

WEST LEGAL STUDIES IN BUSINESS  
ACADEMIC SERIES

# REAL ESTATE LAW

EIGHTH EDITION



MARIANNE M. JENNINGS

...

WEST LEGAL STUDIES IN BU  
ACADEMIC SERIES

# REAL ESTATE LAW

EIGHTH EDITION



...

**MARIANNE M. JENNINGS**

*Professor of Legal and Ethical Studies  
W.P. Carey School of Business  
Arizona State University  
Member of the Arizona State Bar*

THOMSON



Australia • Brazil • Canada • Mexico • Singapore • Spain • United Kingdom • United States



**Real Estate Law**  
Marianne M. Jennings

**VP/Editorial Director:**

Jack W. Calhoun

**Editor-in-Chief:**

Rob Dewey

**Acquisitions and Developmental  
Editor:**

Steve Silverstein

**Marketing Manager:**

Jennifer Garamy

**Associate Content Project Manager:**

Scott Dillon

**Managing Technology Project  
Manager:**

Pam Wallace

**Associate Technology Project  
Manager:**

Rob Ellington

**Manufacturing Coordinator:**

Kevin Kluck

**Senior Art Director:**

Michelle Kunkler

**Cover and Internal Designer:**

Ke Design, Cincinnati

**Cover Image:**

© Joe Sohm/Getty Images, Inc.

**Production House:**

Integra Software Services (P) Ltd.

**Printer:**

Thomson West

Eagan, MN

COPYRIGHT © 2008, 2005  
Thomson South-Western, a part  
of The Thomson Corporation.  
Thomson, the Star logo, and South-  
Western are trademarks used herein  
under license.

Printed in the United States of  
America

1 2 3 4 5 10 09 08 07

ISBN 13: 978-0-324-65020-4

ISBN 10: 0-324-65020-5

**ALL RIGHTS RESERVED.**

No part of this work covered  
by the copyright hereon may  
be reproduced or used in any  
form or by any means—graphic,  
electronic, or mechanical, including  
photocopying, recording, taping,  
Web distribution or information  
storage and retrieval systems, or in  
any other manner—without the  
written permission of the publisher.

For permission to use material from  
this text or product, submit a request  
online at <http://www.thomsonrights.com>.

Library of Congress Control  
Number: 2007925969

For more information about our  
products, contact us at:  
Thomson Learning Academic  
Resource Center  
1-800-423-0563

**Thomson Higher Education**

5191 Natorp Boulevard  
Mason, OH 45040  
USA



# PREFACE

Since the time that the 7th edition of *Real Estate Law* was published, the dull, old area of real estate law has suddenly catapulted to the front page of newspapers and become a topic of heated debate. The housing market exploded around the country, and economic development, coupled with the taking of property, caught the eye of even the U.S. Supreme Court. NIMBYs (not in my backyard) caught our attention for their vocal objections and lawsuits. NoWIMPs (not with my property) were challenging takings and gaining ballot propositions to control eminent domain. Housing prices skyrocketed, but low interest rates still brought record numbers of buyers into the home markets. Many of those buyers took on sizeable mortgages that have left them and us with questions, yet again, about adjustable rate mortgages. And then came the subprime lenders. Real estate value has attracted investors interested in its infamous profits from a “flip,” or quick sale. And then we have experienced the tyranny and benefits of homeowners’ associations. They control everything from the color of houses to the monthly fees to whether owners can fly flags.

It feels as if muddling old real estate law has become the topic on the tip of everyone’s tongues since the time of the 7th edition. The conversations bring questions: How much power does this homeowners’ association have? Can the city really take my property to put in a Bass Pro Shop? And this ARM is still a hefty mortgage, can I get out of it? There are market pressures, fast-moving transactions, and even some who would take advantage of a thriving market and high demand. As a result, there are new laws and regulations affecting everything from listing agreements to homeowners’ associations to economic development and takings. The events of September 11, 2001, continue to affect real estate transactions via the Patriot Act and required disclosures on the transfer of property via escrow agents (see Chapter 16 for more information).

*Real Estate Law* has been a practical and hands-on study of the laws affecting real property since the time of the first edition in 1984. However, now in its 23rd year and 8th edition, *Real Estate Law* charts new territory with its clear and cutting-edge coverage of everything from the basics to the new issues and laws that affect real property.

This edition continues its focus on the three-step approach to understanding the laws that affect real estate:

1. A clear explanation of the applicable laws
2. An example, a case, or a Consider question to help the reader see the application of the law in a particular circumstance.
3. Review materials for self-testing on the concepts presented, such as more Considers and the chapter problems.

You find no feudal land systems or archaic terms as a focus of this text. Brokers faced with dual-representation issues need clear discussions of the law and how to apply it. Partners, couples, and putative spouses continue to have their disputes over property with new categories of rights in those relationships. Home buyers faced with questions about their homeowners’ association need simple explanations of their rights (see Chapter 11). What the 8th edition continues to offer is a format for learning and understanding.

Most real estate books favor a black-letter law approach in which the laws, rules, and terms are presented, but few or no cases and examples help students and

professionals grasp the concept and understand how it affects their decisions, rights, and planning.

This is a book that continues to address the real-life situations that those involved in real property transactions encounter. The problems and cases in this and previous editions have been developed through classroom use and experience from my 30 years of teaching. This teaching approach allows the students to really understand and grasp the material, and they are able to use their problem-solving skills in their professional and personal real estate transactions. If there were ever a remark I dreaded to hear from a student, it was, "I'll never use this." Each chapter shows students how they will use the material.

*Real Estate Law* has long been an innovative book that showed that the law of real property need not be a boring subject. Within the pages of the 8th edition the reader will find a judicial decision on the validity of Barry Bonds' prenuptial agreement; the *Kelo* case that changed eminent domain forever; several NIMBY cases; a case on whether drug use should preclude an individual from being a licensed real estate agent; a decision that explains when emotional issues related to a property's use must be disclosed; and an update on the legislative activity in this highly emotional area! Readers can study what happens when buyers try to avoid a real estate agent in order to escape paying the agent's commission. They can also learn when minimum-age requirements for housing are valid and what a landlord can do when a tenant is using or selling drugs in the rented property. And what happens when a homeowners' association tries to foreclose on your property for not paying your fines?

This book does not turn its readers into real estate lawyers; however, it does train the lay person to spot legal issues and important areas in which extra caution, and perhaps legal advice, is warranted. The reader will understand the material, but the ghosts, the baseball players, and the eccentric nude tenant will help make the principles learned endure.

---

## **The Revised Edition**

As the saying goes, "If it ain't broke, don't fix it." The 1st through 7th editions of *Real Estate Law* were well received by students and instructors. Indeed, many brokers, agents, developers, and lawyers have found it to be a useful handbook. It has proved to be a successful textbook as well as a practical guide for those in the industry. The 8th edition continues the successful and unique features of previous editions.

However, we do listen when feedback comes, and the complexion of the real estate industry has changed over the 23 years of this book's publication. This edition brings a few organizational changes and a number of expanded topics. The chapter on multiunit housing has been renamed to reflect increased coverage of homeowners' associations in all types of home ownership. The chapter on land development has been reorganized and revamped to reflect the dramatic increase in issues related to economic development. This edition continues its coverage of the social issues related to real estate ownership, including group homes, social-issue zoning, issues related to the Americans with Disabilities Act, Section 8 housing, environmental issues, and the evolving law on disclosures on so-called meth houses and other property use and location issues.

*Real Estate Law*, 8th edition, has new materials, updated materials, and some reorganization, but the color, excitement, and interest levels of the first seven editions have only increased. There has, yet again, been substantial rewriting to rid us of the passive voice, which has been reduced slowly but surely through each edition. The reworking

brings yet more life to real property. Activism in real estate law issues has brought even more real life to this edition.

---

## **Organization**

The 8th edition carries through the four-part organization. Part 1 covers the basics of real estate law: the nature of real estate and real estate interests, included to provide the students with a richer backdrop earlier in the text. “Land Interests: Present and Future” remains as Chapter 2 so that students have the big picture of the types of ownership and land interests before delving into specific issues related to land ownership, such as easements and liens. New to this edition is the restructuring of Chapter 11 on multiunit interests to expand the coverage of the dynamic area of association law and the rights of owners.

Part 2 focuses exclusively on legal issues related to the types of land ownership. Part 3 remains a collection of all the legal issues involved in all types of transfers of title to property. Part 3 takes the transfer of property from listing agreement to financing to closing of escrow.

Part 4 continues to cover the issues related to land use and development such as zoning, environmental concerns, and constitutional rights and constraints with regard to land use and transfer, with the order of the chapters varied slightly to strengthen the flow of the material. The combined chapter on real estate development, first introduced in the 6th edition, has changed substantially in this edition to reflect the critical role of economic development projects and local governments in the land development process. This chapter, because of its topics of significance, has been moved ahead of the final chapter on tax issues.

The structure of the 8th edition still allows instructors to cover chapters as they see fit and even reorder the coverage. Cross-references in all chapters help with such restructuring and can show students how the chapter pieces fit together to supply them with an understanding of all the laws and regulations affecting real property.

---

## **Text Features**

### **Cases**

Very few real estate law books have the benefit of reported cases. The cases used are colorful illustrations of points covered in the descriptive materials. I have rewritten the facts of the cases in order to simplify the court’s language and help students attain a clear grasp of the facts before they begin to read and understand the judicial opinion. After the judge’s name is listed, the language of the court begins. However, I have also carefully edited the opinions chosen and reduced their length in order to be sure students grasp the point and the court’s analysis. There are new cases throughout the 8th edition, many of them with 2006 dates.

### **Case Questions**

The restatement of case facts and significant editing help students grasp even the most complex judicial decisions on real property law. However, to be sure that the students understand the case decisions, each case is followed by Case Questions to review facts and findings and to help the students think about what they have read and how to apply it. The case questions ensure that the readers understand both the facts of the case and the conclusion of the court.

## **Practical Tips**

Highlighted suggestions for avoiding legal problems and litigation in real estate, called Practical Tips, have been updated and appear in each chapter. These tips include lists, questions, and ways to avoid the problems that caused the litigation in the chapter cases and Considers. The tips provide yet another practical component to the text and increase its value as a handbook.

## **Consider Questions**

Numbered Consider questions, appearing immediately after their applicable text material, help readers grasp the segments of each chapter as they read along. These questions refine reading habits as well as improve comprehension.

## **Ethical Issues**

Continuing this popular feature, this edition includes updated Ethical Issues for each chapter. These real and hypothetical problems allow students to discuss and debate real-world dilemmas that real estate professionals face regularly.

## **Web Exhibits**

First introduced in the 6th edition, the forms that took up great amounts of text space have been omitted from the text and noted with a Web Exhibit designation. These exhibits are found on the text website; this process enables students and instructors to see the most up-to-date forms that are discussed in the text and frees up the text for coverage of more material. Simply go to the website at **[www.thomsonedu.com/westbuslaw/jennings](http://www.thomsonedu.com/westbuslaw/jennings)**, click on the title of this edition, and then, on the menu to the left, choose Internet Applications to select the correct chapter and exhibit.

## **Charts, Diagrams, and Illustrations**

Throughout the book, charts, diagrams, and illustrations aid readers' understanding of the lengthy and complex topics. For example, there are charts and diagrams depicting the relationships of land interests, Article 9 security interests, easements, and the relationships between and among contractors and subcontractors. This edition offers PowerPoint slides for instructors to use that include the figures from the chapters as well as additional diagrams, problems, illustrations, and charts to help with teaching.

## **Cautions and Conclusions**

Each chapter concludes with Cautions and Conclusions, a feature that wraps up the issues addressed in the chapter. In some chapters, there are precautions, recommendations, or points critical for real estate transactions and professionals in the real world. In other chapters, these are conclusions to be drawn from reading the material covered.

## **Chapter Problems**

Most of the end-of-chapter problems are actual cases, with the case citations. Answers are provided in the *Instructor's Manual/Test Bank*. The cases are short enough to spark interest and yet detailed enough to allow discussion and review of the chapter

concepts. Many chapter problems were once cases in the 1st through 7th editions and have become end-of-chapter review problems as new cases replaced them. Some of the previous cases are found in full in the *Instructor's Manual/Test Bank* so that an instructor could copy and distribute the case to have the students read for purposes of determining the answer to the chapter problems.

## Glossary

The glossary of key terms appears at the end of the text and provides short definitions of the terms that are bold-faced in the text.

## Supplemental Items

---

### ***Instructor's Manual/Test Bank (ISBN: 0-324-26995-1)***

The *Instructor's Manual/Test Bank* was designed to help in lecture preparation. Each chapter is outlined in detail, with examples and illustrations of each of the chapter points. The cases are briefed within the outline as they appear in the text. Answers to all of the Case Questions, Consider questions, and Chapter Problems are provided in the *Instructor's Manual/Test Bank*. Also included are discussion suggestions and resolution for the Ethical Issues.

Each chapter in the *Instructor's Manual* has a list of books and law review articles called Resources. These materials can be used to enhance the instructor's understanding of a topic. They have been updated for this edition.

Some cases that were eliminated from the 1st through 7th editions to make way for new ones have been added to the *Instructor's Manual/Test Bank* to provide supplemental readings for class use. Interactive learning exercises for each chapter, called In-Class Exercises, are again provided in this edition.

Also included in the manual are sample examination questions. There are true/false, multiple-choice, and essay questions for each chapter. The true/false questions are easier and can be used for a quick review quiz. The multiple-choice and essay questions require the students not only to know the laws and materials covered but to think and apply them to various scenarios that differ from any presented in the cases, Considers, and problems in the chapter. This edition offers a still larger menu from which instructors can select questions.

### ***Real Estate Law Website***

The website for *Real Estate Law*, at [www.thomsonedu.com/westbuslaw/jennings](http://www.thomsonedu.com/westbuslaw/jennings), contains supplements, Internet materials from the text, Web Exhibits, case updates, and links to other useful West Legal Studies sites, including West's Legal Resources Center. The Resources Center provides course support for students and instructors.

### ***eCoursepacks***

eCoursepacks provide a tailor-fit, easy to use, and online companion for your course. eCoursepacks give educators access to content from thousands of current popular, professional, and academic periodicals; business and industry information from Gale; and the ability to easily add your own material. Permissions for all eCoursepack content are already secured, saving you the time and worry of securing rights.

eCoursepacks' online publishing tools also save you time, allowing you to quickly search the databases and make selections, organize all your content, and publish the



final online product in a clean, uniform, and full-color format. eCoursepacks are the best way to provide your audience with current information easily, quickly, and inexpensively. To learn more, visit <http://ecoursepacks.swlearning.com>.

## Videos

Videos are available to qualified adopters using this text. You may be eligible to access the entire library of West videos, a vast selection covering most business law issues. There are some restrictions, and if you have questions, please contact your local Thomson Learning/West Legal Studies Sales Representative or visit [http://www.westbuslaw.com/video\\_library.html](http://www.westbuslaw.com/video_library.html).

---

## Debts of Gratitude

Although only my name appears on this book, I cannot claim it as my book alone. As with all achievements in my life, my finished work is the result of the cooperation, work, and sacrifice of many. I cannot name everyone who has helped me in my continuing evolution as an author, but there are those who warrant special note for their efforts in bringing this work to publication:

- Dick Crews, my original editor, who had the educational foresight to see the need for this book and who has been proven correct through the success of seven editions. In 1983 Dick said, “Your book will be around for a long time.” Twenty years and counting.
- James Moody, my dad, a never-ending source of stories, fodder, and the right thing to do when buying and selling real estate.
- Steve Silverstein, the acquisitions editor who stepped in to take over as Developmental Editor
- My patient and tolerant Production Editor Scott Dillon, whose job it was to be patient as I slipped on sending things in.
- My students who continue to teach me how to improve *Real Estate Law*
- Kris Tabor, my long-suffering friend and assistant, who handles the unenviable tasks of word processing my scribbles into a polished instructor’s manual
- The instructors who use *Real Estate Law* and communicate with me via e-mail to update me, correct me, and offer their insights on teaching
- The reviewers for this edition for their work in offering improvements and suggestions. My thanks to the following reviewers:
  - Hakim Ben Adjoua, Columbus State Community College
  - Dr. Ronald C. Goldfarb, Middlesex County College
  - Karen A. Holmes, Hudson Valley Community College
  - Ann Morales Olazábal, University of Miami
  - William C. Weaver, University of Central Florida
- All of the Realtors, developers, lenders, lawyers, and companies that have consented to have their forms and works reproduced in this text in order to make the experience of learning hands-on for the students. Their dedication to education is evidenced by their complete cooperation in granting permission for these items to be used.
- Last, but certainly not least, I am grateful to my husband, Terry, and my children, Sarah, Sam, and John, who sacrifice some of their quality time with me as I hover over the computer. Their “How many chapters do you have left?” keeps me going. I am grateful that they care and are involved. Their presence with me

in my office, lying on the floor doing their homework as I worked, is something I cherish. During the production of this edition, our darling daughter Claire passed away after nearly 20 years of a life with profound disabilities. Her stamina, her patience, her cheerfulness, and her willingness to endure remain with me as reminders of what we can do if we but forge onward. And so we do, but always with her example as the goal.

---

## **A Word for Students**

In using this book, read the material that describes the law first. Follow that by reading the cases that appear in each section. Answer the case questions after each case to make sure that you understood the case and that you grasped the issues and principles of law. Try to solve the Consider questions and Chapter Problems on your own before the instructor gives you the answers. If you can solve all the Consider and Chapter Problems, you understand the chapter material. The figures in chart form are designed to streamline ideas and summarize lengthy topics so that you can commit the concepts to memory. The charts are an excellent form of review for examinations and quizzes. Also visit the text's website for important case updates and other useful links.

If you would like to consult the Uniform Commercial Code, especially Article 9 on secured transactions, you can go to <http://www.nccusl.org>, or to <http://www.law.cornell.edu/ucc/ucc.table.html>.

Finally, remember to apply what you have learned when your course is over. Application is the true test of learning. Good luck with the book and its application. Enjoy the color and flavor of real estate law—it is abundant in this book. And I am always happy to hear from you, at [marianne.jennings@asu.edu](mailto:marianne.jennings@asu.edu)

*Marianne M. Jennings*

# BRIEF CONTENTS

## **Preface** *xiii*

### **Part 1: The Nature of Real Estate and Ownership of Real Estate Interests**

- 1 Introduction and Sources of Real Estate Law 1
- 2 Land Interests: Present and Future 17
- 3 Extent of Real Estate Interests 39
- 4 Nonpossessory Interests in Real Estate 71
- 5 Fixtures 93
- 6 Liens 113
- 7 Describing Land Interests 139

### **Part 2: Real Estate Ownership**

- 8 Co-ownership of Real Estate 157
- 9 The Landlord–Tenant Relationship 185
- 10 Commercial Leases 219
- 11 Real Estate Communities: Multiunit Interests and Owners’ Associations 251

### **Part 3: Transferring Title to Real Estate**

- 12 The Broker’s Role in the Transfer of Real Estate 287
- 13 Methods of Transfer and Conveyance in Real Estate 331
- 14 The Purchase Contract 367
- 15 Financing in the Transfer of Real Estate 407
- 16 Closing the Deal 457
- 17 Transferring Real Estate after Death: Wills, Estates, and Probate 485

### **Part 4: Real Estate and Economic Development**

- 18 Zoning 517
- 19 Constitutional Issues in Real Estate 543
- 20 Environmental Law 567
- 21 Legal Issues in Land and Economic Development 595
- 22 Tax Aspects of Real Estate Ownership and Transfer 627

### **Appendices**

- Appendix A The United States Constitution (Excerpts) 647
- Appendix B The Sherman Act 659
- Appendix C The Fair Housing Act 661
- Appendix D Interstate Land Sales Full Disclosure Act (ILSFDA) 665
- Appendix E Truth-in-Lending Act 669
- Appendix F Real Estate Settlement Procedures Act 673

### **Glossary** 679

### **Index** 695

# CONTENTS

## Part I: The Nature of Real Estate and Ownership of Real Estate Interests

### Chapter 1: Introduction and Sources of Real Estate Law 1

SOURCES OF REAL ESTATE LAW	1
The United States Constitution	2
Federal Legislative Enactments	3
Federal Administrative Regulations	4
State Constitutions	5
State Legislative Enactments	5
State Administrative Regulations	6
County, City, and Borough Ordinances	6
Private Law	6
Court Decisions	7

*Solow v. Wellner* 8

*Poyck v. Bryant* 10

JUSTIFICATION FOR STUDYING REAL ESTATE LAW:	
SOME CAUTIONS AND CONCLUSIONS	13
The Most Frequently Asked	
Real Estate Questions	13

### Chapter 2: Land Interests: Present and Future 17

LAND INTERESTS—FREEHOLD ESTATES AND ACCOMPANYING FUTURE INTERESTS	19
Freehold Estates	19
Fee Simple Absolute Ownership	19
Fee Simple Defeasible	19
Fee Simple Determinables and Possibility of Reverter	19
Possibility of Reverter—The Fee Simple Determinable Future Interest	19
Fee Simple Subject to a Condition Subsequent	20
Right of Entry/Power of Termination	20
<i>AKG Real Estate, LLC v. Kosterman</i>	21
Fee Tail Ownership	23
Life Estate Ownership	23
Rights of Life Tenants	24
Reversions	24
Remainders	25
Executory Interests	27
SPECIAL RULES GOVERNING INTERESTS IN LAND	29
Rule in Shelley's Case	29
<i>Lusk v. Broyles</i>	29

Doctrine of Worthier Title	30
Rule Against Perpetuities	30
<i>Texaco Refining and Marketing, Inc. v. Samowitz</i>	32

LAND INTERESTS—NONFREEHOLD ESTATES	34
------------------------------------	----

ECONOMICS OF LAND INTERESTS	34
-----------------------------	----

CAUTIONS AND CONCLUSIONS	35
--------------------------	----

### Chapter 3: Extent of Real Estate Interests 39

LAND INTERESTS ABOVE THE SURFACE	39
Air Rights	39
<i>United States v. Causby</i>	40
The Right to Light	43
<i>Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.</i>	44
Right to a View	46
<i>Pierce v. Northeast Lake Washington Sewer and Water District</i>	47

SURFACE AND SUBSURFACE RIGHTS	49
Mineral Rights: Oil and Gas Ownership	50
Geothermal Energy	53
Water Rights	53
<i>Stupak-Thrall v. United States</i>	55

PROTECTION OF PROPERTY RIGHTS	58
Trespass	58
Nuisance	59
<i>Spur Industries, Inc. v. Del E. Webb Development Co.</i>	60

DUTIES OF LANDOWNERS	62
Trespassers	62
Licensees	62
Invitees	62
Breach of Duty	63
<i>Paragon Family Restaurant v. Bartolini</i>	64

CAUTIONS AND CONCLUSIONS	66
--------------------------	----

### Chapter 4: Nonpossessory Interests in Real Estate 71

EASEMENTS	71
Types of Easements: Appurtenant v. Easements in Gross	71



Types of Easements: Affirmative v. Negative Easements 72  
 The Parties: Dominant v. Servient Estates 73  
 Creation of Easements 73

*Frierson v. Watson* 74

*Thomas v. Madsen* 77

*Carnahan v. Moriah Property Owners Association, Inc.* 80

Scope and Extent of Easements 82

*Garfink v. Cloisters at Charles, Inc.* 83

Termination of Easements 87

PROFITS 88

LICENSES 88

COVENANTS 89

CAUTIONS AND CONCLUSIONS 90

## **Chapter 5: Fixtures 93**

DEFINITION OF A FIXTURE 93

Degree of Annexation Test 93

Nature and Use of the Property 94

Relationship Between Annexor and Premises 94  
 Intent 94

Trade Fixtures 95

Who Wants to Know? 95

*Kohn v. Darlington Community School District* 96

*Custer v. Bedford County Bd. of Assessment and  
 Revision of Taxes* 98

A Word on Precautions 102

Attachments 102

TRANSFER OF TITLE TO FIXTURES AND  
 PERSONAL PROPERTY 103

CREDITORS' RIGHTS IN FIXTURES 103

Scope of Article 9 104

Creation (Attachment) of Security  
 Interest (9-203) 104

Purchase Money Security Interest in  
 Fixtures (9-103) 105

Perfection of Security Interest (9-301) 105

General Rules of Priority Among Secured  
 Creditors (9-317) 106

Exceptions to General Rules 106

Default by Debtor and Rights of  
 Secured Party (9-604) 108

CAUTIONS AND CONCLUSIONS 109

## **Chapter 6: Liens 113**

TYPES OF LIENS 113

Statutory Liens 113

Equitable Liens 114

Voluntary vs. Involuntary Liens 114

Judicial Liens 114

Mechanic's and Materials Liens 114

CREATION OF MECHANIC'S LIENS 115

Who Is Subject to Lien? 115

*R.T.B.H., Inc. v. Simon Property Group* 115

Who Is Entitled to a Lien? 118

*Haz-Mat Response, Inc. v. Certified Waste Services  
 Limited* 119

*Ontiveros v. Sanchez* 121

*North Bay Const., Inc. v. City of Petaluma* 125

What Property Is Subject to a Lien? 127

PROCEDURAL ASPECTS OF OBTAINING A LIEN 127

PRIORITY OF LIEN INTERESTS 128

Attachment of Lien 128

Rights of Purchasers 129

*DLF Trucking, Inc. v. Bach* 129

Priority Among Mechanic's Liens 131

Mechanic's Liens and Fixture Filings 132

Mechanic's Liens and Homestead Exemption 132

Mechanic's Liens and Mortgages 132

TERMINATION OF MECHANIC'S LIENS 132

Waiver or Release by Agreement 132

LIEN ALTERNATIVES 133

CONSTITUTIONALITY OF MECHANIC'S LIENS 133

CAUTIONS AND CONCLUSIONS 134

## **Chapter 7: Describing Land Interests 139**

METHODS OF DESCRIBING LAND INTERESTS 139

Metes and Bounds 139

*Foreman v. Sholl* 140

Plat Map 141

Government Survey 143

*Triplett v. David H. Fulstone Co.* 146

ADEQUACY OF DESCRIPTIONS 147

Description by Popular Name 147

*Wadsworth v. Moe* 147

Description by Street Number 148

*Reiland v. Patrick Thomas Properties, Inc.* 148

General Conveyances 150

Impermanent Descriptions 150

Interpretation of

Descriptions 150

*Withington v. Derrick* 151

CAUTIONS AND CONCLUSIONS 153

## Part 2: Real Estate Ownership

### Chapter 8: Co-ownership of Real Estate 157

#### METHODS OF CO-OWNERSHIP 157

Tenancies in Common 158

Joint Tenancies 158

The Language of a Joint Tenancy 158

Other Requirements for Joint Tenancy Creation:  
The Unities 159

*In re Estate of Quick* 160

Tenancies by Entirety and Other Survival Marital  
Property Interests 163

Tenancy in Partnership 163

#### CREDITORS' RIGHTS AND CO-OWNERSHIP 164

*Gayton v. Kovanda* 164

#### RIGHTS AND RESPONSIBILITIES OF COTENANTS 165

Rents 165

Expenditures 166

Partition and Ouster 167

#### MARITAL PROPERTY RIGHTS—CO-OWNERSHIP BY MARRIAGE 167

The Common Law—Dower Rights 168

*Funches v. Funches* 168

The Common Law—Curtesy Rights 169

Statutory Marital Law—Community Property 169

*Diosdado v. Diosdado* 170

Extension of Property Rights to Relationships  
Beyond Marriage 173

*Champion v. Frazier* 173

Premarital or Antenuptial Agreements 175

*In re Marriage of Bonds* 177

#### CAUTIONS AND CONCLUSIONS 181

### Chapter 9: The Landlord–Tenant Relationship 185

#### TYPES OF TENANCIES 186

Tenancy for Years 186

Periodic Tenancy 186

Tenancy at Will 186

Tenancy at Sufferance 187

#### TERMS OF LEASE AGREEMENT 187

Need for Lease Agreement 187

Habitability 188

*Chiodini v. Fox* 188

*Schuman v. Kobets* 190

Deposits 193

Amount of Rent 195

Rent Control 195

*Fisher v. City of Berkeley California* 196

Lease Term 198

Attorneys' Fees 198

Rules and Regulations 198

*Berlinger v. Suburban Apartment Management* 199

Landlord's Right of Access 200

Assignments and Subleases 200

Unconscionability 202

#### RIGHTS AND RESPONSIBILITIES OF PARTIES TO LEASE AGREEMENT 202

Responsibilities of Landlords and  
Rights of Tenants 202

*Minjak Co. v. Randolph* 203

*Jablonski v. Clemons* 205

*Ambriz v. Kelegian* 208

*Department of Housing and Urban*

*Development v. Rucker* 211

Rights of Landlords and Responsibilities  
of Tenants 214

#### CAUTIONS AND CONCLUSIONS 215

### Chapter 10: Commercial Leases 219

#### FORMATION OF THE COMMERCIAL LEASE 219

Negotiations 219

*Herring-Marathon Master Partnership B v.*

*Boardwalk Fries, Inc.* 220

The Lease Agreement 222

#### TOPICS IN THE COMMERCIAL LEASE 222

The Lease Term 222

Premises Condition 223

*Richard Barton Enterprises, Inc. v. Tsern* 224

*Bijan Designer for Men, Inc. v. St.*

*Regis Sheraton Corporation* 227

Condition of the Premises—The Sick Building  
Syndrome 229

Rent and Rent Terminology 229

*Circle K Corporation v. Collins* 231

Fixtures and Alterations 234

Operations 235

Common Areas 235

*Pichardo v. Big Diamond, Inc.* 236

Americans with Disabilities Act 238

*Staron v. McDonald's Corporation* 238

Landlord's Right of Entry 241  
 Destruction and Damage to Premises 241  
 Breach 241  
 Landlord's Responsibility for  
   Tenant's Conduct 242  
 Assignment of Leases 242

#### SHOPPING CENTER LEASES—SPECIFIC PROVISIONS 242

The Anchor Tenant 242

*Slater v. Pearle Vision Center, Inc.* 243

Business Restrictions 245

*Child World, Inc. v. South Towne Centre, Ltd.* 245

#### CAUTIONS AND CONCLUSIONS 247

### **Chapter 11: Real Estate Communities: Multiunit Interests and Owners' Associations 251**

#### MULTIUNIT HOUSING 252

The Applicable Laws 252

#### CONDOMINIUMS 253

Definition and Characteristics 253

Creation of Condominium 253

#### COOPERATIVES 254

Nature of Cooperatives 254

*Kadera v. Superior Court and Consolidated Cooperative of Scottsdale East, Inc.* 255

Creation of a Cooperative 257

#### TOWNHOUSES 258

Nature of Townhouses 258

Creation of Townhouses 258

#### TIME-SHARING INTERESTS 258

Nature of Time-Sharing Ownership 258

Creation of Time-Sharing Interests 259

#### HYBRIDS 260

#### MANAGING CLOSE QUARTERS: THE ISSUES OF OWNERS' ASSOCIATIONS 260

*Armstrong v. Ledges Homeowners Association* 261

*Nahrstedt v. Lakeside Village Condominium Association, Inc.* 267

*LaSalle National Trust, N.A. (Carma McClure) v. Board of Directors of the 1100 Lake Shore Drive Condominium* 270

*Mulligan v. Panther Valley Prop. Owners Ass'n* 274

#### LIABILITY ISSUES IN ASSOCIATIONS 275

Owners' Association Liabilities: Management 275

*Randol v. Atkinson* 276

Owners Association Liabilities: Maintenances 277

*Martinez v. Woodmar IV Condominiums* 278

*Medcalf v. Washington Condominium Ass'n* 280

Owners Liability Issues in Associations 281

#### CAUTIONS AND CONCLUSIONS 282

---

## **Part 3: Transferring Title to Real Estate**

---

### **Chapter 12: The Broker's Role in the Transfer of Real Estate 287**

#### NATURE OF BROKER'S/AGENT'S ROLE 287

Definition 287

Traditional Principal/Agent Concepts vs.  
   Principal/Broker Roles 288

#### THE TYPES OF REAL ESTATE BROKER RELATIONSHIPS 288

The Listing Agent 288

The Dual Agency 288

The Buyer Broker 289

The Open Listing Agency 289

The Exclusive Agency 289

The Exclusive Right-to-Sell or Exclusive Listing-to-Sell Agency 289

Multiple Listing Agency 290

The Subagency 290

Net Listing Agency 290

The Designated Agency 291

The Nonagent Broker 291

The Internet as an Agent 291

#### LISTING AGREEMENTS FOR HIRING BROKERS/AGENTS 292

Agreements in Writing 292

Signature by Owner 293

Importance of Careful Drafting and Completion  
   of Standard Form Agreements 293

Expiration Date 293

*Island Realty v. Bibbo* 294

Amount of the Commission 296

*Freeman v. San Diego Ass'n of Realtors* 297

When Commission is Due and Owing 299

Description of Property and Sale Terms 299

Conditions Precedent 300

Liability Limitations 300

Other Details 300

#### RESPONSIBILITIES OF BROKERS/AGENTS 300

Authority 300

Antisolicitation Statutes 300

DUTY OF CARE 302  
 Fiduciary Duty 302  
 Duty of Loyalty 303

*Warren v. Merrill* 304

LEGAL DUTIES AND RESPONSIBILITIES TO THIRD PARTIES 306

Misrepresentation 307

Nondisclosure 307

*Capiccioni v. Brennan Naperville, Inc.* 308

“As Is” Clauses 310

Statutory Duties of Disclosure 310

*Fuller v. Croston* 310

Disclosure, Discrimination, and Silence 315

Insurance Protection 316

Self-Protection 316

LICENSING REQUIREMENTS FOR BROKERS/AGENTS 316

Requirements for Obtaining Licenses 317

Issuance of Licenses 317

Doing Business Without Licenses 317

*Douglas v. Schuette* 318

Exemptions from Licensing 320

Professional Organizations 320

BROKER'S/AGENT'S LEGAL DUTIES AND RESPONSIBILITIES TO STATE 321

State 321

Suspension or Revocation of Real Estate License 321

Rights upon Suspension or Revocation 321

*Dearborn v. Real Estate Agency* 322

RELATIONSHIPS AMONG BROKERS/AGENTS 324

Broker–Salesperson Relationship 324

Salesperson–Salesperson Relationship 324

Broker–Broker Relationship 324

*Telluride Real Estate Company v. Penthouse Affiliates, LLC* 325

CAUTIONS AND CONCLUSIONS 326

## **Chapter 13: Methods of Transfer and Conveyance in Real Estate 331**

TRANSFER OF PROPERTY BY DEED 332

Requirements for Valid Deed 332

*Michaelson v. Michaelson* 334

*Allen v. Scott, Hewitt & Mize* 338

TYPES OF DEEDS 340

Quitclaim Deed 341

Warranty Deed 341

*Schorsch v. Blader* 341

Special Warranty Deed 343

Deed of Bargain and Sale 343

Judicial Deed 343

TRANSFER OF PROPERTY BY

ADVERSE POSSESSION 344

Actual and Exclusive Possession 344

Open, Visible, and Notorious Possession 344

Continuous and Peaceable Possession 345

Hostile and Adverse Possession 345

Possession for Required Statutory Period 346

*Williams v. Estate of Williams* 347

Observations About Adverse Possession 349

TRANSFER OF PROPERTY BY GIFTS 350

Donative Intent 350

Delivery 350

Acceptance 350

TRANSFER OF PROPERTY BY WILL OR INTESTATE SUCCESSION 351

TRANSFER OF PROPERTY BY EMINENT DOMAIN 351

PROTECTION OF TITLE 351

Recording 351

*Gensheimer v. Kneisley* 355

Torrens System 356

Title Abstracts 357

Title Insurance 357

The Title Policy 358

*New England Federal Credit Union v. Stewart*

*Title Guar. Co.* 361

UNIFORM LAWS AND PROPOSALS 363

CAUTIONS AND CONCLUSIONS 363

## **Chapter 14: The Purchase Contract 367**

COMMON LAW PRINCIPLES OF FORMATION AS APPLIED TO REAL ESTATE CONTRACTS 367

Offer 367

Options 369

*Board of Control of Eastern Michigan*

*University v. Burgess* 370

Acceptance 372

*Norkunas v. Cochran* 373

Consideration 378

*Trengen v. Mongeon* 378

SPECIFIC REQUIREMENTS FOR REAL ESTATE CONTRACTS 379

Writing or Record Requirements 379

Signature of Parties 380

Adequate Description of Property 381



TERMS OF PURCHASE CONTRACTS 381  
 Property Identification 382  
 Earnest Money 383  
 Financing 383  
 Property Reports 385  
 Federal Disclosure Requirements 385  
 Condition of Premises 387

*S Development Co. v. Pima Capital Management Co.* 388  
 Environmental Contingency Clause 391  
 Risk of Loss 392  
 Recording the Contract 392  
 Closing Date and Escrow Instructions 392  
 Apportionments 392  
 Marketable Title 393  
 Remedies 394  
*Perroncello v. Donahue* 395

MISREPRESENTATION 397

*Reed v. King* 398

DISCLOSURE STATUTES 400  
 Psychological Disclosure Statutes 401

CAUTIONS AND CONCLUSIONS 402

## **Chapter 15: Financing in the Transfer of Real Estate 407**

THE MORTGAGE 407  
 Parties to the Mortgage 408  
 Title Theory versus Lien Theory 408  
*Siffring Farms, Inc. v. Juranek* 409  
 Creation of Mortgage Relationship 410  
*Moon v. Moon* 411

Federal Regulation of Mortgage  
 Debt Instruments 412

*Carmichael v. The Payment Center, Inc.* 414

Debtor's Rights in Mortgage Credit  
 Transactions 420

Debtor's Rights, Subprime Loans,  
 and Predatory Lending 421

Debtor's Rights with Recording 423

Terms of the Mortgage 423

Types of Mortgages 425

Rights and Responsibilities of Mortgagor and  
 Mortgagee 430

*Comerica Bank-Illinois v. Harris*

*Bank Hinsdale* 430

Property Covered by the Mortgage 432

Transfers and Assignments by Mortgagor 432

Transfers and Assignments of Mortgages by  
 Mortgagees 434

Satisfaction of the Mortgage 434

Foreclosure 434

*First Union Nat. Bank v. Penn Salem Marina, Inc.* 436

*Hull v. North Adams Hoosac Savings Bank* 440

Loan Workouts 441

Proceeds and Priorities upon Foreclosure 442

Postforeclosure Remedies—The Deficiency  
 Judgment 443

*Kawai America Corp. v. Hilton* 443

The Uniform Nonjudicial  
 Foreclosure Act 444

DEEDS OF TRUST 445

Relationship to Mortgages 445

Duties and Responsibilities of the Trustee 446

INSTALLMENT LAND CONTRACTS 446

The Forfeiture Aspect 446

Title Problems 447

Tax Consequences 447

Regulation Z Application 447

SUBDIVISION TRUSTS 448

ALTERNATIVE FINANCING METHODS 449

Shared-Appreciation or Equity-Participation  
 Financing Mortgages 449

Wrap-Around Mortgages 449

Exchange or Trades 450

Lease-Purchase Agreements 450

The Broker, Regulation Z, and Alternative  
 Financing 450

CAUTIONS AND CONCLUSIONS 451

## **Chapter 16: Closing the Deal 457**

THE NATURE OF CLOSING 458

Where? 458

What? 458

Who? 458

THE CLOSING SETUP 459

Requirements for Setting Up the Escrow or  
 Closing 459

Contents of Escrow or Closing Instructions 459

Documents to be Delivered by Each Party 461

Cancellation of Escrow 461

Cancellations, Contingencies, and Contract  
 Performance 462

*Allan v. Martin* 462

RESPONSIBILITIES OF THE LENDER IN  
 CLOSING—THE REAL ESTATE SETTLEMENT  
 PROCEDURES ACT 464

Purpose of RESPA 464

Application of RESPA 465

Disclosures Under RESPA 465

Disclosures Relating to Assignments 467

Prohibited Conduct Under RESPA 468