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Real e-State

Fall 2011
Vol. 8 Issue 4

An electronic newsletter for real estate professionals

LISTED IN Best Lawyers® THE WORLD'S PREMIER GUIDE

From the Desk of

The Real e-ditor
Steven D. Sallen

Achieving *Extreme Success*

My favorite bookstore is any bookstore in an airport. It seems that airport bookstores are the only ones that cater to the businessman, the salesman, the weekday-warrior. Whenever I travel I make sure to visit the bookstores, both in my departure and destination airports. I am always intrigued by the business titles, and I frequently buy something for the plane ride.

Recently, while traveling, home from Denver to visit my oldest daughter, a title caught my eye. *The 10X Rule*, by sales consultant Grant Cardone. Thumbing through the pages, I learned that the 10X rule is the author's notion that the level of action necessary to achieve "success," in anything – business, love, spirituality, philanthropy, health – is ten times what most people are willing to commit to. Most people set goals too low, and, worse, spend too little effort in their achievement, resulting in something less than "success." Having built my practice on hard work this premise resonated with me, so I bought the book, and devoured it on the airplane that evening. The author exhorts his readers not to view success as a result to be achieved, but to "demand success as your duty, obligation, and responsibility."

This is that time of year, when most of us goal-setters take stock of how we did for the year, and set new goals and objectives for the coming year. The old slate is wiped clean, and a fresh slate challenges us. Will we set safe, achievable goals? Or will we stretch for something BIGGER? Will we be satisfied with average results, or do we want something BETTER? Are we willing to put in our usual level of effort, or this year will we work even HARDER? Our firm's fiscal year ends October 31, so timing of *The 10X Rule* was, for me, perfect. And, I have always been motivated by a good, but well intentioned, kick in the pants. *The 10X Rule* says, stop complaining! Start working! Set HUGE goals, and even if you miss, you will miss much higher than would otherwise have been possible. I was so turned on by the author's simple premise that I went through the book with a highlighter, noting particular passages of inescapable relevance and logic.

So, 2012 is almost here, and new goals and objectives, both personal and professional, need to be set. Before you set your goals, I suggest you read *The 10X Rule.* Then, set higher goals, and resolve to work harder to make them a reality.

Steve Sallen

Trying Times Lead To The Assertion of Creative Legal Arguments

By: Danielle M. Spehar

As news of the ever increasing number of mortgage foreclosures continues to pour in, particularly in the residential arena, the creativity of legal counsel for defaulting borrowers continues to correspondingly expand, with mixed success. In an unpublished opinion issued by the Michigan Court of Appeals in *Harold Smith and Phyllis Smith v Household Finance Corporations III* issued on September 20, 2011, the plaintiffs/defaulting homeowners challenged the trial court's order granting Household Finance Corporation's motion for summary disposition in the Smiths' action to recover alleged surplus proceeds from a home foreclosure sale.

The facts in the case were not in dispute. Household was the Smiths' second mortgage lender. In 2005, Household paid off the Smiths' first mortgage loan to Countrywide Home Loans. Two years later, Household foreclosed on the second mortgage and purchased the property at a sheriff's sale. The Smiths did not redeem the property from the sheriff's sale. In this case, the Smiths alleged that the amount that Household paid to Countrywide to pay off the first mortgage was an "expense of foreclose[ure]" that Household was required by statute[1] to tax in circuit court and that the failure to do so resulted in a surplus from the foreclosure sale of approximately $90,000, to which the Smiths were entitled. Household argued the amount paid to Countrywide was not an "expense" but rather became part of the second mortgage obligation.

That statute the Smiths attempted to rely on states:

> The expenses of foreclosing any mortgage by advertisement shall be taxed in the circuit court as in civil actions upon the request of any person paying the expenses thereof, and upon such party liable to pay the same.[2]

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Transfer Taxes and Foreclosure Sales

By: Steven D. Sallen and Danielle M. Spehar

Michigan has long imposed a Real Estate Transfer Tax (which is comprised of separate state and county tax components) upon the recording of deeds and other instruments of conveyance of real property located within the state.[1] The county tax rate is 55 cents in a county with a population of less than 2,000,000, and not more than 75 cents as authorized by the county board of commissioners in a county with a population of 2,000,000 or more for each $500.00 or fraction thereof of the total value.[2] The tax is imposed upon the seller or grantor[3] but, occasionally the burden of paying the tax is shared or shifted entirely to a purchaser by agreement of the parties to a transaction.

Today, more and more properties are being sold at foreclosure sale. Notwithstanding that "sellers" are required to pay the Real Estate Transfer Tax,[4] seller-sheriffs do not pay the Real Estate Transfer Tax, leaving the successful bidder at foreclosure sale to pay the tax. Of course, a Sheriff's deed given at foreclosure is subject to the equity of redemption. Therefore, no transfer through foreclosure is final, until after expiration or waiver of the redemption period, typically six months after the sale. However, buyers are expected to record the Sheriff's deed and pay the Real Estate Transfer Tax prior to expiration of the redemption period. In fact, under the statute,[5] if the Sheriff's deed is not deposited with the register of deeds in the county where the property is located within 20 days of the date of the sale, the commencement of the redemption period is extended until the date of recording. Oftentimes, the successful (and only) bidder at the foreclosure sale is the foreclosing mortgage lender. In such circumstances, there is a statutory exemption from the State component of the Real Estate Transfer Tax.[6]

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State Tax Commission Guides Assessors post-*Klooster* Decision

By: Kasturi Bagchi

In Klooster v. City of Charlevoix,[1] the Michigan Supreme Court held that when an original owner is not a co-tenant in a transaction resulting in a joint tenancy, then the transfer is not exempt from uncapping of taxable values pursuant to MCL 211.27a(7)(h). Under the facts of *Klooster*, husband and his wife owned property as tenants by the entireties. Subsequently, wife conveyed her interest to her husband, and husband simultaneously conveyed ownership of the property to himself and his son, as joint tenants with rights of survivorship. When husband died, the son became the sole owner through the right of survivorship and subsequently quitclaimed the property to both himself and his brother as joint tenants. The municipality reassessed the property the following year claiming an uncapping event had occurred (although failing to specify which event caused the uncapping). The son challenged the reassessment and the Michigan Supreme Court unanimously ruled that taxable values were uncapped, not at the time of the husband's death but when the son formed the joint tenancy with his brother. The son had not qualified for the joint tenancy exemption under MCL 211.27a(7)(h) because only "an original owner may convey property into a joint tenancy without uncapping the property, provided that the original owner is also a cotenant in the resulting joint tenancy." The Court held:

> "To determine who is an 'original owner of the property' within the narrow context of the joint tenancy exception, one must first identify the most recent transfer of ownership that uncapped the property and then determine who owned the property as a result of the uncapping conveyance… There are thus three possibilities for who may constitute an 'original owner' under the joint-tenancy exception: (1) a sole owner at the time of the last uncapping event, (2) a joint owner at the time of the last uncapping event, and (3) the spouse of either a sole or joint owner of the property at the time of the conveyance at issue."

Because the last uncapping event occurred when the husband and wife acquired the property, the Supreme Court concluded that only the husband or the wife could be original owners. Therefore, the son's conveyance constituted a transfer of ownership subject to uncapping.

The State Tax Commission (STC) has issued a memorandum dated June 9, 2011 directed to assessors and equalization directors which summarizes and also extrapolates from the *Klooster* case (the "Klooster Memo").[2] In the Klooster Memo, the STC adopts the *Klooster* decision, and applies the "original owner" principle to hypothetical transfers not specifically addressed by the Court. For instance, had the husband and son in *Klooster* simply added the brother as a joint tenant while they were both still alive, the taxable value would not have uncapped.

In another example, if a husband and wife acquired property as tenants by the entireties in 2004, which they subsequently conveyed to themselves and their son as joint tenants in 2005, subject to a life estate in favor of husband and wife, the STC has concluded that the taxable value would uncap in the year following the death of husband and wife in 2006 because:

> "the expiration or termination of a retained life estate, occurred prior to the joint tenancy becoming a present interest and that this uncapping event took precedence over the exception to uncapping contained in MCL 211.27a(7)(h)."

The STC appears to take the view that the 2005 conveyance created a present interest in a life estate as opposed to a present interest in a joint tenancy. Notably, however, upon the death of husband and wife, the son would be deemed the "original owner."

As a final illustration of partial uncapping, the STC offers this scenario in the Klooster Memo: John purchases a property in 2004; in 2005 he quitclaims the property to himself and his son, Michael, as joint tenants with rights of survivorship; John dies later on in 2005 and Michael is the surviving co-tenant and sole owner; Michael then transfers a 1% interest to his daughter Rebecca as a tenant in common; then in 2007, Michael and Rebecca transferred to themselves as joint tenants with rights of survivorship. Under these circumstances, the STC has determined the following: the first uncapping event occurred in 2006 following the undivided 1% interest received by Rebecca as a tenant in common, thus making Rebecca an "original owner" as to the 1% as a tenant in common only; the second uncapping event took place in 2008 as to the remaining undivided 99% interest in the property as tenant in common because Michael "was not an 'original owner' for the reason that he has not acquired his remaining 99% undivided ownership interest in a transaction that resulted in an uncapping of the taxable value."

Whether the STC's application of the principles of the *Klooster* decision as provided in the Klooster Memo can withstand challenges from taxpayers remains to be seen. However, in the interim, the STC has provided taxpayers and their counsel with insight on its broad interpretation of what joint tenancy transfers are susceptible to uncapping.

1 See State of Michigan Supreme Court Docket No. 140423. See also *Transfers That May Unexpectedly Uncap Taxable Value*, Mark Fink, *Real e-state*, Spring 2011, Volume 8, Issue 2, page 2.

2 The Klooster Memo is available at www.michigan.gov/treasury.

Improvement Exchanges For Commercial and Residential Property

by: First American Exchange Company

In the current real estate market there are many opportunities to acquire distressed property at a fraction of the price. Investors can take advantage of this market by selling their relinquished property in a §1031 tax deferred "improvement" exchange and purchasing replacement property that might need construction work or improvements.

The improvement exchange, also known as a build-to-suit or construction exchange, allows an investor to use the proceeds from the sale of the relinquished property not only to acquire replacement property, but also to make improvements to the property.

For example: If an investor sells relinquished property with a fair market value of $1 million, debt of $200,000 and equity of $800,000, he must acquire a property equal to at least $1 million and must reinvest the entire $800,000 into that property in order to completely defer his/her tax in a §1031 exchange. In an improvement exchange, however, the investor could acquire property worth only $300,000, borrow an additional $200,000 and spend the remaining $500,000 of exchange proceeds plus the $200,000 in loan funds on improvements to the property. This would use up the remaining cash and increase the fair market value of the replacement property to $1 million, resulting in a fully tax deferred exchange.

Structuring an Improvement Exchange

An improvement exchange is accomplished by having a separate entity called an "exchange accommodation titleholder" or "EAT" temporarily take title to the replacement property while the improvements are being made. The exchange accommodation titleholder is necessary because any work done to the property after the investor takes title to it is not considered like kind property and therefore will not increase the value of the property for exchange purposes. The exchange accommodation titleholder creates and owns this entity which holds title to the property for up to 180 days. During that time frame the investor controls the construction, not the exchange accommodation titleholder. The costs of construction are paid for either by the investor, a loan, or by using the funds from the sale of the relinquished property.

Benefits and Drawbacks of Doing an Improvement Exchange

The benefits of doing an improvement exchange include the ability to buy property that is lower in value compared to the relinquished property while still having a completely tax-deferred exchange, and to use exchange funds rather than loan proceeds to fund construction.

The principal drawback of doing an improvement exchange is that the work must be done within the 180 day period in order to have any effect on the exchange. In addition, improvement exchanges can be more costly due to fees and costs of an additional closing and formation of the exchange accommodation titleholder.

Planning for an Improvement Exchange

For those intending to do an improvement exchange, planning ahead is essential.

- First, include a provision in the purchase contract that it is assignable in connection with a 1031 exchange. This is necessary because the exchange accommodation titleholder, rather than the investor, will be taking title to the replacement property.
- Contact an exchange accommodation titleholder and your lender early in the process. Typically the exchange accommodation titleholder signs the loan documents and the loan must be completely non-recourse to the exchange accommodation titleholder.
- Get an accurate estimate of the amount of time it will take to complete the construction project. Although the construction does not have to be complete at the expiration of the 180 day period, the only improvements that will affect the value of the replacement property for exchange purposes are the improvements that are done as of the date that the exchange accommodation titleholder transfers the replacement property to the exchangor.
- Finally, always consult with your tax advisor before doing any exchange, including an improvement exchange.

By properly structuring an improvement exchange, the investor should have much more flexibility in finding appropriate properties and at the same time, complete defer all capital gains tax.

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Trying Times Lead To The Assertion of Creative Legal Arguments

By: Danielle M. Spehar

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The Appeals Court rejected the Smiths' argument and cited the statutory provision which addresses surplus proceeds of a sale in a foreclosure by advertisement, which states in pertinent part "any surplus money after satisfying *the mortgage on which the real estate was sold, and payment of the costs and expenses of the foreclosure and sale*, the surplus shall be paid over. . . to the mortgagor. . . [3]

The Court concluded that when Household paid off the Countrywide mortgage in 2005, that amount became indebtedness secured by the second mortgage. The Smiths' mortgage specifically stated *"Any amounts disbursed by Lender. . . with interest thereon, . . shall become additional indebtedness of Borrower secured by the Mortgage."* The Court concluded that the statutory provision relied upon by the Smiths applies only to *"expenses of foreclosing"* and the amount of the mortgage on which the real estate was sold is distinct from the expenses of foreclosure. The Court ruled that the provision relied upon by the Smiths does not apply to the amount that Household previously paid to Countrywide in satisfaction of the Countrywide loan and because the premise of the Smiths' claim that a surplus existed was faulty, their claim to a surplus fails by necessity. Consequently, the Court held the trial court did not err in granting Household's motion for summary disposition.

As evidenced by the arguments in the Smith case, necessity remains the mother of invention and difficult times often result in "thinking outside the box." However, as we've all learned over time, most inventions are not initially successful.

1 MCL 600.2431
2 MCL 600.2431(1)
3 MCL 300.3252(1)
4 MCL 600.2431(1)
5 MCL 600.3252(1)

Transfer Taxes and Foreclosure Sales

By: Steven D. Sallen and Danielle M. Spehar

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The exemption from the State portion of the Real Estate Transfer Tax specifically states, however, "[t]his exemption does not apply to a subsequent transfer of a foreclosed property by the entity that foreclosed on the mortgage." With greater frequency, foreclosing lenders are looking to sell off their interest in properties (sometimes at very significant discounts) during the pendency of the redemption period. That inevitably leads to a question about payment of Real Estate Transfer Tax in the event of subsequent transfers of the rights conferred by the Sheriff's deed from the successful bidder to a subsequent buyer while the redemption period is still pending. Such "dry" conveyances can be made by a quitclaim deed or by an Assignment of Sheriff's deed. Should such conveyances be subject to Real Estate Transfer Tax?

Recently, several Michigan counties have warned law firms that interim conveyances pending expiration of the redemption period are not tax exempt, even where the quitclaim or other instrument of conveyance recites consideration less than $100.00. Corporation Counsel for Macomb County has warned that any deeds citing improperly claimed exemptions recorded prior to the issuance of its letter of August 17, 2011 must be re-recorded with payment of the Real Estate Transfer Tax, although it is not clear what will happen if not recorded. Can the counties *un*-record a previously recorded instrument? It seems that this question may be left to the courts to decide.

1 MCL 207.501 et seq.
2 MCL 207.504. Notwithstanding the statutory specificity, the tax rate is oftentimes, wrongly, presumed to be $1.10/$1,000.00 in value, which can lead to minor discrepancies in calculations of the transfer tax due on particular transactions.
3 MCL 207.502
4 Id.
5 MCL 600.3232
6 MCL 207.526(v). There is no corresponding exemption from the county component of the tax.

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