March 2007

Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

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Inside This Issue

Case Law Update

In the ever-changing real estate industry, it is important for REALTORS® to keep abreast of new developments in the courts. Reviewing recent court decisions allows REALTORS® to see if the courts are interpreting real estate laws and administrative rules as we understand them to be intended. The common law, that is, the law that comes from the courts over time, shifts and changes as standard legal principles are applied to the new situations presented in our rapidly changing world.

Accordingly, this *Update* reviews recent real estate-related decisions from the Wisconsin Supreme Court and the Wisconsin Court of Appeals. The cases discussed in this issue cover topics such as the offer to purchase, disclosure, landlord/tenant, title policies, listings, condemnation, easements, foreclosure, waterfront rights and personal property tax assessments.

Case Law Summaries

The following Wisconsin case law summaries overview some of the most interesting decisions, primarily from 2006. Although the cases that were not published may not be cited as legal precedent, they give insight into how issues of interest to REALTORS® are treated in the judicial system. The cases with a citation beginning with the year, for instance "2001 WI App 232," are published opinions that will have precedential value. The cases with the docket number and year in parentheses, for instance "(No. 00-2359, Ct. App. 2001)," are unpublished decisions, unless otherwise noted in the *Update*. When a case is a legal precedent, it means that other Wisconsin courts that later decide similar issues generally are obligated to follow the holding of that case.

Offer to Purchase

The cases in the offer section discuss issues such as the validity of an unsigned offer, the inappropriate use of a *lis pendens*, confirmation that – as the offer says – a notice of defects may not be unilaterally withdrawn, confirmation that the inspection contingency definition of defects is what will apply in an offer, and an interesting and unique outcome when a notice of defects is answered by a notice of election to cure defects. Also included are two cases applying the economic loss doctrine to real estate contracts. In simple terms, this doctrine says that the parties to an offer cannot rely upon negligence and other tort claims but instead must use the remedies within the contract.

Unsigned Offer Unenforceable and *Lis Pendens* Asserting Otherwise is Slander of Title Claim

***Marking v. Surwillo* (No. 2006AP 659, Ct. App. 2006).**

The buyer, Marking, faxed an unsigned offer to purchase to the seller, Surwillo, who signed the offer and faxed it back to the buyer. The parties set a closing date no later than December 28, 2004, but Marking later rescheduled the closing for Dec. 29 and then again for Dec. 30. Marking couldn't obtain financing in time to close on the 30th.

On Dec. 30, Surwillo's attorney faxed Marking a letter canceling the deal because he didn't perform by Dec. 28. Marking sued to enforce the offer and

recorded a *lis pendens* on the property. Surwillo counter-claimed for slander of title. The trial court found there was no enforceable contract and that Marking's *lis pendens* slandered Surwillo's title. Marking appealed.

The Court of Appeals held that the plain language of Wis. Stats. § 706.02(1)(e) requires the grantor and grantee to sign all contracts conveying real estate interests. Marking argued that Surwillo intended to enter into a contract and that the trial court erred in dismissing his claim for specific performance. The court of appeals found that a party's intent does not eliminate the statutory requirements of Wis. Stat. § 706.02. Marking also argued that the contract was valid because it need only be signed by the party against whom it was being enforced. Once again, the court relied upon the specific and unambiguous language of Wis. Stat. § 706.02 in rejecting Marking's argument.

The *Lis Pendens* and Slander of Title.

Wis. Stat. § 840.10 allows someone who has filed a lawsuit seeking relief that affects interests in real property to record a *lis pendens* containing the names of the parties, the object of the lawsuit and a description of the land in dispute. Wis. Stat. § 706.13 helps prevent abuse of the *lis pendens* by providing a slander of title cause of action (essentially codifying common law). This statute allows actual damages and punitive damages of $1,000 against anyone who records a *lis pendens* and who knows or should have known that the contents are false, a sham or frivolous.

In order to prove slander of title under common law, there must be a written document which:

1. Results in an injurious falsehood or disparagement of property and includes matters derogatory to the plaintiff's title or business in general, calculated to prevent others from dealing with the plaintiff or to interfere with his relations with others to his disadvantage;
2. Has been communicated to a third person;
3. Plays a material or substantial part in inducing others not to deal with the plaintiff; and
4. Results in special damage.

The court described the filing of a *lis pendens* as a conditional privilege that requires the one making the statement to have reasonable grounds for believing the statements are true and are reasonably calculated to accomplish the privileged purpose. The court held that because Marking knew or should have known that he did not have an enforceable contract to convey real estate, his *lis pendens* was a false, sham or frivolous claim impairing Surwillo's title.

REALTOR® Practice Tips: The courts strictly apply the formal contract requirements set forth in Wis. Stat. § 706.02(1) to an offer to purchase, including the requirement that an offer be signed by, or on behalf of, all parties.

REALTOR® Practice Tips: Filing a *lis pendens* when a party doesn't have a solid underlying cause of action may be quite risky and costly under the Wis. Stat. § 706.13 slander of title remedy.

Notice of Defects Cannot Be Withdrawn Without the Seller's Consent

***Briesemeister v. Lehner*, 2006 WI App 140.**

Wayne and Cindy Briesemeister, the buyers, submitted a WB-11 Residential Offer to Purchase and later accepted a counter-offer from the seller. The sellers had the right to cure in the inspection contingency, which also indicated that if the buyers notified the sellers of a defect and the sellers did not deliver a timely notice that they will cure the defect, the offer would be null and void. The offer to purchase

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also provided that a notice can't be unilaterally withdrawn once delivered.

The buyers had a home inspection performed and used a WB-41 to give the sellers notice of the defects they found objectionable. The sellers had 10 days in which to deliver notice of their election to cure the defect. The buyers understood that the notice did not require a response and could end the contract. They also understood that a different form, the WB-40, could be used if they wanted to negotiate. The notice was delivered to the sellers' agent.

The buyers had second thoughts and instructed the licensee they had been working with to "get rid of those notices and remove my financing contingency." Before the 10-day right to cure period had expired, the buyers submitted an amendment to the offer to purchase that purported to withdraw the notice of defects and remove the financing contingency. On the 10th day following the sellers' receipt of the notice of right to cure, the sellers returned the earnest money and the proposed amendment with "Rejected" written across it. The sellers sold the property to a different buyer.

The buyers filed a *lis pendens* and a lawsuit asking that the sellers be required to deed the property to them. The sellers counter-claimed, alleging slander of title. The circuit court dismissed the buyers' claims and the sellers' counter-claims and both sides appealed.

The Court of Appeals pointed out that the buyers had attempted to waive or unilaterally withdraw the notice of defects. The Court pointed out that the contract specifically provided that once delivered, a notice could not be unilaterally withdrawn. The Court of Appeals rejected the buyer's argument that the seller should have responded within the 10 days that they would not cure the defects, pointing out that under the inspection contingency language, the seller did not have to provide any notice. The Court also noted that the buyer's agent received written notice of the decision not to cure within the 10-day period. The Court held that the buyer's delivery of the notice of defects shifted the balance of power to the sellers who allowed the offer to terminate via their inaction. The buyers' subsequent change of heart and attempts to withdraw the notice of defects and waive the inspection contingency had no effect.

The Court of Appeals agreed with the circuit court that the evidence did not show that the buyers knew or should have known that their claim was without legal basis. They filed the lawsuit and *lis pendens* in an honest effort to salvage the deal.

Likewise, while the buyers' efforts to prevent the sale to another buyer were an attempt to interfere with a contract, it was justified. The buyers believed at the time they started the suit they had a contractual right to the property and had a right to protect it. They did interfere, but the Court of Appeals concluded the buyers' conduct was justified and proper under the circumstances at that time.

REALTOR® Practice Tips: The buyer must understand that giving a notice of defects is a serious step. If the seller has the right to cure, the seller may choose, in his or her discretion, whether to cure the listed defects or let the offer become null and void. If the seller has another more desirable offer or does not want to repair the listed defects, one may assume that the seller will let the offer die. Accordingly, the buyer may not wish to give a notice of defects unless the defects are "deal breakers" which must be fixed if the buyer is to continue with the offer. Giving the seller a notice of defects puts the power to decide the fate of the offer in the seller's hands.

REALTOR® Practice Tips: A party cannot unilaterally withdraw a notice once it has been delivered to the other party. A notice is withdrawn by agreement of both parties, typically expressed in a WB-40 "Amendment to Offer to Purchase."

Court Upholds WB-11 Definition of "Defect" in Inspection Contingency Dispute

***MacLeish v. Kleinschmidt,* (No. 2005AP641, Ct. App., 2006)**

The Kleinschmidts entered into a contract for the purchase of the MacLeishes' home. The buyers had an inspection contingency and the home inspector noted, among other minor issues, that a small portion of the roof had curling shingles. However, the inspector found the roof to be in satisfactory condition overall as curling shingles were not uncommon when they aged. The sellers agreed to fix the other items listed in the buyers' notice of defects, but declined to repair the roof because they didn't feel the curling shingles constituted a defect as defined in the offer to purchase. The buyers refused to close and the sellers sued for $27,000 in damages. The sellers based their damages on the difference in price between the contract price with Kleinschmidts and the price they received in the subsequent sale of their home, expenses they incurred to cure the other defects, and the delay in selling the property to the other buyer.

Both sides presented evidence at trial as to whether the small area of the roof with curling shingles was a defect, as defined in the home inspection contingency of the WB-11 Residential Offer to Purchase. While curling shingles are deemed to be defects in the State of Wisconsin Roofing System Guarantee, the trial court found this evidence irrelevant because the offer to purchase has its own definition of "defect."

The Court of Appeals upheld the trial court's finding that the curled shingles were not a defect and that the buyers

had been contractually obligated to conclude the transaction, stating that the issue was whether the curling singles amounted to a defect per the offer to purchase definition. If the curling shingles had been found to constitute a defect, the buyers would have been relieved of their obligation to close.

REALTOR® Practice Tips: When the parties are unable to agree whether a condition rises to the level of defect, a trial court will need to ultimately decide the dispute on a case-by-case basis by applying the facts of the particular transaction to the definition provided in the contract.

Buyer's Notice of Defects and Seller's Notice of Election to Cure Defects May Function as a Modification to the Contract

***Fritsch v. Premier Investors, LLC* (No. 2006AP000103, Ct. App. 2006).**

John and Judith Fritsch (buyers) and Premier Investors, LLC, (Premier) entered into a condominium offer to purchase in August 2004. The purchase price was $475,000, and the buyers paid earnest money of $47,500. The inspection contingency provided, "This offer is contingent upon a Wisconsin registered home inspector performing a home inspection of the Unit and the limited common elements assigned to the Unit, and an inspection, by a qualified independent inspector, of: no other …."

After the inspection, the buyers submitted a notice to Premier, listing six purported defects, one of which was mold or fungal growth in a crawl space. Premier responded with a notice stating its election to cure the defects. Premier later sent the buyers a letter explaining that five of the six defects had been cured, but that the mold issue was the condominium association's responsibility and that the association was proceeding to remedy it. One day before closing, the buyers sent a fax to Premier, stating that Premier had defaulted by failing to remediate the mold by the specified deadline, and demanding the return of their earnest money. Premier answered that the crawl space was outside of the scope of the inspection contingency. The buyers did not close and sued for the return of their earnest money. Premier counter-claimed for breach of contract, seeking specific performance or damages. The circuit court concluded that the contract had been modified by the parties' notices regarding the defects and accordingly granted judgment to the buyers.

On appeal to the Wisconsin Court of Appeals, the Court observed that the crawlspace was not within the unit or limited common areas and was therefore beyond the scope of the inspection contingency. As such, Premier could only have breached the contract if the notices exchanged by the parties modified the original offer to purchase. Premier contends the buyers' notice of defects did not constitute an offer to modify the contract and there was no consideration for the purported modification. Premier further argues that the mold did not rise to the level of a defect under the contract, and that any purported modification was voidable because of mutual or unilateral mistake.

In Wisconsin, the Court noted, a contract modification need only be supported by new consideration when the contract is complete or when one party has finished performing. Where the contract is wholly executory – no new consideration is required – the original consideration is deemed sufficient. A contract is executory when the parties have agreed to future activity that is yet to be completed. By contrast, a contract is executed when all promises have been fulfilled and nothing remains to be done. The offer provided that, subject to contingencies, Premier would deed its condominium unit to the buyers and the buyers would pay the balance of the purchase price. Thus, neither party had fully performed its contractual obligations when the modification occurred, so no new consideration was required.

The Court found that the notice of defects was an offer to modify the contract, which was accepted by

Premier's notice of its election to cure the defects. Because Premier agreed to remediate the mold and modified the contract by doing so, it does not matter whether the mold would otherwise have been a defect under the terms of the original contract. Premier insisted that the parties did not intend to modify the original contract, but to the extent Premier unambiguously agreed in writing to remediate the mold, it is barred from contesting its intent to do so, the Court concluded.

REALTOR® Practice Tips: The notice of defects and a notice of a seller's election to cure may combine to effectuate a modification of the contract terms when the content goes beyond those matters within the confines of the existing contract.

Supreme Court Upholds LLC Liability Protections and Applicability of the Economic Loss Doctrine to Commercial Real Estate Transactions

***Brew City Redevelopment Group, LLC v. The Ferchill Group*, 2006 WI 128.**

The Wisconsin Supreme Court held in the Brew City case that individuals who are members/managers of LLCs are not immune from liability for tortious interference with contract by virtue of being LLC members or managers, as provided in Wis. Stat. § 183.0304(1). Under Wis. Stat. § 183.0304(1), "a member or manager of a limited liability company is not personally liable for any debt, obligation or liability of the limited liability company, except that a member or manager may become personally liable by his or her acts or conduct other than as a member or manager." In other words, LLC members and managers can be held liable for their personal actions, criminal violations and actions to gain improper personal profit. The court did not shed light on how one can distinguish between personal activity and actions as an LLC member/manager, particularly when there are only one or two LLC members.

The Court also held that the "economic loss doctrine" did not apply to Brew City's "injury to business reputation" claim that the other parties had "willfully injured their reputation," in violation of Wis. Stat. § 134.01. The "economic loss doctrine" is a judicial doctrine that forces parties to use contract remedies, not tort remedies, if the injured party has sustained economic losses arising from a contract. The court ruled that while the economic loss doctrine can apply in commercial real estate transactions, the "injury to business reputation" claim is not dependent on a contract and involves different behavior and separate damages.

The court's rulings were limited to the specific facts in the case and the actual outcome at trial is yet to be determined. The Wisconsin REALTORS® Association Legal Action Program filed an amicus curiae brief in this case.

REALTOR® Practice Tips: The economic loss doctrine continues to apply to commercial real estate transactions and LLC members and managers continue to enjoy liability protection for their actions properly taken in that capacity.

Economic Loss Doctrine May Apply in Residential Real Estate Transactions, but it Does Not Preclude False Advertising Claims Under Wis. Stat. § 108.18

***Below v. Norton*, 2007 WI App 9.**

The sellers (Nortons) provided a Real Estate Condition Report (RECR) in conjunction with the sale of their home to Shannon Below. The sellers indicated that the only plumbing defect known to them was that the bathtub drain handle needed to be repaired. After Below moved into the house, she learned that the sewer line between the house and street was broken. Below sued the Nortons, alleging intentional and negligent misrepresentation, strict liability misrepresentation and a Wis. Stat. § 100.18 false advertising claim.

The court ruled that the economic loss doctrine (ELD) stopped the buyer from asserting her misrepresentation claims. The ELD is a judicially created rule that substantially limits a purchaser of a product from suing the manufacturer for damages for misrepresentation claims. The purpose of the ELD is to bar recovery for economic losses when the relationship between the two parties involves a contract for the purchase of a product. The term "economic loss" generally refers to a product failing in its intended use or failing to live up to the contracting party's expectations. In essence, the ELD limits a party to a contract to breach of contract claims rather than misrepresentation or other tort remedies.

The ELD does not apply when the misrepresentation induced the party to contract and was not related to the subject mater of the contract, i.e., the product or home, in this instance. For example, intentional misrepresentation claims that occurred prior to the formation of the contract – i.e., fraud in the inducement of the contract – are allowed where the fraud is extraneous to, rather than interwoven with, the contract.

While the ELD originally applied to products, the Wisconsin Court of Appeals extended the ELD to commercial real estate in *Kailin v. Armstrong*, 2002 WI App 70. The buyer argued that the ELD shouldn't apply to this case because her contract involved residential real estate. The Court of Appeals disagreed and held the ELD barred of all the buyer's misrepresentation claims, except for the statutory false advertising claim.

In *Kailin*, the Wisconsin Court of Appeals held that the ELD does not apply to false advertising claims under Wis. Stat. §100.18. The plaintiff must prove the following three elements in a false advertising claim:

1. The defendant made an advertise-

ment, announcement, statement or representation relating to the purchase to the public;

2. The statement/representation was untrue, deceptive or misleading; and
3. The plaintiff sustained a pecuniary loss because of the statement/representation.

In *Kailin*, the Court discussed the importance of the timing of the alleged misrepresentation. Because the statement to a potential buyer must be made to the public, the misrepresentation would need to occur prior to acceptance of the contract to satisfy this element. The Court stated that the prospective purchaser is no longer "the public" after he has a particular relationship with the seller such as an accepted offer to purchase, and concluded that the buyer should have been allowed to prove this claim at trial.

REALTOR® Practice Tips: The ELD puts the emphasis on contract claims – another reason that REALTORS® should always be sure to be careful and thorough when drafting offers.

Disclosure

The following cases reveal the major financial consequences of a seller not fully disclosing a use-value assessment situation, and a buyer not taking advantage of the opportunity to inspect.

Seller's Failure to Provide Complete Disclosure of Use-Value Assessment Deemed Misrepresentation

***Thomas v. Pringle* (No. 2006AP 697, Ct. App. 2006).**

The Pringles subdivided a parcel of farmland into a nine-lot residential development and recorded the covenants and restrictions on January 19, 2004. The property also was rezoned from A-1 agriculture to R-1 residential at about the same time. The covenants reflected Pringle's intent to develop the property into single-family residential lots. The entire parcel had been assessed under the Wis. Stat. § 70.32(2r) use-value system as agricultural land for many years. In March 2004, Thomas purchased a five-acre lot that a local farmer was farming at the time of Thomas' purchase.

Thomas apparently inquired with the selling agent during negotiations if the farmer could continue to farm his land to maintain the beneficial tax assessment, but the farmer soon stopped farming Thomas' land. The Kenosha County Treasurer notified Thomas that, because his land was no longer devoted primarily to agriculture use, he was being assessed a use-value penalty of $2,364. Thomas had not made improvements to the land or sought building permits up to this point. Thomas paid the penalty and sued the Pringles in small claims court, alleging the Pringles had negligently misrepresented by omission by failing to disclose whether a use-value penalty had been assessed and whether any such penalty had been deferred.

At the time of the sale, the Pringles provided an RECR published in 2001 that only disclosed that the property "has been valued under Wis. Stat. § 70.32(2r) (use-value assessment)." However, the law had required that the following three items be disclosed since January 1, 2003:

1. That the property has been assessed as agricultural land under § 70.32(2r) (use-value assessment).
2. Whether the seller has been assessed a use-value penalty under Wis. Stat. § 74.485(2).
3. Whether the seller has been assessed a use-value penalty that has been deferred under Wis. Stat. § 74. 485(4).

The RECR published by the WRA in 2002 had been changed to include these disclosures, but, for whatever reason, an outdated RECR form was used. The Court of Appeals found that the Pringles made the first disclosure, but not the other two regarding a use-value penalty.

The Court of Appeals held that the new disclosure requirements reflected the legislature's policy to place additional disclosure requirements upon the seller. In short, notice that the land is assessed as agricultural land, in and of itself, is incomplete. Wis. Stat. § 74.485(7) "requires that a buyer be advised that the seller has not been issued a penalty or granted a deferral so as to put the potential, if not the likelihood, of a penalty more squarely in front of the buyer." The Court of Appeals held that the Pringles' failure to provide full and complete disclosure constituted misrepresentation by omission, causing $2,364 in damages to Thomas.

REALTOR® Practice Tips: Although not specifically required by the use-value law, sellers and REALTORS® should also disclose to buyers that buyers who purchase and change the use of agricultural property assessed under the use-value system may be subject to a potentially substantial penalty, given that such a penalty would likely be considered a material adverse fact.

REALTOR® Practice Tips: The Wisconsin REALTORS® Association (WRA)'s RECR forms each include an item in the "Additional Information" section that asks the seller to indicate whether land sold with the property has been valued under the use-value assessment system and, if so, whether there is a penalty or a deferred penalty.

REALTOR® Practice Tips: If a buyer intends to buy and develop farmland or otherwise change the use of agricultural land, the buyer's offer to purchase should include an investigation contingency giving the buyer ample time to confer with the local taxing authorities, determine the amount of any use-value penalty and obtain any other pertinent tax information.

Failure to Have Home Inspection Precludes Reliance on RECR

***Malzewski v. Rapkin*, 2006 WI App 182**

The Wisconsin Court of Appeals case of *Malzewski v. Rapkin* teaches many lessons about RECRs, misrepresentation claims, home inspections and a buyer's remedies.

In the Malzewski case, the RECR was completed to indicate that sellers were "aware of defects in the basement or foundation (including cracks, seepage and bulges); during very heavy rainstorms, there might be a little seepage in the walls/floors. The seller has regraded to correct this when it has happened." The buyer's offer to purchase included a home inspection contingency and a provision allowing the buyers to "do a walk-through within 3 working days of acceptance." The buyers did the walk-through and waived the inspection contingency. Approximately a year after they closed, paint on the basement walls peeled away and preexisting cracks in the basement walls opened. A foundations contractor estimated that it would cost $25,600 to repair the failing basement walls.

The buyers sued the sellers for failing to disclose the cracks in the basement walls, alleging breach of contractual warranty, intentional misrepresentation, theft-by-fraud, Wis. Stat. § 100.18 false advertising, strict-responsibility misrepresentation and negligent misrepresentation. During discovery, the sellers admitted the basement walls had 12-foot-long, three-eighths-inch-wide cracks, which they filled in 10 to 20 times with masonry cement. They also painted the walls approximately five times. They never had a contractor look at the basement or foundation. The sellers moved for summary judgment, claiming they had fully disclosed the condition of the house on the RECR, and that there was no evidence that they knew the cracks were a defect under the RECR and Wis. Stat. § 709.03. The buyers maintained there were questions of fact both as to whether the sellers intended to deceive them and whether the buyers were justified in relying on the representation that there had been only a little seepage. If the sellers had told them that the walls had repeatedly cracked and had been repeatedly filled in with caulk and painted over, the buyers claimed they would not have purchased the house.

The trial court concluded as a matter of law that the sellers did not know there was a defect in the house and granted the sellers' motion for summary judgment. The buyers appealed to the Court of Appeals, contending that whether the sellers believed that the basement wall cracks were a defect that should have been disclosed on the RECR is a disputed question of material fact that cannot be decided on summary judgment. The Court of Appeals, however, took a different approach and analyzed the justifiable reliance element in the claims made by the buyers. The Court concluded that the buyers must show reasonable reliance on the sellers' RECR in order to sustain all but one of their claims.

For example, the buyers alleged that the sellers breached their contractual warranty when they falsely represented that the only problem with the basement was slight seepage. However, because the buyers waived their right to a home inspection, their reliance on the RECR was unreasonable as a matter of law. The Court referenced the case of *Lambert v. Hein*, 218 Wis. 2d 712 (Ct. App. 1998) as authority for the principle that a buyer who is aware of the true nature of defects, or who has the right to discover the true nature of defects that are disclosed, cannot later complain when he or she goes ahead with the purchase, despite knowing about the defects, or after giving up the contractual right to discover their true nature.

The RECR and the provisions in the offer to purchase, the Court noted, are intended to afford a buyer the opportunity to discover actual or potential defects in the property so that the buyer can then make an informed choice whether to proceed with the transaction, seek amendments to the contract or abort the transaction. By closing the transaction without exercising their right to a home inspection, even when they were aware of potential seepage defects, the buyers waived their right to pursue a claim based on RECR representations.

Similarly, with the causes of action for intentional misrepresentation, strict-responsibility misrepresentation, negligent misrepresentation and theft-by-fraud, the Court concluded that because the buyers waived their right to a home inspection even though the RECR disclosed possible issues with the basement, they were not justified in relying upon the RECR.

The elements of false advertising, found in Wis. Stat. § 100.18, are that the plaintiff sustained a pecuniary loss because of an advertisement, announcement, statement or representation made by the defendant that was untrue, deceptive or misleading. Reasonable reliance is not an element of false advertising, but may still be considered at trial in determining whether the purchaser in fact relied on the seller's representation.

The sellers admitted that they knew that the basement walls had 12-foot-long, three-eighths-inch-wide cracks, which they caulked and painted over. The Court indicated that a reasonable jury could find that those cracks and the attempted remediation efforts should have been disclosed, and that failure to do so violated Wis. Stat. § 100.18, even though the buyers waived their right to the home inspection. Accordingly, the Court reversed the trial court's summary judgment on the false advertising claim and remanded the case for further proceedings.

REALTOR® Practice Tips: The sellers apparently completed the RECR on a subjective basis – they did not view the cracks as a defect, nor did they consider that the seepage problem might reoccur – and the trial court accepted that on face value. The buyers and their attorney, on the other hand, challenged this failure to disclose the complete picture as misrepresentation.

REALTOR® Practice Tips: The sellers may have avoided a lawsuit if they had more fully disclosed the situation – described the problem over the years and what they had done to address it – but they may have lost the sale.

REALTOR® Practice Tips: The sellers' approach of not fully disclosing landed them with a false advertising claim to litigate, and the misrepresentation claims might have held as well were it not for the reliance issue.

REALTOR® Practice Tips: The buyers committed the cardinal sin of not having a home inspection. It seems clear that a buyer who waives the home inspection will have a difficult time later sustaining any misrepresentation claims. The courts will likely find that such a buyer cannot claim to have reasonably relied on any property condition representations.

REALTOR® Resource Page – Disclosure. See the Disclosure REALTOR® Resource page at www.wra.org/disclosure. Check out *Legal Update* 02.07, "Duty to Disclose," online at www.wra.org/LU0207, and for further discussion of the Lambert case and a theft-by-fraud claim, see www.wra.org/legal/wr_articles/wr0501_legal.htm.

Landlord/Tenant

The cases in this section examine the tenant's ability to enforce a lease containing an illegal landlord attorney fee provision, and the actions by a landlord which will be deemed to constitute termination of a lease when the premises have been surrendered.

Tenant May Sever Illegal Attorney Fee Provision in Residential Lease and Enforce the Rest

***Dawson v. Goldammer*, 2006 WI APP 158.**

The Goldammers entered into a four-year farm lease with Dawson. The lease contained an attorney fee provision requiring the Goldammers to pay for any litigation costs Dawson incurred trying to enforce the lease provisions. During the course of the lease, the property developed some problems. Eventually, Dawson refused to accept the reduced rent payments the parties had agreed to, and the Goldammers created an escrow account in which to deposit their rent payments.

Litigation ensued and the trial court ruled that the entire lease was unenforceable because the attorney fee provision violated Wis. Admin. Code § ATCP 134.08(3). Given the court's ruling, Dawson treated the tenancy as month-to-month and delivered a termination notice to the Goldammers. The Goldammers did not vacate so Dawson evicted them and successfully sought attorney's fees. The Goldammers appealed.

The essential issue the Court of Appeals analyzed was whether a tenant who opts to enforce a lease containing an illegal attorney's fee provision can sever that provision and enforce the remainder of the lease, or whether the tenant must abide by the lease in its entirety.

The Court relied heavily on the underlying intent of the regulation. The prohibition against attorney's fees stems from consumer protection concerns in landlord/tenant relations because of the inherent inequality of bargaining power between the parties. The purpose of the rule prohibiting a landlord from including such provisions was that tenants might be intimidated and forgo their legal rights for fear that they would have to pay the landlord's litigation expenses. The Court concluded that if it allowed the landlord to sever the illegal provision and enforce the remaining provisions, landlords would have little incentive to omit these clauses from their leases.

Thus, where a statute is intended to protect one party to a contract, the party intended to be protected may seek enforcement, in spite of the violation. The Court found this rule in compliance with the contract law principle of severability. Severability allows a contract to survive if an illegal clause can be severed from the rest of the contract without defeating the primary purpose of the parties' bargain. Accordingly, an illegal provision may be severed from an otherwise enforceable agreement at the election of the party whom the regulation is designed to protect.

REALTOR® Practice Tips: Landlords should have their attorneys review their leases and make sure there are no provisions violating the ch. ATCP 134 rules – such provisions may prevent the landlord from enforcing the lease against the tenant, while the tenant will be able to disregard illegal provisions and enforce the rest of the lease terms against the landlord.

Landlord's Sale of Leased Property Shows Intent to Accept Surrender of Property and Terminate the Lease

***Grub Stake Properties v. Silver Bullet Mgmt.* (No. 2005AP2786, Ct. App. 2006).**

Silver Bullet Management (SBM) entered into a 20-year commercial lease with Grub Stake Properties (GSP). About three years into the lease, SBM sublet the property to AmeriKing with GSP's permission, but SBM remained liable under the lease.

The lease contained a default provision that allowed GSP to re-enter the property immediately upon SBM's default and to terminate the lease after re-entry by giving SBM 30 day's written notice. This clause further entitled GSP to damages including the value

of the balance of this lease over the reasonable rental value of the premises for the remainder of the lease term.

Subsequently, AmeriKing filed for bankruptcy and unilaterally reduced its lease payments by half for several months before ultimately rejecting the lease and abandoning the property to GSP with the bankruptcy court's approval. Several months later, GSP accepted an offer to sell the property outright with 12 years remaining on SBM's lease. GSP sued SBM seeking unpaid rent and other damages, including diminution of value. The parties were in agreement that the amount of unpaid rent was those amounts due from the time when AmeriKing stopped paying rent through the time of the sale. GSP's argument for diminution of value damages was based on its claim that it could have sold the property for more money had there been a paying tenant occupying the property at the time of sale, but the Court of Appeals disagreed.

The Court of Appeals reiterated that, under Wisconsin law, if a tenant vacates a property prior to the lease expiration, the landlord has only two options. First, the landlord may accept the tenant's surrender, terminating the lease and ending the tenant's liability under the contract. Alternately, the landlord may attempt to mitigate damages by re-entering and re-letting the premises and crediting payments from a successor tenant to the initial tenant's rent obligations under the lease. The landlord maintains his right to select either option until he or she takes steps that clearly signify his choice.

GSP argued that it intended the sale to be an act in mitigation and it did not constitute an acceptance of SBM's surrender. However, the Court found that this assertion was inconsistent with existing case law that interpreted the sale of a property to show the landlord's clear intent to accept the surrender and terminate the lease, rather than an intent to mitigate damages.

REALTOR® Practice Tips: The sale of a rented property, after a tenant breach, demonstrates a clear election to accept the premises and terminate the lease, rather than taking possession for purposes of mitigation of damages.

Title Insurance Coverage

The following case is significant because it establishes that a title insurance policy may provide coverage for encroachments onto adjacent properties if the purchaser makes sure the title policy is properly written.

Wisconsin Supreme Court Reverses Court of Appeals Decision that Title Insurance Policy Didn't Provide Coverage for Property Encroaching onto Adjacent Property

***First American Title Insurance Company v. Dahlmann*, 2006 WI 65.**

The Supreme Court of Wisconsin reversed the Court of Appeals, holding that a substantial encroachment of an improved property onto an adjacent property constituted an encumbrance covered by the title insurance policy insuring title to the improved property. Dahlmann had requested that the title policy be written to remove the standard survey and encroachment policy exceptions when he purchased the Madison Inn in January 1999. The removed exceptions pertained to "any discrepancies or conflicts in boundary lines or any encroachment or overlapping of improvements" and "any facts, rights, interests or claims which are not shown by the public record but which could be ascertained by an accurate survey of the land."

Part of the Madison Inn property included an underground parking facility. Dahlmann later learned that the underground parking had encroached several feet upon the land underlying a city street, owned by the city of Madison, since the day it was constructed. The city indicated that it would charge Dahlmann approximately $4,000 each year, per a city ordinance, and suggested he would have to remove the encroachment if the annual fee was not paid. Dahlmann requested that First American Title defend him or indemnify him for the fee. The title company went to court, seeking a declaratory judgment that Dahlmann's title insurance policy did not provide coverage for this encroachment.

The trial court ruled that the title insurance policy only covered the land described in Schedule A of the policy, which did not include the underground parking encroachment outside of those described boundaries. The Court of Appeals affirmed and Dahlmann petitioned the Wisconsin Supreme Court to hear his case.

The Supreme Court examined whether the Madison Inn encroachment onto city land was an "encumbrance on the title," and thus a covered title defect. A title defect is simply a claim or interest that is inconsistent with the title purportedly transferred. An encumbrance, the Court noted, is a claim or liability that is attached to the property that may lessen its value. Common encumbrances include leases, mortgages, easements and encroachments. An encroachment, the Court observed, occurs not only when a structure on adjoining property encroaches substantially on your property without the benefit of an easement, but also when a structure on your property encroaches upon the adjoining property without an easement.

The Court reasoned that if warranties against encumbrances apply to structures on the seller's property that substantially encroach upon adjoining property, as was the holding in prior case law, then the same reasoning should apply to the title insurance. The test was whether the encroachment is substantial because only a "substantial encroachment" is considered an encumbrance on title. Because the trial court did not adequately

address this question, the Court of Appeals remanded the case back to the trial court to examine the "totality of the circumstances, with a heavy emphasis on how much the structure physically encroaches, and how much it would cost to remove the encroachment," and thus determine whether the encroachment of the Madison Inn parking garage was "substantial."

Next looking at the exceptions removed from Dahlmann's title insurance policy, the Court noted that title insurance policies generally contain two types of provisions that reduce coverage: exclusions and exceptions. Exclusions refer to subjects beyond the ambit of the policy, while exceptions are matters generally within the scope of the insuring provisions.

The Court found that because Dahlmann paid extra to have the survey and encroachment exceptions removed from the policy, the intent of the parties was to provide extended coverage beyond that normally offered. A standard policy containing those exceptions does not cover encroachments. With an extended coverage policy, the parties agree to remove some coverage exceptions, providing additional protection for the owner and exposing the title insurer to greater potential liability.

The Court also rejected First American's assertion that definition of "land" limits the coverage provided. The Supreme Court reasoned that while the legal description identifies the subject property, the title insurance policy insures title, not the land – title protection may involve matters outside the described land boundaries.

REALTOR® Practice Tips: Title insurance policies may be fashioned to provide coverage for encroachments, and may be modified in other ways. Buyers should be given the opportunity to request special features either in the offer or by working with the title company to modify the ordered basic coverage, with the buyer paying additional expense.

Listing Contracts

The case in this section tells the story of parties trying – unsuccessfully – to avoid paying the listing broker's commission. The parties tried to challenge the agency disclosures, an area all REALTORS® should be sure they comply with because this is an area that may be challenged by parties trying to avoid a commission.

Broker's Failure to Include Agency Disclosure Language in the Listing Contract Did Not Invalidate His Right to Sue the Seller for Breach of Contract

***Wangard Partners, Inc. v. Graf*, 2006 WI App 114.**

Wangard Partners (Wangard), a commercial broker, sued the sellers, Gerald and Shirley Graf, for breach of a commercial listing contract, and Steinhafels, Inc. (Steinhafels), the buyer, for intentional interference with contract. During the listing, the broker negotiated with Steinhafels on behalf of the sellers. Steinhafels was interested in purchasing the listed property for use as a warehouse. During the term of the listing contract, Steinhafels made two offers for the property, but the sellers rejected both.

The listing contract, which had been drafted by Shirley Graf, allowed the broker to earn a commission if any prospect acquired an interest in the property up until six months after the listing contract expired. The listing contract defined "prospect" to include anyone with whom the broker or its agents negotiated. In addition, the contract required the sellers to provide the names of anyone who inquired about the property to the broker.

After the listing contract expired, the sellers continued to negotiate with Steinhafels, unbeknownst to the broker, and eventually agreed upon a deal in principle. However, the sellers delayed consummating the deal to avoid paying a commission. The facts showed that Steinhafels urged the sellers to keep the broker out of the transaction, hence supporting the interference of contract claim against Steinhafels.

The sellers moved to dismiss the complaint, alleging that the listing contract was invalid because there was no agency disclosure language in the listing contract. The trial court agreed and dismissed the broker's claims. Wangard appealed, and the Court of Appeals reversed the lower court's ruling.

The Court focused on the (former) language of Wis. Stat. § 452.135(2) that read: "No broker may provide brokerage services (emphasis added) to a party to a transaction unless the broker has provided to that party a written agency disclosure form containing all of the following …"

The key issue for the Court was whether the very act of providing the required disclosure amounted to providing brokerage services. The Court held that it did not, based on Wis. Stat. § 452.135(1), which prohibits a licensee from providing brokerage services until a valid listing contract is in place. If negotiating and executing a listing contract constituted brokerage services, the Court reasoned, the very act of doing so would violate §452.135(1) because no listing contract was yet in place.

The Court also commented that while providing such disclosure at the time of executing the listing contract was commonplace in the industry, this practice was done as a matter of convenience rather than as a necessity to comply with state law. A few days later, and prior to the broker providing any brokerage services, the broker did provide the sellers with proper disclosure. In summary, as long as the broker provided disclosure prior to providing brokerage services, a client could not use §452.135(1)

and §452.135(2) as a means to invalidate an otherwise valid listing contract.

With respect to the intentional interference with contract claim, the court found that the complaint was drafted with enough particularity, and the case was remanded to the circuit court for reinstatement of the complaint and further action.

REALTOR® Practice Tips: The law with respect to providing agency disclosures to clients has changed since this case. All licensees should be sure they are familiar with the *Legal Updates* and other materials found online at www.wra.org/Resources/resource pages/agency law.htm.

Condemnation

In an area which continues to produce a lot of court decisions, the most recent cases conclude that a condemnation may not preclude a lessor from collecting damages under a commercial lease, in addition to damages from the condemnation award, but only if the lease was drawn to establish these rights. We also have a case examining the appropriate way to set compensation when a partial taking impacts multiple adjacent properties, as well as a case discussing what factors can be taken into account when establishing the condemnation award for an underground natural gas transmission pipeline.

Lessor May Pursue Contract Claims Against Lessee Despite Condemnation

***Wisconsin Mall Properties, v. Younkers*, 2006 WI 95.**

The Wisconsin Supreme Court found that the owner of a condemned property may be able to pursue contract remedies against a lessee even though the owner had already received a condemnation award purporting to compensate the owner for the loss of the lease. The city of Green Bay and its Redevelopment Authority condemned the property owned by Wisconsin Mall Properties, Inc. (Wis. Mall) and its long-term lease with Saks, Inc. (Saks). Whether damages under the lease would additionally be available, the Court observed, depended upon the terms of the lease, how those terms apply to the situation, whether the lessee did breach the lease and, if so, what the damages would be. Once this information was determined – by the circuit court on remand – then it can be determined whether the owner is entitled to contract damages in excess of the compensation awarded in the eminent domain proceedings.

In 2001, Saks, a lessee in property owned by Wis. Mall, began negotiating with the city of Green Bay for a possible condemnation of Wis. Mall's property and the Saks lease, a move that Wis. Mall believed was intended to get Saks out of its lease. In April 2003, the city and Saks entered into an agreement wherein the city agreed to condemn the Wis. Mall property and the lease, and to indemnify Saks against any claims arising out of the condemnation, including claims under the lease. In return, Saks agreed to convey its interest in another store property to the city and to contribute $2.75 million toward the city's costs in acquiring the Wis. Mall property.

In August 2003, Wis. Mall gave Saks written notice that Saks was in breach of the lease provisions wherein Saks agreed to "not take any action to terminate, rescind or avoid this lease." In October 2003, the city began the condemnation process and made a jurisdictional offer of $5.7 million to Wis. Mall that included $2.6 million for its property interest and $3.1 million for the present value of the Saks lease. Wis. Mall then sued Saks based on its attempt to avoid the lease, citing the "hell or high water" clause in the lease, which provided that Saks' rent and other obligations under the lease would not be affected by a condemnation, and additionally seeking its costs and attorneys fees in connection with the condemnation.

After Wis. Mall rejected the city's jurisdictional offer, the city filed an award of compensation for $5.7 million and "took" the property and the lease. Under the lease terms, Wis. Mall received all of the condemnation proceeds, but Wis. Mall believed it should receive another $3.8 million for lost rent as calculated under the lease provisions.

In Wis. Mall's breach of contract lawsuit, the circuit court ruled that the condemnation proceedings prevented Wis. Mall from maintaining its contract action against Saks. Wis. Mall appealed, and the Court of Appeals affirmed. Both courts concluded that Wis. Mall was limited to seeking an increase to the condemnation award. Wis. Mall appealed to the Wisconsin Supreme Court.

Wis. Mall argued that its contractual remedies against Saks survive the condemnation under the express terms of the lease, and that the condemnation proceedings do not provide an adequate remedy. Saks and the city argued that Wis. Mall has no rights under the lease because the city had condemned the property and the lease, with the result that the city had effectively stepped into Wis. Mall's shoes. In addition, the city and Saks maintained that any breach of contract damages relating to the Saks lease must be pursued in the condemnation proceedings.

The Supreme Court cited some general rules of law and made the following observations:

1. Complete condemnation of a property terminates a lease relative to that property.
2. The parties to a lease may establish their rights and obligations in the event of a condemnation.
3. It is not correct to assume that the condemnation operated as an assignment of the lease, putting the city into Wis. Mall's shoes as lessor.
4. It is not correct to assume that Wis. Mall is necessarily precluded from enforcing contract remedies against Saks. The termination of a lease would not ordinarily preclude a breach of contract action. For example, landlords have the right to sue, after termination of a lease, for rent that was due prior to termination.
5. Wis. Mall's contract claim against Saks appears to be based on an alleged breach that occurred before the property was condemned.

The state Supreme Court was also not convinced that the damages and remedies available to Wis. Mall in a contract cause of action would necessarily be available in the condemnation proceedings. First, if Wis. Mall can prove that Saks breached the lease, the five-percent discount rate stated in the lease to calculate the present value of future rent damages may or may not be available in condemnation proceedings. The city apparently calculated the condemnation award using a discount rate of approximately 13 percent. According to Wis. Mall, the lower five-percent discount rate would result in $3.8 million more than what Wis. Mall received in the condemnation award.

Second, the litigation expenses (including attorney's fees) available to Wis. Mall in a contract action against Saks may be different from what it could receive in the condemnation proceedings. The lease requires Saks to pay all of Wis. Mall's reasonable costs and expenses and includes an indemnification provision. The Chapter 32 condemnation statutes provide for certain owner's litigation expenses only if limited conditions are met.

As a result, the Court accordingly reversed the Court of Appeals' decision and remanded the case to the circuit court for further proceedings.

REALTOR® Practice Tips: A well drafted lease or contract may contain damage provisions and remedies that will survive a condemnation and continue to apply in certain circumstances. Members engaging in commercial transactions or other long-term contracts should be sure that their attorneys, or the attorneys of any parties that they are working with, are aware of this decision.

Just Compensation of Partial Taking Involving Multiple Contiguous Tax Parcels

***Spiegelberg v. State of Wisconsin and Department of Transportation*, 2006 WI 75.**

The plaintiff owned approximately 150 acres of agricultural land comprised of five separate tax parcels. The parcels are contiguous except for two roads that dissect the properties. The Department of Transportation (DOT) sought a partial taking of approximately 11 of the owner's 150 acres. Prior to the taking, Spiegelberg leased all but the part containing his home as farmland. All parcels had either direct access to existing roads or could have been provided access by Spiegelberg through her own property. Both Spiegelberg's and the DOT's appraiser valued the taking based upon its value before and after the taking. However, the DOT treated the land as one large parcel, while Spiegelberg's valuation treated each parcel separately, resulting in loss valuations of $18,900 and $84,200, respectively. The main reason for the varying calculations was because the taking affected the access of three of the five parcels.

Wis. Stat. § 32.09(6) requires compensation in condemnation cases to be the greater of either:

1. The FMV of the property taken as of the date of evaluation, or
2. The sum determined by deducting from the FMV of the whole property immediately before the date of evaluation, the FMV of the remainder immediately after the date of evaluation.

The DOT argued that the "unit rule" applies, which requires the entire property to be valued as a whole when a party can show contiguity, unity of use and unity of ownership. On the other hand, Spiegelberg likens the separate tax parcels to a subdivision in that they can be freely transferable and can be easily valued. Spiegelberg

also argued that larger parcels typically sell for less per acre than smaller ones.

Wis. Stat. § 32.09(6) sets the proper compensation as the FMV of the "whole property," but the parties could not agree on how to interpret this phrase. The court turned to a dictionary to aid them with this analysis.

Webster's *New Collegiate Dictionary* defined "whole" as a complete amount or sum: a number, aggregate or totality lacking no part, member or element. Thus, the word "whole" could be taken, in the context of the statute, to mean no part of a property is to be left out in determining its FMV. Unfortunately, this definition only indicates that no part of the affected property be omitted from the valuation in a partial takings case. The court then examined the context of the condemnation statute beginning with the meaning of FMV.

With respect to eminent domain proceedings, FMV is to be based on the highest and best use rather than the particular use at the time of the taking. Spiegelberg's appraisal pegged the use as residential development while the DOT's appraisal was limited to agricultural use. Both appraisers used a "before and after" approach, but Spiegelberg's approach fit better with the unique characteristics of the land (separate parcels individually available for sale with a development intent), and allowed for a greater valuation based upon the most advantageous use.

REALTOR® Practice Tips: The method by which just compensation is to be determined for a partial condemnation taking permits a flexible approach based upon the property's highest and best, or most advantageous, use.

Factors for Valuing Easements Taken in Condemnation for Underground Natural Gas Transmission Pipeline

***Hoekstra v. Guardian Pipeline*, 2006 WI App 245.**

Three separate landowners appeal from judgments in condemnation proceedings in which Guardian Pipeline, LLC (Pipeline) condemned portions of the landowners' modest Walworth County farm properties to obtain an easement for an underground natural gas transmission pipeline. The pipeline, which is part of a major transmission line that is not visible above ground other than being marked with stakes, extends across 140.3 miles through Illinois and Wisconsin, and is capable of transporting large volumes of natural gas at 1000 pounds of pressure per square inch.

Each landowner appealed the Walworth County Condemnation Commission's respective just compensation decision to the trial court, which confirmed the compensation awarded by the Commission. The landowners appealed to the Wisconsin Court of Appeals, which consolidated the appeals.

The issues on appeal to the Wisconsin Court of Appeals include (1) whether evidence of comparable sales in a condemnation proceeding is the only admissible evidence in determining the FMV of property, when such evidence is available; (2) whether, under the Wis. Stat. § 709.02 real estate disclosure requirements, the landowners must disclose all possible hazards associated with the pipeline; (3) whether the trial court erroneously excluded expert testimony regarding survey evidence and evidence related to fear, stigma and safety issues; and (4) whether the trial court erroneously excluded evidence of damage to trees that were either removed and/or transplanted as a result of installing the pipeline.

Just compensation was the only issue in this appeal. Wis. Stat. § 32.09(6g) provides that just compensation is calculated "by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation …." The difference between these values, or, in other words, the diminution in the FMV of the remaining land that occurs because of a taking, is referred to as "severance damages." FMV is defined as that amount which can be realized on sale by an owner willing, but not compelled, to sell to a purchaser willing and able, but not obliged, to buy.

1. Evidence Other than Comparable Sales is Admissible

The disputes in this case center on the different approaches employed by the appraisers to determine the value of the easements taken and the severance damage to the remainder of the property not taken. The Court of Appeals concluded that the trial court erred when it excluded offered testimony regarding value because that testimony considered factors other than comparable sales data, such as fear and stigma related to a natural gas transmission line located on a landowner's property. Comparable sales, the Court held, is not the only evidence that may be admitted in a condemnation proceeding to establish value per the plain directive of § 32.09(1m). Any factor affecting the value of property that could influence or sway the decision of a prospective buyer should be considered in the valuation of property in a condemnation proceeding.

2. Expert Testimony Regarding Survey Evidence and Evidence Related to Fear, Stigma and Safety Issues Associated with the Pipeline

The admissibility of expert evidence is left to the sound discretion of the trial court. Expert testimony is admissible if the witness is qualified as an expert, has specialized knowledge that is relevant and assists the court to understand the evidence or interpret facts. The Court of Appeals, however, concluded that the trial

court erroneously exercised its discretion by excluding the testimonies of two of the landowners' appraisers. One relies upon information gleaned from developers who had changed their minds about purchasing land once learning of the presence of a gas pipeline on the property. He assessed the property in terms of its potential uses, zoning and the location of the pipeline, as well as certain features of the pipeline, such as the lack of any odor to the gas that could identify the presence of a leak.

Another appraiser based his valuation of severance damages on two studies related to the effect of pipeline-related stigma on property values and applied the market approach when determining before- and after-takings value. He had surveyed real estate brokers and examined media coverage regarding the safety of pipelines, and had also focused on the impact of a pipeline on rural properties. Both experts found a 15-percent reduction in value.

Any flaws relating to the appraisers' methods in determining severance damages goes to weight, not admissibility, the Court observed, and their testimony would be subject to cross-examination at trial where concerns could be explored or revealed.

On the other hand, other experts that the landowners wished to have testify, such as a pipeline consultant or an environmental attorney, were properly excluded. The Court found that the experts failed to establish the requisite nexus or connection between the data and information they had and the FMV of the properties at issue here before and after the takings.

3. Wis. Stat. § 709.02 Does Not Require Disclosure of All Possible Hazards Associated with the Pipeline

The Court observed that Chapter 709 would not apply to the parcel that was purely agricultural, only to the parcels including dwelling units. In addition, nothing in Wis. Stat. Chapter 709 requires the landowners to disclose all potential risks conceivably associated with the pipeline. There is nothing in the text of these statutes that requires a seller to provide details of specific safety and health hazards associated with any property defect. The disclosure requirement is satisfied by the simple statement that "I am aware of an underground natural gas transmission pipeline on the property."

4. Evidence of Damage to Trees Removed or Transplanted During Pipeline Installation Excluded

The trial court excluded the testimony of two experts regarding the net loss in value to their properties allegedly caused by the removal or transplanting of trees from these properties.

Under Wisconsin eminent domain law, however, the "unit rule" prohibits valuing individual property interests or aspects (in this case, the landowners' trees) separately from the property as a whole. The compensation award is for the land as a whole and not for the sum of the different interests or components therein. Therefore, the Court concluded that the trial court property excluded the evidence regarding the trees.

Easements

The easement cases in this *Update* analyze the extent of incidental rights that accompany an ingress/egress easement and what action is required to terminate easements no longer used or needed.

Ingress/Egress Easement Gives Recipient All Rights Incident to or Necessary for Reasonable and Proper Enjoyment

***Synder v. Eberts* (No. 2006AP276, Ct. App. 2006).**

This case involves a dispute over the rights the grantor conveys to the grantee when she gives an easement for ingress and egress. In 1988, the grantor provided an ingress/egress easement to the grantee, but both parcels changed hands through subsequent conveyances. Snyder is a successor in interest to the grantor of the easement (servient estate), and the Eberts acquired the dominant estate property from the original grantee, relying on the partially paved easement for access to their property from the public highway. An access or ingress/egress easement benefits only a specific property called the dominant estate. The parcel over which the easement runs or which is otherwise burdened by the easement is called the servient estate. An access easement "runs with the land" – a deed conveying the benefited parcel or dominant estate automatically also conveys the easement, even if the deed or other conveyance does not specifically mention the easement.

Eberts maintained the unpaved portion of the easement – they mowed the grass there. Essentially, the paved portion ended at the edge of the Eberts' lawn, and the Eberts placed their mailbox and trash receptacles at the end of the paved portion to facilitate trash collection and mail delivery.

The relationship between Synder and the Eberts deteriorated causing Snyder to complete a new survey. Snyder instructed the surveyor to install several marking posts and painted lathes along the edge of the land subject to the easement at intervals considerably shorter than what was common or necessary. The Eberts responded by pounding the stakes flush with the ground, because they felt the markers would be dangerous to pedestrian and vehicular traffic and their lawn care efforts. Snyder sued for a declaratory judgment as to the scope of the easement and for trespass stemming from the Eberts manipulating the survey posts and lathes. The Eberts counterclaimed, alleging Snyder was preventing their full use and enjoyment of the dominant estate by his placement of the markers along the border.

The Court of Appeals examined the scope of an unrestricted easement granted for ingress and egress purposes. Specifically, did the easement allow travel over the unpaved,

grassy area adjacent to the roadway? After examining the language in the document creating the easement and the attached map, the Court of Appeals did not find anything to support Snyder's assertion that the easement was limited to travel on the paved portion of the easement.

The Court held that an unrestricted grant of an easement gives the grantee all rights that are incident or necessary to the reasonable and proper enjoyment of the easement. An unrestricted easement for egress and ingress is intended for passage, including walking over the grassy part of the land in this instance. Furthermore, the Eberts' placement of the trash bins and mailbox facilitates ingress and egress for those purposes without unduly burdening Snyder's servient estate. Finally, the court ruled that the Eberts' mowing and maintaining the grassy portion of the easement was reasonably necessary for safe passage (pedestrian and vehicular) over the grassy area and did not unduly burden Snyder's servient estate.

Supreme Court of Wisconsin Reverses Court of Appeals Decision and Holds that a Servient Estate Cannot Unilaterally Terminate or Relocate an Express Ingress/Egress Easement

***AKG Real Estate, LLC v. Kosterman*, 2006 WI 106.**

In an easement, the dominant estate enjoys the privileges granted by an easement as to other land, and the servient estate must permit the exercise of those privileges. For an access or ingress/egress easement, the holder of the dominant estate travels over the servient estate to reach the public road.

Grant of Access. In 1960, two parents deeded four of their 80 acres of vacant land (Homestead) to their son. The Homestead was 800 feet from the highway and landlocked so the parents granted ingress/egress easements over their property so their son could reach the road from his four acres. Later when the parents' property (servient estate) was sold to AKG Real Estate, LLC (developer) in 1998, a private road easement for the benefit of the Homestead (dominant estate) was reserved, "until such time as public road access is made available for said real estate upon the following described easement of right of way, to wit: [description of a 30- foot easement]."

Easement Not Suitable for Road. In 2001, the developer met with members of the Racine County Planning Commission to introduce its concept map and plans for the development of a subdivision. They expressed concern because one of the proposed roads connecting to the state trunk highway (along the 30-foot easement) was too close to another access road and thus would be in violation of DOT ch. Trans 233 regulations. The developer altered its plans to give the Homestead, then owned by Patrick and Susan Kosterman (owners), access to the highway via a cul-de-sac, but they needed the owners to release the 30-foot easement to the developer or modify the easements in order to receive municipal approval of the modified subdivision plans. The owners refused, so the developer sued for a declaratory judgment terminating the 30-foot easement since the Homestead would have public road access and ingress and egress to the highway in the new development. The owners counterclaimed for a declaratory judgment that the easement remained in place.

The circuit court and the Wisconsin Court of Appeals held that the easement terminated once the developer provided another means of access to the highway. The Wisconsin Supreme Court overruled that decision.

Impossible to Fulfill Purpose. AKG argued that the easement should be terminated or modified under both "impossibility of purpose" and "changed circumstances" standards. The Wisconsin Supreme Court found that the purpose of the original easement was not to become a public road, as the Court of Appeals found, but to provide ingress and egress to the dominant estate over a specifically described pathway. The law does not require an express easement to be terminated just because an alternate course of ingress and egress becomes available.

The circumstances under which an easement can be modified or terminated depend upon the type of easement. Wisconsin law distinguishes between easements of necessity, easements for a particular purpose, prescriptive easements and express easements. For example, if an easement is granted for a particular purpose, the right continues while the dominant estate is used for that purpose, but ceases when the specified use ceases. Similarly, an easement of necessity is a temporary right that only continues as long as the necessity exists. On the other hand, an express easement and a prescriptive easement (acquired through adverse possession) cannot be terminated or modified solely because the necessity for the easement ceases. This case involves an express easement acquired by an express written grant and cannot be unilaterally modified or terminated just because an alternative is available.

Burdens on the Servient Estate. AKG next argued that, regardless of the language used in the original easement, the easement now inhibits the free and unrestricted use of property and unreasonably burdens its property. The Wisconsin Supreme Court acknowledged that it may result in unneighborly and economically unproductive behavior, but the Court must safeguard property rights. In short, Wisconsin courts have consistently upheld property rights, even under circumstances that were not economically productive.

Accordingly, the Court concluded that the owner of a servient estate could not unilaterally relocate or terminate an express easement.

REALTOR® Practice Tips: Some easements may be terminated by the completion or cessation of the particular purpose for which it was granted, but easements obtained by express grant or prescription may not. Parties dealing with a property where an existing easement seems to serve no purpose should be referred to their attorneys if termination of the easement is desirable.

Foreclosure

The following case confirms that an owner may redeem and stop the sheriff's sale if the owner successfully sells the property to a buyer before the judicial confirmation of the sheriff's sale.

Owner May Redeem Property Before Judicial Confirmation of Sheriff's Sale, and Bidder at Sheriff's Sale Loses Property

***Osterberg v. Lincoln State Bank*, 2006 WI App 237.**

Osterberg appeals from an order vacating his purchase of foreclosed property. Due to miscommunication between the seller, Lincoln State Bank, and its attorney, the bank had proceeded with the confirmation hearing after the sheriff's sale despite having received payment from the mortgagor. When the bank realized the error, it brought the matter to the circuit court, and the court found that the owner of the property had redeemed the mortgage. Because the owner redeemed the mortgage before the sale's confirmation, it remained the property's owner.

In July 2004, the Lincoln State Bank filed an action for foreclosure on a $60,000 mortgage because it had not received payments totaling over $1500. In February 2005, the circuit court entered a judgment of foreclosure. The sheriff's sale occurred on September 26, 2005, and Osterberg was the winning bidder. A hearing to confirm the sale was scheduled for October 17.

Meanwhile, the property owner obtained a loan that it used to pay off the Lincoln State Bank on October 7. Lincoln State Bank's attorney was apparently unaware that the judgment had been paid, and the owners did not attend the hearing because they had paid the mortgage foreclosure judgment. Osterberg did appear, and the court confirmed the sheriff's sale.

The bank's attorney learned of the owners' payment on October 27, and on November 1, the bank moved the circuit court to determine whether the owners or Osterberg had the right to the property. The court determined the owners had properly redeemed the mortgage and were therefore the rightful owners of the property. Accordingly, the court voided the sheriff's sale, discharged the mortgage and ordered that Osterberg's payment be returned to him. The court also ordered the bank to pay his financing costs, property insurance and part of his attorney fees related to the voided purchase. Osterberg appealed to the Wisconsin Court of Appeals.

Osterberg claims that Wis. Stat.§ 846.13 establishes that a mortgagor must pay the judgment, interest and costs, and notify the court that payment has been made. The owners contend that the entire procedure for redemption is that the mortgagor must simply pay either the clerk of court or the plaintiff, and upon payment, the mortgage is redeemed.

In this case, the Court observed, the bank obviously should have notified the court of the redemption and presumably would have done so had it not failed to communicate with its attorney. Public policy is served when redemption allows creditors to be paid in full and landowners to remain in possession of their land. A purchaser at a sheriff's sale must always account for the possibility that he or she might not end up with the property, since the court must confirm the sale and redemption may occur at any time before judicial confirmation.

REALTOR® Practice Tips: The property owner may redeem the mortgage by paying off the foreclosure judgment before the judicial confirmation of the sheriff's foreclosure sale. The property remained the property owner's and the purchaser at the sheriff's sale should have his down payment returned to him.

Waterfront Rights

The cases in this section pertain to pier rights and ability to convey riparian rights via easements recorded before April 9, 1994.

Wisconsin Supreme Court Gives DNR Permission to Declare Existing Piers Illegal

***Hilton v. DNR*, 2006 WI 84.**

A keyhole subdivision in Green Lake consists of 38 back lots, and each lot owner also has a one-thirty-eighth interest in a 77.2-foot-wide waterfront lot. Each back lot owner is also a member of a homeowner's association and has a right to one boat slip along a pier extending out from the waterfront lot. The number of boat slips increased over the years from five in the 1960s to 22 in 2000. The pier also extended into a water depth of 3.5 feet. At the time the keyhole lots were created, no state law or local ordinance prohibited the creation of such lots, nor prohibited the homeowner's association from having 22 boat slips.

In 2001, the Department of Natural Resources (DNR) brought an enforcement action against the homeowner's association, maintaining that the pier exceeded the "reasonable use" standards in the DNR's informal guidelines, commonly known as the "Pier Planner," online at dnr.wi.gov/org/water/fhp/waterway/permits/pack07.pdf. The Pier Planner is a set of standards created by the DNR to regulate the size and dimension of piers. Under these standards, the association's pier was allowed to extend into only three feet of water and only two or three boat slips were allowed given the size of the water-

front lot. (Note: These standards had not been approved by the Legislature, nor had they gone through the administrative rule-making process.)

The Administrative Law Judge (ALJ) ordered the homeowner's association to remove 11 boat slips and shorten the pier so that it did not extend beyond a depth of three-feet. The circuit court modified the ALJ's decision, finding that 17 boat slips was a reasonable amount. The Court of Appeals agreed with the DNR, allowing only 11 boat slips.

On appeal, the Wisconsin Supreme Court upheld the Court of Appeals' decision and required the homeowner's association to remove 11 slips and reduce the length of the pier. The Court based its opinion on the necessary burden of proof that must be met to overturn the ALJ's decision. The Court noted that it was bound by the DNR's determination unless it could be shown that the DNR had no reasonable justification for making this determination. In other words, the Court was required to uphold the DNR's determination even if there was an equally reasonable or more reasonable interpretation.

In a concurring opinion, Justice David Prosser identified the far-reaching impacts of this decision and the impossible burden facing property owners in challenging a determination made by the DNR. "This case involves much more than the number of boat slips on a long-established pier in Green Lake County. This case epitomizes the growth of agency power, the decline of judicial power, and the tenuous state of property rights in the 21st Century…."

The dimensional standards in the Pier Planner have been recently incorporated into state statute (Wis. Stat. § 30.12(1g)(f)), but the Legislature never intended for these standards to be applied retroactively to existing piers. Under this decision, any waterfront property owner with a "nonconforming pier" could be required to remove the pier, or at least sections of it, if the pier has not already obtained a permit from the DNR and:

- Is greater than six feet wide;
- Extends into water deeper than three feet or beyond a water depth necessary to moor a boat, whichever is greater; or,
- Have more than two boat slips for the first 50 feet of water frontage, and one additional boat slip for each additional 50 feet of water frontage.

REALTOR® Practice Tips: Until legislation is signed into law clearly defining which existing piers are grandfathered and which are not, REALTORS® and sellers of waterfront property with nonconforming piers should make prospective buyers aware that such piers do not meet the current dimensional standards found in Wis. Stat. § 30.12(1g)(f) and, at some point in the future, may require (a) a permit from the DNR or (b) modification or removal to meet these dimensional standards. Information that a pier that does not conform to existing regulations may be information suggesting the possibility of a material adverse fact that should be disclosed to prospective buyers prior to entering into a purchase contract.

REALTOR® Practice Tips: For more information about the current status of pier regulations in Wisconsin, please visit the DNR's Web site at dnr.wi.gov/org/water/fhp/waterway/piers.shtml. The DNR has also produced a "fact sheet" for the status of the pier regulations in 2006 found online at dnr.wi.gov/org/water/fhp/waterway/permits/Piers2006.pdf.

Pre-1994 Easement Conveyance of Riparian Rights Did Not Create Pier Ownership

***Nanna v. Daly* (Ct. App. No. 2005AP002645 2006).**

The Helen B. Daly Trust (Daly) owns lot 1 of certified survey map (CSM) #1450 on the shore of Geneva Lake. Under a DNR permit issued in 1985, a pier was constructed off lot 1. The other three lots in CSM #1450, now owned by the Nannas, did not border the lake. The subdivision declaration provides that the owner of each of the four lots in CSM #1450 shall have the right to use the common areas located on CSM #1450, to use the pier adjacent to lot 1 and to purchase one boat slip to be installed on the pier. Sometime between 1986 and 2003, the pier was made larger than that permitted by the 1985 DNR permit.

In October 2002, Daly applied to the DNR for amendment of the pier permit to conform to the actual dimensions of the existing pier. The DNR denied the application, stating that a new permit was required and that Daly could not apply for a new permit because the pier addition was not solely for its own use as the riparian owner.

The Nannas petitioned for review of the DNR's decision, and Daly asserted that the subdivision declaration did not effectively entitle the Nannas to use the pier and boat slips because such entitlement was contrary to law. The Nannas then filed an action against Daly for a declaratory judgment that they have a right to unobstructed access to and use of the pier, and that Daly is contractually obligated to place and maintain the pier consistent with the subdivision declaration.

In circuit court, the DNR conceded that it could not deny the amended permit application solely because nonriparian and riparian owners use the pier. The DNR acknowledged that the Nannas have the right to use the pier as part of the common area, but asked the court to determine whether the provision in the subdivision declaration allowing the Nannas to purchase a boat slip means the Nannas are co-owners of the pier or have ownership rights in their slips.

The court concluded that the subdivision declaration conveyed riparian rights to the Nannas by easement and

that such conveyance predated the prohibition in Wis. Stat. § 30.133, which prevents the conveyance of riparian rights via easement after April 9, 1994. The court found that the declaration was valid and enforceable and that Daly, as the sole riparian owner, is obligated to hold and maintain a permit for the pier and place the pier for use by all the lots. The declaration does not create an ownership interest in the Nannas. The court remanded the matter back to the DNR for further proceedings. Daly appealed to the Wisconsin Court of Appeals.

The Court observed that before the April 9, 1994, cut-off date in § 30.133, Wisconsin followed the general rule that riparian rights can be conveyed to nonriparian owners by easement. Here the easement in the subdivision declarations specifically grants the Nannas access to and use of the pier. The Court rejected Daly's argument that the subdivision declaration grants riparian ownership – the assigned use of a boat slip cannot be equated with riparian ownership. Having concluded that the subdivision declaration is a valid grant of an easement of access to and use of the pier, the Court affirmed the circuit court's reversal of the DNR's decision denying an amended pier permit.

REALTOR® Practice Tips: Riparian rights such as having access to the waterfront and any associated pier could be established by easement prior to April 9, 1994.

Personal Property Tax Assessments

The case in this section analyzes the proper components (real estate, physical structure, permit and location) to include when assessing a billboard for personal property tax purposes.

Proper Assessment of Billboards

***Adams Outdoor Advertising, Ltd. v. City of Madison*, 2006 WI 104.**

Adams Outdoor Advertising, Ltd. (Adams) challenged the city of Madison's personal property tax assessments of its billboards for the years 2002 and 2003, which were $6,022,400 and $5,858,000, respectively. Adams' billboards were all on leased land and it asserted that their fair market value (FMV) was only $401,984. The essence of Adams' claim was that the city assessments included value attributable to elements other than personal property, such as the location of the billboards and the billboard permits.

In 1994, the city switched from the cost approach to the income approach when valuing billboards. Interestingly, the reason for the change was Adams' submission of a billboard appraisal based on the income approach in connection with an inverse condemnation lawsuit against the city. Given the limited number of billboard permits the city issued, the income approach produced much higher assessment values than the cost approach.

Adams' experts testified that the cost approach was the proper method when appraising billboards for personal property tax assessments. Adams also argued that the city improperly included the income-producing value of the billboard permits, which it characterized as an "intangible."

The city's justification for using the income approach was there were no recent arms-length sales of billboards and thus no reasonably comparable sales. The assessor determined the income attributable to the billboard structure by subtracting the value of the leasehold interest, the income attributable to Adams' art and advertising development department and Adams' operating expenses from total income, and then capitalized that amount at a rate of 14 percent. The city argued that the true cash value of the billboards was far greater than the cost of its components, and that the FMV was more than just the mere cost to construct a billboard.

The trial court concluded the city's approach was valid given that it partitioned out the income attributable to Adams' business value and the leaseholds. The city also concluded that the city's inclusion of the value of the "intangibles" – the location and billboard permits – was proper because both are inextricably intertwined with the physical structure of the billboards.

The Wisconsin Court of Appeals passed the case directly to the Supreme Court because it was a case of first impression – the issue had never been decided before in Wisconsin.

The Wisconsin Supreme Court reviewed the following issues relating to the appraisal:

1. Did the City Err by Not Considering Comparable Sales?
2. Did the City Improperly Use Only the Income Approach?
3. Did the City Erroneously Apply the Income Approach by Including the Value of the Billboard Permits in its Assessment?

Did the City Err by Not Considering Comparable Sales?

The city argued the six sales available for consideration were becoming dated, sales information lacked details about the nature of the structures that were sold, sales were of a relatively small number of billboards (six), and information used when calculating the income from the comparables was inaccurate. Adams conceded there were no reasonable comparables available, but still argued that the city did not do enough to actively seek out comparables even though Adams had not tried to find comparables for the city. Given the lack of reasonable comparables, the Court held the city was allowed to rely on the income approach.

Did the City Improperly Use Only the Income Approach?

The Court first stated that it has repeatedly held that an assessment cannot be based solely upon the income approach. If there is insuf-

ficient market data, the assessor must determine market value from the best information the assessor can obtain, considering all elements that collectively have a bearing on the value of the property. Cost, depreciation, replacement value and income all have a bearing on the value of the property. Moreover, the *Wisconsin Property Assessment Manual* states that usually more than one methodology is required to capture all of the factors that bear on FMV. However, the *Manual* also recognizes that there may be situations that require the use of only one methodology given the information available. In this instance, however, the Court found the city's failure to explore the cost method of valuation violated the statutory requirements found in the Manual.

Did the City Erroneously Apply the Income Approach by Including the Value of the Billboard Permits in its Assessment?

Adams contended that the permit is either an interest in real property under Wis. Stat. § 70.03 or intangible personal property under Wis. Stat. § 70.112(1) – either way not subject to a personal property assessment. The Court concluded that a billboard permit is a right or privilege attached to real property and not tangible personal property as defined under Wisconsin law. A billboard permit does not have a tangible characteristic similar to the items found in the Wis. Stat. §70.04 definition of personal property. Rather, the value of the permit lies in the right to construct a billboard and not in the piece of paper. In essence, the Court interpreted the statute defining personal property to not include intangible property such as permits, franchises, licenses and copyrights. The Court also noted that the statute corroborates this interpretation because it expressly includes ferryboat franchises as personal property. In other words, because the statute explicitly included only one type of intangible property within the definition of personal property and not any others, it appeared that all other unmentioned intangible property would not fall within the definition.

Because the permit is classified as real property, the income attributable to it would be properly included in the real property assessment rather than the personal property assessment. The value of billboard permits is not "inextricably intertwined with the structure of the billboard," but rather is attached to the location of the underlying real estate. Billboard permits are issued for a designated location only, and when a permit terminates, the billboard must be moved. Thus, the business value of the permit lies in the permit itself and the location to which it applies, which are real property or features of real property, respectively. An appraisal for personal property tax assessment should be limited solely to personal property involved.

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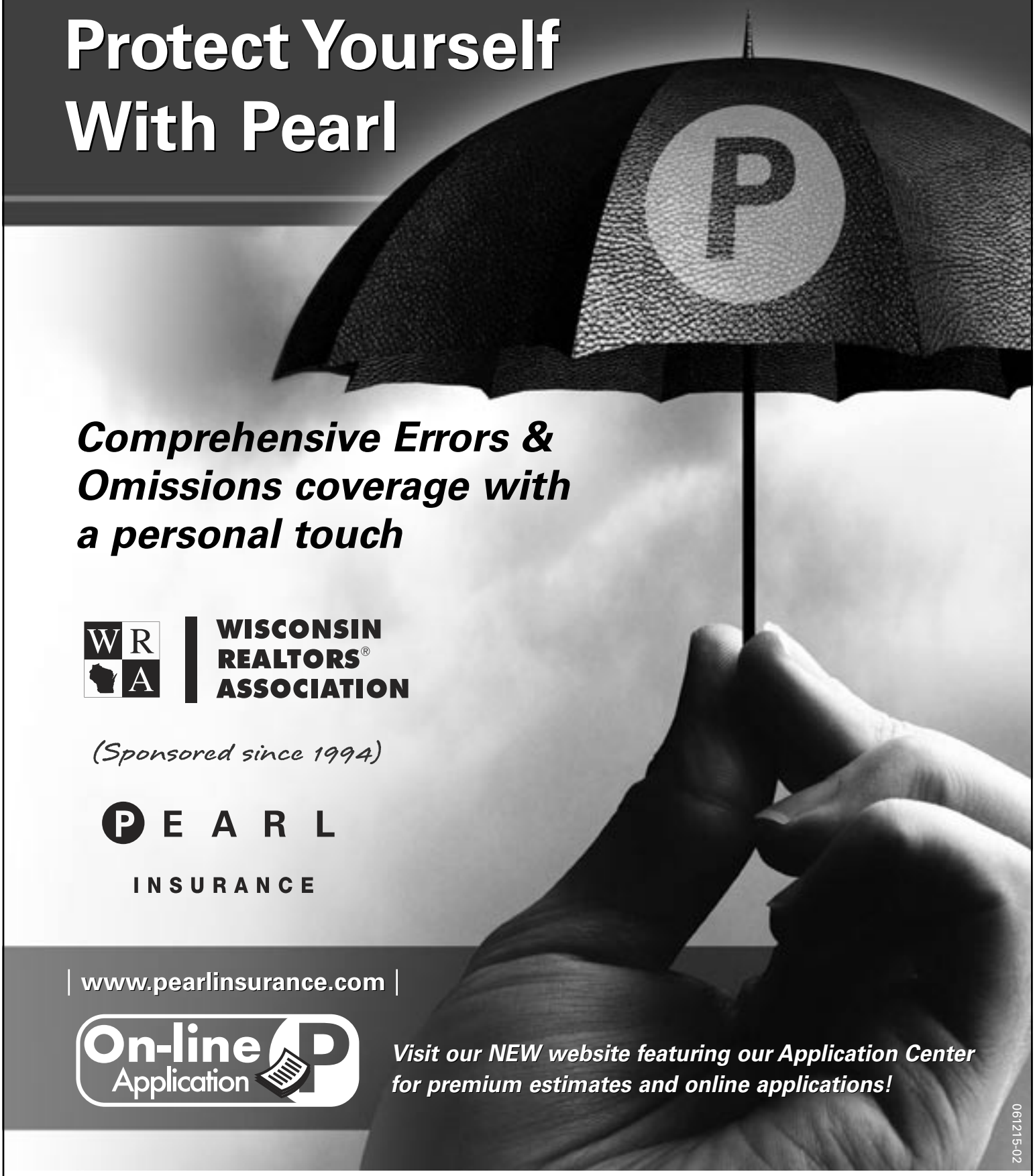

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