

# LEGAL EASE

## The Implied Warranty of Habitability in Condominium Development

By Jason Thompson, Attorney

Developers and purchasers interested in significantly renovated condominiums should consider whether the implied warranty of habitability will govern their transaction. Originally, the rule of “caveat emptor” or “buyer beware” governed the sale of real estate. All property was presumed to be sold “as is” unless there were specific warranties or provisions to the contrary. In keeping with the trend in American law, “implied” warranties were written into contracts by the courts. An “implied warranty of habitability” is such an implied warranty applied to sales of new residential construction.

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SMITH HAUGHEY  
RICE & ROEGGE

*Guiding you through  
the legal process.*

Fall 2006

## RETHINKING LITIGATION THE STRATEGIC USE OF MEDIATION

By Charles B. Judson

**Between 60% and 70% of all lawsuits mediated in the State of Michigan result in a settlement. Here's why and how it works.**

Regular readers of this newsletter will recall that Smith Haughey Rice & Roegge supports the value of litigation alternatives in the resolution of business disputes. In particular, we have emphasized the benefits of mediating settlements through a neutral facilitator as an alternative to actively pursuing relief through lawsuits.

Mediation is normally utilized as a “piece” of the litigation procedure, as opposed to an alternative remedy to a lawsuit. However, the use of mediation early in the dispute can be particularly helpful in resolving a dispute both before and after litigation has been initiated.

### What is Mediation?

In most of the circuit courts throughout the State of Michigan, judges order the parties to participate in a facilitative mediation prior to establishing firm trial dates. For those unfamiliar with the process, mediation involves the selection of a neutral facilitator who brings the parties (and their legal counsel) together for a structured settlement conference. Once convened, the mediator encourages active discussion of the circumstances relating to the dispute in an effort to share the individual perspectives of the participants.

While legal theories are helpful in framing the negotiations, the circumstances facing each party to the dispute are often either unknown or

misunderstood by the other side. Mediation is simply a communication process that offers insight to the thought process of the opposing interest – and hopefully becomes a tool to find an effective middle ground.

Parties actively participating in mediation are quick to realize that the opportunity to reach a settlement is within their control. Mediation is designed to assist each party to realize that a settlement cannot occur unless it is voluntary, with both sides to the dispute satisfied that a settlement will be in their respective best interest. The mediator's job is to help each side understand the perspective(s) of the other so that settlement options can address each party's needs.

### Preparing for Mediation

Businesses can actively prepare for mediation by recognizing that, in order to settle the case, they must be prepared to persuade their opponent that a settlement will be in their mutual best interest. It may seem obvious that a trial results in a judge or jury imposing a final decision on both parties. However, the reality is that legal or factual decisions rendered by a judge or jury do not always address all of the issues in the dispute that are important to the parties.

Through mediation, the parties are able to express in their own words why the dispute occurred – or in the alternative,

*Continued on back page*

# WHAT IS YOUR BUSINESS WORTH?

***Your answer may be more important than ever – now that a Federal Court in Pennsylvania has allowed the owner of a family business to testify as to value in an IRS refund suit.***

*By Ann-Mary Petroskey, Attorney*

In many taxpayer's estate and gift-planning efforts, a formal business valuation appraisal is strongly recommended to determine the value of family-owned businesses. An appraisal provides not only a basis to determine the amount of annual exclusion gifts, but also provides a basis for defending any potential challenges by the IRS on that value.

However, a recent case in the Federal District Court in the Western District of Pennsylvania has provided some authority that, in addition to expert testimony, lay opinion testimony offered by an owner of a family business will also be allowed under certain circumstances. This new case, *Sydney Smith, et al v. US*, involved a suit for a refund of gift taxes paid on a gift of a family partnership interest.

A lower court had awarded a refund even larger than the taxpayer claimed in IRS proceedings – partially based on the court

testimony of a lay witness business owner. Now, a U.S. District Court has held that it was proper to allow that testimony.

The gifts in question were fractional interests in a family limited partnership (FLP) formed by the taxpayer on December 29, 1997. The sole asset of the FLP was 100% of an operating company. When formed, the FLP had two general partners: the original owner of the operating company and another family member.

After a gift of partnership interests in 1998, the IRS assessed additional gift taxes, which the taxpayer challenged. After a jury trial, the IRS appealed, contending that the lower court erred in allowing a general partner to offer a lay opinion at trial as to the value of a 1% limited partnership interest in the Smith FLP.

Normally, opinion testimony by a lay witness is allowed. However, if the witness is not testifying as an expert, the witness' testimony

in the form of opinions or inferences is limited to those opinions or inferences which are:

- (a) rationally based on the perception of the witness,
- (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and
- (c) not based on scientific, technical, or other specialized knowledge.

Prior to trial, the IRS objected to the admission of the general partner's proposed testimony as to the value of a 1% limited partnership interest, contending that it would have to be based on specialized knowledge and that the general partner had not been qualified as an expert witness. However, the court found that an owner of a business is competent to give his opinion as to the value of his property. Whether or not his opinion is accurate goes to the weight of the testimony – but not to its admissibility.

The courts value "particularized knowledge" of the business owner. As a lay person, his or her opinion testimony is admitted, not because of experience, training, or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business.

In order to lay a sufficient foundation to establish a lay witness's "particularized knowledge," it is important to adequately demonstrate to the court:

1. The nature and extent of the business owner's role as an active manager of the business,
2. The business owner's knowledge as to each of the assets of the company in detail, including value, workload, income stream, and operations, as well as his involvement in the company's finances,
3. The business owner's knowledge of the company's competitors and the impact these competitors have on the operations of the business,
4. The business owner's understanding of the FLP and the meaning of fair market value (hypothetical buyer/seller) in terms of a limited partnership interest.

**Ann-Mary Petroskey practices tax law and estate planning in the firm's Traverse City office. She can be reached directly at [apetroskey@shrr.com](mailto:apetroskey@shrr.com) or 231.486.4557.**

# HOW TO GET SUED

## VOLUME II

By Chip Behler, Attorney

A large amount of time and money is spent defending lawsuits today. Most of our clients prefer to use our services to prevent conflicts in the first place. However, if you're determined to become a defendant in a lawsuit, here are just a few more ways you can increase the probability of it happening:\*

1. Don't follow your contract; particularly regarding change orders, notices, specifications, time of performance, etc.
2. Don't share information about your contractual obligations with your employees or subcontractors who have the responsibility to perform those obligations on your behalf.
3. Don't become familiar with the laws, codes, regulations, or professional or industry rules and standards that apply to your profession or business.
4. Don't maintain a positive relationship with the people you do business with, including employees, representatives, clients and customers.
5. Don't try to understand the position of the other side of a dispute in order to determine the strength of your position or theirs, whether the dispute should be negotiated, or whether principle is more important than your business relationship.
6. Don't investigate or evaluate a complaint or claim to determine if it has any factual, technical, or legal basis.
7. Don't document, record, or confirm conversations or occurrences associated with a project or business transaction. Presume you will win the "lying contest" when the resolution of a dispute depends on your word against theirs.
8. Don't follow up.
9. Ignore a "Notice of Claim" or other such communication from a lawyer, client, customer, or insurance company.
10. Don't agree to the terms of an agreement, get it written up, and sign it BEFORE the project or transaction begins

And finally:

11. End a conversation with: "So, sue me!"

\*Our professional opinion, of course, is that you should not engage in any of these behaviors. Instead, call your SHRR attorney to maintain the best legal protection.

## Condominiums *from page 1*

The doctrine has been part of Michigan law since it was first adopted by the Michigan Court of Appeals in 1970. The doctrine provides that each sale carries an implied warranty that the home will be "erected in reasonably workmanlike manner and will be reasonably fit for habitation."

### What Does "New" Mean?

In another opinion, the Court of Appeals applied the implied warranty of habitability to the new construction of condominiums. The Court also noted such claims are subject to a six-year statute of limitations.

Case law makes it clear that liability is only for "new construction" and that subsequent purchasers of the home may not utilize the implied warranty for a cause of action against the developer.

An interesting question so far unaddressed by Michigan courts is the definition of "new construction." Many residential and condominium developments are renovations of existing structures. Michigan law has not decided whether such renovated or refurbished condominiums qualify as "new construction."

Courts in Florida, Delaware, the District of Columbia, Wisconsin, Illinois, and New Jersey that have addressed the issue have concluded that the doctrine applies to such renovations. A decision from Tennessee, however, seems to reject the application of an implied warranty of habitability to renovated premises.

### New Might Be in the Presentation

Many of the public policy concerns that inspired the doctrine are present in the sale of completely renovated condominium projects. As in the case of new construction, a purchaser of a renovated condominium unit must "rely on the skill of the developer" and will have "little opportunity for obtaining meaningful protective changes in the conveyancing documents" prepared by the developer.

Whether a significant renovation represents "new" construction may be a fact question to be decided on a case-by-case basis. Relevant factors to examine may be the promotional material of the developer (for example, if the condominium was advertised as "new") and whether the purchaser was provided with a seller's disclosure statement. (State law requires such a disclosure except for transfers by licensed builders of "newly constructed residential property that has not been inhabited." Some renovations may be the first residential use of the structure, if the property was converted from a warehouse or other commercial use.

While developers will likely want to disclaim the implied warranty in a contract, application of the doctrine may give purchasers additional bargaining power, especially in evaluating an offer for a limited warranty.

**Jason Thompson practices business and property law in the firm's Traverse City office. He can be reached directly at [jthompson@shrr.com](mailto:jthompson@shrr.com) or 231.486.4543.**

Space does not allow publication of every success we achieve on behalf of our clients – but in each issue, we'll spotlight some of our more noteworthy accomplishments:



**Jon Vander Ploeg** and **Bill Henn** successfully defeated a plaintiff's motion for an emergency preliminary injunction to halt a County Road Commission's right-of-way brush control program. They argued, and the Circuit Court agreed, that based on principles of constitutional law creating and governing the

existence of the judicial branch of government, the plaintiffs lacked standing to obtain the relief requested.



**Richard Kraus** received a favorable decision from the Michigan Supreme Court, where the firm represented the University of Michigan.

In *Woodard v Custer*, the court held that when a physician sued for malpractice has specialized in a narrower subspecialty area or received a certificate of special qualifications in that field, any expert witness must have the same experience and qualification in the subspecialty. Prior decisions only required experts to practice the same specialty, as opposed to the same subspecialty. As a result of the Supreme Court decision, the case against the director of a subspecialty unit at the University of Michigan Hospital was dismissed.

## Transfer of Real Estate Not So Taxing After All

By Robert Parker, Attorney

The Michigan transfer tax has become one of those not-so-little negative surprises facing sellers of real property when they arrive at the closing table. It's a tax based upon the value of the property transferred, and it must be paid in order to record the closing documents.

Prior to the passage of Proposal A in March 1994 we didn't give the transfer tax much thought. After all, the tax was only

\$1.10 per \$1,000 of value transferred. With the passage of Proposal A, however, the tax skyrocketed to \$8.60 per \$1,000. So, for example, the transfer tax owed by the seller upon the sale of a \$350,000 home is \$3,010.

The Michigan Court of Appeals recently issued a decision (*Lake Forest Partners 2 Inc. v Department of Treasury*, 6/6/2006) that should allow builders, developers

and sellers of newly built homes and commercial buildings to pay substantially less in transfer tax.

### New Calculation Formula

Past practice had been to calculate the tax based upon the value of the real property when the deed was delivered, i.e., at closing. However, the Court in its recent decision held that the tax should actually be calculated when the purchase agreement is signed.

For real estate sales involving existing structures, this distinction will have little effect. However, for transactions involving real property where structures will be constructed on the property *after* the purchase agreement is signed and *before* closing – well, this distinction can have a significant, positive effect.

Assume a developer has developed a 45-lot residential project. The developer is soliciting to purchase and build homes on the lots. The lots and homes have a value of \$35,000 and \$350,000, respectively, for a total value of \$385,000. Closing, when the deed is delivered, occurs after construction is completed.

# Spotlight:

## Estate Planning vs. Wealth Transfer

By Lisa C. Young, Client Services Director



**Craig Noland** represented a township, the township supervisor, and the township fire chief in defense of a civil lawsuit claiming sexual

harrasment, and retaliatory discharge brought by a former Township employee. At the conclusion of the trial, the Court rendered a judgement of no-cause of action in favor of all the defendants.

### Substantial Savings Potential

Prior to this decision, the transfer tax would have been \$3,311. By crafting the purchase agreement and other closing documents carefully, the transfer tax could be as low as \$301 – for a savings of over \$3,000 per lot. On a 45-unit development, this can add up to a substantial savings.

The increase in transfer taxes was one of the Proposal A features allowing the Legislature to substantially roll back property taxes. Frankly, we wouldn't be surprised to see a legislative response to the Court's decision.

But for now, with some careful assistance from your SHRR lawyer, there's an opportunity to save substantial money when selling real property that is to be improved prior to closing.

**Robert Parker practices in real estate, construction law, and land use and zoning. He can be reached directly at 231.486.4504 or rparker@shrr.com.**



Do you have an estate plan? From a tax standpoint, a traditional estate plan – one that consists of a Will and revocable Trust – reduces your family's tax burden at your death. But is there anything you can do to ensure that every dollar of your money stays with your family without any reduction for taxes?

Enter the tax-saving discipline of “wealth transfer.”

**George Bearup**, chair of the firm's Business and Individual Planning group, offers a few thoughts to those who might consider a wealth transfer strategy.

### Lisa: Exactly who should consider a wealth transfer plan?

**George:** Wealthy taxpayers, those with a taxable estate, should work with an attorney to develop a lifetime tax plan that transfers all of their wealth – intact and tax-free – to their family or to their favorite charities. For business owners, a separate lifetime plan to transfer their business tax-free is part of an overall wealth transfer plan.

### Lisa: At what point in your life should you begin a wealth transfer plan and why?

**George:** The sooner the better. The plan is usually built around strategies that should be implemented during your lifetime, like an irrevocable life insurance trust, a qualified personal residence trust, a grantor retained annuity trust, and a sale to an intentionally defective grantor trust. These transfers allow for continued control or influence over assets – yet you legally transfer assets during your life so they are not subject to the estate tax.

### Lisa: What options are available for business owners?

**George:** Your business is one of the assets – and is usually the centerpiece of a wealth transfer plan. There are endless combinations of strategies; like intra-family buy-sell agreements, generation-skipping techniques, and family limited partnerships that can work effectively to implement a succession plan for a business owner.

### Lisa: How does one get started on a wealth transfer plan?

**George:** First, review your current estate plan with an attorney. Ask yourself: Does it help you eliminate the capital gains tax? Does it address how you will transfer your business to your children – tax-free – and allow you to keep control or influence until you die? How will family dynamics be influenced with a gradual transition in the ownership of a business? If there is any question about whether your family will receive your wealth, there is usually a way to get the job done – legally, and sometimes with ease.

If you would like more information about keeping control of every asset you own, from beginning to end, you can contact George directly at [gbearup@shrr.com](mailto:gbearup@shrr.com) or 213.486.4510.

# Have You Heard The News?



**Andrew Blodgett** wrote an article titled "After Fultz, Can a Third Party Still Use a Contract to Sue in Tort", which was published in the Michigan Defense Quarterly.



**George Bearup** spoke on estate planning principles at a Pre-Retirement Seminar for state employees presented by the State of Michigan Department of Civil Service.



**Ben Hammond** was elected vice-chair of the Grand Rapids Bar Association's Young Lawyers Section. Ben also attended the AIA/AGC Annual Mid-Summer Conference on Mackinaw Island.



**Bill Jewell** presented a seminar in August to a local hospital entitled "Drug Seeking Patients." In September, he gave a seminar regarding disclosure issues to another local hospital.



**Chuck Judson** was elected to the Executive Committee of the Alternative Dispute Resolution Council of the State Bar of Michigan and as Treasurer at its Annual Meeting in September.



**Bill Jack** has been appointed to serve as chair of the firm's diversity committee.



**Richard Kraus** was appointed to act as a "special master" by the United States District Court for the Eastern District of Michigan. A special master is appointed to assist a federal trial court in

the performance of specific judicial duties that arise in a complicated litigation matter.



**Richard Kraus** and **Ed Stein** spoke at several Litigation Boot Camp sessions presented by the Litigation Section of the State Bar of Michigan.



**Adam Lett** was the commentator for a Traverse City presentation on "Estate and Financial Planning for Elderly and Disabled Clients" during an ICLE seminar. He was also a com-

mentator at a September ICLE DVD presentation entitled "Administration of Trusts."



**Veronica Marsich** is speaking on "HIPAA Updates" and **Billee Lightvoet Ward** is moderating a session on "Cutting Edge Issues in Human Research Protection: High Tech Research,

High Tech Institutional Review Boards" at the Michigan State University Fall Institutional Review Board Conference in October.



**Cindy Root** is serving as vice-chair for NALS Education Committee and will be taking over as chairperson in March 2007.



**Danielle Susser** is a member of the Michigan Self Insurer's Association Fall Conference committee and on the program committee for the State Bar of Michigan Worker's Comp

Section winter seminar. She was recently appointed to the Workers' Compensation Research Institute CompScope™ Benchmarking Study advisory committee for Michigan for a term of two years.



**Randy Velzen** and **Monica Julien** presented at the ICLE 3rd Annual Solo and Small Firm Institute on October 19 in Dearborn. They presented on "The Lawyer/Legal Assistant Team in Divorce and Probate Matters."



**Aileen Leipprandt** was elected to serve as president of the Association of Builder's and Contractors.



**Marilyn Tyree** will be recognized as a "Woman of Achievement" at the YWCA's Tribute Awards luncheon.

**Julie Hudgins, Elizabeth Rogatski, Patty Huzel, Jude Dye, Lisa Morales, and Bridget Mitchell** were the latest members of Smith Haughey to attend a two-day Community Institute for Healing Racism workshop presented by the Institute for Healing Racism.

Congratulations to our client **Kevin Denike** on the opening of his store, North Country Furniture and Appliances in Traverse City, Michigan.

In September, **the construction law team** held a seminar in Grand Rapids for design professionals, contractors and sub-contractors. They will repeat the seminar in Traverse City early next year.

### 'Best' or 'Super' We Think They're Great.

**L. Roland Roegge, Charles F. Behler, Edward R. Stein, William W. Jack, Jr., George F. Bearup, John C. O'Loughlin, John M. Kruis, Albert J. Engel, III, Todd W. Millar, and Maurice E. Schoenberger** have all been selected for inclusion in the 2007 edition of "The Best Lawyers in America."

The following shareholders have been selected to be included in the 2006 Michigan Super Lawyers listing: **L. Roland Roegge, Thomas F. Blackwell, Thomas R. Tasker, Charles F. Behler, Gary A. Rowe, Edward R. Stein, William W. Jack, Jr., Thomas M. Weibel, Craig S. Neckers, John C. O'Loughlin, George F. Bearup, Patrick F. Geary, Richard C. Kraus, Albert J. Engel, III, John R. Oostema.** Michigan Super Lawyers is an annual listing of outstanding lawyers who have attained a high degree of peer recognition and professional achievement.



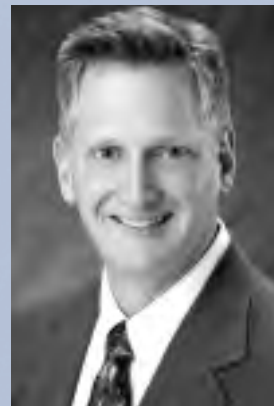
For attorney **Thomas W. Aycock**, moving to Michigan was always an option he and his wife, Wendy, a West Michigan native, had

considered. When Hurricane Katrina hit their New Orleans home in August 2005, that option became their opportunity to head for higher ground and move closer to Wendy's family.

Tom has brought his extensive civil litigation experience to Smith Haughey. He previously worked for Crawford Lewis PLLC in New Orleans, Louisiana. The focus of his practice has been insurance defense, corporate executive officer liability, and multi-party toxic tort litigation.

Tom served as a Legal Specialist in the United States Army from 1985 to 1990. He received his Bachelor of Arts degree from the University of Louisiana Lafayette and his Juris Doctor from the Southern University Law Center in Baton Rouge, Louisiana – where he was the 2001 recipient of the Louisiana State Bar Association's Corporate Law Section Scholarship. Tom is licensed to practice law in the state courts of Louisiana and Michigan, Louisiana Federal Courts, and the U.S. Fifth Circuit Court of Appeals. He is a member of the American Legion.

Tom enjoys fishing, hiking, and spending time with his wife, Wendy Lappenga, and their three dogs. (He hastens to add that these activities are not listed in order of priority.)



**Daniel M. Morley** is a new shareholder in the Traverse City office of Smith Haughey Rice & Roegge, where he focuses his practice on banking and finance.

Prior to joining Smith Haughey, Dan served as Vice President and Trust Officer at First Bank, Upper Michigan in Escanaba. He also was previously a shareholder at the law firm of Butch, Quinn, Rosemurgy, Jardis, Bush, Burkhart & Parks, P.C., where he practiced primarily in the areas of business, banking, real estate and commercial law and litigation.

Dan attended the United States Military Academy, received his Bachelor of Science degree cum laude from Michigan Technological University, and his Juris Doctor with distinction from Thomas M. Cooley Law School. Professionally, he is a member of the State Bar of Michigan and the Delta County Bar Association. He is admitted to practice in the federal courts for the Western District of Michigan and the Eastern District of Wisconsin, the 6th Circuit of the U.S. Court of Appeals, and the U.S. Supreme Court.

In 2001, Dan was presented with the Champion of Justice Award by the State Bar of Michigan. He was lauded for his extraordinary professional accomplishments and adherence to the highest principles and traditions of the legal profession.

Dan volunteers for Habitat for Humanity and is a member of the American Legion. In his spare time, he enjoys golfing, downhill skiing, hunting, and fishing. He lives in Traverse City with his wife, Betsy, and their children, Samuel and Madelyn.



the outcome of a lawsuit seems clear, the party expected to win must consider the value of time and expense a lawsuit in light of the opportunity to compromise, receive a prompt payment, and to avoid trial which places the ultimate resolution in the control of others.

**Understanding Your Opponent**

Facilitative mediation is a tool to share information in order to enhance the opportunity to “walk a few steps” in the shoes of the other party. While a lawsuit provides the litigants and their respective attorneys with a means to advocate their particular position, mediation resolves disputes when the parties actively seek to understand the point of view adopted by the other side, and pursue an acceptable compromise. The participants are able to consider solutions that are still acceptable to them, which also take into account objectives identified by their opponent.

why the dispute is viewed as being without merit. While portions of the discussion can frequently exaggerate tension between the parties, the mediator’s job is to review the options available for each side to resolve the dispute, including the likelihood of success at the time of trial.

In its natural fashion, a settlement involves a compromise of the positions advocated by each party which reflects, among other things, the odds of success of each party if the dispute is litigated to a conclusion. Even when

Mediation is now available throughout the State of Michigan. Smith Haughey Rice & Roegge has a number of skilled attorneys trained in the art of facilitating settlements, both from the perspective of a litigant, as well as serving the role of facilitative mediator.

The pursuit of alternative resolutions to a dispute in a cost effective manner is one of the ways in which we feel we can best serve our clients’ business needs.

**Charles Judson’s primary areas of practice include representation of municipalities, mediation of disputes, real property matters, and commercial transactions. He can be reached directly at 231.929.4878 or [cjudson@shrr.com](mailto:cjudson@shrr.com).**

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