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The Best Survey is a Recorded One

By Paul Thursam, Giarmarco, Mullins & Horton, PC

A recorded survey has special sanctity in Michigan. The original Michigan government survey GSO maps, for example, cannot be attacked as erroneous, even if incorrect. Additionally, Act 132 requires a "stake survey" be recorded if prepared for a property sale. MCL 54.211(2). Our courts have recognized a recorded survey's special significance—even if erroneous—for over 130 years:
" . . . if all the lines were now subject to correction on new surveys, the confusion of lines and titles that would follow would cause consternation . . . and the visitation on the surveyor might well be set down as a great public calamity." *Diehl v. Zanger*, 39 Mich. 601 (1878).

Michigan law further recognizes the "doctrine of repose": more recent surveys should not disturb long established, settled boundaries. *Adams v. Hoover*, 196 Mich. App. 646 (1992). The recent case of *Morelli v. Tudor* (Mich. Ct. App. No. 300621, May, 2012, unpublished) reminds again that recording a survey is the first step in settling a boundary. In *Morelli*, a surveyor prepared and recorded a survey in 1979 whose descriptions were used in subsequent conveyancing documents for 30 years without objection despite other unrecorded, conflicting determinations. In 1999, the county prepared a survey and established new corner markers without referencing the 1979 survey. The new corners produced new boundaries favorable to defendant, who promptly moved her fence 30 feet north. Plaintiff Morelli brought a quiet title action.

The Court of Appeals affirmed for plaintiff, relying on *res judicata* (plaintiff had previously sued to quiet title against defendant, and won). With a nod to its earlier decision, and citing favorably to the doctrine of repose, the Court of Appeals noted: ". . . there exists a clear public policy favoring consistency in determining the location of boundary lines." **The lesson? Record your survey.**

Court of Appeals Revitalizes Limited Application of Equitable Subrogation

By Richard A. Sundquist and Matthew W. Heron, Clark Hill PLC

Equitable subrogation allows a lender to substitute a debt instrument for its prior debt instrument without a change in the priority of its lien, even if its initial mortgage is replaced. Prior to *CitiMortgage, Inc. v. MERS*, 295 Mich App 72 (2011), the Michigan Court of Appeals limited this doctrine. In *Washington Mut. Bank v. Shorebank Corp.*, 267 Mich App 111 (2005), the Court suggested that the doctrine was inapplicable to a "generic refinancing transaction." In *Ameriquest Mortgage Co. v. Alton*, 273 Mich App 84 (2006), the court held that one seeking equitable subrogation must not be a "mere volunteer." In 2008, however, Michigan amended its race-notice statute, eliminating statutory sections upon which *Ameriquest* relied.

In *CitiMortgage*, the Court concluded that the doctrine "is available to place a new mortgage in the same priority as a discharged mortgage if the new mortgagee was the original mortgagee and the holders of any junior liens are not prejudiced as a consequence[.]" This holding adopts, in part, the rationale of Restatement (Third) Property § 7.3, but only as applied to the situations described in the commentary to § 7.3. The Court stressed that any mortgagee seeking subrogation and priority "must be the same lender that held the original mortgage before the intervening interest arose[.]. On remand, the *CitiMortgage* trial court found no prejudice to the second mortgagee where the new mortgage amount was the same and the interest rate was lower than the original mortgage. The case provides an analytical framework for practitioners to assess lien priority in transactions involving loan modifications or replacement mortgages.

Practitioners should carefully evaluate whether the new lender/borrower and old lender/borrower are identical, and potential prejudice to intervening lien claimants, before advising a client to rely on the priority of an old mortgage.

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