

### EXAMINERS' ANALYSIS OF QUESTION NO. 3

#### **(1) Race Notice:**

Michigan is a race notice state, and whoever records first generally takes title. MCL 565.29. A buyer who is on notice of someone else's interest in the property, however, does not take title even if he records first. Notice may be actual or constructive. *Richards v Tibaldi*, 272 Mich App 522 (2006). Actual notice can exist where one "has knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries". *Kastle v Clemons*, 330 Mich 28, 31 (1951) (citation omitted).

Freda should take title because Jenny never recorded her interest in the property. While Jenny might have some recourse against the seller or his realtor, she has no recorded interest in the home, and Freda has already recorded her interest. Under Michigan's race notice statute, Freda wins.

Jenny is arguing that there is some question as to whether Freda had actual notice of another claim to the property because she was apparently aware that Chris "lacked integrity" and therefore might have been put on inquiry notice to investigate further. However, this claim should fail because Freda in fact purchased the property first and there was no *earlier* interest for Freda to uncover. She would therefore take title to the house despite hearing rumors about Chris before she recorded her title.

#### **(2) Seller Disclosure Act:**

Under the Seller Disclosure Act, MCL 565.951 *et seq*, ("SDA") a seller may be liable for certain hidden defects in real property. A buyer may rescind the sale contract if he discovers the misrepresentation before closing. MCL 565.954(3)-(4), *Roberts v Saffell*, 280 Mich App 397, 411 n 4, judgment aff'd 483 Mich 1089 (2009). MCL 565.957 sets forth a disclosure statement that must be attached to real property. Each disclosure must be made in good faith, and the seller may be liable for fraudulent misrepresentation or silent fraud for false statements in the disclosure statement. *Roberts*, 280 Mich App at 401.

That said, a seller has no duty to use ordinary care to discover defects. *Id.* at 408. The seller is not accountable for any error that is not within the personal knowledge of the seller. MCL 565.955(1). Thus, under the SDA, a seller cannot be made liable for unknown and undisclosed information. Furthermore the seller cannot be liable for information that could have only been obtained through inspection or expert knowledge. *Bergen v Baker*, 264 Mich App 376, 384 (2004); MCL 565.955(1).

Here the issue is a plumbing problem that frequently floods the basement. The question is whether Randy, the former owner, was aware of it. If Jenny can establish that Randy was aware, she could successfully bring suit based upon the SDA for silent fraud or fraudulent misrepresentation, and recover damages. Otherwise, Jenny would not be entitled to a damages award. Finally, because Jenny had already taken title to the home, she cannot rescind the contract. MCL 565.954(4); *Roberts*, 280 Mich at 411 n 4.