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Contents

Potential Legislative Solutions to Issues with the Marketable Record Title Act After Public Act 572 Of 2018

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The enactment of Public Act 572 of 2018 ("PA 572") brought significant changes to the Marketable Record Title Act ("MRTA"),[1] but more than anything, it has called attention to a relatively undiscussed area of Michigan law. The MRTA was enacted in 1945, yet relatively few reported appellate cases have interpreted its provisions. The recent revisions have encouraged a number of individuals to review the MRTA and identify issues caused by the changes, or by the MRTA as originally drafted. This article seeks to highlight a number of the larger issues with the MRTA and proposes legislation to prevent the current theoretical arguments from developing into real estate litigation.

I. MRTA before PA 572

Prior to the changes enacted by PA 572, any person that could establish an unbroken chain of title to real estate for 40 years was considered to have marketable record title,[2] subject to the exceptions contained within the MRTA. The most relevant exception was for claimants who recorded a document that purported to divest the marketable record title act holder of an interest in the property. This occurred either by a general recording,[3] or by filing a notice pursuant to MCL 565.103, which effectively provided that as long as a claimant refreshed an interest within 40 years, it would be extended for another 40 years. In theory, this process could happen multiple times, extending the claimant's interest ad infinitum, as long as a notice was recorded.

That basic framework was not changed by PA 572. What changed are the requirements for the recorded document and/or the recorded notice to be effective in defeating the marketable title claim.

Prior to PA 572, common practice in deeds was to include the language "subject to easements and building and use restrictions of record." A number of practitioners were of the opinion that this was sufficient to protect a recorded easement or building and use restriction from being terminated under the MRTA.

This viewpoint may have stemmed from pre-MRTA common law cases like *Wineman Realty Co v Pelavin*,[4] which based enforcement of restrictions largely on whether they appeared in the *muniments of title*. Black's Law Dictionary defines *muniments* as the "[d]ocumentary evidence of title," or more simply put, the recorded documents that make up the whole chain of title back to the original patent. That phrase is even incorporated within the MRTA, as marketable record title is "subject also to any interest … contained in the muniments of which the chain of record title is

1 1945 PA 200.

2 *Id.* Sec. 1, codified at MCL 565.101.

3 *Id.* Sec. 2(1)(b), codified at MCL 565.102(1)(b).

4 267 Mich 594; 255 NW 393 (1934).

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formed,"[5] but protection still requires a recording within 2 years of the amendatory act, or otherwise in the regular 40-year period.

Prior to PA 572, the legal status of this argument was questionable, as there was no binding precedent on point, for or against. From a practical stand point however, title insurers were reluctant to insure that such language would not serve to extend the life of easements and building and use restrictions. Given that the overwhelming majority of real property transactions involve a title insurer, this became the industry standard position, regardless of its technical legal status.

In a number of situations in older, urban localities, residential-only use restrictions on properties that were recorded 80-100 years in the past, and not specifically re-recorded, were being shown as exceptions to title in the current day, based on the theory that the deeds recorded in the chain of title may have been sufficient to prolong the effect of the restrictions. If those communities now sought to redevelop those properties for commercial or industrial usage, title insurers would generally require a court order specifically terminating the restrictions before they would remove the restrictions as an exception from coverage under a title policy. The requirement of a court order results in thousands of dollars of increased costs and delays to redevelop those properties, or potentially even complete failure of redevelopment.

II. MRTA after PA 572

The changes to the MRTA under PA 572 effectively close the door on the argument that "subject to matters of record," or other similar language, is sufficient to extend the life of recorded easements and/or building and use restrictions.

MCL 565.102(2) was created to address general recordings that occurred during the 40-year marketable record title period. A recorded document would only be considered to divest a marketable record title act holder if it "specifically refers by liber and page or other county-assigned unique identifying number to a previously recorded conveyance or other title transaction that created the divestment." Put another way, if an easement or building and use restriction were specifically identified by liber and page within a deed, that would be sufficient to extend the life, but a generalized statement would be insufficient.

The revisions to MCL 565.105 also extensively modified the type and form of notice a claimant could record to extend claims against a marketable record title act holder. Claimants are now required to include specific recording information (liber and page, or other county assigned unique identifying number)[6] of the interest they are seeking to preserve, as well as typical recording information for most executed documents–the claimant's name,[7] address,[8] legal description of the property,[9] and the like.

These changes have caused a great deal of discussion about flaws in the MRTA within the real estate community. Some of those flaws have been inherent since the creation of the MRTA, some others were present from creation but were not of serious concern until PA 572 clearly rejected the "subject to matters of record" argument and brought them to the forefront, and some were created by the changes written into PA 572.

III. Issues to be addressed

A. Lack of Definition of "Claimant" and "Person"

MCL 565.102(1)(b) allows for general recordings that "purport[s] to create the interest in some other person" as providing protection against termination by the MRTA. Similarly, MCL 565.103(4) allows the notice to be filed by the "claimant or by any other person" filing on the claimant's behalf in a few extremely limited situations. Furthermore, the lack of specificity in the phrase "or by any other person" could imply that the claimant must be a person as well, and not an entity or organization. Neither *person* nor *claimant* is defined anywhere within the MRTA, which poses significant issues.

The Michigan Supreme Court has held in other circumstances that "a corporation is a person in the eyes of the law…,"[10] so concerns are not immediate about the ability of corporations to avail themselves of protections under the MRTA. However, given the current political environment and increasing arguments about whether corporations should be treated as persons, it would be wise for the legislature to clearly express that a "person," as used in the MRTA, encompasses the broadest definition and use of the word.

B. Status of Homeowners Associations

One of the largest groups impacted by the revisions

5 MCL 565.101.

6 MCL 565.105(1).

7 MCL 565.105(1)(a).

8 MCL 565.105(1)(b).

9 MCL 565.105(1)(e).

10 *Jones v Martz & Meek Construction Co,* 362 Mich 451; 107 NW2d 802 (1961).

to the MRTA are homeowners associations ("HOAs") charged with the oversight and management of easements and/or building and use restrictions within their community. The MRTA contains no mechanism for an HOA to extend a claim on behalf of its members—a matter of even greater import than the potential issues raised above regarding corporate status.

HOAs within condominium projects have some ability to rely on language in the condominium's Master Deed and By-Laws, which typically give the HOA some authority to act on behalf of the co-owners, as well as the express authorizations contained in MCL 559.160 of the Michigan Condominium Act.[11] HOAs that administer un-platted land or traditional subdivisions are in a much more uncomfortable and unclear situation.

Subdivisions that were platted more recently may have recorded restriction agreements that give the HOA broad authority, similar to that of a condominium HOA; however, that is not the case for older developments. Even the more recent developments may not have contemplated authorizing the recording of an extension notice under the MRTA.

Rather than the current common practice of recording one master restriction agreement across an entire development before any sales are made, historically most developers wrote the restrictions directly into the deed they gave to each homeowner. Often, an HOA was not created, either at the time of, or in the initial deeds. The HOA was created subsequently when the developer completed the project, and the developer's rights were then assigned to the newly created HOA. Such older developments often pre-date the MRTA, and it is unusual to see an authorization to take specific action on behalf of the co-owners (much less a specific authorization to record an extension notice under the MRTA).

Absent some kind of authorizing language within the MRTA allowing an HOA to file these extensions, it is likely a large quantity of private deed restrictions cannot be extended, even if a significant number of homeowners want them to be.

C. Impact of Extension of Interest on Other Property Owners

The MRTA does not contain any statements as to how the extension of one property owner's claim may impact a greater set of interests within a common scheme of development. For example, consider a scenario where a developer deeded out 40 lots with the restrictions written into each deed, but never actually created an HOA to manage or enforce them. This type of deed-based restriction is not unusual in Michigan. In such a situation, the only potential enforcer of rights under the common scheme of development is the individual lot owner.

This concept of a common scheme of development appears elsewhere in Michigan common law. If the owners of Lot 40 received a deed from the same developer as the owners of Lots 1-39, but the deed for Lot 40 contained no restrictions, while restrictions were listed on the deeds to Lots 1-39, the restrictions may still encumber Lot 40 under the theory of *reciprocal negative easement*.[12]

Following the reciprocal negative easement theory above, consider the impact of the owners of Lot 1 recording a notice to extend the life of their right to enforce those restrictions under the MRTA. Is their recording sufficient to extend the restrictions on all 40 lots in the subdivision if the recorded notice includes the legal description of all 40 lots? Furthermore, does their extension preserve only their own right to enforce the restrictions or does it act to affirm the right of enforcement by each of the other 39 lot owners as well? If their notice only contains the legal description for Lots 2-40, can they extend the life of the restrictions for all of the other lots, but not on their own Lot 1?

D. Unintended Termination of Interests

In order to properly analyze the revisions to the MRTA, we reviewed statutes similar to the MRTA in other states.[13] There is a great deal of variance in the types of interests that are specifically exempted from termination from state to state. Currently, the MRTA exempts the termination of:

1. The rights of lessors and lessees at the expiration of a lease;[14]

11 1979 PA 59, as amended.

12 *Sanborn v McLean*, 233 Mich 227, 229-30; 206 NW 496 (1925).

13 California – CA Civil § 880.020-887.070; Connecticut – CT Gen Stat § 47-33b – 47-33l; Florida – FLA. STAT § 712.001-712.12; Illinois – 735 ILCS 5/13-118 – 5/13-121; Indiana – IC 32-20-1 – 32-20-5-2; Iowa – Iowa Code § 614.17-614.20; Kansas – K.S.A. 58-3401 – 58-3412; Minnesota – MINN. STAT 541.023; Nebraska – NE Code § 76-288 – 76-298; North Carolina – N.C.G.S § 47B-1 – 47B-9; North Dakota – N.D.C.C. § 47-19.1-01 – 47-19.1-11; Ohio – ORC 5301.47-5301.56; Oklahoma – 16 OK STAT § 16-71 – 16-80; South Dakota – SD Codified L § 43-30-1 – 43-30-17; Utah – U.C.A. 1953 § 57-9-1 – 57-9-10; Vermont – 7 V.S.A. § 601 – 606; Wyoming – WY Stat § 34-10-101 – 34-10-109.

14 MCL 565.104(1)(a).

2. Mortgagor's or mortgagee's rights under a mortgage in certain circumstances;[15]
3. Easements, when there is observable physical evidence of their use[16] or when there is a physical facility present (e.g., wire, pipe, or pole);[17]
4. Rights of the United States or the State of Michigan;[18] and
5. Rights of holders of mineral interests separate from surface ownership.[19]

Other states' marketable title acts have expanded the non-terminable interest to include:

1. Conservation easements;[20]
2. Remainderman upon the expiration of life-estates or trusts[21]; and
3. Reverted interests upon the failure of a condition.[22]

Conservation easements serve a public purpose by enabling "the donor and the community to maintain an enduring tradition of respect for the natural landscape, open spaces, natural habitats, ecologically significant land and wildlife."[23] While those created directly with the Michigan Department of Natural Resources or other governmental entities are protected from termination under the MRTA, the MRTA would not prevent the termination of conservation easements that are granted to a non-profit corporation. While the non-profit could protect itself via recording notices under the MRTA, the financial burden of monitoring a number of interests may be problematic for a non-profit to manage.

Attorneys in the estate planning and probate sections of the State Bar (and those individuals that have utilized these tools in their estate plan) must also consider what happens to the rights of remaindermen upon the expiration of a life estate or trust. While a ladybird deed may typically be thought of as an estate planning tool used at advanced age, it is also used in estate planning for younger individuals and/or disabled individuals so that they may obtain adequate housing while continuing to qualify for certain government benefits. Similarly, property that is conveyed to the trustee of a trust is conveyed subject to the terms of the trust. Given the language of the MRTA, must these limitations on the trustee's ownership of the property, or the identification of a remainderman at the end of a life-estate, be refreshed every 40 years to avoid the trustee becoming the fee simple owner, or the ladybird transfer failing?

Rights of reverter can be a controversial topic. A number of recent, high-profile cases have addressed the right of reverter and the effect it has on the use and development of land (one of the most notorious being the attempted transfer of the Rackham Golf Course by the City of Detroit, although the case was decided on other grounds[24]). Some of the most common among the types of properties that are subject to rights of reverter are those that have been donated to a charity or governmental organization subject to a condition. For instance, properties have been donated to school districts across the state "for as long as they are used for school purposes," or some other similar language. As it stands, it is very possible that those conditions have been terminated by the MRTA, unless the parties who donated the property, or their heirs, have continually recorded notices under the MRTA. There are sound public policy arguments to be made on both sides of the issue, but it is unclear whether the drafters of the MRTA considered this matter.

E. Conflict between MRTA and Michigan Recording Act

As more thoroughly analyzed in a recent article in the *Michigan Real Property Review*,[25] there is also a tension between the terms of the MRTA and those of the Michigan Recording Act[26] ("MRA"), at least with regard to those counties that maintain only a Grantee/Grant-

15 MCL 565.104(1)(b).

16 MCL 565.104(1)(c).

17 MCL 565.104(1)(d).

18 MCL 565.104(2).

19 MCL 565.104(3).

20 CA Civil § 880.240(d); CT Gen Stat § 47-33h(2); N.C.G.S § 47B-3(8)(C); N.D.C.C. § 47-19.1-11(1)(b); 7 V.S.A. § 604(8); WY Stat § 34-10-108(a)(vi).

21 NE Code § 76-298(b); K.S.A 58-3408(g); SD Codified L § 43-30-12.

22 K.S.A 58-3408(h); 7 V.S.A § 604(5).

23 J. Rohe, *Conservation Easements and Plain English*, Mich. Bar J. 74(5), 402-04 (1995).

24 *City of Huntington Woods v City of Detroit*, 279 Mich App 603; 761 NW2d 127 (2008).

25 John D. Bartley, *Public Act 572 Amends Marketable Record Title Act Creating a Clash of Titans with Michigan Recording Act*, 46 Mich Real Prop Rev 8 (2019).

26 1937 PA 103, codified at MCL 565.201-565.203.

or indexing system. Under Michigan law, the Grantee/Grantor index is the only legally-mandated recording index for most documents.[27]

Absent a requirement that notices under the MRTA include information as to the current owner of the property, it is impossible for a Register of Deeds to index the notice in a fashion that will provide any form of notice to a person searching title to the impacted property. There are two primary compelling positions that deserve protection in these situations:

1. a claimant who holds some kind of right against a piece of property and is seeking to protect that right under the MRTA; and
2. an innocent third party, like a potential bona fide purchaser for value, who is searching the public record to make sure there are no encumbrances on a given piece of property.

The current terms of the MRTA, which do not provide for a recording that can be meaningfully indexed in a Grantee/Grantor system, leave the innocent third party with no actual notice of the claimed interest and no realistic inquiry notice, despite the claimant having recorded a notice against the property.

F. Legal Description to be Used

The changes to the MRTA under PA 572 included a change to require a claimant to attach the current legal description of the property being affected when the claimant recorded a notice under the MRTA.[28] Michigan previously followed the majority of other states with similar marketable title acts, allowing a claimant to use the legal description contained in the document that created the underlying claim.[29] This change is beneficial to parties attempting to search for recorded notices in tract indexing counties but will pose a considerable burden to claimants seeking to file notices under the MRTA to extend their interests as legal descriptions change over time, especially when large tracts of land are divided for development and sale.

For example, suppose a farmer sells 160 acres of his land to a developer with a very basic legal description– the Northeast 1/4 of Section 12, Town 8 North, Range 7 East, with the restriction that it is to be used for residential purposes only. The developer then splits the 160 acres into multiple condominium developments of 40-50 units, while retaining significant acreage for future phases. Under the changes to the MRTA, the farmer is now required to search the municipality's records to determine what has been done with the land since the initial sale and then determine the current legal description before a notice could be filed. While the legislative analysis of PA 572 acknowledged this change,[30] it is unclear whether the potential burden being placed on claimants was recognized.

G. Lack of Public Knowledge of Change to MRTA – Need for Extended Safe Harbor Provision

As discussions of the impact of the changes to the MRTA have taken place, many real estate practitioners have notified their clients of the need to record a notice within the 2-year safe harbor provision offered in PA 572. Given the lack of clarity in several aspects of the MRTA outlined above, it has been difficult for some of those parties to determine what, if anything, they can do to take advantage of the safe harbor provision.

For condominium HOAs, the end of the safe harbor period potentially means the elimination of covenants and restrictions if they are not extended, but it is unclear whether an HOA has the authority to file the requisite notice.

When the original MRTA was enacted and with each significant amendment, a multi-year safe harbor provision has been offered. The changes that are proposed in Section IV, while intended to clarify the MRTA as a whole, will certainly have significant effect on parties who hold marketable titles and parties who hold interests.

Many state citizens are potentially impacted by these changes, whether they realize it or not. Beyond use restrictions, documents such as private road maintenance agreements and other mutual maintenance agreements will potentially be eliminated if extension notices are not recorded. Roughly half of the safe harbor period provided by PA 572 has already expired. It is thus critical that an extended period be granted for the recording of notices and that an effort be made to notify the public of the impact of the MRTA on private restrictions and agreements, regardless of the outcome of the proposed revisions discussed below.

27 MCL 565.28.

28 MCL 565.105(1).

29 CA Civil § 880.330(3); CT Gen Stat § 47-33g(a); FLA. STAT § 712.06(1)(c); IC 32-20-4-2(a)(1); MINN. STAT 541.023; N.C.G.S § 47B-4(b); ORC 5301.52(A)(3); 16 OK STAT § 16-75(A); U.C.A. 1953 § 57-9-5; WY Stat § 34-10-107.

30 House Fiscal Agency Analysis, Senate Bill 671, Dec. 18, 2018.

IV. Proposed Legislative Solutions

Included with this article is a blackline version of the current MRTA with proposed revisions. These revisions can most easily be broken into three categories as follows:

A. Necessary Mechanical Revisions

Necessary mechanical revisions include: (1) providing a clear definition of "person" and "claimant" within the statute; (2) allowing HOAs to act to extend the life of interests under the MRTA; (3) protecting conservation easements and rights of remaindermen of life estates and trusts; and (4) providing an extended safe harbor period for recording of notices.

We propose amendments to MCL 565.101 to broadly define a "person" for purposes of the MRTA, as well as defining "claimant" to be any person holding an interest, claim, or charge on property and filing a notice pursuant to MCL 565.103.

Review of the statutes of other states reveals that the Florida Marketable Record Title Act, 712.001-712.12, ("FMRTA") has the most complete statutory scheme to address the ability of HOAs to extend the life of interests. Drawing from the FMRTA, we propose that MCL 565.103 be changed to allow a notice to be filed by an HOA or similar body. In addition, as part of a new requirement to include property owners' names on the notices as part of MCL 565.105, we also propose that an HOA be allowed to mail a statutory notification to its members and provide an affidavit by one of its board members that it has done so, in lieu of listing all of the members in the recording.

We propose revisions to MCL 565.104 to specifically exempt conservation easements and the rights of remaindermen of life estates and trusts from termination under the MRTA.

We see no public policy reason to allow for the termination of a conservation easement granted to a non-governmental entity. Prior to the enactment of the Michigan Natural Resources and Environmental Protection Act[31] in 1994, Michigan did not statutorily recognize conservation easements, so it clearly could not have been a consideration of the original drafters of the MRTA.

Similarly, ladybird and enhanced life-estate deeds and trusts as estate planning tools should be exempted from enforcement, given their extensive use and the lack of any discernable public benefit to their termination by the MRTA. Furthermore, although interplay between the MRTA and the Estate and Protected Individuals Code[32] is beyond the scope of this article, such an analysis did not appear to be conducted during the debate and review of PA 572. Exempting these estate planning tools could rectify the issue and prevent the need for such analysis.

We also propose an amendment to MCL 565.101 to extend the safe harbor period for an additional period of two years after the effective date of this new amendatory act.

B. Necessary Mechanical Changes That Still Require Discussion

This category covers areas that do require change but also require balancing of interests of the potential parties involved and therefore need additional discussion. This includes the impact of the extension of interests by notice under the MRTA on other property owners and addressing the conflict between the MRTA and the MRA. Both require balancing the needs of interest owners and innocent third parties.

The impact of the filing of a notice under MCL 565.103 on other property owners and interested parties needs to be clarified. There are arguments to be made for a broad interpretation, allowing for a single notice to cascade outwards to protect all similarly-situated interest holders. Given the massive number of interests that would otherwise be terminated by the MRTA if notices are not filed, allowing a single filing to have a broad effect will significantly reduce the costs and burden to the interest holders while preserving the spirit and intent of the revisions in PA 572.

Absent a cascading effect, transferring title in developments where private restrictions are found only in the deed results in a patchwork of restrictions, with some parcels continuing to follow the restrictions while others are free from them.

An additional argument involves the innocent third party, in particular a bona fide purchaser for value. Consider a buyer who goes to the county register of deeds office and diligently searches the Grantee/Grantor index for Lot 5 of Blackacre Subdivision, the property that is about to be purchased. The buyer sees a line of five warranty deeds going back to 1940, well past the 40-year marketable title act requirements, with no covenants or restrictions anywhere in the recorded title history. The buyer closes on the property and begins construction of the stables in the backyard for the horses that the buyer always wanted to keep, only to have the owner of Lot 1 come to

31 1994 PA 451, as amended.

32 1998 PA 386, as amended.

the door and say that keeping horses on the property is prohibited by the deed restrictions. When the buyer argues that nothing was recorded on the property, the Lot 1 owner shows the Notice Pursuant to Marketable Record Title Act that the Lot 1 owner recorded against just Lot 1 to extend the restrictions from a deed recorded in 1926. How was the buyer to know that these restrictions existed if they do not appear anywhere in the record chain of title of the property that was purchased?

For the purposes of discussion, we propose the attached MCL 565.105(5) which provides a fairly broad, cascading effect from the filing of a notice. While this does potentially impose burdens on innocent third parties, we are mindful that the vast majority of real estate transactions are conducted with the aid of title insurance or at least some form of title report. This cascading system closely resembles the pre-PA 572 environment where potential negative reciprocal easements often resulted in exceptions being shown on title that did not actually appear in the chain of title. Given that any extensions would still require the filing of a notice by a claimant, this should allow for termination of older, outdated interests in mature, urban communities. If a party has expressed an interest in extending the interests, we feel it is appropriate that litigation would have to be commenced to remove them, rather than automatic removal by statute.

The tension between the MRTA and the MRA must be addressed in some fashion. Once again, the interests of interest holders need to be balanced against those of innocent third parties searching the record for the property.

We propose the attached MCL 565.105(j), which requires that the name and mailing address of all owners of property that is claimed to be affected by the notice be included, and revisions to existing MCL 565.105(3) to require that notices be included in grantor indexes under the names listed in the notice. Imposing that burden is the only possible way to provide for some measure of comfort for Grantee/Grantor-only counties. Given the significant burden that is being imposed on the interest holders to add these names and addresses, and given the potential issues of laymen attempting to make determinations of who the current owner is in a complicated chain of title on an affected parcel, a reasonable compromise is to use the names and addresses contained in the current tax roll for the affected property. While we acknowledge there will be issues with using the tax roll (e.g., not all owners listed, or outdated information), we argue that this is the best compromise to allow for the notices to be properly indexed in a Grantee/Grantor situation. This will also provide notice to most innocent third parties, without imposing excessive burdens on the interest holder, or opening issues of the effectiveness of the notice if the interest holder makes an incorrect determination of ownership.

Florida has gone to the extent of imposing the full burden on the interest holder of not only determining who the affected property owners are, but also of serving all of the property owners with notice of the extension of a claimed right via mail.[33] While we feel that is imposing too heavy of a burden on the interest holder, it would be the most fully compliant mixing of the MRTA and MRA.

C. Additional Matters for Consideration

As discussed above, some other states have protected rights of reverter and rights of re-entry upon the breaking of a condition from enforcement under their versions of the MRTA. We have included the addition of MCL 565.104(1)(g) in the attached proposals.

As the Supreme Court of Michigan has said: "Michigan recognizes a strong public policy against restraints on alienation."[34] To that end, rights of reverter or re-entry upon the failure of a condition should be viewed with a fairly jaundiced eye. With that said, the states of Kansas[35] and Vermont[36] have included exemptions for just such parties under their versions of the MRTA. Therefore, we believe this should be a point of discussion.

We propose a new MCL 565.105(2) to allow for a statutory form for all notices. Providing a standardized form for filing will make it easier for all parties to determine exactly what interests are being preserved, by whom, and regarding what property. A statutory form is not a mechanical requirement and there is an argument to allow for maximum flexibility in filing notices, therefore, we bring this up as a matter that should be discussed.

Finally, we propose a reversion of the language of MCL 565.105(e) to its pre-PA 572 form, which will allow a claimant to use the legal description from the document that the underlying claim is based on, rather than the current legal description of the property. This is another case of balancing the burdens that are being placed on the parties. The complications for the farmer in the scenario above may seem extreme, but are far from impossible. We are also mindful that the farmer's recording of a notice that references quarter sections would not make the buyer of Unit 12 of the condominium think that he needed to

33 FLA. STAT § 712.06(3).

34 *Albro v Allen*, 434 Mich 271; 454 NW2d 85 (1990).

35 K.S.A 58-3408(h).

36 7 V.S.A § 604(5).

worry. In the final balancing of interests between the parties, we feel Michigan should follow the majority of other states with statutes similar to the MRTA in allowing the claimant to use the old legal description for a notice.

V. Conclusion

While we know that the discussions in this article are far from complete on this topic and that no statutory scheme will ever be perfect, our goals are two-fold. We hope that the proposals we put forth will both (1) highlight some needed changes to the MRTA and (2) provide reference points and thought-provoking scenarios to our legislators in their future review and revision of the MRTA.

Marketable Record Title

Act 200 of 1945

AN ACT to define a marketable record title to an interest in land; to require the filing of notices of claim of interest in such land in certain cases within a definite period of time and to require the recording thereof; to make invalid and of no force or effect all claims with respect to the land affected thereby where no such notices of claim of interest are filed within the required period; to provide for certain penalties for filing slanderous notices of claim of interest, and to provide certain exceptions to the applicability and operation thereof.

The People of the State of Michigan enact:

565.101 Marketable record title.

Sec. 1.

Any person, that has the legal capacity to own land in this state, that has an unbroken chain of title of record to any interest in land for 20 years for mineral interests and 40 years for other interests, is at the end of the applicable period considered to have a marketable record title to that interest, subject only to claims to that interest and defects of title as are not extinguished or barred by application of this act and subject also to any interests and defects as are inherent in the provisions and limitations contained in the muniments of which the chain of record title is formed and that are recorded within 2 years after the effective date of the amendatory act that added section ~~2(2)~~**3(5)** or during the 20-year period for mineral interests and the 40-year period for other interests. However, a person is not considered to have a marketable record title by reason of this act if the land in which the interest exists is in the hostile possession of another.

565.101a ~~"Mineral interest" defined~~ Definitions.

Sec. 1a.

(1) ~~As used in this act,~~ "mineral interest" means an interest in minerals in any land if the interest in minerals is owned by a person other than the owner of the surface of the land. Mineral interest does not include an interest in oil or gas or an interest in sand, gravel, limestone, clay, or marl.

(2) "Covenant or restriction" means any agreement or limitation contained in a document recorded in the public records of the county in which a property is located which subjects the property to any use or other restriction or obligation.

(3) "Person" includes the singular or plural, natural or corporate, private or governmental, including the state and any political subdivision or agency thereof as the context for the use thereof requires or denotes and including any property owners' association.

(4) "Property owners' association" means a corporation or other entity responsible for the operation and/or management of property in which the voting membership is made up of the owners of the property or their agents, or a combination thereof, and in which membership is a mandatory condition of property ownership, an Association of Co-owners as defined under the Condominium Act, 1978 PA 59, MCL 559.103(4) or an association of property owners which is authorized to enforce a covenant or restriction that is imposed on the properties.

(5) "Claimant" means a person holding an interest, claim or charge on property and filing a notice pursuant to Section 3.

565.102 Unbroken chain of title to interest in land; conditions.

Sec. 2.

(1) A person is considered to have an unbroken chain of title to an interest in land as provided in section 1 if the official public records disclose either of the following:

(a) A conveyance or other title transaction not less than 20 years in the past for mineral interests and 40 years for other interests, which conveyance or other title transaction purports to create the interest in that person, with nothing appearing of record purporting to divest that person of the purported interest.

(b) A conveyance or other title transaction not less than 20 years in the past for mineral interests and 40 years for other interests, which conveyance or other title transaction purports to create the interest in some other person and other conveyances or title transactions of record by which the purported interest has become vested in the person first referred to in this section, with nothing appearing of record purporting to divest the person first referred to in this section of the purported interest.

(2) For purposes of this section, except as to mineral interests, a conveyance or other title transaction in the chain of title purports to divest an interest in the property only if it creates the divestment or if it specifically refers by liber and page or other county-assigned unique identifying number to a previously recorded conveyance or other title transaction that created the divestment.

565.103 Marketable record title; successors in interest; notice of claims; filing for record.

Sec. 3.

(1) Marketable title is held by a person and is taken by his or her successors in interest free and clear of any and all interests, claims, and charges the existence of which depends in whole or in part on any act, transaction, event, or omission that occurred before the 20-year period for mineral interests, and the 40-year period for other interests, and all such interests, claims, and charges are void and of no effect at law or in equity. However, an interest, claim, or charge may be preserved and kept effective by filing for record within 2 years after the effective date of the amendatory act that added section ~~2(2)~~ **3(5)** or during the 20-year period for mineral interests and the 40-year period for other interests, a notice in writing, verified by oath, setting forth the nature of the claim in the manner required by section 5.

(2) A disability or lack of knowledge of any kind on the part of anyone does not suspend the running of the 20-year period for mineral interests or the 40-year period for other interests.

(3) For the purpose of recording notices of claim for homestead interests, the date from which the 20-year period for mineral interests and the 40-year period for other interests run is the date of recording of the instrument that contains the basis for the claim.

(4) A notice under this section may be filed for record by ~~any other person acting on behalf of any claimant if 1 or more of the following conditions exist~~:

a. **the claimant;**

b. **any other person acting on behalf of the claimant, as agent, or as authorized by a power of attorney; or**

c. **A property owners' association, to preserve and protect a covenant or restriction that may be enforced by the property owners association from extinguishment by the operation of this act.**

d. **or by any other person acting on behalf of any claimant if 1 or more of the following conditions exist:**

(**1**~~a~~) The claimant is under a disability.

(**2**~~b~~) The claimant is unable to assert a claim on his or her own behalf.

(**3**~~c~~) The claimant is 1 of a class but whose identity cannot be established or is uncertain at the time of filing the notice of claim for record.

(5) The filing of a notice under this section by any claimant which meets all the requirements of this act to preserve the claimant's rights in property, shall also be deemed to act as an effective notice under this section, for:

(a) any other person whose rights originate from the same document as claimant's; and

(b) any other person whose rights can be traced to a common owner with claimant, and whose rights are evidenced by a recorded document which indicates a common scheme of development with those of the recorded document which evidences claimant's rights.

565.104 Marketable record title; failure to file notice not to bar right to possession; applicability to government property or oil and gas interests.

Sec. 4.

(1) This act must not be applied to do any of the following:

(a) Bar a lessor or his or her successor as reversioner of his or her right to possession on the expiration of a lease or a lessee or his or her successor of his or her rights in and to a lease.

(b) Bar any interest of a mortgagor or a mortgagee or interest in the nature of that of a mortgagor or mortgagee until after the instrument under which the interest is claimed has become due and payable, except if the instrument has no due date expressed, if the instrument has been executed by a railroad, railroad bridge, tunnel, or union depot company, or a public utility or public service company.

(c) Bar or extinguish an easement or interest in the nature of an easement, the existence of which is clearly observable by physical evidences of its use.

(d) Bar or extinguish an easement or interest in the nature of an easement, or any rights appurtenant to the easement or interest granted, excepted, or reserved by a recorded instrument creating the easement or interest, including any rights for future use, if the existence of the easement or interest is evidenced by the location beneath, on, or above any part of the land described in the instrument of a pipe, valve, road, wire, cable, conduit, duct, sewer, track, pole, tower, or other physical facility and whether or not the existence of the facility is observable, by reason of failure to file the notice required by this act.

(e) Bar or extinguish a conservation easement, as defined under the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.2140.

(f) Bar or extinguish the rights of any remainderman upon the expiration of any life estate or trust.

(g) Bar or extinguish any rights of reverter or rights of re-entry upon the breaking of a condition.

(2) This act does not affect any right, title, or interest in land owned by the United States, or any right, title, or interest in any land owned by this state, or by any department, commission, or political subdivision thereof.

(3) This act does not affect any oil and gas lease, or other interest in oil or gas, owned by a person other than the owner of the surface, or any storage agreement or other interest in subsurface storage formations owned by a person other than the owner of the surface.

565.105 Notice of claim to contain land description; requirements; recording, fees, indexing.

Sec. 5.

(1) To be effective and to be entitled to record, a notice of claim under section 3 must contain an accurate and full description of all the land affected by the notice, which description must be set forth in particular terms and not by general inclusions. However, except as to mineral interests, if the claim is founded on a recorded instrument, the notice must also state the liber and page or other county-assigned unique identifying number of the recorded instrument the claim is founded on. The failure to include the liber and page or other county-assigned unique identifying number renders the recording ineffective and the claim unpreserved. The notice must contain all of the following:

(a) The claimant›s name.

(b) The claimant›s mailing address.

(c) The interest claimed to be preserved.

(d) Except as to mineral interests, the liber and page or other unique identification number of the instrument creating the interest to be preserved.

(e) The legal description of the real property affected by the claimed interest. **If the claim is founded on a recorded instrument, then the legal description in such notice may be the same as that contained in such recorded instrument.**

(f) The claimant›s signature.

(g) An acknowledgment in the form required by the uniform recognition of acknowledgments act, 1969 PA 57, MCL 565.261 to 565.270, and section 27 of the Michigan notary public act, 2003 PA 238, MCL 55.287.

(h) The drafter›s name and address.

(i) An address to which the document can be returned.

(j) The name and mailing address of all owners of property that is claimed to be affected by the notice. For the purposes of this section, the name and mailing address of the person(s) in whose name the property is assessed on the last completed tax assessment roll of the county in which the property is located at the time of filing shall be deemed to be the owner(s); however, if a property owners' association is filing the notice, the requirements of this paragraph may be satisfied by attaching to and recording with the notice an affidavit executed by an authorized member of the board of directors of the property owners' association affirming that the board of directors of the property owners' association caused a statement in substantially the following form to be mailed or hand delivered to the members of that property owners' association:

STATEMENT OF MARKETABLE TITLE ACTION

The [name of property owners' association] (the "Association") has taken action to ensure that the [name of declaration, covenant, or restriction], recorded in Liber , Page , of the public records of County, Michigan, as may be amended from time to time, currently burdening the property of each and every member of the Association, retains its status with regard to the affected real property. To this end, the Association shall cause the notice required by MCL 565.103, to be recorded in the public records of County, Michigan. Copies of this notice and its attachments are available through the Association pursuant to the Association's governing documents regarding official records of the Association.

(2) A notice of claim under section 3 shall be in substantially the following form:

NOTICE PURSUANT TO MARKETABLE RECORD TITLE ACT

Claimant: _____

Whose address is: _____

hereby claims the following described interest: _____

_____

_____

which was originally created by _____, recorded in Liber _____, on Page _____, _____ County Records, and affects property located in the _____ of _____, County of _____, State of Michigan, and more fully described as:

_____

_____

_____

Commonly known as:

Tax Item No.:

The owner(s) of property affected by this Notice, for purposes of MCL 565.105(j) is/are:

_____

Whose address(es) is/are: _____

_____ _____

<<Claimant>>

STATE OF)

) SS.

COUNTY OF)

This instrument was acknowledged before me on _____, 20__, by <<Claimant>>.

_____ _____

, Notary Public

County, Michigan

My Commission Expires:

Acting in County, Michigan

Drafted by: **Return to:**

(**3**~~2~~) A notice of claim under section 3 must be filed for record in the register of deeds office of the county or counties where the land described in the notice is located. The register of deeds of each county shall accept all notices of claim under section 3 that are presented to the register of deeds that describe land located in the county in which the register of deeds serves and shall enter and record full copies of the notices in the same way that deeds and other instruments are recorded.

(**4**~~3~~) A register of deeds is entitled to charge the same fees for the recording of a notice under section 3 as are charged for recording deeds. In indexing notices under section 3, a register of deeds shall enter the notices under the grantee indexes of deeds under the names of the claimants appearing in the notices**, and the grantor indexes under the names of the owners of property appearing in the notices**.

565.106 Construction of act; purpose; extinguishment of claim.

Sec. 6.

This act shall be construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons dealing with the record title owner, as defined in this act, to rely on the record title covering a period of not more than 20 years for mineral interests and 40 years for other interests prior to the date of such dealing and to that end to extinguish all claims that affect or may affect the interest dealt with, the existence of which claims arises out of or depends upon any act, transaction, event, or omission antedating the 20-year period for mineral interests and the 40-year period for other interests, unless within the 20-year period for mineral interests or the 40-year period for other interests a notice of claim as provided in section 3 has been filed for record. The claims extinguished by this act are any and all interests of any nature whatever, however denominated, and whether the claims are asserted by a person sui juris or under disability, whether the person is within or outside the state, and whether the person is natural or corporate, or private or governmental.

565.107 Limitations of actions.

Sec. 7.

Nothing contained in this act shall be construed to extend the periods for the bringing of an action or for the doing of any other required act under any existing statutes of limitation nor to affect the operation of any existing acts governing the effect of the recording or of the failure to record any instruments affecting land nor to affect the operation of Act No. 216 of the Public Acts of 1929 nor of Act No. 58 of the Public Acts of 1917 as amended by Act No. 105 of the Public Acts of 1939.

565.108 Filing slanderous notices of claims; costs awarded to plaintiff.

Sec. 8.

No person shall use the privilege of filing notices hereunder for the purpose of slandering the title to land, and in any action brought for the purpose of quieting title to land, if the court shall find that any person has filed a claim for that reason only, he shall award the plaintiff all the costs of such action, including such attorney fees as the court may allow to the plaintiff, and in addition, shall decree that the defendant asserting such claim shall pay to plaintiff all damages that plaintiff may have sustained as the result of such notice of claim having been so filed for record.