

An electronic newsletter for real estate professionals



From the Desk of

The Real e-ditor
Steven D. Sallen

Commercial Real Estate Broker's Lien Act A Powerful New Tool for Commercial Real Estate Brokers

The commercial real estate broker's lien act is finally a reality in Michigan. After years of indifference, the Michigan legislature finally heeded the pleas of trade organizations like the Michigan Association of Realtors and the Commercial Board of Realtors, and various other interested organizations and their broker-members, and passed Senate Bill No. 610. Signed into law by Governor Granholm on October 5, 2010, the Bill took immediate effect, and will apply to written commission agreements signed after that date. But rejoice not, unless you understand how to use this important but narrowly crafted tool.

A commercial real estate broker's lien is only available to Michigan licensed real estate brokers, and is not available to their employees, agents or independent contractors. Three critical elements are required for a commercial real estate broker's lien to attach. First, the broker must have a written commission agreement, signed after October 5, 2010, the effective date of the act. Second, the broker must be entitled to a commission under the written commission agreement. Don't underestimate the importance of this requirement; this *entitlement* requirement could be the undoing of many poorly written commission agreements. A thorough review of your standard commission agreement should be undertaken immediately to avoid an unpleasant surprise later. And, third, the broker must record a claim of lien in the county where the real property is located before the actual conveyance occurs. Where a commission is owed for a lease, the claim of lien may be recorded within 60 days after the lease is signed. The time for filing a notice of claim of lien may be forced earlier, however, if the owner notifies the broker of an intent to enter into a lease, which includes a date on which the lease is intended to be signed (such date must be not less than 10 days later), and serves it on the broker. In that case the broker must file the claim of lien before the intended date of lease signing. Buyer's brokers (and tenant rep brokers) can similarly claim a lien if the buyer purchases the property and records a claim of lien. There are also provisions designed to protect a broker's right to be paid a commission where the commission is to be paid in installments, and for purchase options, and where a commission is due on modifications or extensions of leases.

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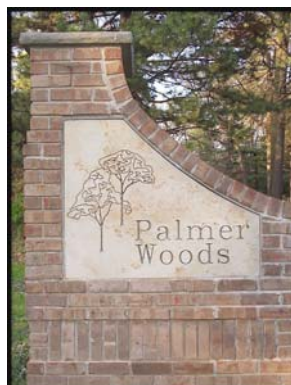
Steve Sallen

Razing the *Barr* — Further Erosion of Tenancy by the Entireties Protection

By: Geoffrey N. Taylor

The United States Court of Appeals for the Sixth Circuit recently struck another blow to the long-standing protection that tenancy by the entireties has afforded married couples who own real property in Michigan. Ordinarily, both spouses must consent to sell or encumber entireties property, and a creditor of one spouse cannot force a sale of the property. However, in *United States v Barr* (Aug. 4, 2010), a three judge panel upheld the government's right to foreclose a tax lien securing the debt of just one spouse, against real property held as tenants by the entireties, expanding upon a decision by the United States Supreme Court that a federal tax lien may attach to a taxpayer's entireties interest in real property. *United States v Craft* (2002).

In this case, Charles Barr was assessed and failed to pay approximately \$325,000 in federal income taxes. By operation of law, the assessment and failure to pay created a federal tax lien on all of Mr. Barr's real and personal property and rights to real and personal property. The government obtained a default judgment against Mr. Barr and sought foreclosure against the home that the couple owned as tenants by the entireties in the Palmer Woods District of Detroit. The court held that the government could foreclose, and that Mrs. Barr was entitled to 50% of the proceeds of the foreclosure sale.



Mrs. Barr claimed to have a dominant interest because she was likely to outlive Mr. Barr and, therefore, had greater rights of survivorship than he did.

The court dismissed this argument, noting that Michigan law presumes equality of entireties interests and equal spousal life expectancy. The court also rejected Mrs.

“... you know a taxpayer is in trouble when a court equates the taxpayer's conduct to a “shell game” ...”

Barr's argument that the court should assert its equitable discretion and decline to order the sale of the residence, noting that there was no evidence that she would be unduly harmed by having to relocate and that the inconvenience of relocating is no different from the inconvenience associated with any foreclosure sale.

Applying a balancing test, the court (i) noted Mrs. Barr participated in asset transfers which frustrated the government's collection efforts and, therefore, had “unclean hands” (you know a taxpayer is in trouble when a court equates the taxpayer's conduct to a “shell game”), (ii) said the government's financial interest would be substantially prejudiced if it were allowed to sell only Mr. Barr's interest in the property because the property was not amenable to partition and it was unlikely that a purchaser could be found for only Mr. Barr's interest, and (iii) focused on the government's “paramount interest in prompt and certain collection of delinquent taxes.”

The moral of this continuing story appears to be that tenancy by the entireties still offers asset protection, just not when the creditor happens to be the federal taxman.



COURT VOIDS LONG TERM LEASE; CITES FAILURE TO DISCLOSE "FACILITY" STATUS

BY: STEVEN D. SALLEN

Recently, a Michigan Court of Appeals case shocked the real estate and environmental law communities. MCL § 324.20116(1) requires owners and operators of a *facility* to disclose to potential transferees, the general nature and extent of release of contamination. Perhaps in the minority of practitioners, we have always presumed that this Section applied to leases, and not just purchase transactions. Consequently, we have (often amidst much client consternation) advised our clients that, where real property is known to be contaminated in excess of generic residential cleanup criteria, a written disclosure must be made to the prospective tenant, of the general nature and extent of release of contamination. However, the penalty for failing to disclose that a property is a facility is not stated in the statute, and has not been known. *Until now!*



In *1031 Lapeer LLC vs. Price*, the Michigan Court of Appeals heard a case where the landlord of a gas station failed to disclose to the tenant the fact that the property was a facility. Once the tenant learned that the property was the site of a petroleum release, the tenant sued for damages, and to rescind the lease. The trial court did, in fact, void the lease, and the Court of Appeals affirmed. The Court of Appeals held that:

"Because the (Landlord) was prohibited from transferring any interest in the property at issue unless he provided (the Tenant) with written notice that the property was a facility, and (the Landlord) admittedly failed to provide (the Tenant) with such written notice, the contract was founded on an act prohibited by statute and was thus void."

"Nevertheless, the Court of Appeals' reasoning focused exclusively on what the landlord did not do, and utterly failed to address the tenant's obvious, even naïve, lack of diligence."

Thus, with the stroke of a pen the Michigan Court of Appeals invalidated a gas station lease because the landlord failed to disclose to the tenant that some ten years prior to entering into the lease, the gas station had been found to be a site of environmental contamination. A fact that was a matter of public record with the MDEQ.

Inexplicably, the Court's written opinion glossed over both the fact that the contract contained numerous generic references to possible pre-existing contamination and designated who would be responsible therefor, and that the tenant failed to conduct its own due diligence investigations of the subject property. Not many gas station buyers today could be surprised by finding contamination! As it happens, the fact that the property was a facility was a matter of public record; had the tenant procured a Phase I environmental site assessment (which is the long recognized minimum standard of care in the real estate industry for property transferees to avoid liability for pre-existing conditions; the so called innocent purchaser defense), presumably it would have immediately learned of the property's contamination history. Nevertheless, the Court of Appeals' reasoning focused exclusively on what the landlord did not do, and utterly failed to address the tenant's obvious, even naïve, lack of diligence.

Consequently, the lesson for landlords is clear and urgent. If you have knowledge that your property is a "facility" under Michigan law, you must comply with MCL § 324.20116(1) by disclosing to any prospective transferee, including tenants, the general nature and extent of the release. Failing to do so may render your lease utterly void. And consider this... Is the next step, that any sale of real estate consummated upon a similar lack of disclosure under MCL § 324.20116(1) similarly voidable? Let the floodgates open!

1"A person who has knowledge or information or is on notice through a recorded instrument that a parcel of his or her real property is a facility shall not transfer an interest in that real property unless he or she provides written notice to the purchaser or other person to which the property is transferred that the real property is a facility and discloses the general nature and extent of the release."

*2*MCL § 324.20101(o) " 'Facility' means any area, place, or property where a hazardous substance in excess of the concentrations which satisfy the requirements of section 20120a(1)(a) or (17) or the cleanup criteria for unrestricted residential use under part 213 has been released, deposited, disposed of, or otherwise comes to be located. Facility does not include any area, place, or property at which response activities have been completed which satisfy the cleanup criteria for the residential category provided for in section 20120a(1)(a) and (17) or at which corrective action has been completed under part 213 which satisfies the cleanup criteria for unrestricted residential use."

*3*MCL § 324.20126(3)(h).

UNIVERSAL HAZARDOUS MATERIALS PICTOGRAMS



Commercial Real Estate Broker's Lien Act A Powerful New Tool for Commercial Real Estate Brokers

By: Steven D. Sallen

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A claim of lien must include several specific elements, and these are readily available in Section 9 of the commercial real estate broker's lien act, including a form of claim of lien. Within 10 days after recording the claim of lien, however, the broker must provide a copy of the claim of lien to the owner of record of the property and to the party who signed the commission agreement, by certified mail with return receipt requested or by personal service. Since a commercial real estate broker's lien is "void and unenforceable" if not properly served, a title search should be undertaken to make sure that service is properly effected on the "owner of record". In other words, do not trust that the signer of the commission agreement is, in fact, the owner of the property; doing so could render a commercial real estate broker's lien void.

Commercial real estate broker's liens should not prevent real estate transactions from closing. Section 5 of the commercial real estate broker's lien act provides that the parties to a transaction shall establish an escrow account for depositing a sum from the proceeds of the transaction sufficient to satisfy the lien, and specifically provides that neither a buyer or seller shall refuse to close a transaction based

on the statutory requirement to establish such an escrow account. However, there are no penalties stated in the act for recalcitrant buyers or sellers who might refuse to close in spite of Section 5. Where the proceeds of sale are sufficient to satisfy a commercial real estate broker's lien, the lien is automatically extinguished and the broker is obliged to provide a release of its lien. If, however, the proceeds of sale are insufficient to satisfy all liens, then no escrow is required and, presumably, the sale may proceed, but subject to the lien. Just as a mortgage lender, brokers are cautioned to make sure that the property has sufficient equity to support payment of all prior debts for which security is granted, and the commercial real estate broker's lien.

To enforce a commercial real estate broker's lien, the broker may file a complaint to foreclose the lien, and an affidavit that the claim of lien is recorded, in the circuit court for the county where the property is located. The broker must also name as defendants everyone having an interest in the property whose interest would be divested or impaired by foreclosure of the broker's lien. Broker lien foreclosure actions must be brought within one year after the date on which the broker's lien is recorded, or the lien will be null and void, and it cannot be re-filed. In successful foreclosure

actions, the court may order sale of any interest in the property, or part thereof, and shall set a period of redemption of not more than four months. Presumably, the court may order a period of redemption shorter than four months. The court can also, in its discretion, award costs to the broker, including reasonable attorneys' fees and prejudgment interest. But brokers beware; one of the main differences between the act and prior bills, was the addition of a provision that, if a court determines a foreclosure action to be frivolous, allows the court to order litigation costs and attorneys fees against the broker.



The commercial real estate broker's lien act is a powerful tool that commercial real estate brokers have long sought to protect their right to be paid a commission. The act will apply to

written commission agreements signed after October 5, 2010.

But like any useful tool, it will only work well if used properly, and can, if misused, backfire against the broker.

Enhancing Financial Institution Safety and Soundness Act

Permanently Ups  Coverage

By: Courtney D. Roschek

Good News! July 21, 2010 brought the President's signature to the Enhancing Financial Institution Safety and Soundness Act and, along with it, a permanent raise to the current standard maximum deposit insurance amount to \$250,000.00*.

The FDIC insures deposits at the nation's 7,932 banks and savings associations and it promotes the safety and soundness of these institutions by identifying, monitoring, and addressing the risks to which they are exposed. Since the FDIC was established, no depositor has ever lost a penny of FDIC-insured funds.

In the wake of the 1929 stock market crash and the depression that followed, President Franklin D. Roosevelt restored the public's confidence and stabilized the banking system when he signed the Banking Act of 1933, which instituted the Federal Deposit Insurance Corporation (FDIC) and, along with it, \$2,500.00 in deposit insurance coverage. Since that time, deposit insurance coverage has been increased from time to time to account for inflation, and the changing financial climate of the United States.

"After all, there is an element in the readjustment of our financial system more important than currency, more important than gold, and that is the confidence of the people."

Franklin D. Roosevelt,
quoted during his first
fireside chat in March of 1933.



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Enhancing Financial
Institution
Safety and Soundness
Act

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Coverage

By: Courtney D.
Roschek

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In 2008, when the American public needed another financial confidence boost, the FDIC sprang to action once again. Via the Emergency Economic Stabilization Act of 2008, the FDIC temporarily raised the basic limit of federal deposit insurance coverage from \$100,000.00* to \$250,000.00*. The temporary increase was effective from October 3, 2008 through December 31, 2010. On May 20, 2009, the temporary increase was extended through December 31, 2013. Now the increase in coverage to \$250,000 is "permanent."

*The standard insurance amount is \$250,000.00 per depositor, per insured bank, for each ownership category. The FDIC provides separate coverage for deposits held in different account ownership categories. Depositors may qualify for more coverage if they have funds in different ownership categories and all FDIC requirements are met.



The TiEcon **2010** Midwest conference will be held on October 28-29, 2010 at The Henry, Dearborn, Michigan.

Entitled *business karma 3.0*, the largest Michigan conference on entrepreneurship will have workshops focusing on attaining success without compromising your principles, opportunities and challenges in information technology, health care, crowd sourcing and automotive industry, and power networking with investors and seasoned entrepreneurs.



Maddin Hauser's *Kasturi Bagchi* is an active member in the organization, and is a featured participant in the conference.

For more information, please contact Ms. Bagchi or visit www.tieconmidwest.org.



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