

# THE TITLE EXAMINER

A QUARTERLY PUBLICATION OF THE MICHIGAN LAND TITLE ASSOCIATION



## IN THIS ISSUE:

Equitable Subrogation  
Eliminating Claims  
CFBP  
Payoff or Invest  
Traversing the Law



The Michigan Land Title Association is a professional association dedicated to creating an environment which enables its members to provide the public with the highest quality land title evidencing, title assurance and settlement services.

[www.MiLTA.org](http://www.MiLTA.org)



# MLTA

Michigan Land Title Association  
Board of Directors 2011-12

## OFFICERS:

**President:** Catharine B. LaMont  
LaMont Title Corporation  
333 W. Fort Street, Suite 1750  
Detroit, MI 48226  
313-963-3100 Fax: 313-963-5488  
clamont@lamonttitle.com

**President-Elect:** Allan G. Dick  
Best Homes Title Agency  
23938 Research Dr, Suite 100  
Farmington Hills, MI 48335  
248-286-3800 x 428 Fax: 248-286-3801  
adick@besthomestitle.com

**Secretary-Treasurer:** Robert N. Wuerfel  
Lighthouse Title Group  
877 E. 16th Street  
Holland, MI 49423  
616-347-9240 Fax: 616-393-9237  
bwuerfel@lighthousegroup.net

## DIRECTORS:

**Lisa A. Cicinelli**  
Old Republic National Title Insurance Co  
4000 Main Street, Suite 150  
Bay Harbor, MI 49770  
231-347-8310 Fax: 231-347-0855  
lcicinelli@oldrepublictitle.com

**Meredith H. Weingarden**  
Fidelity National Title Group  
1360 East 9th St., Ste 500  
Cleveland, Ohio 44114  
800-229-3310 x 1170 Fax: 216-861-8171  
weingardenm@ctt.com

**Marcy Welburn**  
Transnation Title Agency of MI  
Northern Division  
1675 Watertown Place, Suite 200  
East Lansing, MI 48823  
517-318-4390 Fax: 517-318-4361  
mwelburn@transmi.net

**Jeffrey S. Basil**  
Safe Title  
1830 172nd Avenue, Suite D  
Grand Haven, MI 49417  
616-935-1166 Fax: 616-935-1167  
jeffb@safetitle.net

**Deborah A. Wiley**  
First American Title Insurance Company  
5910 Tahoe Drive SE.  
Grand Rapids, MI 49546  
517-202-2011  
dwiley@firstam.com

**David Martyn**  
Stewart Title Guaranty Company  
26555 Evergreen Road  
Suite 410, Southfield, MI 48076  
248-208-7101  
dmartyn@stewart.com

**Past President & Ex-Officio Officer:**  
**Timothy J. McDonnell**  
Old Republic National Title Insurance Co  
4000 Main Street, Suite 150  
Bay Harbor, MI 49770  
810-599-4878 Fax: 734-786-8413  
tmcdonnell@oldrepublictitle.com

**Executive Director:** Marcy Lay  
MLTA  
124 W. Allegan, Suite 1700  
Lansing, MI 48933  
517-374-2728  
ed@mlta.org



|                                     |     |                          |       |
|-------------------------------------|-----|--------------------------|-------|
| Board of Directors.....             | 2   | Traversing the Law.....  | 14-15 |
| Member Spotlights.....              | 3   | Upcoming Events.....     | 16    |
| Memoriams .....                     | 3   |                          |       |
| Habitat for Humanity .....          | 3   | <b>Advertisers:</b>      |       |
| Equitable Subrogation.....          | 4   | eRecording Partners..... | 5     |
| Abstractions .....                  | 5   | Kaspynet .....           | 7     |
| Eliminating Claims.....             | 6   | SoftPro .....            | 8     |
| Views from the Shore.....           | 7   | NATIC.....               | 9     |
| Legislative Update.....             | 8-9 | A.S.K .....              | 12    |
| CFBP .....                          | 10  | Old Republic.....        | 13    |
| Summer Convention Sponsorships..... | 10  | Ramquest .....           | 16    |
| Payoff or Invest .....              | 11  |                          |       |
| Michigan Realtor Statistics .....   | 12  |                          |       |
| tRU Tips.....                       | 13  |                          |       |



**SAVE THE DATE:**  
**2012 MLTA**  
**Summer Convention**  
**July 15 - July 17th**  
**Grand Traverse Resort**  
**Traverse City**

## THE TITLE EXAMINER STAFF

Editor & Board Representative: Bob Wuerfel ■ Lighthouse Title Group  
Publisher: Laura Veldhof ■ Laura Veldhof Designs, L.L.C.  
Communications: Darlene Wilsey ■ Fidelity National Title Group  
Allan Dick ■ Best Homes Title Agency, LLC

## CONTACT

Laura Veldhof 616-212-8536 ■ LauraVDesigns@gmail.com  
or MLTA 517-374-2728  
with any questions, comments, or if you would like to contribute.



## Eileen K. LaPlante

**Position:** Vice President-Dept. Supervisor

**Company:** CFC Title Services, Inc., Midland, Michigan

**MLTA Involvement:** I am a member of the Habitat for Humanity Committee, Education Committee, and Professional Designation Committee. I participate in Education Seminars and attend Summer Convention. I have also participated in legislative day/winter conventions in the past.

**Personal Interests/Hobbies:** I enjoy gardening and cooking, camping, boating, and traveling to warm climates in the winter. My new favorite vacation is cruising (with the understanding that the ship stay upright and floating)

**Something About Eileen:** I would just like to say Thank You, to all of the title professionals that over the years I have had the privilege to work for, with or know through MLTA. You have shared your knowledge, offered guidance, assistance and wisdom, all with the sense of humor which is essential to working in this industry.



## Tom Richardson

**Position:** General Counsel

**Company:** Liberty Title Agency, in Ann Arbor and in my ever moving car with tablet PC/cell phone.

**MLTA Involvement:** Audit committee and membership. Currently serving as Title Industry Representative on the State E-Recording Commission.

**Personal Interests/Hobbies:** Golf, wine, dog walking and travel.

**Something About Tom:** I enjoy working with my wife Michele, our President and Chief Visionary Officer, Teresa Parker our Chief Operating Officer and all of my wonderful co-workers as we grow Liberty Title. On the fun side, I swam the Straits of Mackinac when I was 14; served a term as Mayor Pro Tem in Ann Arbor; chaired the A2 Art Center Winefest and managed to get a hole-in-one at Barton Hills!



## IN MEMORIAM

**GILBERT MCKAY (MAC) THURSTON, JR.** lost his battle with cancer January 7, 2012 with his family by his side. The former owner/operator of Northern States Title Corporation in Saginaw, Mac was born May 23, 1933 and raised in Redford, Michigan, before going to Albion College and Detroit School of Law, where he specialized in Real Estate Law. Naturally, that led him into the title and abstract business. He moved to Saginaw to work for Burton Abstract, before starting Northern States Title in 1972, which he later sold to Metropolitan Title in 1997.

Active in various bar associations, as well as Realtor and builders associations, Mac and Wilma, his wife of 33 years, were regular attendees at MLTA Summer Conventions and among the friendliest. Many of us have missed his welcoming smile and unassuming style. He was a credit to the title industry. Mac is survived by Wilma and numerous children, grandchildren and great grandchildren, and leaves many fond memories.

**WILLIAM (BILL) TUDISCO**, a founding partner of Philip F. Greco Title Company, and escrow manager for many years, died February 7, 2012 at age 81. A veteran of 40+ years in the title industry before his retirement, Bill was also a Korean War veteran in the U.S. Air Force. A consummate gentleman, Bill is survived by his wife of 42 years, Florence, and numerous children, grandchildren and great grandchildren.

Another tragic loss was the sudden passing of **MIKE LAY**, beloved husband of MLTA Executive Director, Marcy Lay, on January 21, 2012. Mike was only 49. A sports and outdoor enthusiast, Mike attended last summer's MLTA Convention, to assist his wife and meet a number of the MLTA attendees. Mike was a devoted family man, survived by his parents, siblings and many others – most notably, his wife of 27 years, Marcy, and their three children, Nicholas, Stephanie and Nathan. He is sadly missed.

## Did You Know?



- With 77 affiliates, Michigan is one of Habitat for Humanity's most active states in the nation. Every county in Michigan is serviced by a Habitat for Humanity affiliate
- Since 1982, Habitat for Humanity has built over 3,500 homes in Michigan, providing 15,000 individuals with decent, affordable housing. \*
- According to a study conducted by Davenport University, the work of Habitat for Humanity has proven to make a real difference in the lives of Habitat partner families:

- 68 percent of families report an increase in income
- 25 percent of families report better grades in school for their children
- 23 percent of families report less sickness
- 58 percent of families report less family conflict
- 40 percent of families report going on to obtain additional education

Please help the MLTA Habitat for Humanity/Community Outreach committee reach its goal of donating \$1,000 dollars to a local affiliate at the 2012 Summer Convention. For information on how you can contribute, or if you'd like to get involved with the committee please contact Darlene Wilsey at [Darlene.wilsey@fnf.com](mailto:Darlene.wilsey@fnf.com).

*\*taken from Habitat for Humanity of Michigan Website [www.habitatmichigan.org](http://www.habitatmichigan.org)*



# Equitable Subrogation in Michigan

*Peter C. Brown & Adam A. Holland, Gallagher Law Firm*

In December 2011, the Michigan Court of Appeals issued an opinion in *CitiMortgage, Inc. v MERS, Inc.* that addressed and expanded the doctrine of equitable subrogation in Michigan. The Court held that if the refinancing lender is the holder of the original mortgage that is being refinanced, the new mortgage can be subrogated to take the position of the original mortgage and it may retain the original mortgage's priority over intervening mortgages.

The doctrine of equitable subrogation arises in the following circumstances:

Borrower grants a mortgage on real property in favor of the original lender, who duly records the original mortgage.

Borrower subsequently grants second mortgage on the same real property in favor of an intervening lender, who duly records its junior mortgage.

Borrower subsequently refinances the original mortgage and grants a new mortgage on the same real property, contemporaneously applying the proceeds of the loan to pay off and discharge the original mortgage.

Although this appears to be a traditional refinance transaction, the problem arises when an intervening mortgage is not paid off and discharged. The question then arises: Does the intervening mortgage have priority or is the new mortgage subrogated to take the priority of the original mortgage? For nearly the last century, Michigan case law has provided conflicting answers to this question.

Under the Restatement of Property, the refinancing lender's new mortgage would be subrogated to take the position of the original mortgage, so long as intervening lenders are not "materially prejudiced." However, unlike most jurisdictions, Michigan Courts have not adopted the Restatement's position on equitable subrogation. Instead, despite several conflicting Michigan Supreme Court cases, Michigan Courts have rejected the application of equitable subrogation in recent years.

An example of Michigan's refusal to apply equitable subrogation came in the 2005 Michigan Court of Appeals case, *Washington Mutual Bank, N.A. v. Shorebank Corporation*. In *Washington Mutual*, the Court held that "we are unaware of any authority regarding the application of the doctrine of equitable subrogation to support the general proposition that a new mortgage, granted as part of a generic refinancing transaction, can take the priority of the original mortgage, which is being paid off, giving it priority over intervening liens." The Court relied on the "mere volunteer" rule that provides that equitable subrogation will not be available in situations where the refinancing lender has no preexisting interest in the property. However, the Court noted an important distinction when it provided that equitable subrogation "may be applicable

where the new mortgagee is the holder of the mortgage being paid off or where the proceeds of the new mortgage

are necessary to preserve the property from foreclosure or another action that would cause the intervening lien holders to lose their security interests."

In a 2006 Michigan Court of Appeals case, *Ameriquist Mortgage Co. v Alton*, the Court addressed the conflict between the Restatement and recent cases such as *Washington Mutual* that exemplified the recent trend by Michigan Courts to reject the application of equitable subrogation. In *Ameriquist Mortgage*, the Court noted that "because the holding of *Washington Mutual Bank* establishes an inflexible rule precluding the application of equitable subrogation in mortgage refinancing, we find it contrary to the principles of equity the doctrine is intended to promote."

As a result, the *Ameriquist Mortgage* Court urged the Michigan Supreme Court to review and reconsider the precedent in light of the prevailing modern view reflected in the Restatement.

As suggested by the Court in *Washington Mutual*, the Michigan Court of Appeals recently expanded the doctrine of equitable subrogation to apply to instances where the refinancing lender is also the holder of the mortgage that is being paid off and discharged. On December 15, 2011, the Michigan Court of Appeals issued an opinion in *CitiMortgage, Inc. v MERS, Inc.* that moved Michigan's position on equitable

subrogation closer to that of the Restatement. The *CitiMortgage* Court held the doctrine of equitable subrogation is available and should be applied if the refinancing lender is the same lender that held the original mortgage before the intervening mortgage arose and the intervening lienholder is not materially prejudiced by the application of equitable subrogation.

Despite the holding in *CitiMortgage*, it is important to note that the "mere volunteer" rule is still applicable and equitable subrogation will not be available to third-party refinancing lenders that have no preexisting interest in the property. Therefore, before closing a refinance transaction, lenders and their title insurers should be sure to closely examine the title of the subject property to conclusively determine the existence of any intervening liens. If an intervening lien is of record, the intervening liens must be paid off and discharged. However, in light of the Court's ruling in *CitiMortgage*, if an intervening mortgage is missed, a refinancing lender may have an opportunity to use the doctrine of equitable subrogation in certain circumstances to obtain priority over the intervening mortgage.

*Peter C. Brown and Adam A. Holland are attorneys at the Gallagher Law Firm in Lansing, Michigan. Peter's primary areas of practice are real estate litigation, title insurance law, and creditors' rights. He can be reached at 517-853-1518 or PCB@thegallagherlawfirm.com. Adam's primary areas of practice are banking law and creditors' rights. He can be reached at 517-853-1520 or AAH@thegallagherlawfirm.com.*





# ABSTRACTIONS

by Allan Dick, Best Homes Title Agency, LLC

Make your reservations for April 11 (Mt. Pleasant) and May 2 (Livonia) for the next MLTA Education Seminars. A dynamite lineup will include guest speakers on E&O, CPLs, PA 116s, Split Closings and a favorite finale, the (Split) Closing from Hell (skit), among others.

The National Association of Realtors reports the number of Americans who signed contracts to buy homes in January jumped 2% to its highest level in nearly two years, reflecting the fact that home buying has become more affordable with declining prices and rock bottom mortgage rates. According to Freddie Mac, the average rate for a 30 year fixed rate mortgage stayed below 4% for the entire month of February 2012, hitting a record low of 3.87% before rising slightly. Home sales in Michigan rose 8.3% in January 2012 over the previous January. But, prices still dipped by 4.8% from the previous year, according to data released by the Michigan Association of Realtors. Nationally, sales rose only 0.7% January-to-January, with a 2% price decline.



Many lenders are anticipating an increase of refinance activity with the implementation of the new Home Affordability Refinance Program (HARP 2.0), which is to have fewer limitations than the previous programs, but has a number of complications in getting it rolled out and becoming generally available. They should start to have an impact in the second quarter.

Last year, I decided to buy my mother-in-law a cemetery plot as a Christmas gift. This year, I didn't buy her a gift. When she asked me why, I replied, "Well, you still haven't used the gift I bought you last year!" And that's how the fight started.....

Interesting bit of news – the nation's #3 mortgage provider, Bank of America, will reportedly no longer sell mortgages to Fannie Mac, apparently due to the number of defaulted mortgages they have had to buy back, because of non-conformance with Fannie Mae's underwriting standards.

And, the San Francisco Chronicle recently reported that errors were found in 84.2% of the mortgages in foreclosure, according to the San Francisco Recorder-Assessor – ranging from technical errors to violations. Reportedly, 99% contained some type of irregularity!

Finally, the Bloomberg Consumer Comfort Index rose for the 5th consecutive week, ending February 19th, to the highest level since 2008. Unfortunately, the still shows a rating of minus 38.4 on a scale of minus 100 to plus 100, based on a random sampling of 1,000 consumers. (In other words, about 308 were positive, 692 negative.) But, hey, it's moving in the right direction.

Mark your calendars for July 15-17 and the MLTA Summer Convention at Grand Traverse Resort. Arrangements have been made for some excellent speakers and activities, and, of course, Unreal Property has once again agreed to entertain us the first evening, along with a new MLTA-PAC FUNdraiser – last year's bash was unforgettable! Details will be forthcoming.

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For more information, contact:

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[jerry@erecordingpartners.net](mailto:jerry@erecordingpartners.net)

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N E T W O R K

# Eliminating Preventable Claims

by Jeff Boas, Fidelity National Title

In the summer of 2011, FNTG formed a new department called Title Loss Reduction and Education. The primary goal of the department is to reduce title claims nationwide. Members of the department will work jointly with claims, underwriting and title operations on a program designed to identify the sources of preventable title claims and suggest ways to significantly reduce, if not eliminate, those claims. This article will describe some of the common types of claims that can be prevented by simply taking a little extra care in how we do our jobs and by developing processes to avoid similar claims. The term “report” as used here means a commitment, preliminary report or other preliminary document showing the vesting, estate, exceptions, requirements, etc.

**Datedowns/updates/bringdowns** — One of the most common causes of claims is the failure to datedown reports prior to closing, resulting in missing documents of record that appear between the date of the report and the closing. Some of the most common sorts of documents recorded in the “gap” that continue to result in claims (because of the failure to perform pre-closing updates) include mortgages, deeds of trust, judgments and tax liens. In addition, claims often result when datedowns are performed, but the items found are not properly addressed. Many of these claims could be avoided with improved communication between the title operation and the settlement or closing agent.

**Missing documents on chain sheets** — Many claims are the result of the failure to carefully review items shown on chain/property run sheets and printouts. This includes the failure to thoroughly examine all items shown and, in some instances, the failure to search back far enough to pick up mortgages, deeds of trust and other liens that have not been released.

**Fraud and forgery** — Many fraud and forgery claims could be avoided by taking two simple steps:

- 1) Always question transactions when the report discloses that the property is free and clear of mortgages or deeds of trust. Although transactions do occur when the property is free and clear, it's far more common for properties to be subject to existing encumbrances.
- 2) Carefully examine releases, satisfactions and other documents associated with mortgages or deeds of trust, particularly those that aren't supported by new loans and those that were recorded during the past 12 months. A careful review of all documents recorded during the last 12 months will help identify fraudulent documents and, in the process, reduce or

eliminate the very expensive claims that result from fraud and forgery. In addition, it's not uncommon for lenders to record rescissions/cancellations of fraudulent releases and satisfactions, and all such recordings by lenders should be treated as red flags.

**Closings** — Many claims result from the failure to review closing documents prior to settlement. A final review of deeds, mortgages and deeds of trust will often disclose errors in legal descriptions or in the names of the parties to the instruments that can be easily cured prior to recording. Also, prior review of closing documents will help find and fix errors in execution and acknowledgements, which can be particularly difficult to correct after the defective document is recorded. It is also critical that closing documents be recorded in a timely manner and that settlement agents follow up to obtain releases, reconveyances and satisfactions of liens for recording. A final review of the report prior to settlement will also afford an opportunity to verify that all requirements are being complied with.



**Equity line mortgages and deeds of trust (HELOCs)** — Failure to properly close residential and commercial equity line accounts is one of the largest causes of claims. These claims are usually significant, and most of them can be easily avoided by following proper procedure. Title personnel can assist by specifically identifying HELOCs and other lines of credit as equity line mortgages and deeds of trust on the report and including the appropriate requirements for the satisfaction of equity line mortgages and deeds of trust in reports. It is not sufficient to obtain a standard pay-off letter on the HELOC and then remit pay-off funds to the lender. Settlement agents must take the necessary steps to close credit line accounts prior to closing and must also ensure that the pay-off information is up to date on the day of closing. In addition, it's critical that settlement agents follow up to obtain releases, satisfactions and reconveyances and that those documents are recorded immediately upon receipt.

**Examination of documents in the chain of title** — Many claims result from the failure to fully examine documents in the chain of

title. A common example is the failure to show restrictions that a careful examination of the recorded document would have disclosed. It's critical that all pages of documents be examined.

**Name runs** — Claims involving name searches could be avoided by taking a few preventative measures. Orders may be opened with names that differ from those which are actually in title, so be sure that all of the names are run — both the versions appearing on the order (for example, on the purchase and sale contract, loan application or open order sheet) and the versions appearing in the record title. Be sure to run both last names when the names are hyphenated. Run the names of all parties appearing in the chain of title, and don't forget to run the names of parties that are added late in the transaction. Where appropriate under state law, the names of non-titled spouses must be run. Also, be aware of misspellings, and attempt to ascertain the correct spellings of names. The procedure for running names should further be modified to account for known local or regional plant and courthouse posting practices. Please remember to

run names for the appropriate periods of time to account for lien enforcement periods under state and federal law.

**Underwriting** — Adhere to all local, state and national underwriting guidelines that are currently in place. You are encouraged to contact our company underwriters to discuss title issues.

**Communication** — Perhaps the most important step is to ensure effective communication between and within title departments and closing/settlement departments. Many claims can be avoided if changes to transactions or any other matters pertaining to a particular transaction are communicated in a timely and accurate manner. Remember, there's no such thing as a stupid or silly question. In our profession, when something doesn't feel right, it's usually because it isn't. We encourage our agents and internal staff to call our underwriters whenever something raises a red flag. By working together as a team, we'll be able to significantly reduce title claims.

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# VIEWS FROM THE SHORE

By Sam Hill

Well, the winter that never was, as some are calling it, hasn't been too nasty, and some of my Fly Girl friends put on their woolies along with their waders, 'cause they can't wait for spring. More power to 'em. Me, I'll just tie a few flies, read a few stories and wait for REAL spring. I keep thinking there's one good winter storm left out there with our name on it. Hope I'm wrong. But, out here this time of year weather often dominates the conversations. Hey, it's better than talking about politics!

The other day we did have our first closing for a downstate title company that made us collect transfer tax from the buyer even though the deed said exempt, because of the whole Freddie/Fannie mess. When I went to talk to our Register, Mildred Icenogle, about it, she covered her ears and made a frowny face. We don't like it when she gets a frowny face. We like our Register to have a smiley face all the time. In one of our even

more remote counties, the ladies at the Register's office acted surprised like they didn't even know about the Freddie/Fannie transfer tax mess. I was envious.

It's hard to know what to expect or who to believe these days, with all this election year jibber-jabber. I heard a kinda funny one the other day about some teacher asking a student about the significance of President's Day, figuring she'd hear about Washington or Lincoln. According to her student, President's Day is when Obama comes out of the White House, and if he sees his shadow, we will have one more year of unemployment. It might be funnier, if it didn't hit so close to home.

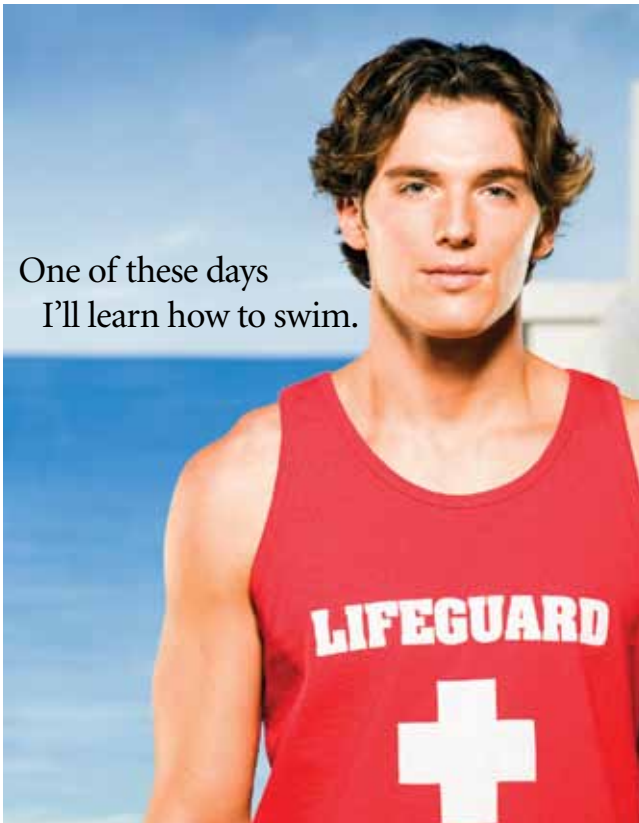
Hey, I'm not pinning that all on him – plenty of blame to go around, as I see it. Mostly it's this economy stuff that worries me. Now that I think of it, the economy is a lot like the weather. As Mark Twain used to say, "Everybody talks about the weather, but, nobody does anything about it." Sound familiar? Well, here's Sam-ism: Talk is cheap. Gas ain't. Well, that's the way I see it, and this is the view from the shore, so you can see what it looks like from here to there from time to time.

Regards,

*Samantha Hill*



One of these days  
I'll learn how to swim.



## Some things are not what they seem.

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# Legislative Update

by Cami Pendell,  
Michigan Legislative  
Consultants

## NEAL CASE FIX LEGISLATION INTRODUCED

Rep. Peter Pettalia and Rep. Vicki Barnett recently introduced House Bills 5257 and 5258, which are an MLTA priority issue for this legislative cycle. HB's 5257-58 allow for a copy of an original instrument that is verified by an affidavit and recorded to be deemed as complying with all recording requirements in this state. These bills were referred to the House Local, Intergovernmental and Regional Affairs Committee.

In 2009, a United States Bankruptcy Court Judge decided in *In re Neal* that a copy of an original instrument along with a verified affidavit does not satisfy the necessary requirements for recording a real estate conveyance because it does not contain the original signatures as required by statute. This has created a problem in the industry because of the impact it has on determining the chain of title on certain parcels of property. Additionally, there are other instances where a Register of Deeds has accepted copies of the original instrument and this decision would negatively impact the industry's ability to insure those properties in question. HB's 5257 and 5258 will allow a copy of an original instrument that is verified by an

affidavit and recorded to be deemed as complying with all recording requirements in this state. This language is retroactive so that it will cover these types of recordings that have happened in the past.

Please ask your legislator, as well as members of the House Local, Intergovernmental and Regional Affairs Committee, to support this initiative and help advance it through the legislative process. Also, please thank Rep. Pettalia and Rep. Barnett for their support of the land title industry.

### Contact information:

(All email addresses are full name @house.mi.gov  
i.e. vickibarnett@house.mi.gov)

### Bill Sponsors:

| District | Name                               | Phone        |
|----------|------------------------------------|--------------|
| 106      | Peter Pettalia (R-Presque Isle)    | 517-373-0833 |
| 37       | Vicki Barnett (D-Farmington Hills) | 517-373-1793 |

### Committee Members:

| Dist | Name  | Phone        |
|------|---|--------------|
| 52   | Chairman, Mark Ouimet (R-Scio Twp)          | 517-373-0828 |
| 106  | V.Chair, Peter Pettalia (R-Presque Isle)    | 517-373-0833 |
| 38   | Hugh D. Crawford (R-Novi)                   | 517-373-0827 |
| 82   | Kevin Daley (R-Lum)                         | 517-373-1800 |
| 91   | Holly Hughes (R-White River Twp)            | 517-373-3436 |
| 32   | Andrea LaFontaine (R-Richmond)              | 517-373-8931 |
| 89   | Amanda Price (R-Holland)                    | 517-373-0838 |
| 71   | Deb Shaughnessy (R-Charlotte)               | 517-373-0853 |
| 103  | Bruce R. Rendon (R-Lake City)               | 517-373-3817 |
| 34   | Minority V.Chair, Woodrow Stanley (D-Flint) | 517-373-8808 |
| 16   | Bob Constan (D-Dearborn Heights)            | 517-373-0849 |
| 26   | Jim Townsend (D-Royal Oak)                  | 517-373-3818 |
| 4    | Maureen L. Stapleton (D-Detroit)            | 517-373-1008 |
| 54   | David Rutledge (D-Ypsilanti)                | 517-373-1771 |
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## Governor Snyder's State of the State Address and Budget Recommendations

Governor Snyder's State of the State Address & Budget Recommendations

On January 18th, Governor Snyder provided his second State of the State Address. He said that Michigan's economy is moving in the right direction and 2012 must be devoted to continuing the state's reinvention by taking care of unfinished business, addressing other critical challenges and emphasizing good government. He outlined several

issues that he would like to tackle this year with the cooperation of the Legislature, including:

- **Government accountability:** The governor will work with lawmakers to promote greater accountability and transparency in government by enacting overdue reforms to Michigan's campaign finance, lobby and ethics laws.
- **Crime:** The cities of Saginaw, Flint, Detroit and Pontiac are among the nation's top 10 in violent crime, which Snyder called unacceptable.
- **Health care:** The governor announced Pure Michigan Fit, a collaborative pilot program with Gerber Products, the Michigan Grocers Association and the Michigan Health and Hospital Association.
- **Autism:** Snyder said Michigan should join the 27 other states that require insurers to cover evidence-based therapies for autism.
- **Energy and environment:** This fall Snyder will deliver a special message to the Legislature on energy and the environment.
- **Taxes:** The governor will work with local governments and industry leaders to reform the personal property tax on industrial assets, while preserving funding for communities.
- **Infrastructure:** Snyder is urging lawmakers to conduct hearings on bills that will create a system of roads and bridges for the 21st century.
- **Communities:** Snyder is recommending additional funding for the successful Economic Vitality Incentive Program, which builds stronger communities and promotes regional cooperation.

In February, the Governor presented his Executive Budget recommendations to the Legislature. He recommended a total of \$48.2 billion in state and federal revenue sources, more than 75 percent of which would be devoted to education, health and human services under his proposal. The Snyder administration will now work in partnership with the members of the Michigan House and Senate to enact the budget. The state's new fiscal year begins Oct. 1, 2012. The Legislature's goal is to complete their budget work before they break for the summer in July.

## Legislative Schedule

At the beginning of 2012, the Michigan Legislature released their Session schedule. They will have a usual Tuesday, Wednesday and Thursday session calendar through all of February and March. They will then go on Spring Break during the first two weeks of April and resume their usual session schedule from mid-April until the end of June. They will then have intermittent session through the summer and into the fall. Since this is an election year, there will be few session days in September, October and November.

## Legislative Member Spot Light

With the introduction of House Bills 5257 and 5258, this quarter's Legislative Member Spot Light is on Representative Peter Pettalia.

Rep. Pettalia is from Presque Isle and was elected in November 2010 to his first term in the Michigan House to represent residents of Alpena, Presque Isle, Montmorency, Crawford, Oscoda and Alcona counties. He serves on the following committees: Vice-Chair of Local, Intergovernmental and Regional Affairs; Banking and Financial Services; Judiciary; and, Natural Resources, Tourism and Outdoor Recreation.

Pettalia previously served as Presque Isle Township supervisor for 16 years and as a volunteer firefighter for East Grand Lake Fire Department for 15 years. He currently is vice-chairman for the State Park Advisory Board for Negwegon, Rockport and Thompson Harbor State Parks. He was one of the founding members of the Presque Isle County Economic Development Commission and the Community Development Commission.



He and his business partner have successfully operated an auto repair business for 33 years. He also operates a seasonal cabin rental business on Grand Lake in Northeast Michigan.

Pettalia, born in 1955, has been married to Karen for 32 years and they have two grown children. A resident of Presque Isle Township since 1977, Pettalia is an avid sportsman who supports outdoor recreation. He is a member of the Presque Isle Museum Society, the Alpena Area Convention & Visitors Bureau and the Alpena Downtown Development Authority.

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# The CFPB: the Earps come to Tombstone

Charles Cain,  
WFG National Title  
Insurance Company

For those of you old enough to remember the movie genre known as “Westerns”, the subject of Wyatt Earp and his brothers taking down the Dalton gang in Tombstone was a common plot. The Earps were U.S. Marshals and routinely portrayed as the guardian of the public interest as versus the Daltons who were portrayed as little more than desperados. History has in fact shown that the locals were just as afraid of the Earps as they were of the Daltons (maybe more so) as the Earps had badges and could pretty much do as they chose.

On July 21, 2011, the Consumer Financial Protection Bureau opened as prescribed by the Dodd-Frank Act. As an overarching agency, it governs 234 regulated areas under 18 separate federal consumer protection laws. It is an Executive Agency within the Federal Reserve System. While it immediately began enforcing existing laws within the purview of its authority, it was restricted from enacting any new rules until a director was in place. Over the holidays, Richard Cordray became that director under a recess appointment. Since then, they have been very busy.

Title agents, by virtue of their being regulated by state insurance regulators, are not regulated by the CFPB. But real estate settlement service providers, though not specifically defined, are under the CFPB's authority. Closing and escrow services are certainly within this definition, and therefore it is in that role that title agents who perform settlements are within the CFPB's jurisdiction. Further, the CFPB can regulate “related persons” to regulated entities (such as lenders) where the related person knowingly or recklessly participates in the violation of law or regulation or breach of fiduciary duty. Such “related persons” can include independent contractors such as appraisers, accountants and, most shockingly, attorneys.

And, in an advisory of about a month ago, the Bureau announced that as they are an executive agency within the Federal Reserve that the same rules apply to their investigations as apply to investigations carried out

by the Fed, namely that attorney-client privileged communications and documents were not so privileged to them, though if they required them the privilege would still extend to third parties. The Bureau was not created under the same law as the Fed, so whether this position will stand up remains to be seen, but I think you are getting the gist of things. The Bureau can initiate its own investigations. No consumer or industry complaint is needed.



Beginning in the late summer and ending in the autumn five iterations were put forward for comment as to a new combined GFE/TIL disclosure document. Botanical names were assigned to the different models which can be seen at their website of [www.consumerfinance.gov](http://www.consumerfinance.gov).

The Bureau clearly pointed out that these were five differing examples and not to be construed as amended from previous iterations. That is whatever is finally proposed may look like any one of the proposed iterations and not necessarily the last.

We have since seen four iterations (perhaps more at press time) of a new proposed Settlement Statement to be used at closing. They combine elements of the GFE, the TIL and the HUD-1 form. They run 5-6 pages. Some also include new terms such as Total Interest Percentage (“TIP”) and Lender Cost of Funds (“LCF”). In the sample in the “Hemlock” iteration, these numbers come to 79.75% and 1.20%, respectively. These would surely lead to an interesting new dialogue with a borrower. The new iterations return to a fuller break-down of closing costs of the pre-2010 HUD-1. Again these can be found at the CFPB website.

One thing of which we can be sure is that new GFE/TIL forms and a new Settlement Statement will be promulgated this year with a likely implementation date of sometime in 2013. The CFPB is very efficient in hitting deadlines, far more so than most of the agencies and departments whose enforcement authority moved to the CFPB. And while they have to go through the comment period under the Administrative Procedure Act, the CFPB can implement essentially any forms they choose. Their rule making authority is not bound by Congressional oversight or influence (as planned under Dodd-Frank). They create and enforce their own rules directly and can implement fines of \$5,000 per day going to \$25,000 per day for reckless violations, and \$1,000,000 per day for knowing violations. They can require rescission of transactions, refunds of fees and restitution, damages, reimbursement from unjust enrichment and public notification of violations.

Chuck Cain, a graduate of Ohio State University and the Salmon P. Chase College of Law at Northern Kentucky University, has been in the Title Insurance industry since 1977, including stints as corporate officer for LandAmerica and owner-operator of his own agency. A native Cincinnati, he is admitted to practice in Ohio and Kentucky, and has been involved with the Cincinnati Bar Association, the Cincinnati Mortgage Banker's Association, ALTA, RESPRO, and many other land title and bar associations. His many articles have been published in state land title publications and in October Research publications, and having worked in all areas of the title industry, he brings a great depth of knowledge of all aspects of the real estate industry.



## 2012 Summer Convention Sponsorship opportunities

Planning has begun for the MLTA 2012 summer convention to be held at the Grand Traverse Resort in beautiful Traverse City.

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# Should You Pay Off Your Mortgage or Invest?

*Bruce Bos, Waddell & Reed, Inc.*

Owning a home outright is a dream that many Americans share. Having a mortgage can be a huge burden, and paying it off may be the first item on your financial to-do list. But competing with the desire to own your home free and clear is your need to invest for retirement, your child's college education, or some other goal. Putting extra cash toward one of these goals may mean sacrificing another. So how do you choose?

## Evaluating the opportunity cost

Deciding between prepaying your mortgage and investing your extra cash isn't easy, because each option has advantages and disadvantages. But you can start by weighing what you'll gain financially by choosing one option against what you'll give up. In economic terms, this is known as evaluating the opportunity cost. Here's an example. Let's assume that you have a \$300,000 balance and 20 years remaining on your 30-year mortgage, and you're paying 6.25% interest. If you were to put an extra \$400 toward your mortgage each month, you would save approximately \$62,000 in interest, and pay off your loan almost 6 years early. By making extra payments and saving all of that interest, you'll clearly be gaining a lot of financial ground. But before you opt to prepay your mortgage, you still have to consider what you might be giving up by doing so--the opportunity to potentially profit even more from investing. To determine if you would come out ahead if you invested your extra cash, start by looking at the after-tax rate of return you can expect from prepaying

your mortgage. This is generally less than the interest rate you're paying on your mortgage, once you take into account any tax deduction you receive for mortgage interest. Once you've calculated that figure, compare it to the after-tax return you could receive by investing your extra cash. For example, the after-tax cost of a 6.25% mortgage would be approximately 4.5% if you were in the 28% tax bracket and were able to deduct mortgage interest on your federal income tax return (the after-tax cost might be even lower if you were also able to deduct mortgage interest on your state income tax return). Could you receive a higher after-tax rate of return if you invested your money instead of prepaying your mortgage? Keep in mind that the rate of return you'll receive is directly related to the investments you choose. Investments with the potential for higher returns may expose you to more risk, so take this into account when making your decision.

## Other points to consider

While evaluating the opportunity cost is important, you'll also need to weigh many other factors. The following list of questions may help you decide which option is best for you.

- What's your mortgage interest rate? The lower the rate on your mortgage, the greater the potential to receive a better return through investing.
- Does your mortgage have a prepayment penalty? Most mortgages don't, but check before making extra payments.
- How long do you plan to stay in your home? The main benefit of prepaying your mortgage is the amount of interest you save over the long term; if you plan to move soon, there's less value in putting more money toward your mortgage.
- Will you have the discipline to invest your extra cash rather than spend it? If not, you might be better off making extra mortgage payments.
- Do you have an emergency account to cover unexpected expenses?

It doesn't make sense to make extra mortgage payments now if you'll be forced to borrow money at a higher interest rate later. And keep in mind that if your financial circumstances change--if you lose your job or suffer a disability, for example--you may have more trouble borrowing against your home equity.

- How comfortable are you with debt? If you worry endlessly about it, give the emotional benefits of paying off your mortgage extra consideration.

- Are you saddled with high balances on credit cards or personal loans? If so, it's often better to pay off those debts first. The interest rate on consumer debt isn't tax deductible, and is often far higher than either your mortgage interest rate or the rate of return you're likely to receive on your investments.

- Are you currently paying mortgage insurance? If you are, putting extra toward your mortgage until you've gained at least 20% equity in your home may make sense.

- How will prepaying your mortgage affect your overall tax situation? For example, prepaying your mortgage (thus reducing your mortgage interest) could affect your ability to itemize deductions (this is especially true in the

early years of your mortgage, when you're likely to be paying more in interest).

- Have you saved enough for retirement? If you haven't, consider contributing the maximum allowable each year to tax-advantaged retirement accounts before prepaying your mortgage. This is especially important if you are receiving a generous employer match. For example, if you save 6% of your income, an employer match of 50% of what you contribute (i.e., 3% of your income) could potentially add thousands of extra dollars to your retirement account each year. Prepaying your mortgage may not be the savviest financial move if it means forgoing that match or shortchanging your retirement fund.

- How much time do you have before you reach retirement or until your children go off to college? The longer your time frame, the more time you have to potentially grow your money by investing. Alternatively, if paying off your mortgage before reaching a financial goal will make you feel much more secure, factor that into your decision.

## The middle ground

If you need to invest for an important goal, but you also want the satisfaction of paying down your mortgage, there's no reason you can't do both. It's as simple as allocating part of your available cash toward one goal, and putting the rest toward the other. Even small adjustments can make a difference. For example, you could potentially shave years off your mortgage by consistently making biweekly, instead of monthly, mortgage payments, or by putting any year-end bonuses or tax refunds toward your mortgage principal. And remember, no matter what you decide now, you can always reprioritize your goals later to keep up with changes to your circumstances, market conditions, and interest rates.

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*Bruce Bos is a Financial Advisor with Waddell & Reed in Grand Rapids, MI, and can be reached at 616-956-6051. Waddell & Reed, Inc. - Member SIPC.*





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## Residential Sales Statistics

January 2012

| Local Association                                   | 2012 Jan Sales | 2011 Jan Sales | 12-11 % Change | 2,012 Jan Avg Price | 2,011 Jan Avg Price | 12-11 % Change | 2012 YTD Jan # Sales | 2011 YTD Jan # Sales | 12-11 YTD % Change | 2012 YTD Jan Avg Price | 2011 YTD Jan Avg Price | 12-11 YTD % Change |
|---|----------------|----------------|----------------|---------------------|---------------------|----------------|----------------------|----------------------|--------------------|------------------------|------------------------|--------------------|
| Ann Arbor Area Board of REALTORS®                   | 173            | 178            | -2.81%         | \$168,011           | \$167,745           | 0.16%          | 173                  | 178                  | -2.81%             | \$168,011              | \$167,745              | 0.16%              |
| Antrim Charlevoix Kalkaska Association of REALTORS® | 36             | 42             | -14.29%        | \$122,984           | \$171,511           | -28.29%        | 36                   | 42                   | -14.29%            | \$122,984              | \$171,511              | -28.29%            |
| Battle Creek Area Association of REALTORS®          | 87             | 85             | 2.35%          | \$81,894            | \$80,425            | 1.83%          | 87                   | 85                   | 2.35%              | \$81,894               | \$80,425               | 1.83%              |
| Bay County REALTOR® Association                     | 85             | 109            | -22.02%        | \$76,950            | \$63,600            | 20.99%         | 85                   | 109                  | -22.02%            | \$76,950               | \$63,600               | 20.99%             |
| Branch County Association of REALTORS®              | 38             | 31             | 22.58%         | \$61,725            | \$75,295            | -18.02%        | 38                   | 31                   | 22.58%             | \$61,725               | \$75,295               | -18.02%            |
| Central Michigan Association of REALTORS®           | 48             | 52             | -7.69%         | \$78,968            | \$87,910            | -10.17%        | 48                   | 52                   | -7.69%             | \$78,968               | \$87,910               | -10.17%            |
| Clare-Gladwin Board of REALTORS®                    | 37             | 46             | -19.57%        | \$64,936            | \$80,089            | -18.92%        | 37                   | 46                   | -19.57%            | \$64,936               | \$80,089               | -18.92%            |
| Detroit Board of REALTORS®                          | 429            | 385            | 11.43%         | \$15,574            | \$16,042            | -2.91%         | 429                  | 385                  | 11.43%             | \$15,574               | \$16,042               | -2.91%             |
| Down River Association of REALTORS®                 | 100            | 77             | 29.87%         | \$60,810            | \$72,880            | -16.56%        | 100                  | 77                   | 29.87%             | \$60,810               | \$72,880               | -16.56%            |
| Eastern U.P. Board of REALTORS®                     | 21             | 19             | 10.53%         | \$72,960            | \$68,700            | 6.20%          | 21                   | 19                   | 10.53%             | \$72,960               | \$68,700               | 6.20%              |
| Emmet Association of REALTORS®                      | 34             | 28             | 21.43%         | \$242,068           | \$184,008           | 31.55%         | 34                   | 28                   | 21.43%             | \$242,068              | \$184,008              | 31.55%             |
| Genesee County                                      | 383            | 337            | 13.65%         | \$64,458            | \$66,434            | -2.98%         | 383                  | 337                  | 13.65%             | \$64,458               | \$66,434               | -2.98%             |
| Grand Rapids Association of REALTORS®               | 797            | 750            | 6.27%          | \$114,858           | \$110,400           | 4.04%          | 797                  | 750                  | 6.27%              | \$114,858              | \$110,400              | 4.04%              |
| Greater Kalamazoo Association of REALTORS®          | 191            | 137            | 39.42%         | \$144,606           | \$130,035           | 11.20%         | 191                  | 137                  | 39.42%             | \$144,606              | \$130,035              | 11.20%             |
| Greater Lansing Association of REALTORS®            | 433            | 311            | 39.23%         | \$94,117            | \$97,403            | -3.37%         | 433                  | 311                  | 39.23%             | \$94,117               | \$97,403               | -3.37%             |
| Greater Wayne County                                | 1,049          | 1,010          | 3.86%          | \$77,792            | \$81,594            | -4.66%         | 1,049                | 1,010                | 3.86%              | \$77,792               | \$81,594               | -4.66%             |
| Hillsdale County Board of REALTORS®                 | 18             | 18             | 0.00%          | \$63,161            | \$60,370            | 4.62%          | 18                   | 18                   | 0.00%              | \$63,161               | \$60,370               | 4.62%              |
| Huron County  | 8              | 2              | 300.00%        | \$72,766            | \$177,500           | -59.01%        | 8                    | 2                    | 300.00%            | \$72,766               | \$177,500              | -59.01%            |
| Jackson Area Association of REALTORS®               | 117            | 120            | -2.50%         | \$77,601            | \$69,596            | 11.50%         | 117                  | 120                  | -2.50%             | \$77,601               | \$69,596               | 11.50%             |
| Lapeer County                                       | 65             | 61             | 6.56%          | \$99,080            | \$122,925           | -19.40%        | 65                   | 61                   | 6.56%              | \$99,080               | \$122,925              | -19.40%            |
| Lenawee County Association of REALTORS®             | 54             | 56             | -3.57%         | \$64,402            | \$78,570            | -18.03%        | 54                   | 56                   | -3.57%             | \$64,402               | \$78,570               | -18.03%            |
| Livingston County                                   | 157            | 148            | 6.08%          | \$168,807           | \$152,937           | 10.38%         | 157                  | 148                  | 6.08%              | \$168,807              | \$152,937              | 10.38%             |
| Oakland County                                      | 1,105          | 1,117          | -1.07%         | \$148,680           | \$137,891           | 7.82%          | 1,105                | 1,117                | -1.07%             | \$148,680              | \$137,891              | 7.82%              |
| Macomb County                                       | 731            | 605            | 20.83%         | \$91,918            | \$83,224            | 10.45%         | 731                  | 605                  | 20.83%             | \$91,918               | \$83,224               | 10.45%             |
| Mason-Oceana-Manistee Board of REALTORS®            | 41             | 46             | -10.87%        | \$102,375           | \$106,991           | -4.32%         | 41                   | 46                   | -10.87%            | \$102,375              | \$106,991              | -4.32%             |
| Midland Board of REALTORS®                          | 49             | 42             | 16.67%         | \$128,070           | \$146,031           | -12.30%        | 49                   | 42                   | 16.67%             | \$128,070              | \$146,031              | -12.30%            |
| Monroe County Association of REALTORS®              | 69             | 90             | -23.33%        | \$110,725           | \$120,044           | -7.76%         | 69                   | 90                   | -23.33%            | \$110,725              | \$120,044              | -7.76%             |
| Northeastern Michigan Board of REALTORS®            | 31             | 38             | -18.42%        | \$81,257            | \$68,760            | 18.17%         | 31                   | 38                   | -18.42%            | \$81,257               | \$68,760               | 18.17%             |
| Paul Bunyan Board of REALTORS®                      | 88             | 67             | 31.34%         | \$58,692            | \$84,528            | -30.57%        | 88                   | 67                   | 31.34%             | \$58,692               | \$84,528               | -30.57%            |
| Saginaw Board of REALTORS®                          | 134            | 113            | 18.58%         | \$65,279            | \$88,768            | -26.46%        | 134                  | 113                  | 18.58%             | \$65,279               | \$88,768               | -26.46%            |
| Sanilac County                                      | 9              | 9              | 0.00%          | \$56,394            | \$57,444            | -1.83%         | 9                    | 9                    | 0.00%              | \$56,394               | \$57,444               | -1.83%             |
| Shiawassee Regional Board of REALTORS®              | 29             | 68             | -57.35%        | \$72,113            | \$75,244            | -4.16%         | 29                   | 68                   | -57.35%            | \$72,113               | \$75,244               | -4.16%             |
| Southwestern Michigan Association of REALTORS®      | 159            | 129            | 23.26%         | \$162,529           | \$164,035           | -0.92%         | 159                  | 129                  | 23.26%             | \$162,529              | \$164,035              | -0.92%             |
| St. Clair County                                    | 96             | 67             | 43.28%         | \$80,261            | \$110,375           | -27.28%        | 96                   | 67                   | 43.28%             | \$80,261               | \$110,375              | -27.28%            |
| St. Joseph County Association of REALTORS®          | 38             | 37             | 2.70%          | \$69,394            | \$81,653            | -15.01%        | 38                   | 37                   | 2.70%              | \$69,394               | \$81,653               | -15.01%            |
| Traverse Area Association of REALTORS®              | 113            | 94             | 20.21%         | \$180,713           | \$162,849           | 10.97%         | 113                  | 94                   | 20.21%             | \$180,713              | \$162,849              | 10.97%             |
| Tuscola County                                      | 21             | 18             | 16.67%         | \$46,055            | \$63,481            | -27.45%        | 21                   | 18                   | 16.67%             | \$46,055               | \$63,481               | -27.45%            |
| Upper Peninsula Association of REALTORS® *          | 112            | 80             | 40.00%         | \$91,020            | \$85,879            | 5.99%          | 112                  | 80                   | 40.00%             | \$91,020               | \$85,879               | 5.99%              |
| Water Wonderland Board of REALTORS®                 | 91             | 88             | 3.41%          | \$76,278            | \$87,521            | -12.85%        | 91                   | 88                   | 3.41%              | \$76,278               | \$87,521               | -12.85%            |
| West Central Association of REALTORS®               | 58             | 65             | -10.77%        | \$92,401            | \$76,394            | 20.95%         | 58                   | 65                   | -10.77%            | \$92,401               | \$76,394               | 20.95%             |
| West Michigan Lakeshore Association of REALTORS®    | 211            | 192            | 9.90%          | \$128,475           | \$112,770           | 13.93%         | 211                  | 192                  | 9.90%              | \$128,475              | \$112,770              | 13.93%             |
| <b>TOTALS</b>                                       | <b>7,545</b>   | <b>6,967</b>   | <b>8.30%</b>   | <b>\$95,882</b>     | <b>\$100,728</b>    | <b>-4.81%</b>  | <b>7,545</b>         | <b>6,967</b>         | <b>8.30%</b>       | <b>\$95,882</b>        | <b>\$100,728</b>       | <b>-4.81%</b>      |



## Strategic People Reminders for the Busy Executive

by Scott Patchin, The trU Group

### What I'm hearing

"How can I possibly have time to do evaluations and one-on-ones, address future people needs in my business and focus on the development of my people? I know it's important, but I have so much to do!"

### What it means

I asked a group of human resource professionals what would be the number one reason their leaders gave for not doing one-on-one discussions, performance evaluations, or succession planning. The answer — and it is always the answer: time.

All the research says that spending time with people to help them focus is the most valuable investment a leader can make. Gallup proves this in their Q12 Index employee-engagement research, with the top two questions focusing on whether people (a) know what is expected of them at work and (b) have the tools needed to do their jobs.

More recently, a Ken Blanchard Companies®/Training magazine study found that 80 percent of respondents identified setting performance

expectations as the key job factor owned by their direct leaders.

The research is crystal clear regarding that which people need to be at their best, and how engaging them fully will have a positive financial impact on a business. But, in the trenches of leading a business, there's this barrier called "time."

What if I told you that this could be accomplished with a 10-hour-per-person commitment each year?

### What you should do

Everyone needs a target, so here's one for you in terms of what you need to do and when. I call it the trUPerformance™ Talent Calendar. It is this simple. It's also difficult to do because starting means changing some habits and learning to make this a priority. It consists of three key habits to perform with each of your people: monthly one-on-ones, annual performance conversations, and midyear check-ins. For a more strategic look at your people, another key event to include is a yearly key role/key people discussion.

The Talent Calendar gives any size business the tools to focus on the most important asset in that business — its people. It makes the time commitment clear and makes the limited time you have available count.



Looking to create this habit across a group of leaders in 2012? Is it time to rebuild some of the habits and culture around investing in your people? Contact [Scott@thetrugroup.com](mailto:Scott@thetrugroup.com).  
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Tim McDonnell, MI-Agency Representative with his friends Greta and Bou.

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# SURVEYOR'S VIEW POINT: Traversing the Law: The Adjundication of Boundaries

by Jeffery N. Lucas, PLS, Esq.



This issue deals with the subject of the land surveyor adjudicating boundaries. It is without question that the land surveyor has no legal authority to adjudicate boundaries between two coterminous landowners. It is equally unquestionable that there is no legal authority against the land surveyor doing so. If we step back and consider the reality of the situation, we find that surveyors, wittingly or unwittingly, adjudicate boundaries on a daily basis. My own experience has shown me that the general public thinks that this is exactly what surveyors are doing. In my study of the law and my interactions in the legal community, judges and attorneys, by and large, think that surveyors are adjudicating boundaries. Our dirty little secret is that we seem to be the only ones who don't think that is what we ought to be doing.

If we go back to the quote from Williams and Onsrud<sup>1</sup> in my October 2006 column, this is exactly what they think land surveyors are doing. Who are Williams and Onsrud? Mitchell G. Williams is a practicing attorney in New York and Harlan Onsrud is a professor in the Department of Spatial Information Science and Engineering at the University of Maine. I first found them quoted in Evidence and Procedures<sup>2</sup> and later found a copy of their treatise. According to the reference in Evidence and Procedures, their paper was reprinted by the American Bar Association as late as 2000. It is crystal clear from reading their paper that Williams and Onsrud are of the opinion that land surveyors are actually trying to adjudicate boundary locations.

The surveyor is guided by legal principles in his evaluation of the evidence for a boundary line location.... The resolution of the conflicts between written and unwritten rights is one of

the most difficult problems for both surveyors and lawyers.... But even within a deed or other written conveyance there frequently are conflicting terms which must be resolved [emphasis added].<sup>3</sup>

Williams and Onsrud also describe five basic reasons for having property surveyed. Not found among the reasons is idle curiosity over the location of deed lines irrespective of all other evidence of boundaries. No--three out of the five deal with the surveyor's role in interpreting the written record and physical evidence, resolving the conflicts between the written instrument of conveyance and the reality on the ground, weighing all of the evidence, and establishing (or recognizing) the true boundary between two coterminous landowners. "Merely locating the lines described in a deed on the ground is not adequate for establishing the physical limits of a property owner's interests."<sup>4</sup>

My biggest heartburn over the issue of land surveyors adjudicating boundaries, besides the fact that we actually do adjudicate boundaries whether we want to admit the reality or not, is that many property owners never get their "day in court" in the land surveyor's courtroom. They never get to testify as to the location of boundaries, all of the evidence isn't considered by the land surveyor, and a bad ruling is made, usually weighing heavily towards measurements and the written description. There are three possible outcomes from the land surveyor's ruling on the boundary issue: the results will be accepted, ignored or litigated in a court of competent jurisdiction.

It's a fact that the vast majority of civil disputes never go to trial. Although passions may run high and principles may outweigh logic, the typical boundary dispute case between two coterminous private citizen landowners does not generate a great interest in the legal community due to the relatively small war chests involved.

While it may be true that the land surveyor has no legal authority to adjudicate boundaries and the surveyor's decisions are subject to judicial review (and real adjudication in a court of competent jurisdiction), in the vast majority of cases they never will be. So that leads me to a question of my own. If the vast majority of surveyor decisions will stand as the final adjudication between two coterminous landowners, why shouldn't it be a good decision based on the evidence in the case, a fair evaluation of that evidence and the law?

Surveyors occasionally disagree on the proper location of a boundary line: not necessarily because one surveyor measures better than the other but more commonly because each surveyor has weighed the evidence differently and has formed different opinions. Just as two lawyers may draw different conclusions from the same line of cases, surveyors may disagree about the appropriate location for a boundary. Being a professional opinion, a survey is subject to review by a court in the event that a boundary dispute reaches litigation. Because a survey is primarily a professional opinion, the attorney should remember that a survey and supporting documentation provided by one professional surveyor may be far superior or far inferior to that provided by another.<sup>5</sup>



## We Aren't Lawyers and We Aren't Judges

It is true that most land surveyors are neither lawyers nor judges. However, this doesn't mean that the land surveyor cannot know more about the law, especially property law as it applies to land boundaries, than the average lawyer or judge. As a matter of fact, I advocate the position that the land surveyor practicing boundary surveying should know more about the law within his area of expertise than any lawyer or judge he will ever encounter. The law is a very big subject and there are very few attorneys or judges who specialize in land boundary issues. In contrast, every surveyor who practices land boundary surveying is a specialist. And this is a very distinct area of the law that can be understood very well.

All citizens are ascribed with knowledge of the law--more so the professional. Ignorance of the law will not be an excuse when the boundary dispute is adjudicated in a court of competent jurisdiction. Under the right circumstances, this ignorance of the law on the part of the professional land surveyor could give rise to charges of incompetence, negligence or any number of other torts, some carrying punitive damages. Many surveyors seem to find solace in the idea that their map of survey meets the minimum standards or the detail requirements for surveys as promulgated by their state, and yet have survey results that are--well--wrong. Often these wrong results are based on an overreliance on measurements or legal descriptions in deeds to the exclusion of all other evidence of boundaries.

## What's Wrong With Being Right?

Let me ask another question: what's wrong with being right? If we all know our decisions are subject to judicial review, what's wrong with making the same decision the judge will make? Consider this: your map of survey meets all of the requirements of the state standards (or any other standard that may be applicable), and you gathered all of the evidence in the case that any reasonably prudent surveyor in like or similar circumstances would have gathered (including but not limited to testimony evidence, measurement evidence, the written evidence as found in the deed of conveyance and as found in the deeds of adjoining). Then you weighed the evidence gathered against the civil standard that will be used in court. By the preponderance of the evidence, you applied your state's property law as has been handed down through the courts and legislature, and you made a decision as to the location of the true boundary line between the coterminous landowners. You win in court. What's the downside?

Let's change the scenario. You're given a deed by your client and asked to go "stake out my deed." Relying almost exclusively on your client's deed you go to the field and, weighing heavily on your measurements, you stake out his deed. Your map of survey meets all of the applicable requirements of the state standards (or whatever other standard you are using), but you ignored other evidence of the true boundaries, i.e. testimony, occupation, repose, etc.<sup>6</sup> Since you ignored this other evidence, you have no evidence to weigh against the standard the court will use in reviewing your survey results,

and you applied no law to your decision. Your plan is to hide behind your client's deed once you go to court and claim that you owe no duty to anyone but your client. The results of your survey are found to be in error when you go to court. I don't think there is any question given the choice between these two scenarios--winning in court is the better option.

## Professional Adjudication

Invariably, the comment that comes back to me, especially in live seminars, is "but all my client wants me to do is stake his deed." The answer to this is simple: then tell him that's what you're doing--you are simply staking a deed. Don't call your survey a "boundary survey." Call it what it is: a "deed stakeout."

The analogy is easy to recognize in other professions. In the legal profession, for example, many clients want the attorney to prepare a "simple will" or a "simple divorce." Every attorney in the country knows that there is no such thing. The issues involved in both cases are not simple and the attorneys don't attempt to make them so. If they do, they set themselves up for malpractice suits. The lawsuit on the "simple will," for example, won't come from the dead man. It will come from his estate or third parties whose rights were ignored in the preparation of the "simple will." Are we professionals or simply technicians doing what we are told?

It is abundantly clear from my study of the law that the land surveyor has no legal authority to adjudicate boundaries. It is equally clear that there is no prohibition against it. The reality is that the general public and the legal profession, by and large, think that this is exactly what the land surveyor is doing, adjudicating boundaries. "If the surveyor's evaluation of the evidence...is eventually upheld in a court of law, it is because the surveyor has arrived at a comprehensive and well-reasoned answer rather than because he has arrived at the theoretically correct answer. Again, there are no 'true' answers waiting to be discovered; only well-reasoned answers."<sup>7</sup>

Go forth and measure redundantly.

*Neither the author nor POB intends this column to be a source of legal advice for surveyors or their clients. The law changes and differs in important respects for different jurisdictions. If you have a specific legal problem, the best source of advice is an attorney admitted to the bar in your jurisdiction.*



References 1. "The surveyor, having made an evaluation of the evidence, forms an opinion as to where he believes the lines would be located if fully adjudicated in a court of law. The typical modern day surveyor sees himself as an expert evaluator of evidence. He strives to arrive at the same opinion of boundary location regardless of whether he was hired by his client or his client's next door neighbor." Williams & Onsrud, "What Every Lawyer Should Know about Title Surveys," reprinted in Land Surveys, A Guide for Lawyers, Real Property and Trust Law Section American Bar Association, 1986.

2. Robillard, Wilson and Brown. Evidence and Procedures for Boundary Location, Fifth Edition, Hoboken, New Jersey, 2006, page 22.

3. Williams and Onsrud, page 47.

4. Id. at 44.

5. Id. at 43.

6. Adverse possession is a right and a remedy; it is not a boundary doctrine and is of no help to the land surveyor attempting to determine boundaries between coterminous landowners. However, there are other doctrines of the law that do establish boundaries "as a matter of law" and the courts in this country have been telling surveyors how to handle these situations for more than 230 years. The problem is that surveyors haven't been listening.

7. Williams and Onsrud, page 53.



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| April 11         | Spring Education<br><i>Mt. Pleasant, MI</i>                        |
| May 2            | Spring Education, <i>Livonia, MI</i>                               |
| July 15-17       | 2012 Summer Convention<br>Grand Traverse Resort<br><i>Acme, MI</i> |
| October 16       | Legislative & Membership<br>Committee Meeting                      |
| October 17       | Fall Education Seminar<br><i>Mt. Pleasant, MI</i>                  |
| November 7       | Fall Education Seminar<br><i>Livonia, MI</i>                       |
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