodology based upon comparable sales and property characteristics.

Accordingly, the Court found that the Board properly accepted the town assessor's valuation and that the owners failed to overcome the presumption that the town assessor's valuation is correct. Thus, the circuit court's decision was affirmed.

REALTOR® Practice Tips:
As the ***Anic*** case illustrates, property owners must make their best case to the board of review because their decision will be presumed to be correct if the board decision is appealed to the courts. For further information regarding property assessment appeals, see the December 2008 edition of *Wisconsin Real Estate Magazine* at http://news.wra.org/story.asp?a=1024.

Market Rent Not Contract Rent Used for Income Approach Valuation:

Walgreen Co. v. City of Madison, 2008 WI 80.

Walgreens challenged the city of Madison's assessments for both 2003 and 2004 on two properties leased to Walgreens for retail space. Walgreens' leases require Walgreens to pay

property taxes for both locations.

In exchange for constructing buildings meeting Walgreens' specification, Walgreens pays the developers monthly rent in a fixed amount calculated to reimburse them for land acquisition costs, construction costs and financing, and to provide a return on investment. Both leases effectively guarantee locked-in rents for 20 years. Walgreens' challenges to the assessments as excessive before the Madison Board of Review, circuit court and the Court of Appeals were unsuccessful, so it appealed to the Wisconsin Supreme Court.

Assessing Leased Retail Property

The Court first sought to identify the correct methodology for assessing leased retail property for purposes of municipal taxation when the leases contain monthly payments significantly above the market rental rate, in part because of certain unique business and financing terms incorporated therein. The *Wisconsin Property Assessment Manual* provides that, "the goal of the assessor is to estimate the market value of a full interest in the property, subject only to governmental restrictions. All the rights, privileges, and benefits of the real estate are included in this value. This is also called the market value of a fee simple interest in the property."

Under the *Manual*, there are three primary methods of property assessment that are also generally recognized in real estate appraisal law: the sales comparison approach, the cost approach and the income approach. The *Property Assessment Manual* explains that in leased property scenarios, the income approach is often the most reliable approach for property valuation. Under the income approach, the assessor estimates and then capitalizes the net rent that the property could generate. The *Property Assessment Manual* explains that an assessor using the income approach must use market rent and not contract rent unless valuing federally subsidized housing. Market rent is the rent that a property would receive based on the current, arm's-length rent commanded by similar properties in the marketplace

When assessing these properties under the income approach, the city assessor relied on the guaranteed contract rents that Walgreens was obligated to pay under its leases. The city assessor used the contract rents to determine the net income-producing capacity of the properties and, in turn, used this information to estimate the amounts an arm's-length buyer would be willing to pay for the properties. The city found that these locked-in rents caused the properties to be more valuable than comparable properties without such lease agreements. Walgreens, on the other hand, wants the city to ignore the contract rents and instead value the properties based on estimated market rent the properties would have commanded on the assessment dates, that is, rent a hypothetical tenant would pay on the assessment date if the tenant negotiated to lease the properties after the land was acquired and buildings built. The parties agree that market rent was substantially lower than the contract rents and would result in substantially lower assessments.

Wis. Stat. § 70.32(1) forbids assessment of real property in excess of market value. The city assessor in this case failed to properly apply the provisions of the *Property Assessment Manual* requiring that income approach assessments of the fair market value of a fee simple interest must be based on market rate rents rather than contract rents, absent the existence of an encumbrance bringing the leased fee value below actual market rates. The Court concluded that the circuit court and the Court of Appeals failed to apply these well-established rules of property assessment. Therefore, the Court reversed the decision of the Court of Appeals and remanded the case to the circuit court for further proceedings.

REALTOR® Practice Tips: The Wisconsin Property Assessment Manual holds the answers to most property assessment questions. The Manual aids assessors in the interpretation of statutes related to classifying and valuing property, describes the property assessment cycle and deadlines, and defines the responsibilities of public servants charged with carrying out property valuation. The Manual is developed and maintained by the Department of Revenue, Bureau of Assessment Practices and is updated on an annual basis. The Manual may be found on the Department of Revenue's Web site at www.revenue.wi.gov/slf/wpam/wpam09.pdf.