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MICHIGAN LAND TITLE STANDARDS – Supplement No. 5 to 6th Edition (May 2018)

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2 – STANDARD 8.1 (12-14)

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6 -- nothing

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STANDARD 16.45 (05-18) (insert after
Standard 16.44 (12-14)

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STANDARD 31.1 (05-18) (insert after
Standard 30.3 (03-15)

STANDARD 31.2 (05-18) (insert after
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INDEX TO THE SIXTH EDITION
(through Supplement No.5, May,
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INDEX OF STANDARDS INCLUDED IN

SUPPLEMENT No. 5

MICHIGAN LAND TITLE STANDARDS

SIXTH EDITION

Standard	8.1
Standard	16.43
Standard	16.45
Standard	17.8
Standard	31.1
Standard	31.2

SUPPLEMENT No. 5

MICHIGAN LAND TITLE STANDARDS

SIXTH EDITION

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of the State Bar of Michigan

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PREFACE TO MICHIGAN LAND TITLE STANDARDS

SIXTH EDITION (through Supplement No. 5)

The Sixth Edition of Michigan Land Title Standards (including Supplement No. 1, Supplement No. 2, Supplement No. 3, Supplement No. 4 and Supplement No. 5) has been prepared by the Land Title Standards Committee of the Real Property Law Section of the State Bar of Michigan and published by the Real Property Law Section.

First published in the 1950s, the Michigan Land Title Standards is a series of selected statements of the law of land titles, as supported by applicable statutes and case law. Each Standard is a concise statement of a principle of law, accompanied by problems which illustrate the proper application of the principle. Each Standard includes specific references to the statutes and cases which provide the legal authority for the principle addressed. Some of the Standards include explanatory comments by the Committee.

The Committee has taken care to include only those principles of land title law which are clearly supported by the law of Michigan or, where applicable, by the law of the United States, and for which there are supporting statutes or published cases which are definitive in their effect or holding. Points of law that are subject to dispute or uncertainty, or as to which there are conflicting opinions, have not been included in the Standards, even if a particular interpretation may be commonly accepted in practice. The Standards are not intended as a treatise on land title law, but rather consist of selected statements of legal principles to guide lawyers on the legal effect of land title instruments.

The Standards have played a significant role in promoting the certainty and continuity of Michigan's principles of real property law, the importance of which was noted in a recent decision of our Supreme Court:¹

[I]f there is any realm within which the values served by stare decisis -- stability, predictability, and continuity -- must be most certainly maintained, it must be within the realm of property law. For this reason, "[t]his Court has previously declared that stare decisis is to be strictly observed where past decisions establish 'rules of property' that induce extensive reliance."

* * * *

The justification for this rule is not to be found in rigid fidelity to precedent, but conscience. . . . Judicial "rules of property" create value, and the passage of time induces a belief in their stability that generates

¹ 2000 *Baum Family Trust v Babel*, 488 Mich 136, 172; 793 NW2d 633, (2010), citing *Bott v Natural Resources Comm*, 415 Mich 45, 77-78; 327 NW2d 838 (1982).

commitments of human energy and capital.

During the more than 60 years since their initial publication, the Standards have come to be regarded as an authoritative reference on the law of land titles and other aspects of real property law as developed and interpreted in Michigan. Trial and appellate courts have frequently cited the Standards in support of the legal principles relied upon in decisions in real property cases. Indeed, the Michigan Land Title Standards are generally regarded as among the most complete and authoritative of all the state land title standards in the United States.

The Committee has been ably guided by the following Chairpersons: Ralph W. Aigler (1953-54), James H. Hudnut (1954-55), Ralph Jossman (1955-59), Cyrus M. Poppen (1959-61), Ray L. Potter (1961-63), Clarence W. Videan (1963-64), Reuben M. Waterman (1964-65), F. Norman Higgs (1965-66), T. Gerald McShane (1966-69), Frank L. Charbonneau (1969-71), James W. Draper (1971-74), Myron Winegarden (1974-76), Andrew Cooke (1976-78), Paul A. Ward (1978-80), John R. Baker (1980-83), Carl A. Hasselwander (1983-85), Janet L. Kinzinger (1985-88), Thomas C. Simpson (1988-90), Gerard K. Knorr (1990-91), Russell A. McNair, Jr. (1991-92), Anne H. Hiemstra (1992-93), C. Robert Wartell (1993-95), James R. Brown (1995-98), Dennis W. Hagerty (1998-2001), James E. Reed (2001-04), Robert D. Mollhagen (2004-07), Russell E. Prins (2007-10), James M. Marquardt (2010-13), Brian J. Page (2013-15), Catharine B. LaMont (2015 -17) and Lawrence M. Dudek (2017-18).

The Committee continuously reviews and revises the Standards and prepares new Standards to include new subject matter and authorities and to reflect changes in the law. New and revised Standards are published in periodic supplements. The Committee welcomes comments and suggestions from all interested members of the Bar.

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Lansing, Michigan
May, 2018

2017 - 2018
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CHAPTER VIII

CONVEYANCE BY AND TO TRUSTEES



STANDARD 8.1

DEED CREATING PASSIVE TRUST

STANDARD: A CONVEYANCE TO A TRUSTEE, WHO HAS NO POWER OF ACTUAL DISPOSITION OR MANAGEMENT OR UPON WHOM NO TRUST DUTIES ARE IMPOSED, CREATES A PASSIVE TRUST AND VESTS TITLE IN THE BENEFICIARY, IF LIVING, AND NOT IN THE NAMED TRUSTEE.

Problem: John Doe deeded Blackacre to “Richard Roe in trust for Mary Doe.” The deed contained no other reference to a trust. Investigation establishes that there is no will, declaration of trust or other instrument in which Roe is named as trustee for Mary Doe. Later, Mary Doe deeded Blackacre to Simon Grant. Roe did not join, either individually or as trustee. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Authorities: MCL 555.3 and MCL 555.5. *Ready v Kearsley*, 14 Mich 215 (1866); *Everts v Everts*, 80 Mich 222, 45 NW 88 (1890); *Rothschild v Dickinson*, 169 Mich 200, 134 NW 1035 (1912); *Woolfitt v Histed*, 208 Mich 308, 175 NW 286 (1919).

Comment: *Nash v Duncan Park Comm*, 304 Mich App 599, 848 NW2d 435 (2014), lv gtd on other grounds, 497 Mich 884, 854 NW2d 721 (2014), held that a deed which imposed active duties on the named grantee-trustees created a valid trust, and vested title in the trustees and not the trust beneficiary.

Note 1: The prudent title examiner should consider requiring a deed from the named trustee in addition to a deed from the beneficiary,

because of the difficulty in establishing with certainty whether a trust exists.

Note 2: The Qualified Dispositions in Trust Act (the “Act”), MCL 700.1041 *et seq.*, became effective on March 8, 2017. Subject to the provisions of section 5 of the Act, a transferor may retain an interest, as beneficiary, in real property transferred to a trust created under the Act free from claims of creditors. Section 4 of the Act provides that a transferor, as beneficiary, has the right to make certain fiduciary and administrative decisions regarding a trust created under the Act.

Section 10(2) of the Act states: “If any provision of this act conflicts with any provision of chapter 63 of 1846 RS 63, MCL 555.1 to 555.28, or the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8206, the provision of this act prevails.”

STANDARD 16.43

INADEQUACY OF BID PRICE AT SALE ON FORECLOSURE BY ADVERTISEMENT

STANDARD: MERE INADEQUACY OF THE BID PRICE AT A SALE ON FORECLOSURE BY ADVERTISEMENT IS NOT ITSELF SUFFICIENT TO INVALIDATE THE SALE.

Problem: Munising Bank made a \$500,000 loan to Shipwreck Inc. secured by a mortgage on Blackacre. Shipwreck defaulted, and Munising foreclosed the mortgage by advertisement. Munising purchased Blackacre at the foreclosure sale by credit bidding \$100,000 of the \$500,000 in outstanding debt. The true value of Blackacre at the time of the sale was \$500,000. Shipwreck sued to set aside the sale because the bid price was less than the true value of the property. Was the sale valid?

Answer: Yes.

Authorities: MCL 600.3280. *Cameron v Adams*, 31 Mich 426 (1875); *Chabut v Chabut*, 66 Mich App 440, 239 NW2d 401 (1976).

Comment A: A sale on foreclosure by advertisement will not be set aside based on an inadequate sale price absent fraud or irregularity. *Cameron v Adams*, *supra*; *Macklem v Warren Construction Co*, 343 Mich 334, 72 NW2d 60 (1955).

Comment B: In a foreclosure by advertisement, the mortgagor or other person liable on the mortgage debt may have a defense and a right of set-off to a deficiency claim under MCL 600.3280, if the real property sold was fairly worth the amount of the debt at the time and place of sale or if the amount bid was substantially less than its true value. MCL 600.3280. See, *DAGS II LLC v Huntington Nat'l Bank*, 865 F3d 384 (CA 6, 2017).

STANDARD 16.45

INTEREST ACQUIRED BY PURCHASER AT MORTGAGE FORECLOSURE SALE

STANDARD: UNLESS THE MORTGAGED REAL PROPERTY IS REDEEMED WITHIN THE STATUTORY REDEMPTION PERIOD, A SHERIFF'S DEED BECOMES OPERATIVE TO VEST IN THE PURCHASER THE INTEREST THE MORTGAGOR HAD IN THE MORTGAGED REAL PROPERTY AT THE TIME OF THE EXECUTION OF THE MORTGAGE, OR AT ANY TIME THEREAFTER, SUBJECT TO (A) ANY INTEREST, LIEN OR ENCUMBRANCE SUBSEQUENTLY CREATED TO WHICH THE MORTGAGE IS SUBORDINATED, AND (B) ANY INTEREST, LIEN OR ENCUMBRANCE SUBSEQUENTLY ATTACHING TO THE MORTGAGED REAL PROPERTY AND ACCORDED PRIORITY UNDER APPLICABLE LAW.

Problem A: Henry Roe mortgaged Lot 5 in Birmingham Subdivision to Abigail Lane. The recorded plat for Birmingham Subdivision contained an easement over the rear 10 feet of Lot 5 for sanitary sewer. Lane foreclosed the mortgage and purchased Lot 5 at the sheriff's sale. Following expiration of the statutory redemption period without redemption, did Lane acquire Lot 5 subject to the easement?

Answer: Yes.

Problem B: Acme LLC mortgaged Blackacre to Munising Bank in June 2010. In January 2012, an adjoining land owner granted Acme an appurtenant storm drainage easement over the adjoining land for the benefit of Blackacre. In April 2014, Munising Bank foreclosed the mortgage by judicial foreclosure and purchased Blackacre at the sheriff's sale. The sheriff's deed did not refer to the appurtenant easement. Following expiration of the statutory redemption period without redemption, did Munising Bank acquire an interest in the appurtenant easement?

Answer: Yes.

Problem C: Same facts as in Problem B. Acme leased Blackacre to Pictured Rocks Tours in 2013. Munising Bank did not subordinate its mortgage to the lease or agree not to disturb Pictured Rocks Tours' interest in Blackacre. Did the foreclosure terminate the leasehold interest of Pictured Rocks Tours?

Answer: Yes.

Problem D: Same facts as in Problem B. Acme granted Last Resort Bank a mortgage on Blackacre in 2013. Munising Bank did not subordinate its mortgage to the Last Resort Bank mortgage. Did Munising acquire Blackacre free and clear of the lien of the Last Resort Bank mortgage?

Answer: Yes.

Problem E: Same facts as in Problem B. In January 2012, Acme granted Cathy Brown an access easement over a part of Blackacre for the benefit of Brown's adjacent land. Munising Bank did not subordinate its mortgage to the easement. Was the easement extinguished by the foreclosure?

Answer: Yes.

Problem F: Acme LLC mortgaged Blackacre to Munising Bank in June 2010. Acme failed to pay the 2014 real property taxes. The county treasurer obtained a judgment of foreclosure for the unpaid 2014 taxes in 2017. The 2014 taxes were not paid by March 31, 2017. Did the county treasurer acquire title to Blackacre free and clear of Munising Bank's interest?

Answer: Yes.

Authorities: MCL 600.3130 (judicial foreclosure); MCL 600.3236 (foreclosure by advertisement).

Problem A: *Kirchen v Remenga*, 291 Mich 94, 288 NW 344 (1939).

Problem B: *First National Trust & Savings Bank v Smith*, 284 Mich 579, 280 NW 57 (1938).

Problem C: *Dolese v Bellow-Claude Neon Co*, 261 Mich 57, 245 NW 596 (1933); *Cheff v Edwards*, 203 Mich App 557, 513 NW2d 439 (1994).

Problem D: *Swarthout v Shields*, 185 Mich 427, 152 NW 202 (1915).

Problem E: *Hanson v Huetter*, 339 Mich 130, 62 NW2d 663 (1954).

Problem F: MCL 211.78(k)(5).

Comment A: The purchaser at a mortgage foreclosure sale acquires an equitable interest in the mortgaged real property which ripens into legal title if the property is not redeemed. This equitable interest can be sold or assigned by the purchaser. *Roff v Miller*, 189 Mich 558, 155 NW 517 (1915); *Dunitz v Woodford Apartments Co*, 236 Mich 45, 209 NW 809 (1926).

Comment B: The interest acquired by the purchaser at a mortgage foreclosure sale is or may be subject to certain non-consensual liens which arise after the time of the execution of the mortgage but are accorded priority under applicable law, including, for example, liens for unpaid real property taxes and assessments and construction liens. See, Chapters 22 and 17 respectively.

Comment C: In *First Nat'l Trust & Savings Bank v Smith*, *supra*, the court upheld the Bank's claim to ownership of an appurtenant access easement granted in favor of the mortgaged property after the mortgage was executed. The appurtenant easement was created by reservation in a deed and the reservation did not create any obligations on the part of the benefited property owner (other than obligations which might be implied by law). The Committee expresses no opinion as to whether the interest acquired by the purchaser is subject to an after-acquired appurtenant easement which creates obligations burdening the mortgaged property or the extent to which such obligations are binding on the purchaser.

Comment D: A mortgagee may unilaterally subordinate its mortgage to a junior lien or mortgage. MCL 565.391.

Note: See Standard 27.3 regarding the effect of a mortgage foreclosure on a lease made after the recording of a mortgage. See Standard

22.9-3 for the effect of a tax foreclosure on a mortgage. See Standard 16.1 regarding the lien of a mortgage on after-acquired title.

STANDARD 17.8

PRIORITY OF MORTGAGE, LIEN, ENCUMBRANCE OR OTHER INTEREST OVER CONSTRUCTION LIEN

STANDARD: A MORTGAGE, LIEN, ENCUMBRANCE OR OTHER INTEREST IN REAL PROPERTY RECORDED BEFORE THE FIRST ACTUAL PHYSICAL IMPROVEMENT HAS PRIORITY OVER A CONSTRUCTION LIEN, EXCEPT THAT A MORTGAGE ADVANCE AFTER THE FIRST ACTUAL PHYSICAL IMPROVEMENT DOES NOT HAVE PRIORITY OVER:

(A) A CONSTRUCTION LIEN UNLESS THE MORTGAGEE HAS FOR SUCH ADVANCE:

- (1) RECEIVED A CONTRACTOR'S SWORN STATEMENT PURSUANT TO MCL 570.1110;**
- (2) MADE THE ADVANCE PURSUANT TO THE SWORN STATEMENT; AND**
- (3) RECEIVED A WAIVER OF LIEN FROM THE CONTRACTOR AND EACH SUBCONTRACTOR, LABORER AND SUPPLIER WHO PROVIDED A NOTICE OF FURNISHING; OR**

(B) THE CONSTRUCTION LIEN OF A LIEN CLAIMANT NOT SET FORTH ON A CONTRACTOR'S SWORN STATEMENT IF THE LIEN CLAIMANT HAS:

- (1) PROVIDED A NOTICE OF FURNISHING BEFORE THE ADVANCE OR IS EXCUSED FROM PROVIDING A NOTICE OF FURNISHING PURSUANT TO MCL 570.1108, 570.1108a OR 570.1109; OR**
- (2) RECORDED A CLAIM OF LIEN BEFORE THE ADVANCE,**

UNLESS THE MORTGAGEE HAS RECEIVED FROM THE LIEN CLAIMANT EITHER:

(1) A FULL UNCONDITIONAL WAIVER OF LIEN; OR

(2) A PARTIAL UNCONDITIONAL WAIVER OF LIEN FOR THE FULL AMOUNT DUE THE LIEN CLAIMANT AS OF THE DATE THROUGH WHICH THE LIEN IS WAIVED AS SHOWN ON THE WAIVER OF LIEN, WHICH DATE IS WITHIN 30 DAYS BEFORE THE DATE OF THE ADVANCE.

Problem A: Charland Enterprises, Inc., the owner of Whiteacre, entered into a contract with Morris Construction, Inc. to build an office building on Whiteacre. On October 15, 2006, Main Bank recorded a mortgage given by Charland to secure a loan for construction of the building. On October 16, 2006, Charland recorded a notice of commencement against Whiteacre. The first actual physical improvement for the building construction occurred on October 24, 2006. Weadon Concrete Co., a subcontractor of Morris, provided materials for the building on November 1, 2006. On November 15, 2006, Main Bank made an advance under the mortgage for costs of construction of the building pursuant to a contractor's sworn statement. Main Bank did not obtain a waiver of lien from Weadon, which was listed on the sworn statement. On December 18, 2006, Weadon recorded a claim of lien against Whiteacre. Does the Weadon lien have priority over the advance?

Answer: Yes, because Main Bank did not obtain a waiver of lien from Weadon.

Problem B: Same facts as in Problem A, except that Weadon was not listed on the sworn statement but provided a notice of furnishing on November 1, 2006. Does the Weadon lien have priority over the advance?

Answer: Yes, because Main Bank did not obtain a waiver of lien from Weadon.

Problem C: Same facts as in Problem A, except that Weadon was not listed on the sworn statement, did not provide a notice of furnishing and was not excused from providing a notice of furnishing. Does the Weadon lien have priority over the advance?

Answer: No.

Problem D: Same facts as in Problem C, except that Weadon recorded a claim of lien before the date of the advance. Does the Weadon lien have priority over the advance?

Answer: Yes.

Problem E: Same facts as in Problem B, except that Charland did not record a notice of commencement and Weadon did not provide a notice of furnishing. Does the Weadon lien have priority over the advance?

Answer: Yes, because the failure to record the notice of commencement extends the time to provide the notice of furnishing.

Problem F: Same facts as in Problem E, except that Charland recorded a notice of commencement and Weadon contracted directly with Charland. Does the Weadon lien have priority over the advance?

Answer: Yes.

Authorities: Generally: MCL 570.1119(2), (3) and (4).

Problem E: MCL 570.1108(10).

Problem F: MCL 570.1109(1).

Comment A: The Committee expresses no opinion concerning whether “disbursement pursuant to a contractor’s sworn statement” in the third sentence of MCL 570.1119(4) requires the mortgagee (1) to obtain a waiver of lien from each contractor, subcontractor, laborer and supplier listed on the sworn statement which has not provided a notice of furnishing or is excused from providing a notice of furnishing, or (2) to make direct payments to each contractor, subcontractor, laborer and supplier pursuant to MCL 570.1110(7).

Comment B: The requirement that a notice of furnishing be provided may be excused under MCL 570.1108(10)-(13) (the failure of an owner, lessee or designee to record or, upon the request of the lien claimant, to provide a notice of commencement with a blank notice of furnishing attached with respect to an improvement to real property operates to extend the time within which the contractor, supplier or laborer may provide the notice of furnishing), MCL 570.1108a(9) and (10) (the failure of an

owner, lessee or designee, upon request of the lien claimant, to provide a notice of commencement with blank notice of furnishing attached with respect to an improvement to a residential structure operates to extend the time within which a contractor, supplier or laborer may provide a notice of furnishing) and MCL 570.1109(1) (if the contractor contracts directly with an owner or lessee).

Comment C: Generally, the construction liens of all lien claimants have equal priority based upon the date of first actual physical improvement. However, the amount of a construction lien entitled to priority vis-à-vis one or more advances under a mortgage is based upon separate determinations as to whether the construction lien has priority over or is subordinate to each advance under MCL 570.1119(4). These separate determinations can result in differing priorities among construction liens as to one or more mortgage advances.

Note: See Comment A to Standard 17.6 regarding the definition of “first actual physical improvement” and the priority of construction liens generally. See Standard 17.7 regarding the priority of construction liens if the first actual physical improvement occurs before a mortgage is recorded.

CHAPTER XXXI

RECEIVERSHIPS



STANDARD 31.1

DISPOSITION OF REAL PROPERTY IN OPERATION OF ORDINARY COURSE OF OWNER'S BUSINESS BY RECEIVER APPOINTED PURSUANT TO UNIFORM COMMERCIAL REAL ESTATE RECEIVERSHIP ACT

STANDARD: A RECEIVER OF REAL PROPERTY APPOINTED PURSUANT TO THE UNIFORM COMMERCIAL REAL ESTATE RECEIVERSHIP ACT MAY SELL, LEASE, LICENSE, EXCHANGE, OR DISPOSE OF RECEIVERSHIP REAL PROPERTY IN THE OPERATION OF THE ORDINARY COURSE OF THE REAL PROPERTY OWNER'S BUSINESS EXCEPT AS LIMITED BY ORDER OF THE COURT APPOINTING THE RECEIVER OR OTHER MICHIGAN LAW.

Problem A: Acme Subdivision Developers LLC's ordinary course of business was developing land into residential subdivisions and selling the resulting unbuilt residential lots. The circuit court entered an order appointing a receiver of one of Acme's subdivision developments, Blackacre Subdivision, pursuant to the Uniform Commercial Real Estate Receivership Act. Acme owned several unbuilt lots in the Subdivision, including Lot 20. The order appointing the receiver did not limit the receiver's power to sell unbuilt lots in Blackacre Subdivision in the operation of the ordinary course of Acme's business. Pursuant to a sales agreement entered into by the receiver, the receiver gave a deed describing Lot 20 of Blackacre Subdivision to Betty Builder Co. Did Betty Builder Co. acquire Acme's title to Lot 20?

Answer: Yes.

Problem B: Keystone Shopping Centers LLC’s ordinary course of business was owning and operating commercial shopping centers for lease to tenants. The circuit court entered an order appointing a receiver of one of Keystone’s shopping centers, The Shoppes, pursuant to the Uniform Commercial Real Estate Receivership Act. The order appointing the receiver did not limit the receiver’s power to lease space in The Shoppes in the operation of the ordinary course of Keystone’s business. The receiver entered into a lease agreement with Gwendolyn’s Store, Inc. for the lease of Retail Suite A in The Shoppes for three years. Did Gwendolyn’s Store, Inc. acquire a leasehold interest in Retail Suite A under the terms of the lease?

Answer: Yes.

Authorities: MCL 554.1015(2) and 554.1022(1)(b).

Comment A: The Uniform Commercial Real Estate Receivership Act, 2018 PA 16, MCL 554.1011, *et seq.* (the “Act”), has an effective date of May 7, 2018, and does not apply to a receivership for which the receiver was appointed before the Act’s effective date. MCL 554.1038 and 554.1040.

Comment B: MCL 554.1014(1) provides that the Act “applies to a receivership for an interest in real property and any personal property related to or used in operating the real property,” except as otherwise provided in MCL 554.1014(2) or (3).

MCL 554.1014(2) provides that the Act does not apply to “a receivership for an interest in real property improved by 1 to 4 dwelling units unless 1 or more of the following applies: (a) The interest is used for agricultural, commercial, industrial, or mineral-extraction purposes, other than incidental uses by an owner occupying the property as the owner’s primary residence. (b) The interest secures an obligation incurred at a time when the property was used or planned for use for agricultural, commercial, industrial, or mineral-extraction purposes. (c) The owner planned or is planning to develop the property into 1 or more dwelling units to be sold or leased in the ordinary course of the owner’s business. (d) The owner is collecting or has the right to collect rents or other income from the property from a person other than an affiliate of the owner.”

MCL 554.1014(3) provides that the Act does not apply to a receivership authorized by Michigan law other than the Act in which the receiver is a governmental unit or an individual acting in an official capacity on behalf of the governmental unit except to the extent provided by the other Michigan law.

Comment C: The Act does not contain a definition of “ordinary course of business.” See Comment 2 to Section 12 of the National Conference of Commissioners on Uniform State Laws’ published Uniform Commercial Real Estate Receivership Act with Prefatory Notes and Comments dated July 29, 2016.

Note: See Standard 31.2 regarding transfers of receivership real property not in the ordinary course of the business of the real property owner.

STANDARD 31.2

TRANSFER OF REAL PROPERTY NOT IN ORDINARY COURSE OF OWNER'S BUSINESS BY RECEIVER APPOINTED PURSUANT TO UNIFORM COMMERCIAL REAL ESTATE RECEIVERSHIP ACT

STANDARD: A RECEIVER OF REAL PROPERTY APPOINTED PURSUANT TO THE UNIFORM COMMERCIAL REAL ESTATE RECEIVERSHIP ACT MAY TRANSFER THE RECEIVERSHIP PROPERTY BY SALE, LEASE, LICENSE, EXCHANGE, OR OTHER DISPOSITION NOT IN THE ORDINARY COURSE OF THE PROPERTY OWNER'S BUSINESS IF THE TRANSFER IS APPROVED BY ORDER OF THE CIRCUIT COURT WITH JURISDICTION OVER THE RECEIVERSHIP. UNLESS THE AGREEMENT OF SALE PROVIDES OTHERWISE THE SALE IS FREE AND CLEAR OF A LIEN OF THE PERSON THAT OBTAINED APPOINTMENT OF THE RECEIVER, ANY SUBORDINATE LIEN, AND ANY RIGHT OF REDEMPTION, BUT IS SUBJECT TO A SENIOR LIEN.

Problem A: Investment LLC owned Blackacre, which was improved with a four-story office building and encumbered by three separate mortgages. The second-priority mortgagee obtained a circuit court order appointing a receiver pursuant to the Uniform Commercial Real Estate Receivership Act. The order included Blackacre in the description of the receivership property. Later, the circuit court entered an order approving the sale of Blackacre by the receiver to Acquisition LLC not in the ordinary course of Investment LLC's business, pursuant to a sales agreement that was silent on whether the sale was free and clear of liens or redemption rights. At the closing of the sale, the receiver gave a deed describing Blackacre to Acquisition LLC. Did Acquisition LLC acquire Investment LLC's title to Blackacre?

Answer: Yes.

Problem B: Same facts as in Problem A, except that neither the order appointing the receiver nor the order approving the receiver's sale of Blackacre included Blackacre in the description of the

receivership property. Did Acquisition LLC acquire Investment LLC's title to Blackacre?

Answer: No.

Problem C: Same facts as in Problem A. Did Acquisition LLC acquire Investment LLC's title to Blackacre free and clear of the second- and third-priority mortgages and corresponding redemption rights?

Answer: Yes.

Problem D: Same facts as in Problem A. Did Acquisition LLC acquire Investment LLC's title to Blackacre free and clear of the first-priority mortgage and corresponding redemption rights?

Answer: No.

Authorities: MCL 554.1012(p) and 554.1026(3).

Comment A: A lien on receivership real property that is extinguished by a transfer under MCL 554.1026(3) attaches to the proceeds of the transfer with the same validity, perfection, and priority the lien had immediately before the transfer, even if the proceeds are not sufficient to satisfy all obligations secured by the lien. MCL 554.1026(4).

Comment B: A creditor holding a valid lien on receivership real property to be transferred under MCL 554.1026(3) may purchase the property and offset against the purchase price part or all of the allowed amount secured by its lien if the creditor tenders funds sufficient to satisfy in full the reasonable expenses of transfer and the obligation secured by any senior lien extinguished by the transfer. MCL 554.1026(5).

Comment C: The reversal or modification on appeal of an order approving a transfer of receivership real property under MCL 554.1026(3) will not affect the validity of the transfer to a person that acquired the property in good faith or revive against the person any lien extinguished by the transfer, even if the person knew before the transfer of the request for reversal or modification, unless the order approving the transfer of the property was stayed before the transfer. MCL 554.1026(6). "Good faith" for this purpose is defined in MCL 554.1026(1) to mean "honesty in

fact and the observance of reasonable commercial standards of fair dealing.”

Comment D: The Uniform Commercial Real Estate Receivership Act does not contain a definition of “ordinary course of business.” See Comment 2 to Section 12 of the National Conference of Commissioners on Uniform State Laws’ published Uniform Commercial Real Estate Receivership Act with Prefatory Notes and Comments dated July 29, 2016.

Note: See Standard 31.1 regarding dispositions of receivership real property in the operation of the ordinary course of the business of the real property owner.

MICHIGAN LAND TITLE STANDARDS

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