



Real Estate Litigation

FROM THE SECTION OF LITIGATION REAL ESTATE LITIGATION COMMITTEE

Spring 2011, Vol. 9, No. 2

TABLE OF CONTENTS

Articles »

Proving Positional Bias

By Anthony F. Della Pelle and Richard P. De Angelis Jr.

How much discovery should be permitted of an expert witness's financial interests?

Leveraging All Knowledge in Real Estate Disputes

By Deanne Koll and Bridget Finke

From the beginning, both a litigation and a transactional attorney should be involved in dispute cases.

Landslide Liability Issues

By Ken Van Vleck

Failing to repair damage will cost more if the hillside fails to stabilize and causes further damage.

The Importance of Pro Bono Work in Professional Development

By Brian J. Murray

During this poor economy, pro bono work provides an excellent means to develop one's craft.

News & Developments »

Defective Foreclosure Titles Due to Incorrect Legal Descriptions

An erroneous legal description utilized in a foreclosure proceeding renders the certificate of title void.

Massachusetts Court Ruling Calls into Question Foreclosure Validity

There must be proof that the assignment was made by a party that held the mortgage.

Message from the Chairs »

Real Estate Litigation Goes Digital!

We are proud to offer this newsletter as one of the benefits of membership in our committee.

ARTICLES

Proving Positional Bias

By Anthony F. Della Pelle and Richard P. De Angelis Jr. – April 20, 2011

Typically, in eminent domain and real estate tax appeal litigation, the bulk of the evidence to establish the value of a property is presented through expert witnesses. Appraisers, engineers, and planners are often called upon by the property owner and condemning authority or taxing authority to present evidence that will assist the fact finder in determining a property's value, whether it is just compensation in a condemnation case or fair market value for real property taxation.

Property value litigation is no different than any other type of litigation where experts are used in that expert opinions are fair game for attack by the opposing side in discovery and certainly at trial. This gives rise to the question: To what extent are the individual experts who proffer those opinions subject to review beyond their work-related actions in a particular case? In other words, how far may opposing counsel go to prove the "positional bias" of an adverse party's expert witness?

State courts have been confronted with this question in the context of discovery motions involving the discovery of potential positional bias through a non-party expert witness's financial records and matter-specific information. However, while the state courts acknowledge the importance of balancing important discovery rights against the privacy rights of expert witnesses, there has not been a uniform approach to handling requests for such information from experts. Thus, all lawyers, and especially condemnation and tax appeal attorneys who handle cases that are so dependent on expert testimony, should be mindful of the scope of expert discovery in their state. In addition, counsel would be well advised to consider the extent to which their experts may be susceptible to positional bias attack.

Varying State Court Approaches to Expert Discovery

Recently, the Appellate Division of the New Jersey Superior Court overturned a trial court and ruled that an expert's financial records are not subject to disclosure. In *Gensollen v. Pareja*, 416 N.J. Super. 585, 2010 N.J. Super. LEXIS 218 (N.J. Super. App. Div. 2010), the defendants' counsel objected to the document request. During his deposition, the defendants' expert physician testified that well over 95 percent of his litigation work was for defendants. Thereafter, the plaintiff filed a motion to compel; the physician cross-moved for a protective order. The trial court granted the plaintiff's motion and denied the physician's motion. The Appellate Division granted leave to appeal to consider the extent to which a party could inquire into an expert's finances and litigation history in gathering information in an attempt to prove at trial the expert's



positional bias. *Gensollen*, 2010 N.J. Super. LEXIS 218, at *1. The Appellate Division reversed the trial court judge's order because the request was both burdensome and harassing. *Id.* at *7-9.

The New Jersey court acknowledged that a litigant is entitled to explore, through discovery, the potential for positional bias but ruled that such discovery is "neither limitless nor may it continue unceasingly until the expert cries 'uncle' and concedes positional bias." *Id.* at *7. Discovery should stop "once the expert provides information that would permit the requesting party to argue to a fact-finder that the expert is a 'professional witness' or 'hired gun' who mostly offers opinions that largely seek to vindicate a particular position." *Id.* at *7-8. The court concluded that "in ruling on similar discovery requests, trial judges must recognize that licensed professionals do not surrender their privacy rights when hired to render an expert opinion for monetary consideration." *Id.* at *8.

The New Jersey appellate court also stated its agreement with the Florida Supreme Court in *Elkins v. Syken*, 672 So. 2d 517 (Fla. 1996), which held:

[A]n overly burdensome, expensive discovery process will cause many qualified experts, including those who testify only on an occasional basis, to refrain from participating in the process, particularly if they have the perception that the process could invade their personal privacy. [Excessive discovery into an expert's finances or into other extraneous matters] could have a chilling effect on the ability to obtain doctors willing to testify and could cause future trials to consist of many days of questioning on the collateral issue of expert bias rather than on the true issues of liability and damages.

The New Jersey Appellate Division held that the scope of discovery in this regard should focus on the particular financial arrangements between the party and its witness, the extent to which an expert renders opinions for plaintiffs and defendants, and the portion of time the expert devotes to litigation. The court, again relying on *Syken*, concluded that an expert's tax records and business records should be produced only "upon the most unusual or compelling circumstances." *Gensollen*, 2010 N.J. Super. LEXIS 218, at *9.

In *Syken*, the Florida Supreme Court reviewed an appellate court decision concerning the appropriate scope of discovery necessary to impeach an expert medical witness. *Syken* involved a personal injury action in which the petitioners sought substantial personal financial information from the medical expert witnesses for defensive purposes. The trial court ordered the experts to produce personal tax records and confidential information on unrelated patients. The appellate court reversed and outlined eight specific criteria to be followed in discovery disputes involving financial information from opposing medical experts. *Syken*, 672 So. 2d at 521. The *Syken* criteria allow a party opponent to probe an expert (through oral or written deposition) as to his or her work generally and litigation work, whether such work is on behalf of plaintiffs or defendants. The eight criteria approved in *Syken* are as follows:

© 2011 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.



1. The medical expert may be deposed either orally or by written deposition.
2. The expert may be asked as to the pending case, what he or she has been hired to do and what the compensation is to be.
3. The expert may be asked what expert work he or she generally does. Is the work performed for the plaintiffs, defendants, or some percentage of each?
4. The expert may be asked to give an approximation of the portion of their professional time or work devoted to service as an expert. This can be a fair estimate of some reasonable and truthful component of that work, such as hours expended, or percentage of income earned from that source, or the approximate number of [independent medical examinations] that he or she performs in one year. The expert need not answer how much money he or she earns as an expert or how much the expert's total annual income is.
5. The expert may be required to identify specifically each case in which he or she has actually testified, whether by deposition or at trial, going back a reasonable period of time, which is normally three years. A longer period of time may be inquired into under some circumstances.
6. The production of the expert's business records, files, and 1099's may be ordered produced only upon the most unusual or compelling circumstance.
7. The patient's privacy must be observed.
8. An expert may not be compelled to compile or produce nonexistent documents.

Syken, 672 So. 2d at 521 (quoting *Syken v. Elkins*, 644 So. 2d 539, 546 (Fla. Dist. Ct. App. 1994)).

The Florida Supreme Court held that “[t]he production of the expert’s business records, files, and 1099’s [sic] may be ordered produced *upon the most unusual or compelling circumstances*.” *Id.* at 521 (emphasis added). The decision of the Florida high court was a departure from earlier decisions:

Decisions in this field have gone too far in permitting burdensome inquiry into the financial affairs of physicians, providing information which “serves only to emphasize in unnecessary detail that which would be apparent to the jury on the simplest cross-examination: that certain doctors are consistently chosen by a particular side in personal injury cases to testify on its respective behalf.”



Id. (quoting *Syken v. Elkins*, 644 So. 2d at 546 (Fla. Dist. Ct. App. 1994) (citing *LeJuene v. Aikin*, 624 So. 2d 788, 790 (Fla. Dist. Ct. App. 1993) (Schwartz, C.J., specially concurring)).

Syken has been reviewed in other jurisdictions, and although it has provided guidance, it has not been universally accepted. For example, the Supreme Court of Kentucky provided some criticism of the *Syken* opinion in *Primm v. Isaac*, 127 S.W.3d 630 (Ky. 2004). In *Primm*, the issue was whether a doctor appearing as an expert could be compelled to produce his income tax records and other financial documents for use as possible impeachment evidence at trial. *Primm* was the third in a string of cases confronting Kentucky courts concerning the extent to which a party may discover and prove positional bias of an adverse party's expert witness. In *Metropolitan Property & Casualty Insurance Co. v. Overstreet*, 103 S.W.3d 31 (Ky. 2003), the court determined that a jury could find that a witness who derives a substantial percentage of his annual income from examinations for the defense "might be tempted to slant his testimony to suit his employer." Therefore, the court extended pretrial discovery and admission into evidence of the number of examinations and evaluations performed by the expert doctor on behalf of employers, insurance companies, and other defendants in the previous 12 months as compared with the number of patients seen for treatment purposes during the same period; the expert's charge for each examination; and the expert's charge for each deposition given as a result of an examination. *Id.* at 44.

Following *Overstreet*, the Kentucky Supreme Court in *Primm* found that a doctor's bias from financial gain was generally discoverable. *Primm*, 127 S.W.3d at 634. The court held that "an expert can be questioned not only as to the percentage of income attributable to [medical examinations] and other litigation-related services, but also the total amount of income derived from such activities." *Id.* at 637. While the Kentucky court agreed with the Florida court that the expert's gross income, billing practices, and other financial information should not be subject to routine disclosure, it did hold that its ruling was not intended to preclude discovery of a non-party witness's financial documents and that the production of such information should be compelled upon a finding that the witness was not forthcoming about the information. *Id.* Thus, *Primm* expanded the scope of available discovery to include more specific information from the expert, but the Kentucky court, in a veiled criticism of the holding in *Syken*, held that its opinion would afford the same protections to experts that were of concern to the Florida Supreme Court. *Id.* at 639.

Pennsylvania also permits discovery of income information when testing the potential positional bias of an expert witness. In *Cooper v. Schoffstall*, 905 A.2d 482 (Pa. 2006), the Pennsylvania Supreme Court approved the use of interrogatories to inquire as to the following:

[a] the approximate amount of compensation received and expected in the pending case; [b] the character of the witnesses' litigation-related activities, and, in particular, the approximate percentage devoted to specific types of litigation and/or work on behalf of a particular litigant, class of litigant, attorney, and/or attorney organization; [c] the number of examinations,

© 2011 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.



investigations, or inquiries performed in a given year, for up to the past three years; [d] the number of instances in which the witness has provided testimony within the same period; [e] the approximate portion of the witness's overall professional work devoted to litigation-related services; and [f] *the approximate amount of income each year, for up to the past three years, garnered from the performance of such services.*

Id. at 495.

The Pennsylvania court recognized that some jurisdictions, specifically Florida with the *Syken* decision, have limited discovery of an expert's financial information, but held that "this limited aspect of income information is within the fair scope of relevance on the question of potential favoritism." *Id.*

In *Cooper*, the physician expert relied on *Zamsky v. Public Parking Authority of Pittsburgh*, 105 A.2d 335 (Pa.1954), in arguing that to the extent the discovery request sought information related to payments made by persons or firms unrelated to the parties, counsel, or the insurer involved in the case, it exceeded the bounds of permissible discovery. *See Cooper*, 905 A.2d at 485. It is interesting that *Zamsky* was a condemnation case, in which the court held that it was error to question the condemning authority's expert witness concerning fees that he had received over a five-year period for services rendered in connection with the acquisition of other parcels. *See id.*

The Pennsylvania court in *Cooper* distinguished *Zamsky* by noting that the earlier case relied on prior decisions that approved inquiries concerning the fees expert witnesses earned for testifying in the case at trial, but that those decisions did not address fees earned for similar testimony in other cases. *See Cooper*, 905 A.2d at 493 (citing *Zamsky*, 105 A.2d at 336). The court in *Cooper* also observed that *Zamsky* recognized that the issue was one of first impression, which it resolved by stating simply that "[t]he earnings of the expert witness from other services performed for the defendant were a purely collateral matter and the testimony thereon was not admissible to affect his credibility." *Id.* The court in *Cooper* noted that there is no mention in *Zamsky* of the matter of potential favoritism or any consideration of the professional witness phenomenon at issue in the later case. *Id.* The court reasoned that "[g]iven that there is little depth in *Zamsky's* treatment, we do not regard it as the type of decision that should greatly constrain future consideration and/or adjustment, particularly across the broader range of cases." *Id.* Thus, it appears that the decision in *Cooper* would be binding in a Pennsylvania condemnation case today.

As can be seen from the review of the controlling cases in the few jurisdictions that have considered this issue, there appears to be no uniform rule. Whether an expert's personal financial information is subject to discovery will depend on the jurisdiction in which the expert is called to testify. How jurisdictions resolve this issue could impact eminent domain and real estate tax appeal litigation because both practices rely heavily on expert opinions to establish a property's



value. Counsel need to be prepared to deal with the procedural aspects of seeking or opposing such discovery.

Limiting Exposure in a Positional Bias Attack in Condemnation Cases and Tax Appeals

In addition to knowing how a court might resolve a discovery dispute concerning access to an expert's financial information, counsel should consider whether his or her witness is vulnerable to attack for positional bias. It is not uncommon, for example, to see the same appraisers working for condemning authorities over and over again. Likewise, counsel for property owners may be drawn to use an appraiser who is typically employed by property owners in eminent domain litigation. The same is true in property tax appeal litigation.

Discovery of an expert's financial records may not seem as attractive if it is clear from the expert's initial report that he or she is not a "hired gun" for a particular side but, rather, has been employed by both property owners and governmental entities alike. To avoid expensive motion practice concerning expert discovery and positional bias, counsel would be well advised to consider an expert witness with experience relevant to the assignment as opposed to the party. For example, in a condemnation action, counsel for a property owner should consider the appraiser's knowledge and experience in valuing a particular type of property, for example, gas stations or automobile dealerships, or a specific geographic area, for example, a suburban township or downtown urban area, regardless of whom the appraiser may have worked for in those previous assignments. Not only does this limit the basis for a "positional bias" attack, but also it may lead the fact finder to lend greater credibility to the witness in light of his or her particularized knowledge.

The following hypothetical better illustrates the point: In a condemnation action in which the condemning authority is a county acquiring a property for a transportation project, counsel for the property owner may want to consider an appraiser who has been or is currently engaged by the municipality in which the property is located. (The scope of such work could be for property tax appeals, property acquisitions, whether voluntary or by condemnation.) Regardless of the scope of that engagement, it shows that the appraiser is one who is hired by both governmental entities and property owners and also has experience in that particular municipality. Another option is to use an appraiser who has, in the past, been retained by the county to appraise properties in connection with other projects. Still a third option may be to find an appraiser who has worked for both the condemning authority and the municipality in which the property is located.

In the foregoing hypothetical, a positional bias attack would seem senseless as would any attempt to prove positional bias through discovery of the expert's financial information and documents.



Conclusion

Whether an expert's personal financial information is subject to discovery will depend on the jurisdiction in which the expert is called to testify. Aside from being prepared to deal with the procedural aspects of seeking or opposing such discovery, counsel should consider not only whether his or her witness is vulnerable to attack for positional bias, but also whether an individual with broader experience may better serve the client's interests.

Keywords: litigation, real estate, discovery, expert witnesses, positional bias, property value litigation

Anthony F. Della Pelle is a partner, and Richard P. De Angelis Jr. is an associate, at McKirdy & Riskin, P.A., in Morristown, NJ.

Leveraging All Knowledge in Real Estate Disputes

By Deanne Koll and Bridget Finke – April 20, 2011

A real estate dispute often involves a clash between two property owners. A prospective client with a real estate dispute can also trigger a conflict between attorneys within a firm over who is best equipped to assist the client: a transactional real estate attorney or a trial attorney. For example, a potential client calls for counsel on a boundary dispute, an easement issue, or a seller's misrepresentation in a real estate sale. The transactional attorney claims she is appropriately armed to handle the case because she is well versed in real estate law and works primarily (if not solely) in that area every day. The trial attorney, on the other hand, claims she is better equipped to handle the case because the matter will inevitably result in litigation and she can set the appropriate stage to create the greatest likelihood of success. Who should handle the case? The often overlooked answer is for *both* a transactional attorney and a trial attorney to be involved throughout the process. Leveraging all legal knowledge ultimately gives the client the best service and, likely, the best result. (In larger firms, attorneys may specialize in real estate disputes. Those attorneys tend to identify themselves as litigation attorneys; thus, the same argument applies—working with a transactional attorney can benefit your case, even if you are a specialist.)

Knowledge Base

“Play to your strengths” is a phrase often used by a colleague. In the case of a real estate dispute, the knowledge bases of both transactional and litigation attorneys are strengths. So, why not use both?

A transactional attorney typically works on real estate documents and issues on a daily basis. He or she can quickly review title work, legal descriptions, and easements. He or she may rapidly identify the applicable statutes and recent case law interpreting those statutes. He or she is likely

© 2011 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.



to have relationships with local professionals needed for consultation, such as surveyors and title companies. A transactional attorney's day-to-day practice requires that the attorney possess a broad real estate knowledge base to assist his or her customary clients. That knowledge is equally useful whether a deal is being put together (transaction) or a deal is being taken apart (litigation). However, the transactional attorney may seldom need to draft a jurisdictional statement in a complaint or take a deposition. Consultation with a litigation attorney may reduce needless drafts of pleadings and research of local court rules.

On the other hand, a trial attorney is often, by definition, a generalist. A trial attorney's toolbox contains such skills as drafting pleadings, conducting discovery, and arguing motions. However, he or she may handle only one or two real estate litigation disputes per year. While handling those cases, the trial attorney will research and gain in-depth knowledge of the issues specific to the case. As an illustration, while prosecuting a buyer's claim against a seller, a trial attorney may gain a comprehensive understanding of the interrelationship between misrepresentation and fraud claims or the impact of the economic loss doctrine. However, he or she may not use this knowledge for extended periods of time. So, the trial attorney may be able to draft a complaint quickly but not have the specialized real estate law at the tips of his or her fingers. Consultation with a transactional attorney may cut research time or aid in preliminary issue spotting.

Analysis of Claims

A transactional attorney's view of a client's potential claim can vary drastically from a trial attorney's view of the same dispute. A transactional attorney may lean toward solutions that are most familiar and make use of his or her skills: problem solving and negotiation. Accordingly, a transactional attorney may view the claim as an opportunity to make a deal and bring practical, win-win solutions to the table. What do both parties want? Is there a creative alternative that will satisfy both parties? How will this affect insurability of title? In contrast, a trial attorney will analyze the claim in the framework of trial, in terms of liability, damages, collectability, and the likelihood of success. Who will testify? What is the appropriate evidence needed to win? How much will it cost to pay an expert? Neither of these assessments is incorrect. In fact, both views are immensely helpful to decide whether to take a case and to determine the proper course of action.

Client Expectations

A client's expectations are difficult for an attorney to control. How many times has your colleague answered a call from a friend, given some general legal advice, and then said, "But this isn't in my area. I'll get you to my partner who can help you."? When you, as the lucky helping partner, get that caller, the potential client already has an outline from your colleague about how *you* will handle the case. Too often, your colleague's off-the-cuff assessment vastly differs from your anticipated plan of attack. You are then faced with the unenviable task of reframing the client's expectations.



Litigation and transactional attorneys approach their prospective clients in different manners. However, if both attorneys meet with a real estate dispute client at the initial conference, the client's expectations can be appropriately molded from the start. At first, it is often unclear whether the client needs immediate litigation or whether the matter can be resolved with a few phone calls and drafting of documents. This uncertainty is dangerous if both a transactional attorney and trial attorney are not at the initial meeting. One can imagine the client's dismay when the client is told it will only take two phone calls and an easement to resolve the issue only to find out that the matter needs to be fully litigated. The initial contact can make all the difference in setting the client's expectations when both attorneys are there to assess the matter. In addition, it comes as no surprise that a client's initial expectations often set the tone for his or her final assessment of satisfaction with the attorney and firm.

Joint Representation

Two heads are better than one. This is certainly true when the two heads process information in completely different frameworks. To give your client the best value, use both a trial and a transactional brain to work through a case.

It is common for a trial attorney to take a file and sit on it, thinking over time about the best trial strategy. Unfortunately, this does not always provide the best service to a client. The better alternative is for the trial attorney to sit on the file, think about the file, come up with a strategy, *and then go next door* to a transactional lawyer to discuss it. Trying out the strategy and analysis on a colleague adds value to the case. The transactional attorney will view the case through a different "lens" and will give the trial attorney feedback on the strategy that another trial attorney may not consider. The transactional attorney may ask, "But what about when the client wants to sell the property 10 years from now?" Or, "Have you called the title company to verify insurability of title?" These may very well be issues that the trial attorney would not have considered through the lens of a litigation-based world. Alternative views are certainly value added to the case.

Now, take the same example and reverse the roles. A transactional attorney has a client conference regarding a boundary dispute with the client's neighbor. A transactional attorney might suggest this solution: "Let's just sell the neighbor the strip of land in dispute and be done with it." The client makes a little money, avoids a lawsuit, and maintains harmony with the neighbor. Why would this not be appropriate? Why would the transactional attorney want to discuss the case with a litigation attorney? Because the case benefits from an alternative viewpoint. The transactional lawyer is thinking low-cost, fast result, and a happy fix for all involved. The transactional attorney is likely *not* thinking, "What if the sale doesn't go through and this ends up in litigation?" or "What if this is construed as an admission against interest?" This is where the litigation attorney can add value to a seemingly simple real estate sale matter.

In conclusion, why not leverage all knowledge? Both a litigation and a real estate transactional attorney can add value to a real estate dispute case. Whether it's for their knowledge, analysis, or



client control, both attorneys should be involved in real estate dispute cases from the beginning. The client benefits from dual representation—and the attorneys do, too.

Keywords: litigation, real estate disputes, transactional attorney, practice tips

Deanne Koll and Bridget Finke are associates at Bakke Norman, S.C., in northwestern Wisconsin.

Landslide Liability Issues

By Ken Van Vleck – April 20, 2011

With all of the recent rain in California, hillsides have been moving, houses slipping, and retaining walls failing. Who is liable for the damage?

Landslides, debris flows, mudslides, land subsidence, and cliff-side failures: Each of these has the potential for catastrophic failure to land and structures. In the past several months, hundreds of homes in Southern California and elsewhere have been damaged by these kinds of geological failures. They are not always caused by excessive rainfall, but the rain has definitely increased their numbers. When a hillside moves, everyone suffers: the uphill neighbor whose back yard is missing and whose house is suddenly on unstable ground, the downhill neighbor whose yard and home have been covered by debris, and the city or county whose roads may have been damaged or buried in the slide. The costs of repairing this kind of spectacular geological failure can be enormous. But the cost of failing to repair the damage may be even greater if the hillside fails to stabilize itself and causes further damage. What can a homeowner do to seek recovery?

Landslides Defined

A general overview of the categories of geotechnical failures may be helpful. They may consist of the following:

- debris flows—where wet or dry material flows over the surface of the land;
- mudslides—where internal soil components swell, change consistencies, or slip because of trapped moisture and inadequate drainage;
- erosion—where surface drainage causes earth to wash away;
- cave-ins—where adjoining land is improperly excavated; or
- rock falls—where boulders released from cliff sides fall onto land below.

Earth movement may even be associated with the change of direction, flow, or drainage of underground creeks, aboveground landscaping, or even surface grading, causing land to become saturated and expand or dry out and compact, which may differentially raise or lower a home's foundation. There may be slumps, slips, creeps, or cracks—each with its own cause and



symptoms. Failures may happen instantly or over the course of many years. One law of nature is inescapable, however: It is the habit of mountains to become flat.

Landslides and the Insurance Exclusion

When faced with a catastrophic landslide cleanup, a homeowner's first inclination may be to call an insurance carrier and submit a claim. While it is certainly prudent to put a carrier on notice of potential claims, it may not always be in a homeowner's best interest to submit a claim for land movement. Frequently, land movement is excluded from first-party coverage under homeowner's insurance policies. And claims submitted, even if denied, may have an effect on insurability of the home.

There is a difference between first-party claims (those submitted to a homeowner's own insurance carrier for his or her own damage) and third-party claims (those submitted to the carrier for the defense of claims made by others). The same landslide may cause damage to both the uphill and downhill neighbor. For example, if Mr. Uphill submits a claim to his own insurance carrier seeking coverage for the landslide loss of his entire backyard and swimming pool, he may find that the loss is specifically excluded from coverage. But if Mr. Downhill sues Mr. Uphill seeking the immediate removal of a swimming pool from Mr. Downhill's living room, that same cause (the landslide) may be a covered event under a third-party negligence claim.

First-Party Claim Exclusion

California courts examined the "earth movement exclusion" language from two different large insurance company policies. One policy excluded coverage for any loss resulting from the following:

Earth movement, including, but not limited to, earthquake, volcanic eruption, landslide, subsidence, mud flow, sinkhole, erosion, or the sinking, rising, shifting, expanding, bulging, cracking, settling or contracting of the earth. This exclusion applies whether or not the earth movement is combined with water.

Another policy excluded coverage for losses from the following:

Earth Movement, meaning the sinking, rising, shifting, expanding or contracting of earth, all whether combined with water or not. Earth movement includes but is not limited to earthquake, landslide, mudflow, sinkhole, subsidence and erosion.

Some courts have upheld these exclusions, so long as the language is sufficiently clear to put a reasonable person on notice that the exclusion exists and what it excludes. Other courts have found this language to be ambiguous enough that there may be coverage for some kinds of earth movement in spite of the exclusion. The language is not the same in all policies, and a review by

a qualified attorney may be necessary to determine whether a first-party claim should be submitted.

Third-Party Claim Coverage

In contrast to a first-party claim, however, when Mr. Downhill sues Mr. Uphill for negligence, claiming that he failed to take reasonable steps to avoid the failure of the land supporting his swimming pool, there may be third-party negligence liability coverage available to Mr. Uphill to pay for his legal defense and, to the extent Mr. Downhill proves negligence, the damage caused to Mr. Downhill's property. Although Mr. Uphill's insurance carrier may not cover his own losses, it might cover him for claims of negligence regarding his maintenance of the property.

In an interesting twist, if Mr. Uphill cross-complains against Mr. Downhill, asserting that his negligent actions in failing to maintain properly the downhill retaining walls caused the landslide, Mr. Downhill's insurance carrier may be obligated to defend and indemnify him against those allegations.

Liable Parties

There may be numerous liable parties for geological failures. Given the variety of those failures, it would be impossible to address all of the potential types of liability in this article. But, in general, the potential liable parties could be property developers and their agents; neighboring property owners; city, county, or other governmental agencies; or prior owners of property.

Property Developers and Their Agents

The property developers, their architects, designers, engineers (of all types), contractors, geologists, and even, in some limited cases, lenders may be liable for the damage. Liability may be based on negligence, breach of warranty, fraud, or even strict liability, depending on the circumstances of the failure and the kind of developer.

In one case, a property developer affirmatively misrepresented that the property was on a "cut" site, not a "fill" site. (A cut site is one in which the lot is cut into the hillside, while a fill site is built up using compacted fill, usually removed from a cut site.) At the first rains, the property slid, and it was conclusively demonstrated that the site was a "fill" site, not a "cut" site. In that case, the buyer was entitled to rescission of the real estate transaction based on the fraudulent misrepresentation.

Neighboring Property Owners

Neighbors may owe a duty to protect against these kinds of failures between their properties. For example, both Mr. Uphill and Mr. Downhill may well have valid arguments that the other was negligent in some respect. Other kinds of liability may be based on the failure of lateral support (for example, in excavation or retaining wall failures), nuisance, or even the concentration and discharge of surface water across the neighbor's land.



County, City, or Other Governmental Agencies

Hillside failures may be caused by the negligent cutting of roads without appropriate retaining structures in place, by inappropriate placement of drainage, or even roads that, because of their slope, gather and discharge water across the land of a downhill landowner in a way that causes damage. In dealing with these kinds of claims, it is imperative to follow any number of governmental claims statutes, which may significantly shorten the claims periods and may require that claims be presented in a specific manner before a lawsuit may be brought.

Prior Owners of Property

If a prior owner of property knew of a condition of the land that would suggest its geological instability and failed to disclose that condition upon sale of the property, the prior owner may be liable for fraud or negligent misrepresentation. In one example, a property seller knew that there was a noticeable gap growing at the intersection of sidewalk and lawn. Before selling, the seller filled the gap and placed additional sod to cover the scar. But the gap was evidence of land movement that might have put a buyer on notice of the need to investigate the stability of the hillside. The slope failed, and the buyer sued.

If indeed the prior owner misrepresented a material condition of the property, and the buyer relied on that misrepresentation, the buyer may be entitled to rescission of the sale—essentially transferring the severely damaged property (and possibly even any potential liability associated with the landslide) back to the seller, in exchange for a full recovery of all money spent in acquiring the property.

Conclusion

When the earth moves due to earthquake, heavy rains, poor construction, change in drainage, or loss of vegetation, the damage can be enormous. What may have seemed a simple and innocuous thing to do, such as adding landscaping to a hillside, may have catastrophic results. When that happens, it is important to stabilize the moving earth quickly and effectively to prevent further damage. It is also important to identify the potentially liable parties and put them on notice of a possible claim for damages.

Keywords: litigation, real estate, landslide liability, insurance claims

Ken Van Vleck is a partner at GCA Law Partners LLP in Mountain View, CA.



The Importance of Pro Bono Work in Professional Development

By Brian J. Murray – April 20, 2011

Any lawyer who watches the news, reads a newspaper, or surfs the web is aware of the difficulties currently facing the economy. This time lawyers are not immune; many young commercial litigators are sitting at their desks with time on their hands. With the constant drumbeat of gloom permeating the news cycle these days, perhaps these associates could be forgiven if their first instinct is to spend the work day updating their status on Facebook or trolling the various blogs to learn how many more law firms laid off associates. But I would suggest there is a better alternative—taking on pro bono matters to gain valuable experience and hone skills for the future while riding out this economic downturn. Daphne Eviatar, “[Pro Bono Picks Up in Down Times](#),” AmLaw Daily, Dec. 15, 2008.

Now, why should any young litigator listen to this advice? A fair question. One obvious answer is that taking on pro bono matters provides young litigators with the opportunity to do some good in the world—an important initiative in its own right, especially in these challenging times. Beyond that, though, there are important benefits to be had that are generally not available to young litigators through traditional work in law firms of any significant size.

The strategy of using pro bono work to develop and perfect one’s craft as a litigator was established over a century ago by a young litigator named Louis Brandeis. Young Louis, who appears to have been one of the first lawyers to incorporate public service systematically into the private practice of law, cut his legal teeth on a wide array of pro bono matters. Melvin I. Urofsky, “Louis D. Brandeis: Advocate Before and On the Bench,” 30 J. Sup. Ct. Hist. 31, 34 (2005). While it is difficult to dispute that he did some great work for his clients, it is also difficult to dispute that the work ultimately did as much good for his own professional development. So active was he in taking on and relentlessly pursuing matters for public interest clients that people eventually dubbed him “the People’s Lawyer.” Most of us now know him better, not as Louis, the junior litigator, but as the person he ultimately became through perfecting his craft: Justice Louis Brandeis, an associate justice of the U.S. Supreme Court.

My own experience, albeit more limited, has also been influenced by the value of pro bono work in perfecting one’s craft. While Justice Brandeis focused on trial work, my own expertise lies in appellate matters. I work in the appeals group of one of the world’s largest law firms. But I was not always as experienced as I am today. Fortunately for me as a young lawyer, I was routinely encouraged by senior lawyers to always have at least one active pro bono matter, even when the economy was humming along. Pro bono is a large part of how I have developed my appellate skills over the years.

© 2011 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.



Both Justice Brandeis's work and my own more limited experience, then, suggest that pro bono work is not only good for the soul, but it can also be good for the career. In particular, three things about pro bono work stand out: (1) pro bono work can provide early opportunities for substantial and meaningful direct interaction with clients; (2) it often offers young litigators the opportunity to develop skills through experiences that simply would not be available to them from paying work; and (3) it can provide experience in a far wider range of subject matters than the standard commercial litigation fare.

Client Interaction

In contrast to paying work, pro bono work often provides an opportunity for immediate, meaningful client contact. Any young associate who has worked on large-scale commercial litigation knows that client interactions are typically the province of senior associates or partners on the team. And it is no secret that in many law firms, particularly the larger ones, associates frequently express dissatisfaction with the minimal interaction they get with the firm's large corporate clients and the lack of immediate impact of their work as a result of this isolation. *See* William C. Kelly Jr., "Reflections on Lawyer Morale and Public Service in an Age of Diminishing Expectations," *The Law Firm and the Public Good*, 90, 94 (Robert A. Katzman ed., 1995).

Pro bono work, in contrast, often provides young associates a chance to interact directly with their clients. Scott L. Cummings, "The Politics of Pro Bono," 52 *UCLA L. Rev.* 1, 112 (2004). Such interactions provide important learning experiences for young associates and great opportunities to develop skills critical to the litigator's arsenal, such as active listening, effective face-to-face interpersonal communication, and, where appropriate, managing expectations. Esther F. Lardent, "[Making the Business Case for Pro Bono](#) [PDF]," *Pro Bono Inst.*, 6–7. Moreover, client interactions can also be personally rewarding, allowing the young associate to connect directly with the person or people who will be immediately and directly impacted by the attorney's work. *See Kelly, supra*, at 94. In ways that large commercial cases tried on behalf of massive legal entities cannot, pro bono projects often present opportunities for face-to-face contact with clients and the chance to see firsthand the impact the work of the lawyer has in the lives of clients. *See id.* at 99.

Justice Brandeis understood the importance of client interaction. For him, the focal point of the job was not being seen as a lawyer, but using his position to help people. As he put it, "I would rather have clients than be somebody's lawyer." Clyde Spillenger, "Elusive Advocate: Reconsidering Brandeis as People's Lawyer," 105 *Yale L. J.* 1445, 1447 (1998) (citing Ernest Poole, "Brandeis: A Remarkable Record of Unselfish Work Done in the Public Interest," Foreword to Louis D. Brandeis, *Business—A Profession* at ix, 1–li (1914)). Client interaction for him, though, was not the wining and dining typical of today's law firms. Often, Justice Brandeis would start his relationship with a client by demanding—directly and with no mincing of words—that the client convince him of the rightness of the client's claims. He often used this dialogue to decide whether to press ahead into litigation for the client (where the claims seemed



strong), or to try to help the client through more effective means (where the claims did not seem strong enough to hold up to litigation), such as by working to find a solution that would be just and reasonable for both parties. *Urofsky, supra*, at 34. He dubbed this approach to client counseling as “counsel to the situation.”

In one notable instance (albeit not a pro bono matter), Brandeis confronted his client—the owner of a large shoe factory dealing with a striking workforce—after visiting the factory and discovering the irregularity of the work provided to the factory’s employees. David Luban, “The Noblesse Oblige Tradition in the Practice of Law,” 41 Vand. L. Rev. 717, 722 (1988). Brandeis reprimanded his client for not knowing the situation of his workers: “Do you undertake to manage this business and to say what wages it can afford to pay while you are ignorant of facts such as [the irregularities of work]? Are not these things that you should have understood and that you should have seen that your men too understood, before you went into this fight?” *Id.* at 722–23. He then brought the union leader and the owner together to reach an accord on both the wages and regularity of work for the employees. *Id.* at 723. Interestingly, Brandeis’s approach garnered criticism from some who opposed his nomination to the Supreme Court on the grounds that Brandeis was not working on behalf of his client alone but would advocate for both his clients and opposing parties at the same time. *See Urofsky, supra*, at 34.

My own experience with pro bono matters, while perhaps less adversarial than Justice Brandeis’s, has provided ample direct client contact. My first in-person client meeting occurred in connection with an appeal I picked up through the Pro Bono Project at the U.S. Court of Appeals for the Ninth Circuit. I was a third-year associate, and the appeal was from a district court’s order throwing my client out of court. *See Wolfe v. Strankman*, 392 F.3d 358 (9th Cir. 2004). It was an appeal only a law geek could love, involving highly technical questions about the *Younger* abstention, *Younger v. Harris*, 401 U.S. 37 (1971), and the *Rooker-Feldman* doctrine, which holds that a federal district court lacks jurisdiction to review a state court judgment. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); Esther F. Lardent, “Making the Business Case for Pro Bono,” 460 U.S. 462 (1983); *see also* Brian L. Shaw & Mark L. Radtke, “*Rooker-Feldman*: Still a Litigator’s Merry Mischief-Maker?,” Am. Bankr. Inst. J. 24 (July/Aug. 2008). I flew out to San Francisco the night before the oral argument—my first ever federal appellate argument—to meet with the client in our offices. The client was a retiree; he walked with a cane but had as sharp an intellect as I had ever encountered. He came up to the offices and ultimately found his way to the conference room where we were meeting. We shook hands, and he looked me over carefully. He remarked that he was expecting his lawyer to be someone older. But he quickly added that, if this really was my office, then I must be a better lawyer than my age would indicate, and he agreed to let me proceed with the oral argument.

I ended up having dinner with him that night, and he regaled me for a couple of hours with stories of some amazing life experiences, including starting the first independent newspaper on the West Coast, driving a taxicab, serving as the head of the tenants’ committee in his apartment building, and, ultimately, the events that led to the lawsuit resulting in the appeal I was there to

argue. Of course, I had prepared extensively, and from reading the facts in the record over and over again, I knew them cold. But it was an entirely different experience to actually hear them directly from the person who had lived them. It made the case just a little more real in a way I had not appreciated before. It forced me to listen actively to the client—to make sure I understood everything as he was saying it—so I could be the most effective advocate possible. And, of course, it provided an opportunity to learn to manage expectations. We were the appellant, and everyone knows most appeals result in affirmance. I have never forgotten that dinner or the lessons it taught me in how to deal with clients. Even now when I deal routinely with in-house client attorneys and general counsels, although the dollar value of the litigation may be higher, the approach is no different.

Lead Counsel Experience

Perhaps the most evident benefit that pro bono work offers to young litigators is the opportunity to take the lead in actual trials or appeals. Indeed, then-attorney Louis Brandeis made a name for himself in *Muller v. Oregon*, 208 U.S. 412 (1908), a case he argued before the Supreme Court for a non-paying client, the state of Oregon. *See Urofsky, supra*, at 34. Brandeis's approach in this case was novel for his time. He focused almost exclusively on the facts surrounding the challenged law rather than on the legal theories underlying the action. *See id.* at 36.

In fact, his brief set forth only three pages of legal argument as compared to over 100 pages of fact-based analysis. This approach to briefing cases, now known as the Brandeis Brief, has made an undeniable impact on the American legal system as a whole. *See id.* (noting the use of Brandeis's facts-based approach by anti-segregationists in *Brown v. Board of Education*, 347 U.S. 483 (1954) and by the University of Michigan in defense of its affirmative action policies in *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003)). But the unqualified success of Brandeis's argument and supporting brief in *Muller*—a unanimous decision by the Supreme Court in favor of the state of Oregon—translated into future successes for Brandeis as well. Brandeis himself successfully employed the same facts-based approach in later cases and causes. *See id.* (citing *Ex parte Anna Hawley*, 85 Ohio 495 (1914); *Hawley v. Walker*, 232 U.S. 718 (1914)).

Although most young associates will not have such a prestigious opportunity as arguing before the Supreme Court, many will get the chance to run a trial or argue an appeal for a pro bono client long before they would for a paying client. *See Reni Gertner*, "Pro bono work helps young lawyers to gain valuable experience," *Minn. Law.*, Nov. 6, 2006; *see also Lardent, supra*, at 7–8. Indeed, law firms have seen opportunities for civil trial work decrease in recent years, reducing the in-court experiences available to many associates. *See id.* (noting the increasing instances of settlements and corresponding decrease in trials). The real-life experience offered in pro bono cases fill that void, which in turn can help catapult an associate to greater responsibilities and roles in the representation of the firm's paying clients. *See Cummings, supra*, at 111–13 (quoting a partner at Jenner & Block who noted the value of a young lawyer with hands-on experience gained through pro bono work to the firm's main practice areas).



My own experience here is illustrative. Thinking back to my first Ninth Circuit appeal, I took on the matter at the time because I wanted to do some good for the world. I was not really focused on the good it could do for me. But perhaps I should have been. The second federal appeal I argued came before the same court, the Ninth Circuit, in a matter my firm had handled at the trial level. *See Motorola, Inc. v. J.B. Rogers Mech. Contractors, Inc.*, 177 F. App'x 754 (9th Cir. Apr. 27, 2006). After the jury rendered its verdict (in our client's favor) and judgment was entered, an appeal was clearly in the offing. I knew the lead partner on the trial team and had spoken with her several times about my earlier pro bono appeal. Although I had not worked on the trial, to my surprise, when the notice of appeal was filed, the lead partner on the case asked me to take the lead in drafting the brief for the appellee.

After the case was fully briefed and argument was finally set, the partner went out of her way to approach the client to get approval for me to argue it. As one might guess, the client, a multimillion dollar company that had won over two million dollars at trial, was rightly a bit reluctant. But I had unwittingly armed the lead partner with the unanswerable argument: I had argued before that court before, and she had not. The client was persuaded and agreed to let me handle the argument.

Of course, not every firm has such generous partners, who are not only willing to give up arguments for themselves, but also stick their necks out for junior associates. And arguing and winning one appeal in front of a court may not be enough to convince a client that a young litigator should be entrusted with arguing a second appeal. But the point is that, as with most things in the practice of law, experience breeds opportunities. In the last five years alone, I have argued seven federal appeals, as well as a few in various state appellate courts—all as an associate. Several of the initial arguments were pro bono, while the more recent arguments have been for paying clients. Suffice it to say that, even though I am still fairly young in terms of seniority, clients generally do not question my appellate oral argument experience level anymore. And I owe that in large part to my pro bono work.

Broader Substantive Experience

Pro bono work often provides opportunities to gain experience in parts of the law that are outside the normal scope of what a commercial litigator might encounter. *See Lardent, supra*, at 8; *see also Gertner, supra* (recounting the experience of an associate who represented a pro bono client in an appeal of a removal order before the Eleventh Circuit). Justice Brandeis himself put it well: “[N]o hermit can be a great lawyer, least of all a commercial lawyer. When from a knowledge of the law, you pass to its application, the needs of a full knowledge of men and their affairs becomes even more apparent.” Donald W. Hoagland, “Community Service Makes Better Lawyers,” *The Law Firm and the Public Good* 104, 109 (Robert A. Katzman ed., 1995) (citing Keynote Address, Judge Frank M. Coffin, Program on Professional Ethics and Responsibility, Boston University School of Law, Jan. 8, 1990). A fierce believer in the importance of immersing himself in the facts and circumstances of—as well as the law applicable to—each of his cases, Brandeis used his mastery of cases to persuade judges and justices before whom he



appeared of the rightness of his clients' positions. *Urofsky, supra*, at 36 (noting the effectiveness of the original "Brandeis Brief," a 100+ page treatise on the facts of the *Muller v. Oregon* case, which drew note in Justice David Brewer's opinion, unanimously holding in favor of Brandeis's client, the state of Oregon). Justice Brandeis once wrote, in a memo to himself, "Know not only whole cases, but whole subjects . . . Know not only those facts which bear on direct controversy, but know all the facts and law that surround." *Urofsky, supra*, at 33 (citing undated memorandum, "What the Practice of Law Includes," Louis D. Brandeis Papers, University of Louisville Law Library, Louisville, Kentucky). Later, Justice Brandeis used this same technique to educate other justices, and consequently shape their opinions, on fundamental jurisprudential issues. *Urofsky, supra*, at 38–40 (discussing the evolution of Brandeis's First Amendment jurisprudence and noting that Brandeis used long dissents to educate the Court and illustrate the factual basis for his opinions).

Perhaps even more so today than when Justice Brandeis practiced, law—especially big-firm law—has become a highly specialized affair. Firms have myriad practice groups, dividing and subdividing specialties until young litigators find themselves experienced only in pharmaceutical products liability cases, Title VII retaliation cases, or some other narrow swath of expertise (or at the very least, limited to general products cases or general labor and employment cases). *See Hoagland, supra*, at 115 (noting attorneys' increased attention to more specialized areas of expertise).

Pro bono provides a readily available way to supplement this experience, oftentimes granting access to areas of the law one would never encounter in law firm practice. This broader understanding of the law and society can help strengthen an attorney's ability to effectively counsel and be a better advocate for his or her paying clients. *See id.* at 114. For example, a trial lawyer might want to take on a pro bono appeal from a federal appellate court. A patent lawyer might want to take on a habeas corpus or section 1983 conditions of confinement case, whether at the trial level or the appellate level, for a client in need of representation. The possibilities are endless.

In my own practice, I have focused in recent years on immigration cases, especially matters involving political asylum, in cooperation with a local organization called the National Immigrant Justice Center (NIJC). I handled one such case in which we won a reversal of the denial of asylum for a Cameroonian woman. *Tchemkou v. Gonzales*, 495 F.3d 785 (7th Cir. 2007). The client had become active in Cameroon's student movement in 1993 when she was a senior in high school and participated in a march to support striking teachers. The Cameroonian police arrested, beat, and detained her for three days without food or water. After she was released, she was hospitalized for two weeks to treat dehydration and other injuries she sustained in the extraordinarily inhumane conditions of the jail. In 1996, she resumed her political activities and was arrested and severely beaten on two separate occasions. In 2001, she obtained a visa, escaped her persecutors, came to the United States, and applied for asylum.



An immigration judge denied her asylum request, and the Board of Immigration Appeals (BIA) affirmed. After meeting with the client, listening to her story to fully understand the facts, and, of course, doing my best to manage expectations, we crafted an appeal brief that we thought was persuasive. A few months later, I delivered the oral argument to the U.S. Court of Appeals for the Seventh Circuit.

When the court handed down its opinion reversing the BIA, it was a moment of pure elation for everyone involved. When I called my client to tell her the news, she literally had to sit down because she was so emotional. She was in tears and was so grateful for the legal help that she received. Without this pro bono experience, I surely never would have been able to grapple with the legal complexities of the Immigration Code. I wouldn't have learned about Cameroon, about the political difficulties the country faces, or in particular, about my client and the obstacles she overcame to be here. And without getting involved through NIJC, I never would have had the chance to contribute to changing the course of my client's life—quite literally from a path certain to lead to injury or death at the hands of her persecutors to a path that ends here in America. Not that my large commercial cases are not every bit as important as this one, because they are. But this one just felt especially good to win.

For all of these reasons, then, I encourage young litigators to get involved in pro bono work, and the sooner the better. Pro bono work can help a young associate's career in very tangible ways. Specifically, by taking on pro bono projects, a young associate also takes on the responsibilities of the case that are, in the realm of paying clients, usually reserved for more senior members of a team. With these responsibilities come great learning and training experiences for the young associate and also the chance to work in areas of the law typically not encountered in law firm commercial litigation practice.

There is, of course, no guarantee that taking on pro bono cases will mean that a young litigator will eventually sit on—or even argue before—the Supreme Court as in the case of Justice Brandeis. But there can be little dispute, as I can personally attest, that pro bono work will provide an excellent means to develop one's craft, not to mention that the right cases can go a long way in nourishing the lawyer's soul, even in these challenging times. As Louis Brandeis put it himself: "The great opportunity of the American Bar is and will be to stand again as it did in the past, ready to protect also the interests of the people." Luban, *supra*, at 721 (quoting Louis Brandeis, "The Opportunity in the Law," *Business—A Profession* 315, 321 (1914)).

Keywords: litigation, pro bono, professional development, Louis Brandeis, trial tips

Brian J. Murray is an associate at Jones Day in Chicago.

"Becoming Louis Brandeis: How to Get Trial Experience," 2009, by Bryan J. Murray, originally published by the ABA Section of Litigation, ABA Annual Meeting 2009. Copyright © 2009 by the American Bar Association. Reprinted with permission. All rights reserved. This information or any portion thereof may not be copied or

© 2011 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.



disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

This article later appeared in the ABA Section of Litigation [Environmental Litigation Committee's](#) Summer 2010 issue of the [Environmental Litigator](#).

NEWS & DEVELOPMENTS

Defective Foreclosure Titles Due to Incorrect Legal Descriptions

The [epidemic of foreclosures](#) that has swept across the country is well publicized. Irresponsible loan underwriting, sloppy loan documentation, poor handling of foreclosure files by “foreclosure mills,” coupled with an avalanche of defaults, has created turmoil and havoc in state courts across the country. Although small in percentage, a portion of these mortgages working their way through the court system are defective due to inaccurate legal descriptions.

A troubled foreclosure involving an erroneous legal description typically unfolds as follows. The legal description attached or referenced in the mortgage is incorrect. The foreclosure attorney fails to discover this defect and uses the improper legal description in the lis pendens for the property, the publication for service of process on the defendants, the foreclosure final judgment, and the clerk’s advertisement of the foreclosure sale.

A foreclosure speculator then purchases the property at the foreclosure sale and is issued a certificate of title with the erroneous legal description. The purchaser improves the property only to be told by a buyer’s title underwriter that his or her title is void due to the incorrect legal description used in the mortgage and foreclosure proceedings. The purchaser then seeks a refund of the purchase price and reimbursement for his or her carrying costs and monies expended improving the property.

Under the well-settled law of Florida, an erroneous legal description utilized throughout a foreclosure proceeding renders the certificate of title void. *Lucas v. Barnett Bank of Lee County*, 705 So. 2d 115 (Fla. 2d DCA 1998). *See also, Fisher v. Villamil*, 56 So. 559 (1911). The reason being is that the mortgage never “closed” on the property because of the erroneous legal description. *Id.* The appropriate course of action is to vacate the certificate of title and begin the foreclosure proceedings anew after the incorrect legal description has been reformed. *Id.*

Any purchaser whose title has been vacated in this circumstance is entitled to be restored to his or her position before the purchase. *Bridier v. Burns*, 4 So. 2d 853 (1941), opinion supplemented on other grounds, 7 So. 2d 142 (1942). Restoration includes any sums paid out in good faith,

© 2011 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.



relying on the validity of the title transferred under the certificate to title, for example, improvements on the property, taxes, etc. *Id.*

After the certificate of title has been vacated, recovery by the purchaser of the foreclosure sale proceeds is ministerial. The lender/mortgagee, upon proper application to the foreclosure court by purchaser, will be required to refund the purchase price into the court registry. The clerk of the court then issues a refund check to the purchaser.

Recovery by the purchaser of other sums expended in reliance on the validity of the certificate of title—for example, taxes, insurances, and the cost of improvements—is more difficult because there is no clear, bright line rule as to who is responsible to the purchaser and under what circumstances. The Florida Supreme Court, in *Bridger v. Burns*, provided instructions to a trial court in this situation, stating that “[i]t is the duty of [the trial court] upon the proper application by petition or motion to investigate the facts, and by proper order cause [the purchaser] to be restored to all things which they have by reason of the decree which has been reversed.” *Bridger* at 4 So.2d 853, Fla. 1941. To a real property litigator, this means that the court can render what it perceives, in its discretion, as an equitable result. The court did not give any guidance as to what factors the trial court should consider, but such factors should include the extent to which any improvements made by the purchaser increased the value of the lender/mortgagee’s collateral, whether the lender/ mortgagee has a claim under a lender’s title insurance policy, and whether, in the cases of taxes and insurance, the lender likely would have paid for those costs in the first instance.

— [Jason R. Alderman](#) is a partner in Alderman & Kodosi.

Massachusetts Court Ruling Calls into Question Foreclosure Validity

This consolidated lawsuit was brought by two homeowners challenging the validity of the foreclosures of their properties. The banks that carried out the foreclosure actions were not the original mortgagees. The respective notes had been transferred into trusts for which the foreclosing banks were the servicers. The mortgages, however, had not been assigned to the foreclosing banks.

When the banks attempted to record the assignments following the foreclosure, the Massachusetts Land Court ruled that the assignments could not be recorded after-the-fact and that the foreclosures were invalid. In upholding the land court's decision, the Massachusetts Supreme Judicial Court rejected the defendant banks' argument that the securitization documents



Real Estate Litigation

FROM THE SECTION OF LITIGATION REAL ESTATE LITIGATION COMMITTEE

Spring 2011, Vol. 9, No. 2

alone were sufficient to demonstrate that the banks had the right to foreclose despite the absence of a recorded assignment.

— *Danielle Andrews Long, Esq., Robinson & Cole LLP, Boston, MA*

MESSAGE FROM THE CHAIRS

As the effects of the financial crisis continue to ripple through the real estate markets, the number and complexity of real estate disputes continues to grow. We trust that this quarter's newsletter will provide you with insights and advantages in your practice as you advise clients and resolve real estate-related disputes.

To help your real estate practice, we have also been busy producing programs and a webpage. At the Section of Litigation Annual Conference in Miami Beach, Florida, April 13–15, the Real Estate Litigation Committee co-sponsored a program on mortgage fraud litigation. If you were unable to join us, please visit our webpage and review our program materials. On our webpage, you can also find case law updates and news items. We also encourage you to join our committee's group page on the [LinkedIn website](#). It's a great networking tool and another way to keep abreast of timely developments in real estate litigation.

We are placing a special emphasis as committee leaders on recruiting diverse members of the bar to help lead our committee and others in the Section of Litigation. We have leadership openings for subcommittee chairs and case note editors. We are also working with the Real Property, Trusts and Estate Law Section to expand use of their [Diversity Speaker Database](#). The Diversity Speaker Database was created to provide a comprehensive, easily searchable tool to identify experts in real estate and estate planning law, who are interested in participating in ABA activities. Please think about who you can recommend at your firm or in your community to join our committee in a leadership capacity or be added to the Diversity Speaker Database. You can call or email either of us directly with ideas.

We appreciate your continued membership in our committee and welcome your suggestions and ideas on what we can do to better serve you.

ABA Section of Litigation Real Estate Litigation Committee
<http://apps.americanbar.org/litigation/committees/realestate/home.html>

© 2011 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.