

An electronic newsletter for real estate professionals



From the Desk of

The Real e-ditor
Steven D. Sallen



Real Estate Licensees To Assume Added Responsibilities?

By: Danielle M. Spehar

When Your Customer Is Bankrupt, Paybacks Are

A ...

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Measuring Consumer Confidence ...

At The Animal Shelter

Meet Bear!

Our family pet was a mutt we rescued from euthanasia about ten years ago. He was an Australian Shepherd mix, with a big bark, scary yellow eyes and a huge appetite for small animals! The latter trait turned out to be a great asset, since our home backs up to a wetland. For the past ten years, we have joked that Charlie was "on the job!" For two cups of kibble a day, Charlie kept an invasion of swamp creatures at bay for us, and he loved every minute of his job; even getting skunked didn't seem to dampen his enthusiasm. I am convinced that Charlie supplemented his diet almost every day with a *Critter du jour*. Slowly, Charlie became a member of the family; he was loved for his good manners, luxuriant black coat and independent demeanor, and admired for his devotion to his tradecraft, Critter annihilation! Alas, Father Time caught up with Charlie a couple of weeks ago. A stroke left him disoriented and vacant; for the first time ever, a walk was out of the question, and food went uneaten. And then he was gone.

So off to the animal shelters and rescue leagues we went, in search of Charlie's replacement. For every dog we met, I would ask, "what's his story?" Some were strays; others damaged or sickly; still others were unemployed fighting dogs (at least that's what they looked like!) rescued by cruelty investigators. Then we met Bear. A four year old Labrador-Husky mix (so they say...). This dog was beautiful, and looked like a little Polar Bear, with a silky white coat, intelligent face, and ears that didn't know whether to stand or flop. Best of all, instead of barking and doing back-flips off-the-wall in his cage, Bear sat down next to the gate as if to conduct an interview with my son, Robert. 'Robert, will your home be a suitable and loving environment for me?' And, 'when you go back to college in the fall, will your parents care for me as you would?' When Robert walked away, Bear barked at him as if to say, 'let's follow-up with a second appointment!' This animal was special. He didn't belong in a shelter; he belonged in someone's home.

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On April 21, 2010 House Bill No. 6056 was introduced by Representative Gino Polidori to amend the Michigan Occupational Code by amending Section 2512 (MCL 339.2512) and adding Section 2516. If enacted in its current form, Section 2516 would provide:

Sec. 2516. A real estate salesperson shall do both of the following, as applicable:

(A) Convey an offer to purchase to the owner of real estate and, if an action for foreclosure has been commenced against the real estate, to the financial institution, bank, or other entity holding the mortgage. In the case of real estate subject to foreclosure, the offer shall be conveyed to the financial institution, bank, or other entity holding the mortgage during the time of the foreclosure action, including the redemption period.

(B) In the case of real estate subject to foreclosure, the real estate salesperson shall obtain, within 5 business days after receipt of the offer to purchase, a letter of acceptance or rejection from the financial institution, bank, or other entity holding the mortgage. The letter of acceptance or rejection shall be immediately conveyed to the offeror or the buyer's agent, as applicable. (emphasis added)

A real estate licensee who fails to complete both actions set forth in Sections 2516 may be subject to penalties including:

- Placement of a limitation on a license;
- Suspension of a license;
- Denial of a license or renewal of a license;
- Revocation of a license;

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The U.S. Circuit Court of Appeals recently issued an Opinion that warns of the dangers of doing business with a debtor in bankruptcy without undertaking appropriate due diligence. *In Marathon Petroleum Co., LLC v. Aaron R. Cohen (In re Delco Oil, Inc.)*, 599 F. 3d 1255 (11th Cir. 2010) the Court of Appeals held that Marathon Petroleum Co. was required to pay back \$2,000,000 it received from the Debtor for the sale of petroleum products because the \$2,000,000 was cash collateral subject to a lien in favor of CapitalSource Finance. The Court found that the transfer of \$2,000,000 was an unauthorized post-petition transfer of estate property and recoverable by the Chapter 7 Trustee appointed after the case was converted from a Chapter 11 proceeding.

"... when asked to act as a broker or salesperson for the sale of a bankruptcy debtor's property, brokers must obtain an order authorizing their retention as a professional under applicable Bankruptcy Code rules."

The message is clear. When doing business with a Chapter 11 bankruptcy debtor, do not assume that you will be protected if you receive money in payment for goods or services without knowing the status of secured credit and/or any cash collateral order. Persons doing business with bankruptcy debtors should demand a "comfort" order authorizing payment and/or consent of the secured creditor(s). The cash in the possession of the debtor may be subject to financing orders as a lien in favor of the secured creditor(s). Payment of such cash without proper approval may violate a court order and/or the rights of a secured creditor.

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Steve Sallen

RECLASSIFICATION OF PROPERTY BY THE STATE TAX COMMISSION THREATENS LOSS OF TAX INCENTIVES

BY: KASTURI BAGCHI AND MICHAEL K. HAUSER

Owners of industrial real estate and their advisers need to be aware of a current campaign by the State of Michigan to reclassify parcels of real property from “industrial” status to “commercial” status for property tax purposes. In June of 2010, approximately 10,000 owners of “industrial” real property or “industrial” personal property received a notice from the State Tax Commission (“STC”) of a state government effort to reclassify real property and/or personal property from “industrial” to “commercial” status for property tax purposes.¹ The notices typically state that, if the property owner chooses to object to the new classification, the owner can submit written information within a limited time period to support an “industrial” classification.

Many real property owners have been caught off guard by the notices, having no idea whether they will be negatively impacted by the loss of “industrial” status, and whether they should file an objection. Interestingly, a classification change for real property tax purposes will not ostensibly have a negative effect – in fact, both industrial and commercial real properties are taxed at the same tax rate, and the valuation of both types of properties is determined by the “true cash value” (which should not change based merely on a reclassification).² Professionals have speculated on whether assessors may change their determination of true cash value based on the classification of real property as commercial or industrial, but there does not appear to be a clear basis for doing so.

The question, then, is why is the State of Michigan attempting to change the classification of real property for property tax purposes? The answer appears to be that the State is taking an indirect approach to “take a bite” out of certain tax benefits provided to payers of personal property tax, rather than real property tax. As background, during 2007, the Michigan Legislature passed three new laws intended to confer significant tax benefits to owners of industrial personal property.

- First, personal property taxes levied on industrial personal property entitle the owner to a 35% tax credit against the owner’s Michigan Business Tax (“MBT”).³ This benefit does not apply to commercial personal property.
- Second, industrial personal property is exempted from up to 18 mills of personal property tax levied by a local school district (commercial personal property is

exempted from only 12 mills of personal property tax).⁴

- Third, industrial personal property is exempted from 6 mills of state education tax (commercial personal property does not qualify for this exemption).⁵

Clearly, the State of Michigan has a pecuniary interest in preventing owners of personal property from receiving an “industrial” classification.

So, if the primary issue for the State of Michigan is the taxation of personal property, then why is the State reclassifying 10,000 parcels of real property? The STC’s own viewpoint is that the determination of whether personal property should be classified as industrial or commercial does not depend on how the real property at which its located is classified. In a February 18, 2010 memorandum, the STC clearly stated that personal property can be classified as industrial even though the real property on which the personal property is located is classified as commercial. Thus, the STC has officially agreed that even if real property owners acquiesce to a commercial classification status for real property purposes, the owner of the personal property situated thereon can still qualify for the industrial personal property classification and the related tax benefits.⁶ However, the STC is concerned that the classification of real property as “industrial” on the assessment rolls will influence the classification status of personal property located thereon, thereby paving the way for owners of personal property to qualify more easily for industrial status. This explains the recent statement by the State Tax Commission that it has “weeded out what it determined to be commercial, residential or other parcels that do not house any industrial activities.”⁷ “We want people who are entitled to the tax credit to get it,” stated Kelli Sobel, the Executive Director of the STC.⁸

The link between real property classification and personal property classification is a legitimate concern for the STC because: (a) the statutory definition of industrial personal property refers to the property being located on “industrial parcels”⁹ and, arguably, the classification of the real property as industrial automatically requires the personal property located thereon to be deemed industrial, although the STC has rejected this viewpoint;¹⁰ and (b) even if a classification of the real property as industrial does not automatically

lead to a personal property classification as industrial, nevertheless the STC has acknowledged that the classification of real property as industrial may be one factor favoring industrial classification of the personal property.¹¹

So what property is deemed to be “industrial”? Industrial real property primarily includes “platted or unplatted parcels used for manufacturing and processing purposes, with or without buildings,”¹² while industrial personal property primarily includes “all machinery and equipment, furniture and fixtures, and dies on industrial parcels, and inventories exempt by law.”¹³ As noted above, arguably the term “industrial parcels” means real property parcels that are classified as industrial; however, the State Tax Commission has rejected this interpretation.¹⁴ Instead, the STC takes the position that personal property is located on an industrial parcel if industrial activity is conducted on the parcel, which it primarily defines as follows: “industrial activity is the manufacturing of parts, components and subassemblies used to make finished goods; or manufacturing of finished goods, including the assembly of finished goods and the processing of food.”¹⁵ Conversely, the following are not industrial activities in the STC’s view: the “breakdown of larger shipments or lots into customer orders;...wholesale or retail trade; or ...the measurement, cutting, fitting, mixing, combination or assembly of ingredients, materials or other commodities that are manufactured or extracted elsewhere, to the specific order and/or specifications or needs of an end-user.”¹⁶ If there are both industrial and commercial components to a taxpayer’s personal property, then the classification of personal property at a given location follows the activity and usage of such property “which provides the largest net revenue.”¹⁷

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To conclude – for real property owners that use the property to conduct a manufacturing business, it appears wise for such owners to object to a classification of the real property as commercial, because being passive could make it easier for the State to disallow the owner’s personal property from being classified as industrial (causing the owner a direct, negative tax impact). However, for real property owners that are landlords, the tax benefits of the industrial property classification would only be felt by the tenant, not the landlord. Still, the landlord will likely have an interest in seeing a tenant succeed, and ensuring a tenant (or potential tenant) will not abandon the premises to obtain better tax treatment elsewhere. Therefore, even though a landlord may have no *direct* benefit to securing industrial classification of its real property, it may be *indirectly* in the landlord’s interest to appeal the real property classification, as a means of satisfying and/or attracting tenants. Still, as noted above, arguing about the real property classification may be a moot point, as the personal property located thereon could anyway attain industrial status.

Depending on the procedural background of the case, an objection to an attempted reclassification could either be filed directly to the STC, or to the March local board of review (with appeals going to the STC). Notably, the

classification decision is made on an annual basis – and thus, even if a protest is not made (or is not made successfully) in one year, the owner could make a protest the following year (to the board of review and the STC). Finally, it should be noted that disputes over classification could also involve a number of related issues, for example, the issue of whether property should be considered real property or personal property (for example, “fixtures” that are attached to real estate may be classified as real property or personal property, which could be important in that tax benefits could arise from the ownership of industrial personal property). Similarly, the issue of whether personal property is leased or owned by a manufacturer may be of critical importance, as the STC regards leased personal property as generally ineligible for industrial status.¹⁸

³MCLA 208.1413(1)(a).
⁴MCLA 380.1211 and 211.9k.
⁵MCLA 211.903 and 211.9k.
⁶Memorandum dated August 13, 2008 from T.J. Schnelle, Manager of the Commercial/Industrial/Utility Valuations Section, Assessment and Certification Division, of the STC.
⁷See Domsic, Mid-Michigan.
⁸See Id.
⁹MCLA 211.34c(3).
¹⁰See above-cited Memoranda dated February 18, 2010 and August 13, 2008.
¹¹See STC Bulletin 2007-7.
¹²MCL 211.34c(2)(d)(i).
¹³MCL 211.34c(3)(c)(i).
¹⁴See above-cited Memorandum dated August 13, 2008.
¹⁵Id.
¹⁶Id.
¹⁷Id., MCLA 211.34c(5) (providing that the activity which has the greatest influence on valuation of the parcel should govern the classification.)
¹⁸See Memorandum dated August 13, 2008.



Footnotes

¹ See Melissa Domsic, Mid-Michigan Industrial Properties Come Under Scrutiny, Lansing State Journal, June 13, 2010

² MCLA 211.27-27a. Note that all discussion herein of classification refers only to an assessor’s classification of a property’s status for tax purposes, regardless how the property is zoned under local law.

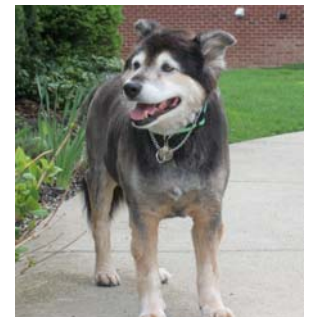


Measuring Consumer Confidence ...

At The Animal Shelter

When I asked the shelter employee about Bear’s “story” the answer was sad but not surprising. I had already heard this story several times in the past couple of weeks at various other area shelters. Bear’s family could no longer afford to keep him. They had lost their home; circumstances had changed; things were bad; there was no money to care for a 75 pound dog. Bear had to find his own way. So, Bear came home with us.

The same day Bear came home with us, a *New York Times* article headline declared, Wall Street Hiring in Anticipation of an Economic Recovery. Well isn’t that nice. Those same wonderful folks that nearly caused the decline of Western Civilization as we know it, expect to be hiring more investment bankers, bond traders, and stock analysts soon. Notwithstanding Wall Street’s anticipated up-tick, Bear’s “story” shows that the economy is still struggling mightily around here. But, things are improving, aren’t they? Having just passed the 2010 half-way pole, things are obviously improving from 2009. After all, the shelters were busy last weekend; not just with folks dropping off pets they could no longer care for, but with potential adopters, too. Bear would tell you that all is not doom and gloom!



Charlie: “On The Job!”

Real Estate Licensees To Assume Added Responsibilities?

By: Danielle M. Spehar

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- A civil fine not to exceed \$10,000.00;
- Censure;
- Probation; and
- A requirement that restitution be made.

"In the case of real estate subject to foreclosure, the real estate salesperson shall obtain, within 5 business days after receipt of the offer to purchase, a letter of acceptance or rejection from the financial institution ..."

The practical difficulty for licensees in complying with the proposed Section 2516 is the requirement that the real estate salesperson shall obtain within five (5) business days after receipt of the offer to purchase, a letter of acceptance or rejection from the financial institution, bank, or other entity holding the mortgage. In the current marketplace, it is not unusual for parties to submit an offer to a financial institution pertaining to a property for which a foreclosure action has been commenced, and to receive no response whatsoever from the institution for an extended period of time. The proposed legislation exposes the real estate licensee to potential penalties for failure to comply with a statutory obligation which is completely beyond his/her control.

Interestingly, nothing in the available legislative history

suggests what inequity this law is intended to remedy, nor how its implementation would solve any such inequity. And most certainly, nothing in the legislative history suggests how a real estate broker is supposed to extract a response from any financial institution before it's prepared to do so.

At present, the Bill has been introduced in the State House. It has been referred to a the House Committee on Regulatory Reform. Further information regarding the status of this Bill will be provided in future issues of our *Real e-State Newsletter* as information becomes available.



Did you know ... that "assistance dogs" can be trained to withdraw money from cash machines for their disabled owners?

A spokesman for charity, Canine Partners for Life (<http://www.k94life.org/>), said they are adept at inserting and withdrawing ATM cards to withdraw the cash — they won't be able to help you remember your PIN — but disabled citizens with assistance dogs now have this option. The organization can train up to 30 dogs a year, it takes two years to train them, and they can also learn how to load the washing machine, and shop for items off shelves!



When Your Customer Is Bankrupt, Paybacks Are A ...

By: Michael S. Leib



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On a similar note, when asked to act as a broker or salesperson for the sale of a bankrupt debtor's property, brokers must obtain an order authorizing their retention as a professional under applicable Bankruptcy Code rules. The penalty is severe. If working as a professional during the course of a Chapter 11 or Chapter 7 proceeding without the necessary order authorizing retention, a professional could find him or herself unable to collect compensation due, or worse, having to pay it back (as happened in the case recited above).

If you are asked to do work for a bankruptcy debtor or perhaps a trustee in bankruptcy, make sure that you do proper due diligence to protect yourself and consult a bankruptcy attorney for assistance.

**"GO GREEN
Adopt A
Quality Pre-
Owned Pet
Today"**



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