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N.Y. Real Property Law Journal

A publication of the Real Property Law Section
of the New York State Bar Association

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A Message from the Section Chair

Real Property Law Section: New Mission Statement and Current Projects

1. Mission Statement

The RPLS has reviewed and updated its Mission Statement:

> The Real Property Law Section serves New York real property lawyers and the public, promotes the successful transaction of real estate business in New York State, and contributes to the sound development of real property law in New York State. Toward that end, we:
>
> - Identify and draw attention to problems, abuses, and issues affecting real property, recommending improvements in real property law, procedure, and practice as appropriate;
> - Publish a high-quality *Journal* to keep Section members informed of developments and the latest thinking in real property law;
> - Provide a Section Web site and give Section members a variety of forums to discuss the state of the law and possibilities for improvement;
> - Offer high-quality continuing legal education programs to Section members sufficient to meet all their CLE requirements;
> - Act as a resource for legislators and government officials and comment on and, where appropriate, initiate legislation;
> - Establish and operate committees and task forces that seek to achieve the Section's goals within numerous areas of real property law;
> - Educate the public about real estate law and the benefits of using lawyers in real property transactions, particularly residential transactions; and
> - Work with the real estate finance, brokerage, title insurance, surveying, and other related industries, to improve practices, communications, and working relationships.

2. Committees and Task Forces

The Section has 18 Committees and 7 Task Forces (listed on the RPLS part of the NYSBA Web site). The largest memberships are for Condominiums and Cooperatives (252), Title and Transfer (176), Real Estate Financing (164), Commercial Leasing (162), Land Use and Environment (122), Landlord and Tenant Proceedings (79) and Legislation (59). Check out these and other committees on our RPLS Web site at www.nysba.org/realprop and join one.

3. Current RPLS Legislation Projects

Adverse Possession. A9156/S5364A was an attempt to reverse the outcome in *Walling v. Przybylo*, 7 N.Y.3d 228 (2006), by providing that a title claim based on adverse possession could not succeed if the claimant had knowledge of the true ownership. Our Section opposed the bill (RPLS Legislation Memorandum #13) because it contained ambiguities and raised important issues, and the Governor vetoed the bill. Our Task Force on Adverse Possession has studied the law and has recommended a better alternative to help ensure that homeowners are on notice of adverse possession and to eliminate claims based on minor encroachments and lawn mowing. The RPLS Executive Committee has approved the bill and sent it to the NYSBA Executive Committee for its approval.

Mortgage Foreclosure. Our Task Force on Mortgage Foreclosure is analyzing various mortgage foreclosure notice bills and trying to find a way to have the legislature coordinate the notice bills. It will also be analyzing the impact of the Home Equity Theft Prevention Act and will consider proposing legislation to correct any problems (e.g., with deeds-in-lieu of foreclosure).

MERS. The Real Estate Financing Committee is studying issues raised by MERS (e.g., *MERSCORP, Inc. v. Romaine*, 8 N.Y.3d 90 (2006) (county clerk had duty to record and index mortgages that named MERS as lender's nominee; dissent by Kaye, J., urged legislative reform). The Committee has drafted memos in opposition to A9295 and A9491, which would grant discretion to County Clerks to reject documents.

Subprime Lending. The Real Estate Financing Committee has also been asked to study proposals in response to the subprime lending problems (e.g., A8972 Responsible Lending Act, which would define and regulate subprime loans).

Title Agents and Service Charges. The Section successfully negotiated an exclusion from the controlled business prohibition for attorney title agents and examining counsel in the title agents registration bill (A1743/S877) and consequently supported the bill. Our Title and Transfer Committee has drafted a bill to require disclosure of service charges to consumers in connection with title insurance that would separately identify (1) payments to third parties and (2) service charges.

Offensive Restrictive Covenants. In response to a request for comment from an Assistant Counsel to the Governor, we are drafting a memo in opposition to the bill (A5182/S5727), vetoed by the Governor, that would have required title companies to record a document removing racial and other offensive covenants. Our memo suggests that existing laws and practices by title insurers in not reporting such restrictions appear to be effectively addressing the concern. It is the opinion of the Section that existing Federal and State Laws that prohibit the enforcement of such restrictions effectively address the issue.

4. Dry Loan Closing Survey and Report

Last year, members reported that banks' funding procedures often resulted in delays of completion of closings for hours, even days. Surveys were conducted of RPLS members and NYSAR members. A summary of the RPLS survey is on p. 6 and the survey itself is to be published on the RPLS Web site. A report was submitted by the Superintendent of Banks to the Governor and Legislature on July 13, 2007, which called for further investigation by December 2007. It appears that no further action is contemplated by the Banking Department unless the Section urges them to act.

5. *N.Y. Real Property Law Journal* on Lexis and Westlaw

Articles from our *Journal* are to be published on Lexis and Westlaw, with a time delay (intended to not discourage membership in the Section).

6. Section Web site

Our RPLS Web site at www.nysba.org/realprop has several useful features: *N.Y. Real Property Law Journal* issues back to 1998; committee rosters and mission statements; minutes of Executive Committee meetings; schedule of RPLS CLE and committee meetings (Upcoming Events); Real Property Forum discussion group (Section Listserve); RPLS Blog; listing of bills of interest in the Senate and Assembly (Status of Pending Legislation); and 2007–2008 Legislative Memoranda: prepared by the RPLS. Go to our Web site to keep up with the latest developments.

Karl B. Holtzschue

Real Property Law Section Summary of Results of Survey on Dry Closings

By Karl B. Holtzschue, RPLS Chair

1. RPLS Study of Dry Closings

The New York Superintendent of Banks was required, under Chapter 500 of the Laws of New York 2006, to conduct a study of residential mortgage closings where funds were not available for the closing (so-called "dry closings"). The Banking Department contacted the Real Property Law Section (RPLS) to ask for reports from its members regarding the frequency of such dry closings, the type of lending institutions involved, and the other implications for the lack of funds at closing. To that end, the Title and Transfer Committee, at the request of the RPLS Chair, solicited and assembled that information. The RPLS had 5,158 members at the time; 3,697 members having e-mail addresses were invited to participate. Respondents took the survey in the 19-day period from January 23 to February 10, 2007; 332 completed responses were received. The RPLS Survey is to be published on the RPLS Web site at www.nysba.org.

2. Superintendent of Banks Report

The Superintendent of Banks submitted a 10-page "Report to the Governor and the Legislature," dated July 13, 2007, which described surveys by the RPLS, N.Y.S. Association of Realtors and the N.Y.S. Bankers Association. It concluded that: (1) dry closings do not comprise a significant portion of residential real estate closings; (2) many problems arise with the involvement of multiple parties and geographically remote and/or specialty lenders; (3) lenders based outside of New York expect that a notarized closing is permitted and that they may receive signed closing documents prior to making funds available; (4) there is a clear difference in proper closing between closings in bank settings and non-bank settings; (5) failure to consummate a proper closing is due broadly to a lack of knowledge by participants in non-bank closings. The Department stated that it would not draw any final conclusions or take any specific regulatory actions at that time. It recommended the development of a more comprehensive survey and research tool, to be completed by December 2007.

At this time it does not appear that the Banking Department will take further action unless urged to do so by the RPLS or others.

3. The Following Is a Summary of the Results of the RPLS Survey

1. How many residential closings did you handle last year?

Quantity of Closings	Frequency	Percent
(skipped)	13	4.1%
0	3	0.9%
1-25	72	22.8%
26-50	74	23.4%
51-75	28	8.9%
76-100	45	14.2%
101-125	6	1.9%
126-150	13	4.1%
151-175	5	1.6%
176-200	13	4.1%
201+	44	13.9%
Total	316	100.0%

Total quantity of closings: 52,141

2. In what counties did those closings occur (please select all that apply)?

New York	153	(46.1%)
Nassau	151	(45.5%)
Queens	139	(41.9%)
Suffolk	124	(37.3%)
Kings	116	(34.9%)
Westchester	100	(30.1%)
Bronx	69	(20.8%)
Richmond	55	(16.6%)
Rockland	54	(16.3%)
Orange	47	(14.2%)
Dutchess	43	(13.0%)
Albany	37	(11.1%)
Saratoga	37	(11.1%)
Ulster	31	(9.3%)
Schenectady	30	(9.0%)
Rennselaer	29	(8.7%)
Putnam	24	(7.2%)
Sullivan	22	(6.6%)
Monroe	20	(6.0%)

[had the most over 5%]

3. How many times in the past year have you personally experienced, or have your associates or paralegals experienced, dry closings where funds were not available at the time of closing?

Quantity of Closings	Frequency
(skipped)	16
0	53
1-09	128
10-19	44
20-29	29
30-39	12
40-49	8
50-59	12
60-69	3
70-79	4
80-89	1
100-109	7
150-159	3
250-259	2
	322

Total dry closings: 5,140
Percentage of closings that were dry:
5,140/52,141 = 9.85%

4. In those situations, what type of lenders were involved?

Lender	Select all that apply	Operate through local mortgage broker?		
		Yes	No	Unknown
In-State Bank	40.4%	67.1%	13.6%	19.3%
Out-of State Bank	67.2%	76.6%	5.0%	18.5%
In-State Non-Inst'l	19.0%	71.4%	7.9%	20.6%
Out-of State Non-Inst'l	28.9%	67.7%	15.1%	17.2%
Non-Bank Lender	12.0%	54.3%	15.2%	30.4%
Other	1.5%	28.6%	42.9%	28.6%

5. If you selected "other" above, please identify the type of lender.

Federal Credit Union, at all times through mortgage brokers, NY HDC, Internet mortgage lender, e-trade.

6. In how many of those situations, was there a local attorney, closer or escrow agent involved in the transaction to whom funds could have been wired in advance? (please enter a number)

Could get wire	Frequency
(skipped)	62
0	12
1-9	121
10-19	38
20-29	29
30-39	12
40-49	7
50-59	11
60-69	3
70-79	4
80-89	1
90-99	1
100+	21
Total	322

7. Have you experienced situations where the lender has no contact locally and you are asked to be their local attorney for the transaction and required to prepare the loan documents, close the loan and return the package to the lender before funding will occur?

Yes: 196 (64.1%)
No: 110 (35.9%)

8. Have you experienced any problems with this type of arrangement?

Yes: 135 (55.6%)
No: 108 (44.4%)

9. Is it your general experience that lenders will not wire funds until they have received copies of all of the loan documents?

Yes: 116 (38.4%)
No: 186 (61.6%)

10. If that is so, what is the usual delay after delivery of those loan documents before funds are available to complete the transaction?

1-3 hours: 116 (52.5%)
4-6 hours: 52 (23.5%)
7-12 hours: 13 (5.9%)
Other: 40 (18.1%)

11. Is it your general experience that lenders will not wire funds until they have received a fully executed and complete HUD-1 Settlement Statement?

Yes: 187 (61.3%)
No: 118 (38.7%)

12. If that is so, what is the usual delay after delivery of the HUD-1 before funds are available to complete the transaction?

1-3 hours: 141 (65.3%)
4-6 hours: 34 (15.7%)
7-12 hours: 10 (4.6%)
Other: 31 (14.4%)

13. In those situations where you experienced "Dry Closing" problems, was a closer present at the closing?

Yes:	250	(94.7%)
No:	14	(5.3%)

14. If yes, please identify the type of closer:

Local Attorney:	188	(56.6%)
Licensed Title Company Closer:	73	(22.0%)
Settlement Company Agent:	72	(21.7%)
Out-of-Area Attorney:	52	(15.7%)
Mortgage Broker:	4	(1.2%)

15. What solutions would you suggest to address this problem?

[Suggested solutions listed on pages 33-43*]

16. Would the suggested solution above require delivery of funds to a local contact the day preceding closing?

Yes:	222	(81.0%)
No:	30	(10.9%)
Not sure:	22	(8.0%)

17. If there is a local contact, should that local contact be a licensed attorney?

Yes:	250	(87.7%)
No:	8	(2.8%)
Not sure:	27	(9.5%)

18. What is the frequency with which the funds are presented when available in a form other than a bank check or an attorney trust account check, such as a corporate check drawn on the local closer?

[Various answers on pages 44-45*]

19. Please provide examples of the types of lenders involved:

In-State Bank:	100	(30.1%)
Out-of-State Bank:	165	(49.7%)
In-State Non-Inst'l:	55	(16.6%)
Out-of-State Non-Inst'l:	83	(25.0%)
Non-Bank Lender:	39	(11.7%)
Other:	6	(1.8%)

20. What other problems have you personally experienced, other than delay in funding, resulting from dry closings?

[Various answers on pages 53-63*]

*Page numbers refer to the final published survey, a copy of which is available online at www.nysba.org/realprop.

Reverse Mortgages—Mortgage Recording Tax Exemption

By Marvin N. Bagwell

Pursuant to Section 252 of the Tax Law,[1] certain reverse mortgage borrowers are exempt from having to pay the mortgage recording tax. Recently, the New York State Department of Taxation and Finance issued an advisory opinion in response to a petition submitted by Jason Jerozal—Primary Land Services, LLC (hereinafter Jerozal),[2] in which it attempted to clarify exactly which reverse mortgage borrowers qualify for the exemption. The problem, which the Department attempted to address, involves the ages of the co-owners of the property secured by the reverse mortgage. Reverse mortgages taken out by individual borrowers, tenants by the entirety, joint tenants with the right of survivorship, or tenants in common do not pose any difficulty. In those cases, it is clear under state law that the youngest of the borrowers has to be at least 60 years of age[3] or 70 years of age[4] to qualify for a reverse mortgage and for a mortgage recording tax exemption. To qualify for a federally authorized reverse mortgage, better known as a Home Equity Conversion Mortgage (hereinafter HECM) insured by the Department of Housing and Urban Development (hereinafter HUD), the borrower must be at least 62 years of age.[5]

The problem occurs when there are third-party owners with an interest in the property who may or may not be of the requisite ages. This occurs when title is held by a borrower having only a life estate in the property (usually Mom) with co-owners (usually the kids) holding the remainder interest. The problem also arises when title to the property is held by a trust where Mom is the beneficiary and the kids are the contingent beneficiaries. It is certainly possible that the third-party kids may not be 60, 62, or 70 years of age when Mom takes out the reverse mortgage. Will this keep Mom, who is the life tenant or trust beneficiary, from qualifying for the mortgage tax exemption? It might.

There is a second level of inquiry which must be kept in mind. In Jerozal, the Department made clear that there are two types of mortgages which qualify for the mortgage tax exemption: (1) mortgages which are authorized by §§ 280 (borrowers at least 60 years of age) and 280-a (borrowers who are 70 years of age) of the Real Property Law (hereinafter RPL) (state authorized reversed mortgages) and (2) HUD HECM reverse mortgages.[6] The basic qualification rules for both are the same; the borrower must own the property to be secured by the reverse mortgage and the property can contain no more than one to four family units of which one unit must be the borrower's principal residence. The major difference however, aside from the 60 and 70 (state) and 62 (federal) minimum-age distinction referenced above, is in the amount that the borrower can borrow. The amount that a 62-year old can borrow under HUD's HECM program is determined pursuant to a complex formula involving the zip code of the property's location, the borrower's actual age, the interest rate, the borrower's equity in the property and other factors. However, given these factors, the mortgage amount that HUD will actually insure in the New York City metropolitan area is capped at $362,790 for a one-family home and at $697,696 for a four-family home.[7]

The state has no such cap. Hence, a lender can find authority to issue a multi-million dollar "jumbo" reverse mortgage pursuant to state law, whereas HUD, by not providing insurance for such a "jumbo" mortgage, effectively curtails its issuance pursuant to federal authorization. (Admittedly this statement is a point of contention. There is anecdotal evidence that some reverse mortgage lenders believe that they do not need federal or state authorization to issue reverse mortgages. The proof is that these lenders are devising programs whereby the reverse mortgages will be secured by a vacation home, a property type which does not meet the principal residence requirement of federal or state law and regulations.[8])

To come back full circle, under HUD's HECM program, when title is held by a living or *inter vivos* trust, the beneficiaries of the living trust must all be at least 62 years of age.[9] This means that Mom and Dad, the usual trust beneficiaries, must meet the age requirement. However, the contingent beneficiaries, (usually the kids) are not required to be 62 years of age.

Although there is no advisory opinion directly on point, the state will probably follow HUD on this point and require that the trust beneficiaries (Mom and Dad) must meet the statutory age requirement but the contingent beneficiaries need not do so.[10] In the advisory opinion issued in response to the Edna Huff Trust (hereinafter Edna Huff), the grantor and presumed beneficiary of the trust was 77 years of age. The trustees were her children. Because the trust met the federal HECM requirements, the State Department of Taxation and Finance opined that the trust qualified for an exemption from having to pay the mortgage recording tax. Since

Mrs. Huff met the federal age requirement, it was immaterial that the trustees did not, even though the trustees, as the title holders, were required to execute the mortgage and the §§ 280 or 280-a Affidavit which must be presented to the recording clerk in order to obtain the mortgage tax exemption (see discussion below).

Under HUD's HECM program, when title is held by a life tenant, the remainder persons do not have to be 62 years of age or older; they can be under 62.[11] Under state law, the remainder persons must be over the age of 60.[12] In the William H. Bradt advisory opinion,[13] Emma Fonti, who was over the age of 60, held a life estate in her property. Her children, who were under the age of 60, held the remainder interest. As co-owners of the property to be secured by the reverse mortgage, they would be co-mortgagors and, as such, also be required to execute the reverse mortgage documents and the RPL § 280 affidavit in order to obtain the mortgage tax exemption. The Department held that since the children failed to meet both the federal (62) and the state (60) age requirements, the reverse mortgage did not qualify for the mortgage tax exemption. Note that the Department decided the William H. Bradt advisory opinion[14] before the federal regulation on requiring the life tenant to meet the age requirement went into effect.

In Jerozal,[15] the Department was given the opportunity to update its position. Ms. M, age 62, entered into a HUD HECM reverse mortgage. However, Ms. M had conveyed the property to members of her family, retaining only a life estate for herself. The family members were all under the age of 62. Pursuant to federal regulations, Ms. M was the sole borrower, but the co-owning family members were required to execute the mortgage documents. Since this reverse mortgage met the 1996 HUD HECM requirements, the Department opined that the mortgage qualified for the mortgage tax exemption. However, the affidavit required by state law to be presented to the recording office to obtain the exemption had to be modified to set forth that the mortgage met the federal requirements.

The result of the current state regulations is that the person who has put title to his or her property in a living trust will qualify for a mortgage tax exemption on a "jumbo" reverse mortgage (even if the contingent beneficiaries do not meet the state statutory age requirement), whereas a similarly situated person who has only a life estate to his or her property with the remainder interest in third parties will qualify for the reverse mortgage only if the third parties meet the state statutory age requirements. This is because HUD caps the mortgage amount that it will insure, thereby leaving borrowers who wish to take out a "jumbo" reverse mortgage having to meet state requirements to qualify for a mortgage tax exemption. State law treats property held by a living trust differently from property that is held in a life estate. At the risk of repetition, the contingent beneficiaries of a living trust do not have to meet the 60 or 70 years of age requirement, whereas the persons holding the remainder interest after a life estate must do so.

This may be a little confusing. Here is a table you might find useful:[16]

In order to qualify for the Mortgage Tax Exemption, are the beneficiaries of a living trust or remainderpersons (when the borrower holds only a life estate) required to be over the applicable ages: 60 or 70 (for state authorized reverse mortgages) or 62 (for HUD HECM reverse mortgages)?

	HUD HECM	**State**
Trusts	Yes (1)	Yes (2)
Life Estates	No (3)	Yes (4)

The contingent beneficiaries (usually Mom and Dad's kids) do not have to meet the age requirement.

Pursuant to Tax Law § 252-a(2),[17] in order to claim an exemption from the mortgage recording tax, the lender is required to attach an affidavit setting forth the basis for claiming the exemption when submitting the reverse mortgage to the County Clerk for recordation. Different affidavits are required when the mortgage is state authorized pursuant to §§ 280[18] or 280-a[19] of the Tax Law or authorized pursuant to federal law and regulations under 12 U.S.C. § 1715z-20.[20] The forms of the affidavits are attached as Appendices A and B to this Memorandum.

The point here is only to point out the ambiguity. It is not to stake out a policy position. After all, a person who has enough equity in their home to qualify for a million-dollar "jumbo" reverse mortgage probably can afford to pay the mortgage recording tax no matter how the property is titled. It is up to the people whom we voters send to Albany to eliminate or continue the disparate treatment. It is also up to members of the elder bar to be aware of the discrepancy when undertaking their client's estate planning. This is just one other factor to take into consideration.

Endnotes

1. N.Y. Tax Law § 250 (McKinney 1998).
2. Advisory Opinion from the State of New York Commissioner of Tax and Finance TSB-A-07(5) R (Oct. 18, 2007).
3. N.Y. Real Prop. Law § 280 (McKinney 2006).
4. N.Y. Real Prop. Law § 280-a (McKinney 2006).
5. *See* U.S. Dep't of Hous. & Urban Dev., Handbook No.: 4235.1 Rev-1: Mortgage Credit Analysis 4-4 (1994).
6. *See supra* note 2.
7. *FHA Mortgage Limits List*, https://entp.hud.gov/idapp/html/hicost1.cfm (last visited April 23, 2008).
8. Kelly Greene and Valerie Baurelin, *Reverse Mortgages*, Wall St. J., Nov. 13, 2007, at D1.
9. *See* U.S. Dep't of Hous. & Urban Dev., Handbook No.: 4235.1 Rev-1: Mortgage Credit Analysis 4-5(A) (1994) (which

provides that "all beneficiaries of the trust must be eligible HECM borrowers at the time of origination and until the mortgage is released . . .").

10. *See* Advisory Opinion from the State of New York Commissioner of Tax and Finance TSB-A-96 (4) R (May 22, 1996). (In answer to petition No. M960126B by The Edna Huff Trust, where the issue presented was whether the recording of a reverse mortgage placed on premises held in trust is exempt from the mortgage recording tax. (Article ll of the Tax Law) based on the exemption provided in section 252-a.2 of the Tax Law (the exemption for reverse mortgages)).
11. 24 C.F.R. § 206.35 (1996).
12. Advisory Opinion from the State of New York Commissioner of Tax and Finance TSB-A-04(2)R (Jul. 19, 2004).
13. *Id.*
14. *Id.*
15. *See supra* note 1.
16. *See* U.S. Dep't of Hous. & Urban Dev., Handbook No.: 4235.1 Rev-1: Mortgage Credit Analysis 4-5(A) (1994); Advisory Opinion from the State of New York Commissioner of Tax and Finance TSB-A-96 (4) R (May 22, 1996); 24 C.F.R. § 206.35 (1996); Advisory Opinion from the State of New York Commissioner of Tax and Finance TSB-A-07(5) R (Oct. 18, 2007); Advisory Opinion from the State of New York Commissioner of Tax and Finance TSB-A-04(2)R (Jul. 19, 2004).
17. N.Y. Tax Law § 252-a(2) (McKinney 1998).
18. *See supra* note 3.
19. *See supra* note 4.
20. National Housing Act, 12 U.S.C. § 1715z-20 (2001).

Marvin N. Bagwell is the Vice-President and Eastern Divisional Counsel of United General Title Insurance Company in White Plains, New York. Mr. Bagwell is a graduate of Harvard College and Harvard Law School. Mr. Bagwell is a certified CLE instructor for Virginia and Pennsylvania. He is admitted to practice in Virginia and in New York. He is a Past President of both the New York State Land Title Association and the Title Insurance Rate Service Association ("TIRSA").

APPENDIX A

SECTION 252 AFFIDAVIT

(Reverse Mortgages Pursuant to Section 280 or 280-a of the Real Property Law)

STATE OF NEW YORK)

) to wit:

County of _____)

_____, being duly sworn deposes and says:

1. I am the _____of _____, the mortgagee in the mortgage made by _____ to the mortgagee, dated _____, in the amount of $_____ submitted herewith for recording. I am familiar with the facts set forth herein.
2. The mortgage is a reverse mortgage made pursuant to Section 280 (280-a) of the Real Property Law.
3. All of the mortgagors are at least 60 (Section 280) or 70 (Section 280-a) years of age.
4. The mortgage is on real property improved by a one-to-four family dwelling or condominium unit that is the residence of the mortgagor or mortgagors.
5. The mortgage conforms to all of the provisions of Section 280 or Section 280–a of the Real Property Law.

Wherefore, your deponent requests the mortgage submitted herewith for recording be recorded without the payment of a mortgage recording tax pursuant to Section 252-a subd. 2 of Article 11 of the Tax Laws of the State of New York.

_____

Sworn to before me this _____ day of _____, 20____

_____
Notary Public

APPENDIX B

SECTION 252 AFFIDAVIT

(Reverse Mortgages Pursuant to 12 U.S.C. § 1715z-20 (HUD HECM Reverse Mortgages))

STATE OF NEW YORK)

) to wit:

County of _____)

_____, being duly sworn deposes and says:

1. I am the _____of _____, the mortgagee in the mortgage made by _____ to the mortgagee, dated _____, in the amount of $_____ submitted herewith for recording. I am familiar with the facts set forth herein.
2. This mortgage is a reverse mortgage that conforms to the applicable federal law and regulations issues pursuant to 12 U.S.C. § 1715z-20.
3. Therefore, this mortgage is exempt pursuant to Section 280(4) or Section 280-a (4) of the Real Property Law and exempt from the mortgage recording tax pursuant to Section 252-a.2 of he Tax Law.

Wherefore, your deponent requests the mortgage submitted herewith for recording be recorded without the payment of a mortgage recording tax pursuant to Section 252-a subd. 2 of Article 11 of the Tax Laws of the State of New York.

_____

Sworn to before me this _____ day of _____, 20____

_____
Notary Public

Landlord's Checklist of Silent Lease Issues (Second Edition)

By Landlord's Silent Lease Issues Subcommittee, Commercial Leasing Committee, Real Property Law Section, New York State Bar Association

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In commercial leasing, a "standard form" does not necessarily say everything it needs to say. This checklist offers a supplemental checklist to give any landlord's lease a "tune-up."

When a landlord and a tenant agree on the business terms of a substantial commercial lease, the landlord may ask its counsel to prepare the first draft of the lease. If you are that counsel, you will probably start the assignment by using one or some combination of the following, whichever apply(ies):

- A standard form of lease, possibly recent but more likely not;
- A form of lease from another recent transaction; or
- A similar lease negotiated between the same parties or their affiliates.

For purposes of this checklist, a "Standard Form" means any of these possibilities.

Whatever Standard Form landlord's counsel uses, it will probably cover the traditional leasing issues adequately. The Standard Form will not necessarily deal with recent developments in leasing law; recent reported cases; unreported litigation and disputes; newly discovered gaps and glitches in Standard Forms generally; advances in technology; or changes in the marketplace and the world. To the extent that participants in other transactions have developed better ways to handle particular landlord-tenant issues or identified new issues or concerns that typical commercial leases have not covered, those improvements will probably not have found their way into the Standard Form.

Even if you know your Standard Form is somewhat out of date or needs work (usually true), you probably will lack the time in any particular transaction to revisit the Standard Form and improve it. If you want to give the Standard Form a tune-up, or even a complete overhaul, you may find the task daunting, and entirely incompatible with the timing and budget of any particular transaction. To do the job right, you might first need to assemble a half dozen other leases that seem particularly well done, thorough, and up to date. Then you will need to read each and compare it against the Standard Form, updating and improving the Standard Form as appropriate. This is a job that almost no particular transaction will ever support. It will probably never rise to the top of your "to do" list at any other time either. It is just too large and amorphous and a bit painful. But you should probably consider doing it once in a while anyway.

To simplify any such task, and to create a guide and starting point for any landlord's counsel who wants to rethink and perhaps update a Standard Form, the New York State Bar Association Real Property Law Section Commercial Leasing Committee in 2000 appointed a subcommittee to prepare the first edition of a "Landlord's Checklist of Silent Lease Issues."

The subcommittee tried to identify and collect leasing issues that a typical Standard Form might likely omit, or not adequately cover, all as considered from a landlord's perspective. These issues—the so-called "landlord's silent lease issues"—might arise from any of the causes or trends described above. Many of them also reflect the reality that judges hesitate to infer obligations or prohibitions in leases or contracts, particularly in New York, and particularly at the behest of a landlord. Courts often say that if a landlord wanted to impose on a tenant any particular obligation, burden, restriction, or prohibition, the landlord had the opportunity to do so in the lease. If the landlord did not use that opportunity, then courts often deny the landlord a second chance. Landlords need to say everything the first time around. This checklist represents an attempt to help them do exactly that. It is the courts, more than resources like this checklist, that force completeness and thoroughness—and hence girth—in legal documents.

The "Landlord's Checklist of Silent Lease Issues" complements an earlier "Tenant's Checklist of Silent Lease Issues," prepared by a similar subcommittee.[1] The "Tenant's Checklist" was intended to help tenants' attorneys identify and raise possible issues in lease negotiations, emphasizing tenant-oriented issues typically not addressed at all in landlords' lease documents. The "Landlord's Checklist" focuses on commercial leasing issues that a landlord's Standard Form probably does not, but possibly should, cover. As a general proposition, the Landlord's Checklist tries to suggest pro-landlord changes in a Standard Form that will be relevant in at least 15% of commercial leasing transactions. To make it onto the list, though, an issue must also be less than 50% likely to appear in a typical Standard Form—assuming that the Standard Form was intended to cover transactions of the type for

which the issue is relevant, but has not been updated recently. The Landlord's Checklist theoretically ignores any provision that the subcommittee thinks is 50% or more likely (when relevant) to appear in a typical Standard Form, or likely to be relevant in less than 15% of commercial leases.

The subcommittee applied both the "15% test" and the "50% test" in an absolutely arbitrary, capricious, and subjective manner, with no evidence, data, or other empirical information, validation, confirmation, or corroboration of any kind whatsoever. Random exceptions were made with precisely the same lack of analytical rigor. Ultimately, the test was applied inconsistently, unpredictably, and based on pure whim. Thus, the inclusion or exclusion of any particular issue carries no weight. The checklist merely amounts to a reasonable reference point for anyone representing a landlord and looking for points to consider. Such imperfection is inevitable in any checklist of this type.

When the co-chairs of the Silent Lease Issues Subcommittee first proposed creating a Landlord's Checklist of Silent Lease Issues, one of the more active members (and a former co-chair) of the Commercial Leasing Committee argued that a list of landlord issues would be amorphous and potentially unending. Shouldn't such a list ultimately include everything that any good lease should include? And if it does, what value does the list add? A landlord should simply start with a good Standard Form, the Committee member argued, then modify it to reflect the business deal and any particular concerns the transaction might create.

All this may be true. But the subcommittee co-chairs believe:

- A "good" Standard Form is not so easy to identify; and
- Even with a "good" Standard Form, you may benefit from having a somewhat condensed summary of the latest issues that an author of a "state-of-the-art" Standard Form might wish to cover, all collected in one place.

The subcommittee believes that this Landlord's Checklist delivers exactly that—in a reasonably (and perhaps even surprisingly) succinct and contained manner—and will help commercial leasing practitioners. That was true of the first edition and is even truer of the second edition.

Does the Checklist Give Landlords an Unfair Advantage?—As an objection to this checklist, some might argue that Standard Forms are already landlord-oriented enough—no one benefits by piling on even more landlord rights and tenant burdens (also sometimes known as "gotcha" clauses). The landlord may counter that argument by stating that once in possession, the tenant has all the leverage and judicial sympathy, and the landlord merely has the words of the lease on which to rely.

A landlord would say that if the lease enforcement game were played on a level playing field, then perhaps lease forms would not need to be landlord-oriented; they could be "balanced" and "fair." The use of landlord-oriented Standard Forms (including "new and improved" landlord-oriented Standard Forms of the type this checklist suggests) merely represents some minimal effort to restore balance to the landlord-tenant relationship. Tenant's counsel would, of course, disagree.

As a variation on the theme of leveling the playing field, this Landlord's Checklist will also help landlord's counsel respond to a major tenant that insists on using its own form of lease. The points this checklist mentions will tend to be the same points that a tenant's form of lease disregards.

Intended for Major Commercial Space Leases—This checklist is intended mainly for substantial commercial space leases, for both retail and office uses. It does not apply to residential leasing transactions. Most issues here will apply to some leases but not others. Any reader should interpret every item in the checklist as if prefaced by the words: "if applicable, appropriate, desired, possible, and realistic under the circumstances, taking into account the size and nature of the transaction, market conditions, the landlord's project, the tenant mix, the needs and negotiating positions of the parties, the timing, and all other circumstances, including whether the lease already adequately covers the point in question."

The checklist does not try to suggest which issues apply to which types of leases, which issues matter most, or how a tenant might respond to any of these issues. Because of these limitations, this checklist will add more value for an experienced lease negotiator than for a novice. Even a novice, though, will find it useful. Any reader of this checklist should use it prudently and with judgment, and not stop thinking just because something appears on this checklist.

Caveats, Warnings, Disclosures—This checklist does not represent a position statement or recommendation by The New York State Bar Association or its Real Property Law Section, Commercial Leasing Committee, any of its subcommittees, or any member of any of them. The checklist does not establish a "minimum standard of practice" and is neither exhaustive nor complete. It is offered merely as a tool for leasing practitioners, with the hope that it might help. This checklist creates no legal duties or obligations. No representation or warranty is made regarding the enforceability, validity, or practical feasibility (or tenant palatability) of any provision suggested here. The checklist simply lists some issues to consider when updating a Standard Form.

Although the authors of the checklist and the subcommittee members will be honored and pleased if anyone who reads this checklist

mentions it in lease negotiations, this checklist does not estop any author or subcommittee member from taking any position in any lease negotiation.

Notes on Style—In the editing process, the authors decided to express some issues as affirmative recommendations, to achieve a more direct and lively presentation. Thus, the checklist sometimes says a landlord "should" consider some concept or even "should" incorporate specific provisions in its lease. You must take each such statement with a bushel of salt. The subcommittee does not purport to establish or define "standard" requirements for what any lease "should" or "should not" say. Every lease represents its own negotiation, depending largely on the considerations above. Making definitive "one-size-fits-all" recommendations would thus be inconsistent with reality—a bad joke. Such an approach in this checklist does, however, simplify, streamline, and add life to the presentation, which could otherwise be deadly (and perhaps still is).

This checklist mentions each issue only once, even if it might reasonably belong under more than one heading. No cross-references are provided in these (or any other) cases. Any user of this checklist should read it from beginning to end.

Finally, the checklist generally does not provide legal citations or specific lease language, with a few exceptions. Counsel will need to track down legal citations by other means, including perhaps a visit to the library. A "library" is a room or other central physical facility that contains a range of "books," which are objects consisting of multiple paper sheets, printed on both sides, in which people who claim expertise in a particular legal area share the benefit of that expertise. A "book" can sometimes be even more effective than "Google" as a legal research technique. Unfortunately, "books" are also more work to use, often requiring the user to leave his or her computer terminal and email stream for well over five minutes. "Books" also often force the reader to learn something about related legal issues not directly responsive to the user's specific question, surely an inefficient and unnecessary use of time. Similarly, counsel will need to develop lease language from sources outside this checklist (the library, perhaps?) or by thinking, an activity that seems less and less a daily part of the modern practice of law.

Written from Landlord's Perspective—This checklist considers lease negotiations from a landlord's perspective. It is a landlord's checklist. The subcommittee members do not necessarily believe tenants should accept (or at least accept without objection) a landlord's position regarding any issue this checklist suggests. To the contrary, when representing a tenant, members of the subcommittee would reject many suggestions in this checklist. Nevertheless, most of the lease provisions suggested in this checklist come from actual landlords' leases proposed in actual transactions.

As a future project, it might be possible to develop a checklist of recommended "middle-ground" outcomes on all the major commercial leasing issues. For each issue, one would seek to identify the legitimate concerns of each party and figure out a reasonable way to accommodate those concerns. The overall goals of such a project are: (1) to assure the landlord a reliable rental stream reflecting the occupancy value of the tenant's space; (2) to give the tenant the flexibility it needs to run its business even as circumstances change over time; and (3) to give neither party a potential "holdup opportunity" where the lease allows that party to extract an unexpected "windfall" from the other side because the other side needs some form of reasonable concession or cooperation.

In other words, one would try to create a "fair" lease. Such efforts have been undertaken in the past.[2] Although this all sounds like a great idea, "fairness" is very much in the eye of the beholder, much like "progressive," "public interest," and "reform." To reach the right result in any particular case, it may make more sense to let each party identify its own needs and then let the two parties negotiate a reasonable middle ground that works under the particular circumstances. Of course, that approach tends to take longer and cost more than trying to define a standard "one size fits most" middle-ground commercial lease.

Subcommittee Membership— To develop the Second Edition of the Landlord's Silent Lease Issues checklist, the Landlord's Silent Lease Issues Subcommittee held a series of meetings every quarter or so, starting soon after publication of the first edition of this checklist. Those meetings were widely announced through State Bar communications channels. Each meeting covered a few sections of the checklist in alphabetical order, eventually reaching the end. Each meeting amounted to a brainstorming and educational session, during which everyone had the chance to compare notes and learn something new. Even if these meetings had not led to the work product offered here, they gave all participants an unusually valuable and advanced form of continuing legal education.

Anyone who attended at least one meeting qualifies as a "member" of the subcommittee. On that basis, subcommittee members for the second edition include at least: Francisco Augspach, Adam Leitman Bailey, Marc Becker, Yosi Benlevi, Andrew Berkman, Joshua Bernstein, Wally Bock, Harvey Boneparth, Robert Bring, Spencer Compton, Kathy Cook, Thomas Curtis, Julie DiMauro, Joanne Feil, Mario Ferazzoli, Jim Fiorillo, Herbert Fisher, Gerald Goldstein, Robert Gorzelany, Kenneth Gordon, George Grace, Leonard Hecht, Austin Hoffman, Richard Janvey, Ira Kaufman, Michael Kahn, Matthew Klein, James Kole, Michael Korn, Abe Krieger, Alfredo Lagamon, Lawrence

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If you participated but were not listed, please notify either co-author and we will add your name when we next republish this checklist. If you would like to participate in a third edition (should we ever produce one), please let the co-authors know.

1. Alterations and Build-Out

1.01 Activities Outside Premises.
If the lease lets the tenant perform any alterations outside the premises (such as cable or riser installations, changes in elevator operation, HVAC equipment installations, backup generator, or fuel storage and transmission), then require the tenant to meet all the same requirements (including removal/restoration) that would govern alterations within the premises, plus additional requirements as appropriate. At the landlord's option, consider having the landlord, not the tenant, perform any alterations that affect space outside the premises, with the tenant obligated to reimburse.

1.02 Americans with Disabilities Act (and Similar Laws).
Require the tenant's alterations to comply with not only the ADA, but also state and local laws on disabled/handicapped access, which are often more burdensome. Give the landlord an express right to block any alteration—even just within the leased premises—if it might require changes to space outside the leased premises to comply with any of these laws. In any case, the landlord must understand those requirements before signing the lease. In the worst case, they may ultimately mean that this particular tenant won't make sense for this particular building.

1.03 Artists' Rights.
Prohibit the tenant from installing any artwork that could give the artist a right under federal law to prevent the artwork from being modified or removed. If the tenant has an agreement with the artist governing removal, the landlord needs to see and approve that agreement and it must allow modification or removal. Consider requiring a direct agreement between the artist and the landlord on these issues.

1.04 Completion of Alterations.
Require the tenant to close out the job, close out all alteration permits and deliver a final certificate of occupancy within a certain time after the tenant has obtained its first building permit. At completion, require the tenant to deliver an estoppel certificate confirming the satisfactory completion of any work the landlord performs for the tenant. (The lease will probably already allow the landlord to request an estoppel certificate at any time. The landlord should simply remember to exercise that right.)

1.05 Consent.
State that the landlord's consent to any alteration does not imply the landlord represents or warrants that such alteration complies with applicable laws. The landlord should not be responsible for any contractors, architects, or engineers, even if the landlord approved or required them.

1.06 Construction Protocol.
During construction, require the tenant to fence off or close off its premises. As its staging area, the tenant may only use the area the landlord designates.

1.07 Exterior Hoist.
If the tenant wants to use a hoist outside the building, all lease provisions, rules, and regulations that govern alterations and activities within the premises should also apply to the hoist. In the lease or a separate agreement, the parties should memorialize the terms of the tenant's use of the hoist, including priorities, versus the landlord and other tenants if the hoist will not belong exclusively to the tenant. Require the tenant to remove the hoist by a certain date. Should the landlord have the right to "free rides" on any hoist? If other tenants complain about the hoist or even try to claim rent offsets because of it, the tenant should indemnify the landlord. If the landlord has installed the hoist, provide for scheduling, charges, and the right to remove it. In any agreement or lease provisions on the hoist, think about how the hoist is attached; use of walkie talkies; the landlord's liability under scaffolding laws; insurance; and the landlord's liability to other tenants. Consider requiring that the landlord, rather than the tenant, control the hoist.

1.08 Filings.
Consider requiring that the landlord's architect or expeditor supervise or handle all certificate of occupancy filings, and perhaps all other governmental filings for the tenant's work.

1.09 Labor Harmony.
The tenant's obligation to maintain labor harmony should relate not just to construction, but also to any other activities at the premises. Establish a specific monetary consequence if the tenant doesn't comply, such as $_____ for each day of noncompliance. (Describe it as liquidated damages, and include the "magic language" necessary to make the liquidated damages enforceable.) Also, try to prohibit the tenant from starting any of its work until the landlord has completed all "base building" and other landlord work.

1.10 Landmark Buildings.
If the building is designated as an historical landmark (or similarly protected area), include whatever "magic language" the landmark protection

law requires. If the building is not so designated, but might make an attractive target for designation, the tenant should agree: (a) not to file for historic designation and (b) to oppose any such designation if the landlord so requests.

1.11 Modifications to Plans and Specifications.
The tenant should have no free right to modify its plans and specifications in the field except as necessary to conform to field conditions. If the tenant modifies its plans and specifications after the landlord approves them, the alterations as modified should still meet the original landlord requirements. If the landlord wants to avoid dealing with a flood of change orders, the landlord might give the tenant some leeway, but subject to criteria to protect the landlord's interests in the building.

1.12 Plans and Specifications.
Require the tenant to deliver plans and specifications (initial, as-built, and as filed with the building department) in a specified (or more current) computer aided design ("CAD") format using naming conventions and other criteria as the landlord approves or requires. Also, require the tenant to deliver copies of all governmental approvals necessary for the alterations, including a building permit and a temporary and permanent certificate of occupancy, as and when applicable.

1.13 Punchlist Waiver.
If the landlord has delivered the premises to the tenant, and the tenant starts work (or takes occupancy to conduct business) in any area, then the tenant waives any claims about the landlord's work in that area, unless previously included in a punchlist notice to the landlord.

1.14 Restoration.
State that the landlord's consent to any alteration does not waive the tenant's obligation to remove it and restore the premises at the end of the term—particularly for major or difficult-to-restore alterations such as a slab cut for an internal staircase. To the extent that the landlord wants—or might want—the tenant to leave a major alteration in place, give the landlord that right. More generally, to the extent that the lease contemplates major alterations that might be difficult to restore, try to define in a lease exhibit exactly what must stay and what must go at the end of the term (and the landlord's options).

1.15 Scope of Work.
Even if the tenant will bear all construction risks and costs, the landlord should think twice before agreeing to tenant alterations that may require a major compliance effort and/or cost. Regardless of what the lease says, tenant construction projects that will raise major issues will often, one way or another, end up costing the landlord money and grief. For example, they may spotlight code compliance issues elsewhere in the building or require additional work that neither party anticipated. Landlords need to understand those problems before they undertake the landlord-tenant relationship that may bring issues out of the woodwork.

1.16 Supervisory Fee.
Allow the landlord to charge a supervisory fee for any tenant alterations and for any landlord review of environmental and other conditions. The landlord's wage schedule or standard rates in effect from time to time should constitute *prima facie* evidence of reasonableness.

1.17 Tenant Improvement Allowance.
Coordinate the landlord's payment to the tenant of any tenant improvement allowance with the terms of the landlord's construction loan or other financing. Consider requiring the tenant to provide a declining letter of credit (initially in the amount of the tenant improvement allowance, or the landlord's cost of build-out) to protect the landlord if the tenant defaults after the landlord incurred significant expense for tenant improvements. Provide that to the extent the tenant does not use the entire tenant improvement allowance by a specific date, the landlord may keep it. Limit the tenant's ability to use the tenant improvement allowance for anything that does not directly improve the landlord's real property (such as "soft costs," furniture, and network wiring).

1.18 Tenant Work Letter.
The tenant work letter will become part of the lease. Give it the same degree of legal scrutiny as the rest of the lease. The landlord should confer with its architect to make sure that the landlord can in fact deliver what the lease exhibits require.

1.19 Tenant's Records.
Consider requiring the tenant to maintain records of the costs of its improvements for six years. This information may help in real estate tax protest proceedings. If the tenant's cost of any particular alterations exceeds $____, consider requiring the tenant to deliver its cost records no later than upon completion of construction (plus some reasonable additional time so the tenant can organize and finalize its records).

1.20 Third-Party Fees.
Require the tenant to reimburse the landlord for its architect's, lender's fees under the loan documents and other in-house and outside professional fees in reviewing plans and specifications.

1.21 Warranties.
Require the tenant to provide a warranty on completed alterations or at least an assignment of any warranty it receives from its contractor. If the tenant surrenders space (either at the end of the term or because the tenant reduces its occupancy), require the tenant to assign to the landlord any warranties the tenant received for any improvements or equipment surrendered.

1.22 Temporary Signage.
Require a retail tenant to install temporary promotional signage during construction and before opening.

2. Assignment and Subletting: Consent Requirements

2.01 Assignment/Sublet of Other Tenants' Leases.
Even if other tenants' leases permit assignment or subletting, ask this tenant to agree not to accept an assignment of any other tenant's lease or a subletting of any of its premises in the building without the landlord's consent.

2.02 Change of Control.
Treat a change of control of the tenant (unless a public company) as an assignment. To monitor, require the tenant to: (a) represent and warrant the tenant's current ownership structure, perhaps in an exhibit, when the parties sign the lease, to establish a baseline and define "change of control"; (b) deliver an annual (or upon request) certificate from its accountant or attorney, or perhaps a corporate officer, confirming the tenant's then-current ownership structure; and (c) report any change of control. Do not limit the restriction to refer only to corporations, partnerships, and limited liability companies. The restriction on transferring equity should apply even to future entity types not yet known.

2.03 Continuing Status as Affiliate.
If the lease allows "free transfers" to the tenant's affiliates, require that the assignee or subtenant thereafter remain an affiliate throughout the lease term. If the affiliation ceases, then the tenant must notify the landlord (but the landlord should not assume the tenant will remember to do so). Once the affiliation ceases, the transaction becomes a prohibited transaction that requires the landlord's consent and possibly a payment—failing which the transaction may become an event of default.

2.04 Fixture Financing.
Prohibit the tenant from financing its fixtures, or impose appropriate protective conditions upon any such financing arrangements.

2.05 Future Sublease–Related Transactions.
Even if the lease allows the tenant to sublet, think about future transactions that might arise from the subletting, such as further subleasing by subtenants. Therefore, require the tenant to obtain the landlord's approval for any future modification or termination of a sublease, any recapture, any subsubletting, or any expansion or assignment by the subtenant. A landlord will regard any of these transactions as a future opportunity, which the landlord wants to preserve.

2.06 Government Tenants.
A government tenant often burdens the elevator, HVAC, parking, lobby, restrooms, and security. A government agency tends to produce a higher occupant density than the typical private sector tenant. This can change a high-quality building to a second-tier building. Governmental occupancy (even by a subtenant) can sometimes lead to the unexpected imposition of governmental procurement regulations on the landlord. When drafting a sublease consent provision, consider limiting occupant density, power consumption, parking, operating hours, and noise. If the landlord is generally willing to allow a particular government agency as tenant, state that only a particular agency (or its successor performing the same functions) can occupy the space. Any change of agency should be deemed an assignment. Conform the use clause accordingly.

2.07 Prohibit Collateral Assignment of Lease.
Any prohibition against assignment and subletting should also prohibit any collateral assignment of the lease (such as mortgaging, encumbering, or hypothecating the lease).

2.08 Prohibit Other Landlord's Takeover.
Any other landlord's takeover of the lease, perhaps as an inducement to move the tenant to space in that landlord's building, should be deemed a prohibited sublease.

2.09 Restriction.
Prohibit assignments or sublets to existing tenants in the building or for less than fair market rent or the present rent. Prohibit the tenant from subleasing to any entity (a) that occupies any other building the landlord (or its affiliate?) owns within a specified area or (b) with whom the landlord is actively negotiating or has recently negotiated. Consider prohibiting any assignment/sublet to (1) any party with whom the landlord (or its affiliate) is in litigation (or its affiliate), or perhaps even any party with whom other landlords have had significant litigation; (2) a controversial entity such as a terrorist organization; (3) any party entitled to diplomatic immunity; or (4) specified entities or their affiliates (such as a chain store or multi-site restaurant operator that may have become notorious for its aggressive litigation programs against landlords). Also, prohibit assignment/sublets to any government (domestic or foreign); any government agency; a government contractor doing its contracted work in the space; or any other entity whose presence could subject the landlord to governmental procurement and affirmative action regulations. (Federal procurement regulations sometimes make the landlord a deemed federal contractor under circumstances like these. State regulations vary, of course.) On the other hand, the landlord may prefer not to limit itself to any particular grounds for disapproval and rely instead on its right to "reasonably" reject proposed transactions on grounds such as those suggested in this paragraph. This approach has the disadvantage, though, of creating an amorphous factual issue that may require litigation to resolve. Moreover, the cases make clear that if

a landlord agrees to act "reasonably," this imposes a meaningful restriction on the landlord and could require the landlord to demonstrate an objectively sound basis for its decision, such that a "reasonable person" type of landlord would reach the same result—not a conversation that any landlord should relish having.

3. Assignment and Subletting: Implementation

3.01 ADA.
Prohibit any assignment or subletting that triggers incremental ADA or other legal compliance requirements in the building or by the landlord in the premises. (As with some of the other suggestions about assignment and subletting, the first place to consider this issue is in the original lease itself—don't wait until the tenant wants to assign or sublet.)

3.02 Advertisements.
The landlord should have the right to pre-approve any advertisements for assignment or subletting. The lease should prohibit any reference to pricing in those advertisements.

3.03 Assignor Guaranty.
As a condition to any assignment that the lease allows, consider requiring any unreleased assignor—and any guarantor of the lease—to deliver a guaranty with full suretyship waivers or at least an estoppel certificate to confirm that the signer remains liable. In either case, state that any future changes in the lease obligations do not exonerate the guarantor, though the guarantor need not stand behind any incrementally greater obligations.

3.04 Breach of Anti-Assignment Covenant.
A breach of the covenant not to assign the lease without the landlord's consent should create an automatic event of default, not merely a generic default for which the tenant might have a cure period.

3.05 Confidentiality.
Require the tenant to keep confidential the terms of any assignment or sublease, particularly if the tenant's pricing is below current market value (or the landlord's conception of current market value) or the landlord's asking price for direct space.

3.06 Contiguous Subleased Floors.
Consider requiring sublet floors to be contiguous—ideally at the top or bottom of the tenant's stack. Perhaps require that any subleasing maximize contiguity (in some defined way), to facilitate future transactions and flexibility.

3.07 Leasing Agent.
Require the tenant to designate the landlord's managing agent as leasing agent at market-rate commissions for any contemplated assignment or sublet.

3.08 Partial Subleases.
Wherever the lease refers to subletting, it should refer to a subletting of "all or any part of" the premises, because a bare reference to subletting may let the tenant argue that the provision relates to a sublet of the entire premises only. This is yet another example of how a literal and narrow reading (or the possibility of a literal and narrow reading) produces ever-longer legal documents.

3.09 Processing Fee.
Charge a processing fee for any assignment/subletting, payable when the tenant submits an application. The tenant should agree to pay the landlord's attorneys' fees and expenses for any assignment or sublease, whether or not the transaction requires or receives the landlord's consent.

3.10 Prohibited Use.
Even if the tenant has certain rights to assign or sublet, the new occupant should expressly remain bound by the use clause in the lease. Although that proposition may seem self-evident, courts may infer some unintended flexibility on use if the parties negotiate a right to assign or sublet. Retail landlords are particularly vulnerable in this regard. Consider eliminating "reasonable" when describing the landlord's consent requirement. Instead, list specific permitted criteria, then agree that the landlord must be reasonable only once the tenant has met these criteria.

3.11 Recapture Right.
If the tenant wants to sublease any space, give the landlord a right to recapture that particular space. Define the recapture period window as well as the date when any recapture becomes effective. Avoid circularity (such as saying the recapture becomes effective on the date of the sublease, but the sublease becomes effective upon the landlord's consent and, therefore, never becomes effective). If the tenant wants to sublease 50% or more of its space, also allow the landlord to recapture right the entire leased space. If the landlord exercises any recapture right, consider requiring the tenant to pay the landlord a brokerage commission equal to what the tenant would have paid a third party to broker a comparable transaction. For any partial recapture right, require the tenant to pay for any demising wall or other space-separation expenses that may arise. These could include code compliance expenses to establish a legally separate occupancy.

3.12 Rent Increase Upon Assignment.
If the tenant assigns, let the landlord increase base rent to fair-market rent. When assigning a lease with percentage rent, consider resetting the base for the rent calculation—either to current market rent or, in the case of retail space, the sum of existing base rent plus the average percentage rent for some specific period before the assignment. (Anemic percentage rent will, however, often correlate with a tenant request to assign or sublet.)

3.13 Subtenant Nondisturbance.
If the landlord agrees to provide nondisturbance or recognition rights to subtenants, require that the "nondisturbed" (or "recognized") subleases

satisfy clear and objective standards. Before agreeing to nondisturb (or recognize) any actual or potential sublease, the landlord must ask whether it wants to be "stuck with" that sublease and all its terms if the main lease terminates. The landlord may want to require minimum rents, a certain form of sublease, arm's length negotiations, a reasonable configuration (such as multiple contiguous full floors), subrent that does not decline over time, and other characteristics. The sublease should not impose obligations on the landlord that exceed the landlord's obligations under the main lease regarding the subleased space. If the tenant occupies multiple floors, try to limit the nondisturbed space to full floor(s) at the top or bottom of the tenant's stack. Subtenant nondisturbance or recognition agreements can create issues similar to partial release clauses in mortgages (concern about "cherry picking" and/or destruction of expected value), and opportunities for fraud or abuse (such as an obligation to "nondisturb" a below-market sublease to the tenant's brother-in-law). Any landlord obligation to deliver agreements to protect subtenants should be conditioned on the absence of any default under the main lease. If the landlord does agree to enter into a nondisturbance agreement with any subtenant, the landlord may want to hold the subtenant's security deposit (although beware becoming involved in sublandlord/subtenant disputes) and may want the tenant to reimburse the landlord's legal fees in reviewing the sublease and negotiating the nondisturbance agreement.

3.14 Tenant's Profit.
If the tenant must pay the landlord a share of the consideration or other profit the tenant receives from a subletting or assignment:

3.14.01 Allow the landlord to audit the tenant's books and records;

3.14.02 Any tenant revenue arising from rent concessions the landlord made under the original lease belongs entirely to the landlord (a proposition that has a ring of fairness to it but may reverberate with a dull thud);

3.14.03 If the tenant does not furnish the necessary information for the landlord to calculate assignment/subletting profits, the landlord may estimate and the tenant must pay the estimated amount until a correct amount is established;

3.14.04 The landlord may condition the closing of any assignment/subletting transaction on the tenant's acknowledging the amount of the landlord's profit participation and making any payments due on closing that transaction;

3.14.05 The landlord may collect profit payments from the assignee or sublessee if the tenant fails to pay;

3.14.06 For a sublease, amortize the tenant's transaction costs and other deductions over the term of the sublease, not only from early subrent payments;

3.14.07 Require the tenant to disclose all income derived from any subtenant (potentially backed by a certificate from the subtenant and from the tenant's principals);

3.14.08 Require the tenant to deliver copies of all assignment/sublease documents to the landlord for review before the landlord signs off on anything;

3.14.09 Carefully define, limit, and scrutinize the scope and timing of all "offsets" or "credits" the tenant may claim in calculating its profits;

3.14.10 Consider requiring the tenant to pay the landlord's share of sublet profits in a present-valued lump sum at sublease execution;

3.14.11 Try not to allow the tenant to deduct any of the work allowance the tenant provided for the assignee or subtenant; and

3.14.12 Keep in mind that, even though the landlord might want to claim 100% of the sublet/assignment profit, this would vitiate the tenant's incentive to negotiate any sublease profit at all. The landlord might therefore prefer a somewhat lower percentage. In any case, the landlord might also want to require that the sublease be at market rents or higher.

3.15 Transactional Requirements.
For any assignment/sublet, independent of any consent requirements, require the tenant to satisfy certain conditions (such as permitted use, reputation, net worth of assignee/subtenant, and no violation of exclusives) and delivery of certain documents satisfactory to the landlord (such as assignee/subtenant's certified financial statements, unconditional assumption of the lease, and reaffirmation of guaranties). Should any of these requirements exceed those which already apply under the base lease?

4. Bankruptcy

4.01 Characterize Tenant Improvement Contribution as Loan.
To the extent that as an economic matter the tenant's rent reimburses the landlord for tenant improvements, consider restructuring such payments as payments on a loan, independent of the lease, evidenced by a note. Require the tenant to pledge (at least) its leasehold as security and perhaps supplement that security with a separate "tenant improvements loan letter of credit." This structure may give the landlord an argument to avoid Bankruptcy Code limitations on the landlord's claim for "rent," although the landlord would then instead face all the risks of being a secured or unsecured creditor. The landlord's choice of poison will vary with circumstances, but merits consideration in structuring the lease.

4.02 Letters of Credit.
If the tenant delivers a letter of credit in place of a security deposit for more than a year's rent, consider the effect of Bankruptcy Code (11 U.S.C.) § 502(b)(6). Check the drawdown con-

ditions of the letter of credit to confirm that the landlord has the right (though not the obligation) to draw on the letter of credit if the tenant files for bankruptcy, even if the tenant remains totally current in payments. Don't just rely on the proposition that a tenant bankruptcy would constitute an "Event of Default"; instead, the letter of credit should expressly allow the landlord to draw on it in this event.

4.03 Multiple Leases.
If the same tenant (or its affiliate(s)) leases multiple locations, try to structure the transaction as a single combined lease for all locations to prevent the tenant from "cherry picking" in bankruptcy. If the landlord must use multiple leases, try to provide cross-defaults and give all the leases the same date. Try to avoid any language that would allocate particular rent to particular premises, thus inviting or supporting selective lease rejection. Even a formulaic adjustment of rent based on casualty or condemnation may create enough of a hook for a bankruptcy judge. Try to figure out how not to create that hook.

4.04 Shopping Center Premises.
Bankruptcy Code (11 U.S.C.) § 365 gives a landlord greater rights upon a tenant's bankruptcy if the landlord's building constitutes a "shopping center." But the statute does not define "shopping center." Within reason and the bounds of reality, the landlord can try to include favorable language in the lease to confirm that the landlord's project constitutes a "shopping center."

5. Bills and Notices

5.01 Date of Delivery Definitions.
Confirm that every permitted means of notice also provides for the date when that particular notice will become effective. Try to make all notices effective as quickly as possible, even if the tenant refuses to accept the notice.

5.02 Means of Notice.
Allow either party to give notice by facsimile or email, provided that the sender (a) keeps a confirmation sheet or print out and (b) delivers a paper copy of the same notice to the recipient by overnight delivery. (Clarify that the overnight-delivery copy only confirms the notice, but the notice will be effective when faxed or emailed.) Try to allow more than one permitted means of giving notice.

5.03 Next Business Day Delivery.
Define "overnight" delivery as "next business day" delivery, to avoid occasional case(s) saying "overnight" doesn't mean any particular number of nights (yet another example of bad cases producing ever-longer documents).

5.04 Routine Rent Invoices.
Avoid any suggestion that the landlord cannot send routine rent or other invoices both (a) by ordinary mail and (b) only to the tenant (no copies to counsel or the like). Negate any duty to send out base rent invoices unless they notify the tenant of an increase in base rent. The landlord should try to send only an annual invoice setting forth the year's base rent and known monthly escalation payments.

5.05 Service of Process.
State that notice (or process) may be served on the tenant by serving the tenant's principal at his or her residence.

5.06 Tenant's Notices.
Copies of notices from the tenant (or perhaps just notices of alleged landlord defaults) should also go to the landlord's counsel.

5.07 Tenant's On-Site Contact.
Require the tenant to provide a primary single on-site contact for operational issues. Also require the tenant to give the landlord that person's current home and cellular telephone numbers.

5.08 Who May Give Notices.
State that the landlord's counsel or managing agent (as engaged from time to time) may give notices for the landlord. Negate any suggestion that the party that gives the notice needs to provide any evidence of authority. If the tenant wants evidence of authority, allow them to ask for it, but without thereby deferring the effectiveness of the notice.

6. Compliance with Laws

6.01 ADA.
If the tenant uses the premises as "public accommodation" or for any other use that triggers extra ADA requirements in the building (such as the lobby or public corridors), the tenant should pay for the work necessary to bring the premises into compliance with those legal requirements.

6.02 Definition.
Define "Laws" broadly to include future enactments and amendments, insurance regulations and requirements, utility company requirements, administrative promulgations, and recorded declarations, present and future.

6.03 Legally Required Improvements.
Require the tenant to perform all improvements to the premises required by law. For any such required improvements that relate to the building as a whole, the tenant should pay its proportionate share.[3] If the tenant resists (which it probably will, and should), consider limiting the tenant's obligation to apply only to laws enacted after the lease commences. (The tenant will probably still resist and the parties will probably reach the usual negotiated outcome in any space lease. The landlord will bear the risk of present and future laws that generally govern similar buildings and generic occupancies like the tenant's. The tenant will bear the risk for legal requirements that arise from the tenant's nongeneric or unusual use of the space.)

6.04 Operating Licenses.
Require the tenant to maintain all licenses necessary to operate its business in the premises.

6.05 PATRIOT Act.
The landlord should check the Office of Foreign Assets Control ("OFAC") list of terrorist entities online at www.fincen.gov to determine whether the tenant or, in the case of a corporate tenant, any of its principals appears on the list. Require the tenant to certify that it is not a terrorist or someone with whom the landlord cannot legally do business, using language that refers to specific types of prohibited person. For what it's worth, also have the tenant indemnify against any loss the landlord suffers (including, of course, the landlord's attorneys' fees) because the tenant really is a terrorist or falls within some other category of prohibited person.

7. Consents

7.01 Conditions to Consent.
Even if the landlord has agreed to be reasonable about a consent, require the tenant to satisfy certain conditions first, for example, the tenant not be in default under the lease. Require the tenant to deliver an estoppel certificate and copies of all relevant documents. Set other requirements tailored to the particular consent at issue. Remember that the landlord may forget to impose any such requirements as a condition to the consent when issued. The lease should give the landlord a checklist of what to require, assuming that the landlord will think of opening up the lease and looking at it when the tenant actually requests a consent.

7.02 Deemed Consent.
If the landlord has agreed that failure to grant or withhold consent within a specified number of days will be deemed consent, try to: (a) have this concept apply only in particular areas (such as consents to transfers or alterations), (b) require a reminder notice before the deemed consent arises, and (c) require both the original notice and the reminder notice to state conspicuously (in all capital boldface letters) that the landlord must respond within that period or will be deemed to have granted its consent.

7.03 Discretionary Consents.
If the business agreement between the parties does not require the landlord to be reasonable about assignment or subletting, simply ban both—instead of requiring "consent in Landlord's sole discretion"—to avoid possible claims of an implied obligation to be reasonable. Also, in this case, negate any implication that the landlord must at least consider whatever proposal the tenant presents.

7.04 Expenses.
Require the tenant to pay any fees or expenses the landlord incurs, including legal costs, in connection with any consent, even if denied. Consider requiring an application fee in connection with any consent request. Try to make the reimbursement obligation broad enough so it even applies if the tenant initiates discussions with the landlord for a totally discretionary lease amendment or waiver, as opposed to a consent already contemplated within the four corners of the lease.

7.05 Lender's Rights.
Review the landlord's loan documents to assure that the landlord's rights and obligations under the lease track the landlord's obligations as borrower under the loan. What landlord consent rights do the existing loan documents require the borrower to retain? And what landlord consent rights will future lenders probably require? (If the loan documents are being negotiated at the same time, try to correct any disconnects by modifying the loan documents if necessary. The concerns in this paragraph go beyond assignment and subletting, but seem mostly likely to apply to assignment and subletting.)

7.06 Limitation of Remedies.
The lease should say that if the landlord wrongfully withholds consent (for example, the landlord acts unreasonably even though it agreed to act reasonably), then the tenant's only remedy is specific performance—not monetary damages, and especially not consequential damages. As a backup position, the lease could require expedited arbitration, perhaps with the potential arbitrator(s) designated in the lease. This might particularly make sense for construction disputes, if the tenant anticipates performing substantial construction. Negate any potential tort or common law liability as a result of withholding consent unreasonably or in violation of the lease or applicable law.

7.07 No Representation.
State that the landlord's consent to anything is not a representation or warranty that the matter consented to complies with law or will meet the tenant's needs or otherwise makes any sense at all.

7.08 Permitted Use.
State that the landlord has no obligation, implied or otherwise, to allow any change in the permitted use of the premises, even if the landlord consents to (or is required to consent to) an assignment or subletting or any alterations.

7.09 Reasonableness.
When the landlord agrees to be "reasonable," try to set specific criteria the tenant must first meet. Once the tenant has met these criteria, the landlord will not unreasonably withhold its approval. Any mortgagee's disapproval of a matter should automatically constitute a "reasonable" basis for the landlord to withhold consent. Without some criteria or clear flexibility for the landlord, the interpretation of "reasonableness" can result in litigation that will often be stacked in favor of the tenant. Consider requiring arbitration on any issue of reasonableness.

7.10 Scope of Consent.
Any consent applies only to the particular matter under consideration, and does not waive any future requirement to obtain the same consent if similar matters arise later.

7.11 Survival of Conditions to Consent.
Whenever the tenant must satisfy certain conditions to obtain the landlord's consent (or to take any action without obtaining the landlord's consent), consider as a general proposition whether the lease should require the tenant to cause those conditions to remain satisfied even after the consent is granted or the action taken.

8. Default

8.01 All Rent Due at Signing.
Consider requiring the tenant to pay all rent for the term of the lease at signing, but state that the landlord agrees to accept monthly installment payments only so long as no event of default exists.

8.02 Cross Defaults.
Provide for cross defaults as against other leases with the landlord or its affiliates, or even against other obligations of the tenant or its affiliates (such as financial covenants under bank loans).

8.03 Default Notices.
Provide that default notices need not specify cure periods. Although any default notice will need to specify the default, give the landlord the right to supplement any default notice to include any additional defaults that were missed or correct any miscalculations, without thereby extending the tenant's cure period (unless the change is substantial).

8.04 Discount for Timely Payment.
Consider increasing "face rent" in the lease by some high percentage, but also state that if the tenant pays its rent by the first day of the month, then the tenant receives a discount equal to the increased part of the rent.

8.05 Impairment of Business.
Define an event of default to include events (beyond the usual insolvency list) that may indicate the tenant is preparing to shut down. These might include the tenant's announcing that it will make substantial distributions, dividends, or asset sales outside the ordinary course of business; shut down its operations elsewhere; suspend or terminate a substantial part of its business; or lay off staff above a certain threshold. At a minimum require reporting of these matters.

8.06 No Right to Cure Event of Default.
Once an event of default has occurred, should the tenant have a wide-open cure right even after the tenant's cure period has already lapsed? Whenever the landlord can exercise remedies "if an event of default shall have occurred and be continuing," this quoted language effectively gives the tenant an open-ended right to cure the event of default, provided the tenant does so before the landlord actually exercises its remedies. Does the landlord really want that? Also provide that if the landlord accepts rent after giving a notice of termination of the lease, the rent constitutes merely a payment on account of sums due. It does not vitiate the notice of termination—or any landlord right to terminate—unless it brings current all arrearages.

8.07 Noncurable Defaults.
The landlord may want to state that certain defaults are noncurable, such as prohibited transfers.

9. Destruction, Fire and Other Casualty

9.01 Disaster.
Consider drafting a clause to address loss of the tenant's ability to use the premises because of disaster conditions that go beyond the building, or arise entirely outside the building, such as flood or terrorist attack.

9.02 Rent Abatement.
If the landlord maintains rental income insurance, rather than requiring the tenant to maintain business interruption insurance, then the lease should allow the tenant to abate rent for a casualty. If, however, the casualty affects only part of the premises, then limit the abatement accordingly, so it applies only to the extent that the premises are not useable. A landlord must, however, carefully coordinate any such provision with the landlord's insurance program, to prevent surprises and problems.

9.03 Tenant Waiver.
Require the tenant to waive the provisions of New York Real Property Law § 227 (which allows a tenant to terminate a lease in the event of a casualty that renders the premises untenantable), and comparable provisions in other states.

9.04 Termination Right; Limitation on Restoration.
Provide no right (or a limited right) for the tenant to cancel upon casualty. To the extent the lease requires the landlord to restore, impose appropriate conditions, including completion of insurance adjustment and recovery of adequate insurance proceeds.

9.05 Time to Restore.
If the landlord has the right or obligation to restore after a casualty, measure any deadline from the landlord's receipt of insurance proceeds—not from the date of casualty. Insurance policies require restoration "with due diligence and dispatch." If the lease defines an unrealistically short restoration period and allows the tenant to terminate the lease if the landlord misses the deadline, this will create an issue with lenders. Moreover, depending on policy language, any resulting lease termination may not constitute loss covered by the landlord's insurance program.

10. Development-Related Issues

10.01 Air and Development Rights.
If the project includes development rights from other locations, should the landlord include them as part

of the definition of the project? The answer may vary depending on state and municipal law. Have the tenant waive any right to object to any merger or transfer of development rights, and agree to sign any zoning lot merger if requested to do so. The tenant should have no right to limit any other uses within the project.

10.02 Building Expansion.
If the landlord may at some point expand or add floors to the building, build in enough flexibility so the landlord has no issues when doing so. For example, give the landlord the right to enter the premises to install structural supports for any construction above the premises; to install new posts, pillars, or supports as necessary; and to move walls around to accommodate any of this work. Allow the tenant an equitable rent adjustment for any interference or reduction of the premises, but have the tenant waive any right to an injunction, damages, or claim of constructive eviction. (Commentators raised their eyebrows when a recent case reached the result the previous sentence suggests, even in the face of silence in the lease. Despite the landlord-friendly outcome in that case, a careful landlord's counsel will want to prevent the issue entirely.)

10.03 Building Name and/or Address.
Allow the landlord to change the name or address of the building. Require the tenant to refer to the building only by whatever name or address the landlord gives it.

10.04 Building Standard Specifications.
The landlord should reserve the right to modify building standard specifications.

10.05 Condominium Conversion.
If the landlord considers condominium conversion at all likely, think about it in the lease. Allow the landlord to delegate its responsibilities to the condominium board. Adjust pass-throughs to include condominium fees as appropriate. Consider how condominiumization would affect building operations, the use clause, tax allocations, and everything else. What role should the condominium board have?

10.06 Construction Restrictions.
State that nothing in the lease limits by implication the landlord's right to construct or alter any improvements (including kiosks) anywhere on the landlord's property. If the lease does contain any such restrictions, state that they are limited to their express terms.

10.07 Demolition.
Allow the landlord to terminate the lease after reasonable notice if the landlord intends to demolish the building. Set as low as possible a standard for the landlord to satisfy. For example, avoid any requirement that the landlord must be unalterably committed to demolition or must have terminated other leases or obtained a demolition permit or construction financing. Give the tenant incentives to cooperate. Set up a process so the landlord will find out quickly whether the tenant will try to fight the early termination of the lease. For example, the lease can require the tenant, promptly after receiving a termination notice, to deliver an appropriately tailored estoppel certificate and an increased security deposit. Pay the tenant a demolition fee only if the tenant vacates strictly on time.

10.08 Expansion Rights.
If the landlord may want to expand the physical size of the building:

10.08.01 Consider resetting base years after the expansion;

10.08.02 Consider how the expansion would affect the tenant's proportionate share for escalations (after completion and lease-up);

10.08.03 Require the tenant to sign appropriate documents as needed;

10.08.04 Allow the landlord to expand the measure of real estate taxes by adding other tax lots to the project;

10.08.05 Expressly allow the landlord to reconfigure parking and the building as a whole;

10.08.06 The lease should automatically remain subordinate to any future easements and other recorded documents the landlord signs to facilitate further development;

10.08.07 Review/revise/adjust the definition of "Building"; and

10.08.08 The tenant should waive any rights to light or air.

10.09 Relocation Right.
Give the landlord the right to relocate the tenant to comparable premises in the building or in some other specific building the landlord or its affiliate owns.

11. Electricity

11.01 Additional Electrical Capacity and Riser Rights.
If the tenant negotiates additional power and/or additional riser space, the landlord will want to preserve remaining electrical capacity and/or riser space for other tenants. Will the landlord want the tenant to remove any additional installations at the end of the lease term?

11.02 Change of Provider.
State that if the landlord changes the electricity provider for the building, the tenant must use the new provider, to the extent legally allowed, even if the tenant directly meters its own consumption.

11.03 Delivery of Electrical Service.
The tenant should comply with electrical conservation measures and any limits on power grid availability, including required shutdowns that may arise.

11.04 Electrical Service.
If the tenant's space is directly metered, require the tenant to keep the landlord informed of the tenant's electrical consumption, with copies of bills. This may facilitate the landlord's long-term planning of electrical service for the building and future releasing of the space.

11.05 Electricity Measurement.
In defining the electrical capacity that the landlord must provide, multiply the required watts per square foot by useable, not rentable, square feet.

11.06 Post-Termination Electric Charges.
To the extent any utility provider has the right to recalculate charges and bill the landlord later, expressly allow the landlord to bill the tenant for its share of such charges. If the electric utility has a certain time within which they can send such a bill, give the landlord the same time plus 60 days for processing.

12. End of Term

12.01 Abandoned Personalty.
State that upon lease termination, any personalty in the premises that the lease requires the tenant to remove—but the tenant does not remove—will be deemed abandoned. Require the tenant to pay to remove and store that personalty unless the landlord elects to retain or discard it.

12.02 Cables, Conduits.
The landlord should retain ownership of all cables and other wiring in the building. Require the tenant to remove cables, conduits, wires, raised floors, and rooftop equipment at the end of the lease term either in all cases or at the landlord's request. Require the tenant to indemnify the landlord from all liability in connection with that removal. To the extent that the lease allows any of these items to remain, require the tenant to properly cap and label them.

12.03 Consequential Damages.
If the tenant holds over, require the tenant to pay all damages the landlord incurs, including consequential damages such as the loss of the next prospective tenant. Consider giving the tenant a window of up to 60 days before consequential damages apply. Holdover rent would apply as usual.

12.04 Holdover.
Consider providing that if the tenant fails to vacate the premises at the end of the term, the tenant must pay a use and occupancy charge (not "rent") equal to the greater of (a) some high percentage of the final adjusted rent (including escalations) under the lease and (b) some high percentage of the then fair market rental value of the premises. Calculate the charge on a monthly basis for an entire month for every full (or partial) month the tenant holds over. Confirm what the maximum enforceable holdover rate may be (it can vary). Describe this payment as liquidated damages and not a penalty. Consider simplifying matters by saying that the final year of occupancy will require the tenant to pay either fair market appraised rent, or a very, very high rate. Give the tenant an option to terminate the lease effective just before that last year of the term begins, on at least a year's notice. This way, if the tenant stays, the landlord can try to collect very high rent. The landlord doesn't have to hold its breath to the last minute to see if the tenant will decide to default. (The whole arrangement would look something like the "anticipated repayment date" and "hyperamortization" provisions that have sometimes appeared in securitized loans.)

12.05 Landlord's Property.
At the landlord's option, the tenant should leave behind any improvements, fixtures, or personal property that the landlord paid for (including through a rent abatement). Consider the tax implications of ultimate ownership.

12.06 Obligation to Restore.
Require the tenant to restore the premises (including removing signage) at the end of the term. Where appropriate, specify by exhibit which alterations may remain, which must remain, and which must be restored. The restoration obligation should survive expiration or sooner termination of the lease. State that if the tenant does not complete restoration or other end-of-term activities (such as environmental remediation) by the expiration date, the tenant must pay holdover rent until completion.

12.07 Security Deposit.
Consider requiring an incremental security deposit to back the tenant's end-of-term obligations.

12.08 Tenant Waiver.
Require the tenant to waive any civil procedure law or rule that would allow a court to issue a stay in connection with any holdover or other summary proceedings the landlord might institute.

12.09 Time of Essence.
State that "time is of the essence" for the tenant's obligation to vacate the premises.

13. Environmental

13.01 Copies of Notices.
Require the tenant to promptly deliver copies of all notices it receives from any state or federal environmental agency relating to the property.

13.02 End-of-Term Assessment.
Allow the landlord to require an environmental assessment at the tenant's expense at the end of the term. Require the tenant to remediate any conditions that would have been the tenant's responsibility under the lease. (For clarity, the landlord might also want to provide for a "baseline" assessment at lease commencement.)

13.03 High Risk Uses.
For a gas station or other high-risk use, consider: (a) establishing an environmental baseline by undertaking a sampling plan before occupancy (this will establish what problems, if any, already exist); (b) requiring periodic monitoring, especially at locations where groundwater might be readily affected, and along perimeter areas where migrating oil can be detected; (c) obtaining an indemnification that is both very broad (all environmental risks) and very specific (particular environmental issues arising from the tenant's particular business); (d)

requiring the tenant to post a bond if the tenant cannot obtain environmental liability insurance; and (e) if underground tanks already exist, requiring the tenant to: (1) accept the tanks "as-is," (2) comply with all applicable laws, including obtaining all permits (as well as annual registration and recertification), (3) post all state-required financial assurances, (4) maintain, repair and replace, if required, all tanks, and (5) maintain all required records and inventory controls.

13.04 Interior Air Quality. Disclaim any landlord liability for mold, bad air, or "sick building syndrome." Also allow the landlord to prohibit smoking anywhere in the building or at adjacent sites such as sidewalks and terraces.

13.05 Landlord Indemnification. If the landlord agrees to indemnify the tenant for past environmental problems, limit this indemnification to any liability that exists under present law based on present violations. Exclude any liability arising from future laws, amendments of existing laws, or any action (or failure to act) of the tenant that exacerbates any existing condition or increases any existing liability.

13.06 Notice of Hazardous Conditions. Require the tenant to notify the landlord of any leaking or other hazardous or potentially adverse condition on the premises, including mold, leaks, and other conditions that could cause mold. Require the tenant to abate any such circumstances promptly.

13.07 Reports; Inspections. The tenant should agree to deliver, or reimburse the landlord's cost to obtain, updated environmental reports. Give the landlord and its environmental consultant the right to inspect the premises and perform environmental assessments (including invasive assessments) if the landlord reasonably believes that a violation of environmental law exists, all at the tenant's expense.

13.08 Required Tank Removal. The landlord might want the right to perform a further environmental assessment at the end of the term, and require the tenant to remove any underground storage tanks (especially but not only if the environmental assessment discloses problems) and perform any required remediation. Condition the return of the tenant's security deposit on the tenant's completing any such removal and/or remediation.

13.09 Tenant Indemnification. Require the tenant to indemnify the landlord against all environmental violations affecting the landlord's property and arising out of the tenant's use and occupancy. That indemnity should survive the expiration or termination of the lease.

14. Escalations

14.01 Audit Issues (Operating Costs)

14.01.01 Auditors. Prohibit contingent-fee auditors or auditors who have worked for other tenants in the building. If the landlord agrees to reimburse audit costs (such as if the tenant's audit reveals a certain level of mistakes), then negate any reimbursement to contingent fee auditors. Consider requiring a national CPA firm. Insist that such firm agree to notify the landlord of any undercharges or errors in the tenant's favor that the audit discloses, and to give the landlord a copy of the auditor's full report. (If the auditor doesn't, the tenant should agree to do so.) If the tenant engages any particular lease auditor, require that lease auditor to agree not to represent other tenants in the building.

14.01.02 Claims. Require specificity, completeness, and finality in any tenant claim of discrepancy or error.

14.01.03 Condition for Audit. Allow the tenant to audit operating costs only if those costs increase more than a specified percentage over a specified prior year or base year.

14.01.04 Confidentiality. Require the tenant and its auditor to sign a confidentiality agreement satisfactory to the landlord for any audit and its results before disclosing any records or information to the tenant or its auditor. The agreement should, among other things, prohibit the tenant and its advisors from disclosing the existence of any audit or any of its results, including any settlement, particularly to other tenants in the building. The tenant's breach of the confidentiality agreement should constitute an incurable default under the lease or at a minimum preclude the tenant from initiating further audits for several years.

14.01.05 Costs of Audit. Ask the tenant to pay for the landlord's out-of-pocket costs for any audit (such as photocopying, staff time, document retrieval, accountants' time spent answering inquiries, etc.), at least if the audit fails to disclose any material issues (i.e., issues serious enough that the landlord would need to pay for the tenant's audit).

14.01.06 Dispute Resolution. Provide a private and final mechanism (such as arbitration) to resolve any dispute about operating costs.

14.01.07 Inspection Restrictions. Allow the tenant (or its representative) to examine specified books and records only, and only for a specified period, but prohibit copying. Require that any audit comply with the landlord's reasonable requirements and instructions.

14.01.08 Limits. Limit the timing, frequency, and duration of audits. Require the tenant to complete the audit by a date certain after notifying the landlord of the audit. Consider requiring the tenant to audit multiple years at once, or requiring that the

notice of audit specify the specific issues the tenant intends to raise (difficult if the tenant has not yet seen any of the underlying records).

14.01.09 Threshold for Payment. If overcharges (net of undercharges) total 3% or less of total annual operating costs (a generally accepted definition of "materiality"), then the tenant should receive no adjustment or reimbursement of its audit costs. Define carefully the factor to which the lease applies the 3% factor. Use as large a number as possible. For example, refer to 3% of gross annual operating costs rather than 3% of the tenant's escalation payment.

14.02 Generally

14.02.01 Base Year. Consider whether anything might make the current base year for operating costs unusually high, such as a spike in insurance costs, energy cost spikes, a change in management, extraordinary repairs, or unusual capital expenditures.[4] Normalize the base year for operating costs to adjust for such unusual spikes. Or, instead, consider a fixed dollar amount to define the base.

14.02.02 Brokers' Commissions. Exclude all escalations from the calculation of broker's commissions in the brokerage agreement.

14.02.03 Ease of Proof. Make operating costs easy to prove. The landlord doesn't want to have to prove all the underlying facts. How would a judge respond to the definition of operating costs in the lease, and all the various definitions and exclusions? Ask a litigator.

14.02.04 Examples. For any complex or intricate escalation formula, consider adding an example, but don't make the numbers dramatic or shocking.

14.02.05 Fixed Fee. Consider replacing escalations based on operating costs or CAM with a fixed dollar figure.

14.02.06 Implied Covenants. State that the landlord has no obligation to use operating cost escalations to pay operating costs.

14.02.07 Liability for Refunds or Rent Credits. The landlord's liability for any refund (or credit) of overpaid escalations should terminate after a specified number of years (and automatically upon any sale, receivership, or foreclosure of the building?) to prevent open-ended obligations or issues in this event. Consider whether the landlord should have the right to pay in installments, or limit the tenant's relief to a future offset against rent (unless the lease expires before the tenant fully recovers what's due).

14.02.08 No Decrease. Escalation formulas should never allow rent to go down.

14.02.09 Survival; Timing. Limit the time during which the tenant may challenge any escalation or demand a refund that the landlord "forgot" to pay. (Be careful, though. The tenant may try to make this reciprocal for the landlord's billings.) All the tenant's obligations on escalations should survive the expiration or termination of the lease.

14.03 Operating Costs

14.03.01 Broad Definition. Consider any special characteristics of the property that may lead the landlord to incur costs outside the typical operating cost definitions in a generic lease. For example, if a reciprocal easement agreement or a ground lease imposes costs similar to real estate taxes or operating costs, expand the appropriate definition to include them.

14.03.02 CAM. Avoid the term "CAM" (common area maintenance) because operating cost escalations cover far more than common area maintenance. A tenant may argue that the phrase "CAM" somehow deceives the tenant.

14.03.03 Capital Improvements. Amortize capital improvements only in the comparison years, not the base year, for operating costs. Include an interest factor on the landlord's unreimbursed capital outlay.

14.03.04 "Gross Up" Clause. The landlord should have the right to "gross up" (for example, if the building has an occupancy level under 95%, increase the amount of operating costs to the amount that the landlord would have incurred for full occupancy). Expect the tenant's counsel to negotiate a gross-up in the base year operating costs as well.

14.03.05 Major Repairs. Do not necessarily limit multiyear amortization of large repair costs to "capital" items. Particularly if leases limit escalations or if the landlord worries about base years for new leases, the landlord may want the ability to spread major noncapital repair costs over multiple years.

14.03.06 No Fiduciary Duty. Negate any fiduciary duty regarding operating cost escalations and their administration.

14.03.07 Off-Site Costs. Avoid limiting "operating costs" to those incurred physically within the particular building. The landlord may incur off-site operating costs, such as in a multi-use project (such as holiday decorations in a central plaza) or for off-site equipment, installations, traffic improvements, shuttle bus services, or the like to benefit the building.

14.03.08 Reality Connection. When negotiating the operating cost escalation clause, confirm that the clause, particularly as negotiated, matches the landlord's current practices in operating the building, so the landlord can actually make the necessary calculations and adjustments without experiencing a long slow descent into accounting hell. Consider consulting with the landlord's accountant and the building manager. Ask both to review the definition of operating costs and any exclusions.

14.03.09 Reserve Charge. To avoid the common arguments about how to treat "capital" items, consider establishing an annual per-square-foot

capital reserve charge. The landlord would not need to account for these funds and the lease would define categories of "capital type" costs to which tenants need not contribute. (If, however, this reserve charge stays constant from year to year, including the base year, then the landlord will never be able to collect a penny of escalations under the typical pass-through of only increases in operating costs. Therefore, make it a separate additional charge.)

14.03.10 Timing. Try not to agree to tight time limits (or, worse, a "time is of the essence" provision) for the landlord's obligation to provide operating statements. The landlord should, of course, try to be timely, based on cases that have required such timeliness based in part on an inferred "fiduciary duty" because the landlord controls the information.

14.03.11 Use of Generally Accepted Accounting Principles ("GAAP"). In defining operating "costs" (not "expenses," perhaps an accounting term of art), try not to refer to GAAP. The term often arises in two places: (a) when defining what the landlord can pass through to tenants; and (b) when excluding "capital" items. GAAP may unintentionally skew the calculation of operating costs in ways the landlord would regard as a surprise. Again, coordinate with the landlord's accountant.

14.04 Other Escalations

14.04.01 Consumer Price Index. Use the Consumer Price Index for all Urban Areas ("CPI-U") index. Many believe that this index has historically increased faster than the Consumer Price Index for Urban Wage Earners and Clerical Workers ("CPI-W") index.

14.04.02 Fixed Percentage Increase. Neutral, predictable, and easy to administer.

14.04.03 Porter's Wage. Include fringe benefits and all other labor costs. The wage rate used should not reflect "new hire" or other transitional wage rates.

15. Estoppel Certificates

15.01 Additional Requirements. In defining the scope of an estoppel certificate, allow the landlord to require any additional information the landlord reasonably requests. Think about uncertainties that, at some later date, a lender might want the tenant to confirm—such as whether the tenant exercised an option, the dollar amount of base operating costs, or any nonstandard dates that might help define either party's obligations.

15.02 Attach Documents. Require the tenant (if asked) to attach to any estoppel certificate a copy of the lease and all amendments, option exercise letters, and other documents that define the landlord-tenant relationship.

15.03 Estoppels. Require the tenant to agree to deliver future estoppel certificates at any time on the landlord's request. Provide that such certificates shall bind the tenant whether or not the landlord can demonstrate detrimental reliance. (Does that concept work?)

15.04 Exhibit. Attach a form of estoppel certificate as a lease exhibit (conform to typical lender requirements), but build in flexibility for future lender requests. Include a certification of the tenant's current ownership structure.

15.05 Failure to Respond. Establish specific meaningful remedies for failure to sign an estoppel certificate within a short period. These might include: deemed estoppel; a power of attorney to execute it for the tenant; or a nuisance fee (such as $100 per day).

15.06 Legal Fees. If the landlord agrees to give an estoppel, require the tenant to pay the landlord's legal fees and expenses. The landlord should establish procedures to assure that when the tenant requests an estoppel, the landlord will be able to list all documents that define the landlord-tenant relationship, such as option exercise letters, notices, and the like.

15.07 Ratify Guaranty. Allow the landlord to require a confirmation/ratification of any guaranty, not merely an estoppel certificate from the tenant.

15.08 Reliance. Allow reliance by prospective purchasers, mortgagees or any participant in a future securitization, including rating agencies, servicers, trustees, and certificate holders.

16. Failure to Deliver Possession

16.01 Condition of Premises. Substantial completion should suffice (for example, temporary certificate of occupancy) for the landlord's delivery of the premises.

16.02 Delivery Dispute. Provide for a short deadline for the tenant to report any issue or problem about the premises or the landlord's work. If possible, state that taking of possession constitutes acceptance for all purposes.

16.03 Delivery Procedure. Try to tie the "Commencement Date" to an objective event—preferably within the landlord's control—or a date, rather than to any notice from the landlord. Notices are often not as easy to give (and give quickly) as they would seem to attorneys drafting leases. Any delay in giving a commencement date notice will mean lost revenue for the landlord.

16.04 No Liability. The landlord should incur no liability for failing to deliver possession on the commencement date for any reason, including holdover or construction delays. The lease should expressly waive any applicable law that may provide otherwise. The tenant's obligation to pay rent should commence on possession. Perhaps extend the term by the duration of any landlord delay in delivering the premises, especially if the delay exceeds a certain amount of time.

16.05 Rent Abatement.
To the extent the landlord agrees to give the tenant a rent abatement for late delivery, limit the duration of the abatement (for example, if the rent abatement exceeds a set number of days, thereafter the tenant must either terminate or wait, but cannot continue to claim an abatement).Try to defer any such abatement (for example, spread it out in equal annual installments over the remaining term of the lease). This will reduce immediate damage to the landlord's cash flow at a time when the landlord may face financial stress.

16.06 Termination Right. The landlord (not just the tenant) may want the right to terminate the lease if the landlord ultimately cannot deliver possession by a date certain.

17. Fees and Expenses

17.01 Attorneys' Fees and Expenses. The tenant should reimburse the landlord's attorneys' fees and expenses both broadly and with specificity (for example, for actions and proceedings, including appeals, and in-house counsel fees and expenses). The reimbursement obligation should cover attorneys' fees and expenses incurred in connection with: (1) any litigation the tenant commences against the landlord (including any declaratory judgment action or any action to interpret or apply the lease), unless the tenant obtains a final favorable judgment; (2) negotiating a lender protection agreement for the tenant's asset-based lender; (3) the landlord's (or its employee's) acting as a witness in any proceeding involving the lease or the tenant; (4) reviewing anything that the tenant asks the landlord to review or sign; (5) any lien filing, even if the lien filing does not constitute a default; (6) bankruptcy proceedings; (7) obtaining a nondisturbance agreement for the tenant; and (8) considering and responding to any tenant request for an amendment or waiver.

17.02 Fees and Expenses.
The tenant should pay a fee (and expenses) for the landlord's review of any plans, specifications, or request for any consent/waiver. Avoid a flat fee. Set the fee according to a formula based on the size of the job or hours necessary, with a floor.

17.03 Witnesses.
The tenant should reimburse the landlord for costs incurred if the landlord or its personnel are called as a witness in any proceeding related to the lease or the tenant.

18. Future Documents and Deliveries

18.01 Further Assurances.
Require the tenant to enter into any amendments that the landlord reasonably requests to correct errors or otherwise achieve the intentions of the parties, subject to reasonable limitations.

18.02 Future Events.
The parties should agree to memorialize any commencement date, rent adjustment, or option exercise in a lease amendment. If the parties don't actually do that, though, the lease should say the failure does not affect either party's obligations. (It would merely create an issue of proof, although the lease needn't say that.)

18.03 Governmental Benefits, Generally. Require the tenant to cooperate in a timely manner, as necessary, to help the landlord qualify for any available tax or governmental benefits (such as tax abatements).

18.04 Permitted Disclosure.
If the landlord agrees to any confidentiality restrictions, or if governing law automatically infers such restrictions, then the landlord should exclude from such restrictions the right to disclose any information to actual or prospective mortgagees, equity investors, or purchasers.

18.05 Reporting.
Require the tenant to immediately report if the tenant or any guarantor experiences: (1) any adverse change in financial position; or (2) any litigation that could adversely affect the ability to perform. For an individual guarantor, require the tenant to notify the landlord of the guarantor's death or disability.

18.06 Tenant's Financial Condition.
Require the tenant to deliver annual financial statements for itself and any guarantor. Negotiate the right to require a security deposit, rent adjustment, or other consequences to protect the landlord if the financial condition of either deteriorates.

18.07 Termination of Lease Memo.
If the tenant obtains a memorandum of lease, then: (a) the tenant should agree to execute and deliver a termination of memorandum of lease in recordable form if the lease terminates early; and (b) consider requiring the tenant to sign such a termination at lease execution, to be held in escrow.

19. Guaranty

19.01 Estoppel Certificate.
The guarantor should agree to issue estoppel certificates promptly upon request. Any failure to do so should constitute a default under the lease.

19.02 "Good Guy" Guaranty.
Consider a "good guy" guaranty (i.e., a guaranty of rent and perhaps all other obligations under the lease, including liens, building permits, certificate of occupancy and completion of construction, continuing only until the tenant surrenders the premises vacant, in satisfactory physical condition, and free of any occupancy rights, provided the guarantor gives ___ months notice of surrender and pays ___ months rent). Upon the tenant's surrender, and as a condition to release of the guaranty, the tenant should release the landlord in writing from all lease obligations.

19.03 Guarantor Consents.
Tailor the guarantor's consent/waiver boilerplate to reflect circumstances of the lease, such as pre-consent to any future assignment of lease, and any state-specific language necessary or helpful for a guaranty.

19.04 Guarantor Consideration.
In any guaranty, recite the relation-

ship between the guarantor and the tenant to confirm the guarantor will receive some benefit from the lease.

19.05 Guarantor's Net Worth.
Require regular reporting of each guarantor's net worth. State that a material decline in a guarantor's net worth or a guarantor's death or bankruptcy constitutes an event of default unless the tenant promptly furnishes additional collateral or guaranties satisfactory to the landlord or meeting an agreed financial test (such as a net worth equal to some multiple of the annual rent). Any remedies triggered by a guarantor's bankruptcy should be perfectly enforceable against a tenant.

19.06 Lease Assignment.
If the landlord sells the property, then the guaranty should, by its terms, automatically travel to the purchaser, whether or not the transfer documents say so.

19.07 Security.
Consider securing a lease guaranty obligation with a letter of credit or other security. By tying such a letter of credit to a guaranty rather than to the lease, the landlord may reduce the likelihood that the tenant's bankruptcy estate could "claw back" any letter of credit proceeds that exceed the landlord's permitted claim for rent in the tenant's bankruptcy.

19.08 Social Security/EIN Number/ Address.
State the social security or employer identification number (and, perhaps, driver's license and passport number) and home address of any guarantor beneath its signature line. This underscores the fact that the guaranty is intended to constitute a personal obligation of the guarantor and may facilitate enforcement. In the case of any foreign or out-of-state guarantor, require appointment of an in-state agent for service of process and a consent to jurisdiction.

19.09 Springing Guaranty.
Consider a springing guaranty if certain adverse events occur (such as a material reduction in the tenant's or a guarantor's net worth).

19.10 Tenant Bankruptcy.
The guarantor (and any unreleased assignor) should acknowledge its liability will not decrease if a tenant bankruptcy "caps" the landlord's claim for "rent."

19.11 Unreleased Assignors.
If the tenant assigns the lease, then unless the landlord has released the assignor, recognize that the assignor remains functionally a guarantor of the lease. Any reference to a guarantor of the lease should include any unreleased assignor, and the lease should treat them the same way.

20. Inability to Perform

20.01 Exception to Force Majeure.
Force majeure should never limit any monetary obligation of the tenant, or any obligation to maintain insurance.

20.02 Force Majeure.
For the landlord, force majeure should include a failure to obtain governmental consents or permits and acts of government, war, terrorism and insurrection.

20.03 Triggering Event.
If the tenant negotiates a force majeure clause, require the tenant to notify the landlord promptly of any "force majeure" event. The extension of time should continue only so long as such triggering event actually causes the tenant delay.

21. Insurance

21.01 Additional Insureds.
Include the landlord and its managing agent and mortgagee as "additional insureds," not "named insureds." The latter may owe premiums and may prevent the landlord from seeking indemnification against the tenant for any claims.

21.02 Approval Rights.
Allow the landlord to approve the identity and financial condition of the tenant's insurance carriers. Set minimum financial rating standards for any insurance carrier (typically a minimum A:X by AM Best or A by Standard & Poors).

21.03 Coordination with Loan Documents.
Conform the insurance requirements in the lease to those in the landlord's current loan documents. Allow the landlord to change the insurance requirements in the lease as needed to comply with the landlord's and any mortgagee's future reasonable requirements.

21.04 Evidence of Insurance.
Require "evidence" of insurance (the "ACORD 28" form, formerly "ACORD 27")[5] or a copy of the tenant's insurance policy at lease signing, not a "certificate" of insurance (the "ACORD 25" form), which is often regarded as worthless unless modified. If possible, require delivery of a binder (not just the relevant ACORD form). Have the binder or certificate specify appropriate ISO endorsements in the policy. The lease should require the tenant to deliver evidence of insurance whenever necessary to facilitate the landlord's refinancing of the property, with a nuisance fee for late delivery of certificates of insurance.

21.05 Improvements and Betterments.
Have the tenant insure any improvements and betterments it makes to its space, not just its personal property.

21.06 Insurance Advice.
Work with the landlord's insurance broker/consultant to check, update, and improve the insurance requirements of the lease as appropriate. Keep an eye on TRIA/terrorism-related legislation.

21.07 Insurance Broker.
Allow the landlord (at its option) to deal directly with the tenant's insurance broker to obtain any insurance documents the lease requires. But the lease should state that doing so imposes no liability or obligation on the landlord, and doesn't excuse the tenant from any obligations.

21.08 No Fault Liability.
Resist the inclination to state that the tenant gets no rental abatement after a casualty if the tenant caused the casualty. Though this may sound "fair," remember that the tenant has paid for its share of insurance coverage through operating cost escalations or otherwise. Fault may not be easily determined. Also, if rent does not abate upon a casualty, then the landlord can't make a claim under its rental income insurance. State that if the landlord cannot collect insurance proceeds, the tenant's rent abatement ceases. Any tenant waivers of liability should expressly cover negligence and should benefit not just the landlord, but also the usual litany of landlord-related parties, the property manager, and so on.

21.09 Plate Glass Insurance.
Require any retail tenant to carry plate glass insurance (This coverage relates only to glass on the first floor of a building.)

21.10 Rent Coverage.
A landlord will usually prefer to maintain rental income insurance, as part of a larger property insurance package. In that case, it probably makes no sense to require the tenant to maintain business interruption insurance. Any rental/business interruption insurance should cover additional rent (such as escalations or tax pass-throughs) and percentage rent as well as base rent. The landlord should try to carry rental income insurance coverage for at least 12 months, more for very large buildings that would take longer to rebuild. The landlord will typically want to supplement the coverage with 12 months of extended period of indemnity to cover the releasing period.

21.11 Self-Insurance.
If the tenant self-insures, state that it cannot benefit from the waiver of liability for purposes of the waiver of subrogation. The tenant must act as the insurer.

21.12 Should Landlord Insure?
Consider having the landlord insure the tenant's improvements (with the tenant reimbursing the allocable insurance cost—premium, co-insurance and all other insurance costs—either directly as additional rent or as an operating cost), and having the landlord restore (or give the landlord the right to require the tenant to restore) with any insurance proceeds.

21.13 Tenant Failure to Insure.
If the tenant fails to insure and a fire occurs, then make the tenant liable for the entire loss and not merely the unpaid insurance premiums—even if the landlord knew about the failure to insure. (Such a provision responds to cases that limit the tenant's liability to the amount of the unpaid premiums.) For net leased properties where the tenant is responsible for buying the insurance, give the landlord the right (but do not impose the obligation) to buy the required insurance and obtain reimbursement from the tenant.

21.14 Tenant's Rights to Proceeds.
Make any right of the tenant to receive insurance proceeds subject to the rights of the landlord's mortgagee and to fulfillment of any tenant restoration duties under the lease.

21.15 Tenant's Special Use.
Consider the tenant's specific use and whether the lease should require any particular insurance. For instance, if the tenant sells liquor on the premises,require the tenant to purchase liquor liability insurance and dram shop coverage. If the tenant gives away liquor without charge, then the lease should require host liquor liability insurance. More generally, if the tenant's use and occupancy of the premises presents an unusual situation or risk of loss, consult with a professional risk management firm for special insurance requirements.

21.16 Waiver of Subrogation.
Understand "waiver of subrogation." This is a tricky topic, often wrongly handled. These clauses should be mutual, covering all losses caused by any insured risk (even negligence of the landlord or the tenant), provided the insurance carrier has consented to the waiver. Such consents often appear in standard insurance policies, although this should be confirmed.

22. Landlord's Access to Premises

22.01 Emergency Contact.
Require the tenant to provide the name, telephone number and email address of an emergency contact and recite in the lease, subject to change by proper notice.

22.02 Keys.
The tenant should deliver copies of all keys and access codes to the landlord. The landlord should consider, though, whether it truly wants whatever liability travels with the keys and access codes, especially if the tenant has unusually valuable personal property. The landlord may want to be selective about requiring keys and access codes.

22.03 Landlord's Right to Enter.
Give the landlord the right to enter to perform repairs in the premises and to facilitate the landlord's ability to perform repairs and do work in other tenants' premises.

22.04 No Eviction.
Make clear in the lease that the landlord's entry onto or inspection of the premises does not constitute an actual or constructive eviction and does not entitle the tenant to any rights or remedies, or any claim, offset, deduction, or abatement of rent.

22.05 Notice Requirements.
The lease should state that the landlord may enter without notice in an emergency. Even absent an emergency, oral notice to someone on site should suffice. This is yet another example of an area where a requirement for "written notice" may sound perfectly reasonable, but in the real

world such a requirement is completely impractical.

22.06 Reconfiguration.
Reserve for the landlord the right to reconfigure or change the means of access to the premises.

22.07 Secure Areas.
Limit the tenant's right to create secure areas (areas the landlord may not enter without the tenant's permission) by annexing an exhibit to the lease specifically identifying such areas.

22.08 Signs and Showings.
The landlord should insist on having the rights to: (1) show the premises to prospective purchasers, mortgagees or appraisers and post "for sale" signs; and (2) during the last [12] months of the term, show the premises to prospective tenants and post "for rent" signs.

23. Landlord's Liability

23.01 Exculpation.
Limit the landlord's liability to its interest in the property or, better, to whatever equity the landlord would have if it had entered into a mortgage securing financing equal to 80% of the value of the property. Negate any personal liability of the landlord and its partners, members, managers, officers, directors, affiliates, and the like. Recent cases have applied the "implied covenant of good faith and fair dealing"—a tort theory of liability—to sidestep exculpation clauses in leases. To avoid the possible effect of such cases, state that the landlord's exculpation applies not only to claims under the express terms of the lease, but also to claims of any kind whatsoever arising from the relationship between the parties or any rights and obligations they may have relating to the property, the lease, or anything related to either.

23.02 Landlord Default.
Give the landlord the same open-ended cure periods for nonmonetary defaults that tenants typically obtain. So long as the landlord has commenced and is diligently prosecuting the cure of its default, the tenant should have no rights or remedies against the landlord.

23.03 Liability.
Any liability of the landlord should end if the landlord transfers its interest in the premises.

23.04 Liability for Prior Owners' Acts.
As a rather aggressive position, say that after any conveyance of the property (even outside foreclosure), the new owner is not liable for (and the tenant may not assert any credit, claim or counterclaim because of) any claims the tenant might have had against the former owner, such as for overcharges and refunds of escalations.

23.05 Statute of Limitations.
Require the tenant to assert any claim against the landlord within 90 days after the tenant first became aware of the facts supporting the claim.

23.06 Tenant's General Indemnity.
Require the tenant to indemnify the landlord against all harm arising from the tenant's use and occupancy of the premises and the property, including all environmental matters as well as anything the tenant installs outside the premises. The indemnity should survive lease expiration or termination.

24. Landlord's Representations

24.01 Express Not Implied.
State that the landlord makes no implied covenants, representations or warranties. Limit the landlord's responsibilities to those expressly set forth in the lease (i.e., hopefully, none).

24.02 Merger.
State that any agreements, written or otherwise, predating the lease (including prior lease drafts) merge into the lease. Indicate that any statements or representations on the landlord's Web site or in the landlord's advertising are not part of the lease.

24.03 Other Leases.
State that the landlord makes no representations, warranties or covenants about other tenants (past, present or future) or the terms of their leases.

25. Maintenance and Repairs

25.01 Broad Repair Obligations.
Where the tenant has broad repair obligations, expressly include "ordinary or extraordinary, structural or nonstructural, foreseen or unforeseen" repairs.

25.02 No Overtime.
The landlord should have no obligation to do any work at overtime or premium rates.

25.03 Periodic Upgrades.
Beyond maintaining the premises "as is," the lease could require the tenant to upgrade and renovate every specified number of years, to keep the premises exciting and new, particularly for retail space. Perhaps the tenant must invest a certain amount within a certain period as a condition to exercising any lease renewal rights.

25.04 Right to Perform.
If the tenant's acts or omissions cause damage to another tenant's premises, the landlord can repair them at this tenant's expense.

25.05 Specify Repair Obligations.
Avoid distinguishing repairs as "structural" (the landlord's responsibility) and "nonstructural" (the tenant's responsibility). Draw these lines specifically and in detail. Otherwise, a court may decide what the parties intended.

25.06 Tenant's Obligation.
The tenant must maintain, repair and/or replace any parts of the building—including storefronts and sidewalks—that exclusively serve the premises.

25.07 Wireless Internet.
If the tenant's wireless internet service causes interference, the tenant must resolve. The landlord may require the tenant to password-protect its wifi service.

26. Occupancy

26.01 "As Is" Condition.
The tenant should represent and acknowledge that it takes possession of the premises and the building and common areas in their "as is, where is" condition as of the commencement date.

26.02 No Obligation Except Specific Work.
Confirm that the landlord has no obligation to perform any work or make any installations to prepare for the tenant's occupancy, except as the lease expressly states.

26.03 Service Contracts.
Consider whether the tenant should covenant to reimburse the landlord for some share of the cost of all applicable service contracts (such as HVAC, boiler, sprinklers, alarms, approved contractors) or to maintain such contracts for the premises at the tenant's expense.

26.04 Tenant Covenants.
The tenant should covenant to file its plans, obtain its construction permits, install its fixtures, obtain any permits necessary for business operations, and open for business, in each case by a certain date. The tenant should then agree to operate for at least a certain minimum period.

27. Options (Expansion/ Renewal/Reduction)

27.01 Carveouts from Purchase Rights.
If the tenant negotiates an option or right of first refusal to purchase the landlord's building, exclude: (a) foreclosure or its equivalent (and any subsequent transaction); (b) transactions between the landlord and affiliates or family members; (c) other permitted transactions, such as transfers of passive interests or creation of preferred equity for mezzanine lenders (and any exercise of remedies by the lender); and (d) if the tenant "passes" on its preemptive right, then all subsequent transactions.

27.02 Conditions.
Condition any option exercise on the tenant's: (a) not being in default (and not potentially being in default) both on the exercise date and on the effective date, and perhaps even for ____ years before the exercise date; (b) not having assigned the lease or sublet more than a certain amount of space; (c) retaining a certain minimum occupancy; (d) actually operating in the space; (e) satisfying a net worth test (fixed dollars or rent multiple) for at least ____ years before exercising the option; (f) if the lease allows the tenant to "give back" space, the tenant has never exercised any "giveback" right; (g) if the lease gives the tenant "first refusal" rights, the tenant has not recently waived any such rights that have arisen; and (h) if the tenant has invested a certain dollar amount in capital improvements during a specified period.

27.03 Coordination of Options.
The landlord should parse through all possible preemptive rights to assure that no two tenants can ever claim the same space at the same time. Given that these problems can even arise if the landlord exercises the utmost care, the landlord may want to include appropriate exculpatory language in the lease. Limit the tenant's remedy if the landlord inadvertently allows overlapping options.

27.04 Multiple Bites at the Apple.
If the landlord offers "first refusal" space and the tenant does not take it (or if the tenant declines to exercise an option), then for a specified number of months deem the tenant to have waived any first-refusal rights (and any options that would otherwise apply), at least where they relate to comparable space, broadly defined.

27.05 Option Maintenance Fee.
Require the tenant to pay a nominal annual fee to preserve future options. This gives the tenant an incentive to terminate any option rights that it does not truly need.

27.06 Option Rent.
Set a "floor" for option rent equal to the previous rent under the lease.

27.07 Option Subject.
Make any expansion option subject to existing exclusives and renewal clauses of other tenants. To preserve tenant diversity, the landlord may even want the right to negotiate a renewal with an existing tenant before the space become available under an option or right of first refusal.

27.08 Reduction Options.
If the tenant negotiates an option to "give back" space, this raises many of the same issues as expansion or renewal options. In addition, think about the practical issues that any space reduction might create. Will the tenant need or want to leave any installations in place to service their remaining space in the building? If the tenant gives back a partial floor, who will construct—and pay for the construction—of any new demising walls or any incremental costs to comply with building code requirements for a separate occupancy? How will the landlord need to change its operations if a floor previously occupied by one tenant becomes a multiple-tenant floor? Will the tenant's elevator lobby signage need to change? Exclusive elevator banks? Submetering and other configuration of utilities? What happens if the tenant gives a notice of reduction but then can't move out on time? If the tenant reduces its occupancy, should it lose some of the concessions it otherwise negotiated in the lease? If the tenant gives back multiple floors, the lease might require contiguity among those floors, and require them to consist of the highest (or possibly lowest) floors in the tenant's stack.

27.09 Time of the Essence.
Make time of the essence for exercising any option or right of first refusal. Say that timely notice constitutes an agreed and material condition of exercise. Recognize that the courts

sometimes validate late exercise after the fact. Perhaps provide for a protective rent adjustment in this case (for example, to fair market rental value if the lease would not otherwise provide for it).

27.10 Timing.
Make the exercise deadline early enough to give the landlord time to relet if the tenant does not exercise its option. Provide that the landlord may immediately commence showing the option space if the tenant does not exercise its option. Coordinate the timing with other leases to facilitate assembling large blocks of space in the future if the landlord wants to do so. A landlord usually wants plenty of lead time and notice, but may want to give the tenant as little lead time and notice as possible, to maximize the landlord's flexibility in dealing with unexpected changes in occupancy. If an existing lease ends earlier than anticipated, give the landlord the right to accelerate any future option or first refusal right that the tenant may have on the affected space.

27.11 Update Due Diligence.
If the tenant wants to exercise an option, condition it on the tenant's satisfying conditions (such as net worth) that applied when the parties signed their lease.

28. Percentage Rent and Radius Clause

28.01 Audit Right.
Let the landlord audit the tenant's gross sales. If the tenant underpaid percentage rent by more than 3%, the tenant should pay interest and the costs of the audit.

28.02 Effect of Casualty.
The lease should state that if the premises are closed part of the year because of a casualty or condemnation, the "breakpoint" for percentage rent will drop. (This assumes the lease expresses the "breakpoint" as a fixed dollar amount, and not a formula referring to actual fixed rent payable from time to time. The latter would be more common, so this problem usually does not arise.)

28.03 Fixed Rent Increases.
Increase fixed minimum rent (and the percentage rent breakpoint) periodically over time based on projected increases in gross sales.

28.04 Gross Sales.
Define gross sales to include sales by subtenants and concessionaires.

28.05 Inclusions/Exclusions.
For percentage rent purposes, consider whether to include any catalog or Internet sales that the tenant makes through the store. Take into account the mechanics of the tenant's business. Prohibit the tenant from claiming any credit for goods that a customer bought through a catalog or over the Internet (unless previously included in store sales). Exclude sales to the tenant's employees only if the tenant makes those sales at a discount (or, better, include them at such discounted price).

28.06 Increases.
Provide for an increase in percentage rent upon any change of use or change of the tenant. Clarify whether percentage rent bumps are compounded or merely added to the bump(s) in previous year(s).

28.07 Kick-Out Right.
Give the landlord the right to terminate the lease if percentage rent does not reach a certain level by a certain date. Upon any such termination, require the tenant to reimburse the landlord for all its unamortized leasing costs, including the cost of tenant improvements, brokerage commissions, negative rent, inducement payments, free rent, and cash allowances. Try to continue any "kick-out right" over the entire lease term.

28.08 Limit Any Percentage Rent Penalty Period.
If any cotenancy or other problem arises, the lease may allow the tenant to pay "percentage rent only." In those cases, if the landlord ever solves the problem, regular rent should once again apply. After a certain time, allow the landlord to require the tenant to either terminate or resume paying regular rent.

28.09 Radius Clause.
Include a "radius clause" in any lease requiring percentage rent, i.e., the tenant may not compete with itself within a restricted area without the landlord's consent.

28.10 Recordkeeping.
Require the tenant to maintain records, in accordance with GAAP or any other generally accepted accounting standard, sufficient to make any audit meaningful. The tenant should keep its records at an accessible and reasonable location, specified in the lease. If the tenant moves its records, it should agree to promptly notify the landlord. The tenant should agree to keep its records for at least three years.

28.11 Sales Reports.
Even if the tenant does not pay percentage rent, a retail tenant should still provide monthly sales reports. This helps assess the tenant's profitability, the long-term prospects of the project, and how to approach future rent negotiations.

28.12 Violation.
If the tenant violates the radius clause, then consider requiring the tenant to include as "gross sales" (for percentage rent purposes) the greater of (a) a specified percentage of gross sales at the premises; or (b) the gross sales of the tenant's store in the restricted area if it violates the radius clause.

29. Quiet Enjoyment

29.01 Conditions.
New York law (and probably the law of other states) implies a covenant of quiet enjoyment if the lease says nothing. Say that quiet enjoyment is subject to the rights of mortgagees, ground lessors, other tenants, matters of record and all other terms of the lease. Condition the covenant of quiet enjoyment upon the tenant's not being in default.

29.02 Limit Services.
Expressly limit the landlord's obligation to provide services and other obligations regarding the building to

bare occupancy and express obligations under the lease. Try to prevent the courts from using the "covenant of quiet enjoyment" as the basis to infer possible landlord obligations to provide services beyond those the lease requires. But also consider whether modifying the covenant of quiet enjoyment at all justifies the controversy and negotiations it may cause.

30. Real Estate Taxes

30.01 Allocation of Tax Liability.
The landlord might not always want to allocate taxes by square footage. For example, retail space may increase taxes more than residential or office space. Try to require each tenant to pay for any real estate tax increases that result from that particular tenant's installation. If one tenant receives a tax abatement, the other tenants should typically contribute to real estate taxes based on the pre-abatement taxes.

30.02 Base Year Real Estate Taxes.
Define "Base Year Real Estate Taxes" to include water and sewer charges, as "net of any special assessments" and "as finally determined." Consider the impact of varying tax years for varying tax jurisdictions, such as school district, water district, municipal, county, and so forth.

30.03 Business Improvement District ("BID") Charges and Special Assessments.
Include any "BID" charges and special assessments in the definition of "Real Estate Taxes."

30.04 Estimated Tax Payments.
Require the tenant to make monthly estimated tax payments, especially if the landlord's mortgage requires tax escrow payments. Time the tenant payments to precede the tax escrow payments by a few days.

30.05 Further Assurances.
The tenant should agree to assist the landlord, as reasonably necessary, to qualify for tax abatements and benefits (such as the Industrial and Commercial Incentive Program, or "ICIP," in New York City). If the landlord obtains such benefits, the lease should say whether the landlord or the tenant will ultimately receive the economic benefits of the program and how those benefits interact with real estate tax escalations. If an ICIP reduction arises from a particular tenant, all parties will typically expect it to be allocated just to that tenant. If the landlord might convert the building to condominium ownership, think about how it would affect the tax escalation definitions.

30.06 Imperiled Abatement.
If the property benefits from any tax abatement, deferral, subsidy, or the like, think about the risk that someone might challenge the validity of such benefit. If any such challenge arises or someone threatens such a challenge, allow the landlord to require the tenant to pay monthly (just like a regular payment of real estate taxes) an appropriate contribution toward whatever incremental taxes, with interest, the landlord might owe if the challenge succeeds. The landlord would refund these payments with interest if the challenge failed. Without a structure like this, the landlord will bear much of the risk of any challenge and, in practice, may not be able to shift much of that risk to tenants.

30.07 Management Fee.
If the landlord protests real estate taxes, impose a reasonable extra management fee to compensate for the landlord's time, trouble, and effort. Such a fee might apply generally or, if appropriate, only to particular tenant(s) requesting the tax contest.

30.08 Payments in Lieu of Taxes ("PILOT").
Include PILOT payments in real estate taxes.

30.09 Successful Contest.
If a tax contest succeeds, the tenant will not necessarily be entitled to its share of the full refund. Instead, subtract the refund from actual real estate taxes for the year in question, and then ask whether this would have reduced the tenant's tax escalation, after considering base years. The tenant's refund should not exceed that hypothetical reduction.

30.10 Tax Contests.
Prohibit the tenant from contesting taxes without the landlord's consent. If the landlord does consent, the landlord may want the right to require the tenant to post a bond or letter of credit equal to any contested taxes (if the tenant did not need to pay the taxes first, as a condition to the contest) and use counsel the landlord approved. The tenant should indemnify the landlord against all losses that arise from any tax contest the tenant initiates. The landlord will almost always prefer to handle the contest.

30.11 Transfer Taxes.
Consider possible transfer taxes on the lease. New York, for example, imposes a transfer tax on certain leases that extend beyond 49 years (including options) or contain a purchase option.

31. Remedies

31.01 Abandonment.
The landlord's seizure and re-entry of the premises based on "abandonment" can create risk, because of uncertainty about what "abandonment" means. Try to define abandonment in the lease, such as nonpayment of rent and physical absence from the premises for a certain time. State that if the tenant defaults beyond cure periods and also removes a significant number of fixtures and equipment, that would constitute an abandonment and a surrender of the premises, entitling the landlord to repossess. Thus, the landlord need not bring summary proceedings or give the tenant further cure rights. Expressly allow self-help for abandonment.

31.02 Default Rate.
Require the tenant to pay interest at the default rate on amounts past due even after judgment (when the statutory judgment rate would otherwise apply).

31.03 Equitable Relief.
Try to state that the landlord can obtain injunctive and declaratory and specific performance-type relief regarding all nonmonetary covenants—both negative and affirmative (supervised and monitored by a special master if necessary).

31.04 Inducement Repayments.
State that if the lease terminates early because of default, the tenant must repay with interest the unamortized balance of the landlord's rent concessions, brokerage commissions, contribution to the tenant's work, and work the landlord performed for the tenant. (The tenant will argue that this gives the landlord double compensation. That may be true—but only if the tenant actually pays the damages the lease or governing law requires the tenant to pay. The landlord can agree to offset any liquidated damages provided for in the lease by the damages suggested in this paragraph if the tenant actually pays the latter damages. But in that case, why bother?)

31.05 Interest and Late Charge.
Require the tenant to pay interest on late payments, in addition to a late charge. Multiple defaults or bounced checks within a specified period should trigger special consequences up to and including termination of the lease. For example, the landlord can require a higher late fee; a larger security deposit; that the next default be incurable; or that future payments—or at least all payments for the next specified number of months—be made by certified or cashier's checks or wire transfer.

31.06 Intermediate Remedies.
Deal with the fact that courts typically refuse to terminate leases based on "minor" defaults such as failure to deliver financial information or an estoppel certificate. For these defaults, establish intermediate remedies. Make them meaningful, but not Draconian, such as liquidated damages ($500/day), a temporary rent adjustment, or a suspension or deferral of some privilege or benefit. If the tenant's "minor" default continues for a specified period, at some point it should constitute an event of default. Consider the degree of reasonableness necessary for the remedy to qualify as liquidated damages.

31.07 No Mitigation.
Provide that the landlord has no obligation to mitigate damages. If the landlord agrees to mitigate, the lease should define exactly what the landlord must do.

31.08 Nonpayment.
If the tenant fails to pay rent, expressly allow the landlord to exercise a "conditional limitation" right and terminate the lease, not just commence nonpayment proceedings. (Many Standard Forms establish a "conditional limitation" only for all defaults except failure to pay rent.) Expressly allow the landlord to exercise a "conditional limitation" right to terminate the lease and also prosecute simultaneously a proceeding for nonpayment of rent. Try to negate the usual rule that requires the landlord to elect between the two—although of course the landlord cannot actually obtain both forms of relief.

31.09 Ownership or Succession.
Consider asking the tenant to excuse the landlord from any obligation to prove ownership or succession in any eviction proceeding. The landlord would need to prove only tenant default. The tenant would then bear the burden of proving that the party claiming to be the landlord is really just an impostor without rights. If enforceable, this would eliminate a sideshow that merely gives any tenant an opportunity to trip up the landlord, with no practical benefit in the real world.

31.10 Right to Cure.
Allow the landlord to cure the tenant's defaults and bill the tenant for the landlord's expenses, with interest at the default rate as additional rent.

31.11 Waiver of Jury Trial.
The waiver should apply to all matters arising out of the landlord/tenant relationship and the property, not merely the lease, so as to reach tort claims between the parties.

31.12 Yellowstone Injunction.
Consider whether the landlord can proactively add language to the lease to limit the availability and potential burden of so-called "Yellowstone" injunctions under New York law. For example, consider some or all of the following, each of which responds to one or more of the issues that arise in "Yellowstone" proceedings:

31.12.01 Cure Period Extension Rights. Provide that the tenant may obtain an open-ended cure period, and as much time as the tenant wants to litigate an alleged default, by depositing with the landlord as security an amount equal to the landlord's estimate of the cost to cure the alleged default. State that such a deposit constitutes the only way the tenant can evidence its ability and desire to cure the default. Only if the tenant actually makes the deposit, will it be entitled to prevent the landlord from terminating the lease.

31.12.02 Final Cure Period Before Eviction. State that if the landlord obtains a warrant of eviction, the tenant will automatically have—or the landlord can agree at any time to grant the tenant—a short final cure period before the landlord proceeds with actual eviction. A "last clear opportunity to cure" at the end of the eviction proceedings substantially undercuts the basis for a "Yellowstone" injunction. Provide that the Landlord may offer the tenant any such "last clear chance" either in the notice to cure or at any later point before the lease has actually terminated.

31.12.03 Financial Defaults. Require the tenant to acknowledge that it cannot obtain a "Yellowstone" injunction for any financial default, even if uncertainty or disagreement exists about the tenant's obligations. (Uncertainty

or disagreement will always exist in these cases.) The tenant must pay first, fight later.

31.12.04 Landlord Court Victory. State that if the Landlord prevails in litigation, the lease will be deemed to have terminated on the date the Landlord delivered notice of default, and the holdover rent rate applies from that date forward. Require the tenant to deposit this amount in escrow during the pendency of any "Yellowstone" injunction.

31.12.05 Other Rights and Remedies. State that a "Yellowstone" injunction, if granted, limits only the landlord's right to terminate the lease and does not limit any other rights or remedies (such as late charges, default interest, and reimbursement of the landlord's expenses).

31.12.06 Waiver. Require the tenant to waive its right to bring a "Yellowstone" injunction (but recognize that existing law makes such a waiver unenforceable). Perhaps consider limiting the duration of any "Yellowstone" injunction to 20 days.

32. Rent

32.01 All Payments Are "Additional Rent.
"Define "additional rent" to include all payments the lease requires of the tenant. This will support the use of "summary dispossess" rights for nonpayment of all these amounts. The same characterization may have unfavorable consequences in bankruptcy, though. Hence the landlord may wish to be strategic about this issue.

32.02 Commercial Rent Control.
Leases already require the tenant to make a corrective payment when rent control terminates. Consider requiring the tenant to escrow the shortfall amount with the landlord each month during any rent control period, and pay interest on the shortfall (with credit for any interest earned on the escrow).

32.03 Finalizing Dates.
Where important dates remain to be determined after lease signing (such as the delivery date or the commencement date), state that the landlord can later deliver a commencement date letter to the tenant (a form of which the lease could include as an exhibit) memorializing all relevant dates. The letter should automatically become effective unless the tenant delivers a written objection to the landlord within ten days after receipt.

32.04 Free Rent.
Define the free rent period as ending on a particular date (defined in the term sheet), not a certain number of months after an event (such as lease signing or delivery of premises). Consider including a rent schedule for clarity. This approach shifts to the tenant the financial risk of protracted lease negotiations. Free rent periods should apply only to fixed rent. As a compromise in "free rent" negotiations, consider allowing a retail tenant to pay rent in gift certificates for a certain period.

32.05 Lockbox.
If the tenant pays rent into a lockbox, consider how to handle the risk that the lockbox administrator will deposit a check that the landlord would have wanted to reject. For example, the lease might say that any such deposit does not waive the landlord's rights, as long as the landlord refunds the amount of the incorrectly deposited check within some short time after the lockbox administrator deposited it. Thus, the landlord can correct the lockbox administrator's mistakes and preserve the landlord's rights.

32.06 Payment.
The lease should include an express covenant to pay rent, not merely a schedule of rental amounts. Allow the landlord to require the tenant to pay all rent by wire transfer.

32.07 Remeasurement.
Negate any possible remeasurement of the space or the common areas. If the tenant insists on the right to remeasure, define the formula for measurement (for example, refer to the Building Owners and Managers Association ("BOMA") standards). Have the landlord's architect/space planner certify such measurement to the landlord. If the tenant later brings an action against the landlord for bad measurement, the landlord may have a claim against the design professional.

32.08 Rent Concessions.
Allow the landlord to undo or recapture a rent concession and any other inducement if the tenant defaults before fully applying the concession. Consider extending a rent concession for a longer time (such as six months of 50% free rent rather than three months of 100% free rent) or in stages over the lease term (such as one month free after every 24 months rather than several months free at the beginning). Condition any rent concession on the tenant's finishing its initial alterations by a certain date or meeting certain other specific conditions of special importance. Consider any accounting implications for the landlord.

32.09 Rent Not Per Square Foot.
State rent as a flat amount rather than basing it on the square footage of the premises. This can prevent controversy about square footage and remeasuring. Avoid any statement about the square footage or rentable square footage of the premises.

32.10 Stock Options.
For tenants with initial public offering ("IPO") potential, consider whether to require (or accept) stock, options, or warrants. (This paragraph was added early in the development of this checklist, sometime before April 2001. Recognizing that no one has yet repealed business cycles, the co-authors decided to leave this paragraph in place.)

32.11 Waiver.
Consider requiring the tenant to waive legal principles that can automatically convert a terminated lease into a month-to-month tenancy, with notice requirements for termination. (Some subcommittee members reject such a waiver, arguing the automatic conversion makes sense.)

33. Rules and Regulations

33.01 Compliance.
Require the tenant to comply strictly with the rules and regulations attached as an exhibit to the lease, and also with any changes (or perhaps only just "reasonable" changes) that the landlord makes later. Consider whether the landlord's rules and regulations correctly reflect present circumstances and building operations; if not, update them.

33.02 Lease Incorporation.
If the rules and regulations contain anything unusually important, move it to the body of the lease. Courts may ignore rules and regulations. State that if any conflict exists between the rules and regulations and the lease, the lease governs.

33.03 No Liability.
If the landlord does not enforce the rules or regulations against other tenants—or if other tenants violate them with impunity—this should impose no liability or obligation upon the landlord. A landlord often wants to have the freedom to enforce rules and regulations against some tenants but not others.

33.04 Recycling.
Consider requiring the tenant to separate its waste. The landlord's requirements may exceed those of applicable law. Consider adding a provision governing medical waste or other tenant-specific recycling or waste disposal requirements.

34. Security

34.01 End-of-Term Issues.
Expressly allow the landlord to apply the security deposit to costs to restore the demised premises and remove the tenant's abandoned personal property and signs.

34.02 Increased Security.
Require the tenant to increase the security deposit if the rent rises or the tenant's financial rating drops below a certain point. Should any other circumstances trigger such a requirement?

34.03 Letter of Credit.
Consider requiring the tenant to deliver a letter of credit in place of a cash security deposit to try to reduce the impact of any possible tenant bankruptcy. To minimize administrative complexity, require the tenant to elect at lease signing whether it will post cash or deliver a letter of credit. Don't allow either/or. Only if the landlord insists on the promptest possible closing, allow the tenant to deliver a letter of credit after signing. Close with a cash security deposit. This avoids extensive delays in dealing with banks' letter of credit departments.

34.04 Letter of Credit Requirements.
If the tenant delivers a letter of credit, require that: (1) the issuing bank be (a) reasonably acceptable to the landlord and (b) a New York Clearinghouse bank; (2) the landlord can draw the letter of credit at a bank branch in the same city as the landlord upon presentation of merely a sight draft (no drawing certificate or other documentary conditions); (3) the letter of credit be an "evergreen" or the bank must notify the landlord (at least __ days before expiry) of any failure to renew and the landlord may draw (or better, shall be deemed automatically to have drawn) the letter of credit; (4) even if the letter of credit is an "evergreen," the issuer must confirm the current expiry date upon request; (5) the letter of credit will not expire until at least a specified period after lease expiration; and (6) the landlord can transfer the letter of credit without charge to any lender or purchaser (or, if there is a charge, the tenant must pay it).

34.05 Lien on Personalty.
Consider taking a lien on the tenant's personal property (but typically not "fixtures"), perfected with a UCC-1 financing statement. Any security interest should by its terms survive lease termination; otherwise it might terminate with the lease.

34.06 Mortgagee Requirements.
Accommodate future mortgagee requirements (for example, allow the landlord to pledge the landlord's interest in the security deposit or to transfer any letter of credit to the mortgagee). If the tenant ultimately needs to cooperate with these measures, establish a tight time frame for that cooperation. Allocate any resulting costs, including attorneys' fees.

34.07 Replenishment.
Require the tenant to replenish promptly the amount of any security that the landlord draws, or restore the letter of credit accordingly.

34.08 Segregated Account.
The landlord should comply with any state-specific requirements on holding security deposits. When these provisions require notices to the tenant about the security deposit, try to build those notices into the lease, if possible and permissible. Before the landlord disburses any interest to the tenant, the tenant should execute and deliver a W-9 form to the landlord. As a fallback, the lease should include the same language and information as a W-9 form.

34.09 Waiver.
Require the tenant to waive any damages claim against the landlord for any wrongful drawing on the letter of credit, and any right to enjoin or otherwise interfere with a drawing.

35. Services

35.01 Additional Services.
If the landlord agrees to make available additional electricity or HVAC services, allow the landlord to set aside capacity for future needs, as the landlord estimates them. State that the landlord will furnish building

services only during "building standard" hours, with some flexibility to (re)define what that means.

35.02 Changes in Building Operation.
Allow the landlord to change how the building operates and the services the landlord provides (such as the number of elevators and security levels and procedures), subject to reasonable standards. To the extent that the landlord agrees to particular performance standards, build in flexibility if usage levels change (for example, if the long-term storage area for old files on the third floor becomes a cafeteria).

35.03 HVAC.
Define any HVAC standards as design criteria, not as performance specifications. The landlord's only obligation should be to operate HVAC in conformance with design criteria. The tenant should be responsible for any distribution problems within the premises.

35.04 Off-Season Air-Conditioning.
If the landlord provides air-conditioning before or after the regular air-conditioning season (because of hot weather or tenant requests), allow the landlord to charge tenants for that extra service, even if the lease does not yet require air-conditioning.

35.05 Specifications.
To the extent the landlord agrees to meet specifications for any landlord services, consider the assumptions that underlie those specifications. For example, elevator specifications assume a certain level and distribution of occupancy and type of usage. If the tenant installs a cafeteria, this may alter traffic patterns so much that the landlord should have the right to change the elevator performance specifications.

35.06 Sprinklers.
Charge the tenant for sprinkler maintenance and upgrades. Consider charging a monthly fee for static water.

35.07 Telecommunications/Fiber Optics Cable Provider.
Consider requiring the tenant to use the landlord's telecommunications/fiber optics cable provider. Give the landlord the right to change providers. Negate any landlord obligation to continue to use any particular provider. (The Federal Communications Commission constantly reviews and revises the rules in this area which often supersede lease language.)

35.08 Tenant Complaints.
Limit who can complain about building services. Require a written notice of any such complaint, signed by specified officers of the tenant. Excuse the landlord from any liability for utility service failures.

35.09 Tenant-Provided Services.
Prohibit the tenant from providing its own building-related services, such as cleaning, especially if this might create labor problems.

35.10 Utilities.
Require the tenant to pay for temporary utilities during construction. If the tenant's business will consume unusual amounts of utilities or services (such as a hairdresser, restaurant, or trading floor), require the tenant to pay its share of such usage, and think about how to allocate it.

36. Subordination and Landlord's Estate

36.01 Condominium or Ground Lease.
The landlord should retain the right to create a condominium regime or to enter into a ground lease of the entire building. Provide for the rights and obligations of the landlord and the tenant in such an event. Require the tenant to cooperate, as reasonably necessary, provided the new structure produces no material adverse impact on the tenant. Allow the landlord to equitably adjust escalation formulas if the building becomes a condominium or the landlord makes some similar structural change. Allow the landlord to delegate its duties to the condominium board of managers.

36.02 Expenses.
Require the tenant to reimburse the landlord's expenses for obtaining any SNDA from the landlord's mortgagee, including the landlord's reasonable attorneys' fees.

36.03 "Financeability" Provisions.
To avoid negotiating a separate subordination, nondisturbance and attornment agreement (an "SNDA"), include directly in the lease all mortgagee protections and benefits that an SNDA would typically give a mortgagee. Require the tenant to confirm these protections if a mortgagee so requests, with the form of confirmation attached as an exhibit (perhaps within the form of estoppel certificate). Build in flexibility to add any other SNDA protections that some future mortgagee might (reasonably?) require. Tightly limit any cure period for any default arising from the tenant's failure to sign an SNDA.

36.04 Lease Subordinate.
Make the lease automatically subject and subordinate to the landlord's existing or any future fee mortgage. Try not to condition subordination on delivery of an SNDA.

36.05 Mortgagee Modifications.
Require the tenant to agree to any reasonable modification that a mortgagee requests, if it does not materially reduce the tenant's rights or materially increase its obligations.

36.06 Mortgagee Right to Subordinate.
State that any mortgagee can unilaterally subordinate its mortgage to the lease, in whole or in part, at any time, including after commencement of a foreclosure action. Any such subordination should bind the tenant automatically, whether or not the tenant has been notified of it.

36.07 SNDA Form.
Require the tenant to execute any SNDA form that the landlord's lender requires or attach an industry standard model SNDA, such as the one the New York State Bar Association

promulgated. Edit the form of SNDA to make it nonrecordable, and prohibit recordation. State that if the landlord delivers a conforming SNDA and the tenant does not sign and return it within a specified period, then the landlord has fully performed its obligations regarding obtaining an SNDA from that mortgagee.

36.08 Zoning Lot Mergers.
Require the tenant to cooperate and timely execute documents as necessary.

37. Tenant's Equipment and Installations

37.01 Conduits and Risers.
The landlord should control/coordinate use of conduits and risers that run through or adjacent to the premises. The landlord should have no liability for claims arising out of the tenant's use of conduits and risers. Allow the landlord to relocate conduits; to recapture unused conduit or riser space; and to require the tenant to remove cables, conduits, and risers no longer in use.

37.02 Ducts and Ventilation.
Require the tenant to pay the cost of any alterations or upgrades. Require the tenant to ameliorate at its expense any venting or odor problems reported by other tenants.

37.03 Electromagnetic Fields ("EMF").
The tenant should agree not to cause any EMF interference. If the tenant generates EMF interference, the tenant should agree to solve the problem. Negate any landlord liability. Allow the landlord to limit placement of machines that may cause EMF, even within the premises.

37.04 Rooftop Equipment.
The landlord should control roof rights, including penetrations, fuel supplies, ancillary equipment, relocation, and size and weight of any rooftop dish or other equipment. Require the tenant to remove its equipment (and any connecting cables) and restore the roof at the end of the term. The tenant should agree to indemnify the landlord against all liability and roof damage that arises from the tenant's rooftop equipment. Charge for the tenant's use of rooftop space. State that the landlord may require the tenant to relocate equipment elsewhere on the roof, and to provide screening or walkways, all at the tenant's expense. Prohibit the resale of services. State that any use rights granted to the tenant do not limit the landlord's use rights. Describe the tenant's rooftop rights as a "nonexclusive license."

37.05 Signage and Identity.
Confirm that the landlord controls all rights to exterior signage (including the name of the building, any flagpole, and rights to install plaques or other identification), even if exterior signage affects light and air. Prohibit digital, flashing, or video signs, or establish criteria for such signs (such as how often they may change). Signage can only advertise this operation at this location; it cannot advertise the tenant's products or services generally. If the landlord installs any signs for the tenant, the tenant should pay for them. As an alternative, state that the tenant's signs must comply with signage criteria attached as a lease exhibit, which the landlord may modify or update from time to time. For future changes in signage criteria, give the landlord an express right to upgrade the tenant's signs, at the tenant's expense. Require the tenant to cooperate and execute all necessary documents. Give the landlord the right to remove signage temporarily for repair or compliance with law. In drafting lease provisions, think of signage as a profit center, which the landlord should preserve and protect.

37.06 Supplemental HVAC, Backup Generator, and Fuel Tank.
The tenant must maintain its equipment in compliance with law and good practices (such as monthly inspections), and keep written maintenance records. These installations become the property of the landlord at the end of the term. Tenant must deliver the equipment in good working order with all permits, warranties, and maintenance history documents. Restrict testing of backup generators (sometimes very noisy).

37.07 Uniform Elevator Lobbies, Signage, Entrance Doors and Window Shades.
Require all tenants to maintain uniform elevator lobbies, signage, entrance doors and window shades. As an alternative, consider giving the landlord the right to require future uniformity. Give the landlord the right to install thermal film on the inside surfaces of any windows.

38. Use

38.01 Advertising.
In a retail lease, consider requiring the tenant to include the name and address of the premises, as appropriate, in all regional and internet advertising. Or, in the alternative, prohibit the tenant from using the name, image, or likeness of the building in its advertising, or control the manner in which the tenant does so.

38.02 Certificate of Occupancy.
State that the landlord does not represent or warrant that the tenant may use the premises for the permitted use. Even delivery of a certificate of occupancy does not create such a representation or warranty.

38.03 Continuous Operation.
Require a retail tenant to open and stay open during certain prescribed hours with sufficient personnel and inventory. If the tenant breaches, try to define the landlord's measure of damages. Also, provide for remedies other than an injunction or a lease termination (such as higher rent), because a court may not grant an injunction and the landlord would probably not want to terminate the lease.

38.04 Cotenancy.
Provide for flexibility in cotenancy requirements to accommodate possible future changes in the retail marketplace. Avoid requirements that

over time may become impossible to satisfy (for example, because of multiple name changes)Terminate the co-tenancy requirements at some point (for example, based on time or sales thresholds).

38.05 Density.
Limit density in the premises, i.e., how many people in how much space.

38.06 Exclusive Uses.
Track exclusive uses to avoid conflict. The landlord would ideally have no liability for conflicting exclusive use clauses or enforcement of exclusive use clauses. Consider limiting the tenant's remedies if the landlord violates any exclusivity clause. For example, allow the tenant to pay "percentage rent" only--but have no other remedy—if the landlord violates the clause. If some other tenant operates a prohibited use, allow the landlord to assign to this tenant any right to enforce the prohibitions in the other tenant's lease. Carve out from any "exclusive use" any store that operates the same use as one of multiple uses, but not its primary use. Consider measuring limited permitted excluded use by square footage, time of day, or percentage of sales.

38.07 Limited Hours of Operation.
Consider limiting hours of operation as appropriate (for example, in a mixed-use building with security concerns).

38.08 Loss of Exclusive.
Provide that if the tenant does not use its exclusive use right, the right permanently terminates. (A temporary termination does not help the landlord much.)

38.09 Narrow Use.
Draft the use clause narrowly (for example, not general office use, but office use for a computer consulting company operating under a specific business name). Then say: "and for no other use." If the landlord requires a certain quality level, don't use words like "first class." Instead, define the required standard of operation, such as "white tablecloth" or "table service" in the case of a restaurant.

38.10 Noise and Odors.
If the tenant's operation emits noise or odors (such as a bar, a restaurant, or a donut store), define in the lease specific noise and odor mitigation measures, rather than a general obligation of the tenant to control or prevent noise and odors. Allow the landlord to impose additional noise and odor control measures if the landlord determines that the initial measures do not work. State that the landlord has no responsibility for other tenants' noise or odors, provided the landlord exercises reasonable efforts to require such tenants to comply with applicable codes.

38.11 Recapture Right.
In a retail lease (especially one without an operating covenant), give the landlord a continuous or periodic recapture right if the tenant ceases to operate for a stated period. Structure the right so a lender can exercise it after foreclosure. For example, do not just give the landlord a one-time right to recapture within a certain period after the tenant closes its store; provide for a periodic or continuous right.

38.12 Single-Store Operation.
Require the tenant to use and operate the premises only as a single retail operation (no separate stores or stalls, except bona fide licensed departments or concessions not operated under a separate name). Prohibit the tenant from segregating any part of its space from the rest of the space for use as a separate store, with or without a separate entrance.

39. Vault Space

39.01 Diminution.
State that any reduction of vault space (such as use by any government or utility) does not entitle the tenant to any rights.

39.02 Recapture.
Give the landlord the right to recapture any vault area if the landlord, a utility, or governmental authority ever needs the space.

39.03 Use and Occupancy.
Since vault space may lie outside the boundaries of the landlord's property, state that the landlord makes no representation about any right to use or occupy such space. If the tenant uses any vault space, require the tenant to maintain, repair, and pay any municipal fees imposed from time to time. Alternatively, the landlord may want to prohibit the tenant's use of any vault space to avoid liability and other issues.

40. Miscellaneous

40.01 Additional Security.
Make the tenant responsible for any additional security (and any damages) necessitated by the tenant's presence in the building and its use of the premises.

40.02 Arbitration.
If the tenant has the right to invoke arbitration of disputes, condition this right on the absence of any rent default. Expressly exclude any rent dispute from the arbitration right. If the landlord cares about quick resolution of any arbitrated dispute, agree in the arbitration clause on possible arbitrators (and the number of arbitrators), the arbitration agency, and the rules that will apply. Don't leave these matters until a dispute arises. Specify arbitrators, or arbitrator qualifications, so that the arbitrators will understand the landlord's business and position (or even favor the landlord?). Specify a limited and short list of issues for which arbitration will apply (such as escalation charges; disputes about repairs; and assignment and subletting if the landlord has agreed to be reasonable). Landlords often believe tenants are more willing to arbitrate than to litigate. Arbitration should not apply to nonpayment, dispossess, or conditional limitation proceedings.

Require any arbitrator to issue a written explanation of its decision.

40.03 Broker's Representations.
State that any representations made by any broker, including about square footage, do not bind anyone and shall not be used to interpret the lease.

40.04 Completion Bond.
Before the tenant undertakes alterations estimated to cost above $_____, require the tenant to deliver a bond or letter of credit in an amount equal to __% of the estimated cost. If the landlord doesn't require such a measure because of the tenant's great credit, consider giving the landlord the right to rescind that concession if the tenant's credit changes or if the tenant assigns the lease.

40.05 Confidentiality.
Require the tenant to keep the terms of the lease confidential, subject to applicable law, rules, and regulations.

40.06 Continued Status.
The tenant should agree to update its representations and warranties from time to time and to stay in good standing throughout the lease term.

40.07 Diplomatic Immunity.
If applicable, obtain the tenant's waiver of diplomatic immunity. Ascertain under the specific circumstances whether this waiver will be enforceable. If it won't be enforceable, find a different tenant.

40.08 Independence of Covenants; No Termination Right.
The tenant should acknowledge that all landlord's covenants are independent. The tenant should waive any right to terminate based on the landlord's default.

40.09 Interpretation.
Say once (and only once) that "include" means "without limitation."

40.10 Limits on Tenant's Rights.
To the extent that the landlord gives the tenant any special "right" or "privilege," condition it as appropriate. Certain minimum occupancy? No default? Other criteria or conditions? When the landlord agreed to the concession, what assumptions did the landlord make? What happens if those assumptions stop being true? For example, if the tenant's good credit eliminates any requirement for bonds or other landlord protections, undo this concession if the tenant's good credit turns bad. Can the tenant exercise any privilege or right only once or only within a certain period? Or does it apply throughout the lease term? Can the tenant assign any particular special privilege if the tenant assigns the lease? If the tenant exercises any privilege or right, should the lease require the tenant to deliver an estoppel certificate, any documents the tenant entered into in exercising the privilege or right, or any other documents? These issues potentially arise for every tenant "right" or "privilege," including permitted assignments, releases from liability, options, and exclusive uses.

40.11 Marked Leases.
When preparing final lease documents for signature, mark them against the landlord's standard form to facilitate future lease review projects and administration. Do not necessarily distribute those marked copies to tenants.

40.12 Original Lease Document.
The landlord may scan and destroy its original lease in the ordinary course of business. The landlord need never produce an original counterpart.

40.13 Resale.
Prohibit the tenant from reselling to other tenants any telecommunication services, satellite capacity, electricity, or other utility or service.

40.14 Security Cameras.
Reserve the landlord's right to install security cameras in common areas. Require the tenant to waive any right to object to such cameras, and any right to sue the landlord over any privacy and/or labor/workplace issues arising from their use.

40.15 Survival.
The tenant's obligations and liabilities under the lease should survive the expiration or termination of the lease.

40.16 Tenant's SEC Filing.
Because a publicly held tenant whose lease is a "material obligation" must file a copy of the lease with the tenant's publicly available SEC filing, consider having the tenant: (a) represent that the lease is not a "material obligation"; (b) agree to notify the landlord if the tenant later must publicly file the lease; and (c) agree to try to have rental information redacted or given "confidential" treatment.

41. Due Diligence

41.01 Consents.
Does any mortgage, ground lease, other space lease, development agreement, or REA limit who may be a tenant in the building? Confirm this tenant complies and, if appropriate, obtain representations and warranties (for example, not a "prohibited person"). Does the transaction require any consent on the landlord's side, such as from a joint venture partner? If necessary, obtain consents from the landlord's mortgagee, mezzanine lender, or ground lessor.

41.02 Credit.
Perform a credit check, an OFAC check, and a UCC search for the actual entity that will be the tenant under the lease (not just its parent or affiliate).

41.03 Financial Statements.
Obtain and review the tenant's, its affiliates', and the guarantor's financial statements.

41.04 Identities of Tenant and Guarantor.
Determine early the exact name of the tenant and any guarantor(s). Understand the tenant's stock ownership structure. Get the right entity as the tenant.

41.05 Other Leases.
Does any other tenant have a right of first refusal or other pre-emptive rights for the space now being leased?

41.06 Previous SEC Filings.
If the tenant is publicly held and any previous lease of the tenant was a "material obligation," the tenant should have incorporated that prior lease in a previous SEC filing. As a strategic matter, the landlord may wish to review this filing and see what the tenant accepted in the previous transaction.

41.07 References.
Obtain references for the tenant and its principals.

41.08 Scope of Premises.
Think about where the premises begin and end, identifying and resolving any uncertainties. Don't just refer, for example, to "the eighth floor" or "all the rentable space on the eighth floor." Prepare a clear diagram (or at least a sketch) to attach to the lease. Even for a full-floor tenant, clearly demarcate where the premises end and the common areas (and other landlord-controlled areas) begin. Do the premises include service closets? Elevator lobbies and restrooms, in the case of full-floor premises?

41.09 Tenant Representations.
Obtain representations and warranties about the ownership structure of the tenant, perhaps backed by a secretary's certificate and copies of documents.

42. Other Documents

42.01 Advice and Administration Memo.
The landlord may desire counsel to prepare a memorandum summarizing important provisions of the lease and advising the landlord on actions it should remember to take to avoid problems, issues or disputes.

42.02 Brokerage Agreement.
Consider the effect of a possible tenant default on the landlord's liability for unpaid brokerage commissions. What about an early negotiated termination of the lease based on a change in the tenant's financial condition? Try to negate any further payment obligations to the broker in any such event.

42.03 Certificate of Insurance.
Have an insurance consultant review the tenant's insurance certificate as well as the underlying insurance coverage.

42.04 Good Standing and Organizational Documents.
Obtain and review the tenant's good standing certificate and government-certified copies of organizational documents. Ask for an organizational chart if the tenant's structure is complex

42.05 Guaranty.
Obtain a guaranty executed by the correct guarantor and acknowledged.

42.06 Letter of Credit.
Review the letter of credit form in advance. Obtain lender sign-off as needed.

42.07 Memorandum of Lease and Release.
If the lease requires the landlord to sign a memorandum of lease, also obtain a release of memorandum of lease, and deposit it in escrow with the landlord's counsel or some other third party willing to assume responsibility.

42.08 Opinion of Counsel.
For a major lease, consider obtaining an opinion of counsel about the tenant's due authorization, execution, and delivery of the lease, though probably not enforceability of the lease. Consider requesting a representation by the tenant that entering into the lease does not violate any pre-existing agreements.

42.09 Taxpayer Identification Number; W-9 Form.
Require the tenant's taxpayer identification number under the tenant's signature. Sooner or later the landlord will need it. If the tenant delivers an interest-bearing security deposit, the landlord will need the taxpayer identification number immediately. Consider incorporating the tenant's W-9 Form certifications into the body of the lease, as a backup for a separate form.

42.10 UCC-1 Financing Statement.
File a UCC financing statement if the landlord obtains a security interest in the tenant's personal property.

43. Post-Closing; Monitoring

Note: The following handful of suggestions on lease administration and enforcement does not constitute as a complete guide to administering and enforcing leases.

43.01 Abandonment.
If the tenant appears to have moved out, then before entering and taking control of the premises, consider sending an "estoppel" notice to the tenant reiterating the lease provisions on "abandonment" and inviting the tenant to confirm that it has not abandoned the premises (with payment of any unpaid rent). If any doubt exists about whether the tenant has abandoned the premises, consider using a summary possession action rather than self-help to avoid claims of wrongful eviction.

43.02 Alteration Consents.
A lease sometimes says the tenant need not remove its alterations and restore the premises at the end of the term unless the landlord requires such restoration as a condition to the landlord's approval of the particular work. In those cases, the landlord must remember to exercise its right to require restoration when appropriate.

43.03 Change of Address/Notice Party.
If the landlord relocates, it should send a formal notice of change of address to the tenant, with a copy to any other tenant representatives designated in the lease to receive notices. Keep current addresses of all notice parties with the lease or in a single database.

43.04 Delivery of Premises.
Issue formal notice and confirmation of delivery of the premises. Memorialize the commencement date with a document filed in such a way that someone will be able to find it in five years.

43.05 Estoppels.
The landlord may wish to request periodic estoppel certificates simply to try to prevent future issues from arising. Request an estoppel certificate (or include equivalent language in the documentation) for any amendment, consent, waiver, favor, or other concession of any kind. Include "reliance" language to support enforceability. Consider requiring an estoppel certificate upon completion of build-out as well.

43.06 Future Amendments.
If the landlord and the tenant amend the lease, the landlord should obtain guarantor consent (even if the guaranty waives such a requirement); amend any recorded memorandum of lease; and take other steps to protect the landlord's interests.

43.07 Future Deliveries.
To the extent the lease requires the tenant to make future or periodic deliveries of documents (such as financial statements, certificate of ownership structure, estoppel certificates), remember to ask for them. If the landlord fails to enforce a tenant obligation long enough, that might create a waiver.

43.08 Future Events.
Memorialize any exercise of an option, delivery of additional space, and the like, and any resulting rent or base year adjustments. Keep a copy of any resulting documentation in the lease file, in a place where someone will find it when they want "all" the lease documents.

43.09 Insurance.
Monitor expiry dates of insurance. Update coverage limits and requirements as markets change.

43.10 Letters of Credit.
Monitor expiry dates. Typically, draw at the earliest possible opportunity, if necessary.

43.11 Preemptive Rights.
Give the tenant notices of available space, and other notices, under any right of first refusal or other preemptive rights in the lease.

43.12 Tickler Reminders.
If the tenant persuaded the landlord to remind the tenant of certain matters (such as restoration obligations, option exercise deadlines), establish appropriate reminders in the landlord's calendar. Counsel may also wish to make appropriate "tickler" entries, but should avoid assuming responsibility to remember.

Endnotes

1. "The Tenant's Checklist of Silent Lease Issues" appeared in the New York State Bar Association Real Property Law Section's *New York Real Property Law Journal* (Fall 1999), and was modified and republished in *The Practical Real Estate Lawyer* (May 2000) and elsewhere. A second edition of the "Tenant's Checklist" appeared in New York State Bar Association's *New York Real Property Law Journal* (Fall 2002) and *The Practical Real Estate Lawyer* (March 2003 and May 2003) and in a wide range of other publications.
2. *See, e.g.*, Gary Goldman, *Drafting a Fair Office Lease,* A.L.I.-A.B.A. Comm. on Continuing Prof'l. Education (2d ed. 2000).
3. Landlords often include such an obligation within the definition of operating costs for escalation purposes. That is fine, provided that the inclusion applies only during the adjustment years and not for purposes of any base year.
4. Ideally, the base year would disregard capital expenditures—even their partial amortization. In that case, unusual capital expenditures in the base year or preceding years would not raise an issue.
5. "ACORD" is the universally used acronym for Association for Cooperative Operations Research and Development, a nonprofit standard-setting body for the world-wide insurance industry. For more information, visit www.acord.org.

S.H. Spencer Compton and Joshua Stein, the main authors of this checklist, also Co-Chair the Silent Lease Issues Subcommittee. Joshua Stein initiated and edited both the landlord's checklist and the tenant's checklist. With this publication, each of those two checklists has now reached its second edition. Changes, additions, and other improvements to this checklist are welcome. They will be taken into account as appropriate when this checklist is updated and republished, and if it ever reaches its third edition. If you have suggestions, please send email to: shcompton@firstam.com or joshua@joshuastein.com.

Cooperatives and Condominiums in the New York City Housing Court

By Gerald Lebovits and James P. Tracy

I. Introduction

Cooperatives and condominiums are unique forms of valuable property ownership that engender special legal issues. In New York City, residential landlord-tenant issues are litigated in the Civil Court's Housing Part, commonly called "Housing Court." Residential landlord-tenant disputes arising in cooperatives and condominiums are referred to specialized parts. This article reviews the legal concepts and disputes litigated in the New York City Housing Court Coop and Condo Part.

II. Cooperatives

A. The Basics

Cooperatives are unique ownership regimes in which three different property interests are created. The first interest is created when the cooperative corporation secures the property in fee simple. The second is created when the shareholders purchase the corporation's shares, which are personal property. The third is created when the corporation enters into long-term leases, called proprietary leases, with those shareholders, entitling each shareholder to occupy a particular unit.

Cooperative corporations, which own the building and its land in fee simple, may be formed in New York State under the New York Business Corporation Law,[1] the Not-for-Profit Corporation Law,[2] or the Cooperative Corporation Law.[3] Creating the cooperative corporation involves choosing a corporate name, filing articles of incorporation, and drafting by-laws.[4]

The articles of incorporation for cooperatives are tailored for cooperatives. Because corporations formed under the Business Corporation Law might include in their articles of incorporation any provision consistent with state law,[5] many cooperatives vest decision-making power with proprietary lessees rather than with the board of directors.[6] Many cooperatives also include in their articles of incorporation powers necessary to manage a cooperative, such as the authority to buy property and buildings in fee simple, to lease the apartments in property the corporation owns, and to mortgage buildings.[7]

A cooperative corporation is bound by the articles of incorporation and the by-laws, the proprietary leases, and the cooperative's rules and regulations.[8] Cooperative shareholders have the right to commence a derivative action against the corporation.[9]

As with all corporations, cooperative corporations owe their shareholders fiduciary duties. These responsibilities sometimes conflict with duties the corporation, acting as landlord, owes to a proprietary lessee.

Shareholders do not own a unit in fee simple. They own a portion of a corporation that owns the entire property in fee simple. Thus, shareholders do not pay taxes on their individual unit. Instead, real-estate taxes are levied on the property as a whole, and the corporation assesses the proprietary lessees according to their ownership shares.[10] Similarly, cooperatives may encumber the entire property with a mortgage, which the shareholders satisfy.[11]

In entering into a proprietary lease with the cooperative, shareholders enter into a landlord-tenant relationship with the cooperative corporation.[12] This relationship is similar to a conventional landlord-tenant relationship. It confers on a proprietary lessee some benefits of fee simple ownership. Proprietary lessees, as shareholders, own a portion of the cooperative, and so have a voice in managing the building. The shares allocated to a particular unit might appreciate in value. The shares and leasehold interest may be leveraged.[13]

The proprietary lease establishes many of the rights and duties held by the cooperative and the proprietary lessee. The most important of these is the proprietary lessee's duty to pay to the cooperative maintenance charges, often called rent.[14] Typically, the proprietary lease provides an amount that may be amended by the directors, depending on the building's needs.[15] Cooperatives typically encumber the property as a whole with a mortgage, and real-estate taxes are levied on the entire property. Cooperatives depend on the shareholders to satisfy those obligations.[16]

Other provisions in the proprietary lease deal with the right to sublet, the right to make alterations, the cooperative's house rules, the duty to make repairs, and the shareholders' rights if they default on the lease.[17]

Real Property Law Article 7 applies to cooperatives and governs the landlord-tenant relationship between the cooperative and proprietary lessees.[18] This relationship confers Housing Court's jurisdiction on disputes between these parties.

B. Other Types of Cooperatives

1. Low- and Middle-Income Housing Cooperatives

New York State law allows for the creation of special cooperatives dedicated to providing low- and middle-income housing. These cooperative developments receive aid from the state, in the form of low-interest loans or tax-exempt status, in exchange for restrictions on the rent charged and the process by which tenants may be evicted.

a. Housing Development Fund Company

One special cooperative is the housing development fund company (HDFC), created under Private Housing Finance Law Article XI.[19] To qualify as an HDFC, the entity must dedicate itself to serving low-income tenants[20] and use all "income and earnings of the corporation" for corporate purposes rather than for "the benefit or profit of any private individual, firm, corporation or association."[21] HDFCs are authorized to receive a "temporary loan or advance" from funds established by the statute in exchange for submitting to Department of Housing and Community Renewal (DHCR) oversight and regulation.[22]

HDFC buildings are established after they fall into New York City's hands, for instance, due to tax foreclosure. Instead of administering the building or evicting the residents and leaving the building vacant, the City will invite the residents to form an HDFC. The deed restricts the building's use to low-income housing, with a provision that the property will revert to City ownership if that restriction is violated. This arrangement furthers the City's goal of creating low-income housing while not requiring the City to manage large amounts of real estate.[23]

HDFCs are exempt from rent regulation because they are cooperatives[24] and because they are nonprofit organizations.[25] In *546 West 156th Street HDFC v. Smalls*,[26] a tenant raised as a defense in a nonpayment proceeding that she was entitled to rent-stabilized status, despite the statutory exemptions. The tenant alleged that the HDFC had bestowed permanent rent-stabilized status upon her tenancy in a stipulation resolving an earlier nonpayment proceeding and had then offered a series of leases on rent-stabilized lease forms.[27] The Appellate Division, First Department, noted that the parties' beliefs regarding the tenant's rent-regulated status were not dispositive and held that the "subject agreement to treat respondent's apartment as rent-stabilized does not confer protection under the Rent Stabilization Law in contravention of the explicit statutory exemption for housing accommodations organized as a cooperative corporation or operated for charitable purposes"[28] The effect was that the tenant was a month-to-month tenant.

Because the government is "entwined" in HDFCs, those companies must accord their tenants due process required under the Fourteenth Amendment to the U.S. Constitution before effecting an eviction.[29] In finding this "entwinement," the Appellate Division, First Department, in *Grimmet* noted that because HDFCs perform an important government service by housing the poor, they are subject to strict government regulation and may revert to City ownership if the HDFC fails to comply with the restrictions placed on it.[30] This "significant and meaningful governmental participation"[31] triggers due process guarantees, including notice to the tenant of the reason for an eviction. These protections apply only to the tenant of record.[32]

Due-process protections ensure that an HDFC tenant may not be evicted merely because a lease has expired.[33] Rather, the HDFC may evict only for cause,[34] although little case law defines "cause" and in how much particularity it must be plead. Thus, an HDFC is unable to evict a month-to-month tenant after issuing a 30-day notice of termination.[35] On the other hand, an HDFC successfully evicted a tenant who, in violation of her lease, did not use the unit as her primary residence.[36] In that case, the notice to cure provided the tenant with sufficient notice of the alleged default.[37]

b. Limited Profit Housing Companies (Mitchell-Lama Housing)

Limited profit housing companies, often known as "Mitchell-Lama" cooperatives, so-called because of the sponsoring legislators, must be dedicated to providing low or middle-income housing. Under the Public Housing Finance Law, private developers are eligible for government-funded mortgages, tax abatements, and other incentives. In exchange for this aid, the housing projects must limit their profits and rent increases and are subject to DHCR regulation. Mitchell-Lama housing projects are required to submit financial information to the DHCR, which determines the allowable rent increases for the project.[38]

Before evicting a tenant for reasons other than not paying rent, a Mitchell-Lama development must first obtain a "certificate of eviction" from the New York Department of Housing Preservation and Development (HPD) before commencing a proceeding in Housing Court.[39] To appeal HPD's determination on a certificate of eviction, a party must commence an Article 78 proceeding. A party may not collaterally attack that determination in a Supreme Court ejectment action[40] or in a summary Housing Court proceeding.[41]

Practitioners should keep in mind the *Landaverde* rule and its application to Mitchell-Lama cooperatives. In *ATM One LLC v. Landaverde*,[42] the Court of Appeals interpreted DHCR regulations implementing the Emergency Tenant Protection Act (ETPA) to require a landlord to give a tenant 10 days' written notice to cure and another five days to cure if the notice is mailed. That rule was applied to Mitchell-Lama cooperatives in *Southbridge Towers v. Frymer*[43] because the Mitchell-Lama law's purpose and language is similar to the ETPA's.

2. Condoperatives (Condops)

A condoperative, or condop, combines condominium and cooperative ownership. Condops are buildings divided into one large residential condominium unit and one or more commercial condominiums. The residential condominium is then transferred to a cooperative corporation. The cooperative corporation divides the residential condominium into separate units allocated to the various

proprietary lessees. In other words, the cooperative owns the units under a condominium regime, rather than owning the entire building in fee simple.[44]

Condops receive tax advantages over the conventional cooperative. Cooperative shareholders may deduct their proportionate share of the cooperative's mortgage interest expenses and real-estate taxes if the cooperative derives 80 percent of its annual gross income from the shareholders.[45] Separating the commercial space from the cooperative may allow shareholders to benefit from that tax treatment.[46] The Mortgage Forgiveness Debt Relief Act of 2007, recently signed into law by President Bush, amends this tax provision by providing two additional ways to qualify for the tax treatment. Cooperatives may also now qualify if 80 percent of the corporation's property is used for residential purposes or if 90 percent of the corporation's expenditures are to acquire or maintain the property for the shareholders' benefit.[47]

III. Condominiums

A condominium divides a property into units owned in fee simple and common elements owned in common-fee ownership.[48] Unit owners hold title to their units in fee simple absolute and an undivided, proportionate common interest in the common elements, which are owned with all other unit owners.[49]

A condominium association, composed of the unit owners, may be incorporated pursuant to the Business Corporation Law or the Not-for-Profit Corporation Law[50] but may also remain unincorporated.[51] If incorporated, the statute under which it is formed will govern, unless the governance violates the Condominium Law.[52] Many provisions of these statutes, such as Business Corporation Law § 717, which governs fiduciary obligations,[53] also apply to unincorporated condominium associations. A derivative action may be brought against an unincorporated association.[54]

A property becomes a condominium upon the filing of a declaration.[55] The declaration must contain information for prospective purchasers and contractors, including that the property will be submitted to the provisions of the Condominium Act; a description of the land on which the building is located; a description of the building; a description of the units; a description of the common elements; a description of the common interest of each unit owner; and how the declaration may be amended.[56] Floor plans of each unit must be filed with the declaration.[57]

Condominiums must have by-laws that govern its administration and which must be filed with the declaration. The by-laws must provide for the method of electing a board of managers and officers, the conduct of meetings, and how condominium rules and regulations are made.[58] The declaration, the by-laws, and the house rules govern the condominium and its unit owners.

Although the by-laws must provide for the election of a board of managers to administer the building, in practice the board often delegates that authority to a management company through a management agreement.[59]

Condominium unit owners must pay "common charges" for the building's maintenance, similar to cooperative shareholder's maintenance.[60] In contrast to cooperatives, in which shareholders contribute to the cooperative's tax assessment, New York City condominium unit owners pay their real estate taxes for their units directly to the New York City Department of Finance.[61] Also in contrast to cooperatives, no "blanket mortgage" may encumber an entire condominium building,[62] and so condominium unit owners need not contribute to a shared mortgage. Condominium unit owners are not as bound together as cooperators.

Real Property Law Article 7 landlord-tenant provisions apply to cooperatives but not condominiums. In contrast to a cooperative's "hybrid" nature, in which shareholders own shares of the cooperative but also enter into a landlord-tenant relationship, condominium unit owners own their unit in fee simple absolute. Thus, cooperative shareholders are entitled to the protections of the warranty of habitability implied in their proprietary lease, but condominium unit owners do not receive these protections.

Because condominium unit owners do not enter into a landlord-tenant relationship with the condominium association, condominiums do not appear in Housing Court unless a unit owner leases a unit to a market-rate or rent-regulated subtenant or if, as shown below, a tenant remains in occupancy after a rental building converts to condominium ownership.

IV. Housing Court

Housing Court has jurisdiction over landlord-tenant disputes, including nonpayment proceedings (nonpayment of rent or maintenance), holdover proceedings (lease expiration or termination), lockout proceedings, Article 7-A proceedings (receiverships for distressed buildings), and HP proceedings (code violations).

Disputes between cooperative boards and proprietary lessees appear in Housing Court because of the landlord-tenant relationship. Among a great many examples, in *Jones v. Surrey Co-op. Apartments, Inc.*,[63] a cooperative board brought a nonpayment proceeding against a tenant for failure to pay monthly maintenance charges. Also among a great many examples, in *Gouverneur Gardens Housing Corp. v. Lee*,[64] a cooperative board brought a holdover proceeding against a tenant after issuing a notice of termination in accordance with applicable lease provisions.[65]

No landlord-tenant relationship exists between a condominium association and its unit owners. Housing Court does not hear condominium nonpayment and holdover disputes involving associations and unit owners.[66]

Cases involving cooperatives were a part of Housing Court's general docket until 1997, when the New York State Unified Court System created a separate part for cooperative and condominium cases. Proceedings involving units in cooperative or condominium buildings are heard in the Coop and Condo Part,[67] called Part C in New York County. Every borough has a separate coop and condo part except Staten Island, which hears all Housing Court cases in its All Purpose Part Y.

Petitioners must identify a proceeding involving units in cooperative or condominium buildings by using a green "legalback." If the petitioner fails to do so and the proceeding is referred to another judge, that judge must refer the proceeding to Part C upon determining that it involves a dispute in a cooperative or condominium building.

Housing Court instituted the Coop and Condo Part in response to significant pressure from important real-estate interests that want Housing Court to handle cooperative and condominium cases efficiently. The decision to create a separate court for cooperatives and condominium reflects several considerations. It allows these cases to escape an otherwise-busy Housing Court docket. And it allows, indeed compels, the presiding judge to develop a special expertise in cooperative and condominium law.[68] As Vickie Chesler, executive editor of *The Cooperator*, explained, "[C]o-op and condominium issues are being developed on a case-by-case basis. In co-ops, you're dealing with securities, corporate boards and business issues. Sometimes, the housing court judges try to fit those issues into landlord-tenant laws and precedents. And usually, they just don't fit."[69]

V. The Warranty of Habitability

The warranty of habitability, codified in Real Property Law § 235(b), guarantees to a tenant that a leased premises be "fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety."[70] The warranty is implied in all residential leases. Any waiver violates public policy. This protection for lessees is effectuated through rent abatements when a court finds that the premises' condition violates the warranty.

Cooperative shareholders are cooperative "owners" represented by the board, but the "proprietary lease given to the tenant is not different from any other type of lease and it creates a landlord-tenant relationship between the stockholder and the cooperative corporation."[71] Thus, shareholders, as tenants, are entitled to the warranty of habitability's protections.[72] One court noted that "[w]hile there is thus created the anomalous situation that one who is essentially an owner (by virtue of his purchase of shares) is in a sense suing himself, the situation is not vastly different from any stockholder who has occasion to sue the corporation of which he is a pro rata owner by purchase of stock."[73]

If the conditions in a tenant-shareholder's unit are "dangerous, hazardous or detrimental to their life, health or safety," [74] that shareholder may be entitled to relief. Second-hand smoke infiltrating a leased unit has been found to violate the warranty of habitability.[75] Excessive noise might lead to a warranty-of-habitability violation if the noise deprives the tenant of "the essential functions that a residence is supposed to provide."[76]

The warranty of habitability applies to the landlord-tenant relationship created in a cooperative, but the cooperative's hybrid nature requires that the warranty apply slightly differently than in a conventional landlord-tenant relationship. For instance, if "the conditions within the respondents' apartments are a direct result of a building-wide renovation project that the board of directors voted on and approved, it does not fall within the purview of a breach of the warranty of habitability. . . ."[77] This special application of the warranty of habitability allows cooperatives to act with the entire building's best interests in mind.[78] Ultimately, the abatement court must look to the proprietary lease to decide whose responsibility it is to repair or maintain a condition that plausibly affects the warranty of habitability.

No landlord-tenant relationship exists between a condominium unit owner and a condominium association. The warranty of habitability is inapplicable.[79] A condominium unit owner may not withhold common charges to the condominium association because of building violations in either the common areas or within a unit.[80] A landlord-tenant relationship is created when a unit owner leases a unit to a tenant. That tenant may enforce the warranty of habitability against that unit owner.[81] That tenant does not have this relationship with the condominium association and cannot enforce the warranty of habitability against it.[82]

VI. HP Proceedings

The New York Legislature created the Housing Court in 1973 to adjudicate actions and proceedings enforcing federal, state, and local housing standards to assure a safe, habitable, and plentiful housing stock in New York City. The Housing Court's jurisdiction includes nonpayment and holdover proceedings, which make up nearly the entire calendar, but the primary mission of the Housing Part (HP), a Part of the Housing Court (whose formal name is itself the Housing Part), is to hear housing code proceedings, referred to as "HP proceedings" or "HP actions."[83] An occupant, a tenant, a group of tenants, or the New York City Department of Housing Preservation and Development (HPD) may bring an HP proceeding. The goal of the proceeding from the petitioner's perspective is to urge the court to exercise its equitable, injunctive jurisdiction to compel a property owner, broadly defined, to correct housing violations in dwellings, to hold recalcitrant owners

in civil and criminal contempt, and to impose civil penalties on them.[84]

The Housing Part's subject-matter jurisdiction includes cooperative apartments, including the cooperative's common areas.[85] Proprietary lessees may bring an HP proceeding against the cooperative to force the cooperative to make repairs and cure violations of the Housing Maintenance Code and similar safety codes.

Most proprietary leases assign responsibility for repairs to the proprietary lessees if the problem arises from within and remains within the subject apartment, and to the cooperative corporation if the problem comes from outside the apartment. If a proprietary lessee brings an HP proceeding against the cooperative, the cooperative may not assert as a defense that the proprietary lease allocates responsibility to the lessee to fix the complained-of condition. The HP judge will order the cooperative to make the repairs.[86] If the shareholder is responsible for the costs of the repairs, the cooperative may recover its costs in a plenary action.

The Housing Part also has jurisdiction over condominium common areas[87] and to condominium units that a unit owner leases. A condominium unit owner may not bring an HP proceeding against its condominium association for conditions within the condominium unit, because no landlord-tenant relationship exists between the parties, and thus the warranty of habitability is inapplicable.[88] A City code-enforcement agency may bring a proceeding against a unit owner or the condominium association to correct violations, even if no landlord-tenant relationship exists.

Although every part of the Housing Court has code-enforcement jurisdiction—for instance, a tenant-respondent may invoke code violations as a defense to paying rent in a nonpayment proceeding and as a defense to paying use and occupancy in a holdover proceeding—there are a number of advantages for tenants or proprietary lessees to bring an HP proceeding. Those receiving government assistance, such as Social Services or Section 8 voucher recipients, face difficulties withholding their rent. The indigent benefit from the court's waiving filing fees[89] and from HPD attorneys' help with cases they deem viable. Wealthier tenants also benefit from suing for repairs. They might want to avoid withholding rent or maintenance due to potential damage to their credit rating and the stigma attached to defending a nonpayment proceeding.

VII. The Business-Judgment Rule

A. Generally

The business-judgment rule, which applies to cooperatives, "prohibits judicial inquiry into actions of corporate directors 'taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.'"[90] Business Corporation Law § 717, also applicable to cooperatives, states the rule somewhat differently, requiring directors to act "in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances."[91] Cooperative boards' actions and decisions need not be optimal. They must be made in accordance with the procedures set forth in the governing documents and be made in good faith. Absent this showing, "judicial review is not available."[92]

The business-judgment rule was developed in the context of corporate governance. The Court of Appeals decided in *Levandusky v. One Fifth Avenue Apartment Corp.*[93] to apply that rule to cooperatives. The Court developed a rule to review corporate behavior judicially because "a cooperative corporation is—in fact and function—a corporation, acting through the management of its board of directors, and subject to the Business Corporation Law."[94] The Court also found that although "decisions of a cooperative board do not generally involve expertise beyond the usual ken of the judiciary, at the least board members will possess experience of the peculiar needs of their building and its residents not shared by the court."[95] The Court of Appeals believed that this rule appropriately allows cooperative boards to manage buildings effectively and efficiently, while still protecting residents from board decisions that do not reasonably relate to the cooperative's business.[96]

In the *Levandusky* case, a shareholder had sought to make alterations to his unit, including moving a steam riser. The shareholder's proprietary lease required him to receive the cooperative board's consent before making any alteration affecting the building's heating system. Despite the shareholder's contention that the alteration would not harm the building's plumbing, the board, after consulting with an architect, decided to deny the application. The parties eventually litigated the dispute, with the shareholder asking the Court to overturn the board's refusal.

The Court of Appeals applied the business-judgment rule.[97] The Court found that the board acted within the procedures set forth in the proprietary lease in examining the shareholder's alteration plans. The shareholder was unable to show that the board did not rely on its architect's advice or that any board member harbored animosity against him. Even if the shareholder had shown that the building's heating system would not be harmed and that the board's decision was unreasonable, the Court would not intervene.[98]

The *Levandusky* Court stressed that the business-judgment rule's application to cooperatives might differ from its application to more conventional corporations. The Court anticipated this difference because the rule's development in the conventional corporate context responded to "self-dealing and financial self-aggrandizement," which, in its view, would not be a major problem among directors of not-for-profit cooperatives.[99]

One motive to apply the business-judgment rule to cooperative board actions is to protect honestly made decisions from lengthy litigation. New York courts have helped effectuate that purpose by not hesitating to grant summary-judgment motions to resolve these disputes quickly. In *Sherry Associates v. Sherry-Netherland*, a group of minority shareholders sued their cooperative corporation, a dual-purpose residence and hotel, alleging that it discriminated against shareholders who owned hotel units.[100] The Appellate Division held that the governing documents entrusted the management of the hotel units to the board and that the plaintiffs did not overcome the presumption that the board acted in good faith and in the exercise of honest judgment.[101] The plaintiffs alleged that the hotel units could have been more profitable. That allegation did not defeat the business-judgment rule.[102]

Courts have also been quick to grant summary judgment in cases challenging the promulgation of rules clearly within the board's authority. In *Jacobs v. 200 East 36th Owner's Corp.*, a resident challenged the "promulgation of a rule prohibiting deliveries of food by placing the food packages on the floor of the elevator and sending the elevator to shareholders' floors and requiring residents to pick up food deliveries in the lobby."[103] Finding the record devoid of proof that the action did not further safety and cleanliness, the court granted the managing agent's summary-judgment motion.[104] Similarly, a cooperative's summary motion was granted when the plaintiff, challenging the adoption of a rule by the cooperative board expanding the hours of usage of the common roof garden adjacent to a penthouse apartment, could not "establish that the board was not acting for the purposes of the cooperative, within the scope of its authority and in good faith."[105]

Courts have also granted summary judgment to challenges against enforcing cooperative rules. In *W.O.R.C. Realty Corp. v. Carr*, the defendants' membership in a club in which shareholders used summer cottages was terminated due to rule violations. Because they were unable to show that the board "deliberately singled them out for harmful treatment or selectively enforced West Oak's bylaws and regulations," the business-judgment rule applied, and summary judgment was awarded.[106]

The business-judgment rule might help shield cooperative boards from some litigation, but it will not shield actions taken in conflict with a contract, such as a proprietary lease or the by-laws. In *Whalen v. 50 Sutton Place South Owners, Inc.*, after concluding an alteration agreement with a resident, the board revoked its consent to the renovations.[107] In refusing to apply the business-judgment rule, the court wrote that "while it may be good business judgment to walk away from a contract, this is no defense to a breach of contract claim."[108]

Similarly, the business-judgment rule will not protect a board that violates a proprietary lease's express provision.[109] The business-judgment rule is inapplicable if a board acts without express authority in a proprietary lease, for instance in imposing a sublet surcharge. In one case, the board acted outside its authority and instead should have followed "the proper procedures to effectuate an amendment of the Proprietary Lease authorizing such a sublet surcharge."[110]

The business-judgment rule will not insulate actions taken contrary to public policy or law. Unreasonable restraints on alienation, such as a requirement that shareholders end litigation against the board[111] or to sell their shares above a minimum set price to gain the board's consent to transfer their shares,[112] violate public policy and render the business-judgment rule inapplicable.

Most issues involving cooperatives and the business-judgment rule arise in Supreme Court, not Housing Court. We discuss the concept here because the business-judgment rule applies in Housing Court in holdover proceedings when a shareholder's lease is terminated for objectionable conduct.

B. Objectionable Conduct

Most proprietary leases allow a cooperative board to terminate a proprietary lease for objectionable conduct. Although RPAPL § 711 requires a landlord to prove with competent evidence that the occupant's conduct was objectionable, courts apply the business-judgment rule when cooperative shareholders challenge lease terminations. As long as the shareholder is unable to show the board acted outside its authority, in bad faith, or without honest judgment, a board's determination that an occupant's conduct was objectionable will stand.[113]

The seminal *Pullman* case arose when one shareholder circulated flyers throughout the building accusing one long-time resident of being a "psychopath," alleging that his wife had intimate relations with the board president and had cut his telephone wire.[114] The problem shareholder performed renovations in his apartment without the board's consent and on weekends. In accordance with the proprietary lease, the cooperative board convened, with proper notice, a special meeting, where more than the necessary two-thirds of the shareholders voted to terminate the shareholder's lease due to his objectionable conduct.

The Court of Appeals in *Pullman* applied the business-judgment rule to the shareholder's challenge and held that the shareholders terminated his proprietary lease in accordance with the procedures set forth in the cooperative's governing documents. Although the Court found RPAPL § 711's requirement for "competent evidence" relevant, it deferred to the shareholder vote and "stated findings as competent evidence that the tenant is indeed objectionable under the statute."[115] Under *Pullman*, to challenge a lease termination for objectionable conduct successfully, the shareholder

must show that the board's decision does not deserve the business-judgment rule's protections.[116]

In *13315 Owners Corp. v. Kennedy*, a cooperative board, rather than the shareholders, sought to terminate a lease on objectionable conduct grounds.[117] Without deciding whether the *Pullman* framework was appropriate for a board decision, the court found on the facts that the board would not have been entitled to deference.[118] The board had acted outside its authority; it had not been properly elected. The board also acted in bad faith when it silenced the shareholder's attorney at the meeting held to determine whether the shareholder had acted objectionably.[119] The court did not apply the business-judgment rule. It denied the cooperative's summary-judgment motion and adjourned the case for trial to determine whether the board could prove by competent evidence that the shareholder's conduct was objectionable.[120] The preceding immediately settled after that ruling.

That same court decided in *London Terrace Towers, Inc. v. Davis* what it declined to decide in *Kennedy*: that a board decision to terminate a lease due to objectionable conduct deserves *Pullman* deference. Finding the Court of Appeals' dicta in *Pullman* persuasive, the court granted the board summary judgment after it applied the business-judgment rule to a board decision made within its scope of authority, in good faith, and after offering the shareholder notice and an opportunity to be heard, the twin pillars of due process.[121]

In determining whether the board has acted within its authority, courts look to the cooperative's governing documents. The court in *Carnegie Hill 87th Street Corp. v. Heller* refused to vacate a default judgment against a tenant unable to present a meritorious defense.[122] Although the tenant had not been allowed an opportunity to defend herself in a special meeting of the board, the cooperative's governing documents did not require such a meeting, the court found.[123]

The Appellate Division, First Department, recently applied the business-judgment rule and affirmed a Supreme Court decision to terminate a proprietary lease for objectionable conduct.[124] In *1050 Tenants Corp. v. Lapidus*, the shareholder had violated a stipulation entered into with the cooperative and installed an air-conditioning system that malfunctioned and damaged a neighboring apartment. The shareholder then refused to remove the system.[125] The board of directors notified the shareholder of a special meeting to consider a resolution to terminate his lease. The shareholder's attorney appeared on his behalf. The board of directors voted unanimously in favor of terminating the lease. Shareholders later overwhelmingly ratified the decision.[126] The court applied the business-judgment rule and upheld the Supreme Court's final judgment of possession.[127]

Whether a board or shareholder determination is entitled to business-judgment deference is relevant only if the board seeks a possessory judgment under business-judgment deference. If a cooperative seeks to evict for objectionable conduct or some other lease or statutory violation and goes to trial with proof of that conduct or violation, a shareholder may not defend on the ground that the cooperative acted in bad faith or outside its authority, or without giving the shareholder notice and an opportunity to be heard before the proceeding began. The only issue in a non-*Pullman* holdover proceeding brought by a cooperative corporation against a shareholder is whether the board can prove the conduct or violation with competent evidence and what defenses the shareholder can bring to bear.

VIII. The Pet Law

Under New York City Administrative Code § 27-2009.1, known as the Pet Law, if a tenant harbors a pet openly and notoriously for three months, and the owner or its agent knows of it and does not commence a summary proceeding against the tenant, the owner waives its right to enforce a no-pet lease provision. The Pet Law imputes to the owner the knowledge of employees, such as a superintendent, doorman, or guard. If a building employee knows for three months that the resident had a pet, the cooperative may not force the tenant to move or to get rid of the pet. The Pet Law's purpose is to force owners to enforce promptly a no-pets-allowed rule or to waive the rule.[128]

Many cooperatives and condominiums prohibit residents from harboring pets in the unit.[129] The Pet Law applies to cooperatives seeking to terminate a tenant's proprietary lease for violating a no-pet clause.[130] The Second Department applies the Pet Law defense to condominiums,[131] while the First Department does not.[132]

IX. The Martin Act

The Martin Act governs the offering for sale of condominium and cooperative units.[133] Sponsors of conversions are required to submit to the state Attorney General an "offering plan" that provides information about the contemplated offering, including "detailed terms of the transaction; a description of the property, the nature of the interest, and how title thereto is to be held; the gross and net income for a reasonable period preceding the offering where applicable and available; the current gross and net income where applicable and available."[134] The Act authorizes the Attorney General to promulgate disclosure through regulation.[135]

The offering plan is submitted to the Attorney General, but the Attorney General does not necessarily review and approve plans. Rather, the Attorney General accepts the plans for filing and reviews the plans to ensure that the required disclosures

are provided. Generally, if an offering plan is deficient, the sponsors are merely required to disclose that a deficiency exists rather than to correct that deficiency.[136] The Martin Act does not provide a private cause of actions for parties injured by deficient offering plans, although a common-law fraud action might lie.[137]

A. Conversion to Condominium or Cooperative Ownership Under the Martin Act

The Martin Act provides additional requirements to convert a rental building to condominium or cooperative ownership.[138] The purpose of those requirements is to provide for an orderly conversion of those buildings while seeking to preserve affordable housing and ameliorate the disruption of conversion on the lives and welfare of affected tenants.[139]

1. Non-Eviction Plan or Eviction Plan

If a sponsor seeks to convert a building from rental units to condominium or cooperative ownership, the offering plan must include whether the conversion is being done pursuant to an "eviction plan" or a "non-eviction" plan.[140]

A non-eviction offering plan will not be deemed effective until "written purchase agreements have been executed and delivered for at least fifteen percent of all dwelling units in the building"[141] by "bona fide tenants in occupancy or bona fide purchasers who represent that they intend that they or one or more members of their immediate family intend to occupy the unit when it becomes vacant."[142] Tenants in occupancy when the Attorney General accepts the offering plan are entitled to a good-faith, non-discriminatory offer to purchase their unit.[143]

A non-eviction plan is so-called because sponsors may not commence eviction proceedings "against non-purchasing tenants for failure to purchase or any other reason applicable to expiration of tenancy."[144] Furthermore, "an owner of a unit or of the shares allocated thereto may not commence an action to recover possession of a dwelling unit from a non-purchasing tenant on the grounds that he seeks the dwelling unit for the use and occupancy of himself or his family."[145] However, non-purchasing tenants may be evicted "for non-payment of rent, illegal use or occupancy of the premises, refusal of reasonable access to the owner or a similar breach by the non-purchasing tenant of his obligations to the owner of the dwelling unit or the shares allocated thereto."[146]

Non-purchasing tenants subject to rent regulation before an offering plan is filed continue to enjoy regulations after filing.[147] The Martin Act protects free-market non-purchasing tenants from "unconscionable increases beyond ordinary rentals for comparable apartments during the period of their occupancy,"[148] which has been interpreted by the Appellate Division, Second Department, as prohibiting landlords from demanding above-market rents from non-purchasing tenants.[149] This protection is not a form of rent-regulation and does not prevent large rent increases consistent with market conditions.[150]

A non-eviction plan may not be amended into an eviction plan.[151]

On the other hand, an eviction plan is not effective until 51 percent of the development's units are purchased by a "bona fide tenant" under a good-faith, non-discriminating offer.[152]

As suggested by its name, eviction plans offer few protections against eviction to non-purchasing tenants. The Martin Act prohibits eviction proceedings against eviction plan non-purchasing tenants until the later of the expiration of the tenant's lease agreement or a three-year period after the offering plan becomes effective.[153] Non-purchasing tenants who are senior citizens or disabled are not subject to eviction, except for "non-payment of rent, illegal use or occupancy of the premises, refusal of reasonable access to the owner, or a similar breach by the tenant of his obligations."[154] Senior citizens and disabled tenants are protected from unconscionable rent increases.[155]

As in non-eviction plans, non-purchasing tenants under an eviction plan who were previously subject to rent regulation remain subject to them.[156]

2. Tenants in Occupancy

Because tenants in occupancy are afforded an insider's purchase option and protections against eviction, it is crucial to determine who falls within that group. Much litigation has revolved around the question, and numerous cases have sought to answer it.

In *De Kovessey v. Coronet Properties Co.*, the Court of Appeals addressed who qualifies as a tenant in occupancy.[157] In that case,[158] the sponsor of a cooperative conversion plan offered tenants an insider price. Before accepting, one tenant died, and the estate sought to exercise the right. The court held that to uphold the estate's right to exercise an option would violate the purposes of the Martin Act, which protects tenants against dislocation while allowing owners to develop their property. The Court saw no reason to encumber further an owner's rights to give an estate a valuable purchase option, while not protecting an actual tenant from eviction.[159]

In *Manolovici v. 136 East 64th Street Associates*,[160] the Court of Appeals interpreted the phrase "tenant in occupancy." In that case, Mr. and Mrs. Manolovici were undergoing marital problems, and Mr. Manolovici voluntarily vacated the apartment, in which his wife remained with their children. During this arrangement, the Attorney General accepted an offering plan for conversion for filing. The offering plan provided a favorable "insider's price" for the tenant in occupancy of the Manolovici's apartment. Mrs. Manolovici sued for declaratory relief to be named the sole tenant in occupancy.[161]

The Court of Appeals denied that relief, holding that Mr. Manolovici was entitled to share the purchase option. The Court found that the "critical date" to determine who is the "tenant in occupancy" is the date the offering plan was accepted for filing.[162] The Court determined that although he was not actually living in the apartment, Mr. Manolovici maintained a "sufficient nexus with the apartment as of the critical date," qualifying him to a share in the purchase option.[163]

In *322 West 57th Owner v. Penhurst*, the Housing Court applied the "sufficient nexus" test to determine whether tenants were entitled to statutory protections against eviction.[164] In that case, a number of tenants' leases expired after the owner's offering plan for conversion to condominium ownership was submitted to the Attorney General but had not yet been accepted for filing. When the owner began summary holdover proceedings against the tenants, the tenants claimed protections as non-purchasing tenants under a presently accepted offering plan.[165]

The *Penhurst* Court held that, despite the expiration of their leases, the tenants were entitled to protection under the Martin Act as non-purchasing tenants. The tenants were occupying the units and so had a "sufficient nexus" to the apartments.[166] Because the owner had not yet been granted a judgment of possession, the landlord-tenant relationship had not been extinguished.[167] Even though the respondents were "holdover tenants," they were afforded the status of non-purchasing tenants, and the proceedings were dismissed.[168] The *Penhurst* case is currently on appeal before the Appellate Term. A decision is anticipated shortly.

Some courts have further extended the Martin Act's protections to tenants who come in possession after the "critical date" of the offering plan's filing. In *Paikoff v. Harris*,[169] a landlord commenced a holdover proceeding to evict tenants after the expiration of their 1992 lease. The parties disputed whether the tenants were entitled to "non-purchasing tenant" status and, thus, to protections against eviction. The landlord, while conceding that those tenants had not purchased shares of the cooperative, argued that they were not entitled to "non-purchasing tenant" status because they took possession after the 1987 conversion of the building and so could not be tenants in occupancy.[170]

The Appellate Term, Second Department, found in *Paikoff* that the tenants were entitled to the Martin Act's protections. According to the court, that statute protects tenants from dislocation as building owners' economic incentives change. When operating a rental building, an owner has an incentive to retain an unobjectionable market-rate paying tenant. Sometimes the unit is worth more as a condominium or cooperative, and the owner is then incentivized to evict the tenant and sell the unit. The Martin Act protects the tenant from this economic change and, thus, according to the court, there can "be no valid distinction between tenants in possession at the time of the conversion and those who rent from sponsors after the conversion."[171]

Courts have extended the Martin Act's non-eviction protections to family members of deceased rent-stabilized tenants. In *Langdale Owners Corp. v. Lane*,[172] due to the statute's purpose of protecting families from dislocation and to similar interpretations of prior conversion statutes not addressed legislatively in the Martin Act, the Appellate Term, Second Department, held that a family member of a deceased tenant was entitled to a rent-stabilized lease renewal.

X. Recovery of Unit and Shares

Should a cooperative board successfully pursue a summary proceeding in Housing Court and evict a tenant for its default in paying of maintenance, or after the expiration or termination of a lease, the cooperative does not automatically regain possession of the shares. That relief is unavailable in Housing Court, which awards possession of the premises, rent, and use and occupancy but has no jurisdiction to allocate shares.

Cooperatives and condominiums have a number of mechanisms that might afford relief.

First, the proprietary lease might require the proprietary lessee to sell its shares to the cooperative upon termination of the lease.[173]

Second, the share certificates might provide that the cooperative may obtain a lien over the shares should the tenant fail to pay maintenance.[174] The cooperative does not automatically obtain a lien. [175] New York law does not recognize a "landlord's lien." Rather, a lien must be created under an agreement between the parties.[176] If properly created, and if the cooperative complies with U.C.C. Article 9, the shares may be foreclosed upon in a nonjudicial sale.[177]

Many shares are also pledged as security for a loan taken to purchase the shares. Often, a cooperative seeking maintenance and a bank seeking mortgage payments both seek to enforce their respective liens. In *ALH Properties Ten, Inc. v. 306-100th Street Owners Corp.*,[178] a cooperative issued shares stating "Corporation, by the terms of said By-laws and the proprietary lease, has a first lien on the shares represented by the certificate for all sums due and to become due under said proprietary lease."[179] The Court of Appeals held that even if the cooperative's "first lien" were valid, it applied only to the maintenance due under the lease.[180] The Court gave priority to the mortgagor's lien for the non-maintenance obligations.[181]

Similarly, in *Bankers Trust Co. v. Board of Managers of Park 900 Condominium*,[182] a condominium asserted that it had a "first lien" on unpaid common charges. The First Department held that the bank's mortgage held priority over the asserted lien on the common charges.[183]

Third, upon receiving a money judgment for nonpayment of maintenance, a cooperative may obtain a judicial lien under CPLR 5234. The judgment may be satisfied upon foreclosing the former tenant's shares.[184]

XI. Miscellaneous Topics

A. Succession Rights in Cooperatives

Upon the death of a proprietary lessee, disputes often arise about who may properly take possession of the apartment. Possession of the decedent's shares does not necessarily create an entitlement to occupy the apartment.[185] One must examine the proprietary lease and by-laws to determine succession rights.

In *Chapman v. 2 King Street Apartments Corp.*,[186] the proprietary lease provided that the cooperative board could not unreasonably withhold its consent to an assignment of the lease and shares to a "financially responsible" family member of the decedent.[187] The Court reviewed the board's decision to refuse the decedent's daughter's application on the ground that she was not financially responsible and found that the board acted reasonably.[188] In *Joint Queensview Housing Enterprise, Inc. v. Balogh*, the cooperative's by-laws provided that an inheritor of shares was required to receive permission from the board before occupying the apartment.[189] After inheriting shares and taking possession of the apartment, the defendant applied to the board for permission to do so.[190] After the board refused permission and the defendant refused to vacate the apartment, the board sued. The Court applied the business-judgment rule and refused to order the board to accept the defendant's application.[191]

B. Statute of Limitations Considerations

Claims involving cooperatives are subject to a range of different statutes of limitations, depending on the claim's nature. When the action is brought on the corporation's behalf against present or former directors, officers, or shareholders, or if the action is brought for equitable relief, a six-year statute of limitations applies.[192] If the action is brought for money damages, a three-year statute of limitations is applicable.[193] If the action seeks to challenge a board determination in an Article 78, the statute of limitations is a mere four months.[194] A rent claim or counterclaim for abatement is subject to a six-year contracts statute of limitations, although the doctrine of laches can affect the possessory portion of a judgment against a shareholder.

C. Attorney Fees

Although most proprietary leases require a shareholder to pay the cooperative's attorneys' fees in the event of a dispute, courts enforce those provisions only when the cooperative is the prevailing party.[195] A further consequence of the Real Property Law's application to cooperatives is that attorney-fee provisions in proprietary leases are made reciprocal. Shareholders may collect attorney fees if they are the prevailing party.[196] Shareholders are also protected in many leases by language requiring the shareholder to be in "default" of the lease for the cooperative to recover for attorneys' fees.[197]

D. Possessory Judgments

In the rent-regulated context, the general rule is that a possessory judgment may not include additional charges above the legal regulated rent, such as attorney fees or other costs.[198] In cooperatives, a possessory judgment may include attorney fees and other costs, if they are defined as added or additional rent in the proprietary lease. A cooperative may not secure a possessory judgment, or even bring a summary proceeding, to replenish a security deposit or an escrow account.[199]

XII. Conclusion

The New York City Housing Court's Coop and Condo Part handles a broad array of possessory and money disputes involving cooperatives and condominiums. Cooperatives and condominiums are unique forms of property ownership; disputes over cooperatives and condominiums involve unique and heavily litigated legal issues, distinct from those arising in more conventional ownership and leasing arrangements. This article has described issues that arise often in the Coop and Condo Part.

Endnotes

1. N.Y. Bus. Corp. Law §§ 401-409.
2. N.Y. Not-for-Profit Corp. Law §§ 401-406.
3. N.Y. Coop. Corp. Law §§ 10-19.
4. Vincent DiLorenzo, New York Condominium and Cooperative Law § 3:9 (2d ed. 2007).
5. *Id.* at § 3:10; N.Y. Bus. Corp. Law § 402(c).
6. DiLorenzo, *supra* note 4, at § 3:10.
7. *Id.*
8. Eva Talel & Dale Degenshein, 2006-2007 Legal Update for Court Attorneys: Cooperatives and Condominiums—Significant Decisions and Legal Principles 1 (unpublished CLE manuscript for N.Y.S. Judicial Inst.).
9. N.Y. Bus. Corp. Law § 626; Talel & Degenshein, *supra* note 8, at 1.
10. DiLorenzo, *supra* note 4, at § 1:2.
11. *Id.*
12. Daniel Finkelstein & Lucas A. Ferrara, Landlord and Tenant Practice in New York (2008).
13. DiLorenzo, *supra* note 4, at § 1:2.
14. Carlyn Millar Ross, Condominiums and Cooperative Apartments § 148 (2d ed. 2007).
15. DiLorenzo, *supra* note 4, at § 3:13.
16. *Id.* at § 1:2.
17. *Id.* at § 3:13.
18. Talel & Degenshein, *supra* note 8, at 2.
19. N.Y. Priv. Hous. Fin. Law § 573.
20. *Id.* § 573(3)(a).
21. *Id.* § 573(3)(b).
22. *Id.* § 573(3)(c).
23. *See E. 11th St. HDFC v. Grimmet*, 181 A.D.2d 488, 489, 581 N.Y.S.2d 24, 25 (1st Dep't 1992) (mem.); *50 W. 11th St. HDFC v. Ali*, 13 Misc. 3d 1237(A), 831 N.Y.S.2d 353, 2006 WL 3342679, N.Y. Slip Op. 52150(U) (Hous. Part Civ. Ct. N.Y. County 2006).

24. RENT STABILIZATION LAW (N.Y.C. ADMIN. CODE) § 26-504(a); *546 W. 156th St. HDFC v. Smalls*, 43 A.D.3d 7, 11, 839 N.Y.S.2d 62, 66 (1st Dep't 2007).

25. N.Y. COMP. CODES. R. & REGS. tit. 9, § 2520.11(j).

26. 43 A.D.3d at 9, 839 N.Y.S.2d at 64.

27. *Id.* at 8-10, 839 N.Y.S.2d at 64-66.

28. *Id.* at 12, 839 N.Y.S.2d at 66.

29. *Grimmet*, 181 A.D.2d at 489; *Ali*, 13 Misc. 3d 1237(A), 831 N.Y.S.2d 353, 2006 WL 3342679.

30. *Grimmet*, 181 A.D.2d at 489, 581 N.Y.S.2d at 25.

31. *Id.*, 581 N.Y.S.2d at 26.

32. *W. 149th St. HDFC v. Rodriguez*, 5 Misc. 3d 1020(A), 799 N.Y.S.2d 165, 2004 WL 2752468, at *2 2004 N.Y. Slip Op. 51471(U), *2 (Hous. Part Civ. Ct., N.Y. County Sept. 29, 2004) (Gerald Lebovits, J.); *757 E. 169th St. HDFC v. Haney*, 171 Misc. 2d 965, 966, 656 N.Y.S.2d 92, 93 (Hous. Part Civ. Ct., N.Y. County 1996).

33. *Grimmet*, 181 A.D.2d at 489, 581 N.Y.S.2d at 24.

34. *Id.* at 489, 581 N.Y.S.2d at 26.

35. *Id.* at 489, 581 N.Y.S.2d at 25; *Marcus Garvey Park Homes Hous. Dev. Fund Corp. v. Franco*, 12 Misc. 3d 840, 815 N.Y.S.2d 807 (Hous. Part Civ. Ct., N.Y. County 2006).

36. *167-169 Allen St. HDFC v. Ebanks*, 22 A.D.3d 374, 375, 802 N.Y.S.2d 650, 651 (1st Dep't 2005) (mem.).

37. *Id.* at 375, 802 N.Y.S.2d at 652.

38. *See Davis v. Starr*, 88 Misc. 2d 210, 213, 387 N.Y.S.2d 351, 354 (Sup. Ct., N.Y. County 1975) (noting that N.Y.C. Administrative Code requires only a "public hearing" for rent increases).

39. *Wong v. Gouverneur Gardens Hous. Corp.*, 308 A.D.2d 301, 304, 764 N.Y.S.2d 53, 57 (1st Dep't 2003) (mem.) (holding that HPD has primary jurisdiction over eviction of Mitchell-Lama tenant); *Gouverneur Gardens Hous. Corp. v. Lee*, 2 Misc. 3d 525, 527, 769 N.Y.S.2d 829, 831 (Hous. Part Civ. Ct., N.Y. County 2003) (Gerald Lebovits, J.) (HPD issued certificate of eviction); ANDREW SCHERER, RESIDENTIAL LANDLORD-TENANT LAW IN NEW YORK § 6:12, at 366 (2007-2008 ed.).

40. *Bedford Gardens Co., LP v. Jacobowitz*, 29 A.D.3d 501, 502, 815 N.Y.S.2d 149, 151 (2d Dep't 2006) (mem.).

41. *Lindsay Park Hous. Corp. v. Grant*, 190 Misc. 2d 777, 777, 740 N.Y.S.2d 552, 552 (App Term 2d Dep't 2d & 11th Jud. Dists. 2001) (mem.); *Yorkville Towers Assocs. v. Mourino*, N.Y.L.J., June 9, 1997, at 29, col. 3 (App Term 1st Dep't) (*per curiam*).

42. 2 N.Y.3d 472, 475, 812 N.E.2d 298, 299, 779 N.Y.S.2d 808, 809 (2004).

43. 4 Misc. 3d 804, 809, 781 N.Y.S.2d 207, 210 (Hous. Part Civ. Ct., N.Y. County 2004) (Gerald Lebovits, J.).

44. *See generally* RICHARD SIEGLER, *The Feasibility of Co-Op to Condo Conversion*, N.Y.L.J., Mar. 5, 1997, at 3, col. 1; RICHARD SIEGLER, *Techniques for the 80/20 Test of IRC § 216—Part I*, N.Y.L.J., May 5, 1999, at 3, col. 1 [hereinafter "Techniques for the 80/20 Test"]; STUART SAFT, *Commercial Real Estate Forms* 27:8 (3d 2007); *Xamaka, Inc. v. 166 E. 61st St. Assocs.*, N.Y.L.J., Nov. 17, 1999, at 26, col. 3 (Sup. Ct. N.Y. County).

45. *See* 26 U.S.C. § 216; TALEL & DEGENSHEIN, *supra* note 8, at 1; *see* RICHARD SIEGLER & EVA TALEL, *Dealing with the 80/20 Test*, N.Y.L.J., July 5, 2006, at 3, col. 1.

46. *See generally* RICHARD SIEGLER, *Cooperatives and Condominiums: Dealing with the 80/20 Test*, N.Y.L.J., July 5, 2006, at 3, col. 1; SIEGLER, *Techniques for the 80/20 Test*, *supra* note 44.

47. PUB. L. 110-142, § 4(a), 121 STAT. 1804.

48. DILORENZO, *supra* note 4, at § 3:1.

49. *Id.*; TALEL & DEGENSHEIN, *supra* note 8, at 29.

50. N.Y. BUS. CORP. LAW § 401 *et seq.*; N.Y. NOT-FOR-PROFIT CORP. L. § 401 *et seq.*; DILORENZO, *supra* note 4, at § 3:2.

51. DILORENZO, *supra* note 4, at § 3:2; TALEL & DEGENSHEIN, *supra* note 8, at 28.

52. DILORENZO, *supra* note 4, § 3:2.

53. *Id.*; *see also, e.g.*, *Bd. of Managers v. Fairway at N. Hills*, 193 A.D.2d 322, 324, 603 N.Y.S.2d 867, 869 (2d Dep't 1993) (noting that although the Condominium Act is silent, fiduciary duty akin to that imposed in B.C.L. § 717 is imposed on the initial board of managers); *Schoninger v. Yardarm Beach Homeowners' Assoc.*, 134 A.D.2d 1, 2, 523 N.Y.S.2d 523, 524 (2d Dep't 1987) (business judgment rule applies to actions of board of unincorporated condominium); TALEL & DEGENSHEIN, *supra* note 8, at 28.

54. *Caprer v. Nussbaum*, 36 A.D.3d 176, 187, 825 N.Y.S.2d 55, 64 (2d Dep't 2006); TALEL & DEGENSHEIN, *supra* note 8, at 28.

55. DILORENZO, *supra* note 4, at § 3:3.

56. *Id.* at § 3:3; N.Y. REAL PROP. § 339-n.

57. *Id.* at § 3:4; N.Y. REAL PROP. § 339-p.

58. DILORENZO, *supra* note 4, at § 3:5.

59. *Id.* at § 3:7.

60. SCHERER, *supra* note 39, at 388, § 6:75.

61. TALEL & DEGENSHEIN, *supra* note 8, at 29.

62. N.Y. REAL PROP. § 339-r (when first conveyed); N.Y. REAL PROP. § 339-1 (subsequent liens); DILORENZO, *supra* note 4, at § 1:2.

63. 263 A.D.2d 33, 35, 700 N.Y.S.2d 118, 120 (1st Dep't 1999).

64. 2 Misc. 3d 525, 526, 769 N.Y.S.2d 829, 830 (Hous. Part Civ. Ct., N.Y. County 2003) (Gerald Lebovits, J.).

65. *See* ROSS, *supra* note 14, at § 149.

66. DILORENZO, *supra* note 4, at § 11:9; FINKELSTEIN & FERRARA, *supra* note 12, § 2:133, at 2-49.

67. Report of the Civil Court of the City of New York, Jan. 1, 1997–Dec. 31, 2006, *A Decade of Change and Challenge in "The People's Court"* 1997-2006, at 9.

68. JAY ROMANO, *Your Home; Co-op Cases Are Getting Own Court*, N.Y. TIMES, Oct. 26, 1997, at S. 11, at 3.

69. *Id.*

70. N.Y. REAL PROP. § 235(b).

71. *Suarez v. Rivercross Tenants Corp.*, 107 Misc. 2d 135, 137, 438 N.Y.S.2d 164, 166 (1st Dep't 1981) (*per curiam*).

72. *Id.* at 139, 438 N.Y.S.2d at 167.

73. *Id.*, 438 N.Y.S.2d at 167.

74. *Id.* at 138, 438 N.Y.S.2d at 166.

75. *Poyck v. Bryant*, 13 Misc. 3d 699, 701, 820 N.Y.S.2d 774, 766 (Civ. Ct., N.Y. County 2006).

76. *Kaniklidis v. 235 Lincoln Place Hous. Corp.*, 305 A.D.2d 546, 547, 759 N.Y.S.2d 389, 389 (2d Dep't 2003).

77. *315-321 Eastern Parkway Dev. Fund Corp. v. Wint-Howell*, 9 Misc. 3d 644, 648, 802 N.Y.S.2d 892, 895 (Hous. Part Civ. Ct., Kings County 2005).

78. *Id.* at 648, 802 N.Y.S.2d at 896.

79. *Frisch v. Bellmarc Mgmt.*, 190 A.D.2d 383, 385, 597 N.Y.S.2d 962, 963 (1st Dep't 1993); *Linden v. Lloyd's Planning Service*, 299 A.D.2d 217, 218, 750 N.Y.S.2d 20, 21 (1st Dep't 2002) (mem.), *lv. denied*, 99 N.Y.2d 509, 790 N.E.2d 274, 760 N.Y.S.2d 100 (2003).

80. *Bd. of Managers of First Ave. Condo. v. Shandel*, 143 Misc. 2d 1084, 1087, 542 N.Y.S.2d 466, 468 (Hous. Part Civ. Ct., N.Y. County 1989).

81. *Sneddon v. Greene*, 17 Misc. 3d 1, 4, 844 N.Y.S.2d 575, 577 (App. Term 2d Dep't 9th & 10th Jud. Dists. 2007) (mem.).

82. *McCarthy v. Bd of Managers of Bromley Condo.*, 271 A.D.2d 247, 247, 706 N.Y.S.2d 104, 105 (1st Dep't 2000) (mem).

83. *See Mark C. Rutzick & Richard L. Huffman*, *The New York City Housing Court: Trial and Error in Housing Code Enforcement*, 50 N.Y.U. L. Rev. 738, 749-58 (1975).

84. Civ. Ct. Act § 110(a)(7) (giving Housing Court jurisdiction to order violations corrected); HMC (Admin. Code) §§ 27-2115(i), (j).

85. *Kahn v. 230-79 Equity Inc.*, 32 H.C.R. 233A, 2 Misc. 3d 140(A), 784 N.Y.S.2d 921, 2004 N.Y. Slip Op. 50302(U), *2, 2004 WL 869746, at *2, 2004 N.Y. Misc. LEXIS 409,

at *1 (App. Term 1st Dep't Apr. 8, 2004) (*per curiam*) (cooperative corporations); *McMunn v. Steppingstone Mgt. Corp.*, 131 Misc. 2d 340, 343, 500 N.Y.S.2d 219, 221 (Hous. Part Civ. Ct., N.Y. County 1986) (same).

86. *Kahn*, 2004 WL 869746, at *2; *McMunn*, 131 Misc. 2d at 343, 500 N.Y.S.2d at 221.

87. *Pershad v. Parkchester S. Condo.*, 174 Misc. 2d 92, 94-95, 662 N.Y.S.2d 993, 995-96 (Hous. Part Civ. Ct., Bronx County 1997) (incorrectly noted in Official Reports as New York County) (holding condominium association responsible for repairing code violations extending beyond individual unit), *aff'd per curiam*, 178 Misc. 2d 788, 683 N.Y.S.2d 708 (App. Term 1st Dep't 1998*); Smith v. Parkchester N. Condo.*, 163 Misc. 2d 66, 69, 619 N.Y.S.2d 523, 525 (Hous. Part Civ. Ct., Bronx County 1994) (finding HP proceeding available when violation stems from defective conditions in common area in condominium association's exclusive control); *Gazdo Props. Corp. v. Lava*, 149 Misc. 2d 828, 831-33, 565 N.Y.S.2d 964, 966-67 (Hous. Part Civ. Ct., Kings County 1991) (holding condominium managing board or agent responsible for common areas), *appeal dismissed mem.*, 150 Misc. 2d 1019, 579 N.Y.S.2d 305 (App. Term 2d Dep't 2d & 11th Jud. Dists. 1991).

88. *Frisch v. Bellmarc Mgt., Inc.*, 190 A.D.2d 383, 389, 597 N.Y.S.2d 962, 966 (1st Dep't 1993) (finding warranty of habitability inapplicable to condominiums).

89. Civ. Ct. Act § 1911(b).

90. *Levandusky v. One Fifth Ave. Apt. Corp.*, 75 N.Y.2d 530 537, 553 N.E.2d 1317, 1321, 554 N.Y.S.2d 807, 811 (1990) (quoting *Auerbach v. Bennett*, 47 N.Y.2d 619, 629, 926, 393 N.E.2d 994, 1000, 419 N.Y.S.2d 920 (1979)).

91. B.C.L. § 717.

92. *Levandusky*, 75 N.Y.2d at 538, 553 N.E.2d at 1322, 554 N.Y.S.2d at 812.

93. *Id.* at 537, 553 N.E.2d at 1321, 554 N.Y.S.2d at 811.

94. *Id.* at 538, 553 N.E.2d at 1321, 554 N.Y.S.2d at 811.

95. *Id.* at 539, 553 N.E.2d at 1322, 554 N.Y.S.2d at 812.

96. *Id.* at 540, 553 N.E.2d at 1323, 554 N.Y.S.2d at 813.

97. *Id.* at 535, 553 N.E.2d at 1320, 554 N.Y.S.2d at 810.

98. *Id.* at 540, 553 N.E.2d at 1322, 554 N.Y.S.2d at 813.

99. *Id.* at 538, 553 N.E.2d at 1321, 554 N.Y.S.2d at 811.

100. *Sherry Assocs. v. Sherry-Netherland, Inc.*, 273 A.D.2d 14, 15, 708 N.Y.S.2d 105, 106 (1st Dep't 2000) (mem.).

101. *Id.* at 14, 708 N.Y.S.2d 106.

102. *Id.* at 15, 708 N.Y.S.2d at 106.

103. *Jacobs v. 200 E. 36th Owners Corp.*, 281 A.D.2d 281, 281, 722 N.Y.S.2d 137, 137 (1st Dep't 2000) (mem.).

104. *Id.*, 722 N.Y.S.2d at 137.

105. *Rubinstein v. 242 Apt. Corp.*, 189 A.D.2d 685, 685, 592 N.Y.S.2d 378, 378 (1st Dep't 1993) (mem.).

106. *W.O.R.C. Realty Corp. v. Carr*, 262 A.D.2d 310 , 311, 691 N.Y.S.2d 104, 105 (2d Dep't 1999) (mem.).

107. *Whalen v. 50 Sutton Place S. Owners, Inc.*, 276 A.D.2d 356, 356-57, 714 N.Y.S.2d 269, 270-71 (1st Dep't 2000) (mem.).

108. *Id.* at 357, 714 N.Y.S.2d at 271.

109. *Ludwig v. 25 Plaza Tenants Corp.*, 184 A.D.2d 623, 624, 584 N.Y.S.2d 907, 908 (1st Dep't 1992) (mem.).

110. *Zimiles v. Hotel Des Artistes, Inc.*, 216 A.D.2d 45, 45, 627 N.Y.S.2d 382, 382-83 (1st Dep't 1995) (mem.).

111. *Chemical Bank v. 635 Park Ave. Corp.*, 155 Misc. 2d 433, 437, 588 N.Y.S.2d 257, 260 (Sup. Ct., N.Y. County).

112. *Oakley v. Longview Owners Inc.*, 165 Misc. 2d 192, 195, 628 N.Y.S.2d 468, 470 (Sup. Ct., Westchester County).

113. *London Terrace Towers, Inc. v. Davis*, 6 Misc. 3d 600, 602, 790 N.Y.S.2d 813, 815 (Hous. Part Civ. Ct., N.Y. County 2004) (Gerald Lebovits, J.).

114. *40 W. 67th St. Corp. v. Pullman*, 100 N.Y.2d 147, 150-52, 760 N.Y.S.2d 745, 748-50, 790 N.E.2d 1174, 1176-79 (2003).

115. *Id.* at 154-55, 760 N.Y.S.2d at 751, 790 N.E.2d at 1180.

116. *Id.* at 153, 760 N.Y.S.2d at 749, 790 N.E.2d at 1179.

117. *13315 Owners Corp. v. Kennedy*, 4 Misc. 3d 931, 932, 782 N.Y.S.2d 554, 556 (Hous. Part. Civ. Ct., N.Y. County 2004) (Gerald Lebovits, J.).

118. *Id.* at 950-51, 782 N.Y.S.2d at 570-71.

119. *Id.*, 782 N.Y.S.2d at 570-71.

120. *Id*.

121. *London Terrace Towers*, 6 Misc. 3d at 603, 790 N.Y.S.2d at 816.

122. *Carnegie Hill 87th St. Corp. v. Heller*, 9 Misc. 3d 1106(A), 806 N.Y.S.2d 444, 2005 WL 2205724, 2005 N.Y. Slip Op. 51417(U), *2 (Sup. Ct., N.Y. County 2005).

123. 2005 N.Y. Slip Op. 51417(U), at *3.

124. *1050 Tenants Corp. v. Lapidus*, 39 A.D.3d 379, 835 N.Y.S.2d 68 (1st Dep't), *lv. denied*, 9 N.Y.3d 807, 875 N.E.2d 29, 843 N.Y.S.2d 536 (2007).

125. *Id*. at 380-82, 835 N.Y.S.2d at 70-71.

126. *Id.* at 382, 835 N.Y.S.2d at 71.

127. *Id.*, 835 N.Y.S.2d at 71-72.

128. N.Y.C. Admin. Code § 27-2009.1.

129. *See, e.g.*, *Bd. of Managers v. Lamontanero*, 206 A.D.2d 340, 341, 616 N.Y.S.2d 744, 745 (2d Dep't 1994) (mem.) (condominium by-laws prohibit pets); *Linden Hill No. 1 Co-Op Corp. v. Kleiner*, 124 Misc. 2d 1001, 1002, 478 N.Y.S.2d 519, 520 (Hous. Part Civ. Ct., Queens County 1984) (proprietary lease prohibits pets in cooperative).

130. *Seward Park Housing Corp. v. Cohen*, 287 A.D.2d 157, 162, 734 N.Y.S.2d 42, 47 (1st Dep't 2001) (applying Pet Law to publicly funded cooperatives); *Corlear Gardens Hous. Co, Inc. v. Ramos*, 126 Misc. 2d 416, 420, 481 N.Y.S.2d 577, 579 (Sup. Ct., Bronx County 1984) ("This Court finds that all tenants, including cooperative tenants, are in need of the protection of the Pet Law."); *Linden Hill No. 1 Co-Op*, 124 Misc. 2d at 1007, 478 N.Y.S.2d at 523.

131. *Lamontanero*, 206 A.D.2d at 341, 616 N.Y.S.2d at 745.

132. *Bd. of Managers of Parkchester N. Condominium v. Quiles*, 234 A.D.2d 130, 130, 651 N.Y.S.2d 36, 36 (1st Dep't 1996) (mem.).

133. G.B.L. § 352 *et seq.*; G.B.L. § 352-e 1(a) provides that "it shall be illegal and prohibited . . . to make or take part in a public offering or sale in or from the state of New York of securities constituted of participation interests in real estate . . . including cooperative interests in realty, unless and until there shall have been filed with the department of law, prior to such offering, a written statement . . . which shall contain the information and representations required by paragraph (b) of this subdivision. . . ."

134. *Id.* § 352-e(1)(b).

135. For regulations promulgated by the Attorney General, see 13 N.Y.C.R.R. Part 18.

136. Stuart Saft, *Understanding a Condominium Offering Plan*, N.Y.L.J., Nov. 29, 2004, at 1, col. 4.

137. *Vermeer Owners v. Guterman,* 78 N.Y.2d 1114, 1116, 578 N.Y.S.2d 128, 129, 585 N.E.2d 377, 378 (1991) (mem.); *CPC Int'l v. McKesson Corp.,* 70 N.Y.2d 268, 275, 519 N.Y.S.2d 804, 806, 514 N.E.2d 116, 118 (1987).

138. G.B.L. §352-eeee.

139. *322 W. 57th Owner LLC v. Penhurst Productions, Inc.*, 15 Misc. 3d 1105(A), 836 N.Y.S.2d 504, 2007 WL 824105, 2007 N.Y. Slip Op. 50515(U) , at *2 (Hous. Part Civ. Ct. N.Y. County 2007).

140. G.B.L. § 352-eeee.

141. *Id.* § 352-eeee(1)(b).

142. *Id.*

143. *Id.*

144. *Id.* § 352-eeee(2)(c)(ii).

145. *Id.*

146. *Id.*

147. *Id.* § 352-eeee(2)(c)(iii).

148. *Id.* § 352-eeee(2)(c)(iv).

149. *Paikoff v. Harris,* 185 Misc. 2d 372, 378, 713 N.Y.S.2d 109, 113 (App. Term 2d Dep't 2d & 11th Jud. Dists. 1999) (mem.) ("We do not read this provision, as do the tenants, as focusing on the size of the increase. Rather, its clear meaning is that the rent may not be increased beyond the rents being charged for comparable apartments. Contrary to what tenants may believe and the Housing Court may have indicated, the purpose of the statute was not to institute a system of rent regulation for 'non-purchasing tenants' but to prevent sponsors from charging these tenants above-market rents as a means of forcing them out.").

150. *Id.*, 713 N.Y.S.2d at 113.

151. G.B.L. § 352-eeee(2)(c)(v).

152. *Id.* § 352-eeee(2)(d)(i).

153. *Id.* § 352-eeee(2)(d)(ii).

154. *Id.* § 352-eeee(2)(d)(iii).

155. *Id.*

156. *Id.* § 352-eeee(2)(d)(ii); G.B.L. § 352-eeee (2)(d)(iii).

157. 69 N.Y.2d 448, 454, 515 N.Y.S.2d 740, 742, 508 N.E.2d 652, 654 (1987).

158. The opinion covered four similar cases, consolidated and decided together.

159. *De Kovessy v. Coronet Props.*, 69 N.Y.2d at 458, 515 N.Y.S.2d at 744, 508 N.E.2d at 656.

160. 70 N.Y.2d 785, 787, 521 N.Y.S.2d 414, 415, 515 N.E.2d 1212, 1213 (1987) (mem.).

161. *Id* at 786. 521 N.Y.S.2d at 414, 515 N.E.2d at 1212.

162. *Id.* at 787, 521 N.Y.S.2d at 415, 515 N.E.2d at 1213.

163. *Id.*, 521 N.Y.S.2d at 415, 515 N.E.2d at 1213.

164. *Penhurst Productions,* 15 Misc. 3d at 1105(A), 836 N.Y.S.2d 504, WL 824105, N.Y. Slip Op. 50515(U), *5.

165. *Id.* at *2.

166. *Id.* at *5.

167. *Id.* at *7.

168. *Id.* at *11.

169. 185 Misc. 2d 372, 374, 713 N.Y.S.2d 109, 110 (App. Term 2d Dep't, 2d & 11th Jud. Dists. 1999) (mem.).

170. *Id.* at 374-75, 713 N.Y.S.2d at 111.

171. *Id.* at 377-78. 713 N.Y.S.2d at 113.

172. 166 Misc. 2d 439, 441, 636 N.Y.S.2d 577, 578 (App. Term 2d Dep't, 2d & 11th Jud. Dists. 1995) (mem.).

173. DiLorenzo, *supra* note 4, at § 11:8.

174. *Berkowners, Inc. v. Dime Savings Bank of N.Y., FSB*, 286 A.D.2d 695, 696, 730 N.Y.S.2d 339, 341 (2d Dep't 2001).

175. *Saada v. Master Apts. Inc.*, 152 Misc. 2d 861, 863, 579 N.Y.S.2d 536, 538 (Sup. Ct., N.Y. County 1991); DiLorenzo, *supra* note 4, at § 11:9.

176. *McMillan v. Park Towers Owners Corp.*, 225 A.D.2d 742, 743-44, 640 N.Y.S.2d 144, 145 (2d Dep't 1996) (mem.); *Saada v. Master Apts. Inc.*, 152 Misc. 2d 861, 863, 579 N.Y.S.2d 536, 538 (Sup. Ct., N.Y. County 1991).

177. DiLorenzo, *supra* note 4, at § 11:6.

178. 86 N.Y.2d 643, 658 N.E.2d 1034, 635 N.Y.S.2d 161 (1995).

179. *Id.* at 648, 658 N.E.2d at 1036, 635 N.Y.S.2d at 163.

180. *Id.*, 658 N.E.2d at 1036, 635 N.Y.S.2d at 163.

181. *Id.* at 649, 658 N.E.2d at 1036, 635 N.Y.S.2d at 163.

182. 81 N.Y.2d 1033, 1034, 616 N.E.2d 848, 848, 600 N.Y.S.2d 191, 191 (1993) (mem.).

183. *Id.* at 1036, 616 N.E.2d at 850, 600 N.Y.S.2d at 193.

184. *In re State Tax Com. v. Shor*, 43 N.Y.2d 151, 400 N.Y.S.2d 805, 371 N.E.2d 523 (1977); *Cibro Petroleum Products, Inc. v Fowler Finishing Co.*, 92 Misc. 2d 450, 450-51, 400 N.Y.S.2d 322, 322-23 (Sup. Ct., Albany County 1977); DiLorenzo, *supra* note 4, at § 11:9.

185. *See Joint Queensview Hous. Enterprise, Inc. v. Balogh,* 174 A.D.2d 605, 606, 571 N.Y.S.2d 312, 314 (2d Dep't 1991); *Will of Katz*, 142 Misc. 2d 1073, 1076, 539 N.Y.S.2d 659, 662 (Sur. Ct., N.Y. County 1989).

186. 8 Misc. 3d 1026(A), 806 N.Y.S.2d 444, 2005 N.Y. Slip Op. 51294(U), 2005 WL 1961330 (Sup. Ct. N.Y. County 2005).

187. 2005 N.Y. Slip Op. 51294(U). *2.

188. 2005 N.Y. Slip Op. 51294(U), *8.

189. *Joint Queensview Hous. Enterprise*, 174 A.D.2d at 605, 571 N.Y.S.2d at 313.

190. *Id.* at 606. 571 N.Y.S.2d at 313.

191. *Id.*, 571 N.Y.S.2d at 313.

192. CPLR 213(7).

193. *Yatter v. William Morris Agency, Inc.*, 256 A.D.2d 260, 261, 682 N.Y.S.2d 198, 199 (1st Dep't 1998) (mem.).

194. CPLR 217 & 7802; *Buttitta v. Greenwich House Cooperative Apts., Inc.*, 11 A.D.3d 250, 251, 783 N.Y.S.2d 26, 27 (1st Dep't 2004) (mem.).

195. *Excelsior 57th Corp. v. Winters*, 227 A.D.2d 146, 147, 641 N.Y.S.2d 675, 676 (1st Dep't 1996) (mem.).

196. RPL § 234.

197. *Rubinstein v. 242 Apt. Corp.* 189, A.D.2d 685, 685, 592 N.Y.S.2d 378, 378 (1st Dep't 1993) (mem.).

198. *Silber v. Schwartzman*, 150 Misc. 2d 1, 2, 575 N.Y.S.2d 226, 227 (App. Term 1st Dep't 1991) (per curiam).

199. *930 Fifth Ave. Corp. v. Shearman*, 2007 N.Y. Slip Op. 52153(U), 2007 WL 3353570, at **1-4 (Hous. Part Civ. Ct. N.Y. County 2007) (Gerald Lebovits, J.).

Gerald Lebovits, a judge of the New York City Civil Court, Housing Part, and an adjunct professor at St. John's University School of Law, presided over New York County's Coop and Condo Part from 2003 to 2005. James P. Tracy is an associate at Finkelstein Newman Ferrara LLP. The authors thank New York Law School student Stephanie L. Torre for her research assistance.

Due to a formatting error, only the first page of this chart was published in the Winter 2008 issue of the N.Y. Real Property Law Journal. *The chart appears below in its entirety.*

Detailed Chart Comparing Provisions of Current Bankruptcy Bills Dealing with Modification of Home Mortgages, as of 12/13/2007

Prepared by Mark S. Scarberry, Professor of Law, Pepperdine University School of Law
(who served as the Robert M. Zinman Scholar in Residence at the American Bankruptcy Institute from Sept. to Dec. 2007)[1]

	Durbin Bill, S. 2136	**Specter Bill, S. 2133** **Chabot Bill, H.R. 3778** (identical except as noted in row for "Allows strip down …")	**Miller Bill, H.R. 3609** as introduced	**Conyers Amendment to H.R. 3609 in the Nature of a Substitute** (approved 17-15 by House Judiciary Committee)
Has sunset provision, orlimitation based on time of mortgage origination, or limitation to particular chapter of Code	No sunset provision. No limitation based on time of mortgage origination. Some provisions apply to chapters other than chapter 13.	Would apply only to chapter 13 cases, and only to such cases filed before the sunset date, seven years after the date of enactment. Provisions dealing with modification of mortgages would apply only to mortgages "initiated before September 26, 2007."	No sunset provision. No limitation based on time of mortgage origination. Provisions apply only in chapter 13 cases.	Would apply only to chapter 13 cases. Provisions dealing with mortgage modification would (1) be subject to seven year sunset provision (thus applying only to cases filed during period beginning with date of enactment of bill and ending seven years later), and (2) apply only to mortgages securing debts incurred during period beginning Jan. 1, 2000 and ending on date of enactment.
Eliminates or limits § 1322(b)(2) prohibition on modification of mortgage on principal residence	Yes. Modification would be permitted if debtor has insufficient current income to make mortgage payments and cure arrearages, after deducting other "expenses" permitted under § 707(b)(2)(A) & (B) (as incorporated in § 1325(b)(3)).	Yes. In certain cases the bills would permit modification, but only in specified ways described below. Uses same approach as § 1322(d) to determine relevant median income for comparison. Mortgage modification permitted if debtor's and spouse's current monthly income (whether or not case is joint case) times twelve is less than 150% of relevant median income. (Bill could be read to apply 150% multiplier only to debtors in households of one person.) Modification is limited to mortgages "initiated before September 26, 2007."	Deletes prohibition in § 1322(b)(2).	Yes. In certain cases the bill would permit modification. If permitted, modification could take specific forms described below. Only "nontraditional mortgages" and "subprime mortgages," as defined in the bill,[2] could be modified, and only if debtor has insufficient current monthly income to make mortgage payments and cure arrearages, after deducting "amounts"[3] (other than payments to be made on the mortgage at issue) set forth in § 707(b)(2)(A) & (B). To confirm plan, court must find that "modification is in good faith."

	Durbin Bill, S. 2136	Specter Bill, S. 2133 Chabot Bill, H.R. 3778	Miller Bill, H.R. 3609	Conyers Amendment to H.R. 3609
Allows strip down of mortgage lien to value of home in chapter 13[4]	Yes, if modification of mortgage is permitted. Strip down is not addressed specifically but would be permitted under the general authorization to modify the mortgagee's claim.	Specter Bill: Yes, if modification of mortgage is permitted, ***but only if debtor and mortgagee so agree in writing***. Chabot Bill: Yes, if modification of mortgage is permitted ***with no requirement of agreement by mortgagee***.	Yes. Strip down is not addressed specifically but would be permitted under the general authorization to modify the mortgagee's claim.	Yes, if modification of mortgage is permitted. Allows "claim for a debt … secured by" the mortgage to be reduced to value of property. Provides, on completion of plan, for lien to be retained only for unpaid amount of that reduced claim. Might be interpreted to reduce overall claim rather than simply secured claim, which could prevent mortgage holder from having unsecured claim for deficiency.
Allows payment of modified mortgage beyond duration of chapter 13 plan	Yes. Unclear whether it provides exception to § 1325(a)(5)(B)(i)(I)(bb) to allow mortgagee to retain lien after debtor receives discharge. Does not provide expressly for discharge to be granted on completion of payments other than mortgage payments. Does not expressly provide for mortgage not to be discharged as personal liability of debtor.	Apparently yes, if modification of mortgage is permitted, because allowed modifications do not include changes in payment schedule. Unclear whether it provides exception to § 1325(a)(5)(B)(i)(I)(bb) to allow mortgagee to retain lien after debtor receives discharge. Does not provide expressly for discharge to be granted on completion of payments other than mortgage payments. Does not expressly provide for mortgage not to be discharged as personal liability of debtor.	Yes. Provides expressly for mortgagee to retain lien after debtor receives discharge despite provisions of § 1325(a)(5)(B)(i)(I)(bb). Also provides expressly for discharge not to be delayed until completion of mortgage payments, and for mortgage obligation not to be discharged.	Yes. See row immediately below. Provides expressly for mortgagee to retain lien after discharge of other debts until reduced and modified mortgage claim is paid, despite provisions of § 1325(a)(5)(B)(i)(I)(bb). Also provides expressly for discharge not to be delayed until completion of mortgage payments, and for mortgage obligation (as possibly reduced by modification) not to be discharged.
Allows chapter 13 plan to provide for extension of mortgage payments beyond term of mortgage	Yes, if modification of mortgage is permitted. Mortgage term can be extended to thirty years from origination of mortgage.	No.	Yes, without any express limitation on term.	Yes, if modification of mortgage is permitted. Language is ambiguous but apparently allows modified mortgage to be paid over term ending thirty years from origination of mortgage or over any longer period provided by original payment schedule.

	Durbin Bill, S. 2136	Specter Bill, S. 2133 Chabot Bill, H.R. 3778	Miller Bill, H.R. 3609	Conyers Amendment to H.R. 3609
Allows or requires court to determine mortgage interest rate for home mortgage modified in chapter 13 plan	Yes, if modification of mortgage is permitted. Court must set mortgage rate at most recent annual Fed figure for yield on conventional mortgages plus risk premium. Debtor might have option of leaving contractual provisions regarding interest rate unchanged.	No.	Yes. Ordinary rules for determining interest rate needed to provide full present value of secured claim apparently would apply. No further guidance given in bill.	Yes. Not clear whether, if plan modifies mortgage, plan must include all modifications specified in bill. Probably debtor may choose to include in plan only those modifications desired by debtor. Thus plan may set interest rate at most recent annual Fed figure for yield on conventional mortgages plus risk premium, but probably need not do so. If plan does so, then court would determine amount of risk premium.
Allows chapter 13 plan to determine home mortgage interest rate.	No, except to extent that plan proponent must include appropriate interest rate in plan.	Yes, to a limited degree. If modification permitted, plan may modify right of holder of adjustable rate mortgage by "prohibiting or delaying adjustments to the rate of interest applicable to the debt on and after the date of filing of the plan or voiding any such adjustments that occurred during the 2-year period preceding that date of filing." Apparently debtor could lock in below-market teaser rate for life of mortgage. Voiding of increases might entitle debtors to refunds of some interest paid prepetition.[5]	No, except to extent that plan proponent must include an interest rate that court will find to be sufficient to provide full present value of secured claim per § 1325(a)(5)(B)(ii).	Yes, if modification permitted. Combines elements of Durbin and Specter/Chabot approaches. If plan sets interest rate at Fed figure plus risk premium, then plan will include proposed risk premium but court will then determine the needed risk premium. Alternatively, with respect to adjustable rate mortgage, plan may modify interest rate by "prohibiting, reducing, or delaying adjustments to such rate of interest applicable on and after the date of filing of the plan." Debtor with below-market teaser rate apparently can opt to keep it and prevent rate increases for life of mortgage.

	Durbin Bill, S. 2136	Specter Bill, S. 2133 Chabot Bill, H.R. 3778	Miller Bill, H.R. 3609	Conyers Amendment to H.R. 3609
Limits post-petition fees and charges imposed by oversecured home mortgagee where debtor is in chapter 13	Only lawful and reasonable fees provided for in the mortgage agreement may be added, and only if mortgagee gives court notice.	Not clear. Same treatment as interest in cases of substantial failure to disclose material terms regarding fees. See footnote 5 below.	Requires timely notice of fees to debtor and trustee.	Only lawful and reasonable fees provided for in the mortgage agreement may be added, and only if mortgagee gives court notice. Only oversecured mortgagee may add fees. Fee limitation appears to preclude not only allowance of fees (beyond those permitted) in chapter 13 but also any form of liability for such fees incurred during chapter 13 case regardless of whether chapter 13 plan is confirmed or successfully completed.
Allows waiver of prepayment penalty in chapter 13 plan	Yes, whether or not mortgage may be modified otherwise, and without regard to income and expenses.	Yes, in chapter 13 plan, but only if modification of mortgage is permitted.	Yes (not specifically but as part of general authorization to modify mortgagee's claim in chapter 13 plan).	Yes, in chapter 13 plan, but only if modification of mortgage is permitted.
Disallows mortgage claim for violations of law	Yes. Applies generally to allowance of claims under all chapters of Bankruptcy Code. Entire mortgage claim is disallowed (and mortgage lien is voided) if mortgage is subject to any damages or rescission claim for any violation of TILA or any other state or federal consumer protection law in effect when noncompliance occurred, even if mortgagee obtained foreclosure judgment.	No.	No.	No.

	Durbin Bill, S. 2136	Specter Bill, S. 2133 Chabot Bill, H.R. 3778	Miller Bill, H.R. 3609	Conyers Amendment to H.R. 3609
Waives pre-filing credit counseling requirement where home is in foreclosure	Yes, if mortgage foreclosure sale has been scheduled, and regardless of which chapter of the Bankruptcy Code the filing is made under.	Yes, as a pre-filing requirement, but debtor must obtain such counseling after the filing, apparently in addition to the required pre-discharge financial management course. Waiver applies only in chapter 13 cases.	Yes, if mortagee has initiated judicial or nonjudicial foreclosure on debtor's principal residence. Waiver applies only in chapter 13 cases.	Yes, as a pre-filing requirement (in cases commenced within seven years of enactment of bill), on certification that debtor received notice that mortgage holder "may commence a foreclosure." Debtor must obtain such counseling after the filing, apparently in addition to the required pre-discharge financial management course. Waiver applies only in chapter 13 cases.
Allows debtor (or trustee, upon timely intervention) to pursue claims (or defenses) held by debtor but not scheduled as asset of debtor (or as defense, presumably by way of scheduling creditor's claim as disputed).	Yes. Defendant cannot avoid liability by claiming that debtor is not real party in interest or by asserting judicial estoppel. Applies generally, not just in chapter 13 cases.	No.	No.	No.
Allows court to refuse enforcement of arbitration agreement in core matters involving consumer debtor	Yes. Applies generally, not just in chapter 13 cases.	No.	No.	No.
Creates $75,000 federal bankruptcy homestead exemption for debtors over 55	Yes. Applies generally, not just in chapter 13 cases. A $75,000 exemption is added to § § 522(b)(3) and 522(d). Could be read to be in addition to whatever homestead exemption is provided under state law, where state law exemptions are used.	No.	No.	No.

	Durbin Bill, S. 2136	Specter Bill, S. 2133 Chabot Bill, H.R. 3778	Miller Bill, H.R. 3609	Conyers Amendment to H.R. 3609
Requires study to be performed	No.	Yes. Comptroller General must conduct a study "to determine the impact of allowing bankruptcy judges to restructure principal residence mortgages on the secondary market for mortgages"and submit a report to Congress within 180 days of enactment.	No.	Yes. Comptroller General and Director of Executive Office for United States Trustees each must conduct a study "to determine the impact of the amendments made by sections 2 through 7 of this Act" and each must submit a report to Congress within 180 days of enactment.

Endnotes

1. The "Detailed Chart Comparing Provisions of Current Bankruptcy Bills Dealing with Modification of Home Mortgages, as of October 17,2007," which appeared on page 38 of the Winter, 2008 issue, was prepared solely by Professor Mark S. Scarberry, who is a Professor of Law at Pepperdine University, School of Law and was then serving as the Robert M. Zinman Scholar in Residence at the American Bankruptcy Institute.
2. A nontraditional mortgage is one which at any time provides for periodic payments that are interest-only or that would cause negative amortization. Perhaps unclear whether common practice of paying pro-rated interest only for partial month at beginning of mortgage would make almost all mortgages "nontraditional." Definition could cause mortgage to become "nontraditional" if mortgage holder permits financially distressed debtor to temporarily make reduced payments. Subprime mortgages are first mortgages with interest rates more than 3% over yield on comparable Treasury securities (under detailed provisions in bill for determining interest rate and choice of comparable Treasury securities) or subordinate mortgages with interest rates more than 5% over yield on comparable Treasury securities.
3. Use of term "amounts" in Conyers Substitute H.R. 3609 rather than term "expenses" as in S. 2136 makes clear that under Conyers Substitute payments on other secured debts must be included in calculation.
4. Note that if chapter 13 case is "dismissed or converted without completion of the plan," the full amount of the lien under nonbankruptcy law would be restored. See § 1325(a)(5)(B)(II), which would not be amended by any of the bills. A debtor who cannot complete a plan may qualify for a chapter 13 hardship discharge under § 1328(b), in which case the strip down would not be reversed, because the chapter 13 case would not be dismissed or converted.
5. The bills also explicitly allow court to order recovery (in chapter 13 cases only) of pre-petition interest payments as fraudulent transfers if there was a substantial failure to disclose material terms regarding interest. Under § 548(a), up to two years of pre-petition interest could be recoverable. Section 548(a) apparently would not allow recovery of post-petition interest paid by debtor during the plan (though this is not clear), and the bills do not characterize the obligation to pay interest going forward as a fraudulently incurred obligation

Says the Borrower to the Lender: "Now Here's What I Want You to Do . . ."

By Bruce J. Bergman

This is the story of a conditioned tender—and why a lender or servicer need not accept it and why rejecting it creates no problem.

Mortgage lenders and servicers should be familiar with the scenario. A borrower is seriously in arrears. He claims to disagree with the sum owed. He protests late charges. He doesn't want to pay for inspections or legal fees or much of anything for that matter. Diligence by the lender or servicer finally persuades the borrower that he had best reinstate now or the property will be lost. So the check arrives, *but* the borrower imposes a condition.

For example, he conditions payment upon a reduction in the tax escrow, which he avers is just too large. Or, as in a recent case [*Cardella v. Giancola*, 297 A.D.2d 618, 747 N.Y.S.2d 31 (2d Dep't 2002)], he demands that a portion of the money submitted be held in escrow to settle a dispute about some real estate transfer taxes he says the lender was supposed to pay. (Other examples of conditions a borrower might demand are legion and lender clients can probably fill in their tales of borrowers' flights of fancy.)

What to do with a conditional tender? The law is clear in New York. It can be rejected. The simple fact is that a tender of money submitted conditionally (albeit the full amount due) is not a tender.[1] Hence, it can be sent back. Such a rejection often gets a borrower's attention and certainly disposes of any issues about the condition.

But this leads to another issue. If a wily borrower remits all sums necessary to reinstate or pay off the mortgage (as the case may be), but nevertheless imposes some unacceptable or untoward condition resulting in its rejection of the payment, could the borrower argue that because all the money was sent, interest must cease upon the day the money arrived? The new case confirms the answer as "no." The controlling principle is that to stop the running of interest a tender of payment must be *unconditional*.

The bottom line: A supposed tender of all the sums due which imposes a condition can properly be rejected and interest continues to accrue nevertheless.

Endnote

1. Not surprisingly, the nuances attendant to the concept of tender are far more extensive than this discussion. For considerably further review, see 1 *Bergman on New York Mortgage Foreclosures* § 4.08 (Matthew Bender & Co., Inc., rev. 2004).

Mr. Bergman, author of the three-volume treatise *Bergman on New York Mortgage Foreclosures* (Matthew Bender & Co., Inc., rev. 2004), is a Partner with Berkman, Henoch, Peterson & Peddy, P.C., Garden City, New York; an Adjunct Associate Professor of Real Estate with New York University's Real Estate Institute, where he teaches the mortgage foreclosure course; and a special lecturer on law at Hofstra Law School. He is also a member of the USFN and the American College of Real Estate Lawyers.

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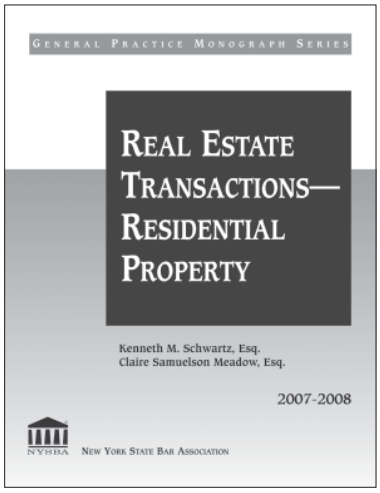

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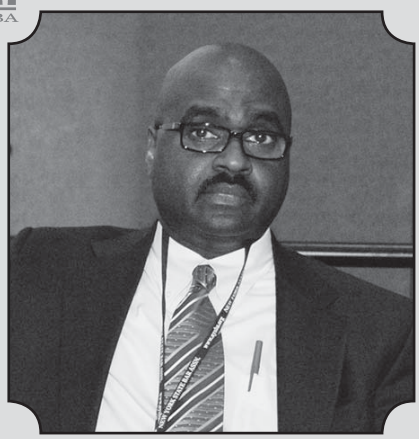


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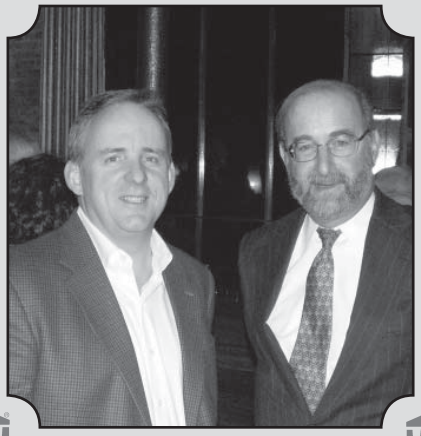

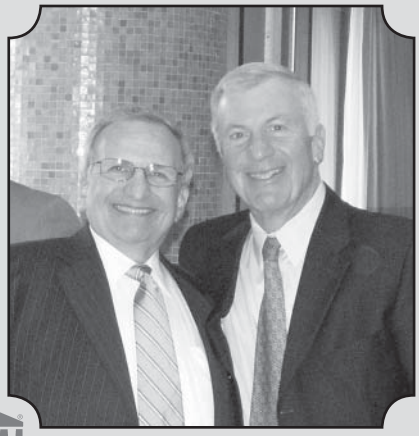

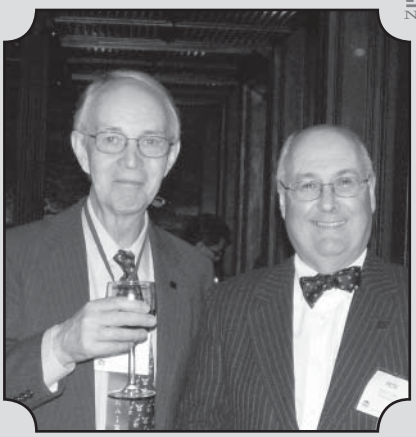

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