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The **Michigan Real Property Review** is the official journal of the Real Property Law Section of the State Bar of Michigan. The **Review** is published quarterly and is a significant part of the Section's program of publications, seminars, conferences, legislative liaison and other undertakings for the professional education and development of its members and the Bar.

The Section encourages interested members of the Bar to contribute articles and other publishable material relating to real property law and of interest to the profession. Manuscripts are reviewed by attorneys experienced in the subject matter covered by each article.

Readers are invited to submit articles, comments and correspondence to George J. Siedel, Editor, 5211 Business Administration Building, University of Michigan, Ann Arbor, Michigan 48109-1234. The publication of articles and the editing thereof are at the discretion of the Editor. A cumulative index of articles is printed annually in the Winter issue of the **Review**.

Articles in the **Review** may be cited by reference to the volume number, abbreviated title of the publication, the appropriate page number and the year of publication as, for example, 14 Mich Real Prop Rev 35 (1987).

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THE YEAR AHEAD: A MESSAGE FROM THE CHAIRPERSON

by *Jack D. Shumate*

1997-98 promises to be an active and challenging year for the Section as we move forward with strategic planning to define our role at the beginning of the 21st century, deal with an active legislative calendar, respond to any new needs to prepare and file amicus curiae briefs, continue to expand our excellent pro bono program, and respond to the many unforeseen challenges which always arise.

For the past year, the Section's 21st Century Committee, under the leadership of our Past Chairperson, Larry McLaughlin, has been studying the questions posed by a changing information and educational environment in the legal profession. The Committee's report will soon be made available to all Section members, possibly by publication in the next edition of the **Review**. The report will serve as the basis for discussion of a number of critical issues, such as what changes (if any) should be made in the Homeward Bound program, how should we go forward in continuing our long standing cooperation with ICLE, to what extent and in what time frame should materials from our seminars be available on-line, and how is the Section's education program, generally, likely to be impacted by the increasing availability of on-line materials and the growing involvement of legal publishers and other commercial entities in educational seminars. The input of all of our members and committees on the issues raised by the Committee's report will be vital to assist the Council in planning and implementing a program which meets our members' needs and desires.

The 1997 session of the Legislature, thus far, has featured the introduction of a great deal of legislation of concern to real estate lawyers. Our legislative consultant, Karoub & Associates, advises us that we can anticipate an active and eventful legislative session continuing for the next year.

During the past year, the Section has been invited by the Michigan Supreme Court to file amicus curiae briefs in three separate cases. We appreciate the confidence and the respect for the Section as a source of advice for the court and we trust that we shall have the opportunity to continue to be of service in this way. In responding to these invitations from the court, the Section, of course, must rely upon its committee(s) concerned with the issues raised in a given case, so we anticipate that the court's requests in the year ahead may generate some additional demands upon some of our committees.

The Section's pro bono program has become an outstanding success; indeed, the State Bar's Pro Bono Coordinator has singled out the Section's program as a model.

Originated only a few years ago under the leadership of former Chairperson Alan Schwartz and Carol Ann Martinelli, and carried forward by the Pro Bono Committee under the leadership of Ms. Martinelli, the program has produced many significant achievements: recruitment of attorneys to provide real estate services on a pro bono basis to local legal services organizations; writing and publication of public information brochures on tenant-landlord matters and land contract information; establishing a real estate mentoring program for pro bono lawyers; and recruiting attorneys to provide service to Habitat for Humanity organizations throughout the State. Much remains to be done, however. One of the important goals of the Section for the next year will be the continued expansion of the pro bono program. I look forward to assisting the Pro Bono Committee in any way that I can in its efforts.

As you can see, we will be dealing with a full plate in the next year. The demands may be great at times, but dealing with the challenges will be an interesting and exciting process. As always, the strength and success of the Section depends upon the strength and activity of its committees. I urge all of our members who are not presently active in a Section committee to consider joining a committee and becoming actively involved in the work. You need only contact the chairperson of the committee in which you are interested or Chairperson-Elect Jim Candler to make your interest known.

ESTATE PLANNING FOR OWNERS OF REAL ESTATE: PART II

by *William B. Acker**

Selected topics important in estate and financial planning for owners of real estate are explored in this article. Readers should refer to Part I, Estate Planning For Owners of Real Estate, 23 Michigan Real Property Review 137 (Fall 1996), for a fundamental discussion of federal transfer taxes and other foundational topics. Several of the subjects considered in this article can become very complex (e.g., family entities); therefore, the discussion focuses on an overview, designed to provide the real property practitioner with an understanding of the utility of planning techniques available.[1]

TRANSFERS OF UNDIVIDED JOINT INTERESTS IN REAL PROPERTY

Valuation for federal, estate and gift tax purposes of a transferred undivided joint interest in real property remains subject to controversy. The IRS has taken the position that valuation discounts are limited to the cost of partitioning the property.[2] Judicial authority exists for a more substantial discount, based on the effect the cost and delay of a partition proceeding would have on value.[3]

TRANSFERS OF SPLIT INTERESTS IN REAL ESTATE, PARTNERSHIPS, ETC.

Gifts of Split Interests in Real Property. Transfer of an interest in real property to a trust for benefit of one or more persons may be a gift. The value of the interest(s) transferred depends on the nature of the trust interest received by the donee.

Types of Split Interests. Transfer to a trust of an income interest will constitute a gift of a present interest eligible for the $10,000 annual exclusion from taxable gifts when made, if the income beneficiary of the trust is entitled to currently receive all of the gifted income

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and its payment is not subject to the discretion of the trustee or any other person.[4] In contrast, if the donee receives solely the right to the property in trust after death of another, or after a term of years, the value of this "remainder interest" would be determined by IRS valuation tables,[5] which have the effect of valuing and subtracting the income interest from the fair market value of the property. As a gift of a future interest, a remainder interest gift is not eligible for the $10,000 annual exclusion.[6]

Grantor Retained Interest. In a case where the grantor retains an interest, such as the income for a term of years or life, the full value of the property may be included in the donor's taxable estate for estate tax purposes, if the grantor died during the term or if at death the grantor retained an income interest for life.[7]

If, however, the donor retained a term for years and survived the term, the gift would then be complete. The value of the property would not be included in the grantor's estate.

Transfers of Interest in Partnerships, Trusts and Corporations. Specialized valuation requirements were enacted to prevent perceived abuses of the gift tax in the case of retained interest transfers of interests in partnerships and trusts to family members.[8] Rather than allowing the donor to benefit from a favorable gift tax cost, the specialized valuation requirements value the retained interest at zero, increasing the gift tax on a split interest transfer.[9]

Special Exceptions to Specialized Valuation Requirements. Exceptions to the specialized valuation requirements are provided for two important types of irrevocable trusts: (i) a Grantor Retained Annuity Trust ("GRAT"), and (ii) a Grantor Retained Unitrust ("GRUT").[10] They both must have retained income interests that have precisely defined payouts, although they differ in structure. The income interests are valued and subtracted from the total fair market value of the property transferred to the trust. Thus, the gift tax payable (and/or use of the unified credit required) is based solely on the resulting value of the remainder interest.[11]

Real Property GRATs and GRUTs. GRATs and GRUTs offer substantial advantages to owners of income producing real estate where the income stream is reasonably certain to continue over the trust term. A powerful reduction in transfer tax is possible with a GRAT or a GRUT because if the grantor survives the term, the only transfer tax cost of the gift of the entire value of the property is the gift tax on the value of the remainder interest. If the grantor does not survive, the advantage will not be obtained. However, the resulting detriment is generally limited to transaction costs. If the income will likely exceed the returns assumed in the applicable actuarial tables, an additional benefit will be realized because the excess income will accumulate, hopefully for the remaindermen, without further gift tax cost.

Non-income producing real estate, or real estate with substantially variable income, would not be suitable for a GRAT or GRUT because insufficient income would force the trustee to utilize principal to satisfy the irrevocable income payout requirements. This may result in a return of the property to the grantor to meet the payout obligation, with the failed arrangement having exacted a gift tax cost or reduction in unified credit.

Sales of Split Interests in Real Property. Theoretically, a bona fide arm's length sale of a remainder interest would be for adequate and full consideration, presumably equal to the actuarial present value of the right to receive the subject property when the seller dies or at the expiration of a term of years. This transaction could arguably result in the exclusion of the transferred property from the seller's estate, at least if the seller retained an interest for a term of years and survived the term.[12]

Lack of clarity in pertinent case law, particularly concerning the adequacy of consideration and nature of remainder interests involved, appears to make a split interest sale uncertain to exclude the property for estate tax purposes.[13] In any case, for transfers treated as made in trust, specialized valuation requirements may make the gift tax cost of transfers of split interests between family members disadvantageous.[14]

FAMILY PASS THROUGH ENTITIES: FAMILY PARTNERSHIPS AND FAMILY LLCS

Introduction. The traditional family pass through entity, a family limited partnership ("FLP") has evolved from its original role as an income tax planning device. It has perhaps historically most often been used to own real property, and to a lesser extent as an operating vehicle for family businesses, including those owning substantial real property and/or securities.

In recent years, taxpayer friendly valuation cases and favorable IRS rulings have created an incentive for the use of FLPs as powerful estate planning tools. At the same time, limited liability company ("LLC") statutes have proliferated, offering LLCs as candidate family pass through entities. Both FLPs and family LLCs ("FLLC") have emerged in the forefront of sophisticated estate planning. FLPs, and to an increasing extent FLLCs, may offer viable estate planning valuation advantages, permitting the real property owner ("RPO") to remove value which would otherwise be potentially taxable in his or her estate, by a lifetime gift with favorable gift tax consequences.[15]

Why Family Pass Through Entities? Prominent reasons for using FLPs and/or FLLCs include transfer tax and other advantages.

Transfer Tax Savings. (i) The value of the property transferred to the partnership will be excluded from the transferors' taxable estates, with only the date of death values of retained partnership interests included; (ii) post transfer appreciation of the property transferred will generally be excluded from the transferors' taxable estates;[16] (iii) partnership interests may be gifted in any fractional share and may qualify for the annual gift tax exclusion,[17] and (iv) transfer tax values of partnership interests (both gifted and retained) may be less than the applicable proportionate share of the value of the partnership's property, i.e., valuation "discounts" apply in relation to the value of the partnership's property because ownership has been fractionalized and partnership interests are less marketable than the unified ownership interest in the partnership's property.[18]

Recent attention to FLPs and FLLCs has often focused on valuation "discounts" (see (iv) above). However, in many situations the primary advantage of any lifetime gift of appreciating property will be the exclusion from the donor's estate of post-transfer appreciation [see (ii) above,] because this may be the most economically powerful advantage.

Non-Transfer Tax Advantages: (i) Facilitation of management; (ii) participation of younger generation family members in management (and the education of the younger generation); (iii) providing for successor management; (iv) preserving assets (and the retention of assets in the control of family members); and (v) preserving control of assets owned by the FLP or FLLC, albeit subject to fiduciary duties owed by the senior generation to other partners, are among the non-tax advantages which may be afforded by a family entity.

Valuation Advantages of Family Pass Through Entities. FLPs and FLLCs[19] are funded with assets, for example, interests in real property owned by a taxpayer and spouse, in exchange for all ownership interests in the entity. Considering a FLP, for example, taxpayer ("T") and spouse ("S") would receive all of the general partnership interests and all of the limited partnership interests.[20] T and S now own separate and distinct forms of property interests, which in a variety of ways are inherently different from the ownership of the underlying real property. Assume that T and S were formerly the sole owners of a fee interest in real property. They have exchanged their interest in a relatively marketable asset for: (i) general partnership interests with the right to control management and distributions, subject to fiduciary standards, and (ii) limited partnership interests with severely restricted rights to management control over operations or over disposition of a marketable interest in the entity's property, no unilateral power to receive cash or other value back, and no control over the timing of the payment of distributions.

Partnership interest valuation substantially depends on these and other state law partnership attributes, in part established in the partnership agreement. These attributes substantively impact the value of partnership interests and are analyzed utilizing principles which have generally been developed by federal regulation and case law involving partnership interests, as well as interests in other entities including, without limitation, closely held corporation stock,[21] subject to special federal estate and gift tax law principles and limitations.

One powerful advantage in creating limited partnership interests in FLPs is that for gift tax purposes their value may be discounted. Typically, a lack of marketability discount and minority interest discount may be available.[22] In many cases, conservative valuations supported by competent appraisals may support an aggregation of these two discounts in the range of 30-35% or more. Also, in many FLPs ownership interests in the entity should be valued at "going concern value," which may be lower than the liquidation value of the assets if the restriction on an owner to prevent withdrawal is not an "applicable restriction" under Code Section 2704(b).[23] Substantial transfer tax savings may be achieved by gifting fractional limited partnership interests to members of T's and S's family, e.g., their children, whether such gifts are protected from transfer tax by the unified credit or they are subjected to gift tax (to the extent not protected by the $10,000 annual exclusion). This technique is favorable because the value of the partnership assets protected by the gift tax exclusion, by the unified credit or that is subject to tax is, in effect, "leveraged" by the substantial discounts.[24]

in some respect require placing the interests of younger generation partners on an equal plane with those of the transferor. (v) Funding the FLP or FLLC must be carefully planned. Although contributions of appreciated property to an entity taxed as a partnership are generally non-taxable transactions,[34] several pitfalls requiring recognition of gain must be avoided, including: disguised sale rules;[35] post contribution sales by the partnership or transfers to another partner within five years of the date of contribution;[36] distributions of property other than cash within five years of contribution;[37] and contribution of appreciated property subject to debt in excess of basis.[38]

Structural Concerns. Partnership qualification issues are critical because the entity must be taxed as a partnership to obtain pass through income tax treatment and a variety of other income tax advantages. Partnership qualification had become increasingly complex in the last ten years or so, but appears to have been simplified in 1997. The older partnership classification rules have been extensively discussed elsewhere. They may have been obviated by new IRS regulations permitting owners of a domestic non-publicly traded unincorporated entity to "check the box" to elect pass through partnership tax treatment.[39] Presumably, this is allowed despite the fact that the entity would be structured in a way which under the former classification rules might deny or jeopardize its partnership tax status. Thus, although not necessarily preferable for non-tax reasons, a family entity may be structured under the check the box rules to be taxed as a partnership and yet have continuity of life (e.g., no dissolution on the occurrences of dissociation events such as death, withdrawal, bankruptcy, etc.), free transferability of owner interests (e.g., without consent of members) and centralization of management. All of these features could not be chosen under prior federal income tax partnership classification rules. Thus, the owners may be able to elect partnership tax treatment and retain control over a variety of entity attributes which could customize their control and enhance available discounts.

VALUATION ADVANTAGE FOR CERTAIN REAL ESTATE: SPECIAL USE VALUATION

General Rule. Real property used in a closely held business or in farming may be eligible for special valuation by election of one of certain specified alternate valuation methods not requiring the "highest and best use" method for valuation.[40] The maximum amount that an estate can be reduced by electing special use valuation is $750,000 less than the fair market value of the property.

Stated Congressional Purpose. Congress intended to benefit targeted family owned businesses and farms to encourage continued use of the property by reducing the federal estate tax.[41]

Scope. Special use valuation does not limit gift tax and is of limited application to the generation skipping tax.[42]

Threshold Tests. The closely held business or farm must be a substantial part of gross estate. Two threshold qualifying tests apply: Real estate and personal property used in the business must be valued (as adjusted) at 50% or more of the adjusted value of the decedent's gross estate, and 25% or more of the adjusted value of the decedent's gross estate must consist of the adjusted value of the real property used in the business.[43]

Fifty Percent Threshold Test: Fifty percent or more of the "adjusted value" (at its highest and best use) of the gross estate must consist of real or personal property (valued at its highest and best use): (i) used for a "qualified use" by decedent or a member of decedent's family on the date of death, and (ii) "acquired from or passed from" the decedent to a "qualified heir."[44]

All gifts made within three years of death, even if otherwise not included in the gross estate, except annual exclusion gifts, are brought back into the gross estate.[45]

"Adjusted value" is the value of the gross estate less allowable deductions, including mortgages on other indebtedness secured by the property.[46] Unsecured indebtedness appears to be not deductible in determining both the "adjusted value of the gross estate" and the adjusted value of the real and personal property.

Cash may be includable as personal property used in a trade or business, essentially treated as part of working capital.

Twenty-Five Percent Test: Twenty five percent or more of the "adjusted value" of the gross estate must consist of real property: (i) "acquired from or passed from the decedent to a qualified heir" and (ii) during five or more years of the eight year period prior to retirement, disability or death, the decedent, or member of the decedent's family, engaged in "material participation," and for five or more years of the eight

Retirees who Resume Work. Resumption of work by a retiree will cause the pre-death material participation test (five or more of last eight years before death) to apply. Thus, a failure to meet the material participation test during retirement could prevent the estate from qualifying for special use valuation.[65]

Material Participation of Surviving Spouse. A surviving spouse who acquires "qualified real property" from a spouse who died after 1976, and who dies after 1981, may meet a modified test to qualify the surviving spouse's estate for special use valuation.[66]

Modified test: "Active Management Test." This is defined as making management decisions in a business, other than daily operation decisions,[67] for example, approving expenditures for other than nominal operating expenses in advance of the time amounts are expended. Management decisions include how to finance business operations and what capital expenditures the trade or business shall make.[68]

The surviving spouse can tack a period of active management to a deceased spouse's material participation to satisfy the five of eight year pre-death material participation requirement.

"Material Participation". Full time direct involvement in business management for thirty five hours or more per week, or lesser extent necessary to personally fully manage the business in which the real estate is used, constitutes "material participation."[69] Some of the factors indicating "material participation": (i) physical work; (ii) participation in management; (iii) regular advice and consultation in the operation of the business; (iv) participation in a substantial number of management decisions; and (v) providing funds, paying operating expenses, or advancing finances.[70] Brief periods of no material participation (e.g., 30 days or less) may be disregarded if both preceded and followed by substantial periods, e.g., more than 120 days, of material participation. "Material participation" must be achieved by personal involvement if certain arrangements are in place with managers or agents and tenants under leases.

Exchanges or Involuntary Conversions. "Material participation" and "qualified use" with respect to replacement property acquired in a qualified like-kind exchange or as part of a non-recognition acquisition under the involuntary conversion rules may be tacked to the same for the relinquished property, qualifying the replacement property for special use valuation to the extent of the fair market value of the relinquished property.[71]

Real Property Owned by Entity. Material participation for real property owned by a corporation, partnership, trust, or estate requires an "arrangement" calling for material participation by decedent or members of the decedent's family, and that the decedent's interest must be an interest in a "closely held business."[72]

Arrangement. Serving as an officer, director, employee or presumably as a partner, even if a general partner, may not be a sufficient arrangement unless the duties of the position as established were sufficient to constitute material participation.[73]

Trust/Estate. An arrangement requires that the participant is: (i) appointed as trustee, or personal representative, as the case may be; or (ii) an employee of a qualified closely held business owned by the trust or estate with a position or responsibilities requiring material participation; or (iii) bound by contract with the trustee (personal representative to manage, or take part in managing the property); or (iv) granted management rights as beneficial owner (e.g., in the trust agreement).[74]

"Qualified Use." The real property must be used by the decedent or a "member of decedent's family" in a non-farming business, or a farm for a farm purpose, on the date of death and for five of eight years prior to death. After death, a two year grace period is available during which the "qualified use" test need not be met, although if the grace period is used, the recapture period is extended for a like period.[75] Otherwise, during the post death period, there must be a continuous qualified use by a "qualified beneficiary" or "qualified heir," not by a member of the qualified heir's family.[76] If devoted to the closely held business's qualified use, a residence on the qualified real property occupied regularly for the purpose of operating the business, roads, buildings and other improvements may be included.[77]

"Acquired From or Passed From Decedent to Qualified Heir/Members of Decedent's Family." This test is important for real property to be "qualified real property," and to satisfy both the 50% and 25% tests.[78] "Qualified heir" and "members of family" are precisely defined. For the pre-death period, individuals satisfying the test are decedents or members of decedent's family. For the after death period, individuals included are qualified heirs, and in some cases members of date selected by the executor, but not more than five years after the normal due date. Each succeeding installment must be paid on or before the next anniversary date.

Election. Made on a timely filed estate tax return, the election requires approval by the IRS District Director, subject to final review by the "Appeals Division."[85]

Election of the maximum benefit available would be in 10 equal installments commencing on the fifth anniversary of the due date for the federal estate tax return.

Interest in Closely Held Business. Interest in *the following qualify as interest in a "closely held* business": (i) A trade or business proprietorship; (ii) a partnership engaged in a trade or business, if 20% or more of the total capital interest is included in the decedents' gross estate, or it has fifteen or fewer partners; or (iii) a corporation engaged in a trade or business, if 20% or more of the voting stock is included in the decedents' gross estate, or it has fifteen or fewer shareholders.[86]

Assets Used in Business. A sole proprietorship may only count assets actually used in the business. Partnerships and corporations may own other assets not used in the trade or business which are not excluded.

Passive Investments. A "trade or business" excludes passive investments. Whether real estate constitutes a trade or business is unsettled under the estate tax deferred rules, and in other areas of the law. Real estate owners have experienced mixed results in seeking deferral of estate tax. Generally, the question may be whether the real property owner is in the business of selling real estate, or whether he or she holds real property for investment. The IRS has ruled that the operation of an office building was a business, but later ruled that management of rental real estate is not a business.[87] The IRS has also ruled that house construction and real estate development and sales were businesses, but that a rental operation connected with the business was not itself a business.[88]

Testing for "trade or business" is made immediately before death, subject to attribution of ownership. For the fifteen or fewer partners' or shareholders' test, ownership is attributed from spouses, lineal descendants, ancestors, siblings, and proportionately from corporations, partnerships, estates or trusts in which decedent owned an interest. However, attribution does not apply for the 35% of adjusted gross estate test, the 20% interest test, and the formula to determine the maximum amount that may be deferred in installments.

Adjustments to "Gross Estate." Certain estate tax deductions from the gross estate (of items also allowable as deductions for income tax purposes)[89] are deducted for purposes of the 35% test.

Less Favorable Deferral. Businesses not *qualifying for full deferred benefits may elect limited* deferral benefits. Estates owning capital interests in a partnership, in non-readily tradable stock or in a holding company may qualify. The five year no payment option and favorable 4% interest rate do not apply.

Passive Assets. Determination of whether an estate qualifies for deferral, and of the portion of estate tax deferred, excludes the portion of an interest in a closely held business attributable to "passive assets."[90] Passive assets are those not used in carrying on an active trade or business, and include certain corporate stock. However, "boot" received in a like-kind exchange may not be necessarily treated as a passive asset.

Loss of Right to Deferral. The deferral is lost if any of the four following events occur: (i) disposition of the business interest, or distributions or withdrawals from business (excluding distribution to a beneficiary, trustee or heir; certain tax free reorganizations; and other distributions); (ii) distributions of insufficient income by the estate; (iii) default in payment of installment amounts or interest; and/or (iv) violation of lien conditions (imposed by IRS).

* * * *

This article does not address in full detail Michigan's July 1997 LLC Act amendments, and certain IRS rulings dated in June of 1997 or thereafter. However, see footnotes 15, 17, 19, 27 and 31 and accompanying text and the article by C. Leslie Banas in this issue discussing the 1997 amendments to the LLC Act which are of particular interest to those contemplating or maintaining real estate LLCs.

ENDNOTES

1. Comprehensive consideration of details, such as endnotes, partnership tax and transfer tax issues would require an extensive discussion, far beyond the scope of this article.
2. TAM 9336002.
3. **LeFrak v Commissioner**, TCM 1993-526 (1993).

Other Advantages of Family Pass Through Entities.

Retention of Control. In a FLP or FLLC, the partnership or operating agreement can be structured to retain for T, or T and S, control over the assets of the entity and over the economic attributes of ownership of an interest, such as distributions. The IRS has tempered concerns under estate tax law that retention of this control would cause inclusion of the full value of the entity in the taxable estate of the party possessed with this control. The IRS stated that such control will not do so because the control is exercised in a fiduciary capacity.[25] Added control by using entity agreement buy/sell provisions, and by interposing trusts for minors, spouses or others may be useful.[26]

Asset Protection. Creditors of an owner would not have direct recourse to real property owned by a FLP or FLLC but could obtain a "charging order" against a former direct owner's now partnership (or LLC) interest. This would not entitle the creditor to control entity distributions and may arguably subject the creditor to income tax without corresponding cash flow to fund the tax liability. Using a FLP or a FLLC to gain this advantage is delicate under complex creditors' rights laws. The timing of the inception of, and the contribution to, the family pass through entity is critical due to fraudulent conveyance laws and other concerns.[27] Other creditor remedies may be available in some states.[28]

Income Shifting. A conservative approach to structuring a family pass through entity would utilize straight pro rata distributions of income based on the percentage interest in entity capital. This is consistent with the family partnership income tax rules under which the entity must be structured.[29] Although income in the form of reasonable salary or guaranteed payments should be paid to the general partner(s) of a FLP or managing member(s) of a FLLC, an allocation of a disproportionate share of income, or payment of all of the entity's income by any of these methods might expose the recipient to inclusion of the entire value of the interest in his or her estate for federal estate tax purposes.[30]

Other Structural Advantages. A FLLC can offer an opportunity for a child or younger generation member to enjoy the most flexibility in becoming actively involved under the tutelage of T and S, who control the entity. This involvement may extend to the entity's business, including management of the real estate, without exposure to the liabilities or risks of the entity's operation. Also, use of a FLLC will significantly simplify the structure of a family pass through entity by eliminating the need for a second entity for liability protection, e.g., an entity to hold the general partner's interest in a FLP. However, care in the selection of a FLLC is recommended, if for no other reason than because under Michigan's pre-amendment LLC Act, and certain other states' LLC statutes, transfer tax valuation advantages may be limited.[31] Presumably, Michigan's amended LLC Act will support the full range of transfer tax valuation advantages, although sophistication in design is necessary.

Practical Aspects and Disadvantages of Family Pass Through Entities. Family pass through entities are not inexpensive. The valuation process begins with a competent valuation of the entity's ownership interest in its assets, including any real property. Valuation of entity interests to be gifted should also be made, taking into account complex legal and other valuation principles. These valuations may require updates if gifts are to be made over time. Local transfer taxes, recordation taxes, and the possible applicability of the Michigan real estate transfer tax are cost factors. Also, uncertainty about a variety of valuation and other issues remains a motivation to be conservative.[32]

Significant considerations (and possible disadvantages) require careful planning when utilizing FLPs and FLLCs. Highlights of such issues include the following: (i) An income tax tradeoff for transfer tax savings may result, as in any gifting plan, because lifetime transfers of assets which result in exclusion of all or any portion of the value of an asset from the estate of the transferor sacrifice a step up in income tax basis on the interest excluded. The donee takes the donor's lifetime basis on the gifted portion. If the donee sells the gifted interest, income taxes may be recognized on any appreciation in excess of the donor's basis. Had the property remained in the donor's estate, subject to transfer tax, pre-death appreciation would be eliminated by a step up in income tax basis and no income tax would be payable on the pre-death gain. (ii) The value of an owner's estate will be reduced as in any gifting plan. (iii) Care must be taken with an FLP or FLLC owning real property that the transfer of the property to the entity does not violate a due on sale clause applying to any debt financed property or that such transfer or any gift of partnership interests does not constitute an act of default under any loan obligations. (iv) The family entity general partner(s) or LLC controlling member(s) (usually the transferor), must have real fiduciary obligations. These are crucial to achieving transfer tax savings.[33] Fiduciary duties may year period preceding death there was a "qualified use" of the real property by decedent or a "member of the decedent's family."[47]

Use/Participation Required. There must be qualified use by decedent or member of family for at least five years of eight years prior to death, and "material participation" by decedent or member of family for five of the eight years before the earlier of retirement, disability or death.[48]

Recapture of Estate Tax. If the "qualified use" ceases in the post death period, a failure to materially participate for a specified period occurs, or a "disposition" of the property within ten years after death; the tax benefits are required to be repaid through an additional estate tax.[49]

Recapture Agreement. Persons with an interest in the "qualified real property" must sign an agreement making those who are "qualified heirs" personally liable for the recapture tax, and others, who are not "qualified heirs," must consent to collection of the recapture tax from the "qualified real property."[50]

Special Lien. A special lien is imposed on any interest in "qualified real property" with respect to which an additional estate tax may be imposed. This lien continues until the liability for the recapture tax has been satisfied, is unenforceable because of lapse of time, or it is established that no further liability may arise.[51]

No Deferral of Recaptured Tax. If the additional estate tax is recaptured, it cannot be deferred.[52]

"Disposition." The recapture tax is not triggered by certain specifically qualified like-kind exchanges, family purchases, certain involuntary conversions, tax free reorganizations, grant of certain easements, and possibly tax free transfers to an entity such as a partnership or a corporation.[53] However, mortgaging the property may or may not trigger "disposition." If the mortgage proceeds are used for purposes other than for the trade or business or farming, the mortgage financing may be a "disposition," triggering recapture. Use of mortgage proceeds to finance improvements to the qualified property should not be a disposition, although this is unclear.[54] If both the relinquished property and the replacement property in a like-kind exchange are "qualified exchange property" that is used for a qualified use, no recapture tax is imposed. The recapture tax liens should be transferred to the replacement property.[55] Contribution to a "closely held business" partnership or corporation is not a disposition if the entity consents to liability for the recapture tax, and the qualified heir continues to maintain an equitable interest in the property.[56]

Election and Consent Agreements. The personal representative must file a notice of the election.[57] Also, real property interest owners must sign a consent agreement agreeing for personal liability for recapture tax.[58]

Valuation. Special use valuation may be accomplished by one of two methods. Business property must be valued using the "five factor method."[59] This allows use of five subjective factors if no comparable sales are available.[60] Case law suggests that a minority ownership discount may be available for special use valuation.[61]

Adjusted Basis. The basis of real property qualifying for special use valuation is the special use value rather than a full step up (or step down) basis using valuation with "highest and best use" principles.[62] This is the primary disadvantage of an otherwise advantageous election. However, any gain on transfer to a qualified heir is limited to the excess of the fair market value over the date of death fair market value.[63]

Alternative Valuation. Both alternative valuation and special use valuation may be available.

"Material Participation Test." The principal threshold test limiting access to the benefits of special use valuation is the "material participation" test, requiring active involvement of decedent, beneficiaries and/or heirs in the trade or business, or farm operation. This distinguishes active owners from passive real estate investors.

Test Periods. Two periods during which a decedent or a "member of decedent's family" must materially participate are required to avoid recapture: Initial Qualifying Period — an aggregate of five of eight years prior to death, disability or retirement; and Post Death Period — an aggregate of three of eight years, during a period ending within ten years after decedent's death.

Retirement. Income from a material participation rental agreement with an unrelated tenant is no longer required to be earned with sufficient participation after retirement to endanger reduction of social security benefits, if more than the social security maximum allowance for earnings is exceeded.[64] A retiree may eliminate the material participation aspects of the rental arrangement because the material participation test is determined as of retirement.

qualified heir's family. Generally included are ancestors, spouses, lineal decedents of parent and spouse and their spouses. Aunts and uncles, cousins and divorced spouses and their family are generally excluded.[79] Care must be taken by the decedent and family members in selecting beneficiaries and devisees. In some cases, a properly executed qualified disclaimer may salvage the special use election.

Estate Planning.

Gifting. Gifts are valued at fair market value and do not qualify for special use valuation. However, gifting of assets other than real property potentially qualifying for special use valuation may be important. Forming a family entity to facilitate a gifting program of the closely held business may be most advantageous if the entity owns assets of the "closely held business" other than "qualified real property" or other assets potentially qualifying for the 50% or 25% test. A separate entity may be used to own these assets. It may or may not be advantageous to gift interest in these assets or in an entity owning them, to enable the estate or trust to meet the 50% or 25% tests, and to enhance the portion of the federal estate tax qualifying for deferral.[80]

Estate Tax Savings. If equal amounts of interests in closely held business real property are held by husband and wife, in their sole names (or as trustees of their revocable living trusts), up to approximately $2,700,000 of value in assets may be passed free of federal estate tax to their beneficiaries, relying on the full $750,000 special use valuation and unified credit in each estate.

Title to Special Use Property. If instead of titling special use valuation property as described above, it is owned by husband and wife as tenants by the entireties, it will pass to the survivor. If its fair market value on death of the survivor would exceed the special use value by more than the limitation, a portion of the property would be taxed at its fair market value. Dividing the property into separate interests would maximize available limitations.

Funding the Marital Sub-Trust. Using special use valuation in property to fund the marital bequest may waste the advantages of the election, unless, in the unusual case, real property is anticipated to sufficiently appreciate beyond the fair market value included in the survivor's estate.

Estate Tax Deferral. Special use valuation may diminish the estate's ability to qualify for estate tax deferral, which requires that the property's value be more than 35% of the decedent's gross estate. An election with respect to part of qualifying special use property may be useful to maximize the deferral benefit.

Transfers Within Three Years of Death. Although transfers made by the decedent are generally no longer brought back into the gross estate for estate tax calculation, they are added back to determine qualification for a number of estate tax benefits, including without limitation, special use valuation.[81]

DEFERRAL OF ESTATE TAX ON BUSINESS ASSETS INCLUDING REAL ESTATE

Advantage of Deferral. Substantial savings in federal estate tax may be achieved if payment may be deferred, and if the interest rate charged is less than the return the estate, beneficiaries or heirs have an opportunity to earn from the assets retained during the period of deferral. For a trust or estate primarily comprised of a business owning real property, the deferral advantage may also enable the trustee or personal representative to avoid having to sell the business or real property to fund the federal estate tax. Rather, the deferral may enable the trustee or personal representative, and/or the beneficiaries, devisees or heirs to continue to run the business, to continue to own the real property and to earn sufficient funds from operations or obtain funding from other sources to pay the federal estate tax without disrupting the business.

Deferral. If the business is closely held and constitutes more than 35% of the value of the adjusted gross estate, the estate may defer that part of the estate tax not payable, or reduced by credits, in the proportion which the value of the closely held business bears to the adjusted gross estate.[82]

Interest Rate. Also, a special 4% interest rate may apply for estate tax paid in installments up to $345,800 (the estate tax on the first $1,000,000 in value of the closely held business) reduced by the unified credit. This makes the maximum value of an interest in a closely held business qualifying for the 4% interest rate equal to $400,000.[83] The "regular" interest rate (quarterly adjusted rate based on applicable federal short term rate) applies to all deferred payments to which the 4% rate does not.[84]

Installments. The personal representative may elect to pay part or all of the estate tax to the extent qualifying in two or more installments, but not exceeding 10 installments, over as much as fourteen years. The first installment may be paid on or before a

4. Reg. Sec. 25.2503-3(b).
5. Reg. Sec. 20.2031-7(d)(2).
6. Reg. Sec. 25.2503-3(a).
7. Code Section 2036(a).
8. Code Sections 2701 and 2702.
9. Code Section 2702(a)(2)(a). Transfer tax reduction may result if the specialized valuation rules do not apply. The actuarial tables used to value the retained income interest might result in a favorable gift value due to the assumption upon which such tables are based. Also, considering a retained interest limited to a term, the transfer would only result in a gift of the remainder interest, although at the end of the term the entire value of the property would be removed from the grantor's estate. Thus, the overall transfer tax cost of the gift would be imposed on a fraction of the fair market value of the property, and the entire fair market value of the property would be removed from exposure to transfer taxation to the grantor.
10. Code Section 2702(a)(1)-(3), 2202(b)(1)-(3).
11. Only a stated amount of income is paid to the donee during the trust term. On termination of the trust, the trust fund, which may include any income earned over the trust term in excess of the stated amount payable to the grantor, is payable to the remaindermen. The difference between a GRAT and a GRUT is how the income interest is structured. The GRAT income interest is a fixed sum payable annually, determined at the inception of the trust. The GRUT income interest is an amount equal to a fixed percentage of the fair market value of the trust. The fixed percentage is established at inception. The fair market value is determined each year. The cost of maintaining a GRUT is higher due to the annual appraisal requirement.
12. Code Section 2036(a).
13. See **Gradow**, 897 F.2d 546 (CA Fed. Cir. 1990) affg, 11 Cl. Ct. 808 (1987) (full value must be paid for the entire property and not merely the remainder interest), and **Estate of McLendon v Comm'r**, 96-1 USTC Para. 60,220 (5th Cir. 1995) (unpublished), reversing **Estate of McLendon**, 66 TCM 946 (1993). See also **D'Ambrosio v Comm'r**, 101 F.3d 309 (CA 3 1996) (cert. den.) and **Wheeler v U.S.**, ___ F.3d ___ (CA5 6/19/97), (holding that fair and adequate consideration for only the remainder interest need be paid to achieve exclusion of the property from the estate of the seller).
14. Code Section 2702.
15. Recent IRS private letter rulings have raised some questions concerning the IRS's view of certain valuation advantages of family entities, at least in certain fact situations but these rulings are not authoritative and may be distinguishable on their facts, or simply erroneous. See PLR 97 19006 and PLR 97 23009. These rulings appear to suggest that the IRS will apply Code Section 2703 valuation restrictions; however, the IRS rationale seems to be faulty. The IRS' contention in PLR 9723009 that a business purpose, or a family business, is required also seem questionable.
16. Obviously, post transfer appreciation of the family entity's real property, for example, will enhance the value of both transferred interests (and to that extent be excluded from the transferor's estate), and of retained interests (and to that extent remain in the subject estate).
17. Notwithstanding the general partners' powers to control distributions, the general partners' fiduciary duty (to not exercise power to promote general partner's personal interests at expense of minority owners) makes such power less than discretionary authority. As a result, limited partnership interests may qualify for the present interest gift tax exclusion. PLR 9415007, TAM 9131806.
18. Of course, general valuation rules apply to the first tier valuation of the partnership's property. For example, development real estate may be subject to high levels of risk which may serve to suppress value; and commercially reasonable restrictions imposed by a third party lender, or restrictions imposed by state law may be taken into account. Code Section 2704(b)(3)(A), and 2704(b)(3)(B). See also Endnote 19 for discussion of discounts and Code Section 2704.
19. Generally, both FLPs and FLLCs would be structured to be taxed as partnerships for federal income tax purposes and are assumed to be so structured for this discussion. See text: Family Pass Through Entities, Structural Concerns, and accompanying footnotes. The use of LLCs (formed under the laws of certain states) as family entities may be arguably less favorable than a term of years limited partnership, if the LLC Act gives all members the right to require liquidation of the member's interest and to receive fair value. Michigan's LLC statute, before amendment in July of 1997, granted members such rights. MCL Sections 450.4509 and 450.305. Although the right to a "fair value" distribution may be changed by a provision in the LLC's operating agreement, this would arguably constitute an "applicable restriction" under Code Section 2704(b) and not be taken into account when valuing the member's ownership interest for transfer tax purposes. Some have contended that state partnership law provisions requiring formation of a limited partnership for a term of years qualifies the mandatory term and the resultant inability of a partner to withdraw during the term for consideration in transfer tax valuation under Code Section 2704(b). The argument is that the term restriction on withdrawal or liquidation, although elected by the taxpayer forming the partnership, is imposed under state law and this is not an "applicable restriction" under Code Section 2704(b). The valuation effect would be to permit limited partners'

interests to be valued at less than liquidation value. Michigan's Limited Partnership statute does not require a definite term, thus possibly not providing an escape from Code Section 2704(b)'s valuation disadvantage. Moreover, Michigan's Act governing limited partnerships allows a modified withdrawal right which may effect valuation. Further controversy may be stimulated by a reported informal view of the IRS that Code Section 2704(b)'s valuation restriction does apply to a fixed term limited partnership. If the IRS takes such a position, only state law required restrictions not involving a selection by partners would apply. For a Michigan LLC under the statute prior to its July, 1997 amendments, "fair value" would be a floor for valuation of a member's interest. Partnerships or LLCs formed under the laws of other states may be better suited to avoid the Code Section 2704(b) trap. See VA Code Ann Section 13.1-1032; see also Colorado, Delaware and Georgia LLC statutes. Michigan's amended LLC Act denies members the right to withdraw and receive "fair value" for their interest, unless provided otherwise in an operating agreement, presumably to bolster an argument that Code Section 2704(b) does not apply.

20. Generally, contributing solely real property to an entity taxed as a partnership will be tax free (see text accompanying Endnotes 34-38, infra), provided that no net relief of liability occurs (and certain other exceptions). This is generally true if liabilities encumbering the property are allocated in the same proportion to the partners as those partners shared them prior to contribution, and the contribution is not tied to partnership distributions or treated as tied to partnership distributions by a variety of tax law provisions. Other exceptions apply. See Part 1, 23 **Michigan Real Property Review** 137, Endnotes 30-34 and accompanying text. In the case of more complex partnership ownership contribution transactions and structures, traditional family partnership rules may require gifts of capital which may be taxable. If there are other partners in the FLP who do not contribute a proportionate interest in the encumbered property, gain may be recognized by a contributor of encumbered property because the contributing partner will be deemed to have constructively received a cash distribution to the extent of liabilities treated as relieved by allocation to the other parties. Planning may alleviate or avoid this gain recognition.

21. Regulation Sections 20.2031-(b), 20.2031-3, 25.2512-3, Rev. Rul. 59-60, Code Sections 2703, 2704 and regulations thereunder. Note that the impact of certain restrictions established and the partnership agreement, to the extent they are more restrictive than those established under state law, may be disregarded for valuation purposes. Code Section 2704(b). See Endnote 19.

22. Discussion of these discounts is complex and beyond the scope of this outline. A minority discount is recognized in the family setting based on Rev. Rule. 93-12, where the IRS confirmed that minority interest held by family members would not be aggregated to prevent application of a minority discount to individual interests. The Service has somewhat backtracked on Rev. Rule. 93-12 by holding in TAM 9436005 that a modified control premium could be applied, a so-called swing vote premium, to situations where transfers of minority interests are simultaneous or sequential. The substantial debate caused by this technical advice memorandum makes it clear that valuation of interest of an entity may be subject to controversy and that complex analysis of specific facts will be included in each particular case. The lack of marketability discount is premised on the inability of limited partner to convert the limited partnership interest into cash. These two discounts may be supported by empirical studies and a variety of cases. For example, see **Moore v Comm'r**, 62 TCM 1128 (1991), **Estate of Andrews v Comm'r**, 79 TCM 938 (1982).

23. See Endnote 19, **infra**.

24. The use of terms "discounts" and "leverage" are not meant to suggest that valuations of partnership interest in FLPs or FLLCs subject to transfer tax are not accurate if less than the applicable proportionate share of the value of the partnership's property. It is the differences between outright ownership of an undivided and unrestricted interest in real property and ownership of the entity interest that may justify lesser transfer tax values for the entity interests.

25. PLR 9131006; PLR 9332006; PLR 9415007. Imposition of fiduciary duties (to not exercise power to promote the general partner's personal interests at the expense of minority owners) presents serious planning considerations for taxpayer(s).

26. Use of trusts for partners who are minors may be required under family partnership income tax rules. Reg Section 1.704-1(e)(2)(viii).

27. Exposure to liability associated with the operation of a FLP or due to the assets themselves may be limited so long as a limited partner does not participate beyond the bounds permitted by state law. A general partner should be insulated by holding his or her interest in a S corporation or an LLC, hopefully exposing only the assets in that entity to the risks of the family entity's operation. Although an LLC may be preferable in some instances, for LLC's subject to Michigan's LLC Act prior to its July 1997 amendments, an S corporation might better help ensure that there would be no termination on the donor's death (since under the LLC Act prior to its July 1997 amendments, an LLC might be dissolved upon a member's death, MCLA Sec. 450.4801 or if there was only one remaining member in the case of a Michigan LLC). Michigan's amended LLC Act does not require that an LLC be dissolved on a member's death

and permits single member LLCs. MCL §§450.102(l); 450.103, 450.202 and 450.501. An S corporation may also be useful so that the donor member could control the distribution of control of the FLP by directing disposition of the S corporation's stock without concern, which would be justified if a LLC interest was used, that management authority could not be given to a substitute member without consent from the remaining members. See pre-July 1997 amendment MCLA Sec. 450.4505(2). Further, if the FLP were operating a trade or business, the "S" corporation could reduce the employment taxes otherwise payable.

28. Some authority exists in certain states that a creditor may foreclose on a debtor partner's partnership interest. **Centurion Corp. v Crocker National Bank**, 208 Cal. App. 3d 1 (Cal 1989); **Beckley v Speaks**, 240 NYS 2d 533 (NY 1963); the charging order remedy provision and the foreclosure remedy may be available to creditors of partners in limited partnerships, **Madison Hills Ltd. Partnership II v Madison Hills, Inc.**, 35 Conn. App. 81, 644 A.2d 363 (1994), although this is not free from doubt.

29. Code Section 704(e). Reg. Section 1.704(e)(1)(ii).

30. PLR 7824005. However, the tax court has disagreed. See **Boykin v Comm'r**, TCM Memo 1987-134 (1981).

31. See Endnote 19, **supra**.

32. Code Section 2704(b). A variety of issues remain problematic. This section disregards for valuation purposes "applicable restrictions," that is, restrictions in the entity's governing agreements and documents which are more restrictive than those contained in state law. This has generated much controversy as to the viability of certain entity structuring techniques designed to enhance valuation advantages. To some extent, avoidance of such issues may be facilitated by adapting a more conservative valuation position. Notwithstanding these concerns, justifiable discounts should remain available. Also, despite the fact that the IRS has withdrawn its 1994 proposed anti-abuse regulations, Ann. 95-8, and that they have been roundly criticized, concerns expressed in these regulations regarding gifts of partnership interests immediately after the formation of the partnership, or creation of a partnership without a substantial business purpose remain. See TAM 9723009 (raising issues under Code §2703), and **Estate of Murphy v Comm'r**, 60 TCM No. 472. Important issues include whether investing in non-actively managed or non-income producing real estate would provide a business purpose. Provisions in organization documents for broad business objectives and a broad scope of business activities appear to be important. **Sears v Hassett**, 111 F.2d 92-64 (1st Cir. 1940); **Sears v Hassett**, 45 F. Supp. 772, 772-73 (D. Mass. 1942); **Morrissey v Commissioner**, 296 U.S. 344, 367 (1935).

33. Transfers of limited partnership interests are not subject to the retained right to income rule of Code Section 2036(a)(1), the retained control over enjoyment rule of Code Section 2036(a)(2), the retained right to alter, revoke or amend rule of Code Section 2038 or the timing of income rule, **Lober v U.S.**, 346 U.S. 335 (1953). PLRs 9415007, 9310039, 9131006, 861004. These conclusions hinge on the transfer or general partners' fiduciary duties to the partnership and to other partners. Additionally, arguments may be made to distinguish these sections. See **Estate of Budd v Commissioner**, 49 TC 468, (1968); **Estate of Goodwyn**, 1976 TCM Paragraph 76,238. See also prior Endnote 17.

34. Generally, no gain or loss is recognized when property is contributed to an entity taxed as a partnership. Code Section 721(a), unless the substance of the transaction is a sale or results in the receipt by the contributor of money or other consideration, Regulation Section 1.721-1(a), a contributing partner gives up the right to be paid a part of his or her capital account. Regulation 1.721-1(b), or net liability relief occurs. Code Section 752.

35. Code Section 707(a)(2)(b).

36. Code Section 704(c)(1)(B).

37. Code Section 737.

38. Code Section 731(a)(1).

39. Although "check the box" regulation, Reg. Section 301.7701-3, has become final, T.D. 8697, 12/17/97, and it revokes the older so called "Kintner" partnership classification rules, questions concerning the new regulation's viability have been raised, at least implicitly by the Joint Committee on Taxation. (JCS-1-97, 4/16/97).

40. Code Section 2032A.

41. H.R. Rep. No. 1380, 945h Cong. 2nd Session 21 (8/2/76).

42. Code Section 2674(b).

43. Code Section 2032A(b)(1)(A) and (B).

44. Code Section 2031A(b)(1).

45. Code Section 2035(d)(3).

46. Code Section 2032A(b)(3)(A).

47. Code Section 2032A(b)(1)(B).

48. Code Section 2032A(b)(1)(C) and (A)(i).

49. Code Section 2032A(c).

50. Code Section 2032A(a)(1)(B), 2032 A(d)(2); Reg. Sec. 20.2032A-8(c).

51. Code Section 6324B.

52. Code Section 6166(a)(1).

53. Code Section 1031 and 2032A(i); Rev. Rul. 85-86; 2032A(h); PLR 8724013; TAM 8731001; and PLR 8109073.

54. See rationale of PLR 8157084.

55. Code Section 6324(B). PLR 8207050. The district director has discretion to release the Code Section 6324B lien.

56. PLR 8109073,. H.R. Rep. No. 1330, 94th Cong. 2nd Sess 25_3.

57. Code Section 2032A(a)(1)(B), Reg Sec. 20.2032A-8. The notice is on the Form 706, U.S. Estate Tax Return. A protective election "pending final determination of values" may be made. Reg. Section 20.2032A-8(b). *Once values are "finally determined"* the taxpayer has only sixty days to amend the U.S. Estate Tax return and amend the election. This period begins with the IRS's issuance of a notice of deficiency, not with conclusion of litigation. **Kokernot Estate v Comm'r**, ____ F.3d _____ (CA 5; 5/27/97).

58. Code Section 2032A(d)(2). Reg. Sec. 20.2032A-8(c)(1).

59. Code Section 2032A(e)(8).

60. The five factors are: (i) capitalization of income expected; (ii) capitalization of fair rental value of property; (iii) assessed last value in some states; (iv) comparable sales of other businesses; and (v) any other fair factor. SEV's may be acceptable as written valuation appraisals. TAM 8735001.

61. **Hoover Estate v Comm'r** (CA 10, 11/1/95) where the 10th Circuit reversed the tax court's denial of the minority discount in **Maddox Est. v Comm'r**, 93 TC 258 (1989).

62. Code Section 1014(a)(3).

63. Code Section 1040(a).

64. Code Section 2032A(6)(4) as changed by the 1982 Tax Act ("ERTA").

65. Code Section 2032A(b)(4)(A).

66. Code Section 2032A(b)(5).

67. Code Section 2032A(e)(12).

68. H.R. Rep. No. 201, 97th Cong. 1st Sess. 170-171 (1981). The "active management" can be met even though no self employment tax is payable under Code Section 1401.

69. Reg. Section 20.2032A-3(e)(1). See also Code Section 1402(a)(1) and Section 211 of the Social Security Act.

70. Regs. Section 20.2032A-3(e)(2).

71. Code Section 2032A(e)(14).

72. Code Section 6166(b)(1). For a partnership: (i) 20% or more of total capital interest must be included in the decedent's gross estate, or (ii) the partnership must have fifteen or fewer partners. Code Section 6166(b). For a corporation: (i) 20% or more in value of voting stock must be included in gross estate of decedent, or (ii) the corporation must have fifteen or fewer shareholders. Code Section 6166(b).

73. Reg. Section 20.2032A-3(f)(2).

74. Reg. Section 20.2032A-3(f)(1),(2).

75. Code Section 2032A(b)(2); 2032A(c)(6)(A) and (7).

76. Code Section 2032A(c)(1)(B).

77. Reg. Section 20.2032A(3)(b)(2):

78. Code Section 1014(b).

79. Code Section 2032A(e)(1) and (2).

80. Code Section 6166. The percentage of federal estate tax deferrable pursuant to 6166 is directly proportional to the percentage of the estate consisting of assets used in the trade or business.

81. Also, the add back operates for deferral and installment payment election, Code Section 6166 and Code Section 303(B) stock redemption treatment.

82. Code Section 6166(a)(1) and (2).

83. Code Section 6601(i).

84. Code Section 6621(b).

85. Rev. Proc. 79-55; a protective election may be made. Reg. §20.6166A-1(e)(3). Although not necessarily authoritative, see Footnote 57 regarding a caution concerning another protection election.

86. Code Section 6166(b)(iv).

87. See Rev. Rul. 66-62, Rev. Rul. 75-365 and Rev. Rul. 75-367.

88. Rev. Rul. 75-365, but see TAM 8451014, PLR 8524037 and 9015009, but see PLRs 95170006, 9223028, 8942018, 8829013, and 880429 (active real estate rental businesses).

89. For example, see Code Sections 2053 and 2054.

90. Code Section 6166(b)(9)(A).

PUBLIC ACT 52: A COMPREHENSIVE AMENDMENT OF THE MICHIGAN LIMITED LIABILITY COMPANY ACT

by *C. Leslie Banas**

Public Act 52[1], the recently enacted amendment ("Amendment") to the 1993 Michigan Limited Liability Company Act ("LLC Act")[2], significantly alters the statutory framework upon which a limited liability company ("LLC") is formed and operated under Michigan law. For instance, the Amendment eliminates certain restrictive provisions in the LLC Act no longer required to insure federal income tax treatment of LLCs as partnerships. It authorizes single member LLCs. It expands the ability of LLCs to merge with other entities and provides for the conversion of domestic partnerships into LLCs. These changes make the LLC, already a favored organizational form for real estate ventures, more flexible and easier to utilize. However, the Amendment also materially alters members' rights and powers in certain cases.

This article will highlight those provisions of the Amendment which are most likely to impact the formation and operation of real estate LLCs.

BACKGROUND

The LLC Act was enacted in 1993 as part of a national movement among state legislatures to provide businesses with the benefits of the LLC form. In an LLC, the members, like the shareholders of a corporation, generally do not have personal liability for LLC debts and obligations. Unlike a corporation, though, an LLC is generally treated as a partnership for federal income tax purposes so that its earnings are taxed only at the member (and not at the entity) level. An LLC may also provide greater flexibility than a corporation in structuring distribution and management arrangements.

Several considerations prompted the enactment of, and are reflected in, the Amendment. First, effective January 1, 1997, the Internal Revenue Service's long awaited "check the box" rules became effective. Under the new rules, most newly formed LLCs will be taxed as partnerships for federal income tax purposes.[3] The adoption of these new rules made certain restrictive

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provisions, incorporated into the LLC Act to conform to prior Service rulings, no longer necessary,[4] and the Amendment eliminates those provisions. Second, the Amendment imports concepts from the organizational statutes for domestic corporations and limited partnerships which the Amendment's drafters felt would be beneficial for domestic LLCs. Next, the Amendment clarifies the text of certain LLC Act provisions. Finally, since Michigan practitioners had begun to form LLCs under other state LLC laws, such as Delaware's,[5] because those laws were more flexible than the LLC Act, the Amendment incorporates some of those laws' flexible features, so that practitioners will also view Michigan as a favorable domicile for LLCs.

HIGHLIGHTS OF THE AMENDMENT

SINGLE MEMBER LLCS

The most highly publicized change made by the Amendment is the recognition of single member LLCs. Previously, at least two members were required to form an LLC. Hence, an individual property owner seeking protection from liability and the other benefits of the LLC format was compelled to create another entity (such as a corporation in which he was the sole shareholder) to become the second member of the LLC. The individual thereby incurred the additional expense of forming a second entity, as well as ongoing record keeping and filing obligations. Following the lead of Delaware and other states, the Amendment now permits an LLC to be formed by one person.[6]

Certain provisions in the Amendment acknowledge the unique situation of a single member LLC. For instance, the Amendment recognizes that a sole member LLC will not require an operating agreement.[7] It provides that a sole member's contribution of an obligation to contribute cash or property or to perform services in exchange for a membership interest shall be set forth in a written agreement between the member and the LLC.[8] In addition, it states that the terms under which an assignee of a sole member may become a member of the LLC shall be set forth in an agreement between the sole member and his assignee.[9] Finally, it indicates that distributions to a sole member shall be as determined by the member or authorized by the LLC's managers.[10]

PERSONS ENTITLED TO BECOME MEMBERS

The Amendment expands the list of "persons" who are qualified to become members of an LLC. The LLC Act had indicated that an individual, partnership, LLC, association, governmental entity or other legal entity could be a member of an LLC.[11] The Amendment provides that a "person" may also be a custodian, trust or an estate.[12] Hence, a parent acting as custodian for his children under MUGMA,[13] an inter vivos trust or the estate of a deceased member may (so long as the operating agreement permits it) become a member of an LLC.

TERM OF AN LLC

Due to the LLC Act's silence on the subject, some confusion existed as to whether an LLC could, like a corporation, have a perpetual existence. The Amendment straightforwardly states that the maximum duration of an LLC is perpetual unless otherwise provided in its articles of organization.[14]

DISTRIBUTIONS TO MEMBERS

Where an LLC's operating agreement is silent, the Amendment materially changes the method of allocating distributions of cash and other assets among members. The LLC Act had provided that in the absence of an allocation in the operating agreement, distributions would be allocated among members on the basis of the value (as stated in the LLC's records or determined by any other reasonable method) of the contributions made by the members to the extent they had been received by the LLC and not returned.[15] The Amendment generally provides that where the operating agreement is silent, distributions shall be made in equal shares to all members.[16] The two exceptions to this general rule are for *(i)* distributions made prior to the effective date of the Amendment and *(ii)* distributions after the effective date of the Amendment by an LLC which existed before the effective date of the Amendment and which had previously made allocations in the manner set forth in the LLC Act. In those two cases, the allocation formula generally set forth in the LLC Act will continue to apply.[17]

Members of real estate LLCs often choose to allocate distributions among themselves on the basis of their respective capital contributions, or their respective managerial responsibilities within the LLC, or their respective levels of risk for LLC activities. The Amendment's allocation formula, which does not take any of these items into account, will in those cases not reflect members' expectations or desires. To avoid the application of the Amendment's allocation formula, it is imperative that the operating agreement clearly

RELIEF FROM OPPRESSIVE ACTS

The Amendment gives members the right to obtain relief from certain acts of managers or members who are in control of the LLC. It provides that a member may bring an action in circuit court to establish that the acts of such managers or members are illegal, fraudulent, or willfully unfair and oppressive to the LLC or the members.[27] If the member establishes grounds for relief, the circuit court may issue an order or grant relief as appropriate, including:

(1) dissolution and liquidation of the LLC;

(2) cancellation or alteration of a provision in the articles of organization or operating agreement;

(3) alteration or prohibition of the act of the LLC, its members or managers;

(4) purchase, at fair value, of the member's interest in the LLC by the LLC or the managers or other members responsible for the wrongful acts; or

(5) an award of damages to the member or the LLC.

This provision is similar to a section in the Michigan Business Corporation Act[28] granting comparable rights to a corporation's non-controlling shareholders. Practitioners may initially look to the case law under the Business Corporation Act for assistance in interpreting this provision.

Since this provision does not specify that it may be modified by the operating agreement, it is uncertain whether a provision in the operating agreement which waives this right will be enforceable.

POWERS OF MANAGERS

One method by which management of an LLC is separated from the ownership of the LLC is through the members' designation of managers to govern the LLC's affairs. The members of an LLC may (but are not required to) appoint managers. The Amendment attempts to clarify the extent of the authority of the managers of an LLC.

The LLC Act had provided that an LLC could be managed by or under the authority of one or more managers[29] and that every manager was an agent of the LLC for the purpose of its business.[30] These provisions could have been viewed as authorizing each manager to exercise all management rights with respect to the LLC. The Amendment states that the rights and duties of any manager or group of managers may be restricted or enlarged pursuant to an LLC's articles of organization or operating agreement.[31] Accordingly, the Amendment appears to permit members to reserve to themselves the right to make certain decisions and to give particular managers the exclusive right to manage specific activities (for example, members may authorize a manager who is an experienced real estate operator to manage a real estate project's day to day operations).

The Amendment also attempts to more precisely explain how decisions by managers are to be reached in cases not otherwise covered by statute or the LLC's operating agreement. In those cases, the LLC Act had provided that decisions were to be made by a "majority vote of the managers,"[32] without describing how a majority was to be determined. The Amendment provides that the vote of a majority of all managers is required to decide or resolve any difference in any matter connected with carrying on the business of the LLC that is within the scope of the managers' authority, and that each manager has one vote.[33]

WITHDRAWAL OF MEMBERS

The Amendment limits a member's ability to withdraw from an LLC. Under the LLC Act, a member could withdraw under the terms set forth in the operating agreement or upon giving 90 days written notice to the LLC and the other members.[34] Other than in connection with the merger of the LLC as described below, the Amendment provides that a member may withdraw only as provided in the operating agreement.[35]

DISSOLUTION

Under the Amendment, the withdrawal of a member (due, for instance, to his death) no longer results in the dissolution of the LLC, unless the operating agreement provides for dissolution upon the withdrawal of a member.[36] Previously, in order to conform to the Service's rulings, the LLC Act had provided that an LLC operated by managers would generally be dissolved upon the withdrawal of a member.[37]

A dissolution of a real estate LLC resulting in liquidation of the LLC's property may have adverse consequences to its members if the occurrence is unplanned and market conditions are unfavorable. The Amendment enables members of an LLC to avoid an liability for acts occurring prior to the conversion, it will relieve them from certain liabilities occurring after the conversion. Before converting a partnership into an LLC, however, the partners should be satisfied that the conversion will not have adverse consequences. For example, the "due on sale" provision of the mortgage to which the partnership's real estate is subject should be reviewed to determine whether the conversion could be viewed as a transfer entitling the mortgage holder to accelerate the debt.

CONCLUSION

As indicated above, the Amendment has made significant changes in the manner in which LLCs are formed and operated in Michigan. By familiarizing themselves with the provisions of the Amendment and the LLC Act, real estate practitioners can assist their real estate clients in developing LLC structures which conform to Michigan law and meet their clients' needs and expectations.

ENDNOTES

1. 1997 PA 52 (effective July 1, 1997).
2. MCL 450.4101 et seq.
3. Treas Reg §301.7701-3. provides for default classifications as partnerships for most LLCs organized under the laws of the United States which have at least two members. Corporate classification is an elective category. The default classifications for most single member entities are as sole proprietorships, branches or divisions.
4. Prior to the adoption of the "check the box rules," the Internal Revenue Service had utilized a four factor test to determine whether an entity could be taxed as a partnership. If an entity possessed more than two of four corporate characteristics (i.e., limited liability, centralized management, free transferability and continuity of life) it was deemed to be a corporation rather than a partnership for tax purposes. Certain characteristics which LLCs could possess, such as the ability of a member to assign an interest to an assignee who would be admitted as a member, or automatic continuation of an LLC after the withdrawal of a member, were viewed as constituting corporate characteristics. With the adoption of the box rules, it is no longer necessary to structure LLCs to avoid these corporate characteristics.
5. Del Code Ann tit 6, §18-101 et seq.
6. 1997 PA 52, Section 202(1) states that "*one* or more persons who will be members may form a limited liability company by filing executed articles of organization." (Emphasis supplied.)
7. 1997 PA 52, Section 102(2)(n) defines an operating agreement as "a valid written agreement of the members of a limited liability company having *more than one member* as to the affairs of the limited liability company and the conduct of its business. (Emphasis supplied.)
8. 1997 PA 52, Section 301(2).
9. 1997 PA 52, Section 506(1).
10. 1997 PA 52, Section 304.
11. MCL 450.4102(2)(o).
12. 1997 PA 52, Section 102(2)(o).
13. The Michigan Uniform Gift to Minors Act, MCL 554.451 et seq.
14. 1997 PA 52, Section 202(2).
15. MCL 450.4303.
16. 1997 PA 52, Section 303(1)(b).
17. 1997 PA 52, Section 303(1)(a) and (2).
18. 1997 PA 52, Section 502(3), (4) and (5).
19. MCL 450.4502(2).
20. 1997 PA 52, Section 502(6).
21. 1997 PA 52, Section 502(1).
22. MCL 450.4502(1).
23. 1997 PA 52, Section 502(1) and (2).
24. 1997 PA 52, Section 502(7). Note, however, that with respect to the approval of certain transactions with managers Section 502(7) provides that a vote of a majority of *disinterested* members is required to approve the action.
25. 1997 PA 52, Section 506(1).
26. MCL 450.4506(2).
27. 1997 PA 52, Section 515.
28. MCL 450.1489.
29. MCL 450.4402(1).
30. MCL 450.4406.
31. 1997 PA 52, Section 402(1) states that the delegation of the management of a limited liability company to managers is subject to any provision in the articles of organization or in an operating agreement restricting or enlarging the management rights and duties of any manager or group of managers.
32. MCL 450.4405.
33. 1997 PA 52, Section 405.
34. MCL 450.4509.

35. 1997 PA 52, Section 509(1).
36. PA 52, Section 801.
37. MCL 450.4801.
38. 1997 PA 528 (Effective January 13, 1997).
39. 1997 PA 52, Sections 701 through 706, inclusive.
40. 1997 PA 52, Section 701.
41. 1997 PA 52, Section 705.
42. 1997 PA 52, Section 705a.
43. 1997 PA 52, Section 705a(1)(a).
44. 1997 PA 52, Sections 705(1)(a) and 705a(3)(a).
45. 1997 PA 528, Section 201(13).
46. 1997 PA 52, Section 705a(6).
47. Of course, before embarking on these and similar transactions, clients and their counsel should thoroughly review the other legal, as well as the tax and business, consequences of the merger to the existing entities and their owners.
48. 1997 P.A. No. 52, Section 707.
49. 1997 PA 52, Section 707(2).
50. 1997 PA 52, Section 707(3).
51. 1997 PA 52, Section 707(5).

FITTING THE ROUND PEG INTO THE SQUARE HOLE: CONDOMINIUM ASSESSMENTS IN CHAPTER 13 BANKRUPTCY

by *Steve Sowell**

Condominium liens are neither a mortgage nor an executory contract, although bankruptcy courts have treated them as both.[1] The truth is that condominium liens have the attributes of both, as well as other attributes not easily categorized under the United States Bankruptcy Code ("the Code").[2] For instance, condominium liens can be foreclosed in the same manner as mortgages if not paid.[3] Also, ownership of a condominium imposes on both the condominium association and the co-owner[4] continuing ("executory") obligations regarding maintenance and repair of the unit and the common elements and compliance with the bylaws, rules, and regulations of the project.

Condominiums were not treated at all in the Code until the Bankruptcy Reform Act of 1994,[5] and because this amendment did not address Chapter 13[6] cases, courts, trustees, debtors, and condominium associations continue to struggle with how to treat condominium assessments in the context of a Chapter 13 bankruptcy case. This article presents a paradigm for treatment of condominium assessments in a Chapter 13 case. The appendix to the article is a proposed Proof of Claim on behalf of a condominium association in a Chapter 13 case.[7]

The Nature of a Condominium and its Lien for Assessments

Condominiums are creatures of statute; condominiums did not exist at common law. A parcel of real property is established as a condominium by the recording of a Master Deed.[8] The affairs of the condominium project are usually governed by a nonprofit corporation ("the association") organized for that purpose.[9] Once established, each condominium unit, together with and inseparable from its assigned share of the common elements, is "subject to ownership,

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mortgaging, taxation, possession, sale, and all types of juridical acts, *inter vivos* or *causa mortis*" independent of the other condominium units in the project.[10]

The enabling statute for condominium liens is MCLA §559.208(1); it provides that "sums assessed to a co-owner by the association of co-owners which are unpaid constitute a lien upon the unit or units in the project owned by the co-owner at the time of the assessment." Assessments typically consist of the unit's proportionate share of the monthly operating expenses of the project and additions to the reserves of the association (the "general" assessment), although additional and special[11] assessments for large repairs or additions to the project are not uncommon.[12] The typical assessment is payable on a monthly basis, usually on the first of the month.[13] Additional and special assessments are payable at such times as the board of directors may direct, or as may be provided in the condominium bylaws.

The due dates for assessments can be confusing. Although the general assessment is levied on a monthly basis, some condominium documents provide for the general assessment to be an annual assessment payable in monthly installments, with provision for acceleration of the balance of the annual assessment upon default.[14] Additional and special assessments are generally due when the Board of Directors, the condominium documents, or the authorizing resolution adopted by the co-owners provides. It is not uncommon for additional and special assessments also to be payable in installments, with or without acceleration.

Claims Under the Bankruptcy Code

Unpaid condominium assessments constitute a claim under the Code.[15] The Code differentiates between secured and unsecured claims: a claim is a secured claim only to the extent that there is identifiable collateral of a sufficient value to pay the full amount of the debt.[16] For a condominium lien, the collateral is the condominium unit or units[17] subject to the lien. If the value of the collateral is less than the amount of the debt, the debt is bifurcated under the Code into a secured claim to the amount of the value of the collateral and an unsecured claim for the excess debt over value. If there is no value in the collateral to which the debt can attach, the claim is completely unsecured.

By statute, a condominium lien is junior to tax liens in favor of any state or federal taxing authority and to sums unpaid on a first mortgage recorded prior to the recording of the Notice of Lien.[18] Depending upon the balance due on senior liens, it is possible that a condominium lien will be partially or completely unsecured. Since Chapter 13 plans can provide for minimal payments on unsecured claims,[19] being completely unsecured may mean that the condominium association receives only a few cents on the dollar.

Valuation of the Condominium Unit

If the condominium lien can be completely unsecured, then valuing the condominium unit and establishing the balance due on superior claims is extremely important to the condominium association. The court will determine the value of a claim secured by a lien on property on motion of any party in interest and after a hearing on notice to the holder of the secured claim and any other entity the court may direct.[20] The value is to be determined in light of the purpose of valuation and of any proposed disposition or use of the property and in conjunction with a hearing on a plan affecting the creditor's interest.[21] By local rule in the Eastern District of Michigan, a Chapter 13 plan must state the value of each item of encumbered property.[22] A creditor who objects to the valuation assigned in the plan may file objections to the valuation, either as an objection to confirmation or in its proof of claim, in which case the valuation must be decided prior to confirmation of the plan.[23]

A valuation hearing may take place as a part of the confirmation hearing, although it may be necessary to schedule a separate evidentiary hearing due to time considerations. The association's attorney should obtain an appraisal of the unit, and should have the appraiser present to testify at the hearing if valuation cannot be resolved with the debtor prior to the hearing. The association's attorney will also need to subpoena the records of any senior lien creditors to find out their balance due, if there is a dispute with the debtor as to the amounts due on these prior claims. At a minimum, the bankruptcy court's claims file should be reviewed to determine the amounts for which these prior creditors have filed proofs of claim.

Components of the Condominium Association's Proof of Claim

As evidence of their claim, creditors file a proof of claim.[24] A claim for which a proof of claim has been filed is automatically allowed unless a party in interest objects to it.[25] If an objection is made, the court shall, after notice and hearing, determine the amount of the claim in US dollars as of the date of the filing of the petition.[26]

The condominium association's proof of claim consists foremost of condominium assessments. The proof of claim should list the months and dollar amounts of the assessments which fell due prior to the filing of the case. While an itemization is not specifically required by the Code, listing the months and dollar amounts of the general (and the special and additional assessments, if any) helps all parties understand the details of the claim, serves to reduce objections to claims, and helps the trustee set up the claim properly for payment. Most condominium bylaws also provide for the recovery of interest[27] on unpaid assessments as well as late charges, and the proof of claim should state the rate and amount of interest and the late charge rate.[28]

The Michigan Condominium Act and most condominium documents provide that "[i]n a proceeding arising because of an alleged default by a co-owner, the association of co-owners, if successful, may recover the costs of the proceeding and such reasonable attorney fees as may be determined by the court."[29] If the condominium lien was in foreclosure at the time of filing of the bankruptcy case, the proof of claim should itemize the attorney fees and costs incurred in the foreclosure proceedings. Since a bankruptcy proceeding is also a "proceeding arising out of a default by a co-owner," the proof of claim should include fees for the filing of the proof of claim.[30] Note that the Code provides that a lienholder is entitled to recover any reasonable fees, costs, or charges provided for under the agreement under which such claim arose only if there is excess value over and above the amount of the lien.[31] Again, valuation is important; if there is not sufficient equity in the condominium unit, costs and fees incurred subsequent to the filing of the case need not be paid. While the statute speaks in terms of the "agreement under which such claim arose," the Supreme Court has held that holders of non-consensual liens are entitled to recover interest.[32]

The association's proof of claim should also state the current amount of monthly assessments and the next due date from the date of filing, so that the trustee can set up his records for payment of the future assessments. At least, setting forth the future rate of assessments puts the debtor, his attorney, and the trustee on notice that there *are* future assessments that must be taken into consideration at some point in the debtor's plan.

<u>Treatment of the Condominium Association's Claim</u>

The debtor is required to file a plan not later than 15 days after the filing of his case, unless the time is extended by the court for cause upon a motion filed within the 15 days.[33] The plan sets forth the treatment of claims. The Code provides the debtor several options for treatment of claims, depending upon the type of claim and its status at the time of filing.

If the association had not recorded a lien prior to the filing of the case,[34] the debtor may classify the association as an unsecured creditor, which will be paid some percentage of its claim. This percentage may be between 100% plus interest[35] down to 10% or less,[36] depending upon a variety of factors, including the debtor's income and the amount and type of his other debts. Obviously, it is to the association's benefit to record a lien prior to the filing of a case.[37]

Assuming that a notice of lien was recorded prior to filing, a Chapter 13 plan may provide for the curing of any arrears due on a claim on which the last payment is due after the scheduled completion of the plan over a reasonable[38] period of time and maintenance of the current monthly payment during the life of the plan. 11 USC §1322(b)(5). It is questionable whether this provision applies to condominium assessments, since assessments theoretically do not exist until they have been levied, and thus there are no continuing monthly payments to be maintained On the other hand, condominium assessments can reasonably be expected to be levied as long as the condominium exists, so it is reasonable to argue that condominium assessments should be treated under this section of the Code.[39]

If a notice of lien was filed and the debtor does not elect to treat the claim in accordance with 11 USC §1322(b)(5), 11 USC §1322(c)(2) provides that the claim may be modified. If the association is only partially secured and the condominium unit is not the debtor's principal residence,[40] the debtor may attempt to "cram down" the association's debt to the debtor's equity in the property remaining after prior liens, and pay that amount over the life of the plan.[41] However, if the claim is modified in this fashion, arguably any assessments levied post-petition would be a post-petition debt not subject to the Chapter 13 plan.[42] If the debtor attempts to modify the association's debt in this fashion the debtor will still have to provide in the plan for payment of future assessments as they fall due, or the debtor will quickly face a post-petition default.

Another possibility is that post-petition condominium assessments are administrative expenses. 11 USC §503(b)(1)(A) provides that there shall be allowed administrative expenses, including "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case." Certainly condominium assessments, which are the co-owner's share of the common expenses of administration of the project, are incurred for preserving the condominium unit, which became property of the estate upon filing.[43] Since the budget on which the assessments are based is a projection for the coming year, the assessments may not be "actual" costs and expenses within the meaning of this section.[44]

Administrative expenses must be paid in full in the course of a case, but the Code does not specify *when* they must be paid. The debtor could provide for payment of all post-petition assessments at the end of the plan. The association's objection to this treatment is that doing so does not provide the association with adequate protection, since it continues to incur the expenses even while they are not being paid.

Finally, the debtor may provide for direct payment of condominium assessments. This seems allowable as long as the debtor is current on assessments at the time of filing and remains so up until confirmation.[45]

Special Protection for "Principal Residence Security Interests"

Section 1322(b)(2) of the Code provides that a Chapter 13 plan may modify the rights of holders of secured claims, "other than a claim secured only by a security interest[46] in real property that is the debtor's principal residence."[47] Prior to 1993, some courts had held that it was possible for a plan to "strip" a partially secured security interest down to the fair market value of the property, paying the balance as an unsecured debt; however, the Supreme Court held in **Nobelman v American Savings Bank**[48] that such lien stripping modified the right of a partially secured mortgagee to receive payments in the amount and at the times specified in the mortgage and thus ran afoul of this anti-modification provision. Thus, as long as a condominium lien is at least partially secured by value in the condominium unit, the condominium association's claim must be paid in full.

However, the protection is not absolute. By its own terms, the Code section applies only to security interests in the debtor's principal residence; it does not apply to second homes, a common use for condominiums, especially in resort areas. It does not apply if the security interest covers more than just the residence; since the lien covers all units owned by the co-owner, this protection probably does not apply to a condominium lien against a co-owner who holds more than one unit in the project. Finally, if there is no equity at all to which the condominium lien can attach because of the balance due on the first mortgage and/or tax liens, at least one court has held, despite **Nobelman**, that the security interest is not "secured" by the debtor's principal residence and the debt can be paid as an unsecured claim.[49]

As with most things in life, timing in the filing of a bankruptcy case is everything. If the co-owner wishes to pay the arrears owed to the association over the life of the plan, the co-owner must file his case prior to a foreclosure sale of the condominium unit.[50] Once the sale has been held, the co-owner may only redeem the unit within the redemption period provided by law.[51]

Objection to Confirmation of the Plan

If the association believes that the debtor is not treating its claim properly in accordance with the Code, the association may file objections to confirmation.[52] The association may also object to confirmation of the case if the association believes that the case has been filed in bad faith.[53] The objection must be served on the debtor, the debtor's attorney, the Chapter 13 trustee, and the United States Trustee.[54] The court will hold a hearing on confirmation to resolve any objections.[55]

Changes in the Amount of the Assessment

The rate of the monthly assessment can reasonably be expected to change during the life of a typical three-to-five year plan, based upon changes in the association's budget. If the trustee is paying the current assessments, the association must notify the trustee of any change in the payment amount so that the trustee can make adjustments in payment accordingly.[56] It is important to notify the trustee of the payment change, so that the trustee makes the payments in the proper amount. If a payment increase occurs relatively early in the life of a plan and no notification is given, the debtor will accrue a significant deficit by the time the plan is completed. This defeats the purpose of a Chapter 13 plan, which is to cure any arrears and allow the debtor to pick up with only current obligations at the end of the plan. Although the Code provides that a debt provided for under 11 USC §1322(b)(5) is not discharged, Local Rule 13.13 for the U. S. Bankruptcy Court for the Eastern District of Michigan provides that a discharge of the debtor means that all payments on such a continuing debt are considered current.[57] A prudent condominium attorney will advise his client in writing of the obligation to update the debtor and the trustee with payment changes to avoid the possibility of discharge of post-petition assessments.

Avoidance of the Condominium Lien

A condominium lien is perfected by recording a Notice of Lien with the Register of Deeds for the county in which the project is located.[58] The Code gives the trustee the power to avoid the fixing of a statutory lien on property of the debtor if the lien "is not perfected or enforceable at the time of commencement of the case against a *bona fide* purchaser that purchases such property at the time of commencement of the case, whether or not such a purchaser exists."[59] The Code also give the trustee the rights and powers of a *bona fide* purchaser of real property from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a *bona fide* purchaser and has perfected such transfer at the time of commencement of the case, whether or not such a purchaser exists.[60]

However, a condominium lien *is* enforceable against a *bona fide* purchaser of a unit: unless a prospective purchaser requests a statement from the association at least five days before the sale, the purchaser "shall be liable for any unpaid assessments against the condominium unit together with interest, costs, and attorney fees incurred in the collection thereof."[61] Because the lien is enforceable against *bona fide* purchasers under applicable non-bankruptcy law even if not recorded, the author would argue that the condominium lien must be treated as a secured claim even if the Notice of Lien has not been recorded as of the commencement of the case.[62]

Why is this issue important to the condominium association? Because the difference between treatment as a secured claim and as an unsecured claim may mean the difference between payment in full and receiving only a few cents on the dollar. If the association's lien can be avoided, the association is unsecured. It is unclear to what extent either the trustee or the debtor may attempt to avoid the association's lien. The duties of the Chapter 13 trustee[63] do not include the avoidance powers, and the debtor is not specifically granted the avoidance powers.[64] Possibly, they share the power jointly.[65]

Post-Petition Defaults

The sad truth is that the majority of Chapter 13 cases end in dismissal, not discharge. Upon a default by the debtor in payment subsequent to confirmation of a plan, the association will need to take prompt action to protect its interest, especially if the condominium is only partially secured. If the debtor were current on assessments at the time of filing so that no lien had been recorded pre-petition, can the association file a lien for post-petition assessments? Determining the answer to this question requires a careful review of several provisions of the Code.

The commencement of a case creates an estate, which consists generally of all legal or equitable interests in property of the debtor as of the commencement of the case. 11 USC §541(a). The automatic stay applies to acts against the debtor or property of the estate. 11 USC §362(a). The Chapter 13 plan may provide for the vesting of property of the estate, on confirmation of the plan or at a later time,[66] in the debtor or in any other entity. 11 USC §1322(b)(9). The stay of a prohibited act against property of the estate continues until the property is no longer property of the estate. 11 USC §362(c)(1). The stay of a prohibited act against the debtor continues until the case is closed, the case is dismissed, or a discharge is granted, whichever is earlier. 11 USC §362(c)(2).

The recording of a lien against the condominium unit may not be stayed post-confirmation if the debtor's plan provides that property of the estate vests in the debtor on confirmation. The service of the lien or otherwise to make a demand for payment to the debtor for solely post-petition assessments would not appear to run afoul of any of the prohibited acts against debtors under 11 USC §362(a).[67] The association should make sure that the demand letter and lien cover only post-petition assessments. Because an individual injured by a willful violation of the stay may recover actual and punitive damages, costs and attorney fees, the prudent association will seek relief from the automatic stay before pursuing collection of post-petition condominium assessments. When in doubt, seek relief from the stay first.

The more usual situation is that the debtor had defaulted prior to filing the bankruptcy case and the association was pursuing foreclosure at the time of filing. In this case, the association should seek relief from the automatic stay prior to pursuing its state court remedies, as to do otherwise would be a violation of one or more prohibited acts against the debtor.

Joe Lawyer (P12345)
Attorney for Wild Thyme Condominium Association
Address
Phone Number

PROOF OF CLAIM

1. Name of Claimant: Wild Thyme Condominium Association
   Managing Agent: Ronald Cramer & Associates, LLC
   Address: 1234 Common Element Road
   City, State, Zip Code: Southfield, MI 48075
2. The amount of the claim is $4,506.29. See schedule below for detail.
3. The basis for the claim is: Condominium lien secured by Notice of Lien pursuant to MCLA §559.208 recorded against property located at 5678 Common Element Road, Southfield, MI 48075.
4. All prior payments made on this claim have been properly credited.
5. If the claim is based on a written instrument, attach a duplicate of the instrument or explain why it cannot be attached.

   A copy of the Notice of Lien is attached as Exhibit A.
6. This Claim is not subject to any setoff or counterclaim.
7. If a security interest is claimed in property of the Debtor(s), attach a copy of the security agreement and evidence of perfection of such interest.

   A copy of the recorded Claim of Lien is attached as Exhibit A.
8. This claim is a general, unsecured claim, except to the extent that the security interest described in Paragraph 7 hereof is sufficient to satisfy the claim.
9. This is a PRIORITY SECURED CLAIM.

Dated: March 25, 1996

Joe Lawyer (P12345)

Please reference the debtor's address on all payments.

SCHEDULE OF ARREARS:

As of the filing of the debtor's petition on March 12, 1996, the past-due balance consists of:

Regular Assessments:
February 1, 1995 to November 1, 1995 @ $120.00 per month: $1,200.00
December 1, 1995 to March 1, 1996 @ $125.00 per month: $500.00
Accrued partial balance for the month of December, 1994: $65.00
Total Regular Assessments: $1,765.00

Special Assessments:
Nature and purpose of assessment: Installation of playground equipment
Due Date: January 1, 1996
Amount: $345.00

Additional Assessments:
Nature and Purpose of assessment: Repair of common element balconies
Due Date: July 1, 1995
Amount: $405.00
Total Special/Additional Assessments: $750.00

Late Charges: $25.00 per month for each assessment or installment of assessment.
Total Late Charges: $375.00

Interest:
7% per annum from the date of initial default $228.69

Costs:

Notice of Lien Recording Fee:	$9.00
Filing Fee for Complaint:	$80.00
Service Fee(s)	$105.00
Motion Fee(s)	$20.00
Judgment Fee	$20.00
Posting Fee	$30.00
Publication Fee	$198.60

Total Costs: $462.60

Pre-Petition Attorney Fees (per MCLA §559.206(b)):
Attorney fees are itemized on the attached statement
5.4 hours @ $125.00 per hour $675.00
Post-Petition attorney fees:
Preparation of proof of claim 250.00

Total Debt Due as of filing: $4,506.29

15. 11 USC §101(5)(A).

16. 11 USC §506(a).

17. MCLA §559.208(1) and (3)(a)(I).

18. MCLA §559.208(1).

19. In the author's observations, the minimum payment permitted to unsecured creditors in a Chapter 13 plan in the Southern Division of the Eastern District of Michigan appears to be 10%. Anything less is considered to have been proposed in bad faith. The author has seen plans in the Northern Division and in the Western District confirmed at 1%, usually on the basis that *any* payment to unsecured creditors is more than they would receive in a liquidation and is therefore proposed in good faith. See 11 USC §1325(a)(3) and (b)(1)(A) and (B).

20. Rule 3012 of the Rules of Bankruptcy Procedure. Motion practice generally is governed by Rule 9013 of the Rules of Bankruptcy Procedure, LBR ED 2.08, and LBR WD 9.

21. 11 USC §506(a).

22. LBR ED 13.03(a).

23. LBR ED 13.08(c)

24. 11 USC §501(a). If a creditor fails to do so in a timely fashion, a joint obligor, the debtor or the trustee may file a proof of claim on behalf of the creditor. 11 USC §501(b) and (c).

25. 11 USC §502(a).

26. 11 USC §502(b). It is not uncommon for Chapter 13 plans in the Western District of Michigan to provide that delinquent payments shall continue to accrue up to the date of *confirmation*, and all pre-confirmation payments will be cured over the life of the plan. The author believes that this treatment probably runs afoul of this and other provisions of the bankruptcy code (see, e.g., 11 USC §1322(b)(2) and 11 USC §502), but since, if the plan is completed, the claim is paid in full anyway, the distinction may be without a difference.

27. Most condominium documents provide for 7% interest on unpaid assessments. The allowable rate of interest on arrears is the contract rate or the market rate, whichever is lower. **In re Colegrove**, 771 F2d 119 (6th Cir. 1985); **In re Cureton**, 163 BR 494 (Bankr. E.D. MI 1994). Since condominium liens are not the subject of any market of which the author is aware, the author would argue either that the document rate applies or analogize to the market rate for mortgages, but then the issue becomes whether to use 30 year mortgages, 15 year mortgages, and whether to include points, etc. There is also an excellent argument that no interest on arrears need be paid pursuant to 11 USC §1322(e) unless the condominium documents specifically provide for the payment of interest on delinquent assessments in bankruptcy. Compare to **Rake v Wade**, 113 S.Ct. 2187 (1993).

28. Due to the mathematics of the plan (the timing and amount of payments and the order of payment of claims), the date of confirmation, and the vagaries of trustee computer systems, payments to creditors are not always made "on time" even though the debtor has made his payments to the trustee timely. If the association receives a payment from the Trustee in a Chapter 13 case after the date for imposition of a late charge outside of bankruptcy, can the association impose a late charge? Anecdotal evidence would suggest no: as long as the debtor is paying the trustee timely under the plan, the fact that the trustee's payments are not disbursed timely will not be held against the debtor.

29. MCLA §559.206(b). Most condominium associations have similar, usually broader, provisions in the Condominium Bylaws.

30. Technically, any post-petition fees and costs should be approved by the court pursuant to Rule 2016 of the Rules of Bankruptcy Procedure. However, fees and costs under $500 do not require a hearing. Rule 2002(a)(7). A creditor is entitled to collect its reasonable costs and fees incurred in enforcing its rights in bankruptcy, not limited to seeking relief from the automatic stay. **In re Astronetics**, 28 BR 612 (Bankr. E.D. MI 1983).

31. 11 USC §506(b).

32. **United States v Ron Pair Enterprises, Inc.**, 489 US 235 (1989) (IRS Lien).

33. 11 USC §1321. See also Rule 3015(b) of the Rules of Bankruptcy Procedure. The Trustees for both the Southern and Northern Divisions of the Eastern District of Michigan have promulgated *pro forma* plans, which should be used in the absence of some particularly compelling reason. Copies of the plan are available by contacting the trustees' offices.

34. Also, the debtor or the trustee may attempt to avoid the lien or object to the claim of secured status in the proof of claim; see the discussion of avoidance of a lien, *infra*.

35. See **Cinco v Hardy**, 755 F2d 75 (6th Cir. 1985).

36. See footnote 18, supra.

37. See the discussion of avoidance of liens, infra.

38. The "unwritten rule" in the Eastern District of Michigan seems to be that three years is a reasonable period of time in which to cure an arrears, absent special circumstances. In the Western District, the rule seems to be that a cure within the length of the plan, however long that might be, is reasonable. The only applicable case known to the author is **In re Dockery**, 34 BR 95 (Bankr. E.D. MI 1983), which provided that a debtor is not limited to twelve months, refusing to follow a Colorado case. The

author has successfully argued for shorter cures on second and third filings.

39. The author would argue that this is the most logical treatment of the association's claim. The association is secured by a lien on the debtor's principal residence, and the claim has two components: the arrears and the continuing payments. Even if the continuing payments do not technically exist, they will spring into existence with virtual certainty in the future.

40. See the discussion of Special Protection for "Principal Residence Security Interests" infra. Debtors may try to cram down a condominium notwithstanding this special protection. Since a creditor is bound by the terms of a confirmed plan, 11 USC §1327(a), the association should timely object to confirmation if a cram down is proposed on a principal residence condominium.

41. A Chapter 13 plan may be confirmed over the objections of a secured creditor as long as it provides that the creditor retain the lien securing the claim and the value, as of the effective date of the plan, of property (i.e., payments) to be distributed under the plan on account of the claim is not less than the allowed amount of the claim. 11 USC §1325(a)(5)(B).

42. **In re Haith**, 193 BR 341 (Bankr N.D. AL 1995).

43. 11 USC §541(a)(1).

44. **In re Cheatle**, 150 BR 266 (Bankr D. CO 1993); **In re Butcher**, 108 BR 634 (Bankr. E.D. TN 1989). But see **In re Hill**, 100 BR 907 (Bankr. N.D. OH 1989).

45. The author has heard each of the judges in the Eastern District of Michigan, Southern Division, rule that a debtor who provides for direct payment of an obligation gives up the protection of the automatic stay as to that obligation. That has *not* been the author's experience in the Western District of Michigan. In either district, the author recommends seeking relief from the automatic stay, as noted later in the article. If it is the association's purpose to foreclose the condominium lien, obtaining a written order lifting the stay is usually a prerequisite to getting a title company to insure the validity of the foreclosure.

46. A security interest is a "lien created by an agreement." 11 USC §101(51). A lien is a "charge against or interest in property to secure payment of a debt or performance of an obligation." 11 USC §101(37). A security agreement is an "agreement that creates or provides for a security interest." 11 USC §101(50). Since a security interest contemplates an "agreement" and condominium liens are usually filed without the co-owner's *contemporaneous* agreement, query whether a condominium lien is a "security interest" within the ambit of 11 USC §1322(b)(2). Some condominium documents provide that, by accepting title to a unit in the project, the purchaser agrees to be bound by all of the terms, conditions and restrictions of the documents; this may be a sufficient "agreement."

47. 11 USC§1322(b)(2). The same protection is afforded in Chapter 11 cases; see 11 USC §1123(b)(5).

48. 113 S.Ct. 2106 (1993).

49. **In re Kidd**, 161 BK 769 (Bankr. E.D. NC 1993).

50. 11 USC §1322(c)(1). This has been the rule in the 6th Circuit since **In re Glenn**, 760 F2d 1428 (6th Cir. 1985); the Bankruptcy Reform Act of 1994 made the rule uniform across the circuits.

51. Or sixty days from the date of filing, whichever is later. 11 USC §108; see also **Federal Land Bank of St. Paul v Brown**, 20 BR 145 (E.D. MI 1982).

52. 11 USC §1324. In the Eastern District of Michigan, objections must be filed not later than twenty-one days after the first meeting of creditors. LBR 13.08(a) as superseded by Administrative order Number 92-03. Notices of Commencement of Case issued in the Western District generally provide that objections must be filed at least five days before the confirmation hearing.

53. **In re Caldwell**, 851 F2d 852 (6th Cir. 1988). Good faith depends on the totality of the circumstances and must be determined on a case-by-case basis.

54. Rule 3015, Rules of Bankruptcy Procedure.

55. 11 USC §1324. LBR ED 13.10 allows for confirmation of a plan without formal hearing if no objections are filed, the trustee has approved the Order Confirming Plan, and no one appears at the time set for hearing with objections.

56. The Eastern District of Michigan has a local rule specifically for mortgage payment changes due to analysis of an escrow account and/or for changes in interest rate on an adjustable rate mortgage; see LBR ED 13.04. The author suggests that this rule be used for condominium assessments. The Western District does not have an analogous rule, but some plans used in the Western District provide for payment changes, at least in mortgage payments, on notice to the debtor's attorney and the trustee.

57. Although the issue has not arisen with regard to condominium assessments to the author's knowledge, the author has seen at least one Eastern District judge advise a mortgage company, that did not analyze a debtor's escrow account during a bankruptcy, that it had to write off the deficiency that had accrued by the time of completion of the plan.

58. MCLA §559.208(3)(c).

59. 11 USC §545(2).

60. 11 USC §544(a)(3).

61. MCLA §559.211(2).

62. It could also be argued that the "or" in the statute ("not perfected or enforceable") is meant to be alternative (not perfected or not enforceable) rather than inclusive (not perfected and thus *not enforceable*). Since an unrecorded lien is not perfected even though enforceable against *bona fide* purchasers, it would still be avoidable under the alternative reading of the statute.

63. 11 USC §1302.

64. 11 USC §1303.

65. The standing trustee for the Southern Division of the Eastern District of Michigan rarely attempts to avoid liens, apparently believing that the debtor is in a better position to determine the validity of a lien and therefore object to it. However, trustees in the Northern Division of the Eastern District and in the Western District take a more active role in attempting to avoid liens.

66. The *pro forma* plan used in the Eastern District of Michigan, Southern Division, provides for vesting of property in the estate in the debtor. *See* Plan, Paragraph I.D. However, the pro forma plan may be modified.

67. However, if a court finds that post-petition condominium assessments are administrative expenses, the condominium association may have violated the automatic stay by attempting to collect the post-petition assessments. See **In re Hill**, footnote 404 supra.

68. 11 USC §362(a)(1).

69. 11 USC §362(d).

70. Rule 9014, Federal Rules of Bankruptcy Procedure.

71. LBR ED 2.08, 2.09; LBR WD 9, 10.

72. 11 USC §362(e).

73. E.g., mortgages, IRS liens, construction liens, state tax liens, non-filing joint owners, lessees, etc.

74. 11 USC §1301.

75. 11 USC §362(g).

76. The trustee is not specifically required to attend hearings on motions for relief from the automatic stay. 11 USC §1302(b)(2). Since Chapter 13 hearings are all scheduled at the same time in the Southern Division of the Eastern District, this is usually not a problem because the trustee is there anyway; however, that is not the case in the Western District, and the prudent association attorney may wish to confirm that the trustee will be present if a default in payment to the trustee is at issue.

77. See, e.g., LBR WD 10.

describe the allocation method agreed to by the members.

VOTING RIGHTS OF MEMBERS

The Amendment provides that the following actions must be approved by members of an LLC, and not by its managers:

(1) a consensual dissolution of the LLC;

(2) a merger of the LLC with another entity;

(3) an amendment to the articles of organization;

(4) a transaction with the LLC or a transaction connected with the conduct or winding up of the LLC in which a manager of the LLC has a direct or indirect interest, or a manager's personal use of the property of the LLC, unless such transaction or use was authorized in advance by the operating agreement; and

(5) a sale, exchange, lease or other transfer of all or substantially all of the assets of the LLC other than in the ordinary course of business, unless otherwise provided in the operating agreement.[18]

Although the LLC Act had provided that members had the "right" to vote on certain matters[19] it was not evident these voting rights were exclusive to members. The Amendment also provides that the articles of organization or operating agreement may provide for additional voting rights of members.[20]

In addition, the Amendment permits greater voting rights to be vested in certain members. It also states that an operating agreement may provide that certain members or groups of members have only limited or no voting rights.[21] If an LLC's operating agreement provides that certain members do not have voting rights, then it seems that the items listed above which are reserved for approval by members will be determined by the members who are authorized to vote.

The Amendment also modifies how members' votes are to be "weighted" in certain cases. Previously, the LLC Act had provided that members would vote as set forth in the operating agreement or otherwise in proportion to their shares of the distributions of the LLC.[22] The Amendment also provides that members' votes shall be calculated as set forth in the operating agreement. However, if the operating agreement does not address voting rights, the Amendment provides that each member shall have one vote, except that, where an LLC was in existence before the effective date of the Amendment and members had previously been allocated votes in proportion to the members' shares of distributions, the LLC shall continue to allocate votes on the basis of members' shares of distributions until the allocation is changed by an operating agreement.[23] The Amendment also provides that unless a greater vote is required by statute, the articles of organization or by operating agreement, the vote of a majority of all members entitled to vote is generally required for approval.[24]

Participants in real estate LLCs often expect that their voting rights with respect to LLC matters will correspond to their percentage ownership interests in the LLC. If, in such a case, members do not have equal percentage ownership interests, it is important that the LLC's operating agreement clearly state that member votes will be allocated in proportion to their percentage ownership interests, in order to avoid a contrary result under the Amendment.

ADMISSION OF ASSIGNEES AS MEMBERS

The Amendment makes it easier for the assignee of a member to be admitted as a member of an LLC. It provides that an assignee may become a member in accordance with the provisions of the operating agreement or upon the unanimous consent of members entitled to vote.[25] In order to conform to the Service's rulings, the LLC Act had not permitted an operating agreement to provide for the admission of a member's assignee to the LLC unless the LLC was not operated by managers *and* the operating agreement did not provide for automatic continuation of the LLC upon the withdrawal of a member.[26]

The Amendment provides welcome flexibility for members of real estate LLCs. Real estate is often acquired and held as a long term investment, and a real estate LLC will often remain in existence for many years. At some point, members may want to assign their membership interests for estate planning, economic or other reasons. In connection with such assignments, the assigning members and their assignees frequently desire to have the assignees admitted as members of the LLC. Assigning members may encounter difficulty in obtaining the unanimous consent of other members to such an admission, if such consent is sought after an operating agreement has been executed. Now, members will be able to consent to the admission of an assignee as a member within the operating agreement.

automatic dissolution in the event of a member's unexpected withdrawal.

MERGER OF AN LLC WITH OTHER ENTITIES

The LLC Act authorized a domestic LLC to merge with other LLCs or business entities. The Amendment, modeled after the merger provisions recently added to the Michigan Revised Uniform Limited Partnership Act[38] more clearly defines the types of entities which can merge with a domestic LLC, the procedures to be followed, and the consequences of the merger. Under the Amendment[39] *(i)* two or more domestic LLCs may merge with each other,[40] *(ii)* a foreign LLC may merge with a domestic LLC[41] and *(iii)* a domestic LLC may merge with a "business organization,"[42] which is defined to consist of a domestic or foreign corporation, limited partnership, general partnership or any other type of domestic or foreign business enterprise except a domestic limited liability company.[43]

In order for a domestic LLC to merge with a foreign LLC or business organization, the merger must be permitted under the law of the jurisdiction in which the foreign LLC or business organization is organized and that entity must comply with that law in effecting the merger.[44] Since the term business organization includes a domestic limited partnership, and since domestic limited partnerships are permitted to participate in mergers,[45] it appears that a domestic LLC may merge with a domestic limited partnership.

It should be noted that where an LLC's operating agreement provides for approval of a merger by less than the unanimous vote of members entitled to vote, and the merger is approved, a member who voted against the merger is entitled to withdraw from the domestic LLC and receive the fair value of his interest.[46]

The Amendment's expanded merger provisions might be useful in several types of transactions. For instance, two existing domestic LLCs which have identical owners or adjacent real estate might combine into one LLC. A foreign LLC whose members are Michigan residents or which owns Michigan property might be merged into a newly-formed domestic LLC, so long as the foreign LLC's organizational law permits a merger. Finally, several different types of business organizations formed under the laws of different jurisdictions might be "rolled up" into a single domestic LLC, so long as their organizational laws permit mergers.[47]

CONVERSIONS OF PARTNERSHIPS INTO LLCs

Finally, the Amendment makes it possible to convert an existing domestic general partnership or domestic limited partnership into an LLC.[48] Once the conversion becomes effective, an entity which was originally established as a partnership is thenceforth deemed to be an LLC.

The Amendment requires the partners of the general partnership or limited partnership to approve the terms and conditions of the conversion in the manner provided in its partnership agreement for the amendment of the partnership agreement, or, if there is no such provision, then by unanimous consent.[49] Once the conversion is approved, the converting partnership or limited partnership files *(i)* articles of organization as an LLC and *(ii)* a certificate of conversion which includes the name of the partnership or limited partnership and the date on which it was formed. In the case of a converting limited partnership, the certificate of conversion must also include a statement that the certificate of limited partnership is cancelled as of the effective date of the LLC's articles of organization.[50]

The Amendment provides that an LLC established pursuant to this provision is considered to be the same entity as existed before the conversion, having the property and rights of the converting partnership or limited partnership and all the liabilities of the converting partnership or limited partnership. An action or proceeding pending against the converting partnership or limited partnership may be continued as if the conversion had not occurred. The liability, if any, of a general partner of the converting partnership or limited partnership for acts or omissions that occurred *before* the conversion will not be affected by the conversion.[51]

The partners of an existing domestic limited partnership who desire to reconfigure it into an LLC may be able to utilize either the merger or conversion provisions of the Amendment to accomplish this result. Of the two methods, a conversion might be simpler to accomplish since, in order to accomplish a merger, the partners of the limited partnership would have to form a new LLC and, as members of the LLC, go through the procedure of approving the merger.

Conversion into an LLC may be an attractive technique for a general partnership or a limited partnership in which the general partners are individuals. Although, as noted above, the conversion will not effect their

What of the co-owner who is making the payments, but is violating some other provision of the condominium documents? For instance, what if the co-owner has moved a dog into the unit in violation of the condominium bylaws? The Code prohibits the commencement or continuation of judicial action against the debtor which was or could have been commenced before the commencement of a bankruptcy case.[68] The author strongly suggests that the association obtain relief from the automatic stay prior to commencing or continuing injunctive relief against the co-owner, especially since the association will likely be requesting the state court to award the association its costs and fees incurred in obtaining the injunction. Again, when in doubt seek relief first.

Motion Procedure

On request of a party in interest and after notice and a hearing, the court may grant relief from the stay for cause, including lack of adequate protection of an interest in property or because the debtor does not have an equity in the property and the property is necessary for an effective reorganization.[69] Relief is requested by motion.[70] Both the Eastern and Western Districts have rules governing both motions generally and motions for relief specifically,[71] and the bankruptcy attorney should familiarize himself with the procedures. In either district, if no response to a motion for relief is filed within a certain period of time, the motion is granted by default and the moving party may submit an order lifting the stay for entry without a hearing.

Under the Code, the stay is lifted automatically thirty days after the filing of the motion unless the court after notice and a hearing orders the stay to continue in effect pending a final hearing, which again must be held within thirty days of the preliminary hearing.[72] Because of this provision the courts give priority to motions for relief.

Counsel should take particular care in determining the persons entitled to notice of the motion. Of course, the debtor, the debtor's attorney, and the Chapter 13 trustee should receive notice. In addition, all parties with an interest in the property[73] and/or parties protected by the co-debtor stay[74] should be served. If the motion is combined with a motion to dismiss or convert the case to a Chapter 7, the United States Trustee should also be served with the motion.

At the hearing on a motion for relief, the moving party has the burden of proof on the debtor's equity in the property, and the party opposing relief has the burden of proof on all other issues.[75] Other issues can include whether the debtor has defaulted in payments to the trustee[76] and/or the association and by how much, whether the debtor has defaulted in some other provision of the condominium documents, and whether the condominium unit is the debtor's principal residence or is otherwise necessary to complete the plan of reorganization. In a Chapter 13 proceeding, the debtor's lack of equity in the property is rarely the grounds for seeking relief from the stay; usually the creditor is asking that the stay be lifted for cause: the debtor has defaulted either in payments required to be made to the trustee under the plan or in payments to be made directly to the creditor. If the initial hearing is also the "final" hearing,[77] the association's attorney should be prepared to present testimony as to the default to the trustee and/or to the condominium association.

Conclusion

The condominium association should closely monitor the accounts of its co-owners, and promptly file a lien if a co-owner becomes delinquent. Having a recorded lien in place prior to the filing of the co-owner's bankruptcy case can greatly increase the association's chances for collecting all unpaid assessments in bankruptcy. However, the absence of a recorded lien does not necessarily mean that the association should lose all hope of collection. The association's attorney should carefully review the Chapter 13 plan and determine that the plan properly treats condominium assessments, as well as file a timely proof of claim on behalf of the association. The attorney should also counsel a client that responsibility does not end at plan confirmation; the association should monitor the debtor's faithful performance of the terms of the plan, should notify of any increases in assessments, and should take prompt action upon a material default by the debtor under the plan. Taking a proactive approach to bankruptcy can minimize its effect on the association.

APPENDIX

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MICHIGAN

In re:	JOHN DOE JANE DOE Debtors	Case No. 96-12345 Chapter 13 Hon. Walter Ray Rhodes

______________/

Continuing Payments:

Condominium Assessments continue to accrue at the rate of $125.00 per month. Assessments are adjusted on an annual basis at the discretion of the Board of Directors pursuant to the terms of the Condominium Bylaws.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MICHIGAN

In re:	JOHN DOE	Case No.
	JANE DOE	Chapter 13
	Debtors	Hon. Walter Ray Rhodes

______________/

Joe Lawyer (P12345)
Attorney for Wild Thyme Condominium Association
Address
Phone Number

PROOF OF SERVICE

I certify that I served a copy of Proof of Claim on:

Debtor's Attorney (address)	Trustee (address)
Debtor (address)	

by first class mail, postpaid, on March 25, 1996. I declare that the statements above are true to the best of my information, knowledge, and belief.

Dated: March 25, 1996

____
Joe Lawyer (P12345)

ENDNOTES

1. Compare **Matter of Rosteck**, 899 F2d 694 (7th Cir. 1990) with **In re Rosenfeld**, 23 F3d 833 (4th Cir. 1994).

2. 11 USC §101 et. seq.

3. MCLA §559.208(2).

4. Co-owner is defined as "[a] person, firm, corporation, partnership, association, trust, or other legal entity or any combination thereof, who owns a condominium unit within the condominium project. 'Co-owner' may include a land contract vendee if the condominium documents or the land contract so provides." MCLA §559.106(1).

5. Public Law 103-394. The treatment of the dischargeability of condominium assessments was codified at 11 USC §523(a)(16). The author previously analyzed this provision of the Code in relation to the Michigan Condominium Act in Sowell, *Condominium Associations Get a Break — Or Do They?*, 22 Mich. Real Prop. Rev. 235 (1995).

6. Different types of bankruptcy cases are referred to by the chapter of the Bankruptcy Code which deals with their particularities. A Chapter 7 case is a straight liquidation, whether individual or corporate. A Chapter 13 case is an individual's reorganization. A Chapter 11 is primarily a business reorganization, but is occasionally used by "wealthy" debtors: those whose debts exceed the limits for Chapter 13.

7. Rule 3001(a) provides that a proof of claim shall conform substantially to the appropriate Official Form, which in the case of a proof of claim is Form 10. Rule 9009 of the Rules of Bankruptcy Procedure provides that the official forms shall be observed and used "with alterations as may be appropriate. Forms may be combined and their contents arranged to permit economies in their use." Although the author has used the form contained in the appendix without objection for several years, the author makes no representations that it will be accepted in the future. If the reader prefers to use the official form, the author urges the reader to attach to the official form an addendum setting forth the amounts and due dates of the assessments, for the reasons stated *infra* in the discussion regarding the Components of the Association's Claim.

8. MCLA §559.172(1).

9. MCLA §559.103(3).

10. MCLA §559.161.

11. "General," "Additional" and "Special" are not terms of art defined by the Michigan Condominium Act, but most condominium documents allow additional assessments, levied by the Board of Directors without a co-owner vote, and special assessments, which do require a co-owner vote.

12. MCLA §559.169.

13. Some documents provide for an annual assessment, but this is usually payable in monthly installments.

14. As discussed in the section on Treatment of the Condominium's Claim *infra*, 11 USC §1322(b)(5) allows a co-owner to decelerate debts which have been accelerated. However, it may be more advantageous for the co-owner to leave the general assessment accelerated, because the co-owner does not have to start paying future general assessments until the end of the acceleration period, and the accelerated assessment can be cured over a reasonable (see footnote 38, *infra*) period of time, thus generating additional cash flow (known as "permo") at the commencement of the case, which could be used to make adequate protection payments to other secured creditors.

ROAD-END ACCESS TO MICHIGAN WATERS: AN UPDATE

by *Douglas S. Loomer**

It is also fundamental that private property cannot be forced on a public authority without its consent.

Kraus v Dep't of Commerce, 451 Mich 420, 429; 547 NW2d 870 (1996).

Michigan has over 11,000 inland lakes, 3,200 miles of coastline, and 36,000 miles of rivers and streams. However, it has many more miles of streets and highways leading to and from its lakes and streams. In the Spring of 1993, this writer co-authored a **Michigan Real Property Review** article which discussed access to Michigan waters via "road-end" sites. Such road-end sites provide ideal points of access to Michigan's waters, but also spawn litigation between waterfront (riparian) owners, so-called "back-lot owners", developers, local governments and the general public. These disputes have traditionally pitted riparian owners against the rest of the world, with the riparian owners attempting to limit use of road-ends for water access. Recent developments in Michigan law, however, suggest that the burden of road development and maintenance may be changing the dynamics of road-end access litigation. This article updates the status of Michigan case law and statutes relating to the ownership, use, and vacation of such road-end sites.

Road-End Use

Road-end water access sites usually arise via dedications in platted subdivisions. A dedication is an appropriation of land to some public use, which has been accepted for such use by or on behalf of the public. **Clark v City of Grand Rapids**, 334 Mich 646, 656-657; 55 NW2d 137 (1952). As population density and use by persons other than riparian owners increase on a particular lake, disputes inevitably arise between the riparian owners and the non-riparian users.

The general rule has been that the scope of activities which non-riparian users are permitted to carry out at a road-end water access site is determined by the intent of the road-end site's grantor. **McCardel**

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v Smolen, 440 Mich 89; 273 NW2d 3, 7 (1978); **Thies v Howland**, 242 Mich 282, 288; 380 NW2d 463 (1985).

As a practical matter, it is often difficult to determine a grantor's intended scope of dedication. Plat dedications are frequently unenlightening or ambiguous. Many water-adjacent subdivisions were platted in the early part of this century, and their grantors are deceased or untraceable. As a consequence, the courts have traditionally held that roads that terminate at water bodies are presumed to be created to "give access to the water and permit the building of structures to aid in that access". **Thies, supra,** at 296. Unless specifically prohibited by a grantor's dedication, such sites have routinely been found to provide public access to Michigan waters.

Several recent Court of Appeals decisions, however, suggest that the courts are not giving great weight to this presumption and are, on the contrary, quite willing to limit non-riparian use of road-end sites for lake access.

In **Jacobs v Lyon Twp. (after rem.)**, 199 Mich App 667; 502 NW2d 382 (1993), the court was called upon to determine what use the public might make of a road-end access site to Higgins Lake in Roscommon County. Initially, the trial court and Court of Appeals attempted to resolve this question on the basis of the language of the road-end dedication and the traditional presumptions relating to road-end water access sites. **Jacobs v Lyon Twp.**, 181 Mich App 386; 448 NW2d 861 (1989). However, the Supreme Court vacated both lower court decisions and remanded the matter to the trial court with instructions to conduct an evidentiary hearing to determine whether the road-end uses at issue were intended by the grantor at the time of dedication. **Jacobs v Lyon Twp.**, 343 Mich 922 (1990).

On the basis of testimony provided by various octogenarians concerning the uses made of this particular site during their childhoods, the Court of Appeals ultimately concluded that the scope of dedication permitted the installation of one non-exclusive dock at the end of the road-end site, and that the public was entitled to reasonable use of the water for boating, swimming and fishing. However, the court determined that the erection of boat hoists and use of the road-end site for such activities as bathing, lounging, or picnicking were not within the scope of the plat dedication.

In three other unpublished Court of Appeals decisions, the Court of Appeals has followed a similar course, requiring full-blown evidentiary hearings concerning the circumstances surrounding dedication of platted road-end sites. **Plourde v Dwyer**, No. 152820 (September 27, 1994); **Stima v Hutchinson**, No. 191229 (April 15, 1997); **Droste v Little**, No. 190557 (May 23, 1997).[1] From these decisions, it appears that any attempt to resolve a road-end access site use dispute without a full-blown evidentiary hearing on the facts attendant to dedication of the road-end site may not pass muster on appeal.

Vacation of Road-End Sites

It is well established that a valid plat dedication of land for a public purpose, including dedication of land for use as a water access site, requires two elements: a recorded plat designating the areas for public use, evidencing a clear intent by the plat proprietor to dedicate those areas for public use, and acceptance by the proper public authority. This public acceptance must be timely and must be disclosed either formally or informally through a "manifest act" by the public authority. **Kraus v Dep't. of Commerce**, 451 Mich 420, 424; 547 NW2d 870 (1996). Consequently, it is common for parties seeking to bar public lake access to argue for vacation of lake access dedications on the ground that these dedications were not properly or timely accepted. The case law concerning vacation of road-end sites has been, however, somewhat murky.

In 1996, with the assistance of the Real Property Law Section's Water Law Committee, the Land Title Standards Committee of the State Bar published the first Michigan title standards relating to riparian rights issues, and standards concerning the effect of dedication of land for use as water access sites.[2] Also in 1996, two cases were published that resolve some of the ambiguities presented by past decisions.

Kraus v Dep't of Commerce, 451 Mich 420; 547 NW2d 870 (1996), concerned a platted road-end site which had been accepted by Roscommon County under the McNitt Act. The McNitt Act, 1931 PA. 130, required each board of county road commissioners to take over all township highways and incorporate them into a county-wide highway system. As a consequence, following enactment of the McNitt Act, county road commissions were faced with the task of accepting, by official resolution, all township roads within their counties. In **Kraus**, the Michigan Supreme Court ruled that a general resolution by a county road commission that did not expressly identify either the platted roads to be taken over or the recorded plat in which the roads were dedicated was insufficient to affect an acceptance of an offer to dedicate the roads to public use. This significant ruling throws into question the validity of literally thousands of McNitt Act type road dedication acceptances.

A McNitt Act resolution is a formal acceptance of a dedication. Road dedications may also be accepted informally when a governmental entity exercises authority and control over a road; however, it is not unusual for road-end access sites to remain undeveloped. Consequently, after **Kraus**, where there has been no expenditure of public resources for road-end development, and where the McNitt Act Road Commission incorporation of a road-end was not sufficiently specific, it is possible that a road-end dedication will be found to have failed, and that the road-end site will be subject to vacation. This is especially true where the abutting riparian owners' use of the road-end site is inconsistent with public ownership. **Kraus, supra** at 431.

In reaching its decision, the court in **Kraus** explained that the requirement of public acceptance by a manifest act, whether formally or informally, "was necessary to prevent the public from becoming responsible for land that it did not want or need, and to prevent land from becoming waste property, owned or developed by no one." **Kraus, supra** at 424. In so holding, the court reached back to a policy consideration first articulated in **Wayne County v Miller**, 31 Mich 447 (1875). The policy enunciated in **Kraus** represents a clear attempt by the court to limit governmental responsibility for road maintenance and development.

This policy was adopted and extended by the Court of Appeals in **Marx v Dep't. of Commerce**, 220 Mich App 66; 558 NW2d 460 (1996). The **Marx** court identified a split in the Court of Appeals regarding whether township approval of a plat constituted acceptance of the plat's dedication. In **Bangle v State Treasurer**, 34 Mich App 287; 191 NW2d 160 (1971), a panel of the Court of Appeals held that township approval of a plat constituted acceptance of the dedication. In **Salzer v State Treasurer**, 48 Mich App 34; 209 NW2d 849 (1973), a different panel declined to follow **Bangle** and held that the **Bangle** court "erroneously equated township approval of a plat with formal acceptance". **Salzer, supra** at 37. Citing the Supreme Court's policy enunciated in **Kraus**, that the public should not be held responsible for land that it neither wants nor needs, the court in **Marx** adopted the law of **Salzer** and concluded that a township's approval of a plat does not constitute acceptance of the dedication of the land dedicated in the plat. **Marx, supra** at 77-78. In so ruling, the **Marx** court further decreased the likelihood that a publicly dedicated road-end site will be found to have been accepted by formal government action in any particular case.[3]

Road-End Ownership

On May 28, 1996, three public acts affecting the ownership of vacated or abandoned road-end water access sites became effective. 1996 P.A. 217 revised MCLA 247.41, et. seq., the Discontinuation of Highway Bordering Lake or Stream Act; 1996 P.A. 218 revised MCLA 224.18, the County Highway Act; and 1996 P.A. 219 revised MCLA 560.224a-.227a, the Subdivision Control Act. The three acts apply to road-ends, as well as roads that border on, cross or are adjacent to lakes or streams. When considered together, these statutory changes insure that, prior to abandonment or vacation of any such roads, the state must be given both notice of the proposed action affecting loss of public access and also an opportunity to assume ownership and control of the road as a water access point. Local townships are given first priority to obtain control of such property as an ingress and egress water access point. The state, via the Department of Natural Resources, is given second priority to obtain and manage such sites. The state may retain title to the site, transfer title to a local unit of government, or deed the property to the adjacent property owners.

These statutory amendments also provide, however, that if the property is conveyed to a local unit or the state, then the local unit or the state shall operate and maintain the property "so as to prevent and eliminate garbage and litter accumulation, unsanitary conditions, undue noise and congestion as necessary." MCLA 247.44(3). MCLA 560.226(4). MCLA 224.18(11). Furthermore, if the local unit of government or the state fails to maintain the property, then, upon application of seven owners of land within one mile of the road ending, the circuit court may order the road-end site closed or may, in extreme cases, order the road-end site conveyed to the adjacent land owners.

These amendments clearly provide safeguards against loss of public access to Michigan waters. They give the state and local bodies of government the opportunity to obtain control of road-end water access sites. However, they also place a potential burden upon government to maintain these sites. It will be interesting to see whether state and local governments will consider the benefits to be worth the burden.

ENDNOTES

1. In **Plourde**, back lot owners sought a declaration that they were entitled to use a road-end site for access to Duck Lake, and that they were entitled to erect a dock in furtherance of that access. The trial court initially granted the back lot owner's request on motion for summary disposition. The court made its determination on the basis of the presumption of access which attaches to road-end sites. The Court of Appeals, however, vacated the lower court's judgment and remanded the case for evidentiary hearing concerning the facts and circumstances relating to the intended scope of the grantor's dedication. In **Stima**, riparian owners of property abutting a road-end access site to Lake Orion sought to close the site to public access. Following a bench trial, the court ruled that the road configuration, together with the plat dedication, raised a conclusive presumption that the grantor dedicated this site for public access to the lake. However, the court also concluded that no surrounding circumstances were presented to evidence an intent that, at the time that the road was dedicated, the dedication of the road extended to shore activities such as sunbathing and lounging. The Court of Appeals affirmed these findings. In **Droste**, back lot owners sought removal of a fence erected by riparian owners across a road-end site, as well as a determination that the non-riparian users could access the lake via the site. The Court of Appeals found the trial court had erroneously concluded that the road-end at issue was not a water terminus site, and remanded the case for further consideration in light of its ruling. In doing so, it noted that although there is "a presumption that access to the water arises when a public road terminates at water, the presumption nevertheless is predicated upon the intent of a platter. Consequently, it instructed the circuit court to consider all the circumstances, including that the road at issue runs perpendicularly to the lake, in determining whether the platter intended to dedicate the road-end as a lake access point.

2. See Michigan Land Title Standards, 5th Ed., Standard 13.1 through 13.4.

3. The **Kraus** policy concerning the right of governmental units not to be burdened with unwanted land was also followed by a panel of the Court of Appeals in the recent case of **Donaldson v Alcona County Board of Road Commissioners**, 219 Mich App 718, 727; 558 NW2d 232 (1996). Although not specifically a road-end water access case, **Donaldson** raises issues important to road-end sites created under the Highway By User Act. MCLA 221.20; MSA 9.21. In **Donaldson**, the Court of Appeals refused to find that a public road was created by use, even though limited public funds had been used to maintain the road. The road was a short dead-end road used primarily by several individuals with property abutting it. The court reasoned that the benefit of the public's maintenance of the road inured to these private landowners, and not to the general public.

CURRENT ABUSES OF THE ANTI-RAIDING PROVISION OF ACT 198 AND PROPOSED REFORMS

by *Thomas P. Martin and Paul J. Mastrangel**

The Michigan Legislature enacted the Plant Rehabilitation and Industrial Development Districts Act ("Act 198") in 1974. The intent of this legislation was to stimulate the state's economy, maintain and increase the number of jobs in the manufacturing sector and increase the tax base of Michigan communities by making Michigan financially attractive to manufacturers. Act 198 provides economic incentives to manufacturing companies which rehabilitate or replace obsolete industrial property or acquire new industrial property for use within the state. This economic incentive is in the form of ad valorem property tax abatement. The maximum abatement for new projects under the Act is 50% of the manufacturer's ad valorem property taxes for a period of up to twelve years. The maximum abatement for "replacement" or "rehabilitation" projects is 100% of the manufacturer's ad valorem property taxes attributable to the increase in the project's state equalized valuation ("SEV") for a period of up to twelve years.

The abatement process is generally a three-step process. The site must first be designated as an "industrial development district" or "plant rehabilitation district." The governing body of the local municipality in which the district is located must then approve the applicant's tax abatement application. Finally, the State Tax Commission must approve the application and issue the industrial facilities exemption certificate which entitles the manufacturer to the tax abatement. When a manufacturer relocates *within* the state, an additional step is required – a consent resolution from the local governmental unit that the manufacturer is leaving.

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When Act 198 was enacted, it did not distinguish between those manufacturers moving to Michigan from other states or countries and those manufacturers who, for a variety of reasons, wished to relocate their existing Michigan operations to new sites within the state. After the adoption of Act 198, many communities utilized tax abatement to induce in-state as well as out-of-state manufacturers to relocate. When tax abatement was added to other favorable conditions in the new community such as site availability, lower property tax rates, and lower land acquisition and development costs, the lure proved irresistible to many manufacturers. A number of Michigan's domestic manufacturers were motivated to relocate within the state.

This relocation of Michigan's domestic manufacturers occurred at the expense of those communities who could not or would not match the economic inducements offered by the new community. While the new community benefitted by the increase in its tax base and the new jobs created, the community in which the facility was formerly located experienced a concomitant loss of tax base and jobs.

When Act 198 was adopted in 1974, the local Michigan unit that faced the loss of jobs by the relocating manufacturer had no input. Prior to 1982, the only local unit involved in the process was the local unit offering tax abatement to the manufacturer. Frequently, the unit where the existing domestic facility was located learned after the fact that an important part of its tax base and labor force were moving to a neighboring community.

In 1982, as a result of the lobbying by those municipalities affected by the "raiding" practices of neighboring communities, the legislature adopted the so-called "anti-raiding provision" of Act 198 (MCLA 207.559(2)(f)). The amendment introduced into the process the local Michigan governmental unit which the in-state manufacturer was leaving. It provided:

> Completion of the facility shall not have the effect of transferring employment from one or more local governmental units of the state to the local governmental unit in which the facility is to be located, except that this restriction does not prevent the granting of a certificate if the legislative body of each local governmental unit from which the employment is to be transferred consents by resolution to the granting of the certificate. If the local governmental unit does not give its consent, a copy of the resolution of denial showing the reasons for the denial shall be filed within 20 days after adoption with the Department of Commerce.

This amendment prohibits tax abatement when the relocation has the effect of transferring employment from one local Michigan governmental unit to another unless the consent is obtained from the unit which would suffer the loss of jobs.

With adoption of this new provision, the local Michigan unit in which the facility is currently located has the opportunity to block tax abatement at the new location. This provision, however, fails to address a number of issues critical to the implementation of the state's policy.

Any number of valid business reasons may prompt a manufacturer to relocate. Relocating an existing facility is not a decision lightly reached. Relocation involves complex planning, significant additional costs to the manufacturer, business interruption and possible customer service problems, possible displacement of key personnel and a host of other potential economic disasters. Before making the decision to relocate, the manufacturer usually examines and exhausts all other cost-effective options. In some cases, the decision to transfer an operation to a different locale is influenced by the perception that the community where the existing facility is located has become a hostile environment. This perceived hostility can be overt or covert. A local unit's refusal to provide prompt and cost-effective municipal services can be as burdensome as high local taxes. Deteriorating or declining infrastructure can also contribute to this perception.

A manufacturer's ability to relocate within the state encourages local units to be competitive in the benefits they offer to manufacturers. When existing economic conditions become too onerous or burdensome, the manufacturer relocates. Regulations, ordinances, or statutes that restrict or impair the ability of a business to relocate may encourage local governmental units to be less responsive and less attentive than appropriate if the goal is to attract and maintain business in the manufacturing sector.

The departure of a number of key businesses can have a salutary effect on the local unit. To retain remaining businesses and attract new concerns, the local unit is motivated to identify its deficiencies and implement the appropriate remedies. These municipalities should compete with those locations which offer new and/or efficient infrastructures, attentive municipal officials and more favorable local tax treatment, including tax abatement.

The anti-raiding provision was never intended to discourage Michigan manufacturers from cost-effective consolidation or relocating within the state for valid business reasons. It was not intended to insulate unresponsive or indifferent local governmental units from the crucible of the marketplace.

As a result of the lack of guidance to local units from the state legislature for the exercise of the delegated authority in the anti-raiding provision, some local governmental units have used the "anti-raiding" provision as a license to indulge in parochial behavior. Like rejected suitors, some local governmental units have taken the position that they will not, as a matter of public policy, grant such consent resolutions or that such resolutions will be granted but only upon the most punitive terms and restrictive conditions that the traffic will bear. This abuse frustrates the state's legitimate interests and the overall purpose of Act 198.

The legislature's failure to promulgate standardized criteria to direct the local unit's evaluation of these applications for consent resolutions has led some communities to assume that the local unit's grant or denial of a request for a consent resolution is wholly discretionary and that the local unit cannot be held accountable for an abuse of discretion. The language of the act, the rules of statutory construction, the state's policy and common sense do not support that interpretation.

A consent resolution is only required when the grant of tax abatement would have the effect of "a transfer of employment." Unfortunately, "Transfer of employment" is not defined in Act 198. There is no case precedent to assist local units or manufacturers and their counsel in determining what facts constitute a "transfer of employment." Whether consent resolutions are required in situations involving temporary transfers of employment, transfers of employment occasioned by mergers or acquisition, transfers which involve the consolidation of operations at a new Michigan site, transfers which involve small numbers of personnel from other locations within the state, or transfers of part-time personnel is unclear. Without legislative clarification, these matters will have to be decided by the courts.

It is a fair assumption that the legislature expected that the power delegated to local communities would be rationally exercised and in a manner consistent with the legislature's announced public policy. The statute requires that when the local unit withholds its consent, i.e., adopts a "resolution of denial," it must articulate on the record its *reasons* for denial. These reasons are forwarded to the State Department of Commerce. The word "reasons" implies that the local unit must have a rational basis for its denial. Requiring the local unit to report its action to a state agency also supports the view that the legislature intended that the local unit exercise this power in the context of and in a manner consistent with the state's policy. The text of the anti-raiding provision does not support the position that the legislature intended to confer on local units the ability to harry, obstruct or punish a manufacturer for implementing sound economic strategic planning.

Most local unit boards, commissions or councils are composed of citizens who volunteer their time and service to their communities. These citizen volunteers are expected to act in the context of furthering the state's policy. It is unfair and imprudent to ask these volunteers to implement state policy without guidance from the legislature.

Few municipalities have made the effort to codify standards or criteria for their legislative bodies to use when evaluating these consent resolutions. The adoption of standardized criteria for these applications will be a step in the right direction. Local governmental units will have a framework in which to exercise their discretion.

Legitimate areas of inquiry for the local unit are the number of jobs involved in the "transfer," whether the jobs are full-time or part-time, the kind of jobs involved (i.e., skilled, unskilled, high-tech, etc.), whether those jobs are critical to the community, whether the community would be likely to retain those jobs in the future if the resolution is denied, whether employees living within that local unit currently hold the jobs that will be transferred and, if so, whether the relocation will necessarily result in the termination of the jobs for those employees, whether there are jobs available in the local unit at comparable pay rates for displaced employees, and the identifiable economic impact, if any, that the adoption of a consent resolution is likely to have on the local unit.

A number of other Michigan statutes which confer tax benefits on manufacturers or other businesses also have transfer-of-employment provisions. These statutes, however, exempt from the consent resolution process transfers-of-employment which involve a de minimis impact on the local unit. In some cases, a state agency is given superintending control over the situation with the ability to override the local unit's negative action. Transfer situations which are exempt in similar Michigan statutes usually reflect those transfers in which less than twenty full-time jobs are involved. Surprisingly, not even these minimal protections exist in the anti-raiding provision of Act 198.

A particularly base practice has gained a foothold in some local units. These local units are inured to the practice of selling consent resolutions like medieval indulgences. This practice has been euphemistically referred to as exacting "quittance" payments. When a manufacturer has received tax abatement benefits from that local unit, a strong argument can be made that it should repay that unit before a consent resolution is granted. However, the "quittance" payment practice often occurs in situations in which the local unit has never granted a tax abatement benefit to the manufacturer. The local unit simply uses the occasion of the manufacturer's request for the consent resolution as an opportunity to extract from the departing manufacturer sums of money. There is no rhyme nor reason to the amount extracted. It is not authorized by the statute. It subverts the intent of the statute by imposing a greater burden on a manufacturer seeking tax abatement than the legislature ever anticipated. No right-minded person can argue there is inherent fairness in the practice of demanding quittance payments when there has been no tax abatement benefit conferred. Such a practice does not advance the state's scheme for a healthy and competitive manufacturing sector.

Approximately ten percent of all the Act 198 tax abatements which are granted involve consent resolutions by local units. These statistics do not reflect manufacturers whose transfer requests have been denied by local units. There are also no statistics to reflect those manufacturers who have tabled or abandoned their plans to relocate to a new community within this state because of a particular municipality's position vis-a-vis these resolutions. No statistics reflect whether the abuses of the anti-raiding provision by local units have encouraged manufacturers to remove themselves from the State of Michigan and relocate in other states where consent of the local Michigan unit is not a prerequisite for favorable tax treatment.

At present, the State of Michigan does not monitor resolutions of denial, nor does it exercise any supervisory control or superintending control over local units which adopt resolutions of denial and report "reasons" for the denial which are inconsistent or incongruous with the state's policy of encouraging tax abatement. The statute provides no appeal of whimsical or abusive decisions by local units. It does not prohibit "quittance" payments.

It is in the best interest of both the state and the local units that the Michigan legislature reform the anti-raiding provision of Act 198. Standardized criteria should be developed and provided to the local units to evaluate these consent resolutions. The anti-raiding provision should be amended to eliminate from local unit consideration de minimis transfers of employment. The anti-raiding provision should be amended to strictly prohibit the request or receipt in any form of so-called "quittance" payments except to the extent of any tax abatement actually granted to the departing manufacturer by that local unit. Finally, the legislation should provide for superintending control and review for abuses of discretion by the appropriate state agency.

These identifiable abuses need immediate correction in the current climate of intense global and national competition for manufacturing facilities. The failure to amend the anti-raiding provision will have the effect of encouraging the continued abuse of delegated authority by the local units. Reform will encourage efficiency and growth in not only the manufacturing sector but also the local governmental units. Local units will be discouraged from inefficiency and the imposition of burdensome or provincial practices on manufacturers. While these proposed reforms cannot insure in all cases that the power delegated to the local governmental unit will be properly exercised, they will eliminate some of the current practices which are counter-productive to the best interests and public policy of the state.

THE "SPECULATIVE BUILDING" DESIGNATION IN ACT 198

by *Paul J. Mastrangel and Thomas P. Martin**

In 1974, the Michigan legislature enacted Act 198, the "Plant Rehabilitation and Industrial Development Districts Act" (the "Act"), to stimulate economic development and promote a favorable business climate in Michigan for manufacturers. The Act provides substantial property tax incentives for new manufacturing facilities located in Michigan.

Industrial operations are among the projects eligible for tax abatement under the Act. The kind of industrial property eligible for tax abatement includes real property improvements, buildings, structures and personal property, e.g., machinery, equipment, furniture and fixtures. This eligibility for abatement applies whether the industrial property is owned or leased.

If the qualified industrial user is a lessee of the real and/or personal property for which tax abatement is sought, the lessee must be the one responsible for paying the ad valorem real property taxes under the terms of the lease. When a tenant is sought for personal property, the qualified lessee must also be the owner or lessee of the personal property. If a non-qualified entity is responsible for the payment of the real property taxes, neither the landlord nor the manufacturer can receive tax abatement on real or personal property taxes, even though the facility may be leased to a manufacturer.

Generally, to obtain tax abatement under the Act, the area in which the facility is located must be first designated by the local governmental unit as an Industrial Development District (IDD). The IDD must be established before an application for tax abatement can be approved. The request for an IDD must be filed with the clerk of the municipality before construction or

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acquisition of the facility occurs. An application for tax abatement must be submitted to the local governmental unit within six months of the date the physical work commences on the project for which the abatement is sought.

The local government unit can approve tax abatement for any period from one to twelve years. If the application for tax abatement is approved, the local governmental unit forwards the application and the resolution approving the application to the State Tax Commission. The State Tax Commission reviews all of the documentation submitted. If the Act's requirements are satisfied, the State Tax Commission issues an Industrial Facilities Exemption Certificate ("IFEC") exempting the qualifying facility from ad valorem real and personal property taxes. The qualifying property is then removed from the regular ad valorem tax rolls of the local governmental unit for the period for which tax abatement is granted and, instead of the normal ad valorem tax, the applicant pays a specific tax called the "Industrial Facility Tax" ("IFT"). The IFT is 50% of the normal ad valorem property tax.

In all cases but one, an application for tax abatement must be made within six months of the date physical work commences on the project. The Act provides for the tolling of the "six-month" rule only in the case of "speculative buildings." A "speculative building" is defined in the Act as:

> . . . a new building that meets all of the following criteria and the machinery, equipment, furniture and fixtures located in the new building:
>
> (a) The building is owned by, or approved as a speculative building by resolution of, a local governmental unit in which the building is located or the building is owned by a development organization and located in the district of the development organization.
>
> (b) The building is constructed for the purpose of providing a manufacturing facility before the identification of a specific user of that building.
>
> (c) The building does not qualify as a replacement facility. MCLA 207.553(8).

A qualified user who later takes occupancy of a building which has received a "speculative building" designation may obtain both real and personal property tax abatement under the Act. MCLA 207.560. The Act further provides that when tax abatement is granted to a qualified user, the effective date of the abatement is the December 31 next following the date that the speculative building or any portion of the speculative building is used as a manufacturing facility. MCLA 207.557(1).

Two kinds of "new" facilities are available to industrial users, the speculative building and what is commonly referred to as the "design/build" facility. In the design/build facility, the user consults with a builder/developer regarding the user's particular needs. After negotiations, the user and builder/developer enter into a contract to construct a facility tailored to the user's specifications. Work then commences on the construction of the facility. In the case of small manufacturing facilities, the time lapse from the execution of the contract to occupancy of the facility is generally less than one year.

The generic speculative building is a facility constructed by a builder/developer for sale or lease to a user or users who have yet to be identified. The size of the facility, the building and site layout, and the building's finishes are all determined by the builder/developer. The builder/developer makes these decisions based upon its experience and its prescience in anticipating future demands in the marketplace. Developers constructing generic speculative buildings design these facilities to be easily adaptable to the needs of a variety of industrial users.

A speculative building virtually eliminates the lag-time between the user's identification of its need for an industrial facility and its ability to take possession of that facility. A speculative building is ready for immediate occupancy. Speculative buildings are particularly attractive to industrial users who (a) do not have extraordinary operational requirements and so do not require facilities tailored for an unusual use, (b) do not have an opportunity to plan well in advance for their increased space needs and/or (c) who are temperamentally disinclined to assume the risks, delays or uncertainties that may be associated with a design/build process.

The Act's "speculative building" designation is only available for a "new" building constructed for or adaptable to use as a manufacturing facility. Rehabilitated or replacement buildings do not qualify as speculative buildings. The "speculative building" designation can be sought at any time from the date that the work on the improvement physically commences provided that the building has not yet been occupied. Once the building has been partially or completely occupied, it is no longer a "new" facility and can no longer receive the "speculative building" designation.

The Act does not specifically require that an IDD be created *before* a project can receive the speculative building designation. The language of the Act supports the interpretation that a project can receive a "speculative building" designation before creating an industrial development district. MCLA 207.553(8)(a). To date there are no published cases to guide counsel for the applicant or counsel for the local unit, nor has the State Tax Commission adopted any rules, regulations or policy statements on this issue. This interpretation, however, is consistent with the legislative intent and would, if adopted, encourage local governmental units to utilize the speculative building designation. Because the local governmental unit may be resistant to a request to create an IDD for a speculative building, the elimination of the requirement to create an IDD as a prerequisite to granting the designation should reassure the local governmental unit that it will retain all of its options vis-a-vis the later review of the request for the creation of an IDD and the actual application for tax abatement when a qualified user is ultimately identified.

The first step to obtain a "speculative building" designation under the Act is to apply by letter to the local governmental unit in which the facility is to be built. When the letter request for the designation and all accompanying documentation have been submitted, the request is scheduled for a public hearing before the governing body of the local unit. At the close of the public hearing, the local governmental unit may adopt a resolution designating the facility as a "speculative building" thereby tolling the six-month rule and saving the opportunity for tax abatement for a subsequently identified and qualified user.

Each local governmental unit has its own requirements for the kind, nature and extent of the information required to be included with the written request. Some local units have existing tax abatement policies which set forth, inter alia, the criteria that the facility must meet in order to obtain the "speculative building" designation. Some local governmental units have no comprehensive tax abatement policies or have policies which do not include criteria for the "speculative building" designation. There is a general resistance to the concept of speculative buildings receiving "tax abatement." This bias usually proceeds from a lack of familiarity with the concept and reflects the community's mistaken belief that a "speculator" is seeking favorable tax treatment at the expense of the community and other taxpayers. In these cases, the familiarization of the local governmental unit with the concept of the speculative building designation and its advantages to the community is necessary.

Facilities designated as "speculative buildings" under the Act are exempt from the general requirement that the application for tax abatement to be filed within six months of the date that the physical work on the project is commenced. The application for tax abatement by a qualified user can be filed *after* the expiration of the six-month period. The "speculative building" designation is intended to preserve for a qualified end-user the opportunity to apply for tax abatement after the expiration of the normal six-month period. The designation itself does not grant tax abatement for the facility to the builder/developer. It does not even commit the city to grant tax abatement to a qualified user except under such terms and conditions as may be acceptable to the city when the application is actually made.

A developer who constructs a speculative building and requests a "speculative building" designation under the Act should consider including in its application a statement that the facility *may* be leased out by portions or units. The written request should describe the number of units into which the facility may be divided, the square footage of each unit, and a statement that the developer reserves the right to later assemble some or all of the units into a larger unit or units. A sketch of each unit's location within the facility should also be provided. Care should be taken that each unit is configured in such a way that it can be easily assembled into a larger unit to suit the particular needs of a qualified user.

A builder/developer who gives a local governmental unit notice that the facility may be divided into units, describes the units by square footage, and provides a visual depiction of those units should anticipate that the local governmental unit will be disinclined to allow it to reduce the size of the several units at a later date. The recommended practice is that the builder/developer create individual "building block" units of such square footage and in such a configuration that each can be easily assembled into a larger unit to accommodate the qualified manufacturer.

The reason for including in the application the statement that the facility may be divided into units is to preserve the opportunity for tax abatement for a qualified user of less than the entire facility. Should a non-qualified user take possession of a portion of the facility before a qualified user and the application for the designation fails to include a statement that the facility may be divided into portions or units, the State Tax Commission has indicated that it will take the position that the entire facility loses its character as a "new" facility and that such an event forecloses the opportunity for tax abatement for a later qualified user.

Industrial areas which are eligible for tax abatement will tend to develop faster than similar property where abatement is not available. The "speculative building" designation can be effectively used by a local governmental unit to direct and accelerate industrial growth in targeted areas. These areas can be used as tools to realize a local governmental unit's specific goals, e.g., diversification of its tax base, diversification of its industrial base, increasing the tax base for special municipal projects, and diversion of new development traffic from already congested areas, etc. The "speculative building" designation and the development of objective criteria for the consideration of the application for that designation should be an integral part of a community's tax abatement policy.

Buildings which receive a "speculative building" designation can be warehoused in a municipality's inventory of industrial sites which are immediately available to qualified users seeking tax abatement. Unoccupied speculative buildings, or those ultimately occupied by users who do not qualify for tax abatement, remain on the municipality's tax rolls at the normal non-homestead tax rates. Even when a facility is designated as a "speculative building," the local governmental unit has the discretion to accept or reject the application of an otherwise qualified user, the authority to determine the number of years for which it will grant tax abatement (if it does approve an application) and the ability to impose upon a qualified user in a tax abatement agreement such conditions as the local governmental unit deems appropriate in connection with the grant of tax abatement.

RECENT DECISIONS

by *Joseph Lloyd*
Chard & Lloyd
201 E. Washington
Ann Arbor, Michigan 48104

Wayne County v William G. and Virginia M. Britton Trust, ___ Mich ___; ___ NW2d ___ (No. 104299, June 17, 1997)

Fixtures – rejection of SJI2d 90.20

In a condemnation case, the Supreme Court reviewed the law of fixtures, and held that a condemnee could elect either to receive the value in place of the fixture, or its detach/reattachment cost. The Court applied and affirmed the 3 part test for determining whether attached property is a fixture, as stated in **Morris v Alexander**, 208 Mich 387; 175 NW 264 (1919), and it discussed in detail the application of that test. Property is a fixture if (1) it is annexed to the realty, (2) its adaptation or application to the realty being used is appropriate, and (3) there is an intention to make the property a permanent accession to the realty.

The court reviewed the provisions of SJI2d 90.20, and found that it could permit a jury to conclude that almost any piece of property was a fixture, notwithstanding **Morris**. The lower courts were instructed to discontinue use of that instruction.

Walters v Snyder, ___ Mich App ___; ___ NW2d ___ (No. 193694 August 29, 1997)

Burden of Proof – Acquiescence – Adverse Possession

In a property dispute, one of the parties asserted ownership of a strip of land based both on adverse possession and based on acquiescence. The trial court held that the burden of proof on both claims was "clear and positive proof." The Court of Appeals reversed. The claim of adverse possession must be proven by "clear and cogent evidence", a standard approaching proof beyond a reasonable doubt. The acquiescence claim, however, required merely proof by a preponderance of the evidence.

Webb v Thurlow, ___ Mich App ___; ___ NW2d ___ (No. 185573, June 13, 1997)

Restrictive Covenants – Injunctive relief

As a cautionary tale, and in the Court's own words, "Defendants concede that they built their home on the property despite two deed restrictions that prohibited this construction. This case illustrates the folly of gambling on the prospect that Michigan's judicial system will ignore and fail to enforce the property rights of others. Defendants' gamble has resulted in the unfortunate outcome that they must now tear down the home that they built."

In this case, the building in question was placed on half of a platted lot. The restrictive covenant stated that "not more than one building shall be used for dwelling purposes on each lot." Defendants argued that they did not know of the deed restriction (although at the time of the first injunction against them, their house was not even framed.) They argued that damages would be a more appropriate remedy. They argued that the court should have "balanced the equities." They argued that their violation was "technical" and resulted in no substantial harm to the Plaintiffs. The Court patiently reviewed each such objection and rejected them all. It noted that, while the parties may yet negotiate a private agreement by which the home may stay, in the absence of such agreement, it must come down.

City of Rochester Hills v Schultz, ___ Mich App ___; ___ NW2d ___ (No. 193500, June 24, 1997)

Home occupation – sign ordinance

The question before the court was whether a zoning ordinance barring signs advertising a home occupation was an unconstitutional regulation of free speech. The trial court, affirmed by the Court of Appeals held that the ordinance was an unconstitutional restraint. The

Court noted that the business was not otherwise illegal. The ordinance was not an attempt to regulate commercial activity, but rather was an attempt to regulate commercial speech. Many other types of signs were legal, and there was no suggestion that home occupation signs were aesthetically more offensive than any other kind of sign. The ban was broader than necessary to serve the community's legitimate interests, and was struck down.

Brookshire Big Tree Association v Oneida Township, ___ Mich App ___; ___ NW2d ___ (No. 190488, August 22, 1997)

Subdivision Control Act – requirements for replat

The owner of land adjacent to a platted subdivision wished to develop his land. He acquired title to a vacant lot in the subdivision and applied to replat the land, using the vacant lot in the subdivision as a roadway for access to his other lands. Other property owners in the subdivision objected. The question before the court was whether the subdivision lot could be "replatted" as a roadway, without the consent of the other lot owners in the subdivision. The trial court, affirmed by the Court of Appeals, held that it was necessary to obtain the consent of owners of all of the lots in the existing subdivision before one of the lots could be used as roadway access to adjacent land.

CONTINUING LEGAL EDUCATION

by
Gail A. Anderson, Chairperson
and
Arlene R. Rubinstein, Administrative Assistant

HOMEWARD BOUND

The Real Property Law Section of the State Bar of Michigan is pleased to announce its twenty-first season of "Homeward Bound" Seminars under the direction of Lawrence M. Dudek of Miller, Canfield, Paddock & Stone in Detroit.

The 1997-98 Homeward Bound series begins Thursday, October 16, 1997 in Troy at the MSU Management Education Center, 811 W. Square Lake Road. The October seminar entitled "Practicing Before the Michigan Liquor Control Commission" will be presented by Terrance P. Conlin of Conlin & Associates, P.C. in Ann Arbor and Thomas J. Giachino of Abbott, Nicholson, Quilter, Esshaki & Youngblood, P.C. in Detroit. This seminar will include licensing matters, management agreements and co-licensing agreements, violations and hearings. The speakers will continue the program with a discussion of appeals to circuit court on licensing and violation matters including discussion of both the scope and standards for review.

The November 13, 1997 seminar entitled "Land Division in Michigan" will be presented by David E. Pierson of McClelland and Anderson, L.L.P. in Lansing and David W. Charron of Mika, Meyers, Beckett & Jones, P.L.C. in Grand Rapids. The speakers will speak on the Land Division Act and pending proposals to amend plat rules which are changing the map of statewide land regulation in Michigan for the first time in 29 years. This seminar addresses what is known and remains to be seen on how these amendments may affect the development of real estate in Michigan.

Joseph F. Galvin of Miller, Canfield, Paddock and Stone, L.L.C. in Detroit, Dean Nelson, M.A.I. and Jay L. Messer, M.A.I. of Dean Appraisal Company in Birmingham will speak on December 11 on "Real Estate Valuation: Problems and Proofs." The speakers will discuss methods for valuing ordinary and unusual real estate properties including leaseholds, subsidized projects and contaminated properties. Different approaches to presenting valuations persuasively to fact finders will be demonstrated.

Registration for individual seminars is $50 for members of the Section and $65 for non-members. A substantial savings can be made by purchasing a "Series Subscription": $250 for Section Members and $340 for non-members. Section members register for the full series and save $150!! A registration form is elsewhere in this issue. For more information, please call Arlene Rubinstein at 248-644-7378 or e-mail at LAWA1@aol.com.

MARK YOUR CALENDARS!

TWENTY-THIRD ANNUAL SUMMER CONFERENCE

JULY 22-25, 1998

TREETOPS SYLVAN RESORT

GAYLORD, MICHIGAN

(Continued on next page)

Set forth is a schedule of continuing legal education courses sponsored or co-sponsored by the Real Property Law Section through January 1998:

Key: HB = Homeward Bound
ICLE = *Courses co-sponsored by the Institute of Continuing Legal Education*

DATE	LOCATION	PROGRAM	TOPIC
October 16	Management Education MSU - Troy	HB	Practicing Before the Michigan Liquor Control Commission
November 13	Management Education MSU - Troy	HB	Land Division Act
December 11	Management Education MSU - Troy	HB	Real Estate Valuation: Problems and Proofs
January 22	Management Education MSU - Troy	HB	Representing the Condominium Unit Purchaser and Regulation of Cable and Satellite Update

"HOMEWARD BOUND" CONTINUING LEGAL EDUCATION PROGRAMS REAL PROPERTY LAW SECTION STATE BAR OF MICHIGAN 1997-1998 Schedule

Management Education Center
Michigan State University
811 West Square Lake Road
Troy, Michigan

October 16, 1997
PRACTICING BEFORE THE MICHIGAN LIQUOR CONTROL COMMISSION
Terrance P. Conlin of Conlin & Associates
Thomas J. Giachino of Abbott, Nicholson, Quilter, Esshaki & Youngblood, PC
(formerly with the Michigan Liquor Control Commission)

November 13, 1997
LAND DIVISION IN MICHIGAN
David E. Pierson of McClelland & Anderson, LLP
David W. Charon of Mika, Meyers, Beckett & Jones, PLC

December 11, 1997
REAL ESTATE VALUATION: PROBLEMS AND PROOFS
Joseph F. Galvin of Miller, Canfield, Paddock & Stone, LLC
Dean Nelson of Nelson Appraisal Company
Jay L. Messer of Nelson Appraisal Company

January 22, 1998
REPRESENTING THE CONDOMINIUM UNIT PURCHASER
AND
REGULATION OF CABLE & SATELLITE UPDATE
Mark F. Makower of Mark F. Makower & Associates, PC
Robert M. Meisner of Meisner & Associates, PC
Wayne G. Wegner of Wegner & Associates, PC

February 12, 1998
ENVIRONMENTAL ISSUES AFFECTING
THE REAL PROPERTY PRACTITIONER IN 1998
David H. Fink of Fink Zausmer, PC
Thomas C. Phillips of Miller, Canfield, Paddock & Stone, LLC

March 12, 1998
DEALING WITH NON-CONSENSUAL LIENS
Lawrence M. Dudek of Miller, Canfield, Paddock & Stone, LLC
John A. Stevens of Matheson, Parr, Schuler, Ewald & Jolly, LLP
Ronald P. Strote of May, Simpson & Strote, PC
C. Robert Wartell of Maddin, Hauser, Wartell, Roth, Heller & Pesses, PC

April 23, 1998
ANATOMY OF A RESIDENTIAL TRANSACTION
Gail A. Anderson of McClelland & Anderson, LLP
Mary M. Fowlie of Standard Federal Bank
Gregory J. Gamalski of Maddin, Hauser, Wartel, Roth, Heller & Pesses, PC
Michael D. Mezey of Stewart Title Guaranty Co.
Gregg A. Nathanson of Couzens, Lansky, Fealk, Ellis, Roeder & Lazar, PC

May 21, 1998
THE IMPACT OF BANKRUPTCY ON COMMERCIAL REAL ESTATE LEASES
Overview of Bankruptcy Law Affecting Commercial Real Estate Leases
Clay E. Ottoni of Clay E. Ottoni, PC
Was the Lease Terminated Before the Tenant Filed Bankruptcy?
Austin M. Hirschhorn of Austin M. Hirschhorn, PC
Larry R. Shoffner of Jaffe, Raitt, Heuer & Weiss, PC
What Happens to the Lease's Bankruptcy Clause if the Tenant Files Bankruptcy?
Donald J. Hutchinson of Miller, Canfield, Paddock & Stone, LLC
Mark P. Krysinski of Jaffe, Raitt, Heuer & Weiss, PC
Special Bankruptcy Issues Affecting Shopping Center Leases
Robert D. Gordon of Erman, Teicher, Miller, Zucker & Freedman, PC
Andrew S. Conway of Miro, Weiner & Kramer, PC

(Continued on next page)

1997-1998
HOMEWARD BOUND SERIES SUBSCRIPTION
REGISTRATION FORM

______ I am a member of the Real Property Law Section and my check for $250 is enclosed.

______ I am not a member of the Real Property Law Section and my check for $340 is enclosed.

______ I would like to become a member of the Section. Enclosed is my $25 membership fee; please send my application.

Name ____

Firm Name ____

Address ____

City ______________________ State __________ Zip __________

Telephone ______________________

Michigan Bar Membership Number ______________

Method of Payment: ____Check ____Visa ____MasterCard Total $________

Name as it appears on credit card ______________________________

Account Number ______________________

Signature ____

Single Registration will be as follows:
Section Member: $50 Non-Section Member: $65

Mail with your payment to: Real Property Law Section
State Bar of Michigan
P.O. Box 473
Birmingham, Michigan 48012

HELP FOR THE HOMELESS

The Real Property Section of the State Bar of Michigan has been asked to assist the Detroit/Wayne County Homeless Action Network to provide advice on developing low income housing in the Detroit/Wayne County area to assist the homeless.

Who are the homeless in Wayne County? In Detroit at least 25,000 people experience homelessness each year. Homeless families are the fastest growing segment of Detroit's homeless population. The majority of homeless women and many of the children are fleeing domestic violence and abuse. The head of one of Detroit's leading charitable organizations indicated the mean age of the homeless is nine. For many people, homelessness is a temporary crisis due to first losing a job and then their housing through eviction or foreclosure. Some of the homeless are presently working at low income jobs but cannot afford existing housing.

What is the Detroit/Wayne County Homeless Action Network? The Detroit/Wayne County Homeless Action Network is a coalition of homeless service providers, advocates, homeless and formerly homeless people and other individuals concerned about homeless people who attempt to develop and carry out strategies to create permanent solutions to homelessness.

Legal expertise and/or development expertise is needed, on a pro bono basis, to advise on organizing entities (i.e., non profit corporations or partnerships), on how to obtain, develop and manage additional low income housing, and especially on how to obtain financial assistance for the additional low income housing from organizations such as HUD, area banks or other governmental and private sector institutions. Do you have experience in the area of low income housing? Would you like to help others? If so please contact Alan Schwartz at (313) 496-7528 or Jack Shumate at (248) 258-1405.