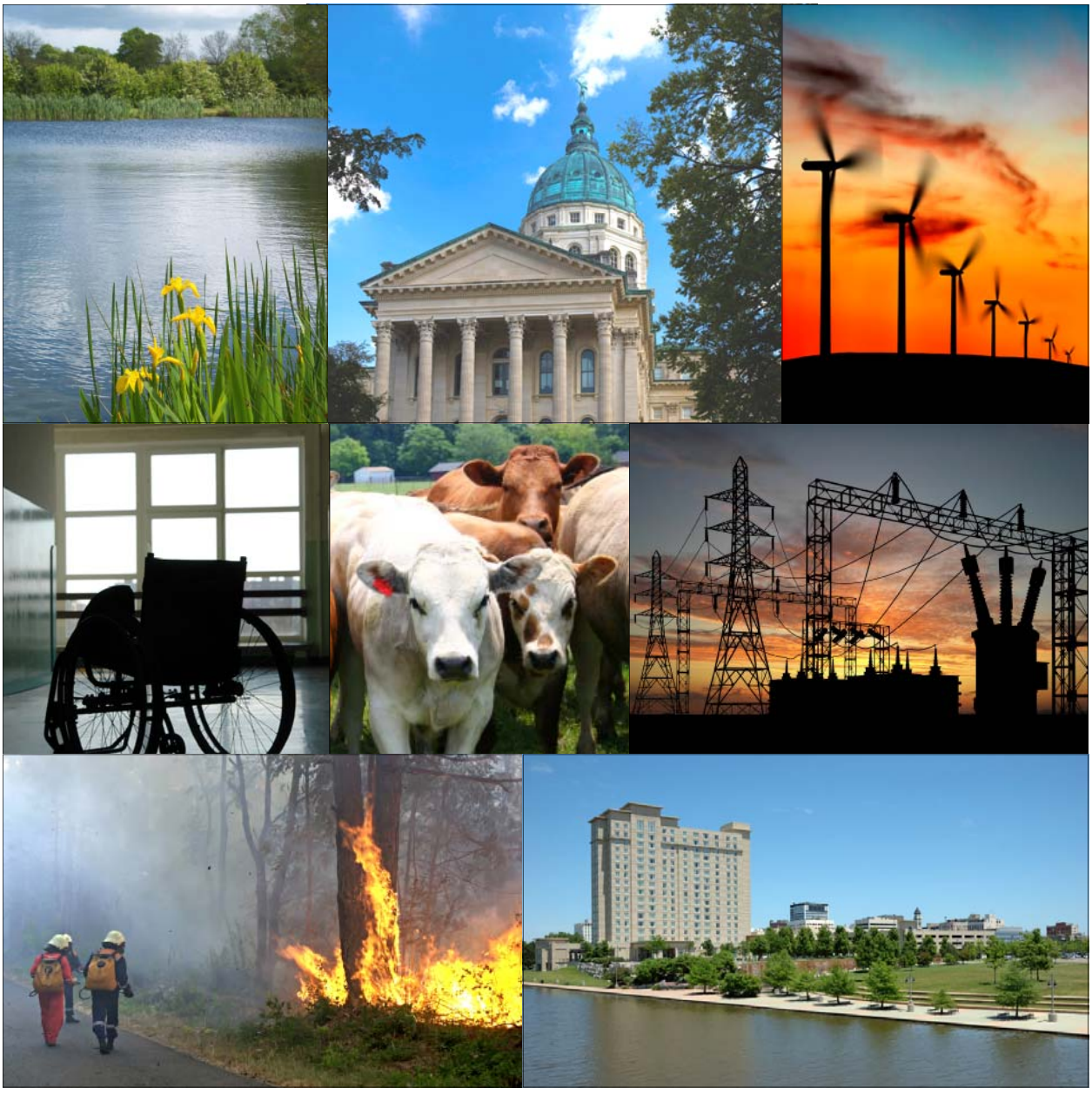
Recent Changes in Real Estate Law in Kansas

2011 Kansas Legislation and Recent Case Law



Prepared by the Real Estate Group of

ADAMS JONES

LAW FIRM, P.A.

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Adams Jones Attorneys

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Recognitions

Top Tier in Kansas Real Estate. The current Chambers USA directory again listed Adams Jones in the first tier of leading firms for real estate in Kansas. Those attorneys selected from the firm in the area of real estate include **Mert Buckley, Roger Hughey** and **Sabrina Standifer**. The rankings were compiled from interviews with clients and attorneys by a team of full-time researchers. **Bradley Stout** and **Monte Vines** were selected for general commercial litigation in Kansas.

Best Lawyers in America. **Mert Buckley, Patrick Hughes** and **Roger Hughey** were selected for the 2011 Edition of The Best Lawyers in America in the area of Real Estate; **Bradley Stout** was selected for Eminent Domain and Condemnation Law; **Patrick Hughes** was selected for Commercial Litigation and Land Use & Zoning Law; **Monte Vines** was selected for Commercial Litigation, Ethics and Professional Responsibility Law, Legal Malpractice Law, Litigation—Banking & Finance and Litigation—Real Estate; **Donald Hill** was selected for Employment Law; and **Dixie Madden** for Corporate Law and Healthcare Law. The Best Lawyers lists, representing 80 specialties in all 50 states and Washington, DC, are compiled through an exhaustive peer-review survey in which thousands of the top lawyers in the U.S. confidentially evaluate their professional peers.

Super Lawyers. Selection to the most recent Missouri & Kansas Super Lawyers included **Mert Buckley** and **Roger Hughey** in the area of Real Estate; **Donald Hill** in Employment Law and **Monte Vines** in the area of Business Litigation.

Overview

This summary of recent changes in Kansas Real Estate Law was prepared by the Real Estate Group at Adams Jones. Our real estate attorneys continually monitor Kansas case decisions and legislation so we remain current on developments in real estate law in Kansas. We feel this up-to-date knowledge prepares us to address client needs more quickly and efficiently because our "research" is often already done when a question arises. Our thanks to Philip Bowman for his contribution.

Purpose

We offer this material to clients and friends in the real estate industry to help keep them abreast of recent changes in real estate law in Kansas and to provide them with real life examples of how the law works in their real estate world.

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Legislation

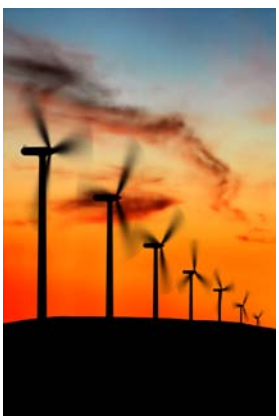
SB 101. Sprinklers. Prevents cities and counties from requiring residential sprinkler systems in new residential construction.

SB 112. Surveys. Requires counties to appoint a county land surveyor and requires the recording of all surveys that create a new legal description or new tract of land. It also modernizes several statutes which formerly allowed some functions of a county engineer to be performed by a county surveyor.

SB150. Incorporation and Annexation. Reduces the size required for incorporation of a new city from 300 inhabitants or lots to 250. It also restricts annexation of land by petition by requiring 2/3rds vote by board of county commissioners. Annexations of more than 40 acres approved by the County Commission now require an election of the landowners in the area to be annexed. Annexations adjoining tracts of less than 40 acres are restricted in frequency to no more than 3 in a 60 month period. Homestead exemptions (of up to 160 acres) continue beyond annexation until the property is sold rather than automatically being reduced. The legislation also requires post-annexation review to occur more quickly, allowing de-annexation to occur more quickly if a city does not provide the services its plan indicated would be provided.

SB198. Economic Development. Creates "Rural Opportunity Zones" in 50 distressed Kansas counties. There are now new incentives for people to move into those counties. New residents from out of state may qualify for state income tax credits. Students who graduate with loan debt and establish domiciles in these counties can participate in a program where the county and the state jointly pay off the student loan debt over 5 years, up to $15,000.

SB 227 (included HB 2141). Wind Energy—Surface Rights. It has two main sections. The first section requires the marking of anemometer towers 50 feet high or taller outside the boundaries of a municipality and makes the failure to mark them a non-person misdemeanor. The markings consist of orange and white bands on the top third of the tower and marker balls on the outside guy wires. The second section amends K.S.A. 58-2272 and deals with conveyances of wind and solar resources. The effect of the statute is to make clear that the property rights used for the production of wind and solar energy are part of the surface estate and are neither within the mineral estate nor capable of being permanently separated from the surface estate. The statute provides that only the surface owner of a tract of land has the right to use the tract for producing wind or solar energy unless granted the right by a lease or easement of definite duration from the surface owner. It does not affect leases or easements recorded before July 1, 2011. Comment: While the new statute prevents severance from the surface of the right to use land for wind or solar production for an indefinite term, it does not prohibit conservation easements which restrict the use of land for wind or solar energy production for an indefinite term.



HB 2147. Home Plus Residences. Changes definition of a Home Plus residence or facility to one caring for not more than 12 individuals (currently eight). Also addresses staffing requirements. Amends K.S.A. 39-923.

Downtown Development Incentives Policy — City of Wichita — Approved May 17, 2011

Overview. This is a new policy for developers who want to participate in public-private projects located in the Downtown area. The process requires developers to first participate in a preliminary development conference with the Downtown Design Resource Center (DDRC). After the conference, the applicant must submit more specific information about their project, including project design and business plan, developer background and experience, and pay an $8,500 fee. The project is then evaluated on a point system discussed below with a recommendation to the City Manager for review, and if appropriate, recommendation to the City Council.

Projects Covered by this Policy.

- Tax Increment Financing (TIF)
- Capital Improvement Projects (CIP)
- Hotel Guest Tax
- Forgivable Loans
- STAR Bonds
- Land
- Cash

Other City incentive programs will remain available for downtown development projects and not be subject to the new policy (e.g., Community Improvement Districts, Façade Program).

Preliminary Review Process. Process must start by contacting the DDRC and participating in a preliminary review

process. A design review will be scheduled after the developer completes a detailed design of the project. The developer must provide a site plan and perspective drawings in advance of the design review meeting. A dialogue may follow regarding what changes are needed to reach consensus on the design. An appeal can be made to the City Manager.

Submittal Requirements. More information is needed after passing the Preliminary Review Process: Project Summary, Design Plan, Business Plan, and Developer Background.

Project Summary.
Project amount and purpose
Description of project, including details of how project meets "Threshold Criteria" and "Public Benefit Criteria" described in "Evaluation Process" section below
Description of proposed public-private partnership, including details of how project meets "Threshold Criteria" and "Business Plan Criteria" below
Description of development team, including description of how development team meets the "Threshold Criteria" and "Developer Background" criteria below

Design Plan.
Site Plan
Perspective Drawings

Business Plan.
Market Analysis
Pro Forma
CEDBR Fiscal Impact Model
Source of capital, including: evidence of developer equity, third-party rating of financial stability of lenders, evidence of lender commitment
Amount and purpose of public investment sought
Repayment plan, if the City ordinarily requires a repayment plan or contingent repayment plan in connection with the type of incentive at issue
Backup repayment plan, including guarantors, if repayment plan is required

Developer Background.
Projected or existing financial statements (three years) and Dun & Bradstreet Financial Stress Score or other third-party financial stability rating
History/ownership/legal structure of the business
Experience of the development team
Banking references
Applicant Disclosure Questionnaire (developer and guarantors)
Financial information can be provided to third parties to avoid disclosure under open record laws

Evaluation Process.

Overview.
Reviewed by team appointed by City Manager
Evaluation Matrix
Requires minimum of 70% of points in each of three categories
Developer may modify proposal after initial evaluation

Minimum Threshold Criteria for Developer.
10% equity
Guarantee proportional share of public revenue shortfall
Letter of interest from primary lender or equity investor
Applicant Disclosure Questionnaire — City vetting process of developer entity and principals

Minimum Threshold Criteria for Project.
Consistent with Project Downtown's General Guidelines and Project Development Criteria
Project infeasible "but for" public investment
Public investment is in a public asset as defined in Project Downtown
Minimum private to public capital investment ratio of 2 to 1
Minimum public debt service coverage ratio of 1.2 to 1

Public Benefit/Compatibility with Overall Downtown Plan.
Project Location/Design
Return on Public Investment (extent the return exceeds 1.3 to 1)
Public Purpose

Proposed Project Characteristics.
Market Analysis
Pro Forma
Developer Equity
Share of Public Funding
Lender Commitment

Current Experience and Creditworthiness of Developer.
Financial Statements
Developer Experience and Qualifications

After Approval.

Development Agreement
Annual Reporting

New Lease Accounting Standards

New lease accounting standards will impact commercial real estate market.

The Financial Accounting Standards Board (FASB) and the International Accounting Standards Board (IASB) have reached tentative conclusions in relation to a substantial change in the way most commercial leases are treated on a company's financial statements. FASB and IASB are concerned with the fact that many companies have significant lease commitments which do not appear on the balance sheets of those companies. Therefore, this change is being made to require many commercial leases to be reflected on the balance sheets of companies, and thus provide better disclosure to regulators, investors and lenders. A final standard is expected to be released later this year, but it likely won't be effective until sometime in 2012 or even 2013.

Under the new standard, a Lessee (Tenant) will be required to record a "right-of-use" asset on its books, and an offsetting "lease payments payable" liability. In relation to a Lessor (Landlord), its balance sheet would include a "lease payments receivable" asset and an offsetting entry, the exact nature of which has not been finally determined, but which will likely involve a derecognition of a portion of the underlying asset (i.e. the balance sheet value of the asset which the company is leasing to someone else will be reduced to offset the amount of the "lease payments receivable"). These additions of assets and liabilities to a company's balance sheet will in turn have a negative impact on the company's financial ratios [e.g. if you add $500,000 to assets and $500,000 to liabilities, your equity will remain the same, but your balance sheet leverage (liabilities/equity) will increase]. Therefore, from the perspective of someone who pays attention to these financial ratios, like an investor or a lender, a company's financial health appears to be not as good.

In addition to the effect which these changes will have on the financial statements of Lessors and Lessees, these changes could also have an impact on the real estate market. Companies who entered into leases previously may now decide to purchase property instead. There will, of course, still be other things to consider in relation to a buy or lease decision, but the advantage of keeping lease obligations off of your balance sheet will no longer be there. Also, the provisions of a particular lease may have a substantial effect on how accounting is done in relation to that lease. Therefore, old lease forms may need updating, and the assistance of a CPA may become more important in relation to the negotiation and drafting of a lease.

Cases

Adverse Possession

Public road by prescription cannot be established by merely suggestive evidence.

Brownback v. Doe, 44 Kan. App. 2d 938, 241 P.3d 1023 (2010).

The Kansas Court of Appeals found there was not clear and convincing evidence to prove that a public easement by prescription had been created. Establishing a public road by prescription requires that:

> [T]he land in question must have been used by the public with the actual or implied knowledge of the landowner, adversely under claim or color of right, not merely by the owner's permission, and continuously and uninterruptedly, for the period required to bar an action for the recovery of possession of land or otherwise prescribed by statute.

Moreover, mere public use is not enough and "there must be some action, formal or informal, by the public authorities indicating their intention to treat the road as a public road."

While members of the public periodically used the "road" for decades, no evidence showed whether the use was continuous, uninterrupted, or adverse to the landowner.

Comment: While rights to property can be gained or lost by adverse possession, adverse possession will not be found from evidence that is merely suggestive.

Bankruptcy

Trustee's avoidance of lien on homestead provides the estate with the rights of an unperfected lien holder, but no power to sell the property to realize the value of those rights.

In re Carmichael, 439 B.R. 884 (2010). The Chapter 7 Trustee sought to sell the debtor's homestead in an effort to recover the value of an unperfected lien on the debtor's manufactured home which had previously been avoided and preserved for the benefit of the estate. The debtor was a joint tenant of the homestead property, and the Trustee had successfully avoided a secured lender's mortgage on the

debtor's half-interest in a manufactured home on the homestead.

The bankruptcy court ruled that the Trustee's interest was limited to a one-half interest in the avoided lien and did not reach the exempt homestead, which was not part of the estate. Because the estate had no interest in the property, the Trustee was not authorized to sell it. The lien avoidance left the Trustee in the status of a holder of an unperfected lien unable to compel the sale of the property. The court noted that the Trustee could sell the lien interest to a third party, negotiate with the debtor to release the interest in exchange for payment of some amount, or wait for a foreclosure by the lender and receive the value of the estate's interest in that proceeding.

Broker's Commission — Credit Bid Sale

Broker entitled to a commission even when lender purchased property by a credit bid.

In re A-1 Plank & Scaffold Mfg., 437 B.R. 689, No. 10-10379, 2010 WL 2347011 (Bankr. D. Kan. 2010), is a bankruptcy case. J.P. Weigand and Sons, Inc. ("Weigand") entered into a post-petition commission agreement with the debtor which was approved by the Court. Weigand showed the property to Sizewize who submitted an offer for $800,000, provided that Sizewize was also the high bidder on another property. Sunflower Bank held the first mortgage and successfully credit bid for $1.75 million, and objected to paying any commission to Weigand.

The issue was whether Weigand was entitled to a commission on the $800,000 cash bid from Sizewise even though the Bank bought the property. Judge Nugent concluded Weigand was entitled to the fee.

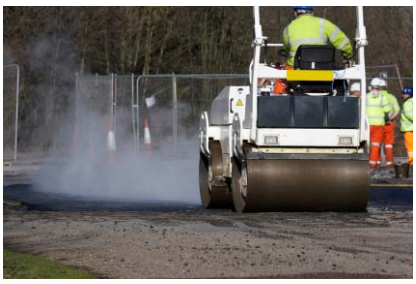
The Court found that the buyer was "ready, willing and able to close" and that Weigand was the procuring cause in providing that buyer, which are the basic requirements entitling a broker to a commission under Kansas law. The Court noted that if credit bidding were allowed to defeat commissions, there would be little incentive for realtors to participate in bankruptcy sales. The Court further found that Sunflower benefited from Weigand's services -- the Bank dealt with Sizewize on the property after the credit-bid sale and the prior work by Weigand facilitated that process.

Comment: Providing a ready, willing and able buyer may earn a commission even when the sale does not go through.

Construction Contracts — Attorney Fees

Recovery of attorney fees under construction contracts. Party claiming fees must prove its entitlement. Kansas Fairness in Private Construction Contract Act is not violated when the amount due is disputed.

Midwest Asphalt Coating, Inc. v. Chelsea Plaza Homes, Inc., ____ Kan. ____, 243 P.3d 1106 (2010). Chelsea Plaza Homes, Inc. (Chelsea Plaza) contracted with Midwest Asphalt Coating, Inc. (Midwest) to repair its parking lot. Chelsea Plaza excluded Midwest from the property before the work was completed, claiming that the work being performed did not comply with the contract. Midwest sent an invoice for the balance of the contract price which Chelsea Plaza failed to pay. Midwest then sued under three different legal theories, including the Kansas Fairness in Private Construction Contract Act (FPCCA), K.S.A. 16-1801 *et seq*. A jury awarded Midwest a portion of its claim without indicating the legal theory on which the award was based. Midwest filed a motion for attorney fees and costs.



The contract contained a clause allowing the prevailing party in litigation to recover its reasonable attorney fees. However, since an attorney fee award would have been appropriate only for a recovery on a breach of contract theory and the court could not tell if the jury's verdict was based on such a theory, Midwest did not carry its burden to prove it was entitled to attorneys' fees.

Midwest also argued that it was entitled to attorney fees and costs under the Kansas FPCCA which allows attorney fees to a prevailing party on an action to enforce the rights provided by that Act. Among the rights provided by the Act is the right to timely payment of any "undisputed payment" due. The court found that the amount due under the contract was disputed and so the Act did not provide a basis to recover fees.

Comment: Contractors should be diligent to try to get provisions in their contracts giving them the right to recover their attorney fees and not rely on the FPCCA to provide that right.

Contracts

Purchaser met requirements to terminate purchase agreement because casino management contract was not reasonably acceptable.

In Kansas Penn Gaming, LLC v. HV Properties of Kansas, LLC, 727 F. Supp. 2d 1100 (D. Kan. 2010), a Purchaser, Kansas Penn Gaming, sought declaratory judgment that it had no further obligations under a land purchase agreement for a casino. The Seller, HV Properties of Kansas, claimed $37.5 million for breach of contract as a result of Purchaser's failure to make contingent payments. The court ruled in favor of Purchaser.

The purchase agreement required Purchaser to pay $2.5 million and make additional payments totaling $37.5 million if certain contingencies were met relating to obtaining a Gaming Facilities Management Contract and commencing gaming operations. The contract required the use of good-faith, commercially-reasonable efforts to obtain the Gaming Facilities Management Contract. Under one provision, Purchaser could avoid the contingency payments if it did not receive a Gaming Facilities Management Contract that was "reasonably acceptable" to it.

Despite making efforts (including filing applications, lobbying in support of the application, negotiating the terms of a non-final management contract, and developing plans), Purchaser withdrew its application with the State for the operation of a casino because a new competing casino near the Oklahoma border changed the economic dynamics. It terminated the purchase contract. This was before the Purchaser had obtained a management contract it was willing to accept.

The court ruled that Purchaser did not receive a "reasonably acceptable" casino management contract from state gaming officials because the terms would not produce the revenues Purchaser internally required to pursue the project. Because Purchaser had used good-faith, commercially-reasonable efforts to obtain a casino management contract, it could terminate the purchase agreement and was not obligated for the contingency payments.

Contracts — Rescission

Builder's suit against homebuyer fails because purchase contract had been rescinded.

Newcastle Homes, LLC v. Thye, 44 Kan. App. 2d 774, 241 P.3d 988 (2010). Newcastle Homes entered into a contract with Mr. and Mrs. Thye to sell them a lot and build a house on it. Newcastle then contracted with Alpha Homes to furnish the personnel to accomplish the construction. During construction, difficulties arose between Newcastle, Thyes and Alpha Homes. For ease of reference, Newcastle and its principal are referred to as Newcastle; Alpha Homes and its representatives are referred to as Alpha; and Mr. and Mrs. Thye are referred to as Thyes.

All parties entered into agreements to cancel and rescind the construction contract for sale of the lot and construction of the house, releasing each other from all claims, with Thyes being paid $20,000 and the property returned to Newcastle. Newcastle then completed the home and sold it. However, Newcastle claimed it lost over $60,000 because of inferior work done by Thyes and Alpha and sued them. In turn, Thyes counterclaimed.

The Court ruled that the parties had settled their dispute when they entered into the cancellation and mutual release agreements which rescinded the original contract. In order to avoid the consequences of the settlement agreements, Newcastle argued it had been fraudulently induced to enter into the settlements. But the Court said Newcastle failed to establish its claim of fraud. Finally, the Court said Newcastle took too long to raise its claim; it failed to provide evidence that it had announced an intent to avoid the cancellation agreements within a reasonable time by waiting over 16 months before doing so. The Court surmised Newcastle chose to proceed with its rights under the cancellation agreement to finish the house in hopes of getting a better price for it, which it did.

Damages — Trees — Correct Measure

Real estate damaged by negligent fire was compensated by the reduction in value to the real estate, not by the cost to replace trees and structures.

Evenson v. Lilley, 43 Kan. App. 2d 573, 228 P.3d 420 (2010). When a neighbor's controlled burn got out of control and burned the plaintiffs' tract, he was sued for the damage. Plaintiff Landowners sought to recover for loss of some improvements, but the main issue was their claim for loss of a number of trees. They sought over $300,000, their estimate of the cost to replace the trees. In contrast, their appraisal of

the value of the property prior to the fire was $160,000. The trial court limited the calculation of damages to the difference in value of the real estate before and after the fire and the Landowners appealed.

On appeal, Landowners argued the proper measure of damages was the cost of replacing that which was damaged. The trial court had relied on the diminution of value approach.

The Court of Appeals affirmed. It noted the Kansas Supreme Court had rejected a strict application of diminution in upholding an award of damages for specific items in prior cases "where the evidence demonstrated distinct and separate value to fruit trees and hay on the property." But here, there was no evidence of the trees' value as part of the realty.

Landowners asked the Court to adopt "a growing trend in negligence law to permit recovery of restoration costs when real property has personal value rather than merely commercial value." The Court declined, noting this was contrary to existing Kansas law and saying that would be "patently unreasonable" in this case where the restoration cost would be nearly double the value of the property before the loss. It said "an injured party is not entitled to a windfall."

The Court also upheld the trial court's award of damages to structures. Landowners had sought to recover the cost of replacing them without taking into consideration depreciation of the damaged buildings. The Court held the proper measure was diminution of value, not replacement.

Deeds — Royalty Interests — Rule Against Perpetuities

A reservation of an interest in the landowner's one-eighth interest in oil and gas that may be produced from the land is a royalty interest, not a mineral interest, and is subject to the rule against perpetuities. Thus, it was void since it did not vest "within lives in being plus 21 years."

Rucker v. Delay, 44 Kan. App. 2d 268, 235 P.3d 566 (2010). A 1924 deed reserved to the grantor "60% of the land owner's one-eighth interest to the oil, gas or other minerals that may hereafter be developed under any oil and gas lease made by the grantee or his subsequent grantees." There were no existing oil and gas leases at the time of the deed. The county clerk listed the reserved interest as a mineral interest and Delays paid taxes on it. No oil was ever produced.

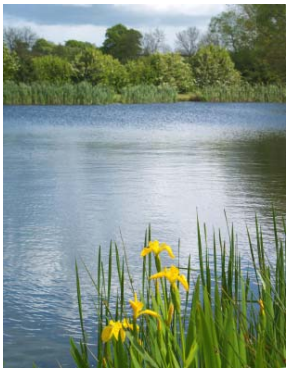
Ruckers, the current owners, sued DeLays to quiet title against the reservation. The court ruled in Ruckers' favor, holding the interest created by the reservation was a royalty interest and that since it was an interest that might never come into fruition, it would not necessarily vest within lives in being plus 21 years. Accordingly, it violated the rule against perpetuities (which requires such "vesting") and was void.

The Court of Appeals affirmed.

Easements vs. License — Interference

Rights granted in a declaration ruled an easement despite use of the word "license."

Gilman v. Blocks, 44 Kan. App. 2d 163, 235 P.3d 503 (2010). An owner of three lots which surrounded a pond filed a Declaration that provided the pond would be a "party pond," and that the owners of the lots would have the right to use it. It contained a restriction against constructing a dock or depositing materials in the pond or on the dam without the consent of the other owners. Specifically, the owners were granted a "license" over all three lots for access to the pond and dam by the most direct route, and to use that part of the lots within 15 feet of the water's edge. The cost of maintaining the pond was to be borne equally.



Eventually, Gilmans became the owner of Lot 3. Thereafter, when Blocks and Ullah ("Blocks") acquired Lot 2, the situation between these owners "quickly became unpleasant." Blocks built a berm and installed landscaping within the 15-foot area, then sent Gilmans a letter informing them they were not entitled to cross Blocks' property. Gilmans responded that Blocks was in violation of the Declaration.

Gilmans filed suit for a declaratory judgment that there was an easement and for an order that Blocks remove the obstruction to Gilmans' access. Blocks counterclaimed to have the Declaration deemed a "license" that did not run with the land.

Gilmans argued the Declaration created an "easement" which could be enforced against the Blocks. In analyzing the Declaration, the Court compared licenses with easements. It said an easement is "a permanent interest in real property and must be created by deed or prescription." A license is a "personal privilege to do some act" on another's land "without possessing any estate in the land."

The Court said a label given by the parties "does not dictate its legal effect." Instead, it considered several factors to determine whether the parties intended an easement or a license. The Court noted the Declaration had been recorded. A license need not be. The Declaration granted a right in a particular part of the land (the 15-foot strip). Further, each owner had the right to maintain the land.

The Court also said the Declaration bound, and was for the benefit of, the owners of each of the three lots, and that it was "to run with the land." And there was a stated consideration — that each was burdened by the others' rights in the 15-foot strip. Lastly, it noted there was no right to cancel the rights given in the Declaration; they were to run "so long as the pond and dam continues [sic] to exist."

The Declaration used language throughout indicating the parties intended an easement not a license. Furthermore, the owner of the third lot testified he was told there was such an easement when he purchased his lot many years earlier. The Court decided that the Declaration created an easement rather than a license.

Comment: Mere permission to use someone's property is a "license" and can usually be revoked at will. An easement, in contrast, gives someone continuing right to use property of another.

Eminent Domain — Inverse Condemnation

Moratorium on building permits not a regulatory taking.

In *Frick v. City of Salina*, 290 Kan. 869, 235 P.3d 1211 (2010), property owners unsuccessfully brought an inverse condemnation case to recover for a temporary deprivation of access to their property and refusal by the City of Salina to issue a building permit.

For nearly three years (the duration of construction of a road improvement and overpass project), the City of Salina enforced a moratorium on permits for construction of any driveway, culverts or other improvements in the public right-of-way adjoining the Frick property. The court analyzed Fricks' challenge to the City's moratorium as a regulatory taking claim and rejected it.

The Court noted that the moratorium could not be classified as the cause of loss resulting from not developing the property since Fricks had failed to present a complete application for a building permit during the moratorium. Had there been no moratorium, there still could have been no development without a building permit. In addition, the Court held that fluctuations in property value during the course of governmental decision making, "absent extraordinary delay, are incidents of ownership rather than compensable takings."

The Court found it noteworthy that Fricks did not have a site-specific development plan awaiting review at the time the City imposed the moratorium. In addition, the amount of delay that could be imposed through a moratorium is generally tied to the reasons for it. In this case, the moratorium was intended to promote traffic safety, avoid delays in construction of public improvements arising from conflicts with private construction, and to avoid waste that would be created if new improvements needed to be removed in the course of the City's construction project. These factors made the moratorium facially reasonable, and Fricks had not shown, only alleged, that the moratorium was improperly directed specifically at them. As a result, the moratorium did not result in a taking.

Comment: Moratoria, used appropriately, may cause injury to a property owner but are not a compensable taking.

Fraud — Disclosures

Buyer not required to state important conditions beyond those on disclosure statement. Duty of disclosure stated.

Kipp v. Myers, ____ F. Supp. 2d ____, 2010 WL 4683984 (D. Kan. 2010). Buyers of real estate sued the Sellers because the property flooded. The Buyers' claims were based on fraud by silence, fraudulent misrepresentation, negligent misrepresentation, breach of contract and rescission. Summary judgment was denied to Buyers because there were fact issues to be resolved by the jury, including whether Sellers knew the extent of the flooding, whether they used reasonable care in communicating true information on the disclosure form, and whether they made fraudulent misrepresentations in their disclosure statement.

The disclosure statement said the Buyers were not relying on any important representations about the property condition "except as disclosed above in the disclosure form or as set forth in writing." Judge Belot ruled that Buyers were entitled to rely on the contents of the disclosure statement without a separate writing, and without writing specific representations in the space provided in the disclosure statement, because the contents of the disclosure statement were "disclosed above." This appears consistent with *Osterhaus v. Toth*

which was later decided by the Kansas Supreme Court. *Osterhaus v. Toth*, ___ Kan. ___, 249 P.3d 888 (2011).

Fraud — Disclosures

Buyer does not waive claims for fraud or negligent misrepresentation merely by failing to explicitly identify which representations, if any, buyer relies on in the property disclosure statement.

In *Osterhaus v. Toth*, ___ Kan. ___, 249 P.3d 888 (2011), Homebuyer sued Seller and Real Estate Agent after discovering that Homebuyer's basement leaked and had various associated defects. Homebuyer's legal theories included the Kansas Consumer Protection Act, fraud, negligent misrepresentation and breach of contract. Seller knew about problems with water, cracking, and shifting of basement walls, but had not disclosed the problems to Homebuyer. Instead, Seller indicated in a seller's disclosure statement that there were no such problems.

The Homebuyer's Acknowledgement and Agreement section of the disclosure statement read: "I specifically represent that there are no important representations concerning the condition or value of the property made by SELLER or BROKER on which I am relying except as may be fully set forth in writing and signed by them." In addition, Homebuyer had and exercised a right to have an inspection, which revealed repaired cracks in the basement that the inspector reported appeared serviceable.

The Kansas Supreme Court summarizes the legal rules by which such cases are determined:

- "[A]s a matter of law, a buyer may not reasonably rely on the admittedly false representations of the seller when (1) the truth or falsity of a representation would be revealed by an inspection *and* (2)(a) the misrepresentations were made prior to or as a part of a contract (b) in which the buyer contracted for the right to inspect the property, (c) the buyer agreed that statements of the seller were not warranties and did not replace the right of inspection, (d) the buyer declined to inspect the property, and (e) the buyer contractually waived any claims arising from the defects which would have been revealed in the inspection."

- "[A] contractual waiver does not necessarily bar claims such as fraudulent misrepresentation and breach of contract as a matter of law where a buyer's reasonable inspection prior to purchase did not reveal a seller's false representation and later defects are discovered."

- A contract provision stating that the buyer is not relying on representations other than those in a writing signed by the seller or broker does not require the buyer to identify representations that are already included in the sellers' disclosure statement in order to be able to rely on those representations. In this case, the Kansas Supreme Court concluded that the Kansas Court of Appeals had been in error in *McLellan v. Raines*, 36 Kan. App. 2d 1, 140 P.3d 1034 (2006), and that error had affected subsequently-decided cases.

- The question of whether a reasonable inspection would reveal misrepresentations and undisclosed defects, and thereby preclude the reasonable reliance on the representations and disclosures that is necessary for a claim, is a question of fact.

- A contract amendment made after the buyer's inspection that the buyer agrees to purchase the property "as-is" with respect to the conditions discovered as a result of the inspection does not mean that the buyer purchases the property "as is" with respect to conditions that are not discovered.

This case also included a claim that Seller was a "supplier" for the purposes of being subject to the Kansas Consumer Protection Act. Homebuyer alleged that Seller, who was not a real estate agent, had engaged in seven real estate transactions over a 2½-year period. Seller claimed she bought and sold only three homes in that time and lived in each one. To be a "supplier," a seller must engage in consumer transactions in the ordinary course of business. The Court found that whether Seller was a supplier was a fact question that depended on her intent behind the sales of her real estate.

Judgment Liens — Dormancy — Tolling

Judgment lien was not barred by dormancy statute where enforcement was stayed during dormancy period.

Casey v. Plake, ____ Kan. App. 2d ____, 244 P.3d 689 (2010). A curious set of facts led to a straight-forward legal decision. When Carl died in 1975, his widow, Ina, received a homestead interest in certain real property and a lien against the homestead for $2,667 plus 8% interest. However, Ina's lien was subject to a stay of execution until she died or abandoned the homestead. The remainder interest was vested in the children of the parties, one-half to Plake, Ina's child, and one-fourth each to William and Carla, Carl's children. Ina continued to occupy the homestead until her death in 2006. Her judgment lien passed to Plake.

The homestead property was sold. Plake asserted the judg-

ment lien gave him rights to the proceeds, while William and Carla contended they were entitled to their half without diminution by the lien. Carla claimed the judgment lien was barred by the judgment dormancy statute — failure to exert efforts to enforce a judgment for more than seven years renders it void and unenforceable.

The dormancy statute prevents any period in which the enforcement is stayed from being counted toward the seven years. But Carla pointed out the tolling clause was added in 1990, after the judgment lien and thus, was not applicable.

The Court of Appeals said that law prior to the amendment held that the time during which execution was stayed could not be counted toward the dormancy period. The 1990 change to the statute merely made that rule explicit as part of the statute.

Kansas Commercial Statute of Frauds — K.S.A. 16-117, 118

Lender's recommendation that borrower default its loan in order to begin restructuring discussions did not amount to a "credit agreement" under K.S.A. 16-118.

In re Bryant Manor, LLC, 434 B.R. 629 (Bankr. D. Kan. 2010) is part of an action in bankruptcy brought by the debtor, Bryant Manor, LLC, against its lender, Bank of America, and its loan servicers.

Bryant Manor owned and operated an apartment complex in Kansas City, Kansas. It approached the loan servicer about deferring a monthly loan payment and possibly restructuring the loan. The servicer told Bryant Manor the only way to have meaningful discussions about a loan restructuring was if Bryant Manor defaulted on their loan.

Bryant Manor followed lead and defaulted. Discussions followed, but the restructuring was rejected. Bryant Manor was eventually offered a modification in payments by $4,000 per month for 24 months if it paid $181,000. Negotiations ended, Bank of America eventually foreclosed.

Bryant Manor brought this adversary action against Bank of America claiming the Bank, through the servicer, had negligently represented that defaulting on the loan was a viable method toward restructuring the loan. Bryant Manor also claimed the Bank failed to negotiate in good faith regarding the restructuring and breached the duty of good faith and fair dealing.

Bank of America moved to dismiss on several grounds, all of which were rejected. The main issue for purposes of this summary pertains to K.S.A. 16-117 and 118 — the Kansas Commercial Statute of Frauds. The Bank argued these statutes barred the debtor from bringing an action to enforce a credit agreement. But Judge Karlin rejected this argument, noting that the statutes only cover "credit agreements" and the allegations in this case involved a promissory note and a mortgage. Promissory notes and mortgages are specifically excluded from the definition of a "credit agreement" under K.S.A. 16-118.

Landlord & Tenant — Assignment — Good Faith

Landlord must act in good faith when exercising power to terminate lease when consent for assignment is requested.

M West, Inc. v. Oak Park Mall, LLC, 44 Kan. App. 2d 35, 234 P.3d 833 (2010). M West and Cingular were tenants in a mall owned by Oak Park. M West wanted to take over space occupied by Cingular. Cingular proposed to assign its lease to M West. The proposal called for Cingular to pay M West $330,000.

M West signed the proposal. The Cingular lease required Oak Park's consent to any assignment and provided that in the event of such submission, Oak Park could simply terminate the lease. Cingular submitted the proposed assignment to Oak Park for its consideration. Oak Park told M West that it "liked" the idea. Meanwhile Oak Park negotiated with Cingular to terminate the lease, ultimately reaching an agreement to do so.

M West sued Oak Park and Cingular for breach of contract and asserted a claim against Oak Park for tortious interference with contract.

Oak Park argued it was acting as it was entitled to do under the terms of its lease with Cingular. When presented with the proposed assignment, it had the right to terminate the lease. It argued there was no tortious interference since there was no evidence it acted with malice or without justification.

The Court of Appeals disagreed and ruled the case could not be decided without a trial. It said there was evidence from which a jury might find Oak Park had acted in bad faith. M West claimed it had relied upon the statement by Oak Park

that it "liked the idea" of the proposed assignment, while, in fact, Oak Park was negotiating to terminate the lease. The Court said the evidence showed Oak Park had encouraged M West to propose taking over the Cingular space and that once it had the proposed assignment in hand, it took advantage of the opportunity to enrich itself by preventing the performance of the contract between M West and Cingular.

Comment: The duty of good faith and fair dealing can make conduct that does not violate an express term of a contract actionable and liable for damages.

Manufactured Homes — Foreclosure

Failure of seller to deliver manufacturer's statement of origin did not void sale or stop foreclosure.

Cornerstone Homes, LLC v. Skinner, 44 Kan. App. 2d 88, 235 P. 3d 494 (2010). Cornerstone Homes, LLC sold a new manufactured home to the Skinners, but did not deliver the manufacturer's statement of origin (MSO) at the time of sale. Skinners later fell into default and Cornerstone foreclosed.

Skinners claimed the transaction was void because they didn't receive the MSO at the time of the sale, relying on K.S.A. 58-4204(h). But this statute voids a sale or transfer of a manufactured home by a dealer who fails to assign a certificate of title which has already been issued, i.e. a used manufactured home. That was not the case here because the certificate of title had not yet been issued. A different statute applies to sales of new manufactured homes and it does not specify that the transfer is void for failure to deliver the MSO (K.S.A.58-4204(e)). Thus, the Court of Appeals rejected Skinners' defense and related counterclaims, and affirmed the foreclosure judgment against them.

Mechanics' Liens — Priority with Successive Owners

Lien claimant cannot tack work onto two successive owners to establish priority date of lien.

In re Corbin Park, 441 B.R. 370 (2010). This case resolved a dispute between a group of mortgagees and a group of mechanics' lien claimants about whether mechanics' liens had priority over the mortgage on the Corbin Park retail shopping center project in Overland Park. Bank of America provided a refinancing and construction loan in connection with the transfer of the retail center project from one development entity to a related one.

Construction had been ongoing for several years and much of the project's infrastructure had been installed before the date of the lending group's loan and mortgage.

The same contractors who worked on the project before the closing continued work for the new owner after the closing. Several months and millions of dollars later, the lender refused to advance more funds under the construction loan, leaving contractors and subcontractors unpaid for several million dollars of work. The contractors and subcontractors filed mechanics' liens on the property.

The contractors claimed their liens had priority over the mortgage because one or more unsatisfied lien claimant contractors had started work prior to the loan closing and mortgage recording, providing a lien priority date before the mortgage date for all lien claimants on the project.

The contractors lost. The priority date of the lien holders was not the earliest date at which a lien claimant had provided lienable work to the project site, but was the earliest date at which such a contractor had provided lienable work to the project under a contract with the owner. Because the post-closing construction work was performed for a *different owner* than the pre-closing work, the date of the pre-closing work was immaterial to the priority date of the post-loan closing work. While the contractors might have been able to file liens for the pre-closing work that had priority over the mortgage, they would have needed to do so within the statutory time limits for filing liens, measured from the last date any particular claimant provided pre-closing work. The liens were not filed within that time limit, and therefore only covered post-closing work.

Comment: This case exhibits that for mechanic's lien purposes, contractors cannot tack work onto the same project for two successive owners to establish their lien priority date.

Mechanics' Liens — Warning Statement

Subcontractors' liens defeated for failure to send Warning Statements to homeowners.

Tarlton v. Miller's of Claflin, Inc. and S & H Lumber Co., Inc., 43 Kan. App. 2d 547, 227 P.3d 23 (2010). Two subcontractors supplied materials for construction of a new residence, but had their mechanics' liens struck down because they failed to send Warning Statements to the homeowner as required by K.S.A. 60-1103a(b).

The claimants argued that the Warning Statements weren't

required because they had direct contracts with the owner. But the Court of Appeals found the claimants failed to carry their burden to prove direct contractual relationships with the owner. The evidence tended to show they were subcontractors, and thus required to send Warning Statements. One claimant had at least eight separate documents where it sold materials directly to the general contractor, which "make it clear" they were a subcontractor to the general contractor. The other claimant had a sales order that was marked for delivery to the general contractor and was accepted by the general contractor. The Court of Appeals remarked there was no explanation of why the claimant would obtain the contractor's signature if the homeowners were the contracting parties.

The mechanics' liens were denied for failure to send warning statements.

Comment: Subcontractors and suppliers tend to overlook the need to comply with the warning statement procedure before filing a lien. This case demonstrates the importance of doing so.

Mortgage Foreclosure — Truth-in-Lending

Rescission claim barred by estoppel because borrowers still asked to fund the loan. TILA claims dismissed for discovery misconduct.

Deutsche Bank National Trust Co. v. Sumner, 44 Kan. App. 2d 851, 245 P.3d 1057 (2010). The Sumners sought refinancing of their home loan by Ameriquest Mortgage Company (AMC). After the loan was closed, it was sold to Deutsche. When Sumners defaulted, Deutsche filed a foreclosure action. Sumners counterclaimed alleging libel, slander, fraud, etc., seeking money damages, set-off and an order for the lender to reinstate their loan.

After considerable discovery difficulties (Sumners failed to appear for their depositions) and change of counsel, Sumners amended their claims to assert violations of the Truth-in-Lending Act (TILA) and the Kansas Consumer Protection Act (KCPA). Deutsche moved to dismiss.

The Court ruled that Sumners' demand for rescission was barred by equitable estoppel. It noted that after they claimed to have sent a request to rescind the loan, they sought funding of the loan. It said the lender was justified in relying on the request for funding, notwithstanding the claimed notice of rescission.

The Court also affirmed the trial court's dismissal of the remaining claims on the grounds of Sumners' conduct during the litigation. The Court recognized the general view that dismissal of claims on such grounds was a matter of "last resort." The Court noted dismissal was normally used only after warning that failure to comply could lead to dismissal, which wasn't given in this case. Sumners had failed to appear for their depositions at least eight times. The trial judge said they had exhibited a "deliberate course of delay" and their failure to appear for the last scheduled depositions without proven justification was the "straw that broke the camel's back." The Court of Appeals said "the sanction of dismissal may not have been severe enough to match the misconduct." It further posted this warning: "[W]e intend our decision today in this case as a sharp warning that litigants and counsel may not engage in an obvious pattern of delay and harassment with impunity in Kansas courts."

Mortgage Foreclosure — Truth-in-Lending — Liability of Assignee

The assignee of a mortgagee is not liable for truth-in-lending violations by the originator of the loan unless the violations are apparent on the face of the disclosure statement.

Wells Fargo Bank v. Eastham, 44 Kan. App. 2d 1059, 241 P.3d 1027 (2010). Easthams obtained a mortgage loan from Intervale Mortgage to purchase a home. Shortly thereafter, Mr. Eastham suffered a serious illness and the Easthams ultimately defaulted on the loan. In the interim, the loan had been sold to Wells Fargo.

When Wells Fargo sued to foreclose the mortgage, Easthams counterclaimed for truth-in-lending (TIL) violations committed by Intervale.

Under the TIL an assignment creditor is liable for TIL violations that are "apparent on the face of the disclosure statement." Easthams argued a TIL violation was apparent since disclosures were dated the same day the loan was made. The Court was not persuaded. It said good faith disclosures are required within three days after the loan application is made and that where the interest rate has changed, another disclosure must be made at closing. It said Wells Fargo could not have known from the face of the disclosure statement whether there had been a change in the interest rate between the good faith disclosure and the one at closing.

Mortgages — Priority

Second mortgage given priority to a leasehold mortgage already of record because loan funds were used to acquire the property.

Black Angus Holdings, LLC, ____ B.R. ____, Case No. 09-21349-11, 2010 WL 3613946 (Bankr. D. Kan. 2010). A first leasehold mortgage given by Black Angus Holdings, LLC ("Black Angus") to CEF Funding ("CEF") described the real property to include "any greater estate in the Property, including the fee simple estate, as may be subsequently acquired by or released to Borrower." Black Angus later acquired fee title to the Property with funds borrowed from People's Bank. People's Bank filed a purchase money mortgage, which was second on file to the CEF leasehold mortgage. Black Angus subsequently filed bankruptcy and the mortgage priority issue arose before Judge Somers in CEF's motion for relief from stay.

Who has priority? CEF claimed priority because they were first on file and their leasehold mortgage contained an after-acquired property clause if the borrower acquired the fee, which it did. People's Bank claimed they had special priority rights as a purchase money mortgage lender, which they were. There is no Kansas law directly on point.

Judge Somers ruled that the purchase money mortgage had priority because the purchaser, based on prior Kansas law, was deemed to acquire the property with the purchase mortgage lien already attached.

The rationale for the superior status is that the purchase money mortgagor is not regarded as obtaining title to the property and then executing a mortgage; rather he acquires the property already subject to the encumbrance in favor of the purchaser money lender.

Thus, the court concluded, if the purchaser acquired the Property already subject to the People's Bank purchase money mortgage, then the CEF mortgage attached to the fee behind the People's Bank mortgage.

Comment: This demonstrates the preferred treatment the law gives to a purchase money mortgage.

Mortgages — Standing

Nominee of mortgagee did not have standing to bring foreclosure action.

Mortgage Electronic Registration Systems, Inc. v. Graham, 44 Kan. App. 2d 547, 229 P. 3d 420 (2010). The Court of Appeals ruled that MERS (Mortgage Electronic Registration Systems) did not have standing to bring a foreclosure action when it held the mortgage as nominee of the mortgagee and did not also hold the promissory note (following *Landmark Nat'l Bank v. Kessler*, 289 Kan. 528, 216 P.3d 158 (2009)). The Court reasoned that MERS did not hold the note, there was "no evidence that MERS received permission to act as an agent" for the lender, and the borrowers were not obligated to make payments to MERS; thus, MERS suffered no injury and lacked standing to bring a foreclosure.

Mortgages — Standing

Note holder had the right to enforce note and mortgage itself or through the nominee as its agent.

Martinez v. Mortgage Electronic Registration Systems, Inc., 444 B.R. 192 (Bankr. D. Kan. 2011). This case arises from the same set of facts as *Mortgage Electronic Registration Systems, Inc. v. Graham*, 44 Kan. App. 2d 547, 229 P. 3d 420 (2010). The Note was held by Countrywide and the mortgage held in the name of *Mortgage Electronic Registration Systems, Inc.* (MERS) as "nominee" for Countrywide. The Court of Appeals earlier ruled that MERS did not have standing to foreclose the mortgage because the note and mortgage were held by separate entities. The debtor then claimed in this bankruptcy adversary action that the debt was unsecured.

Judge Karlin first ruled that the Court of Appeals decision was not *res judicata* because two of the four elements for *res judicata* were missing: (1) "the prior suit did not end with a judgment on the merits" (dismissed for lack of jurisdiction); and (2) "MERS and Countrywide did not have a full and fair opportunity to litigate the claim."

The Court then found that even though the note and mortgage were held by separate entities, Countrywide had designated MERS as its agent to enforce the mortgage. "The fact that MERS and Countrywide chose to use the word 'nominee,' rather than 'agent,' does not alter the underlying relationship between the two parties;" and "[b]ecause MERS was holding the Mortgage in question as an agent of Countrywide, the Court [found] that the Note and Mortgage were never split, and remain enforceable."

Mortgages — TILA Violations

Purchaser of loan not liable for TILA violations unless violations are "apparent" in the disclosure documents.

In re Lindquist, 2010 WL 3636141 (Bankr. D. Kan. 2010). Lindquists obtained a home mortgage loan from Universal Mortgage Corp. The loan was assigned to Wells Fargo Bank. Two years later, Sheila Lindquist filed for bankruptcy and both Lindquists gave notice of rescission of the loan. When Wells Fargo didn't rescind the loan, Lindquists filed an adversary action against Wells Fargo claiming Truth-in-Lending Act (TILA) violations. They asserted they were not given the proper number of TILA Disclosure Statements (one each) or the correct number of notices of their right to rescind (two each). Lindquists sought rescission, statutory damages, attorney fees and costs.

Under TILA, an assignee is not liable for TILA violations by the original lender unless those violations are "apparent" in the disclosure documents. The bankruptcy judge found there was nothing on the face of the documents to show the borrowers had not been given the required disclosures.

Mortgages — Truth in Lending

Mortgage rescinded for failure to give timely notice of right of rescission.

Fortune v. American Window & Siding Systems, Inc. and Community Home Financial Services, Inc., ____ B.R. ____, Case No. 09-41744, Adv. No. 10-7003, 2010 WL 4053107 (Bankr. D. Kan. 2010). Here, the Bankruptcy Court ordered rescission of a mortgage because a contractor who sold siding and windows failed to provide the homeowners with a mandatory three-day right of rescission.

Contractor made an unsolicited visit to Homeowners and sold them $26,691 of siding and windows for a home they were purchasing under a 2001 installment contract for $14,200. Initially, the proper disclosures were made under the Home Ownership and Equity Protection Act of 1994 ("HOEPA") and the Truth in Lending Act ("TILA"). But Contractor couldn't finance the contract while Homeowners were only purchasers under an installment contract, and the transaction was changed to increase the amount financed to $32,776 by paying off the installment contract and taking a mortgage on the house. This also replaced Homeowners' 9.5% interest rate on the installment contract with 17.99% interest on the entire $32,776. Contractor gave Homeowners another disclosure notice and right to rescind when it increased the amount of the debt and additional interest rate, but the notice was given on the date of consummation of the transaction instead of at least three days prior to the date of consummation of the transaction, as required by HOEPA and TILA. Contractor assigned the loan to Lender shortly after the closing. Homeowners later sent notice of rescission within the three-year statutory time limitation.

The Bankruptcy Court recognized that "TILA violations are measured by a strict liability standard" and allowed rescission of the mortgage because of the failure to provide the timely disclosure and right of rescission. Lender had to return all payments made by Homeowners. In turn, Homeowners had to tender the reasonable equivalent value of the property they received (the value of the windows, siding, money and services) which the Court determined as $32,777. But the Court offset this obligation of Homeowners against the amount they had already paid to Lender of $21,235, and further offset it against $19,652 of damages for finance charges made by Contractor, with the net result being that Homeowners would have the house unencumbered and money owed to them by Lender.

Comment: Contractor was the one who violated the law by failing to make the timely disclosures, and Lender took an assignment of the loan from Contractor after that occurred. But the Court also found Lender liable for damages resulting from Contractor's failure to comply with the disclosure obligations. The Court said if Lender had exercised due diligence when purchasing the loan, it could have recognized that the disclosures originally given didn't match the actual loan amount made.

Oil and Gas

Oil and gas lease governed by law where property is located, not by the law where lease was executed. No need to look at the facts and circumstances of each lease to determine whether there are implied covenants with respect to a specific oil and gas lease.

Farrar v. Mobil Oil Corporation, 43 Kan. App. 2d 871, 234 P.3d 19 (2010). In this class action case challenging ExxonMobil's calculations of royalties due lessors of Kansas minerals within the Hugoton Field, defendant ExxonMobil appealed class certification on the grounds that various leases were governed by the laws of the state in which each particular lease was entered. The suit alleged that ExxonMobil improperly deducted from royalty payments a pro-rata portion of the costs for transporting gas through gathering systems to the processing plant.

ExxonMobil asserted that certification was an abuse of the district court's discretion, because the questions of law were not common among the class members since each oil and gas lease was governed by the law in which it was entered (*lex loci contractus*). The Kansas Court of Appeals rejected this argument and held that the law of the situs of the leased property (*lex rei sitae*) controls. This is consistent with existing Kansas law and the approaches taken in other oil and gas producing states. Also, despite ExxonMobil's claim to the contrary, the Court found that applying Kansas law would not be unconstitutional since the contacts with Kansas of oil and gas leases on Kansas minerals were "intimate."

Oil and Gas

Payment of money to lessor under minimum royalty clause without actual production does not extend oil and gas lease beyond the primary term.

Palmer v. Bill Gallagher Enterprises, L.L.C., 44 Kan. App. 2d 560, 240 P.3d 592 (2010). This case determined whether an oil and gas lease continued in effect after the primary term when it had never produced any oil or gas. The Court held it did not. The lease had a minimum royalty provision which called for Lessors to receive at least $1,000 each year. The clause permitted Lessee to make up the difference between the production earnings and the minimum royalties if the production earnings were insufficient to satisfy the minimum royalty. Lessee paid Lessors $1,000 per year for seven years after the expiration of the primary term, none of which came from any production earnings. Lessors provided Lessee with notice that the lease was forfeited for lack of production, and for the next few years, returned the annual $1,000 checks they received from Lessee. Lessors then brought this action to cancel the lease.

The lease did not have a shut-in royalties clause. As a matter of first impression in Kansas, the Court of Appeals found that the minimum royalties clause did not extend the lease in the absence of some actual production royalties.

Partition — Necessary Parties and Property Interest Acquired at Sheriff's Sale

Only owners whose interests are affected by a partition need be made parties; severed mineral interests are included in the partition of real estate unless otherwise provided.

McGinty v. Hoosier, 291 Kan. 224, 239 P.3d 843 (2010). This quiet title action turned on the question of the validity and effect of a judgment in a partition action when not all owners of the property were parties to the action, and when the partition petition did not specifically state it concerned mineral as well as surface interests.

There are two notable lessons from the case: (1) not all owners of an interest in partitioned property need to be made parties to a partition action, so long as the order of partition does not affect the interests of those not parties; and (2) a partition petition describing the land to be partitioned by legal description and without further limitation will partition the interests of the parties to the action in both the surface and the minerals.

Premises Liability

Neighbor injured in herding stray cattle into pasture where he thought they belonged was a trespasser and not owed a duty of reasonable care.

Wrinkle v. Norman, 44 Kan. App. 2d 950, 242 P.3d 1216 (2010). The plaintiff in this case, Rodney Wrinkle, was allegedly injured by a clothesline on the ground when he was herding loose cattle from a highway ditch through an open gate into his neighbors' pasture, where he thought they belonged. He sued the neighbor couple for negligently creating a dangerous condition (the clothesline) that presented an unreasonable risk of harm. The court entered judgment against Wrinkle in favor of the landowner.

A person who occupies land owes a duty of reasonable care to invitees or licensees on that land. By definition, invitees and licensees are both on the premises with consent, whether express or implied. In contrast, a trespasser enters the premises of another without authority or consent. An occupier of land owes a trespasser only a duty to refrain from willfully, wantonly, or recklessly injuring the trespasser.

Wrinkle argued that he was owed the duty owed to a licensee (reasonable care) because he was on the property as a matter of "private necessity" to prevent serious harm to people or the defendants' cattle. The Kansas Supreme Court had never decided this question before – the standard of care owed to a person entering land under a matter of private necessity. But the Court never reached that point here

because Wrinkle had not established that the cattle he herded into the defendants' pasture were the defendants' cattle. If they weren't, the court noted, Wrinkle would not be entitled to protection as a licensee. He was owed the duty due to a mere trespasser, of which there was no evidence the defendants had breached the standard of care (willfully, wantonly, recklessly, injuring the trespasser). Similarly, without showing that the cattle belonged to the defendants, Wrinkle could not recover on the theory that defendants failed to use ordinary care to keep the livestock fenced.

Comment: The level of the duty of care to someone coming onto your property depends upon whether they are trespassers or there for another reason.

Quiet Title — Quiet Title Act

Congress did not waive sovereign immunity for actions involving Indian lands under the Quiet Title Act.

Iowa Tribe of Kansas and Nebraska v Salazar, 607 F.3d 1225 (10th Cir. 2010). The Wyandotte Tribe of Oklahoma sought to purchase a half-acre tract in 1996 for a gaming facility. Congress allocated funding to purchase the property to be held in trust by the Secretary of the Interior. Several other tribes and the Governor of Kansas sued over breach of a tribal-state compact concerning operations of casinos in Kansas. The issue was not whether the Wyandotte Tribe could operate a casino, but sovereign immunity of the United States.

The Tenth Circuit first said that the Quiet Title Act was the exclusive means to challenge claims of the United States to property. The Court then noted that Congress must waive sovereign immunity if a party wishes to sue the government, and Congress had waived sovereign immunity for claims under the QTA, but the waiver did not apply to "trust or restricted Indian lands."

Reformation of Deed

Reformation appropriate when reservation of mineral interest was left out of deed by mutual mistake.

Leathers v. Leathers, ____ F. Supp. 2d ____, 2010 WL 1936137 (D. Kan. 2010). In connection with carrying out a buy-out provision in a partnership agreement, Ronald Leathers executed a quit-claim deed to his brother Michael Leathers, intending to transfer to Michael all of the partnership's surface rights in certain land. Michael and Ronald had acquired equal interests in the mineral estate of the same land through a source outside the partnership. They did not intend to transfer mineral rights, but the quit-claim deed had no reservation for Ronald's mineral interest. The land produced income from mineral production.

When Michael took the position that half of the minerals still belonged to Ronald and/or his wife, Michael was told by Anadarko that the royalty payments relating to Ronald's half-interest in the minerals would be placed in suspense. Michael testified at Ronald's divorce trial that Ronald owned half of the minerals and Ronald's wife was granted one-half of Ronald's interest. Subsequently, Ronald discovered the problem with the quit-claim deed and wrote Michael a letter stating Michael had been receiving royalties that should have gone to Ronald. Michael offered to assist to fix the problem, but suggested his attorneys would require a release with respect to any money paid to Michael in error.

In this action, which involved a variety of claims among Ronald, Michael and Ronald's ex-wife relating to the property and royalties paid from production on the property, the court granted Ronald's ex-wife summary judgment on her claim to reform the quit-claim deed. Even though the request for reformation came more than five years after the deed (the period allowed under the applicable statute of limitations), no party disputed the claim that all parties had waived the statute of limitations. The court found there was a mutual mistake that justified reforming the deed and that reformation of the deed was equitable.

Comment: Generally, a deed can be reformed if there is a mutual mistake between the parties and the five-year statute of limitations has not run.

Right of First Refusal — Good Faith and Fair Dealing

Seller of property subject to right of first refusal was not permitted to increase its recovery from a sale of the subject property to the detriment of the holder of the RFR by coupling it with sale of another property.

Waste Connections of Kansas, Inc. v. Ritchie Corp., 43 Kan. App. 2d 655, 228 P.3d 429 (2010). Ritchie owned property containing a landfill and a waste transfer station. It entered into a real estate contract with BFI related to the waste transfer station. At the same time, the parties signed an escrow agreement under which BFI was entitled to operate the transfer station for 35 years. Under the agreement, BFI paid

Ritchie according to the amount of waste processed at the transfer station. A deed from BFI to Ritchie was escrowed to be delivered to Ritchie at the end of the 35-year period. The escrow agreement also contained a right of first refusal clause (RFR) in favor of BFI. Waste Connections (WCK) is successor in interest to BFI.

Along came Cornejo & Sons (Cornejo) as prospective purchaser of the landfill, offering $3.5 million for it. Ritchie wanted to sell the transfer station as well for a total of $5.5 million. Cornejo wanted only the landfill and countered for both properties at $4.95 million. Ritchie estimated the value of the transfer station was $2 million, whereas Cornejo put its value at $1.45 million. A package deal was reached for a price of $4.95 million for Ritchie's rights under the escrow agreement, but it included a special clause that would come into effect if the RFR was exercised. The contract provided that if that happened, the price of the landfill would be reduced to $3.5 million, the amount Cornejo was willing to pay for it.

As required by the RFR, Ritchie notified WCK it had received an offer to purchase Ritchie's right under the escrow agreement, i.e. the transfer station. Ritchie said the offer was $2 million. WCK, upon learning of the terms of the Ritchie/Cornejo agreement, disputed that price for the transfer station, taking the position the true offer was $1.45 million, and elected to exercise the RFR at the lesser amount. After the disagreement over the correct price to be paid could not be resolved, WCK tendered $2 million into escrow reserving the right to determine the correct price of the transfer station. WCK and Ritchie entered into agreements to allow the sale of the landfill for $3.5 million to be completed, with each party reserving rights as to their positions to the dispute. Ritchie collected the $2 million and WCK received an assignment of Ritchie's rights under the escrow agreement, thus becoming the owner of the transfer station. WCK then brought a declaratory judgment action to obtain a determination that the correct price under the RFR was $1.45 million. WCK asserted Ritchie violated a duty of good faith and fair dealing.

WCK contended that the agreement between Ritchie and Cornejo actually set a price of $1.45 million for the transfer station because Cornejo offered to pay $4.95 million for both properties and $3.5 million separately for the landfill. Ritchie responded the agreement was clear that $2 million was the price for the landfill and that it should be able to "maximize the amount it will receive in payment for its property." It invoked its right to exercise an independent business judgment.

The Court determined the agreement as to the price was ambiguous because it fluctuated depending on whether WCK exercised its RFR. It was not impressed with the "maximized profits" argument. It noted Ritchie admitted it had been willing to sell the transfer station for $1.45 million in the package deal with Cornejo, the amount Cornejo valued it. It said:

> In the context of a package deal involving a right of first refusal, the price for the total package generally should not fluctuate based upon whether the right of first refusal is executed. Ritchie should not be able to receive more money after exercise of the right of first refusal. For the right of first refusal to be given its lawful effect, Ritchie should be in the same financial position regardless of whether WCK exercises the first refusal.

The Court went on to say that Ritchie's conduct constituted a violation of its duty of good faith and fair dealing. It reversed the district court and entered judgment in favor of WCK for $550,000, and remanded the case for determination of the attorney fee issue.

Comment: Parties should be aware that the duty of good faith and fair dealing is implied into their contract negotiations.

Slander of Title

Claim for slander of title requires that plaintiff suffer special damages.

Southern Star Cent. Gas Pipeline, Inc. v. Cline, ____ F. Supp. 2d ____, 2010 WL 4737800 (D. Kan. 2010). Southern Star Gas Pipeline sued Cline (Landowner) for slander of title after he filed an affidavit stating the pipeline company's lease for natural gas storage rights was void. Landowner argued that the pipeline company failed to sufficiently plead its slander of title claim. The pipeline company failed to allege special damages — that it suffered actual economic harm — from Landowner's action questioning its lease rights. The court agreed that the pleading was insufficient and the pipeline company was granted an opportunity to amend.

Statute of Frauds — Email of Contracts

Emailing an unsigned contract as an attached document did not amount to a "signature" of the contract for purposes of the statute of frauds.

Sigg v. Coltrane, ____ P. 3d ____, 2010 WL 5095831

(2010). Tanya Coltrane, the owner of real estate, emailed an "offer to purchase [Coltranes'] real estate" to Sigg with all signature lines left blank. The document also said Coltranes had "the right to reject any and all bids." Sigg signed the document and deposited 10% of the purchase price into Coltranes' bank account. Coltranes later sold the property to someone else, rejecting Sigg's offer to purchase and returning the deposit to her. Sigg then sued for specific performance. Both the trial court and the Court of Appeals ruled for Coltranes under the statute of frauds — the sellers never signed the contract.

K.S.A. 33-106 provides that "no action shall be brought . . . upon any contract for the sale of lands . . . unless the agreement . . . shall be in writing and signed by the party to be charged therewith. . . ." Here, Coltranes had not signed any documents. Sigg argued the email transmission constituted an electronic signature under the Uniform Electronic Transactions Act (K.S.A. 16-1601 *et seq.*), but this failed. The Act defines an electronic signature as "an electronic sound, symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." K.S.A. 16-1602(i). There was no such sound, symbol or process in this case. The Court of Appeals said that simply sending the offer to purchase as an attachment by email to the daughter of Sigg's agent did not constitute a signature under the Act.

The Court also noted the Act only applies to transactions where the parties agree to conduct the transaction by electronic means. Whether they "agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties conduct." And there was "absolutely nothing" to indicate the parties agreed to conduct the transaction by electronic means.

Comment: Parties wanting to conduct a transaction by email have to show an agreement to do so, and there must be a "signature" to the contract.

Tax Increment Financing — Change in Project Plan

City may terminate an existing project plan when the plan is no longer needed and transfer the project area to another redevelopment district by adopting a new project plan.

2011 Op. Att'y Gen. 1. Redevelopment under a TIF requires two steps: creation of a redevelopment district and adoption of a project plan in that district. Both must follow statutory procedures for adoption.

The City of Roeland Park had one TIF District (District 2) with four project areas, and another TIF District (District 3) with two project areas. The City wished to terminate the project plan for an area in District 3, move a project area from District 3 to District 2, modify the redevelopment district plan for District 2 to provide for a new project area and adopt a new project plan for the new area in District 2. The Attorney General advised that a city, through its home rule powers, could terminate the existing project plan when it determined the plan was no longer desired or feasible. In order to transfer the area into a new district, the city would need to adopt a new project plan for the transferred project area as set forth in K.S.A. 2010 Supp. 12-1772.

Tax-Exempt Property — Exclusive Use

Tax-exempt credits taint exclusive-use exemption for group housing use.

In re Class Homes I, L.L.C., 44 Kan. App. 2d 121, 234 P.3d 35 (2010). The Court of Tax Appeals (COTA) and the Court of Appeals denied *ad valorem* tax exemptions to three group housing properties operated for developmentally-disabled individuals in Labette, Crawford and Cherokee counties.

K.S.A. 2009 Supp. 201b *Sixth* grants an exemption from taxation for real and tangible property "used exclusively" for mentally ill, retarded or other handicapped persons. But COTA and the Court of Appeals found that the exclusive use was lost when tax exemption credits were given to investors; they concluded the project then served another purpose — of benefiting the investors. The Court of Appeals said "its ownership interest and contractual financial benefit create a position that is anathema to exemption under K.S.A. 2009 Supp. 79-201b *Sixth*."

Note: A different panel reached a different result in *In re Tax Exemption of Kouri Place, L.L.C.*, 44 Kan. App. 2d 467, 239 P.3d 96 (2010).

Tax Exemption — Group Home for People with Special Needs

Exemption granted for home used exclusively for low-income people with special needs even though funded with tax credits.

In re Tax Exemption of Kouri Place, L.L.C., 44 Kan. App. 2d

467, 239 P.3d 96 (2010). K.S.A. 2009 79-201b *Sixth* grants a real estate tax exemption for properties "used exclusively for the purpose of group housing" for people with special needs such as mental illness or physical or mental disability. Kouri Place, L.L.C. provided housing for people with special needs that met this definition. But the Court of Tax Appeals denied the exemption because the housing project was funded mostly by a federal tax-credit program that the Court of Tax Appeals felt was a separate intangible use of the real estate, thus losing the "exclusive use" requirement of the statute. The Court of Appeals disagreed and reversed.

The Court of Appeals found the source of funds was "exactly what Congress intended" — that people would use these tax credits to help fund projects such as these. The Court noted the significance of the word "use" in the exemption statute, and that "the exclusive *physical* use of the property is for an exempt purpose."

The Court acknowledged that another Court of Appeals panel had come to the opposite conclusion in an "indistinguishable" case from this one, but methodically explained the reasons it took a different direction here. *In re Class Homes I*, 44 Kan. App. 2d 121, 234 P.3d 35 (2010).

Taxation — Leasehold Estate

Leasehold estate is not subject to real estate taxation in Kansas.

In re Lipson, 44 Kan. App. 2d 515, 238 P.3d 757 (2010). The City of Council Grove owns lake properties which it leases to individuals, many of whom place improvements, including mobile homes. Lipson acquired a "cabin site" for $126,000, in which the contract allocated $100,000 for the lease rights.

This dispute involved the County's valuation of Lipson's mobile home and other improvements at $107,080. Lipson claimed the County improperly assessed him for the "intangible value" of his leasehold interest. The County argued it had the right to tax the "taxpayer's intangible right to the lot lease." Both the Court of Tax Appeals (COTA) and the Kansas Court of Appeals ruled for Lipson, finding that a leasehold interest cannot be taxed under Kansas law.

The Court said that a "unitary assessment method" must be followed in our taxation system. This is because Kansas statutes do not authorize the county clerk to consult leases in determining ownership of real estate (only the transfer record, plats and other specified places should be considered). Moreover, it's impractical to expect the assessor to uncover all unrecorded real estate leases in its valuation of real estate. (Following *Board of Johnson County Comm'rs v. Greenhaw*, 241 Kan. 119, 734 P.2d 1125 (1987).)

Comment: The holding of the case: a leasehold estate is not subject to real estate taxation in Kansas.

Zoning — Challenge to Conditional-Use Permit

Neighbors wanting to join in appeal of zoning decision must do so within the 30-day period permitted for appeals. Standards for zoning decisions discussed.

Evans v. City of Emporia, 44 Kan. App. 2d 1066, 243 P.3d 374 (2010). This case is an unsuccessful challenge by neighboring landowners to a conditional use permit granted by the City of Emporia to Westar Energy to upgrade a substation near the plaintiffs and expand the footprint of the equipment on the property.

The reasonableness of a zoning decision can be reviewed through an action under K.S.A. 12-760. A decision is presumed reasonable and "is unreasonable when it is so arbitrary that it can be said it was taken without regard to the benefit or harm involved to the community at large, including all interested parties, and was so wide of the mark that its unreasonableness lies outside the realm of fair debate." The City of Emporia had not accepted the neighbors' arguments concerning noise from the substation, aesthetics, stray voltage, or public health and safety risk arising from electromagnetic fields. The Court found the City was not compelled to do so in light of the evidence that had been before the City and the limited scope of judicial review.

The neighbors also argued the district court erroneously refused to allow additional neighbors to join the lawsuit. Proposed additional plaintiffs sought to be added to the case after the 30-day deadline for filing a challenge had run. They argued to the Court of Appeals that K.S.A. 12-760 is silent as to whether other participants may join a timely challenge by another participant in the same proceedings without filing a timely and separate appeal. The Court of Appeals held that another plaintiff could not be joined because the time limitations are strictly applied, and allowing such a person to join as a plaintiff would circumvent the 30-day deadline to file a challenge to the zoning decision set out in K.S.A. 12-760(a).

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Creditors' Rights. Represent commercial creditors and financial institutions in protecting and recovering assets and property in foreclosures, bankruptcy and workouts.

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Mortgage Foreclosures/Workouts. Represent lenders in foreclosure of commercial properties, appointment of receivers, and collection of rents.

Natural Resources. Represent quarry owners in leasing and selling rock quarries. Represent oil and gas operators, lease owners and contractors over lease operations.

Tax Appeals. Prepare and process appeals of real estate tax valuations and assessments, including actions before the County Tax Appeals. Resolve issues with special assessments and improvement districts.

Title and Boundary Disputes. Represent landowners in disputes with adjoining neighbors over easements, fences, adverse possession, boundaries and trespass. Represent landowners, lenders and title insurers in title and lien priority disputes.

Title Insurance. Assist purchasers and lenders in securing appropriate title insurance coverage. Represent title insurance companies in claims.

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