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September 20, 2011

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Detroit and Southeast Michigan's premier business news and information website

October 16, 2011 8:00 PM

Home is where the cases are

Residential real estate is rare growth area in litigation

By [Chad Halcom](#)

Residential real estate is breaking away as the sole hot spot in an otherwise mild litigation year, and it could go a long way toward sorting the winners and losers among metro Detroit's top business law firms in 2011.

A majority of the 20 largest firms saw lawsuit caseloads shrink slightly with the Michigan litigation market as a whole in 2010, and can expect another decline this year, according to data from the Monitor Suite service of **Hubbard One**, a **Thomson Reuters** company.

But it was a completely different year for those who handled borrower lawsuits against banks, mortgage lending companies, mortgagees assigned by a note holder such as **Mortgage Electronic Registration Systems Inc.** or other lender law firms, according to the Monitor Suite service. Thomson Reuters collects data from electronic court records, public disclosures filed with the **U.S. Securities and Exchange Commission** and companies themselves.

The data compiled for this report cover mainly case filings and opinions between September 2006 and last month. Sources for case records include all U.S. district and federal circuit courts where metro Detroit law firms practiced litigation since 1998, **Michigan Supreme Court** and **Michigan Court of Appeals** records filed since 1990, and state circuit courts where records are available electronically, such as those in Oakland, Macomb and Genesee counties. Don't assume this is the fallout from adjustable-rate mortgage defaults and residential foreclosures that first drove real property lawsuits to their previous peak, back in 2009.

Instead, local attorneys said, the new surge derives mainly from a mix of recent laws, court rulings and regulatory enforcement actions that were intended to help counteract that very trend.

And there's no sign that the new growth will peak anytime soon.

"We continue to staff up to meet that requirement, because it is bucking the trend in (overall) litigation, and it has not yet peaked," said Martin Frenkel, co-chair of the firm's real property and mortgage dispute resolution group at Southfield-based **Maddin, Hauser, Wartell, Roth & Heller PC**.

"There was always a fair amount of litigation in this area (borrower suits), but nowhere (on the scale) that exists now. And we have done a little hiring to help. I used to see a lot more construction litigation and real estate development disputes, and we all know that has cooled, but this (specialty) has grown to the point of crowding out some other

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Brian Nettleingham (left) and Martin Frenkel, in the real property and mortgage dispute resolution group at Maddin, Hauser, Wartell, Roth & Heller PC, are the Southfield firm's busiest litigation attorneys.

practice areas."

Frenkel and partner Brian Nettleingham are the two busiest litigation attorneys at Maddin Hauser, according to the Monitor Suite data; together they account for around 20 percent of the 55-attorney law firm's court cases over the past five years.

"I don't know that it's peaking or when it might peak," Nettleingham said. "Right now, it's just too easy to use these (lawsuits) as a borrower to stall a foreclosure in process."

Frenkel said the firm formally established its real property group, which now comprises eight attorneys, in early 2010 to help cope with the new trend in litigation. Pending litigation for Maddin Hauser

clients grew 50 percent in 2010 to about 125 new cases, and 2011 filings are expected to surpass that level, according to Monitor Suite.

The service tracked 1,665 real property lawsuits so far this year at state and federal courts in Michigan that can be monitored electronically -- on pace to surpass both the 2010 total of 1,744 and the all-time peak of 1,932 in 2009. In the state's federal courts, the same category of litigation in 2011 is already at a five-year high of 483 cases, compared with 416 in 2010 and 353 in 2009.

By comparison, litigation as a whole declined from about 57,260 cases in 2009 to around 53,250 cases last year and, at 35,815 through the last week of September, is on pace for another mild decline from its peak in 2007.

Only one other major litigation category -- torts and negligence suits including personal injury and malpractice -- was not in decline this year and should exceed 2010's total of 573 cases by 2 percent.

Residential real estate foreclosures are driving nearly all of the climb in state and federal property lawsuits in Michigan, local attorneys told *Crain's*. Foreclosures and litigation on commercial real estate peaked in late 2009, and new disputes thus far tend to land in workouts more often than litigation.

So why are borrowers more ornery? Haven't foreclosures been a problem in Michigan for quite a while?

Recent laws or appellate court rulings have armed borrowers to mount a new round of legal challenges this year, attorneys said. One is the Michigan Court of Appeals ruling in April in **Residential Lending Co. LLC v. Saurman**, in which the court found MERS or any company that doesn't hold a borrower's debt could not foreclose by advertisement.

And law firms with a proportionally larger finance and lending or real estate practice are getting busier -- either building upon a prior year of court case growth or reversing a previous decline.

These included Maddin Hauser (where 18.2 percent of recent litigation is real property), **Trott & Trott PC** in Farmington Hills (where it's 43.7 percent), **Orlans Associates PC** in Troy (50 percent) and to a lesser degree **Dykema Gossett PLLC** (about 12 percent) and **Plunkett Cooney PC** in Bloomfield Hills (about 7 percent).

Meanwhile, larger or more full-service business law firms where real property law was less of a factor generally saw lawsuits decline in 2010 and could see fewer again this year, like **Jaffe Raitt Heuer & Weiss PC** (where it's 4.4 percent) **Clark Hill PLC** (3.3 percent) and **Miller Canfield Paddock and Stone PLC** (less than 3 percent).

"I don't know that it's all Saurman. But in any three-month or six-month period there's a hot issue, and Saurman was

a big issue at least until the Supreme Court decides" what to do, said William Meagher, managing partner of litigation at Trott & Trott. "It's certainly a commonly raised issue in what we're seeing these days."

The trend is not universal, since not every lender is equally under assault.

Michigan is on a relative tear in these lawsuits against MERS or specific lenders, even if those companies didn't see their national litigation trend the same way, according to Thomson Reuters.

Target companies included **Bank of America Corp.** (already 6 percent ahead of the 2010 total this year in Michigan, but on pace to drop more than 40 percent nationwide in 2011); **Wells Fargo and Co.** (on pace to grow 25 percent in Michigan, but drop 20 percent nationwide); the **Federal Home Loan Mortgage Corp.**, or Freddie Mac, (up 26 percent from its 2010 Michigan total, but only 8 percent nationwide); the **Federal National Mortgage Association**, or Fannie Mae, (up 61 percent in Michigan this year, but only about 35 percent nationally); and to a lesser degree **J.P. Morgan Chase Bank NA** (on pace to finish about even with 2010 in Michigan but decline about 50 percent nationally).

Chase, Wells Fargo and Bank of America were among the nation's largest banks and mortgage lenders that suspended foreclosures in late 2010 while they internally audited their foreclosure processes.

Some of the nation's top lenders have also reached consent order agreements this year with the **Office of the Comptroller of the Currency**, an agency of the **U.S. Department of Treasury**, over their foreclosure practices.

Dodging much of the new litigation surge so far this year are **Quicken Loans Inc.** (looking at a roughly flat year in Michigan and nationally), **Huntington Bancshares Inc.** (declining in Michigan and nationally) and heavy residential lender **Flagstar Bancorp Inc.** (on pace for a flat year in Michigan, but up to 30 percent growth nationally, with most cases in Florida).

But all of these saw the original litigation peak either in 2008 or 2009, and real property will become a measurably larger share of their litigation mixes by year's end, compared with 2010.

Meanwhile, **Dearborn Bancorp Inc.** and **Citizens Republic Bancorp** also saw litigation grow on a smaller scale, where residential real estate was less of a contributor. New state statutes and court rulings are also setting Michigan apart this year. Local attorneys cited the Michigan Home Foreclosure Prevention Act of 2009, which currently sunsets at the end of this year, and the Saurman ruling this past April, as two key drivers of the new litigation.

"Most of these new cases are frivolous, but be that as it may, some of them still take a lot longer to dismiss than others," said member Brian Summerfield of Detroit-based **Bodman PLC**, which is shrinking in total litigation this year but growing in property lawsuits.

"Some technicalities are good enough to survive a motion to dismiss. Others don't necessarily render a foreclosure void. But one difference I have noticed is in an inclination in many courts to push first for a settlement, before you ask for the dismissal."



Summerfield ranks as the firm's busiest litigation attorney, with 148 of the firm's 1,100-plus total cases since late 2006, according to Thomson Reuters. Four years ago, he was the sole attorney at Bodman defending lenders against borrower lawsuits under the federal Truth in Lending Act and Fair Credit Reporting Act, as well as the Michigan Mortgage Brokers, Lenders and Servicers Act and state Consumer Protection Act.

Summerfield

Since then it has grown from around one-quarter of his total litigation practice to nearly 70 percent, and two other attorneys have recently joined to help shoulder some of the new workload, he said.

He ties much of this year's growth to the state Foreclosure Prevention Act or to the Saurman ruling, which allows borrowers to challenge foreclosures brought by MERS as note holder.

MERS is on pace to decline more than 20 percent nationwide in new lawsuits this year, but to grow more than 30 percent in Michigan compared with 2010, which already saw a 50 percent bump from 2009.

The Saurman case, a consolidation of two older lender lawsuits against defaulting borrowers in which MERS began the foreclosure proceedings, established in April that the registration service does not have standing to initiate foreclosure under the state Foreclosure by Advertisement statute. A spate of new borrower lawsuits has followed, local attorneys have said.

The state act allows borrowers to request a 90-day postponement of foreclosure and seek a mediator with their lenders; some have sued claiming they didn't receive one.

"I've had quite a few successes, and I plan to have more. Sometimes I've been able to get the sale (to a new homeowner) set aside, or the borrower gets a loan modification. It really depends on when you file along the process," said Crystal Hopkins, owner of Troy-based **Hopkins & Associates PLC**, which has brought more than 20 borrower lawsuits since early 2010 according to the data.

"It also used to be that most judges leaned more towards the lender. But with the news that has come out about robo-signing (regulatory review of large banks) even at the federal level, this year I think sentiment has changed. But you still have to argue on the law and not on sympathy."

Some of Detroit's largest law firms continue to grow in litigation outside of property law or home foreclosures, but the growth was often episodic and tied to one class action, acquisitions or attorneys who joined the firm with an established book of business.

Honigman Miller Schwartz and Cohn LLP grew its total litigation in 2010 and is on pace to match that total for 2011, while property lawsuits such as foreclosures account for only 2.3 percent of its litigation. The growth came largely on a mix of new commercial litigation, personal injury defense and intellectual property; the firm has grown extensively in IP from 10 attorneys in 2008 to 35 today -- largely via lateral hires.

Dickinson Wright PLLC grew nearly 20 percent by volume of lawsuits in 2010, but much of that was a surge of intellectual property work and the addition of nearly 100 pending lawsuits in Nevada, according to the Monitor Suite data.

Dickinson in August 2010 acquired Las Vegas-based **Gibson Lowry Burris LLP**, a corporate and intellectual property law firm. Excluding Nevada growth, Dickinson actually saw lawsuits decline slightly in 2010 and is on pace for another drop this year according to the data.

Kitch Drutchas Wagner Valitutti & Sherbrook PC has seen new cases grow about 100 percent to more than 250 this year, with the majority a surge in asbestos-mesothelioma lawsuits against **Owens Corning Corp.** and subsidiary **Owens Corning Cultured Stone LLC** in Pennsylvania, according to Monitor Suite.

Mark Wisniewski, head of the firm's asbestos liability mass tort defense practice, said he believes much of that is either cases transferring to Pennsylvania under a multi-district litigation case that consolidates asbestos claims, or

some new lawsuits brought by plaintiffs before a federal statute of limitations expires.

Kitch was national counsel for Owens prior to its 2000 bankruptcy, and Wisniewski said asbestos litigation hasn't grown noticeably in recent months.

Frenkel and Matthew Boettcher, head of commercial litigation at Plunkett Cooney, both said the property lawsuit trend could cool off if the Michigan Supreme Court decides to overturn the Saurman ruling in a pending appeal, or if the Legislature does not renew the state foreclosure act after Dec. 31. But the cases are also tied to the economy, which doesn't look as promising, Boettcher said.

"You saw a spike in these before, as Michigan entered into this trend before the rest of the country did. It's possible we could also pull out sooner, but it's really difficult to tell if this has peaked or not," Boettcher said. "If the European market goes under and drags the world with it, who knows what can happen then?"

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