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MEMORANDUM

TO: ELEVENTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES

RE: MAXIMIZING ATTORNEY FEE RECOVERY IN LITIGATION

DATE: May 4, 2004

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Many contracts contain provisions intended to obligate one party to pay the attorney fees incurred by the other party if litigation is commenced. In an unpublished opinion, the Michigan Court of Appeals recently held that when a contract obligates one party to pay the other party's **actual** attorney fees the trial court may not apply a reasonableness standard to reduce the amount of attorney fees awarded. *Redford House Condominium Association v Mysza*, unpublished per curium opinion of the Court of Appeals, decided October 23, 2003 (Docket No. 240029). The court ruled that if the term "actual attorneys fees" was not used, the fall back position required application of a reasonableness standard that if the contract provides for the recovery of attorney fees or legal fees. In applying a reasonableness standard the following factors must be used:

1. the time and labor required
2. the novelty and difficulty of the questions involved
3. the skill required to proficiently perform the legal service

4. the likelihood, if apparent to the client, that the acceptance of the client's matter will preclude other employment by the lawyer,
5. the fee customarily charged in the locality for similar legal services
the time limitations imposed by the client or the circumstances
6. the experience, reputation and ability of the lawyer performing the services, and
7. whether the fee is fixed or contingent.

The burden of proof as to the reasonableness of the amount of attorney fees is on the party seeking such award. To avoid this burden and to maximize the amount of attorney fees recovered, the applicable contract provision must require the payment of **actual** attorney fees.

We have extensive experience reviewing and negotiating contracts for real estate sellers and purchaser. If you would like our assistance in revising and negotiating your contract before you are bound by their potentially unfavorable terms, please contact me at (248) 827-1864 or e-mail me at let@maddnhauser.com.