

**CURRENT DEVELOPMENTS IN
REAL PROPERTY LAW**

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Adverse Possession:

ADVERSE POSSESSION; REQUIREMENT OF HOSTILITY: Maryland claimant can adversely possess land she knows to be titled in another after the titled owner has abandoned the property in the face of a threatened third party foreclosure. *Yourik v. Mallonee*, 921 A.2d 869 (Md. App. 2008) cert. denied, 925 A.2d 635

Cotenancies:

DEATH OF A JOINT TENANT ABATES A PENDING PARTITION ACTION. Since the surviving joint tenant now owns the entire property, there is no longer a basis for a partition. A joint tenancy with right of survivorship can only be terminated by a complete, final conveyance or disposition of the jointly held property. *Mercurio v. Headrick*, 2008 WL 2434193 (Fla.App.2008).

Covenants and Homeowners Associations

ASSOCIATIONS; ASSESSMENTS; COLLECTION: A developer may not raise the annual maintenance charge set forth as a servitude in the master deed if the master deed limits such increases; but, if overall development and use scheme cannot be realized by fees set forth in master deed, and public policy demands, a court may modify the servitude to provide for increases. *Citizens Voices Association v. Collings Lakes Civic Association*, 934 A.2d 669 (N.J.App. Div.2007)

2. APPRAISERS; LIABILITY FOR NEGLIGENCE; PRIVACY: In the context of a divorce proceeding, one party's appraisal expert does not owe a duty of care to the opposing party. *Marlar v. Daniel*, 247 S.W.3d 473 (Ark.2007).

3. CLOSINGS; DUTIES OF CLOSING AGENT; DISCLOSURE: A lawyer closing a purchase and loan transaction has no duty to buyer to disclose information known to lawyer concerning defects in title unless buyer has retained lawyer as a title insurer or agent or court concludes that purchaser, in addition to lender, can be regarded as a client of lawyer. *Davis v. Montenery*, 880 N.E.2d 488 (Ohio App.2007)

4. TITLE INSURANCE; INSURER'S DUTY TO NON-INSURED: Title insurer may have duties to non-insureds who foreseeably rely - at least where insurer leads such parties to believe that they can rely upon search and policy provided earlier. *Barrington Reinsurance Ltd., LLC v. Fidelity Nat'l Title Inc. Co.*, 172 P.3d 168 (N.M. App. 2007).

Liquidated damages:

LANDLORD TENANT; COMMERCIAL; SHOPPING CENTERS; EXCLUSIVE USE CLAUSE; LIQUIDATED DAMAGES: Court upholds a clause requiring payment of \$100,000 for breach of a restriction on competition in a shopping center lease despite no provable loss. *Valentine's, Inc. v. Ngo*, 251 S.W.3d 352 (Mo.App. 2008).

FORFEITURE OF LOAN COMMITMENT FEE AS LIQUIDATED DAMAGES. A forfeiture of a 3% loan commitment fee was upheld as liquidated damages, where (1) the fee was freely bargained among sophisticated parties represented by counsel; (2) was well within ordinary industry standards; and (3) the parties had agreed that the amount was a reasonable estimate of probable damages. The court required no proof of actual damages. *Ladco Properties XVII v. Jefferson-Pilot Life Ins. Co.*, --- F.3d ----, 2008 WL 2521273 (8th Cir.2008).

Landlord-Tenant:

LANDLORD/TENANT; EXCULPATORY CLAUSE; GOOD FAITH AND FAIR DEALING: Even in lease between major commercial parties, a clause limiting remedies to equitable relief (excluding damages) for landlord's failure to review promptly proposed tenant improvement plans will not protect landlord from a damages claim based upon breach of good faith and fair dealing in "extortionate" demand for unwarranted fee to carry out the review. *Bank of America Securities, LLC, v. Solow Building Co. II, LLC*, 847 N.Y.S.2d 49 (2007)

LANDLORD/TENANT; LANDLORD DUTIES; HOLDOVERS: New tenant may sue old tenant who holds over for tortious interference with the new tenant's contract rights under the new lease. *Havana Central v. Lunney's Pub*, 852 N.Y.S.2d 32 (N.Y.App.Div.2007)

LANDLORD/TENANT; RESIDENTIAL; IMPLIED WARRANTY OF HABITABILITY: Landlord of condo unit may be liable under implied warranty for impact of second hand cigarette smoke emanating from neighboring unit owned by others and from common area controlled by others. *Poyck v. Bryant*, 820 N.Y.S. 2d 774 (N.Y.Misc. 2006)

Mortgages:

MORTGAGES; FORECLOSURE; FINALITY: Trial court has discretion to vacate a foreclosure sale that occurred after the mortgagor's pre sale statutory right of redemption had elapsed, for purpose of facilitating a "short sale" by mortgagor with mortgagee's consent, notwithstanding objection by the foreclosure purchaser. *Household Bank, FSB v. Lewis*, 2008 WL 2132467 (Ill.App.5/22/08).

MORTGAGES; FORECLOSURE; PREMISES

LIABILITY: Although the winning bidder of real property at a judicial foreclosure sale has not yet obtained legal title at the time of a subsequent fire, due to lack of final confirmation of the sale, it conceivably had equitable title, which could be the basis for a liability claim against it for failure to prevent a fire that damaged adjacent property. *O'Connell v. ABN Ambro Mortgage Group, Inc.*, 2007 WL 867632 (Ky. Ct. App. March 23, 2007) (unpublished)

MORTGAGES; INSURANCE; MORTGAGEE'S

INTEREST: A holder of a deed of trust that credit bids the full amount of the debt is not also entitled to insurance proceeds resulting from damage to the secured property, where the property damage occurred prior to foreclosure. *Countrywide Home Loans v. Allstate Insurance Company*, 246 S.W.3d 515 (Mo.App.2007)

Redevelopment and Eminent Domain:

CONSTITUTIONAL LAW; DUE PROCESS; PUBLIC

PURPOSE: Notwithstanding *Kelo* decision, proposed condemnee is permitted to show that the alleged public benefits for a particular project are a "pretext" and that in fact the real impact of the proposed condemnation is to benefit another private interest. *Franco v. National Capital Revitalization Corp.*, 930 A.2d 160 (D.C. 2007)

PUBLIC USE FOUND IN TAKING FOR POWER

LINE. Condemnation of owners' property for construction of a high-voltage transmission line, authorized by the Secretary of Energy and Administrator of the Western Area Power Administration (WAPA), qualified as a public use, under the Takings Clause. Although the project was a partnership of public and private entities and project beneficiaries were customers of the privately-owned utilities instead of the public at large, WAPA would own the transmission line and associated land, and statutory authorization envisioned continued proprietary and operational presence of the government. *U.S. v. 14.02 Acres of Land More or Less in Fresno County*, 2008 WL 2498103 (9th Cir.2008)

PUBLIC USE FOUND IN TAKING FOR

REDEVELOPMENT. A project providing for redevelopment of a blighted area, creation of affordable housing, creation of public open space, and various mass-transit improvements was rationally related to public use; the state agency authorized by the legislature could make the public use determination in exercise of power of eminent domain. *Goldstein v. Pataki*, 516 F.3d 50 (2nd Cir.2008), cert denied. 2008 WL 891093 (U.S.)

NO COMPENSATION NEED BE PAID FOR REDUCTION OF CONVENIENCE OF ACCESS TO COMMERCIAL PROPERTY. The state's construction of a roadway median that resulted in hotel customers having to take a more circuitous route in entering and exiting a

landowner's hotel property did not constitute a compensable taking under eminent domain. The landowner did not have a property right to a free flow of traffic. *State v. Dunn*, 888 N.E.2d 858 (Ind.App.2008).

Vendor and purchaser:

CONDOMINIUM BUDGET INCREASE BY DEVELOPER DOES NOT WARRANT PURCHASER IN RESCINDING CONTRACT. The developer of a condominium project increased the estimated budget for insurance, utilities, and an upgraded internet access system. A buyer argued that these were material adverse changes, allowing him to rescind the contract to purchase a unit. The court, however, found that they were not, and he was still bound to his contract. *D&T Properties, Inc. v. Marina Grande Associates, Ltd.*, --- So.2d ---, 2008 WL 2356855 (Fla.App.2008).

VENDOR/PURCHASER; MERGER BY DEED;

MISTAKE: Where both parties to closing rely upon closing agent to produce underlying figures for prorated taxes, and those figures are inaccurate, buyer does not lose claim to a subsequent refund to reflect true proration amounts simply because buyer has accepted deed in ignorance of the mistake. *Czarowski v. Lata*, 882 N.E.2d 536 (Ill. 2008)

NUISANCE; "STIGMA:" The escape of natural gas from a facility, and a resulting explosion, although actionable by parties in fact injured through damage or interference with use, cannot sustain a judgment of liability to property of nearby residents who sustained no such injury, simply because of the perceived stigma among the land-buying public. *Smith v. Kansas Gas Service Co.*, 169 P.3d 1052 (Kan.2007)

IMPLIED WARRANTY OF CONSTRUCTION

QUALITY. The Iowa Supreme Court held that a remote purchaser – i.e., one who did not purchase directly from the builder – can recover from the builder on the implied warranty of workmanlike construction. *Speight v. Walters Development Co., Ltd.*, 744 N.W.2d 108 (Iowa 2008).

BREACH OF CONTACT OF SALE BY VENDOR MAY BE A VIOLATION OF A STATE UNFAIR PRACTICES ACT.

The vendor under a contract to sell a condominium unit refused to close or to remove encumbrances on the title. The court found this was a violation of the Massachusetts Unfair Consumer Practices Act and held the vendor liable for treble damages and attorneys' fees. *Schaumburg v. Friedmann*, 888 N.E.2d 963 (Mass.App.Ct.2008)