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Letter from the Chair

Warning! This Envelope Contains "Advertising Material": Why A Proposed Amendment to Michigan's Rules of Professional Conduct is A Bad Idea

by: Thomas F. Cavalier

Michigan lawyers may soon have to place a warning label on many communications with prospective clients. Under a proposed amendment to the Michigan Rules of Professional Conduct, the words "Advertising Material" must be prominently displayed on every written, recorded or electronic communication from a lawyer seeking professional employment from many prospective clients. The Section has come out against the proposed amendment, which, if adopted, would become Mich. Rules Prof'l. Conduct R. 7.3(c). In its public policy report to the State Bar last November, the Section pointed out that the proposal is "too broad" and addresses concerns "dealt with already by the prohibition on deceptive advertising[.]"[1] The Section urges the Michigan Supreme Court to reject the proposed amendment.

The proposal states that "[e]very written, recorded, or electronic communication from a lawyer that seeks professional employment from a prospective client shall include the words 'Advertising Material' prominently featured on the outside envelope, if any, and at the beginning and ending of any written, recorded or electronic communication, unless the lawyer has a family or prior professional relationship with the recipient."[2] It is based on ABA Model Rules of Prof'l. Conduct R. 7.3(c).[3] But the Michigan rule covers far more territory than its inspiration.

The Model Rule is limited to "soliciting" professional employment from prospective clients "known to be in need of legal services in a particular matter," so-called "targeted solicitations." Michigan's proposal extends the labeling requirement well beyond that practice. The requirement covers any communication that "seeks" professional employment from a prospective client whether or not the prospective client is "known to be in need" of legal services in a specific matter. The replacement of "solicits" with "seeks" is telling. Michigan defines "solicitation" to expressly *exclude* written targeted solicitations.[4] The term "seeks", being undefined, has no such limitation. The use of "seeks," rather than "solicits," and the deletion of the "known to be in need" restriction leave no doubt that, under the proposed amendment, *any* written, recorded or electronic communication from a lawyer seeking employment from non-exempt prospective clients, however general or specific the audience, must bear the "Advertising Material" label.

Most states have adopted "advertising" labeling rules.[5] Seventy-five percent of them have some form of the "known to be in need" limitation.[6] Relying on that limitation, ethics boards have decided that the "Advertising Material" label is not required for a law firm's newsletter sent to a wide variety of recipients[7], an attorney's brochure sent to people he met at a seminar[8], and a newspaper article about a law firm sent to the president of a corporation.[9] Michigan's proposed amendment requires all of these communications to bear the "Advertising Material" label since they all seek employment from prospective clients, even though they are not targeted at people with specific legal problems.

The broad scope of the proposed amendment implicates an attorney's First Amendment right to freedom of speech. After decades of suppression by the states, attorney advertising was recognized as protected "commercial speech" by the Supreme Court in its 1977 decision, *Bates v. State Bar of Arizona.*[10] *Bates* dealt with mass advertising to the general public, but freedom of speech protection was later extended to written targeted solicitations.[11] A restriction on non-misleading commercial speech concerning a lawful activity complies with the First Amendment if it "directly advances" a substantial governmental interest and is "n[o] more extensive than is necessary to serve that interest."[12] The standard is less exacting, however, when the government compels the commercial advertiser to engage in speech, like requiring a disclosure or warning. A commercial advertiser's interest in

avoiding such "forced speech" has been called "minimal."[13] Still, the government does not have complete freedom in this area – the disclosure requirement must be "reasonably related to the State's interest in preventing deception of consumers."[14]

Labeling communications to prospective clients as "Advertising Material" is supposed to "prevent deceptive solicitations."[15] The disclosure "forewarn[s] the recipient of the nature of the communication."[16] Thus, the proposed amendment is intended to dispel the mistaken belief that a communication from an attorney seeking professional employment is something *other than advertising.*

The labeling requirement is reasonably related to achieving that purpose only if the public is likely to confuse unlabeled attorney advertising with something else. That might be true if this type of communication with the public were rare or unexpected. But thirty-three years after *Bates* was decided, advertising by attorneys is commonplace. Attorneys run commercials on late-night television, take out full-page ads in telephone books and raise billboards over busy freeways. Other attorneys send newsletters, hold seminars and enter "beauty contests." In this environment, no one would think that the televised pitch from a personal injury lawyer or the emailed newsletter from a corporate law firm is anything but advertising.[17]

There seems to be no evidence that the public mistakes attorney advertisements for something else. The comments to the ABA Model Rule cite none. The Supreme Court has said that evidence of deception is unnecessary if the "deception is . . . self-evident."[18] But it is rarely self-evident that the nature of attorney advertising is concealed.

Advertising a lawyer's services is to make information about those services "publicly and generally known."[19] So, to recognize a public communication from an attorney as an advertisement is simply to understand that it provides information about the lawyer. Certainly, consumers who read or hear an advertisement from an attorney know that they are getting information about the lawyer. Thus, there is no consumer deception to be remedied by the labeling requirement.

Any danger of deception lies in the labeling requirement itself. Many communications seeking professional employment are not "advertisements" because they do not make information about the lawyer "publicly and generally" known. Sending an email to a prospective client inviting her to lunch or mailing an article on a legal topic to a prospective client are not "advertisements" as understood by the ordinary man or woman. Labeling them as such can only confuse the public.

Conceivably, some advertising could be misunderstood as something else. Featuring a name-brand product in a movie in the guise of a prop is a familiar example. Although "product placement" in a movie is ill-suited to legal services, a lawyer might disguise an advertisement in a magazine as an article on a substantive topic. Vulnerable and unsophisticated people may also be at risk. An elderly widow might misconstrue an attorney's mass-mailed invitation to a luncheon estate planning seminar as a gesture of friendship.

These situations, however, are rare and are best dealt with on a case-by-case basis. And, as the Section's public policy report pointed out, the rules prohibiting deceptive advertising already cover them. Mich. Rules Prof'l. Conduct R. 7.1(a) bars an attorney from engaging in a "public communication" that "omit[s] a fact necessary to make the statement considered as a whole not materially misleading[.]" The rule permitting advertising is expressly subject to this prohibition.[20] So, if a particular communication from a lawyer to a prospective client would be materially misleading without the label "Advertising Material", Mich. Rules Prof'l. Conduct R. 7.1(a) already prohibits it. In fact, one state has declined to adopt Model Rule 7.3 (c) because "[t]he prospective client harassment, deception and lawyer overreaching concerns are amply addressed by the dictates in Model Rules 7.1 and 7.2."[21]

Ethical rules are supposed to protect the integrity of the legal profession and promote the public's confidence in it. The labeling requirement will have the opposite effect. The label will tell the public that advertising by attorneys, however informative and helpful, is still suspect, and to be handled with care. The label will reinforce biases that no true professional advertises, that clever lawyers advertise to trick clients into purchasing unneeded services or to stir up frivolous litigation. These prejudices were swept away decades ago by *Bates* and should not be let back in now.

ENDNOTES

1. The Section's public policy position is found at http://www.michbar.org/litigation/pdfs/ppolicy2002-24pdf. It was prepared by Dan McGlynn and Mike Donnelly, Co-Chairs of the Legislative and Rules Committee, and adopted by the Council with minor changes on November 17, 2010.

2. It goes on to provide that "[i]f a written communication is in the form of a self-mailing brochure, pamphlet, or postcard, the words 'Advertising Material' shall appear on the address panel of the brochure, pamphlet or postcard."

3. The Model Rule says that "[e]very written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words 'Advertising Material' on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is [another lawyer, or has a family, close personal or prior professional relationship with the lawyer.]"

4. Mich. Rules Prof'l. Conduct R. 7.3(a) "nor does the term 'solicit' include 'sending truthful and non-deceptive letters to potential clients known to face particular legal problems' as elucidated in *Shapero v Kentucky Bar Ass'n,* 486 US 466, 468; 108 S Ct 1916; 100 L Ed 2d 475 (1988)."

5. Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Florida, Iowa, Louisiana, Maryland Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Virginia, Vermont, Tennessee, Texas, West Virginia, Wisconsin and Wyoming.

6. The exceptions are California (Rule 1-400 (Standards) (5)), Kentucky (SCR 3.130 (7.25)), Florida (Rule 4-7.4(b)(2)(B)), Iowa (Rule 32.7.3(d)), Nebraska (Rule 3-507.3(c)), Nevada (Rule 7.3(b), (c)), New York (Rule 7.1(f)), Tennessee (Rule 7.3(c)(1)) and Virginia (Rule 7.2(d)(3)).

7. CT Eth. Op. 99-49, 1999 WL 33115199 (Conn. Bar Ass'n.). *Compare* Utah Eth. Op. 02-02, 2002 WL 231940 (Utah St. Bar). Utah's version of Rule 7.3(c) that was in effect in 2002 required written communications soliciting professional employment to display the "Advertising Material" notice even if the prospective client was not known to be in need of legal services in a particular matter. Under that rule, Utah's Ethics Advisory Opinion Committee concluded that the notice was required for a "newsletter, alert or brochure [that] encourages the recipient to engage the firm's services or contact the firm for further information, extolls the firm's expertise or otherwise contains an offer to provide legal services[.]" Utah later amended the rule to limit its application to prospective clients "known to be in need of legal services in a particular matter[.]"

8. SC Adv. Op. 97-05, 1997 WL 582910 (SC Bar Eth. Adv. Comm.).

9. CT Eth. Op. 96-15, 1996 WL 404992 (Conn. Bar Ass'n.).

10. *Bates v. State Bar of Arizona,* 433 U.S. 350; 97 S.Ct. 2691; 53 L.Ed.2d 810 (1977).

11. *Shapero v. Kentucky Bar Ass'n.,* 486 U.S. 466 (1988).

12. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n. of N.Y.,* 447 U.S. 557, 566 (1980).

13. *Zauderer v Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U.S. 626, 651 (1985).

14. *Milavetz Gallop & Milavetz, P.A. v. U.S.,* – U.S. – ; 130 S.Ct. 1324, 1339-1340; 176 L.Ed.2d 79 (2010) quoting *Zauderer,* 471 U.S. at 651.

15. Maine Rules Prof'l. Conduct R. 7.3, Reporter's Notes – 2009.

16. 2006 NC Eth. Op. 6, 2006 WL 6135369, * 2 (NC St. Bar).

17. *See* Utah Rules of Prof'l. Conduct R. 7.3, Comment ("Lawyer solicitations in public media that regularly contain advertisements do not need the 'Advertising Material' notice because persons who view or hear such media usually recognize the nature of the communication.")

18. *Zauderer,* 471 U.S. at 652-653.

19. CT Eth. Op. 99-49 quoting WEBSTER'S NEW COLLEGIATE DICTIONARY.

20. *See* Mich. Rules Prof'l. Conduct R. 7.2(a).

21. Maine Rules Prof'l. Conduct R. 7.3 – Reporter's Notes, 2009.

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Discovery in the United States in Aid of International Arbitration

by: Frederick A. Acomb & Mary Kate Griffith

Parties involved in foreign litigation have long had at their disposal a useful tool for obtaining discovery in the United States. 18 U.S.C. § 1782(a) authorizes a United States district court to order a person "resid[ing] or found" in the district to give testimony or produce documents "for use in a proceeding in a foreign or international tribunal ...."[1]

Prior to 2004, the prevailing view was that § 1782(a) could not be used to obtain discovery in aid of private international arbitration. The United States Circuit Courts for the Second Circuit and the Fifth Circuit had both held that § 1782(a) does not authorize United States district courts to compel discovery in aid of private international arbitration.[2] In reaching that result both courts held that an arbitration panel was not a "tribunal" within the meaning of § 1782(a).[3]

Then in 2004, the United States Supreme Court decided *Intel Corp. v. Advanced Micro Devices, Inc.*[4] The Court held that the European Union's primary antitrust enforcement body, the Directorate-General of Competition for the Commission of the European Communities, was a "tribunal" within the meaning of §1782(a).[5] In reaching this result the Court noted that in 1964, Congress had broadened the statute from merely covering "any judicial proceeding pending in any court in a foreign country" to more expansively covering a "proceeding in a foreign or international tribunal."[6] The Court quoted a Senate Committee report stating that Congress used the word "tribunal" in order to "ensure that 'assistance is not confined to proceedings before conventional courts.'"[7] The Court in dicta cited to a scholarly article that stated that the word "tribunal" included "investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional . . . courts."[8]

In concluding that the Directorate-General of Competition for the Commission of the European Communities was a "tribunal" within the meaning of the statute, the Court emphasized that this body "acts as a first-instance decision maker" in a "proceeding that leads to a dispositive ruling" that is reviewable by European courts.[9]

The *Intel* Court did not specifically address whether a private international arbitration panel is a "tribunal" within the meaning of the statute. The decision has led some courts to answer this question in the affirmative, and others in the negative.

Courts Holding That Private International Arbitration Tribunals Are Not Covered Under § 1782(a). In *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa,*[10] the United States Circuit Court for the Fifth Circuit held that *Intel* provided no authority for the notion that a private international arbitration panel is a "tribunal" within the meaning of § 1782(a)."[11] The court held that *Intel* was limited to finding that the Directorate-General of Competition for the Commission of the European Communities was a "tribunal" within the meaning of the statute.[12] The court thus refused to allow discovery in aid of an arbitration conducted before a Swiss arbitral panel under the United Nations Commission on International Trade Law ("UNCITRAL").[13]

In *In re Arbitration between Norfolk Southern Corp., Norfolk Southern Railway Co., & General Security Insurance Co. & Ace Bermuda Ltd.,* the United States District Court for the Northern District of Illinois likewise held that *Intel* was silent on the issue whether purely private arbitrations are covered under the statute.[14] The court distinguished

purely private arbitrations established by contract from arbitrations under the UNCITRAL, a body established by its member states, holding that the former are not covered under the statute.[15]

In *In re Operadora DB Mexico, S.A. de C.V.,* the United States District Court for the Middle District of Florida held that a party could not obtain discovery in aid of an arbitration conducted under the International Chamber of Commerce ("ICC").[16] The court held that, unlike the Director-General of Competition for the Commission of the European Communities at issue in *Intel*, the ICC arbitral panel does not act as a first-instance decision-maker whose decision is subject to judicial review.[17]

Courts Holding That Private International Arbitration Tribunals Are Covered Under § 1782(a). Other courts have reached the opposite conclusion. For example, in *In re Roz Trading Ltd,* the United States District Court for the Northern District of Georgia held that a panel of the Vienna International Arbitral Centre ("VIAC") was a tribunal under §1782(a),[18] emphasizing that it is widely accepted that the word "tribunal" includes arbitration panels.[19]

In *In re Hallmark Capital Corp,* the United States District Court for the District of Minnesota held that a private commercial arbitration panel in Israel was a "tribunal" under §1782(a),[20] emphasizing that the word "tribunal" commonly includes arbitration panels.[21] In *In re Babcock Borsig AG and Comision Ejecutiva Hidroelectrica del Rio Lempa v. Nejapa Power Co.,* respectively, the United States District Courts for the Districts of Massachusetts and Delaware held that the ICC was a "tribunal" under the statute.[22]

New Trend? – A Functional Analysis. In the last couple of years a number of courts have applied what they call a "functional analysis test" to the decision whether an arbitral body is a tribunal under the statute. The functional analysis test inquires whether the arbitral body functions as a first-instance decision-maker whose decision is subject to judicial review.[23]

In *In re Winning (HK) Shipping Co.,* the United States District Court for the Southern District of Florida emphasized that the unidentified English arbitral body at issue in the case was a first-instance decision-maker whose decision would be subject to judicial review.[24] The arbitration award could be appealed to the English Courts and the parties did not waive their right to judicial review.[25] Accordingly, the body was a foreign "tribunal" under § 1782(a).[26]

In O*JSK Ukrnafta v. Carpatsky Petroleum Corp.,* the United States District Court for the District of Connecticut held that a party could obtain § 1782(a) discovery in aid of an arbitration under the Arbitration Institute of the Stockholm Chamber of Commerce ("AISCC").[27] In reaching this result the court emphasized that the AISCC would act as a "first-instance decision maker" whose award was subject to review by the Swedish courts.[28]

In *In re Operadora DB Mexico, S.A. de C.V.,* the United States District Court for the Middle District of Florida held that a party could not obtain discovery in aid of an ICC arbitration because the panel's decision was not subject to judicial review.[29]

Conclusion. As of this writing there is no published opinion by the United States Circuit Court for the Sixth Circuit on whether an international arbitration panel is a tribunal within the meaning of § 1782(a). Nor is there any such opinion by the United States District Courts for the Eastern and Western Districts of Michigan. Hence lawyers seeking or opposing discovery in aid of private international arbitration from persons in Michigan will need to rely on the cases decided above in arguing their respective positions.

ENDNOTES

1. 28 U.S.C. § 1782(a).
2. *Nat'l Broad. Co. v. Bear Stearns & Co.,* 165 F.3d 184, 191 (2d Cir. 1999); *Republic of Kaz. v. Biedermann Int'l,* 168 F.3d 880, 883 (5th Cir. 1999).
3. *Nat'l Broad. Co. v. Bear Stearns & Co.,* 165 F.3d 184, 191 (2d Cir. 1999); Republic of *Kaz. v. Biedermann Int'l,* 168 F.3d 880, 883 (5th Cir. 1999).
4. *Intel Corp.,* 542 U.S. 241 (2004).
5. *Id.* at 257-58.
6. *Id.* at 248-49.
7. *Id.* at 249 (quoting S. REP. NO. 1580, at 7 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 3782, 3788).
8. *Id.* at 258 (quoting Hans Smit, *International Litigation Under the United States Code,* 65 COLUM. L REV. 1015, 1026-27 (1965)).
9. *Id.* at 255, 258-59.
10. *El Paso Corp.,* 341 Fed. Appx. 31 (5th Cir. 2009).
11. *Id.* at 34.
12. *Id.*
13. *Id.*
14. *Norfolk,* 626 F. Supp. 2d 882, 885 (N.D. Ill. 2009).
15. *Id.* at 886.
16. *Operadora,* No. 6:09-cv-383-Orl-22GJK, 2009 WL 2423138, at *12 (M.D. Fla. Aug. 4, 2009).
17. *Id.* at *9-11.
18. *Roz Trading,* 469 F. Supp. 2d 1221, 1225-26 (N.D. Ga. 2006).
19. *Id.*
20. *Hallmark,* 534 F. Supp. 2d 951, 957 (D. Minn. 2007).
21. *Id.* at 954-55.
22. *In re Babcock Borsig AG,* 583 F. Supp. 2d 233, 240 (D. Mass. 2008); *Comision Ejecutiva Hidroelectrica del Rio Lempa v. Nejapa Power Co.,* No. 08-135-GMS, 2008 WL 4809035, at *2 (D. Del. Oct. 14, 2008).
23. *In re Winning (HK) Shipping Co.,* No. 09-22659-MC, 2010 WL 1796579, at *10 (S.D. Fla. 2010).
24. *Id.* at *8.
25. *Id.* at *9.
26. *Id.* at *10.
27. *OSJK,* No. 3:09 MC 265 (JBA), 2009 WL 2877156, at *4 (D. Conn. Aug. 27, 2009).
28. *Id.* (quoting *Intel Corp. v. Advanced Micro Devices, Inc.,* 542 U.S. 241, 258 (2004)).
29. *Operadora,* No. 6:09-cv-383-Orl-22GJK, 2009 WL 2423138, at *9-12 (M.D. Fla. Aug. 4, 2009).

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Recognizing Patterns in Legal Arguments: Bosanac's Litigation Logic

"Logic is the anatomy of thought." – **John Locke**

by: David C. Sarnacki

Paul Bosanac's Litigation Logic is essentially a 486-page, annotated flow chart. He has developed a three-page "Legal Logic Flow Chart" with a series of questions probing your opponent's arguments. Each question is followed by a Yes arrow and a No arrow leading to an informal fallacy. Having identified the flaw in your opponent's argument, you can now refer to the page number which leads to a comprehensive discussion of principles of logic.

Yes, it is a strange format for a book. The accompanying vocabulary may return you to a college philosophy class. And the prospect of flipping back and forth is not particularly enticing. Yet, that's exactly when things get interesting.

The annotated examples grab you with excerpts from the real world. Moments in legal history highlight the explanations of each informal fallacy. Bosanac includes quotes from trial transcripts and court opinions. Making appearances for your consideration: the Aryan Brother-hood, *Batson v Kentucky, Bush v Gore,* Dick Cheney, Bill Clinton, Jeffrey Dahmer, Clarence Darrow, Tom DeLay, Enron Corporation, Newt Gingrich, Adolph Hitler, Iran-Contra, King Henry VI, John McCain, Ronald Reagan, *Roe v Wade,* Winona Ryder, Scopes trial, Sesame Street, O.J. Simpson, and much, much more. Fascinating.

Bosanac uses legal examples to illustrate numerous techniques of argument. His premise is: "Legal arguments, just as arguments in ordinary discourse occur in patterns. Recognizing these patterns, and understanding their strengths and weaknesses, are the keys to effective argument."

Litigation Logic begins with the Legal Logic Flow Chart and uses two infamous examples (Winona Ryder and Tom DeLay) to demonstrate how to use the chart. The chart moves you through seven categories:

1. Does the argument's significance depend on the identity of an individual (or group)?

2. Does language create confusion?

3. Is there an emotional appeal?

4. Are there consequences associated with an argument?

5. Does the conclusion, or result, depend on questionable assumptions?

6. Does the conclusion relate to a whole or its parts?

7. Are statistics used to make the point?

Each of these questions leads to a set of subcategories, and those, in turn, lead to the fallacy within the argument. Each fallacy is discussed, explained and highlighted with the moments in legal history.

Bosanac summarizes the core principles of legal logic into four rules:

1. The number of informal fallacies in an argument is directly proportional to the fervor of the advocacy.

2. Informal fallacies usually travel in the company of other informal fallacies.

3. The best defense to an informal fallacy is an informal fallacy.

4. Use subtlety sparingly; keep the argument simple.

Bosanac developed his Litigation Logic almost as a hobby over many years. His "day job" was with the National Labor Relations Board, and he spent much "free time" researching examples for each of the more than 30 techniques of argument. His selections are relevant and engaging, and you will understand the underlying structure of arguments much better having studied them.

Strange and superficially uninviting. Fascinating, relevant and engaging. It's all here in the chapters that link philosophy, moments in history and the Legal Logic Flow Chart.

Paul Bosanac, LITIGATION LOGIC: A PRACTICAL GUIDE TO EFFECTIVE ARGUMENT (2009, American Bar Association). $129.95.

David C. Sarnacki practices family law, mediation and collaborative divorce in Grand Rapids, Michigan. He is a past Chairperson of three State Bar Sections: Family Law, Litigation and Law Practice Management Section. He is listed in ***Best Lawyers in America****.*

Piercing the Limited Liability Company Veil: An Excess of Judicial Power

by: Thomas F. Cavalier

In recent years, courts have assumed that the judge-made doctrine of "piercing the corporate veil" applies to limited liability companies ("LLC"), whose members, like corporate shareholders, enjoy immunity from the liabilities of the entity. An LLC member's immunity was created by the Limited Liability Company Act ("LLC Act")[1]. Except where the LLC's operating agreement imposes member liability, an LLC member has absolute immunity "[u]nless otherwise provided by law[.]"[2] That qualification raises an important question for courts considering piercing the LLC veil: By using the term "law," did the Legislature reserve for itself, to the exclusion of the courts, the power to create exceptions to otherwise absolute member immunity?

The courts that have considered piercing the LLC veil have rarely addressed this question Instead, they have extended to the LLC the veil-piercing criteria developed for corporations, without acknowledging the extension;[3] acknowledged the extension without justifying it,[4] or explained that equity can modify an LLC member's immunity, without analyzing the limits of that power.[5]

One circuit court, however, has looked closely at the statutory provision granting immunity. It concluded that the statute does not grant courts the power to extend the veil-piercing theory to an LLC.[6] As this article explains, that court's ruling was justified – courts lack the power to carve out an equitable "veil piercing" exception to what is an otherwise absolute statutory immunity.

A Veil-Piercing Overview

Michigan's courts have pierced corporate veils since the early 20th century.[7] There is no single test for disregarding the corporate form.[8] It will be ignored where one corporation is the "mere instrumentality" of the other,[9] where it is intended for "an improper use such as to avoid legal obligations,"[10] where one corporation so dominates and controls the other that "unjust loss or injury will be suffered" unless the controlling corporation is held liable,[11] or where there is a "community of interest" between the corporations.[12] Whatever the test, piercing the veil is an exercise of the court's equitable power.[13]

For generations, the veil-piercing doctrine was largely confined to the "veil" of a corporation. In the early 1990s, the Michigan Legislature, along with its counterparts in other states, created the limited liability company, which, like a corporation, shielded its owners – the LLC's members – from personal liability for the conduct of the entity. With the quick proliferation of LLCs came their inevitable involvement in litigation. Soon Michigan's state appellate and federal district courts started to apply the veil-piercing doctrine to LLCs.[14]

"Law" Is an Act of the Legislature

An LLC member's immunity from liability was created by section 501(4) of the LLC Act: "Unless otherwise provided by law or in an operating agreement, a person that is a member or manager, or both, of a limited liability company is not liable for the acts, debts, or obligations of the limited liability company."[15]

Here, the Legislature clothed LLC members with immunity from liability for the acts, debts, or obligations of the company "unless otherwise provided by law[.]" If "provided by law" means a statute, the judiciary may not fashion an exception, based on a

veil-piercing theory or otherwise, to an LLC member's statutory immunity. On the other hand, if the phrase refers to a court-made exception based on equity, then the courts may pierce the LLC veil using their equitable power. The court's power to pierce the LLC veil, therefore, turns on the proper interpretation of "law."

For over 125 years, the courts have understood the term "law" as used in a statute or the constitution to refer to an act of the Legislature. The specific language appearing in Section 501(4) – "provided by law" – has been construed as "provided by the Legislature." In the state constitution, where it appears in several places, "the phrase 'provided by law' permits action by the Legislature only."[16] The phrase, used in a statute, has been held to have the same meaning.[17]

The term "law," used in other statutory phrases, has long been interpreted to mean a legislative enactment. An early case held that "penal laws of this state" referred to state statutes. The court explained: "The term 'law,' as defined by the elementary writers, emanates from the sovereignty and not from its creatures. The legislative power of the state is vested in the state legislature, and their enactments are the only instruments that can in any proper sense be called laws."[18]

Similarly, the phrases "state law" and "laws of this state" have been viewed as referring to actions that emanate from the Legislature.[19] In *Wikman v. City of Novi*[20], the Court held that a statute granting the Michigan Tax Tribunal exclusive jurisdiction to review special assessments "under property tax laws" referred to "special assessments levied pursuant to statutes, municipal charters and ordinances." The term extended beyond statutes to municipal ordinances and charters only because municipalities derived their authority to levy special assessments from the Legislature: "[A]ny special assessment levied by a municipal corporation is levied under authority delegated by law from the Legislature. Therefore, such assessments are levied under the property tax laws . . . ."[21]

These authorities suggest that "law" refers to a legislative act. So, when the Legislature said an LLC member was immune "unless otherwise provided by law," it meant "unless otherwise provided by the Legislature." Thus, an exception to immunity based on a veil-piercing theory may not be grafted onto the statute by the courts. Such judicial action would not be a "law" within the meaning of section 501(3) of the LLC Act.

Piercing the LLC Veil Encroaches on the Legislative Domain

Interpreting "law" in Section 501(4) as a legislative act recognizes that the legislative and judicial branches of government have different functions, a division enshrined in the Michigan constitution's separation of powers clause.[22] The Michigan Supreme Court has explained that "[t]here is a distinction between legislative and judicial acts. The Legislature makes the law - courts apply it."[23] The legislative power to make law is prescriptive, looking to the future; the judicial power is descriptive, ascertaining existing rights. "To declare what the law *shall be* is legislative; to declare *what it is* or has been is judicial. . . . The legislature prescribes rules for the *future*. The judiciary ascertains *existing* rights."[24] The United States Supreme Court put it this way: "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. . . . Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power."[25] Because "courts cannot make laws"[26], they may not "usurp the lawmaking function of the Legislature[.]"[27]

When the Legislature said that an LLC member is not liable for the company's acts, debts or obligations unless otherwise "provided by law," it could only be talking about a liability to be created later by the Legislature, not determined to already exist by the courts. Before the LLC Act, there was no LLC member liability – or immunity – because there was no LLC law at all. Thus, when the Legislature conferred immunity on the LLC member with exceptions to be "provided by law," it was speaking about some "new rule" that "changes existing condi-

tions,"[28] that is, the existing condition of member non-liability. Fashioning new rules is what the Legislature does. It is not what the courts do. The judiciary declares "existing" rights; it determines what the law "is". Courts do not create liability otherwise barred by statute; rather they declare "liabilities . . . under laws supposed already to exist."[29]

Equity Is Not The Solution

An LLC member's statutory immunity cannot be overridden by equity. "Equity as a rule will follow the law[.]"[30] Thus, "[c]ourts of equity as well as of law, must apply legislative enactments in accord with the plain intent of the legislature."[31] Equity must be restrained even if the statute is unjustly harsh. "[C]ourts must be careful not to usurp the legislative role under the guise of equity because a statutory penalty is excessively punitive."[32]

There are no such concerns when equity is used to disregard the form of a corporation. Shareholder immunity is also created by statute, but that statute has an important exception. The Business Corporation Act states that, "unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he or she may become personally liable by reason of his or her own acts or conduct."[33] Allowing shareholder liability "by reason of his or her own acts or conduct" opens the door to the veil-piercing doctrine, which is based on the shareholder's own use – and misuse – of the corporate form. The LLC Act contains no such immunity exception based on an LLC member's own behavior.

An LLC member's immunity from liability was created by statute, and only the Legislature may carve out exceptions. Until the Legislature acts, courts should refrain from piercing the LLC veil.

ENDNOTES

1. Michigan Limited Liability Company Act, Mich. Comp. Laws §450.4101 (1993) *et seq.*
2. Mich. Comp. Laws §450.4501(4) (2010).
3. *See*, e.g., *RDM Holdings Ltd. v. Continental Plastics Co.,* 281 Mich. App. 678, 714-717, 762 N.W.2d 529 (2008).
4. *Travelers Indemnity Co. v. Employers Co., Inc.,* No. 04-cv-71494, 2006 U.S. Dist. Lexis 59461, *22-23 (E.D. Mich. August 23, 2006)("The theory of piercing the corporate veil should apply to LLCs in the same way it applies to corporations.").
5. *See,* e.g., *Trinc, Inc. v. Radial Wheel, LLC,* 2009 WL 606453, *4 (E.D. Mich., Feb. 25, 2009)("[T]here is an exception to this rule [that LLC members are not liable for the debts or obligations of the LLC] where the owners of a corporation (or LLC) have been guilty of fraud or other inequitable conduct so as to allow a court to pierce the corporate existence[.]") *Dietrich v. Stephens,* No. 05-cv-72113, 2010 U.S. Dist. Lexis 31464, *17-18 (E.D. Mich., March 30, 2010)("The corporate [i.e., LLC] veil should be pierced because no other meaningful remedy exists for Plaintiff. Ignoring a business structure is appropriate where the plaintiff has suffered an unjust loss.").
6. *Glen Meadows Condominium Association v. Westminster & Abbey Homes,* (Genesee County Circuit Court Case No. 07-087324-CH.).
7. *See,* e.g., *People v. Michigan Bell Telephone Co.,* 246 Mich. 198, 204, 224 N.W. 438 (1929)("[W]here a corporation is so organized and controlled and its affairs are so conducted as to make it a mere instrumentality or agent or adjunct of another corporation, its separate existence as a distinct corporate entity will be ignored and the two corporations will be regarded in legal contemplation as one unit.").
8. *Foodland Distributors v. Al-Naimi,* 220 Mich. App. 453, 456, 559 N.W.2d 379 (1996)("There is no single rule delineating when the corporate entity may be disregarded.").
9. *People v. Michigan Bell Telephone Co.,* 269 Mich. at 204.
10. *CMS Energy v. Attorney General,* 190 Mich. App. 220, 232, 475 N.W.2d 451 (1991).
11. *Gledhill v. Fisher & Co.,* 272 Mich. 353, 357-358, 262 N.W. 371 (1935).

12. *LA Walden & Co. v. Consolidated Underwriters,* 316 Mich. 341, 346, 25 N.W.2d 248 (1946). *See also Williams v. American Title Co.,* 83 Mich. App. 686, 698, 269 N.W.2d 481 (1978)("complete identity of interest"), *Allstate Ins. Co. v. Citizens Ins. Co. of America,* 118 Mich. App. 594, 600, 325 N.W.2d 505 (1982)("unity of interest").

13. *United Armenian Brethren Evangelical Church v. Kazanjian,* 322 Mich. 651, 658, 34 N.W.2d 510 (1948) ("[E]quity will look through and behind the legal entity of corporate existence whenever necessary to prevent injustice or right a wrong.").

14. *See,* e.g., *Brentwood Golf Club, LLC v. Brentwood Tavern, LLC,* 329 B.R. 802 (Bankr. E.D. Mich. 2005), *New Era Enterprises, Inc. v. Edward Kacos,* No. 03-cv-873, 2006 U.S. Dist. Lexis 24370 (W.D. Mich. March 24, 2006), *Theresita Dietrich v. Stephens,* No. 05-cv-72113, 2010 U.S. Dist. Lexis 31464 (E.D. Mich. March 10, 2006), *TCF National Bank v. Adobe Liquidations, LLC,* No. 286335, 2009 WL 4143818 (Mich. App., November 24, 2009), *RDM Holdings, Ltd.,* 281 Mich. App. 678, 762 N.W. 2d 529 (2008).

15. Mich. Comp. Laws §450.4501(4).

16. *People v. Bulger,* 462 Mich. 495, 510, 614 N.W.2d 103 (2000).

17. *Michigan Humane Society v. National Resources Commission,* 158 Mich. App. 393, 403, 404 N.W.2d 757 (1987)("The apparent limitation of the NRC's control over open seasons to those 'provided by law', that is, by the Legislature, suggests the omission of further authority [to establish open seasons] was intentional.").

18. *Fennell v. Common Council of Bay City,* 36 Mich. 186, 190 (1887). *See also Delta County v. City of Gladstone,* 305 Mich. 50, 53-54, 8 N.W.2d 908 (1943), *People v. Crucible Steel Co. of America,* 151 Mich. 618, 621, 115 N.W. 705 (1908).

19. *See Durant v. State Board of Education,* 424 Mich. 364, 387, 381 N.W.2d 662 (1985)("the term 'state law' as used in Const 1963, art 9, §29 means state statutes and agency rules."), *Lobaido v. Dept of Corrections,* 37 Mich. App. 171, 173-174, 194 N.W.2d 444 (1971)(state statute applied only to a conviction "of 'a felony or misdemeanor under the laws of this state.' This phrase refers only to violations of state statutes[.]").

20. *Wikman v. City of Novi,* 413 Mich. 617, 637, 322 N.W.2d 103 (1982).

21. *Wikman,* 413 Mich. at 636.

22. Mich. Const. art. 3, §2.

23. *In re Manufacturer's Freight Forwarding Co.,* 294 Mich. 57, 63, 292 N.W. 678 (1940) quoting *In re Application of Consolidated Freight Co.,* 265 Mich. 340, 343, 251 N.W. 431 (1933). *See also People v. Piasecki,* 333 Mich. 122, 145, 52 N.W.2d 626 (1952)("Under our system of state government, the Legislature makes the law, the governor executes it, and the courts construe and enforce it."), *Sutherland v. Governor,* 29 Mich. 320, 324 (1874)("Our government is one whose powers have been carefully apportioned between three distinct departments . . . . One makes the laws, another applies the laws in contested cases, while the third must see that the laws are executed.").

24. *In re Manufacturer's Freight Forwarding Co.,* 294 Mich. at 63 quoting *In re Application of Consolidated Freight Co.,* 265 Mich. at 343 (emphasis added.).

25. *Prentis v. Atlantic Coast Line Co.,* 211 U.S. 210, 226 (1908). *See also Johnson v. Kramer Bros. Freight Lines, Inc.,* 357 Mich. 254, 258, 98 N.W.2d 586 (1959)("The primary functions of the judiciary are to declare *what the law* is and to determine the rights of the parties conformably thereto.")(quoting 16 C.J.S. Constitutional Law §144, p. 687)(emphasis added.).

26. *People v. Detroit, GH&M Ry Co.,* 228 Mich. 596, 612, 200 N.W. 536 (1924).

27. *Lakehead Pipe Line Co. v. Dehn,* 340 Mich. 25, 35, 64 N.W.2d 903 (1954).

28. *Prentis,* 211 U.S. at 226.

29. *Id.*

30. *Daley v. City of Melvindale,* 271 Mich. 431, 436, 260 N.W. 898 (1935).

31. *City of Lansing v. Twp. of Lansing,* 356 Mich. 641, 650, 97 N.W.2d 804 (1959).

32. *Stokes v. Millen Roofing Co.,* 466 Mich. 660, 671, 649 N.W.2d 371 (2002).

33. Mich. Comp. Laws §450.1317(4).

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The Sale of Real Property Pursuant to Judicial Levy in Michigan

by: Scott Mancinelli*

Introduction

The sale of real property by a post judgment levy is a collection remedy which has been available to creditors in Michigan for well over one hundred years. Unfortunately, this remedy is rarely used and there are only a handful of cases elaborating on the procedure, most of which are seventy years old or more. This article will attempt to demystify the procedure and give step by step instructions for completing a sale by levy.

In Michigan, a Judgment Creditor must first obtain from the Court a Request and Order to Seize Property (SCAO Form MC19) for personal property before attempting to levy upon the debtor's real property. If the Request and Order to Seize Property comes back unsatisfied (as to personal property), then the Judgment Creditor may levy upon the debtor's real property. A levy executed on real property pursuant to MCL §600.6025, et.seq. is distinct from a judgment lien under MCL §600.2801 et. seq.[1] Even if the creditor does not presently wish to sell the real property, a levy can still be of substantial value in protecting a creditor's rights and should be recorded in all cases where real property of the debtor has been located.

It is important to conduct a preliminary investigation into the real property. You will want to verify the ownership and find out if any mortgages or liens are on the property by getting a title report and commitment for title insurance.

Generally, real property should not be levied upon unless sufficient personal property cannot be found within the county to satisfy the judgment.[2] MCL §600.6004. If it appears that an abundance of personal property was available, a debtor can have a levy on real estate set aside if a suit is filed prior to the sale.[3] However, the requirement of first exhausting attempts to collect upon personal property (within the county) before resorting to levying upon real estate has not been taken too stringently.[4] The general presumption will be that the levying officer did his or her duty and did not levy on real estate unless there was insufficient personal property within the county to satisfy the judgment. The court officer has some discretion in this regard. A claim that there was sufficient personal property will not be considered if it is brought up after the execution sale.[5]

Steps Required for an Execution Sale on Real Property

Preparing for the Sale

First, send a letter to the levying officer (usually the officer in the county where the real estate is located) along with the Request and Order to Seize Property and a proposed Notice of Levy on the real estate to be filed with the Register of Deeds to perfect the levy. To be valid, a levy must ordinarily be recorded before the expiration of the Request and Order to Seize Property (which is 90 days from the date it is issued). There is a fee for service of the order and levy and also for the officer's mileage. The Register of Deeds charges a recording fee of $14 for the first page and $3 for each additional page for recording the lien.

A Notice of Levy on realty must describe the property with sufficient accuracy to give fair and adequate notice of rights asserted. A notice describing the property incorrectly is no better than a mortgage or a conveyance which is defective.[6]

After recording the Notice of Levy, the officer will send you a copy. The sale must be completed within five years from the date the levy is issued pursuant to MCL §600.6051.

Second, if the property is homesteaded and appears to be worth more than $3,500, an appraisal of the real estate will be necessary. MCL §600.6025. The officer will sometimes send a notice to the debtor that an appraisal is being obtained and that the property will be auctioned off if the debtor does not satisfy the judgment within 60 days. This process can be skipped entirely for commercial property.

The appraisal required under MCL §600.6025 is not a detailed appraisal like that obtained by a bank in a foreclosure. The statute only requires six *"disinterested fee holders of the township or city where the property is located on oath administered by the court officer...shall make and sign an appraisal of the value of the property and the parts thereof, if it can be divided, and deliver such appraisal to the officer who shall deliver a copy of the appraisal to the debtor."* MCL §600.6025(1)-(3).[7] The defendant has no right to choose the appraisers.

The appraisal can be a simple one page form. It is not clear if there needs to be six different appraisals, or that the appraisers can all sign off on the same single appraisal assuming they agree on the value. According to MCL §600.6025(4), appraisers are entitled to two dollars per day for their services, and six cents per mile for traveling, which can be added to the debt at the sale of the property. From a practical perspective, the extremely low amount of the fees in the statute may make it difficult to find people who would be willing to act as an appraiser. However, the requirements of the statute are so minimal that the court officer could simply knock on the doors of the neighbors to the respective property, ask them what they think the property is worth and if they would sign the appraisal. There are no other specific requirements for the appraisal.

Under MCL §600.6027 if the homestead is appraised at more than $3,500, then the court officer shall deliver a notice with a copy of the appraisals to the debtor stating that unless the debtor pays the officer the surplus value of the property over and above the $3,500 homestead exemption, or the amount due on the Request and Order to Seize Property/Levy (whichever is less) within 60 days, the premises will be sold. The statute does not specify the manner of service, but it does indicate that it could be delivered to a member of the family of suitable age to understand the nature of the matter (so substitute service is sufficient). If this notice is not complied with, the property can still be sold, provided that it brings more than $3,500 at the sale and the homestead exemption in the amount of $3,500 is paid to the debtor following the sale. MCL §600.6059. The statute provides no guidance as to when the $3500.00 is paid to the debtor nor is there any case law on the subject. The most logical conclusion would be for the levying officer to pay it at the end of the redemption period, otherwise a redeeming debtor would receive a windfall. A creditor who is the highest bidder at the sale of the real property may not rely on the fact that it has a deficiency balance after credit for the sale to avoid paying the $3,500, nor can a creditor attempt to give the debtor a credit on the debt by applying the $3,500 exemption to the debt either. The $3,500 homestead exemption is the debtor's as a matter of right and once paid is exempt from subsequent execution by the creditor for one year.

The practical effect of the homestead exemption requires a creditor that is conducting the levy sale of the real property to provide a check to the court officer for $3,500 which will then be transferred to the debtor **if** that creditor intends to bid at the sale. The creditor may not add the $3,500 amount paid to the debtor for the homestead exemption to the amount owed or when calculating their bid amount.

The third step is the notification of the sale. Prepare a Notice of Sale for posting and publication which includes the time and place of the execution sale and describes the property with common certainty. The notice must be displayed in three public places for at least six weeks prior to sale in the township or

city where the real estate is to be sold. Unlike a typical foreclosure, it is not necessary to put the amount owed in the Notice. A copy of the Notice must be published once each week for the six successive weeks prior to the sale in a newspaper printed in the county in which the property is located (if there is no newspaper, then print in a newspaper of an adjoining county). Counsel should prepare Affidavits for the posted notices and prepare an Affidavit of Publication from the newspaper publisher (these are similar to those used in a foreclosure by advertisement — sometimes the newspaper itself will prepare the Affidavits). The sale must occur between 9:00 A.M. and 4:00 P.M. at the courthouse or other place where circuit court is held in the county where the real property is located, pursuant to MCL §600.6053.

Adjourning the Sale

If the officer who is conducting the sale adjourns the sale, he must give notice in the same newspaper where notice for the sale was published and post a notice at the location where the sale was to be held. MCL §600.6052(3). An execution sale may be postponed any number of times, as long as notice is given. MCL §600.6042. Thus, if settlement negotiations are in process with the debtor, the sale can be adjourned week to week until a deal is worked out.

Conducting the Sale

Prepare a Bid Sheet, a Certificate of Sale, and a Sheriff's Deed and forward to the levying officer. The bid sheet (assuming your creditor wishes to bid) should include the principal of the judgment, interest accrued up to the date of the proposed sale date, fees for publication, officer's fees, recording fees, and attorney fees if your judgment allows for post-judgment attorney fees. A sale by levy is exempt from transfer tax under MCL§207.526(l). Under a similar provision in the county transfer tax statute, it would appear that the county transfer tax is also exempt. See MCL §207.505(j).[8]

A Certificate of Sale by Judicial Levy must contain the following information pursuant to MCL §600.6055: a description of the property sold; the price bid for each distinct lot or parcel sold; the time when such sale shall become absolute, and the purchaser will be entitled to a deed (three months after the one year redemption period) *see MCL §600.6062 and MCL §600.6063. (6062 states three months after one year redemption period; 6063 states within three months after redemption period);* the rate of interest borne by the judgment for which the execution was issued.

At the sale, the officer should read the information from the Notice of Sale, including the legal description. The officer or his deputies cannot bid at the sale. As in a typical foreclosure, there does not appear to be any prohibition on the officer receiving a bid in advance from the creditor.

Pursuant to MCL §600.6056, if the sale includes multiple tracts, parcels or lots (such as in a real estate development), the levying officer must separately expose each for sale and no more lots, tracts, or parcels may be sold than is necessary to satisfy the execution, as well as costs and expenses of the sale. The judgment debtor may direct which parcel must be directed for sale first. If the judgment debtor has an undivided interest in several undivided or unpartitioned tracts with the same parties, then the debtor's interest may be sold as a single parcel. If the highest bidder refuses to pay, the levying officer may immediately resell the property. MCL §600.6054.

By statute, the court officer gets a percentage of the amount obtained at the sale. Under MCL §600.2559(h) and (i), the court officer will be entitled to the following fees: a) $35 plus round trip mileage; b) actual and reasonable expenses in seizing and keeping the property; and c) 7% of the first $5,000 of the payment or settlement and 3% of the payment or settlement amount exceeding the first $5,000. The court officer's fees may be added to the redemption amount. If there is a settlement prior to the sale, the court officer is still entitled to the statutory percentage of the settlement amount.

After the Sale, the Levying Officer Must Do the Following

When the execution is fully paid, satisfied or discharged, the officer must give each purchaser a copy of the Certificate of Sale (which counsel previously prepared and sent to the levying officer) at the sale and record the original with the Register of Deeds within 10 days. MCL §600.6055. When a payment is made to acquire the interest, title passes from the original execution sale purchaser to any purchasing creditor and to any other subsequent purchasing creditor. MCL §600.6066.

The final step in the execution sale is payment to the lien holders and judgment creditor. Pursuant to MCL §600.6044, if the property sold was subject to a valid lien (i.e. a mortgage), then the secured creditor gets paid first. Next is judgment debtor's exemption for exempt property sold (the homestead exemption on property less than three acres is $3,500 pursuant to MCL §600.6033). Third, the levying officer is paid his fees. Fourth, proceeds sufficient to satisfy the judgment are disbursed to judgment creditor. If the judgment creditor bid in a portion of the judgment, then the judgment would be reduced by that amount. Finally, if there are any remaining proceeds after the judgment is fully satisfied, then they are paid to the debtor. The debtor should receive a credit on the judgment for the amount of the winning bid as of the day of the sale. If the debt is satisfied, then a satisfaction of judgment should be filed with the court. (If the creditor is the high bidder, then it is prudent to wait until the end of the redemption period before filing the satisfaction.)

If the winning bidder is the judgment creditor, then the judgment creditor must submit payment to the levying officer based on the percentages set forth in MCL §600.2559(h) & (i).

The Debtor's Right of Redemption

Pursuant to MCL §600.6062, the debtor may redeem the property within one year. However, the creditor (or winning bidder) may verbally extend the time of redemption. The redemption amount is the bid price (at the execution sale) plus interest and cost of the sale (all officer fees, posting, publication, and appraisal fees). Interest is computed at the annual rate set forth in the judgment pursuant to MCL §600.6062(1) and MCL §600.6041. If the debtor redeems the property, then counsel for the creditor should send a letter to the officer telling him to cancel the sale and record a Release of the Levy and a Release of the Certificate of Sale with the Register of Deeds (if the property is redeemed, the sale is null and void). An Agreement for Release of Levy could also be used to inform the officer.

If the property is not redeemed within a year, then the purchaser's interest may be acquired three months later. MCL §600.6062. The officer must convey via a Sheriff's Deed any unredeemed real property to the purchaser pursuant to MCL §600.6069. The purchaser's sheriff's deed must be recorded within ten years — otherwise the Certificate of Sale shall become null and void.

If the Officer has not returned an original Sheriff's Deed following the sale, the winning bidder should write to the Officer immediately upon the expiration of the redemption period requesting that the original Sheriff's Deed be delivered. The winning bidder may then record the deed fifteen months and one day after the sale. Practically speaking, unless some previously unknown environmental contamination has been discovered, the winning bidder should always record the Sheriff's Deed promptly. If the property is vacant, the winning bidder may take possession at that time. If it is still occupied by the debtor or someone claiming a right by or from the debtor, an unlawful detainer action must be filed.

END NOTES

1. Judgment liens (SCAO form MC94) will apply even to real property that the debtor acquires after the Notice of Judgment is entered. MCL §600.2803. The statute does not address whether the lien attaches to property acquired in other counties, so a creditor must record a separate lien for each county that it believes the debtor owns property. However, a judgment lien is of minimal value, the only real effect it has is to cloud the title and prevent potential purchasers from getting a warranty deed and title insurance on any transaction on the property. Under MCL §600.2807(3) if a property subject to a judgment lien is sold or refinanced, the proceeds of the sale/refinancing due to the judgment creditor are limited to the judgment debtor's equity in the property at the time of the sale or refinancing, after all liens senior to the judgment lien, property taxes, costs and fees necessary to close the sale or refinancing are paid. Consequently, a savvy debtor who is aware of the law could still push forward with the sale or refinancing if he is willing to forgo the equity payment that he might receive. Even worse, Judgment Liens are dischargeable in bankruptcy under MCL §600.2809(d) simply by the judgment debtor recording a copy of his discharge in the bankruptcy case with the respective Register of Deeds Office. A levy can survive a bankruptcy filing to the extent that there is equity in the property and the lien does not impair an exemption of the debtor.

2. A court officer is not required to search for personal property outside the county. *Atwood v. Bears,* 45 Mich. 469 (1881).

3. *In re Dissolution of Field Body Corp.,* 240 Mich. 29 (1927).

4. See *Duro Steel Products, Inc. v. Neubrecht,* 303 Mich. 175, 6 N.W. 2d 474 (1942).

5. *Luton v. Sharp,* 94 Mich. 202 (1892); *Duro Steel Products, Inc. v. Neubrecht,* 303 Mich. 175, 6 N.W. 2d 474 (1942).

6. *Beyschlag v. VanWagoner,* 46 Mich. 91 (1881).

7. The requirement that the appraisers all be from the same township is not stringently enforced. See *Vanden Bogert v. May,* 334 Mich. 606, 55 N.W. 2d 115 (1952)(refusing to grant equitable relief from sale even though one of the appraisers was not a resident of the city in which the property was located where debtor failed to show any prejudice).

8. Although there is no case law on the subject, one treatise has indicated that a sale by levy is not exempt from transfer taxes. See MICHIGAN PRACTICE GUIDE: ENFORCING JUDGMENTS AND DEBTS (2006) § 6:317, Judge James D. Gregg, Linda C. Scheuerman, and Stephen S. LaPlante ["There is an exemption for a judgment or order of a court making or ordering a transfer of real property, unless the court specifies or orders specific monetary consideration for the transfer. [MCL § 207.526(l)]. While a transfer pursuant to execution sale would seem to fall within the spirit of this law, it does not fall within its letter. Not all counties, and not all clerks in all counties, will impose the tax for a transfer pursuant to an execution sale. The transferee's counsel should ask for the exemption (note that the debtor/transferor is unlikely to pay such a tax, so the transferee will normally pay)."]

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