

Dad & Mary at the home

Aging and the economy

families are forced to make tough decisions to care for the elderly

Law

of Lundberg

things that senior citizens count on to sustain them in their golden years — in-comes, pensions and home eq-uity have been decimated by the economy.

As a result, elder law practitioners are being called upon to help families make difficult decisions that even 10 years ago they would have called unthinkable.

Even the most well-intentioned children have to consider measures that strip away their parents' rights. Sometimes the actions they take lead to angst, rivalry and legal battles.

Often the battles are about money, because during a time of difficult and emotional shifts in family dynamics, "That's all there is to fight over," said James Schuster, certified elder law attorney and former chair of the Elder Law and Advocacy Section of the State Bar of Michigan.

When economic times were better, taking care of one's aging parents often meant writing out checks to pay for the services they needed. But today, a growing number of families can't afford to do that, Schuster said.

"Families are trying to keep expenses internal," he said. "Children are taking care of their parents themselves. They're moving into the parents' homes or moving

the parents into their homes."

The mistakes that families make when preparing long-term care arrangements for aging family members are what Schuster calls "the room of horrors."

"Anything that can go wrong, will," he said.

One of the common mistakes families are making happens when they're trying to decide who should physically take care of a parent.

Siblings will take into consideration factors such as geographical proximity. Or someone in the family has recently become unemployed and has time to be a caregiver.

But those factors don't always lead to choosing the best person

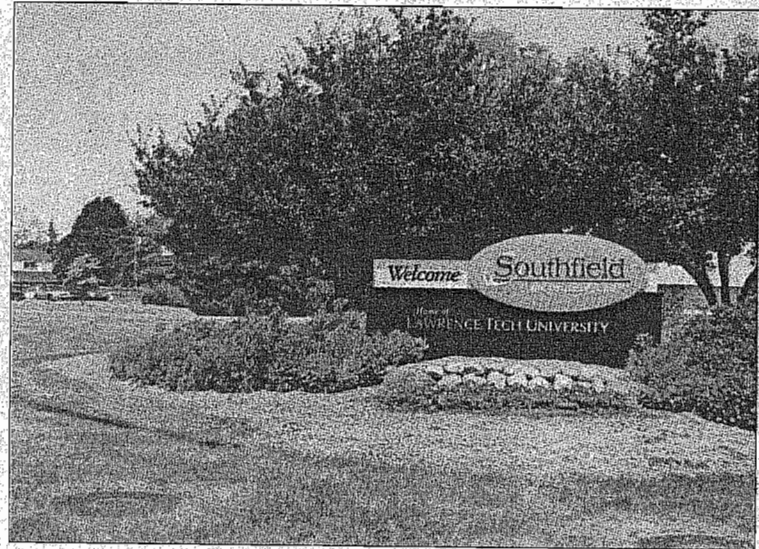
See "Aging," page 22

stances would tempt the "average judge" to lose her or his impartiality.

See "Recusal," page 23

in a case where an employee of one of the parties donated \$3 million to his campaign.

Verdicts & Settlements Plus



LW photo by Douglas J. Levy

The deed to 42 single-family homes scattered throughout Southfield, Lathrup Village and Oak Park was obtained fraudulently, claimed the plaintiff of a recent lawsuit seeking to quiet title and, subsequently, money damages.

Following the trail of liability

Property owner reaches settlement with principal title company after rogue agents swindle deed

By Douglas J. Levy

After two title agents bilked a property owner by using a fraudulent deed to sell off 42 single-family homes, Gerard V. Mantese knew who would be made to pay.

The Troy-based commercial litigator contended that First American Title Insurance Co., the largest underwriter in America, ultimately was liable for its agents' misrepresentations — actions that were costing Mantese's client \$2

million and lost property.

To prove that in *Shafir, et al., v. Krauss, et al.*, "We focused our reference on weighing the responsibility of each of the participants in this transaction and honing in on what the title companies do for the insurer," Mantese said.

"We didn't just file a claim with superficial appeal; we dug deep and established that there was a factual and a legal basis for the principal to be liable."

See "Title fraud," page 5

LAW SUIT FUNDING

Economic pressure on personal injury plaintiffs is pushing them to consider lawsuit-funding, which can actually hamper settlement negotiations. Page 3



TAX TRIBUNAL DELAYS

Because of the great amount of tax appeals being filed, there have been delays in hearings. With scheduling changes, taxpayers should soon be heard in a timely manner. Page 2

Title fraud

Continued from page 1

However, getting that legal basis wouldn't be easy. Michigan case law is limited in terms of these matters, and First American's defense cited out-of-state cases that it asserted would absolve the company of blame.

"We were relying on established principles," said Mantese, of Mantese & Rossman, P.C.

He cited *Trongo v. Trongo*, 124 Mich. App. 432, 436 (1983), and *Beam v. Sterling Iris Co.*, 360 Mich. 208, 213 (1960), the latter of which states that the principal is chargeable with its agents' frauds, "even though the principal was ignorant thereof and the agent, in doing so, exceeded his authority or acted in violation of his principal's instructions."

"But," Mantese said, "the question that was unclear under Michigan law was, do you look solely at the narrow four corners of an agreement to see what acts a principal would be liable for, or do you look beyond the contract and say, 'Well, what is the agent doing, and what does the principal know he's doing?'"

What is, isn't required duty

David F. Hansma, Mantese's co-counsel, said First American's defense was, "They were trying to say that the scope of their agency is just issuing the policies and title commitments and the recording of the documents."

Further, First American asserted its agents were not to record documents and deeds — let alone fraudulent deeds — and could not perform title searches.

But in depositions, it was established that recording documents was an integral part of First American's agents' business.

"One of them actually testified that failure to properly record documents could be grounds for terminating an agency relationship with First American," Hansma said. "So, clearly, First American expected their agents to record documents."

The document in question in *Shafir* was a deed to 42 homes in Southfield, Oak Park and Lathrup Village that was owned by Isaiah Shafir. In 2005, Randy Saylor — who, with Kirk Scheib, ran Patriot Title and Simmons Title, both of which were approved as agents under First American — expressed interest in the properties, and offered \$3.8 million for them.

But Saylor asked Shafir to fax a copy of the deed to Saylor's "lender" in order for a loan to be approved. Saylor then told Shafir that the loan was rejected, and convinced Shafir to let him have the properties acquired on land contract.

Working with Scheib, Saylor recorded the fraudulent deed as an affidavit of lost deed, then sold the properties to straw purchase groups, who in turn mortgaged the properties to various banks.

In November 2007, Shafir stopped receiving monthly payments from Saylor. Upon discovering he'd been defrauded, Shafir sued Saylor, Scheib, their business entities, First American and the straw purchasers, seeking to quiet title.

"[T]he question that was unclear under Michigan law was, do you look solely at the narrow four corners of an agreement to see what acts a principal would be liable for, or do you look beyond the contract and say, 'Well, what is the agent doing, and what does the principal know he's doing?'"

— Gerard V. Mantese (right), Mantese & Rossman, P.C., with co-counsel David F. Hansma



LW photo by Douglas J. Levy

He also wanted to invalidate all conveyances, because "the law says, if you get a deed by trickery or artifice, and you don't have the intent to convey, then you never lose title," Mantese noted.

He said that in trying a case like this, "exhaustive" investigation is needed before taking depositions, so that the attorney knows what to ask and look for.

"By doing [our] research up front and seeing that principals are responsible for misrepresentations of their agents, as long as it's in connection with an activity that the principal knows and expects to occur, then what we needed to do was have these deponents verify what we knew — specifically, that their title agents were expected to close a transaction, do title searches and draft documents," Mantese said.

"And when we got the deposition testimony to support the law that we had researched, we knew we had a winning case."

Shifting objectives

Another tactic employed was constantly re-evaluating his client's intent during the course of litigation. When Shafir's claim was first filed, he simply wanted the properties back.

"But as the economy deteriorated and property values plummeted, the objectives changed to recover as much of a land-contract balance as possible, so we were after money damages," Mantese said. "The way to recover money balances would be to claim fraud, because our client was defrauded. And the next question is, who's liable for that fraud?"

Mantese maintained it was First American, and asserted that he never alleged the company knew of the fraud, but rather that

they should have known of it.

At facilitation, First American settled the case for \$1.8 million, which is \$200,000 less than what Shafir was still owed by Saylor on the properties. The properties were conveyed to the straw purchasers' lenders, and the majority of the settlement was paid to lenders who held prior mortgages on the properties.

In an e-mailed statement, defense counsel Phillip J. Neuman of Taubman, Nadis & Neuman, P.C. in Farmington Hills said that the plaintiff "paints a picture that First American Title was somehow guilty of fraud and that is the reason First American Title settled the case. Nothing could be further from the truth. First American Title settled the case in order to fulfill its obligations under policies of title insurance issued by its agents."

But Mantese said he hopes that as a result of this case, title insurers such as First American will be more thorough in monitoring its agents. The first step, he said, is admitting responsibility.

"If you're setting up these entities that can cause so much harm to the public if they don't do their jobs well, and you're taking commissions, then you have to stand behind those companies when they're not doing their jobs properly," Mantese said.

A Verdicts and Settlements report of *Shafir, et al., v. Krauss, et al.*, can be found on page 7 of this issue, and on our Web site, www.milawyersweekly.com.

If you would like to comment on this story, please contact Douglas J. Levy at (248) 865-3107 or douglas.levy@mi.lawyersweekly.com.

Upcoming



MICHIGAN LAWYERS WEEKLY

Events

21st Century Innovators

On September 10, at the Detroit Marriott in Troy, we will honor 21 law firms that demonstrate innovative thinking in:
 Long-term retention programs;
 Flex-time programs;
 Technology-driven offices;
 Recruitment programs.
 One firm will be crowned

2009 21st Century Innovator. NOMINATIONS ARE OPEN!

Help us identify the best candidates by nominating an Innovator. Download a nomination form online: www.milawyersweekly.com

Rock the Bar

On November 5, we will recognize our next generation of great legal minds — all those who've passed the 2009 Michigan Bar exam. Up for special honors: An exceptional group chosen for having made a substantial impact during their first 10 years of practice — **20 Up & Coming Lawyers. NOMINATIONS BEGIN IN AUGUST!**

For Information:

www.milawyersweekly.com/milw_events.cfm

Verdicts & Settlements

Damages sought after deed acquired fraudulently

Plaintiff asserts national title group ultimately responsible for agents' misappropriation

\$1.8 million

In a lawsuit filed at Oakland County Circuit Court, plaintiff Isaiah Shafr, sought to quiet title — and, subsequently, monetary damages — after the deed to 42 single-family properties he owned was used fraudulently.

In 2005, Shafr was approached by defendant Randy Saylor, who expressed interest in purchasing the properties for \$3.8 million. Saylor said his out-of-state lender required a copy of the deed to approve the loan, and Shafr faxed it. Saylor later told Shafr that he had not been approved for financing, but he wished to buy the properties on land contract. Saylor purportedly used the copy of the final deed with the Register of Deeds. The properties were sold subsequently to straw purchasers.

When Shafr discovered in 2008 that he'd been divested of his properties, he sued Saylor and all transferees, seeking to quiet title in his favor.

The plaintiff asserted that co-defendant First American Title Insurance Co. — which had a standard agency agreement with Patriot Title and Simmons Title, run by Saylor and partner Kirk Scheib — was ultimately responsible for the fraud.

First American asserted that it was not liable for the acts of its agents in participating in these transactions. Relying on the contract between itself and its agents, First



MANTESE



HANSMA

American argued that the agents' authority to act on its behalf extended only to issuing policies and commitments, and did not include defrauding others.

Also, the defense contended, the contracts between First American and the agents did not include recording documents and closing transactions as part of the agents' duties.

Through detailed discovery, the plaintiff demonstrated that First American knew its agents were closing transactions and recording documents; that First American relied on its agents to perform these duties; and that these actions were an integral part of the agency relationship.

Plaintiff's counsel took numerous depositions, including assistant regional counsel for First American, who testified that agents were expected to record documents in the course of issuing policies — a key admission in the case, which undercut First American's position in its earlier briefs.

The defense asserted that Shafr acknowledged being a seasoned real estate investor, but never provided any documentary or other support for his claim that he only faxed a copy of the deed. He also was unable to produce the deed he allegedly only faxed or records to show that a fax transmission had been made. Further, defense contended, Shafr

Type of action: Fraud, slander of title, quiet title

Type of injuries: Loss of real estate

Name of case: Shafr, et al. v. Krauss, et al.

Court/Case no./Date: Oakland County Circuit Court, 08-091478-CH, May 12, 2009

Tried before: Judge

Name of judge: Wendy Potts

Facilitator: Barry Howard

Settlement amount: \$1.8 million

Attorneys for plaintiff:

Gerard V. Mantese, David F. Hansma

Attorney for defendant:

Phillip J. Neuman

Key to winning: Thorough deposition testimony from key witnesses, vigorous motion practices

had signed a document acknowledging that he had actually handed the deed to Saylor.

Plaintiff filed a motion for partial summary disposition, demonstrating that First American was liable as a matter of law for the fraud of its agent committed within the scope of his duties. Shafr soon sought monetary damages instead of a quiet title, as property values on the 42 homes had declined.

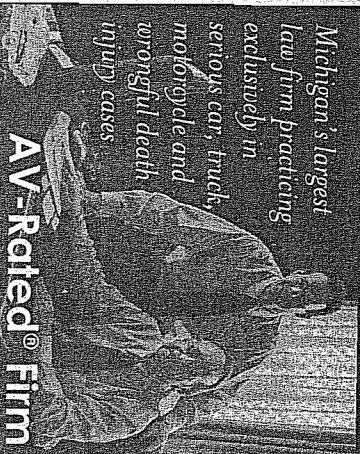
Shortly before the motion was scheduled to be heard, a facilitation resulted in a \$1.8 million settlement. The majority of the settlement was paid to lenders who held prior mortgages on the properties, and the properties were conveyed to the lenders. **See related story on page 1.**

Auto Lawyers

Gursten, Koltonow, Gursten, Christensen & Raitt, P.C.

Michigan's largest law firm practicing exclusively in serious car, truck, motorcycle and wrongful death injury cases

AV-Rated® Firm



- 2009: Lawrence E. Gursten and Steven M. Gursten selected in "Best Lawyers in America"
- 2009: Lawrence E. Gursten, Leonard M. Koltonow, Steven M. Gursten, David E. Christensen & Robert M. Raitt named "Michigan Super Lawyers®"
- 2008: Robert M. Raitt - President of MAJ
- 2008: Steven M. Gursten - President "Interstate Trucking Litigation Group" of AAJ
- Steven M. Gursten elected "Lawyer of the Year" by MI Lawyers Weekly
- Largest auto jury verdict in Michigan in 5 of last 8 years
- **Notable Auto Verdicts**
- \$2 million verdict on zero offer for head injury
- \$4.25 million on defense offer of \$100,000 for head injury/auto injury
- \$2.5 million on defense offer of \$250,000
- 5 separate trial verdicts of over \$1 million on defense offers of \$0 to \$30K

As both an attorney and client,

I'm not your typical consumer. My

expectations were high. In fact, I was

Practice awarded awards from Law & Justice