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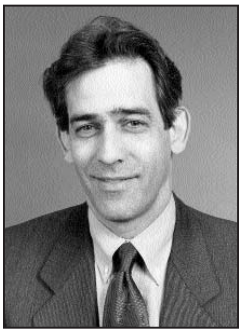
of the New York State Bar Association

A Message from the Section Chair



As the New York State Legislature's 1999 session drew slowly to conclusion in the summer, the Real Property Section (acting through the Executive Committee) commented on two bills of interest to real estate attorneys. The first proposal would add a new Article 14 to the Real Property Law to be entitled "Property Condition Disclosure in the Sale of Residential Real Property." Its purpose is to require delivery of a property condition disclosure statement by sellers of one to four family dwellings. This bill of course reflects a broad trend in our laws, as well of society in general, which favors access to information and which to some extent counters the historic principle of caveat emptor or "buyer beware." Indeed, many states (including our neighbor Connecticut) have already adopted residential sale disclosure statutes. Most such laws require the seller to fill a checklist of questions (based on the seller's actual knowledge), in order to inform the buyer about various aspects of the home which may not be readily ascertainable through the normal inspection process. Some states' laws create a limited right of recission, while others explicitly negate that right after closing. Cer-

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Members of the Real Property Law Section and guests visiting the courthouse in Bermuda during this year's Summer Meeting. NYSBA President Tom Rice is in the second row, third from left. Behind him, to the left, is Steve Horowitz, Chair of the Real Property Law Section. More photos appear on pages 141-144.

NYSBA

tain states establish a financial penalty for sellers' non-delivery of the disclosure statement.

The New York bill follows the common framework, but has a number of unclear and problematic provisions. For example, the number of disclosure items (46) on the checklist is longer than other states require, and it contains some items that can readily be determined through a normal inspection. More important, it is unclear as to what damages are available and under what circumstances, and the standards under which buyers can terminate the contract or seek recission. On a related point, the statute should clarify that sellers are liable, if at all, only for matters of which they have actual knowledge. The Real Property Committee will work on improving the bill when it is re-introduced next session.

The second bill, which is being supported by the New York State Association of Realtors, is informally known as the Brokers' Commission Escrow Bill, and is aimed at assisting brokers in collection of commissions to which they believe they are entitled. Brokers' commissions in many transactions are not large enough to justify the cost of commencing litigation by the aggrieved broker. Nonpayment may occur particularly in the case of co-brokers who may not be directly involved in the closing process.

The proposed solution to this problem is to require sellers to create an escrow at closing in favor of any broker who has previously filed an affidavit in the land records. Such affidavits do not create a lien nor otherwise invalidate transfer of the subject real estate. The sellers' attorney, in the absence of another agreed party, would be required to hold the escrowed funds until resolution of the dispute.

Some attorneys are concerned that they should not be forced to bear the burden of assisting brokers in resolving commission disputes, much less without compensation. An alternative approach to the broker's proposal would be to have all claiming brokers notify the seller of their alleged entitlement. In the absence of agreement among the brokers, the seller could issue the full commission amount by check payable jointly to the claiming brokers, leaving them to resolve their dispute without the seller's attorney. As with the disclosure bill, it is anticipated that the Brokers' Commission Escrow Bill will be reintroduced in the upcoming legislative session.

The Real Property Section's Summer Meeting took place this year in Bermuda at the commodious Southampton Princess Hotel. In addition to partaking of the shopping, sun and pink sands of that lovely island, there were two full mornings of continuing legal education on such topics as real property financing, case law relating to property condition disclosure disputes, a discussion of regulatory takings, impact fees and much more. We also toured the seat of government, visiting the courthouse and House of Assembly, where we were welcomed by the Chief Justice of Bermuda's appellate court. Final appeals from that court are heard by the Privy Council in London, since Bermuda remains affiliated with the United Kingdom. In the same vein, the Governor of Bermuda is appointed by the English.

The Real Property Section sponsored its first trip other than the Summer Meeting. Organized by Joel Sachs, co-chair of our Environmental Law Committee, participants gathered from October 21 to 24 in Chicago for seminars and tours focusing on the architectural and historical heritage of Chicago. The program was run jointly with the Chicago Bar Association, and included visits to the Chicago Board of Trade and several buildings in Oak Park designed by Frank Lloyd Wright.

Steven G. Horowitz

Tenant's Checklist of Silent Lease Issues

New York State Bar Association Real Property Law Section Commercial Leasing Committee

By S.H. Spencer Compton and Joshua Stein

Committee Co-chairs: Dorothy Ferguson and Joshua Stein
Subcommittee Co-chairs: S.H. Spencer Compton and Joshua Stein

When an attorney for a prospective tenant reviews and negotiates a lease, he or she will raise at least two categories of issues and concerns.

First, tenant's counsel will respond to what the lease already says. For example, tenant's counsel may ask for longer notice periods, opportunity to cure defaults, "reasonableness," a narrowing of any open-ended tenant obligations or landlord discretion, flexibility on use and transfers, absolute clarity regarding all monetary and other significant obligations, deletion of inappropriate or excessive obligations and restrictions, correction of errors and internal inconsistencies and the like. To identify issues like these, tenant's counsel needs to read the proposed lease and think about it in the context of his or her experience and knowledge and the tenant's needs.

Second, tenant's counsel might want to raise for its client the issues and concerns tenants have that a landlord's typical standard lease does not consider. These are the "Silent Lease Issues." Unlike the first category of issues, the "silent" issues are not necessarily easy for tenant's counsel to identify, because a landlord's standard lease form does not remind tenant's counsel that these issues even exist.

In 1998, a subcommittee of the Commercial Leasing Committee of the New York State Bar Association began to develop a Tenant's Checklist of "Silent Lease Issues" (the "Checklist") for use by attorneys representing commercial space tenants. The Checklist, which follows, is intended to help tenants' attorneys identify and (if they choose to) raise "Silent Lease Issues" when they review a typical landlord's standard commercial lease.

The scope of the Checklist has expanded to include other significant issues (not just "silent" issues) that tenant's counsel may wish to raise in lease negotiations. Reminders were also added for some, but not all, matters for which a tenant may wish to perform "due diligence" before signing a lease.

The Checklist mentions each issue only once, even if it might reasonably belong under more than one heading. Any user of the Checklist should read it from beginning to end.

The Checklist covers a tremendous range of issues, representing or at least discussing almost all possible issues and events that could arise or occur when two parties have potentially conflicting interests in the same piece of real property over potentially a very long time, where almost anything can happen.

There are ways in which any lease can be seen as a private statute. Unlike a legislative statute, however, a lease can never be changed except by persuading the other party to agree to a change. Therefore, each party should take advantage of the opportunity it has to shape the statute that will govern the relationship. The Checklist is intended to assist tenant's counsel in that process.

Depending on the market, the parties, the transaction, its timing, the scope and terms of counsel's engagement and other circumstances, tenant's counsel may or may not choose to raise any issues from the Checklist. Even to the extent that tenant's counsel raises these issues, tenant's counsel will not necessarily prevail on any of them. Therefore, the fact that any particular lease does not reflect positions suggested in the Checklist does not necessarily mean that tenant's counsel did a bad job. To the contrary, to serve its client best, sometimes tenant's counsel should raise no issues at all and just get the deal signed, or identify and raise issues that are outside the scope of the Checklist.

Conversely, if the tenant's business strategy is to prolong lease negotiations as much as possible (a goal that can always be achieved almost without limit), the Checklist will provide plenty of help. Lease negotiations, almost more than any other category of real estate negotiations, can take as much or as little time as the parties want. For example, the definition of "operating expenses," in and of itself, can raise dozens of knotty issues that may amount to a reinvention of cost accounting.

The Checklist focuses on substantial commercial space leases for both retail and office uses. Most issues mentioned in the Checklist will apply to some leases but not others. Virtually every item in the Checklist should, therefore, be interpreted as if prefaced by the words "if applicable, appropriate, desired, and

possible under the circumstances, taking into account the size and nature of the transaction, the condition of the market, the tenant's business and anticipated use of the premises, the needs and negotiating positions of the parties, the timing, and all other circumstances." Some items on the list are appropriate only for very large tenants, occupying all or most of a large building. For a smaller tenant to raise some of the same issues would be odd.

No effort has been made to indicate which issues listed in the Checklist apply only to certain types or sizes of leases. Nor has the issue of whether and how (politely or otherwise) a Landlord might respond to any of these issues been addressed. Because of these exclusions, the Checklist is targeted more toward an experienced lease negotiator (as a way to jog his or her memory) than toward someone new to the area. The latter category of user can nevertheless obtain some value from the Checklist. All users should use the Checklist with care and judgment.

The Checklist is intended more to spark discussion and thought than to set rigorous "standard requirements" (which would be a ridiculous proposition).

The Checklist does not address "triple-net" leases, ground leases, "bondable" leases, "synthetic" leases, "build-to-suit" leases, leases from a seller to a purchaser of a company or other specialized leasing transactions. The 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 or any subcommittee thereof. It does not establish a "minimum standard of practice" and is not guaranteed to be exhaustive or complete (to the contrary, it is guaranteed to be incomplete). The Checklist merely provides a resource for leasing practitioners. It creates no legal duties or obligations. Users of the Checklist are cautioned not to rely on it in any way or for any purpose.

The authors and the subcommittee members do not necessarily believe that Landlords should accept a tenant's position regarding any issue suggested in the Checklist, though the authors of the Checklist and the subcommittee members will be honored and pleased if anyone reads the Checklist and mentions it in lease negotiations. The Checklist does not estop any author or subcommittee member from taking any position in any lease negotiation.

The Silent Lease Issues Subcommittee is co-chaired by S.H. Spencer Compton and Joshua Stein, who were also the primary authors of the Tenant's Checklist of Silent Lease Issues. The Tenant's Checklist was initiated and edited by Joshua Stein.

Members of the Tenant's Silent Lease Issues Subcommittee included David Badain, Joel Binstok, Bob Bring, Phil Brody, Steven Cohen, Sam Gilbert, Barry Goldberg, Gary Goodman, Andrew Herz, Jonathan Hoffman, Gary Kahn, Huck Qavanaugh, Rob Reichman, Karen Sherman, Barry Shimkin, David Tell, and Allen Wieder.

Changes, additions, and other improvements to this Checklist are welcome. They will be taken into account as appropriate if and when the Commercial Leasing Committee publishes a revised version of this Checklist.

The Silent Lease Issues Subcommittee plans to develop, slowly, a separate "Silent Lease Issues" Checklist for commercial space landlords, which will focus on landlords' concerns that standard lease forms commonly neglect and, in particular, new concerns for landlords based on trends in law and practice since about 1980.

If you have suggestions for this Tenant's Checklist, would like to reprint it, or would like to help work on the Landlord's Checklist, please send email to joshua.stein@lw.com or scompton@paulweiss.com.

Tenant's Checklist of Silent Lease Issues

1. Access to Premises by Landlord

1.1 Prior notice (timing and type).

1.2 Purpose (e.g., repairs, inspection, or to show premises to prospective future tenants).

1.3 Limitations on frequency?

1.4 Limited or no rights of access for "special spaces" (bank vault, securities vault, narcotics, network control rooms, etc.).

1.5 When (business hours, after hours)?

1.6 By whom (Landlord's agent)?

1.7 Tenant's representative to be present (particularly important where Tenant has sensitive, dangerous, or expensive personal property).

1.8 Landlord must minimize interference with Tenant's business and comply with Tenant's reasonable instructions and security requirements.

1.9 Limitation on where pipes and conduits may be placed (e.g., must be within walls or above ceilings). Landlord must disclose any damage.

1.10 Storage of materials only for repairs within the premises (particularly problematic if premises includes a terrace), and only for short periods.

1.11 If Landlord's work in or affecting premises will cause inconvenience, noise, odors, etc., Landlord must work only outside of business hours.

1.12 If Landlord will use hazardous materials for any work in or affecting premises, must notify Tenant in advance and provide "material safety data sheet" disclosures.

2. Alterations

2.1 Attach list of pre-approved contractors, architects, etc., if Landlord has approval rights.

2.2 Reasonableness requirement for Landlord consent to any alterations.

2.3 No consent needed for decorative or minor (less than $_____) alterations or partition walls.

2.4 Flexibility in choosing architects, engineers, other consultants, contractors.

2.5 Right to construct internal stairs or "core" drilling for communications for multi-floor Tenants.

2.6 Right to use "chases" under slab and right of access thereto.

2.7 Right to use vertical shafts and chambers between floors for wiring and supplemental HVAC. Directness and feasibility of pathways (engineering issues).

2.8 No duty to restore if generally usable by other tenants unless improperly made or Landlord reasonably required restoration as a condition to Landlord's consent.

2.9 Right to limit or negotiate fees of Landlord's architects, engineers, or other consultants necessary for Landlord's approval of Tenant's alterations.

2.10 Tenant needs enough time to cure liens, taking into account procedural requirements of applicable law, and related delays. Landlord agrees not to pay any lien that Tenant has bonded.

2.11 Right to install awnings, canopies, crowd control measures on sidewalk.

3. Alterations (Initial Occupancy)

3.1 Landlord's space preparation, including asbestos (abatement? removal?), demolition, refireproofing, leveling of floors if raw space, and closing of floor penetrations.

3.2 Landlord should consent to Tenant's initial work in advance.

3.3 Landlord to cure existing violations that may interfere with Tenant's alterations.

3.4 Credit issues regarding Landlord's contribution or build-out work.

3.5 Building systems: adequacy of existing capacity; upgrades to be performed by Landlord.

3.6 Staging area or storage area for Tenant's con-

struction activities and move-in program. Any other off-site space needed for Tenant's construction and move-in program?

3.7 Required upgrades of bathrooms (overall quality and ADA compliance), elevator lobbies, other common areas and facilities.

4. Assignment and Subletting

4.1 Landlord's consent not required, or at least not to be unreasonably withheld, or automatically given where specified criteria (e.g., net worth, reputation, experience, and proposed uses) are met. Rent cannot be a factor in disapproving subleases.

4.2 Simplified approval procedure (e.g., requiring only term sheet rather than fully executed assignment or subletting documentation). No financial information required if Tenant will remain obligated on Lease.

4.3 Attach required form of Landlord consent as Exhibit, to prevent Landlord from adding new conditions and restrictions (which may be inconsistent with Lease, but Tenant may not be paying enough attention at the time) when Landlord consents to transactions.

4.4 Release of assignor from further liability. Fallback: Structure as a sublease. In the alternative, negotiate protections for unreleased assignors: notice of default and right to regain possession if assignee defaults and Landlord wants assignor to cure (assignor's liability terminates if Landlord doesn't give the notice). If Lease is terminated, new Lease on same terms.

4.5 If stock transfer is deemed an assignment for consent purposes, it should not be for assumption of liability purposes. Purchaser of shares need not assume the Lease. (This is a common drafting flaw in Landlord forms.)

4.6 Right to assign security deposit to assignee of Lease; Landlord to cooperate regarding substitution of any letter of credit security.

4.7 Carve out assignments/sublets to affiliates, successors, or in connection with the sale of business, particularly if multiple locations. Define "affiliate" to include charities, trusts, estates, and foundations in which Tenant or its officers are involved.

4.8 Allow subletting of up to _____ square feet to Tenant's suppliers, vendors, or customers, for Tenant's business convenience.

4.9 No consent required for concessionaires or licensees.

4.10 Landlord to maintain confidentiality of any financial information regarding possible assignee or subtenant. Must sign a standard "confidentiality agreement" if required by (prospective) assignee/subtenant. Similar requirements for final sublease documents delivered to Landlord.

4.11 Right to "sever" a large lease into two or more separate and independent leases, to facilitate assignment in pieces (more flexible exit strategy).

4.12 Nondisturbance protections for specified subtenants.

4.13 If Landlord has recapture right upon proposed assignment or sublease, reserve right to withdraw the request if Landlord exercises the recapture right.

5. Bills and Notices

5.1 Waiver of escalations if not billed within a certain period.

5.2 Effective date of giving of notices.

5.3 Attorneys may give notices on behalf of their clients.

5.4 Copy of notice must go to central leasing personnel, other specified recipients (counsel, etc.).

5.5 Deliver by personal service or nationally recognized overnight courier.

6. Building Security

6.1 Specify security program (including package scanning and messenger interception; operating hours). Right to approve subsequent changes.

6.2 Tenant's right to establish its own security system and connect that system to Landlord's security system.

6.3 Landlord cannot initiate new security measures (e.g., messenger interception) without Tenant's consent.

7. Consents (Miscellaneous)

7.1 For any Landlord consent right, short turnaround time. Silence is deemed consent after ___ days. Any failure to consent must specify all grounds for such failure, which grounds must be reasonable.

7.2 Landlord consents to Tenant's use of name and likeness of building in Tenant's promotional and publicity materials.

7.3 Right for Tenant to consent to site plan and any amendments.

7.4 Press releases, tombstones, and announcements for Lease require Tenant's approval and may not disclose any terms of Lease without Tenant's consent.

8. Defaults and Remedies

8.1 Notice and opportunity to cure (monetary as well as nonmonetary defaults).

8.2 Although "ipso facto" clauses are typically unenforceable against a debtor Tenant, beware of any Event of Default triggered by someone else's bankruptcy.

8.3 Limit Landlord's remedies (to exclude Lease termination or eviction) for defaults or disputes below a threshold level of materiality. Consider eliminating "nonmonetary" defaults entirely, instead requiring Landlord to convert any "nonmonetary" default into a monetary default by curing it and sending Tenant the bill for reimbursement (a common provision in old Woolworth's leases).

8.4 Require Landlord and its mortgagee to waive any statutory or other lien on fixtures, equipment, and other personal property of Tenant, either in all cases or if requested by Tenant's asset-based lender.

8.5 Prorate holdover rent on a per diem basis for partial months.

8.6 Landlord must seek to mitigate damages (still no such legal requirement for New York commercial leases). For example, Landlord must seek to relet premises.

8.7 Landlord waiver of self-help (to retake possession) and right to lock out.

8.8 If Landlord has right to accelerate all rent as liquidated damages, first try to eliminate this remedy. If unsuccessful, then negotiate: (1) Tenant gets credit for fair and reasonable rental value; and (2) discount rate as high as possible.

8.9 If a nonmonetary default is caused by a subtenant, extend the cure period as necessary to enforce the sublease and (if necessary) obtain possession of the subleased premises.

9. Destruction, Fire, and Other Casualty

9.1 Right for Tenant to terminate lease upon a material casualty not repaired within a specified time period, or occurring during the last ___ years of the lease term.

9.2 Right to terminate or abate rent if casualty/restoration causes material change in zoning (e.g., loss of nonconforming use status), access, parking, or visibility of premises.

9.3 Landlord must restore to the extent of available insurance proceeds.

9.4 Abate rent during Tenant's restoration, especially if significant fixturization work needs to be restored (this is just a reallocation of rent insurance versus business interruption insurance).

9.5 If casualty affects other premises, Landlord cannot terminate unless (1) Landlord makes Tenant whole, and (2) Landlord terminates leases of all other similarly situated Tenants.

9.6 Even without a waiver of subrogation, Landlord agrees not to sue Tenant if Tenant negligently caused casualty that would have been covered by typical casualty insurance policy.

9.7 Upon any termination, Landlord must promptly refund prepaid rent and other payments.

10. Electricity

10.1 Totalize multiple submeters, using a third-party service and establishing appropriate security controls regarding access to submetering equipment and computers.

10.2 Allow either party to initiate usage survey.

10.3 Pay for submetered electricity using the same tariff under which Landlord purchases electricity.

10.4 Assurances of sufficient wattage for Tenant's present and near-term anticipated operations.

10.5 Flexibility to obtain more electrical capacity if needed, quickly, at a defined or ascertainable cost.

11. Elevators

11.1 Right to use freight elevators without charge for move in and move out. Use of all elevators at night for same purposes.

11.2 "Night service" for elevators (some cabs out of service) cannot begin before a specified time.

11.3 Prohibit Landlord from changing elevator banks (i.e., if Tenant's space is first stop, should remain so).

11.4 Consider any need for exclusive elevator service.

11.5 Routine elevator repairs and maintenance may not be performed during business hours.

11.6 Specifications for maximum average waiting time for elevators.

11.7 Control over institution and modification of elevator security measures, including keycards.

12. Eminent Domain

12.1 Require Landlord to restore to extent of available condemnation award.

12.2 Right for Tenant to submit separate claim to condemning authority for (1) value of leasehold estate (rarely acceptable to Landlord or its lender) and (2) moving expenses, trade fixtures, goodwill, and damages for interruption of business.

12.3 Right to terminate or abate rent for impairment of parking, access, or visibility (or other adverse impact) if, for example, any road is realigned, widened, or otherwise changed (e.g., loss of curb cuts).

13. End of Term

13.1 No duty to restore alterations if generally usable by other tenants, unless improperly made or Landlord's original approval was reasonably conditioned on such restoration.

13.2 If Tenant must restore (1) right of access to premises after end of lease term as needed and (2) Tenant not deemed a holdover (equitable per diem payments).

13.3 No duty to return premises in any particular condition. For example, no obligation to replace worn-out HVAC compressor in last year of term.

13.4 Landlord cannot terminate under "demolition" clause unless (1) reasonable notice, (2) good faith, and (3) Landlord terminates leases of all other tenants.

13.5 Landlord may not post "for rent" signs until term has actually ended.

13.6 For a reasonable period after Lease termination, Tenant can install a sign directing customers to Tenant's new location.

14. Escalations (Generally)

14.1 For computing Tenant's proportionate share, if the rentable square footage includes Tenant's share of the common areas, then confirm the denominator of the fraction that determines Tenant's proportionate share also includes the common areas.

14.2 Do all tenants' percentages add up to 100%, or is Landlord being overreimbursed for escalations? Are the anchor tenants paying their share, or is that share being shifted to the other tenants?

14.3 Right to re-measure square footage (at least for a new building).

14.4 Allocate based on occupiable space, not occupied space.

14.5 Beware of multiple escalations that give Landlord more than mere protection against inflation.

14.6 Consider any "base year" to confirm full inclusion of expenses. Were any expenses not

yet being fully incurred? Did any exclusions apply?

14.7 Caps on escalations.

14.8 Does "free rent" period apply to pass-throughs or just base rent?

14.9 For "porter's wage" escalation, try to exclude fringe benefits and the value of "time off." Try to limit the measure to reflect only base hourly rate. If fringe benefits cannot be excluded, try to define how they are calculated.

14.10 For CPI adjustment, measure increase annually from starting year of Lease, rather than from preceding year's CPI.

14.11 If Landlord's expenses go down rather than up from the base year, Tenant should try to get a rent credit.

15. Estoppel Certificates

15.1 Require of both Landlord and Tenant. How often?

15.2 Attach form as an Exhibit to prevent subsequent issues.

15.3 Should Landlord reimburse Tenant for its legal fees in researching and preparing future estoppel certificates?

15.4 Tenant should state "to its knowledge," especially for issues involving additional rent claims. Alternatively, Tenant should reserve its rights on these claims. A typical ten-day requirement to deliver an estoppel certificate is too short for Tenant to conduct adequate due diligence to knowingly surrender claims involving complicated and potentially debatable billing of operating expenses and utility charges.

15.5 If estoppel certificate and Lease conflict, then Lease governs. Delivery of estoppel certificate does not waive any rights or remedies of the signer.

15.6 Caveat: Courts do take estoppel certificates seriously. Tenant should not lightly "sign and return."

16. Failure to Give Possession

16.1 Allow Tenant to terminate or abate rent if Landlord does not deliver possession by a date certain (also try to get per diem credit against rent for the delay).

16.2 If Lease is conditioned on lender (or any other) approval, right to terminate if not provided by a certain date.

16.3 If Tenant terminates Lease, refund all payments made on Lease signing.

16.4 If Landlord delivers the space late, push back all rent abatements and adjustments.

16.5 For seasonal businesses, Tenant may not want to be obligated to initially open for business during slow season.

17. Fees and Expenses

17.1 Limit to reasonable, actual, and out-of-pocket.

17.2 Exclude legal fees and expenses relating to claimed default if no default exists or Landlord otherwise does not prevail.

17.3 Mutual reimbursement of legal fees of prevailing party, including the value of time of in-house counsel.

18. Heating, Ventilation, Air Conditioning

18.1 Specifications for HVAC service, with variations by day of week and season, both during and outside business hours.

18.2 Rates (and basis of rates) for overtime HVAC.

18.3 Allocate overtime HVAC charges among multiple simultaneous users.

18.4 Discount on overtime HVAC if Tenant commits in advance to specified level of usage.

18.5 Tenant's right to install supplemental HVAC: How much condenser water must Landlord provide? Chilled water? Who owns the equipment? Who pays costs? Duty to repair/restore? Ability of Tenant to reconfigure building standard HVAC as needed for supplemental service?

19. Improvements

19.1 Term of Lease should be long enough to recover Tenant's investment in improvements.

19.2 Ownership of improvements and right to depreciate.

20. Inability to Perform

20.1 "Force majeure" protections for Tenant, not just Landlord.

20.2 Right of Tenant to cure Landlord's failure to perform (even if caused by "force majeure") where feasible.

20.3 Right to offset rent.

21. Insurance

21.1 No obligation for Tenant to provide more insurance than customarily maintained by similar tenants in similar buildings.

21.2 Right to carry blanket insurance, self-insure, or use "captive" carrier.

21.3 Waiver of subrogation.

21.4 Landlord to carry property and liability insurance, and provide evidence of such insurance on Tenant's request.

21.5 To the extent premises are subleased to others, subtenant's insurance coverage and certificates thereof (if otherwise in compliance with Lease) will fulfill Tenant's insurance obligations.

22. Leasehold Mortgages

22.1 Landlord consent to leasehold mortgage. Rights of leasehold mortgagee to (1) receive notice of default from Landlord, (2) cure, and (3) enter into new lease with Landlord if original lease is terminated due to Tenant default.

22.2 Covenant to amend as requested by leasehold mortgagees, within limits.

22.3 Similar protections for a pledgee of Tenant's stock or other equity interests.

22.4 See other resources regarding "mortgageable leases" (generally beyond scope of this checklist).

23. Maintenance and Cleaning

23.1 Landlord must make structural repairs (including roof, foundation, other structural elements) and maintain and repair building systems, common areas, and sidewalk.

23.2 Landlord must maintain structural elements and electrical, plumbing, sewage, and HVAC systems to the point of entry into leased premises.

23.3 Landlord must maintain building and common areas (including any empty shop spaces, and all common areas on any multitenant floor) in an attractive and first class manner.

23.4 Specify cleaning standards and limit the scope of possible "extras." Cleaning standards are an economic issue and should be reviewed and negotiated accordingly.

23.5 Cleaning work cannot start before a specified time.

23.6 Right to terminate Landlord's cleaning services and take over cleaning.

23.7 Location, access, timing, other arrangements regarding garbage removal.

24. Operating Expenses—Calculation and Auditing

24.1 Preparation of statement by independent managing agent or certified public accountant.

24.2 Limit period in which Landlord may revise.

24.3 In any year the building is not fully occupied, operating expenses are often "grossed up" as if the building had been fully or nearly fully occupied during the entire year. Confirm consistent treatment of base year and adjustment year.

24.4 Landlord should provide annual operating expense statement within a reasonable time (90 - 180 days) after year end, especially where Tenant pays monthly operating expense escalation estimates on account.

24.5 Apportion operating expense contributions if the lease terminates during a calendar year (otherwise, Landlord could argue that annual calculation procedures obligate Tenant to contribute to entire year's operating expenses).

24.6 If Landlord later incurs new categories or items of expense that were not being incurred when the Lease was signed (e.g., addition of an earthquake insurance program), then Landlord must "gross up" the base year to reflect what this expense would have been if Landlord had already been incurring it.

24.7 Meaningful rights to examine and question Landlord's operating expense calculations, surviving expiration/termination of lease.

24.8 Landlord must keep books and records, for at least ___ years, in a specified place under a unified system.

24.9 Extend time periods to give Tenant reasonable time to (1) notify Landlord it wants to audit expenses, (2) conduct and complete the audit, and (3) specify if, and how, it contests Landlord's calculations. If Tenant discovers egregious errors, should retain right to reopen earlier years.

24.10 Audit right should include base year, expiring no earlier than the expiration date for right to audit the first operating year.

24.11 Landlord to pay cost of audit (credited against next month's rent) if it discloses an overcharge of more than specified percentage (3%?).

24.12 If any other tenant's audit discloses a discrepancy, Landlord to give Tenant (without Tenant's having to ask) the benefit of any resulting adjustment to operating expenses.

24.13 Lease should not limit Tenant's right to engage a firm of its own choosing (e.g., "contingent fee" lease auditor) to examine Landlord's books and records.

25. Operating Expenses—Exclusions

Tenant may desire to exclude from operating expenses at least the following:

25.1 Cost to correct initial construction defects.

25.2 Cost of repairs due to Landlord's negligence.

25.3 Salaries above building manager.

25.4 Advertising expenses.

25.5 Brokerage fees and commissions.

25.6 Legal fees and expenses to negotiate and enforce leases.

25.7 Accounting fees.

25.8 Any cost reimbursed by insurance proceeds or condemnation award.

25.9 Management fees beyond those charged in comparable first class buildings.

25.10 Expenses paid to affiliates of Landlord unless at market rates (but what's market and how do you know? Tenant may want preapproval rights).

25.11 Capital expenditures unless (1) any project above $_____ is approved by Tenant or (2) a project is justified by cost of repairs or undertaken to reduce operating expenses, and then only to the extent that Landlord demonstrates actual reduction.

25.12 Any expense for a service not provided to all Tenants (for example, the incremental cost of a higher level of service provided to office or retail Tenants).

25.13 Exactions paid to governmental bodies, including infrastructure, traffic improvements, curb cuts, roadway improvements, transit, "impact," etc.

25.14 Costs that under generally accepted accounting principles consistently applied would be considered capital or are otherwise outside normal costs and expenses in connection with operation, cleaning, management, security, maintenance, and repair of similar buildings.

25.15 Purchase or maintenance of any artwork or sculpture.

25.16 Charitable or political contributions.

25.17 Ground rent.

25.18 Amounts that are "operating expenses" but reimbursed or reimbursable to Landlord by Tenants other than through pro rata rent escalations (e.g., excessive use of utilities).

25.19 Costs related to build-out of space for Tenants.

25.20 Fines and penalties.

25.21 Costs of cleaning portions of the building that have cleaning requirements higher than Tenant's (e.g., office space when negotiating a retail lease).

25.22 Costs incurred from any matter constituting a breach of covenant, representation, or warranty

by Landlord under any lease.

25.23 Costs of testing for, handling, remediating, or abating asbestos and other hazardous materials or electromagnetic fields.

25.24 Costs to clean up Landlord's construction projects.

25.25 Costs to remove CFC's or accomplish other future retrofitting driven by as-yet-unknown future environmental concerns, or to purchase environmental insurance.

25.26 ADA compliance costs, particularly where triggered by the operations of other tenants.

25.27 Other costs caused by the acts or omissions of particular other tenants.

25.28 Y2K compliance costs.

25.29 Next year's newest area of legal concern (for inspiration, check the latest new and improved carveouts from "nonrecourse" treatment in mortgage finance transactions).

26. Options

26.1 Option or right of first refusal and/or first offer to take additional space.

26.2 As a fallback, consider negotiating a wide-open right to sublet excess space until needed (if this works as a business matter).

26.3 For right of first refusal, seek a "second bite at the apple" if Landlord later decides to market the space in smaller pieces than originally contemplated.

26.4 To facilitate future expansion through transactions with other tenants in the building, require Landlord to waive any prohibitions in other leases against assignment or subletting to Tenant, and against any discussions or negotiations contemplating such a transaction.

26.5 Require Landlord to advise on a regular basis of anticipated available space.

26.6 Early termination options, either complete or partial ("shed rights").

26.7 Option to renew term.

26.8 If rent during option term depends on appraisal, try to reserve right to terminate if Tenant disapproves new rent as finally determined.

26.9 Option to purchase.

26.10 Require Landlord to send reminder notices of any upcoming option exercise deadline, but such reminder notices cannot be sent more than ___ days before the deadline. Extend deadline if Landlord delays sending notice.

27. Parking

27.1 Location, number, and pricing (or assurance of no fee) for parking spaces (reserved and unreserved). Attach diagram as Exhibit.

27.2 Parking for bicycles and motorcycles.

27.3 If Landlord expands building, parking ratio should not worsen.

27.4 Prohibit nearby high parking uses (e.g., movie theater, trade school, restaurant).

27.5 Location/quantity of employee parking. Landlord must enforce employee parking restrictions against other tenants.

27.6 Landlord must maintain and clear snow from parking area.

27.7 Lighting of common areas and parking (especially important to a 24-hour operation).

27.8 Right to require Landlord to install fence to segregate parking lot from adjacent heavy-usage facilities.

28. Percentage Rent

28.1 Rent abatements or other rent reductions should not reduce percentage rent breakpoints (to avoid anomaly where breakpoint drops because of negotiated rent abatements, resulting in increased percentage rent payments equal to such abatements).

28.2 Annualize first year gross sales with seasonal adjustment, to prevent excessive percentage rent if Tenant opens in peak season.

28.3 Affirmatively state that parties do not intend to establish partnership or joint venture.

28.4 Depending on type of business, exclude or sub-

tract certain items from "gross sales" (e.g., sales made by concessionaires, sales not in ordinary course of business, refunds, and returns). Avoid any implication of percentage rent payable on sales via catalog or Internet.

28.5 Time limits on Landlord's right to audit.

28.6 Negate any obligation to operate or to "maximize" revenues. No representation as to volume of business.

28.7 Landlord will preserve confidentiality of sales information, etc., provided by Tenant.

28.8 Lower percentage rate for particular activities or categories of sales.

28.9 Any free rent period covers percentage rent too.

29. Quiet Enjoyment

29.1 Beware of "quiet enjoyment" conditioned on no default. Tenant would prefer to condition "quiet enjoyment" only upon lease not having been terminated because of Tenant's default.

29.2 Abate rent if sidewalk shed impairs access or visibility. Limitation on sidewalk sheds (duration, minimum clearance, frequency, purpose).

30. Real Estate Tax Escalations

30.1 Exclude:

(a) Penalties or interest;

(b) Excise taxes on Landlord's gross or net rentals or other income;

(c) Income, franchise, transfer, gift, estate, succession, inheritance, capital stock taxes; and

(d) Taxes on land held for future development ("outparcels").

30.2 Exclude any increases in real estate taxes resulting from:

(a) Construction during Lease if not done for the benefit of Tenants generally or if it does not create additional proportionate rentable area;

(b) Termination of interim assessment;

(c) Loss or phase-out of abatement or exemption; and

(d) If possible, sale of the property.

30.3 Watch definition of "substitute or additional taxes" that become Taxes. Make sure they are truly appropriate for pass-through to Tenant.

30.4 For base year, review Landlord's tax protest filing to understand Landlord's theories for low value. Will those theories inevitably vanish next year, producing built-in increases? As an extreme case, suppose a Lease provides for "free rent" in the first year (also base year for taxes). Next year the "free rent" will go away. If, under local assessment rules, the first year's free rent produces an artificially low assessment that year, then the assessment may automatically rise by the same amount in future years. Tenant may then over the years pay extra tax escalation payments far beyond the value of the free rent.

30.5 Require Landlord to pay in installments as Taxes are due.

30.6 Exclude all "Taxes" from operating expense escalations.

30.7 Landlord should pay special assessments in installments and treat as Taxes only to extent within Lease term.

30.8 Right to require Landlord to contest, or if Landlord does not, right to contest Taxes in Tenant's or Landlord's name. Check statutory and case law requirements on who may contest taxes. For example, in New York a tenant of only part of a building may lack standing to contest taxes.

30.9 If any tax abatement or deferral program might be available, Landlord should agree to apply for it.

30.10 Landlord must promptly pay Tenant its share of tax refunds even after Lease expires, and must notify Tenant of any such refunds promptly when received. If Landlord fails to do so, or must be reminded, then Landlord must pay a high interest rate or some multiple of amount due Tenant.

31. Representations and Warranties

31.1 Utility location and capacity available at premises.

31.2 Submetering equipment in place for all or specified utilities.

31.3 No asbestos or other hazardous materials in premises. Landlord to provide any document required to confirm this, for purposes of building permit applications (e.g., New York City ACP-5 showing non-asbestos job).

31.4 Attach true and correct copy of certificate of occupancy as Exhibit.

31.5 Tenant's use for any and all purposes permitted by Lease will not violate certificate of occupancy, applicable law, or other leases or agreements of Landlord.

31.6 Compliance with Americans with Disabilities Act.

31.7 Landlord has paid or will pay all impact fees and hookup charges.

31.8 Zoning of property and legality of permitted use.

31.9 All building systems are Y2K-compliant.

31.10 No existing violations.

31.11 All brokerage fees and commissions for Lease have been paid. (If Tenant cares about its relationship with broker, Tenant may want right to offset rent and pay broker if Landlord does not.)

31.12 Landlord's entry into Lease does not violate any rights of third parties (e.g., prior Tenant that was evicted from the space).

31.13 Each party represents and warrants duly authorized, executed and delivered, valid and binding.

32. Requirements of Law

32.1 Landlord responsible for compliance if applies generally to property (e.g., "mere office use").

32.2 Landlord responsible if new legal requirement was not caused by Tenant and failure to comply will impair Tenant's alterations or use in manner contemplated by Lease.

32.3 Landlord must cooperate in obtaining permits and must sign permit applications and provide necessary information.

33. Restrictions Affecting Other Premises

33.1 Radius restrictions must not affect Tenant's ability to relocate existing stores within a mall where Tenant is already doing business.

33.2 Carve out any locations acquired in any future acquisition of a pre-existing business.

33.3 Radius restrictions against Landlord? Any other restrictions on Landlord's activities?

33.4 Exclusive use, both in existing structure and in any future expansions in which Landlord has any interest (or for which Landlord or an affiliate presently controls site). Landlord will not enter into REA or otherwise facilitate any nearby construction by others unless counterparty agrees to honor Tenant's exclusivity.

33.5 Restrict type of retail tenancies or other uses in building. Issues of density, traffic, parking, demographics, circulation, quality, likelihood of picketing or other controversy.

33.6 Prohibit flea markets, carnivals, petting zoos, clothing drop-off boxes, kiosks, drive-up booths, etc., elsewhere on Landlord's property, including common areas.

33.7 Landlord may not interfere with traffic patterns in the parking lot without Tenant's consent.

33.8 Restrictions on location and type of additional construction by Landlord (e.g., on "outparcels").

33.9 Minimum operating hours for other tenants.

33.10 Limit Landlord's activities and installations (e.g., kiosks) on sidewalk (or common area of mall) within a specified area near premises.

33.11 Landlord may not change use of overall building (e.g., change shopping center into a telecommuncations facility or a call center).

34. Rules and Regulations

34.1 Require nondiscriminatory enforcement.

34.2 Landlord must enforce against other tenants if requested by Tenant.

34.3 New rules should be reasonable and of the

type customarily imposed for similar buildings.

34.4 New rules require Tenant's approval.

35. Sale of Property

35.1 Purchaser should assume all Landlord obligations, including obligation to return security deposit and refund any previous rent overcharges.

35.2 Require Landlord to transfer security deposit to purchaser of property, with written confirmation of receipt. Right to offset rent if it is not transferred.

35.3 Right of first refusal or first offer.

36. Security Deposit

36.1 Interest earned for credit of Tenant.

36.2 Right to substitute a letter of credit or other alternative form of security.

36.3 Promptly return after Lease expiration.

36.4 Reduce security deposit over time if no defaults.

37. Services (Miscellaneous) Provided by Landlord

37.1 Abate rent if windows are bricked up or covered over for any reason.

37.2 Landlord obligation to install sunscreen film on windows if needed.

37.3 Right to use existing cabling and other systems; Landlord cannot damage or remove.

37.4 Performance standards or criteria for any Landlord services (e.g., comparable to a basket of other buildings).

37.5 Right to require Landlord to replace management company or leasing broker if specified standards are not being met.

37.6 Tenant right to self-help (perhaps using only approved contractors specified on Exhibit to Lease) if Landlord fails to provide required services.

37.7 Promotional association, fund, other similar activities by Landlord.

37.8 If Tenant is not in occupancy, should receive credit for variable costs saved by Landlord (e.g., cleaning). (Such a provision appears in General Services Administration leases but rarely if ever in commercial leases.)

37.9 Location, arrangements, timing, fees (none) for Tenant's receipt of deliveries.

38. Signage and Identification

38.1 Signage requirements (lobby, floor lobbies, elevators, exterior entry area, rooftop, common areas, other exterior), for Tenant and any subtenant. Tenant's right to make future changes in its signage.

38.2 Limitations and requirements relating to other signage and Landlord's signage program (including future changes).

38.3 Right to have top position on pylon and largest sign.

38.4 Name of building. And Landlord can't name building after Tenant or competitor of Tenant.

38.5 Directory entries for Tenant and any subtenant or assignee.

39. Subordination and Landlord's Estate

39.1 Landlord to represent it owns fee estate, with copy of deed attached as Exhibit.

39.2 Landlord must provide nondisturbance agreement from mortgagee(s) and ground lessor(s).

39.3 If lease is "subordinate," try to condition this "subordination" upon Landlord's having delivered specified nondisturbance protections from holders of senior estates. Limit number or type of mortgage(s). Tenant cannot be obligated to "subordinate" to any mortgage if such mortgage is subordinate to any mortgage or other lien that has not provided Tenant with nondisturbance protections. (Foreclosure on that latter, more senior, mortgage could wipe out both the more junior mortgage and the Tenant.)

39.4 Where Tenant leases all or majority of space or an entire building, consider requiring Landlord to covenant that annual debt service payable under any fee mortgage will not exceed specified amount reflecting rent under Lease.

39.5 Required form of nondisturbance agreement. Landlord to reimburse Tenant for legal fees of subsequent negotiations with mortgagees. Remember: future Lease amendments (and any negotiated termination) will require mortgagee's consent.

39.6 Avoid any covenant to be bound by (and do nothing to violate) any present or future mortgages. Such a provision may amount in part to an "end run" around negotiated nondisturbance rights.

40. Tenant's Remedies Against Landlord

40.1 Tenant may cure Landlord defaults (after notice), set-off cost of cure (with interest) against rent, terminate Lease. Similar remedies, as appropriate, if any representation or warranty made by Landlord is inaccurate.

40.2 Abate rent if essential building services are disrupted for longer than specified period.

40.3 Emergency self-help rights if a water leak, power failure, or communications failure in the building imperils Tenant's computer systems or other mission-critical equipment or operations.

40.4 Set-off against rent for claims against Landlord and/or any judgment against Landlord returned unsatisfied (or, if Landlord is in bankruptcy, then based upon mere filing of a claim in the bankruptcy).

40.5 Tenant's payment of rent with knowledge of Landlord default does not waive default.

40.6 Right to terminate Lease if any rent abatement continues more than ___ days.

41. Use

41.1 Try for "any lawful use" or at least "any lawful retail/office use." Build in flexibility on future change of use, if any possibility exists of a change in circumstances (e.g., likely technological obsolescence of Tenant's business).

41.2 Describe permitted use generically so as not to restrict future use by a subtenant or assignee (e.g., "medical or other health practitioner's offices" or "executive offices" rather than "podiatrist's offices" or "main headquarters of XYZ Corp.").

41.3 Include incidental uses (e.g., ATM machines, food, training, duplicating, ancillary retail, gym, day care, other amenities).

41.4 Negate any duty to open or operate. If Landlord counters with request for recapture right, carve out permitted closures (e.g., force majeure, alterations, inventory-taking). Limit Landlord's decision period on any recapture. When recapturing, Landlord should reimburse Tenant's unamortized cost of furniture, furnishings, equipment, and improvements. Any recapture notice by Landlord must be accompanied by mortgagee consent to be effective.

41.5 Satellite dish(es) and antenna(s) on roof, either at no charge or for a defined or ascertainable charge. Ability to relocate if necessary to improve performance. Protection against interference caused by future installations. Connection from rooftop to Tenant's space. No duty to remove at end of term.

41.6 Any need for Tenant to use sidewalk or exterior of building for special events, temporary installations, or other purposes? Exterior loudspeakers? Exterior laser or light displays?

41.7 Delete any provision that Tenant's use will not conflict with other leases or mortgages.

41.8 Right to use building common facilities, such as cafeteria or health club, and common bathroom if premises does not include bathroom. Minimum operating hours and standards.

41.9 Exclusive use of terraces or other outdoor space or facilities. (Landlord's obligation to maintain and clean.)

41.10 Twenty-four hour access, 365 days a year, via elevator or (if elevator is broken) stairway.

41.11 Use of fire stairways for access between floors.

41.12 Tenant reception, security, other facilities in lobby.

41.13 Storage areas ancillary to Tenant's use of premises.

42. Utilities, Generally

42.1 Landlord to bring all utilities to entry point on perimeter of premises.

42.2 Emergency generator and use of fuel tank. Allocation of ownership, responsibilities, and costs between Landlord and Tenant. No duty to remove at end of term.

42.3 Minimum prior notice before any scheduled electrical shutdown or testing of emergency generators; limitation on frequency.

42.4 T-1 lines, multiple points of entry, other special telecommunications requirements, including cabling and connections from service provider to premises.

42.5 Right to select carrier/utility for competing local phone service, telecommunications, electricity.

43. Miscellaneous

43.1 No duty to pay rent until particular anchor(s) are open for business; specified construction shown on site plan is complete, including common areas; Landlord has paid Tenant agreed construction cost reimbursement.

43.2 Limitation of liability of Tenant or Tenant's general partners.

43.3 If Lease requires Tenant to give Landlord any financial or other sensitive information about Tenant, then Landlord must keep it confidential.

43.4 If compensation will be paid for inconvenience caused by work on an adjacent or nearby site, who receives it?

43.5 Criteria and specifications for Landlord's initial construction of building, common areas, parking lot, etc.

43.6 If estimated cost of any capital improvement or replacement for which Tenant is responsible exceeds $_____ (perhaps varying based on remaining term of Lease), then Tenant may Terminate lease or require Landlord to contribute to cost based on expected useful life of improvement or replacement vs. remaining term of Lease.

43.7 Does any other relationship exist between Landlord and Tenant (e.g., purchase and sale of a business) that might give rise to Tenant claims against Landlord, as to which Tenant should be entitled to offset against rent?

43.8 Right to terminate if change in zoning or other law (or inability to obtain or maintain necessary permits) prevents or impairs Tenant from operating its business, in whole or in part.

43.9 Right to terminate Lease (or pay only percentage rent) if specified other tenant(s) shut down.

43.10 In the event of a strike, Landlord will establish separate gate for striking union to minimize any interference with Tenant. If Landlord or any other tenant uses a labor force that causes disharmony with Tenant's labor force, then Landlord shall remove the former labor force from the building.

44. Due Diligence

Caveat: As noted above, this Checklist should not be regarded as exhaustive or complete. That is particularly true as it applies to the following list of "due diligence" that Tenant's counsel may wish to perform.

44.1 Existing condition of premises, including any personal property. Should Landlord be required to remove—or be required to leave in place—any existing improvements?

44.2 Title search and review, or an on-line search to confirm ownership of the fee (easily available in many areas).

44.3 Calculation of actual square footage and scope of premises. Particularly for a full floor Tenant, do all of Landlord's exclusions of space from the "premises" make sense? For example, should the elevator lobby be part of the premises?

44.4 If Landlord's agent signs Lease (or any future amendment or estoppel certificate), require copy of written authority to sign.

44.5 Any additional consents or approvals needed? Especially important where Landlord is governmental entity or charity.

44.6 Do any unusual uses require special measures for permits (e.g., liquor licenses, sidewalk cafes)? What other permits may be required, such as public assembly?

44.7 Adequate ventilation capacity and pathways?

44.8 Due diligence issues related to escalations:

(a) What capital projects are underway or contemplated today? Does Tenant agree with how Landlord plans to treat them?

(b) Historical amounts for operating expenses and taxes, including review of underlying financial information and documents.

(c) Investigate any built-in future increases in tax assessment (e.g., termination of interim assessment, upcoming loss or phase-out of existing abatement or exemption).

44.9 Available capacity for telecommunications and other utilities?

44.10 Tenant's network and other technological requirements.

44.11 Lines of sight for rooftop satellite dish or antenna.

44.12 Landlord's approval requirements (lenders, ground lessors, etc.).

44.13 Present occupancy of premises to be leased? Practical likelihood of delays in possession.

44.14 Disposition of premises currently occupied by Tenant.

45. Preliminary Arrangements and Considerations

45.1 Brokerage agreement and commission negotiations.

45.2 Term sheets and letters of intent—early involvement by attorneys, to try to raise and resolve significant issues while it is relatively easy (and inexpensive) to do so.

45.3 Availability of tax incentives, rebates, etc. Timing requirements and pitfalls for any application (e.g., must sometimes apply before "committed" to the new location).

45.4 During Lease negotiations, Landlord agrees to remove space from market and not negotiate with other parties for specified period. Break-up fee? Reimbursement of expenses if deal does not go forward?

45.5 Selection, coordination, and contract negotiations with Tenant's other professionals: architect, broker, engineer, facilities consultant, signage designer, space planner, etc.

45.6 Tenant's internal approval procedures.

46. Lease-Related Closing Documents

46.1 Memorandum of Lease. Mention any "exclusive use" rights and other Lease provisions that restrict Landlord's activities on other premises. Record against all affected real property.

46.2 Nondisturbance agreement. See "lender's form" as soon as possible, so it can be negotiated along with the Lease.

46.3 Recognition agreement and estoppel from ground lessor.

46.4 Opinion of Landlord's counsel?

46.5 Calculation and allocation of transfer taxes, if any, on creation of Lease (including treatment of any transfer of personal property).

46.6 Title insurance.

46.7 Unusual security arrangements—letters of credit, delivery of marketable securities, etc.—structure and document along with the Lease as needed.

46.8 Consider separate insurance coverage for valuable leasehold.

46.9 Landlord's approval of plans and specifications for initial work (if not attached as Exhibit to Lease).

46.10 Lease exhibit consisting of diagram of premise—review and confirmation by broker, Tenant, other advisers.

Department of Taxation and Finance Rulings on Commercial Credit Line Mortgages

By Michael J. Berey

The New York State Department of Taxation and Finance (the "Department") recently issued an Advisory Opinion and a Technical Services Bulletin concerning the application of § 253-b of the Tax Law to "credit line mortgages" which secure at any time a principal amount which is less than $3 million.

Section 253-b was amended effective November 6, 1996 by Chapters 489 and 490 of the Laws of 1996 to afford commercial credit line mortgages securing less than $3 million the benefits made available in 1985 under § 253-b to mortgages on real property principally improved or to be improved by a one to six family, owner-occupied residence or dwelling. Under the statute, "no further tax shall be payable on advances and readvances by the lender under the recorded primary mortgage, provided such advances or readvances are made to the original obligor or obligors named in such recorded primary mortgage."

Under this Section, a "credit line mortgage" is defined to include

> any mortgage or deed of trust, other than a mortgage or deed of trust made pursuant to a building loan contract as defined in Section 13 of the lien law, which states that it secures indebtedness under a note, credit agreement or other financing agreement that reflects the fact that the parties reasonably contemplate entering into a series of advances, or advances, payments and readvances, and that limits the aggregate amount specified in such mortgage or deed of trust.[1]

A reverse mortgage under Real Property Law §§ 280 and 281 is not a credit line mortgage for the application of § 253-b.

The Department's position on the application of § 253-b to such commercial credit line mortgages has been anticipated to resolve a number of issues. Would, for example, a credit line mortgage securing less than $3 million which was a part of a larger credit facility have the benefit of the statute? Could a recorded credit line mortgage be "spread" to encumber other real property? Might a credit line mortgage not made pursuant to a formal building loan agreement be used to fund improvements to real property? Many of the questions that have been posed are addressed in the Bulletin and the Advisory Opinion discussed below.

On June 25, 1999, the Department's Taxpayer Services Division, by its Technical Services Bureau, issued TSB-M-99(1)R entitled "Application of the Mortgage Recording Tax to Commercial Credit Line Mortgages." The Department, in that Bulletin, has taken the following positions on § 253-b.

1. A revolving credit mortgage for $3 million or more recorded prior to November 6, 1996, the date on which Chapters 489 and 490 of the Laws of 1996 took effect (the "Effective Date"), cannot be reduced to be less than $3 million and receive the benefits of § 253-b.

2. A mortgage securing both a credit line of less than $3 million and also a non-revolving credit obligation will not receive the benefits of § 253-b. The Department has informally advised this author that the mortgage cannot secure both revolving and non-revolving obligations, regardless of the maximum aggregate principal amount that could be secured between them at any one time.

3. A mortgage securing a credit line of less than $3 million will not receive the benefits of § 253-b if the secured obligation is part of an overall credit facility exceeding $3 million.

4. Separate credit line mortgages, on even separate and distinct real property interests, having the same or related mortgagors and being part of the same or related transactions will be aggregated to determine if the under $3 million cap is exceeded.

5. A credit line mortgage, resulting from the severance of an *unsecured* term loan of any amount into a credit facility of less than $3 million and a term loan of any amount, can be recorded on or after the Effective Date and obtain the benefits of § 253-b.

6. On the transfer of real property subject to the lien of a credit line mortgage on which mortgage tax is paid by the grantee, the grantee cannot obtain the benefit of the statute for any future reloans or readvances. § 253-b limits its benefits to the original obligor.

7. The same borrower can with the same lender enter into a later, separate credit line mortgage on different property securing a distinct credit agreement so long as the sec-

ond transaction was not contemplated at the time of the first. This would not be the case, and the benefit of the statute would not be afforded, if the mortgages secured $3 million in the aggregate at any one time and were spread and consolidated, cross-defaulted or cross-collateralized.

The two mortgage transactions would be deemed related, treated as a single mortgage and aggregated when a different lender provides the second credit line mortgage loan and simultaneously takes the other, prior credit line mortgage by assignment, regardless of whether the mortgages are spread and consolidated, cross-defaulted or cross-collateralized.

8. A credit line mortgage can be spread to encumber other real property, with the prior real property mortgaged being released, even when the mortgage is assigned to an unrelated mortgagee. However, the benefits of § 253-b will not be afforded when there is a change in the identity of the obligor, even if the new mortgagor is controlled by the same person or entity. The statute provides that advances and readvances must be "made to the original obligor or obligors named in such recorded primary mortgage."

9. The benefits of § 253-b are not available to a credit line mortgage resulting from the modification of a non-credit line mortgage, even when the original mortgage was recorded after the Effective Date. According to the TSB, the benefits of the statute are to be applied to newly created credit line mortgages recorded after the Effective Date, not credit lines resulting from the modification of an existing recorded conventional mortgage. This position applies as well to credit line mortgages on real property principally improved or to be improved by a one to six family, owner-occupied residence or dwelling.

An Advisory Opinion was also issued by the Technical Services Bureau on April 7, 1999[2] in response to a request for the Department's position on whether a credit line mortgage under § 253-b includes a mortgage executed to secure the repayment of advances and readvances made either (a) to reimburse a borrower for expenses incurred for improvements made to real property or (b) to enable such improvements to be made when, in either instance, there is no agreement between the borrower and the lender which includes the borrower's express promise to make an improvement.

As noted above, § 253-b provides that a credit line mortgage does not include "a mortgage or deed of trust made pursuant to a building loan contract as defined in subdivision thirteen of section two of the lien law." Lien Law § 2(13) defines a "building loan contract" as "a contract whereby a party thereto [the lender] in consideration of the *express promise* of any owner to make an improvement upon real property, agrees to make advances to or for the account of such owner to be secured by a mortgage on such real property." (emphasis added)

In its Advisory Opinion, the Department takes the position that a mortgage executed to secure the repayment of advances and readvances made either to fund or to reimburse a borrower for the making of improvements upon real property will not qualify as a credit line mortgage under § 253-b, regardless of whether a formal building loan agreement is filed. It holds that any limiting conditions in the mortgage or related loan documents relating to the use of the funds will constitute an "express promise" of the borrower to make improvements to real property, and the mortgage will therefore be deemed to have been made pursuant to a building loan contract. This position would also apply to credit line mortgages on real property principally improved or to be improved by a one to six family, owner-occupied residence or dwelling.

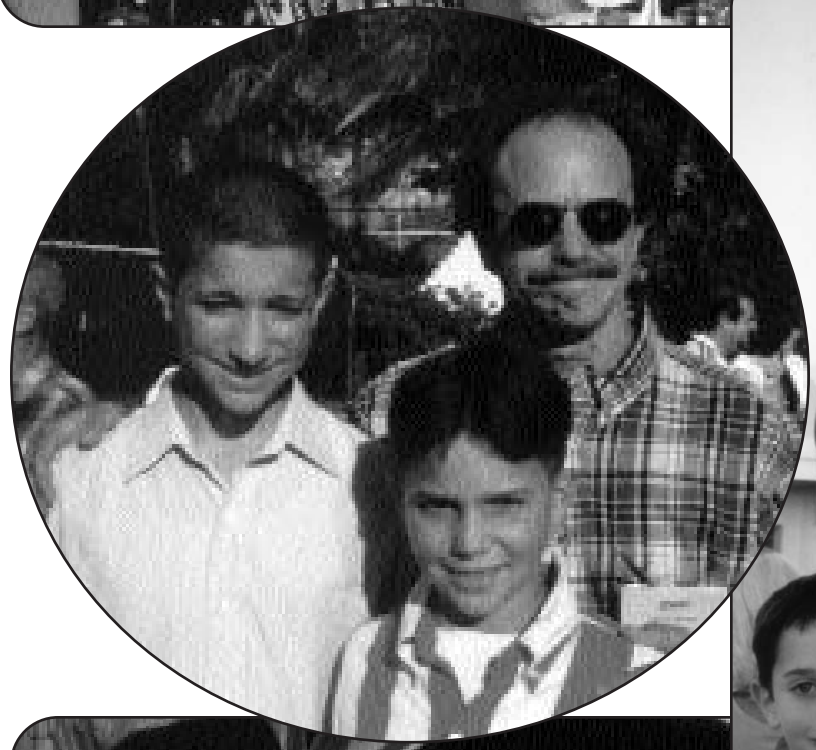
The Department has set forth its position on how to apply § 253-b to commercial credit line mortgages securing less than $3 million. Among other things, clearly a commercial credit line mortgage may not be used to fund improvements, spread to a different parcel of real property and there also be used to fund construction.

Endnotes

1. Section 281 of the Real Property Law affords lien priority for future advances made within 20 years of the recording of a "credit line mortgage," as defined in that section. Under Chapter 183 of the Laws of 1999, a reverse mortgage loan is not subject to the 20 year limitation.
2. Petition No. M981215A.

Michael J. Berey received his J.D. from Boston College Law School and is admitted to both the New York and Massachusetts bars. He is Senior Underwriting Counsel and Senior Vice-President for the First American Title Insurance Company of New York. He has published articles in the *New York Law Journal* and the *N.Y. Real Property Law Journal*, and has lectured on title insurance-related subjects to real estate and title insurance groups. Mr. Berey is a member of the Association of the Bar of the City of New York and NYSBA's Real Property Law Section. He authors and maintains a web site for New York real estate counsel at http://www.titlelaw-newyork.com.

The Fun Side of Real Property



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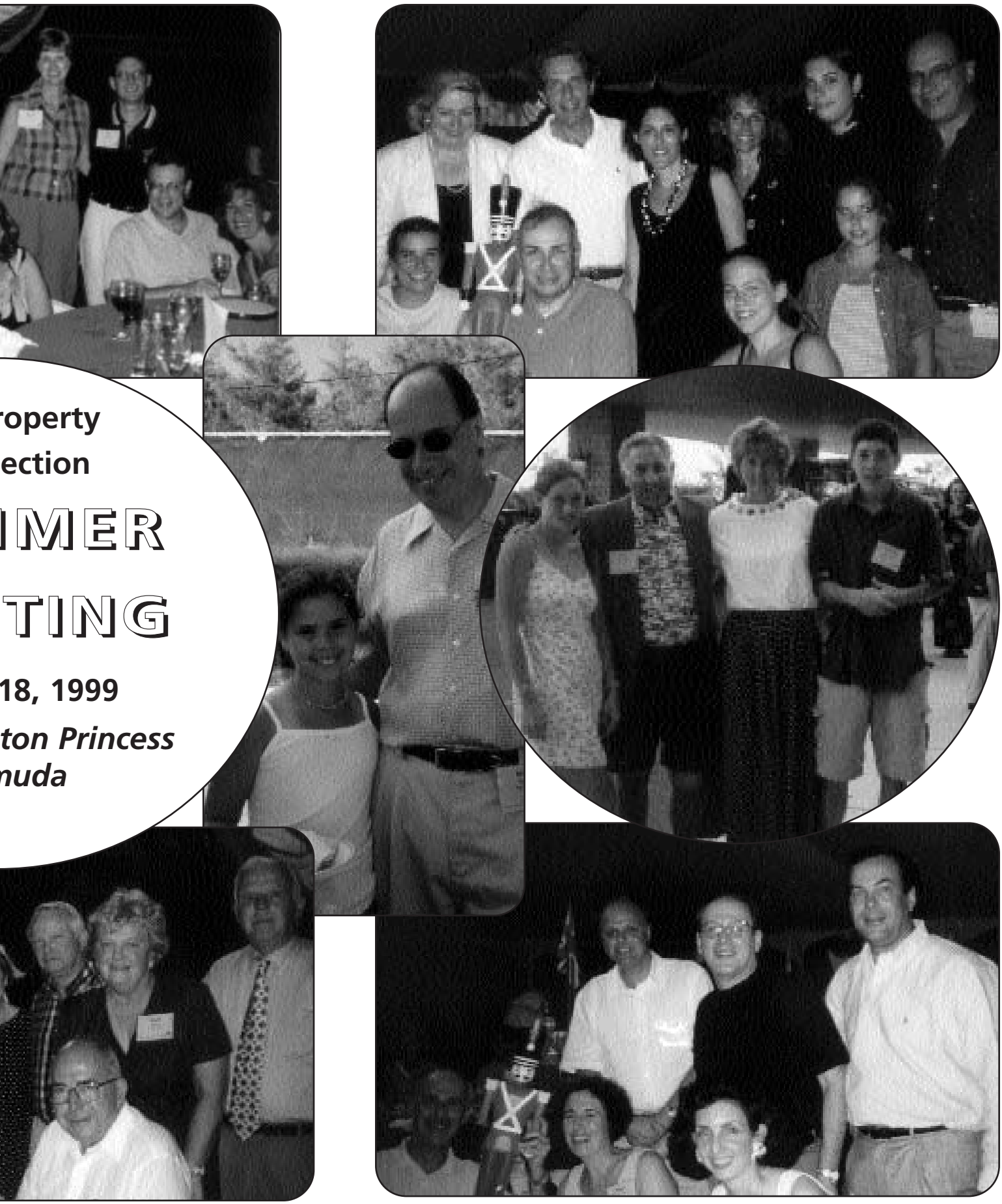
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When Co-Insureds Go to War

By Arthur G. Jakoby

What is a title company to do when it insures title in the name of two people as co-owners of a property and then one owner sues his co-owner claiming that the co-owner has no right to title? Such a situation recently presented itself in *Kachel v. Chicago Title Insurance Co.*, United States District Court, Southern District of New York, Index. No. 98 Civ. 5486.

Kachel concerned a family feud between a father and son. A son who, together with his wife, was buying a home, went to his father and asked him for financial help. The father agreed to give his son $15,000 towards the purchase of the house and—because his son was not credit worthy and could not obtain a mortgage—agreed to co-sign a promissory note so that the son could secure financing. At the closing, the mortgagee bank required that the father's name be on the deed. Within a few months of the closing the son had a fight with his father and the two stopped talking to each other. Several months later when the son went to sell his house the father, as co-owner of the house, advised his son that he would not execute a sale deed unless the son agreed that the sale proceeds would be divided among the two of them. The son thereafter sued his father and sought, among other things, a declaratory judgment that although his father's name was on the deed, his father had no right, claim or interest in the property. Since Chicago Title had insured title in the name of the son, the son's wife and the father, the father asserted a claim against Chicago Title and sought the appointment of counsel to defend him in the action where his son was trying to divest his interest in the insured premises. After Chicago Title denied coverage the father sued Chicago Title and sought a declaratory judgment compelling Chicago Title to defend his title.

Chicago Title immediately moved for summary judgment. Chicago Title argued, among other things, that the essence of the son's claim was not really an attempt to take the father's name off of the deed and divest him of his ownership interest, but rather an attempt to determine what title rights, if any, the father had by having his name on the deed. Chicago Title argued that the heart of the son's claim was that, although his father's name was on the deed, there was never any "intent" that the father would be a "real" owner of the property. After all, according to the son's version of the facts, the only reason title was put in his father's name was to satisfy the credit concerns of the mortgagee. Therefore, Chicago Title contended that claims concerning the "intent" of the parties, or private agreements relating to ownership, are excluded from coverage under the standard title policy exclusion for claims which arise because they were "created, allowed or agreed to by the insured."

On an issue of first impression, Chicago Title also argued that a title policy does not and cannot cover ownership disputes between co-insureds. To do so, argued Chicago Title, would put a title company in the precarious position of appointing one set of counsel to represent the plaintiff and another to represent the defendant. And then, no matter who wins, the title company would lose.

The father contended that since Chicago Title had insured title in his name and the heart of his son's allegations was an attempt to strip his interest in the property, there was no question that Chicago Title was required and obligated to defend such a claim. The father argued that the lawsuit against him did not fall within any of the standard exclusions from coverage and thus should be defended by Chicago Title.

John S. Martin, Jr., New York District Court Judge, Southern District of New York held that:

> No matter what the respective rights are among the insureds, none of the insureds obtained insurance against title claims by their co-owners. Rather, they, as do all title insurance purchasers, sought to insure that the property they bought had free and clear title. The risk presented to the Father by the Son's lawsuit is specifically excluded because it stems from an agreement "created, allowed [and] agreed to by [the insureds]."
>
> Finding for the Father would also present a number of public policy problems. First, requiring title companies to defend co-insureds against each other would place the insurance company in the difficult position of representing both sides of a dispute. Beyond the collusive lawsuits such a ruling would encourage, holding for the Father would require all existing title policies to explicitly reference and exclude every prenuptial agreement or any other contract affecting property owned in common. This would dramatically change the nature of title insurance from protection against buying property with clouded

title to general litigation insurance against any assault on the ownership of a particular property.

Accordingly, the Southern District Court reasoned that a title claim by one insured against his co-insured must, by definition, involve a dispute regarding the manner in which title was acquired and such disputes cannot be covered by title insurance because if such disputes were covered, it would lead to the absurd result that even though a title company issued only one policy, it would be required to provide counsel for both sides of the same dispute! And, thus, it would not matter whether plaintiff won or defendant won—the title company, essentially litigating against itself, would be saddled with paying for the litigation costs of both plaintiff and defendant and would have to pay damages to the losing side. Such a result is clearly absurd and is not what is intended by title insurance—a contract of indemnity. Were that the law, the only way for a title insurance company to protect itself would be to require affidavits from co-insureds or take depositions of its prospective insureds prior to issuing a policy to more than one person in order to evidence any oral or written agreements among the co-insureds regarding the intended ownership rights of one co-insured vis-a-vis the other. Such actions are not now taken by title insurance companies because disputes between co-insureds as to the nature of the interests that they each hold vis-a-vis each other, such as the dispute in *Kachel*, are not covered by title insurance.

Arthur G. Jakoby, a partner with Herrick, Feinstein LLP in New York, represents title companies and their insureds in litigation. Herrick, Feinstein was retained by Chicago Title Insurance Co. to represent it in *Kachel v. Chicago Title Insurance Co*. Although *Kachel* filed a notice of appeal following the Court's decision granting Chicago Title summary judgment and dismissing the complaint, the appeal has been withdrawn with prejudice.

The Nassau County Transfer Tax

By Melvyn Mitzner

The New York State legislature has authorized a new statute[1] which enabled the County of Nassau to pass legislation to institute a Nassau County Real Estate Transfer Tax.[2] The Nassau County Legislature enacted a local law, authorizing the transfer tax effective August 15, 1999.[3] The statute is modeled after the New York State Transfer Tax.[4] The tax is on all real estate conveyed after the effective date, August 15, 1999, subject to a "grandfather" provision. The grandfather provision is in effect and exempts any transaction in which there is a binding contract entered into between the grantor and the grantee before August 15, 1999 with a down payment specified in the contract of sale being deposited before August 15, 1999 in a bank account in the name of an escrow agent of the grantor.[5] The tax amount is where the consideration exceeds $500[6] at a rate of $5 for each $500 of consideration or a fractional part thereof. Sometimes the amount can be expresses as $10 per $1,000 or one percent of the gross transfer amount. The correct amount is of course the $5 amount previously stated. The tax is to be paid by the grantor. If the grantor fails to pay then the grantee is responsible.[7] In other words, where the grantor fails to pay the tax there is joint several liability on both the grantor and the grantee.

The tax will be paid with the recording of the deed, lease, etc. on a form designated as NC-584 (Appendix A). The form is called a Nassau County Real Estate Transfer Tax Return.[8] It must be pointed out that if the exemption for a contract of sale entered into before August 15, 1999 is claimed, the County of Nassau has designated an affidavit (Appendix B) to be signed independently by the grantor(s), grantee(s) and the attorneys for both parties. This affidavit would create liability for each of the parties attorneys where none had previously existed.[9]

The consideration means[10] the price actually paid or required to be paid for the Real Property which includes property "swapped." Where the tax cannot be measured in a dollar value the measure of value will be the fair market value of the property which is similar to the New York State Real Property transfer tax. The tax on a creation of leasehold will be the value of the rental and other payments attributable to the use and occupancy of the real property, the same rates apply for a subleasehold.[11] A taxable lease will be (1) where the term of the lease as well as any options to renew exceed 49 years; (2) substantial capital improvements are or may be made by or for the benefit of the lessee and (3) the premises leased is substantially all of the premises. As of the writing of this article we do not know what percentage substantially all of the premises will represent. Under the New York State Transfer Tax, the amount is 90% of the premises.[12]

The definitions of controlling interest are the same as in the New York State Transfer Tax, to wit if the interest in an entity owning real property is a corporation and the interest is either 50% or more of the total combined voting power of all classes of stock or the owning corporation or 50% or more of the capital, profits or beneficial interest in the corporation owning the real property. If the entity is a partnership, association, trust or other entity (presumably a Limited Liability Company) 50% or more of the capital profits or beneficial interest must be transferred.[13]

It must be pointed out that the statute does *not* contain the continuing lien deduction as is set forth in the New York Real Property Tax.[14]

The exemptions are in part similar to those of the State of New York.[15] They are where the State of New York or any of its agencies, instrumentalities, political subdivisions, public corporations, the United Nations, the United States and any of its agencies and instrumentalities are the grantors, then they are exempt but the grantee is not exempt and the grantee pays the tax. But where the above are the grantees, then the transaction is exempt. Other exemptions are transfers which secure a debt or other obligation, deeds which are corrections, confirmations, modifications or supplements or prior conveyances, deeds given as bonified gifts and other conveyances without consideration, tax deeds, conveyances which effect a mere charge or identity, deeds or partition, bankruptcy deeds and contracts of sale without the use or occupancy of such premises being sold.

The state authorized the County of Nassau to decide in its bill[16] what the apportionment test would be where property was partially in Nassau County and partly in an adjoining or other county. The test is the test set forth under the tax law,[17] to wit, the use of assessment rolls in determining the apportionment.

The exemption for Cooperative Housing Corporation transfers is also utilized in this statute. A partial exemption or credit is given to the sponsor of a cooperative residential unit for the proportional amount of the transfer tax paid in the original conveyance to the cooperative corporation and the consideration for the unit conveyed shall exclude the value of any liens on the real estate.[18] The formula is the total unpaid principal under the mortgage times a

fraction, the numerator of which is the number of shares of stock conveyed in the cooperative transfer being done at that moment and the denominator of which is the total number of shares of stock in the cooperative.

This tax has a sunset provision, to wit, the tax will expire on January 31, 2001.[19]

The statute further states that besides fee and leasehold rights being taxable, that air rights, development rights or rights to receive rents and profits are taxable.[20]

The county is allowed to develop rules and regulations to administer the tax. As of this writing, such rules have not been issued.

Conclusion

The tax went into effect on August 18, 1999 at a rate of $5 per $500 and expires January 31, 2001. The tax is collected by the county clerk on recording with the forms necessary to record.

Endnotes

1. 1999 N.Y. Laws ch. 407, which enacted article 31-E of the Tax Law.
2. Article 31-E is entitled Tax on Real Estate Transfers in the County of Nassau. The statute starts with the § 1449-aaa and ends with § 1499-ooo.
3. Title 34 of the Miscellaneous Laws of the County of Nassau, County of Nassau. County of Nassau Local Law 697 of 1999.
4. Article 31 of the Tax Law of The State of New York.
5. N.Y. Tax Law § 1449-eee, art. 31-E.
6. N.Y. Tax Law § 1449-bbb, art. 31-E.
7. N.Y. Tax Law § 1449-ddd, art. 31-E.
8. N.Y. Tax Law § 1449-ccc, art. 31-E.
9. The form is called NC-6-5 Exemption from Real Estate Transfer Tax Affidavit.
10. N.Y. Tax Law § 1449-aaa, subdivision 4, art. 31-E.
11. N.Y. Tax Law § 1449-aaa, subdivision 4(a) and 4(b), art. 31-E.
12. N.Y. Real Estate Tax Regs. § 575.7(3)(b).
13. N.Y. Tax Law § 1449-aaa, subdivision 4(c), art. 31-E.
14. See §§ 1401, 1402, 1405-B of the Tax Law of the State of New York and § 575.1(d)(1) of the Regulations for New York State Transfer Tax. The exemption for New York State Transfer Tax will not include any lien (mortgage) or encumbrance remaining at the time of sale (conveyance) where the conveyance is a one, two or three family house or individual, residential condominium unit or where the consideration for the conveyance is $500,000 or less. It is believed that this section was omitted from the statute.
15. N.Y. Tax Law § 1449-eee, art. 31-E.
16. See 1999 N.Y. Laws ch. 407, Tax Law § 1449-aaa to § 1449-ooo, art. 31-E.
17. Section 260 first paragraph of the Tax Law of the State of New York states as follows:

    > When the real property covered by a mortgage is situated in more than one tax district, the state tax commission shall apportion the tax paid on such mortgage between the respective tax districts upon the basis of the relative assessments of such real property as the same appear on the last assessment-rolls. If, however, the whole or any part of the property covered by such a mortgage is not assessed upon the last assessment-roll or rolls of the tax district or districts in which it is situated, or is so assessed, as a part of a larger tract, that the assessed value cannot be determined, or if improvements have been made to such an extent as materially to change the value of the property so assessed, the tax commission may require the local assessors in the respective tax districts, or the local assessors in the respective tax districts, or the mortgagor, or mortgagee, to furnish sworn appraisals of the property in each tax district, and upon such appraisals shall determine the apportionment. If such mortgage covers real property in two or more counties, the tax commission shall determine the proportion of the tax which shall be paid by the recording officer who has received the same to the districts entitled to share therein. When any recording officer shall pay portion of a tax to the recording officer of another county, he shall forward with such tax a description sufficient to identify the mortgage on which the tax has been paid, and the recording officer receiving such tax shall note on the margin of the record of such mortgage the fact of such payment, attested by his signature. The tax commission shall make an order of determination and apportionment in respect to each such mortgage and file a certified copy thereof with the recording officer of each county in which a part of the mortgaged real property is situated.

18. N.Y. Tax Law § 1499-ggg(1), art. 31-E.
19. N.Y. Tax Law § 1499-bbb, art. 31-E.
20. N.Y. Tax Law § 1499-aaa(6), art. 31-E.

Melvyn Mitzner is Senior Vice President and Chief Underwriting Counsel for LandAmerica Financial Group, Inc., Commonwealth Land Title Insurance Company and Lawyers Title Insurance Corporation.

APPENDIX A

NC-584

COUNTY OF NASSAU
REAL ESTATE
TRANSFER TAX RETURN

Recording Office Time Stamp

See instructions (NC-584-I) before completing this form. Please print or type

Schedule A - Information Relating to Conveyance

GRANTOR	Name (if individual: last, first, middle initial)		Social Security Number
☐ Individual ☐ Corporation ☐ Partnership ☐ Other	Mailing Address		Social Security Number
	City	State / Zip Code	Federal Employer ID #
GRANTEE	Name (if individual: last, first, middle initial)		Social Security Number
☐ Individual ☐ Corporation ☐ Partnership ☐ Other	Mailing Address		Social Security Number
	City	State / Zip Code	Federal Employer ID #

Location and description of property conveyed

Tax Map Designation				Address	City/Village	Town	County
District	Block	Lot	Unit				

Type of property conveyed (Check applicable box)

☐ 1 -3 Family House
☐ Residential Cooperative (see Residence on reverse side)
☐ Residential Condominium
☐ Vacant Land
☐ Commercial/Industrial
☐ Apartment Building
☐ Office Building
☐ Other

Date of Conveyance: Month | Day | Year

Percentage of real property conveyed which is residential real property: ____ % (See Instructions)

Condition of conveyance (Check all that apply)

☐ A - Conveyance of fee interest
☐ B - Acquisition of a controlling interest (state percentage acquired _____ %)
☐ C - Transfer of a controlling interest (state percentage acquired _____ %)
☐ D - Conveyance to cooperative housing corporation
☐ E - Conveyance pursuant to or in lieu of foreclosure or enforcement of security interest (attach TP-584-I, Schedule E)
☐ F - Conveyance which consists of a mere change of identity or form of ownership or organization (attach TP-584-I, Schedule F)
☐ G - Conveyance for which credit for tax previously paid will be claimed (attach TP-584-I, Schedule G)
☐ H - Conveyance of cooperative apartment(s) (see Residence on reverse side)
☐ I - Syndication
☐ J - Conveyance of air rights or development rights
☐ K - Contract assignment
☐ L - Option assignment or surrender
☐ M - Leasehold assignment or surrender
☐ N - Leasehold grant
☐ O - Conveyance of an easement
☐ P - Conveyance for which exemption from transfer tax is claimed (complete Schedule B, Part III)
☐ Q - Conveyance of property partly within and partly without the state
☐ R - Other (describe)

Schedule B -Real Estate Transfer Tax Return (Article 31-B of the Tax Law and Title 34 of the Miscellaneous Laws of Nassau County)

Part I Computation of Tax Due

1	Enter amount of consideration for the conveyance (If you are claiming a total exemption from tax, check the exemption claimed box, enter consideration and proceed to Part II)	Exemption Claimed ☐	1
2	Tax $5 for each $500, or fractional part thereof, of consideration on line 1		2
3	Amount of credit claimed (see instructions and attach TP-584-I, Schedule G)		3
4	Total Tax due (subtract line 3 from line 2)		4

Please make checks payable to: Nassau County Clerk

For Recording Officer's Use	Amount Received	Date Received	Transaction Number

NC-884 continued NASSAU COUNTY REAL ESTATE TRANSFER TAX RETURN

Schedule B continued

Part II Explanation of Exemption Claimed in Part I (check any boxes that apply)

The following shall be exempt from payment of the real estate transfer tax:

☐ The State of New York, or any of its agencies, instrumentalities, political subdivisions, or public corporations (including a public corporation created pursuant to agreement or compact with another state or the Dominion of Canada). The United Nations, the United States of America and any of its agencies and instrumentalities.

The exemption of such governmental bodies or persons shall not, however, relieve a grantee from there of liability for the tax.

The tax shall not apply to any of the following conveyances:

☐ Conveyances to the United Nations, The United States of America, the State of New York, or any of their instrumentalities, agencies or political subdivisions (or any public corporation, including a public corporation created pursuant to agreement or compact with another state or the Dominion of Canada.

☐ Conveyances which are or were used to secure a debt or other obligation.

☐ Conveyances which, without additional consideration, confirm, correct, modify or supplement a prior conveyance.

☐ Conveyances of real property without consideration and otherwise than in connection with a sale, including conveyances conveying realty as bona fide gifts.

☐ Conveyances given in connection with a tax sale.

☐ Conveyances to effectuate a mere change of identity or form of ownership or organization where there is not a change in beneficial ownership, other than conveyances to a cooperative housing corporation of the real property comprising the cooperative dwelling or dwellings.

☐ Conveyances which consist of a deed of partition.

☐ Conveyances given pursuant to the federal bankruptcy act.

☐ Conveyances of real property which consists of the execution of a contract to sell real property without the use or occupancy of such property or the granting of an option to purchase real property without the use or occupancy of such property.

☐ This conveyance was made on or after AUGUST 15, 1990 pursuant to a binding and written contract entered into prior to such date, and the date of execution has been confirmed by independent evidence as determined by the Treasurer of Nassau County. You must complete and submit NC-8-6 EXEMPTION FROM REAL ESTATE TRANSFER TAX AFFIDAVIT.

☐ Other (attach explanation)

Signature (both the grantor(s) and grantee(s) must sign)

The undersigned certify that the above return, including any certification, schedule or attachment, is to the best of his/her knowledge, true and complete.

Grantor	Title	Grantee	Title

Reminder:
Did you complete all of the required information in Schedules A and B?

If you checked E, F or G in Schedule A, provide two NC-884 forms.

If you checked Residential Cooperative or H in Schedule A, and/or no recording is required, send this return and your check made payable to:
Nassau County Treasurer
Transfer Tax Division
240 Old Country Road
Mineola, N.Y. 11501

All other payments should be made to:
Nassau County Clerk

APPENDIX B

NC-8-5 EXEMPTION FROM REAL ESTATE TRANSFER TAX AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF)

The undersigned being duly sworn depose and say that we submit this Affidavit in support of the exemption from the COUNTY OF NASSAU REAL ESTATE TRANSFER TAX on the grounds that this conveyance was made pursuant to a binding written contract made between Grantor and Grantee prior to August 15, 1999, as follows:

(A) A binding contract was entered into between Grantor and Grantee on (date) _____, 1999 (must be prior to August 15, 1999); and

(B) A downpayment in the sum of (amount) _____, 1999 was deposited on (date) _____, 1999 in an account maintained at _____ Bank, in the name of (account holder) _____.

The undersigned further certify that a complete copy of the fully executed contract of sale and the record of downpayment deposit shall be maintained for a period of three years from the date of this affidavit.

Wherefore, we respectfully request that this conveyance be declared exempt from taxation pursuant to Article 32-B of the Tax Law and Title 94 of the Miscellaneous Laws of Nassau County.

_____ Grantor(s) Signature

_____ Grantor(s) Name

_____ Grantor(s) Address

_____ Grantee(s) Signature

_____ Grantee(s) Name

_____ Grantee(s) Address

_____ Grantor's Attorney Signature

_____ Grantor's Attorney Name

_____ Grantor's Attorney Address

_____ Grantee's Attorney Signature

_____ Grantee's Attorney Name

_____ Grantee's Attorney Address

Sworn to before me this

day of

_____ Notary Public

A Seller's Best Defense: Carefully Drafted Brokerage Agreements

By Linda Gerstel

A recent decision by the New York Supreme Court, New York County held in *Cohen & Company Real Estate, Inc. v. Yassky*,[1] that a Letter of Intent was not enough for a broker to earn his commission. In *Yassky*, the Court granted a real estate developer/seller's motion to dismiss a complaint filed by a real estate brokerage firm. Yassky on his own behalf and as owner of a certain shopping center retained the broker to procure a ready, willing and able buyer for a shopping center. It was agreed that in the event the broker procured a buyer, defendants would pay a commission. The broker procured a buyer which agreed to purchase the shopping center for $4,375,000. The broker had sent the seller a brokerage agreement containing language that a commission would be payable on closing. However, the brokerage agreement was never signed by the seller. A letter of intent was executed between the seller and the potential buyer. Further, the broker had forwarded to the seller a draft purchase and sale agreement. The purchase and sale agreement was not executed, nevertheless it contained language which provided that a commission would be payable only if title had passed.

The broker argued that it had in fact procured a ready, willing and able purchaser, which the broker alleged was evidenced by a letter of intent signed by the purchaser and seller. The broker claimed that the letter of intent and the unsigned purchase and sale agreement contained all the material business terms for the sale of the property and that the "meeting of the minds" was evidenced by the letter of intent. The broker argued that the payment of a commission was never conditioned upon the closing of title on the shopping center and that the seller breached a duty to negotiate in good faith with the purchaser by failing to complete the transaction. Finally, the broker argued that even if that closing of title was a condition precedent to the broker's right to a commission, the developer's bad faith and willful failure to close title entitled the broker to its commission.

The seller relied upon a New York Court of Appeals case which expressly rejected the broker's argument in *Helmsley-Spear, Inc. v. Leasco Realty*.[2] *Leasco* affirmed a dismissal of a complaint as a matter of law, brought by a broker for a commission, on the grounds that a letter of intent does not constitute a final binding agreement as to all the material terms of the potential transaction. The letter of intent expressly provided that the agreements contained in the letter "are expressions of intent only and are not to be considered legally binding until incorporated in a fully executed and delivered joint venture."

With regard to the claim in *Yassky* based upon the seller's willful default, the seller claimed that such a claim was precluded because there was no legally enforceable contract of sale with the purchaser that could have been breached, either willfully or otherwise.[3] The seller relied upon the New York Court of Appeals case of *Graff v. Billet*.[4] *Graff* held that there could be no default of the brokerage agreement unless the seller is bound by a written contract of sale to convey the property to the person located by the broker. The *Graff* court noted the following:

> . . . the rule that where the sale fails due to the seller's fault or default, a broker is entitled to the commission . . . is inapplicable where, as here, the brokerage agreement explicitly provides that the commission is due when "title passes," not merely when the broker has obtained a prospective buyer. In light of such a provision, *the rule would apply only if the seller and the broker's prospective buyer had already entered a sales contract, and the seller's "fault" or "default," within the meaning of the rule, would have reference solely to a breach of that sales contract. . . . Here, there was no executed sales contract to be breached, and the seller's mere refusal to enter into one with the broker's prospective buyer is not a "fault" or "default" of the seller in the absence of any specific commitment by the seller in the brokerage agreement to enter into the sales contract*.[5]

The failure of the parties to agree as to the material terms of the sale for the property simply does not amount to a "willful default" on the seller's part.

The seller successfully argued that, first and foremost, there was no meeting of the minds since the proposed transaction never progressed further than preliminary negotiations. For example, discussions involving price, existing debts, closing date, costs associated with existing debts and essential warranties were subject to further negotiations. Secondly, the seller argued that the draft purchase and sale agreement forwarded by the broker to the seller stated that a commission would be due only when a closing materialized and title passed to the buyer. The New York Supreme Court grant-

ed the seller's motion to dismiss the complaint pursuant to (i) CPLR 3211 (a)(7) for failure to state a cause of action and to (ii) CPLR 3211 (a)(1), i.e., the defense was founded upon documentary evidence.

It has long been well settled that in order to state a claim for a commission, a real estate broker must prove (1) that he or she is duly licensed (2) that he or she had a contract express or implied with the party to be charged a commission and (3) that he or she was the "procuring cause" of the sale. In *Yassky*, the absence of a written brokerage agreement allowed the broker some flexibility to initiate costly litigation claiming that (i) it had earned a commission even though title had not passed and (ii) it was entitled to a commission based upon the developer's willful failure to close title. While the developer had been sent a draft brokerage agreement, he refused to execute it. A developer can take some proactive measures to protect against claims brought by real estate brokers:

- Reduce the understanding with the broker to a *written* brokerage agreement;
- Ensure that the agreement contains a requirement that *title passes* (avoid using the term "payable at closing" since some courts have held that such language merely means that the broker earned its commission under the ready, willing and able standard and has only agreed to defer the payment of the commission until the closing);[6]
- Protect yourself from claims of willful failure to close a transaction with language that spells out that no commission will be due as a result of a failure to close whether by an act of omission, commission, intentional, willful or arbitrary default by either the buyer or seller;
- Spell out the amount of the commission the broker has agreed to accept; and
- Have the agreement provide that if the broker commences an action when title has not passed, the developer would be entitled to legal fees incurred in dismissing the action.

Seller's counsel would be wise to insist on brokerage agreements which state that the seller retains sole discretion to not enter into a contract with the purchaser. Such a brokerage agreement should include the following language:

No compensation shall be earned by Broker for any services which have or hereafter may be rendered with respect to the proposed sale to Purchaser of the Premises, unless and until (a) a written contract of sale, on terms and conditions acceptable to Seller, is entered into between Seller and Purchaser; and (b) the closing of title to the Premises is consummated and the agreed-upon price is paid in full in the manner required by the terms of such contract.

The right of Broker to receive compensation is conditioned upon the actual completion of the proposed transaction, and, in the event of non-completion for any reason whatsoever, including but without limiting the generality of the foregoing, the unmarketability of Seller's title or the failure to perform said contract by either the Seller or the Purchaser (except for Seller's willful default after execution and delivery of a Contract of Sale), no commission or compensation is to be considered as earned and/or due and payable, and Broker shall have no claim whatsoever against Seller for any payment for its services in connection with this transaction.

A carefully worded written brokerage agreement allows for a developer to dismiss a complaint of an overzealous broker. It subscribes the time, manner and amount to be paid a broker. Sophisticated sellers may thereby protect themselves from liability for a commission in the absence of a closing.

Endnotes

1. Index No. 604936/98 (Sup. Ct., N.Y. Co. May 1999).
2. *See Helmsley-Spear, Inc. v. Leasco Realty*, 31 N.Y.2d 1017, 341 N.Y.S.2d. 620, 294 N.E.2d 207 (1973).
3. *See R.L. Friedland Realty, Inc. v. Modern Cabinets Corp.*, 194 A.D.2d 657, 658, 598 N.Y.S.2d 817, 818 (2d Dep't 1993); *See also Jacob Gold Realty, Inc. v. Sckoczylas*, 178 Misc. 2d 409, 412, 499 N.Y.S.2d 502 (N.Y. Civ. Ct., Kings Co. 1998).
4. 64 N.Y.2d 899, 901, 487 N.Y.S. 2d 733, 734, 477 N.E.2d 212, 213 (1985).
5. *Id.*, 64 N.Y.2d at 901-02, 487 N.Y.S.2d at 734 (emphasis added); *See also, Levy v. Friedman*, 216 A.D.2d 18, 628 N.Y.S.2d 265 (1st Dep't 1995) (Finding that because closing was a condition precedent to broker tight to obtain commissions, claim of willful default has no merit in the absence of a binding agreement which seller may be said to have willfully breached); *Corcoran Group, Inc. v. Morris*, 107 A.D.2d 622, 623, 484 N.Y.S.2d 7, 9 (1st Dep't 1985) (noting that until consummation of real estate deal occurs, seller is free to negotiate with anyone).
6. *See e.g., Feinberg Bros. Realty v. Berted Realty Co.*, 70 N.Y.2d 828, 523 N.Y.S.2d 439 (1987).

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MetLife Capital Financial Corporation v. Washington Avenue Associates, L.P.

By Jeffrey H. Newman

On June 30, 1999, a unanimous New Jersey Supreme Court returned normalcy to the New Jersey credit markets. By overturning a 1998 Appellate Division ruling (the ruling was reversed in pertinent part), lenders seeking to impose standard default remedies upon New Jersey borrowers can once again be comfortable in knowing that typical prenegotiated late fee and increased post-default interest remedies will be treated as presumptively valid and will require substantial effort by a borrower before a lender will be required to endure a potentially expensive and protracted court proceeding respecting enforcement of those remedies clauses.

The twice-appealed trial court decision arose from a dispute between a defaulting borrower and its lender. The borrower not only paid 40 of 48 installments after their respective due dates (despite a positive cash flow), but also defaulted on the final balloon payment upon the maturity of the subject 4-year mortgage note.

At the trial level, the court found the lender's standard 5% late fee to be enforceable. However, the court "re-wrote" the stipulated post-default increase in the interest by reducing the rate from the 15% provided for in the mortgage note to 12.55%, thereby determining that a rate of interest which represented an increase of only 3 percentage points over the 9.55% "no-default" rate of interest agreed to in the note was enforceable. In an almost Solomonic manner, the trial court may be seen to have virtually "split the baby down the middle" since the 300 basis point increase in the non-default rate was a 245 basis point reduction from the 15% enhanced rate stipulated to become effective upon default. Hence, the trial court found a 15% post-default rate of interest to be unenforceable; yet, took it upon itself to re-write the interest rate to an enforceable level which it concluded was 12.55%. This case was appealed.

In a decision surprising the lending industry, and no doubt sending shock waves throughout that part of the credit markets dealing with loans subject to New Jersey law, the Appellate Division not only found the 5% late fee to be unenforceable, but similarly found even the 12.55% reduced post-default rate of interest approved by the trial judge to be equally unenforceable.

In so finding, the Appellate Division interpreted the test of enforceability of so-called liquidated (stipulated) damages provision as compromised of a two-prong analysis. The Appellate Division explained that in order for such a provision to qualify as an enforceable liquidated damages clause, rather than an unenforceable penalty, the provision must satisfy both prongs of the analysis, as follows:

1. The late charge must be reasonably related to the anticipated or actual damages to be suffered by the lender from the delay in payment; and
2. Actual of anticipated damages must be difficult to establish.

In a strongly worded opinion indicating the possibility that the terms of the liquidated damages provision might have been coercive, the Appellate Division concluded as to both stipulated damages remedies that (1) the damages were calculable without difficulty, and (2) since the collections costs could be calculated and would not vary much as a function of the size of the loan or duration of the breach, the late charges were not reasonably related to the anticipated or actual damages.

In complete reversal of the damages issue (an unrelated issue was affirmed), the New Jersey Court enunciated a new standard—the "totality of the circumstances"—one that has been adopted in other contexts and will now be the benchmark for determining the enforceability of liquidated damages clauses in the lender-borrower, and apparently all other contexts, i.e., whether the liquidated damage clause is reasonable under the totality of the circumstances. In applying this standard, the Court found both the 5% late fee and 12.55% post-default rate of interest to be a valid measure of anticipated damages.

Once the New Jersey Supreme Court was able to articulate cohesion between the two elements of the "old test," as set forth above, it was easy for the Court to blend the two elements into a new test of reasonableness based upon the totality of the circumstances.

In analyzing the totality of the circumstances, the Court was mindful of the considerable amica briefs submitted by a variety of trade associations representing lenders and consumers who argued, among other things, the following:

1. custom and usage (late fees and enhanced rates of interest in a post-default context are common);
2. industry norms (4%-6% late fees and 15%-18% enhanced default rates of interest are common);
3. statutory guidance (stipulated late fees have been statutorily

codified and endorsed by both state and federal lawmakers); and

4. loan underwriting principles (pricing consideration, without late fees and enhanced rates of interest in a post-default context, would require all loans to be priced higher, i.e., increased "contract" or "non-default" rates, in New Jersey in order to subsidize what would become the increased cost of administering defaulted loans, a patently unfair burden on non-defaulting borrowers and, therefore, a patent failure basic "matching" principles which would dictate the matching of increased costs of doing business to the actual (as opposed to potential) causes thereof.

Perhaps the fourth reason, as set forth above, was the most compelling. Had the Appellate Division been upheld, it would become almost axiomatic for a defaulting borrower to seek to attempt to find the liquidated damages provision of its loan to be unenforceable. Given the slow foreclosure process that already exists in New Jersey (and many other jurisdictions), such an attack would further delay what is already a laborious process. Moreover, the delay could often add insult to injury. In the commercial mortgage loan context, often the only way to obtain repayment of all or any portion of a defaulted loan is to foreclose on the collateral. Because most commercial mortgage loans are non-recourse, oftentimes, it is the property that the lender must seek to obtain in order to reimburse itself for as much of the amount outstanding as possible. Moreover, once foreclosure litigation is commenced by the lender, the property will either be deep into or commencing an aggravated process of deterioration due to historic or recent neglect—neglect that will not abate until the lender is either able to cause the appointment of a receiver or otherwise obtain outright possession of the property.

The Court also noted that, in viewing the totality of the circumstances presented by the MetLife case, the subject transaction took place between two sophisticated commercial entities, with equal bargaining power and with each represented by counsel. In so doing, the Court reaffirmed the presumptive reasonableness of stipulated damages (clearly reaffirming that the burden of proof to overcome that presumption was on the challenger), and may well have implied that the burden on the borrower challenging enforceability might only be met by a showing of fraud, duress or other unconscionable acts on the part of a lender.

In apparent deference to one of the briefs amici curiae, the Court recognized the practicality of liquidated damages as a practical solution to the problem of pricing loans according to actual performance, particularly in light of the difficulty in allocating and determining the costs and damages associated with late payments and defaults (a factual analysis that would open the floodgates of litigation). In fact, the Court mused as to whether such remedies were liquidated damages at all; or, rather as simple contract provision dealing with variable-pricing in order to be able to price a loan on the assumption that it will be timely paid, as opposed to premium pricing the loan in anticipation of a default. While the Court determined top continue to treat such provisions as liquidated damages, the analysis seems to underscore the heightened barrier that must be overcome by a borrower in order to overthrow the presumptive validity of a liquidated damages provision which would then require a lender to put forth a chapter and verse analysis of its actual costs.

In conclusion, the New Jersey Supreme Court has reaffirmed the presumptive validity of liquidated damages provisions and, perhaps, has raised the hurdle for a challenger to attack such provisions in the commercial lending context. In moving to the "modern trend" of applying the blended test of "reasonable under the totality of the circumstances" to liquidated damages provisions, the Court holds that each provision must be analyzed with consideration to all relevant and even near-relevant factors. For example, the Court acknowledged, and, in reaching opinion, considered, that in the current lending market, late charges and enhanced rates of interest upon a default are necessary to offset the increased cost of doing business in a post-default context. However, given the special considerations analyzed by the Court in the commercial mortgage lending context, one might infer that the bar must be overcome on order to challenge the enforceability of such provisions may be lower in other contexts that in the commercial mortgage lender context.

Hence, while calm once again reigns in the New Jersey credit markets, a distant wind may be rising in non-lending contexts.

Epilogue

In reviewing the three decisions from the trial court level to the Supreme Court, it is difficult to disregard the finding of a trial judge and a unanimous panel of Appellate Division justices, all of whom found the enhanced default rate of interest unenforceable, and most of whom (all of the Appellate Court justices) found the late fee unenforceable. Given the paucity of cases which are appealed (much less tried at the lower level prior to settlement), one can envision a different result at trial court levels. The two-pronged Wasserman test, while persuasive but not dispositive on the MetLife

case, nevertheless provides a clear formula in which to analyze liquidated damages provisions. Hence, from a practical perspective, it may yet remain alive and well. In non-lending contexts, replete with liquidated damages provision such as in the landlord-tenant area, too much comfort should not be taken from this opinion. For example, this author believes the "one size fits all" remedy remains highly vulnerable in many landlord-tenant situations. For example, a remedy which allows a landlord, for purposes of calculating percentage rent, to aggregate all of the sale of a tenant's second location with the sales of a first location if the second location violates a radius restriction applicable to the tenant's first location would most likely be found unenforceable. The remedy assumes all of the sale of the violative location would have been enjoyed at the first location. Such a remedy would seem to flunk the Wasserman test as well as be seen as unreasonable under the "reasonableness" test.

Similarly, an acceleration clause, as may be found in a variety of leases, calling for the acceleration of all rents to become due following default, without regard to the landlord's ability to obtain a replacement tenant, disregards concepts of mitigation and concepts of present value of future cash flows. Therefore, such a remedy would also seem to flunk Wasserman and/or be seen as unreasonable.

Hence, while the "enforcer" of the liquidated damages provision beat the "challenger" in the MetLife case, it would be a questionable assumption to believe that this type of litigation will therefore wither. Cases of this nature, win, lose or draw, heighten consciousness and stimulate the truly oppressed challengers as well as those challengers who may sometimes engage in litigation perhaps almost as a form of "sport."

Bergman on Mortgage Foreclosures:
The Scheme Which *Can* Provide a Defense

By Bruce J. Bergman

Anyone involved with any regularity in the mortgage foreclosure arena is aware that bad faith, fraud and oppressive or unconscionable conduct by the mortgagee are defenses to foreclosure. How practical the employment of those concepts may be is, however, a different issue.

Stressed borrowers frequently characterize anything and everything a mortgage holder did—or didn't do—as bad faith, oppressive and unconscionable. Finding such verbiage as part of a grouping of shotgun defenses in an answer is hardly an uncommon occurrence for plaintiffs' attorneys. From the vantage point of mortgagees' counsel, nothing their clients do is ever susceptible to the bad faith, oppressive, unconscionable construct. The verity borrowers miss, lender's counsel should be quick to point out, is that it is *not* bad faith, etc., for a lender to declare due the mortgage balance, even for a minor, inadvertent, monetary default. And the Court of Appeals made that quite clear no less than 69 years ago.[1]

Although it isn't so often the case, there can be more to it than this, typically fact intensive of course. But guidance may be found in those fact patterns. For example, a second mortgagee might be able to resist foreclosure of a first mortgage where a principal of the no-consideration assignee of the senior was a principal of the mortgagor/owner, the allegation being that the senior foreclosure is really a scheme by the owner to rid itself of the burden of the second mortgage.[2]

Then there is the case[3] of partners A, B and C who purchased with partners D and E and then mortgaged income-producing property, the latter partners given management control of the property. A bitter dispute arose between the two groups of partners and litigation ensued. A year later, a corporation whose principal shareholders were partners D and E (and whose sole officer was D's wife) took an assignment of the mortgage encumbering the partnership property, a mortgage in default, asserted A, B and C, because managers D and E deliberately allowed it to happen.

Yes, the foreclosing plaintiff *can* make out a prima facie case for summary judgment. Nonetheless, allegations that the partner managers paid themselves excessive management fees, failed to account to their copartners for the property's income and expenses, purposefully caused the mortgage default, and that plaintiff is a shell corporation pursuing foreclosure solely as a device to oust the non-managing partners from their interest, could be the basis of a defense founded upon bad faith, fraud or oppressive or unconscionable conduct by the mortgagee and might provide relief from default.[4]

The hard part of all this is finding precedent to say that facts like this protect a harassed borrower (hence this article), although in the end claims of this type are, numerically at least, transparent attempts to transmute the words fraud, bad faith, etc., into a valid counterstroke to foreclosure.

Endnotes

1. *Graf v. Hope Building Corp.*, 254 N.Y.1, 171 N.E.884 (1930); See 1 *Bergman on New York Mortgage Foreclosures* § 4.10, Matthew Bender & Co., Inc. (Rev. 1999).
2. *Aubrey Equities, Inc. v. SMZH 73rd Associates*, 212 A.D.2d 397, 622 N.Y.S.2d 276 (1st Dep't 1995).
3. 192 *Sheridan Corp. v. O'Brien*, ___A.D.2d___, 676 N.Y.S.2d 351 (3d Dep't 1998).
4. 192 *Sheridan Corp. v. O'Brien*, __A.D.2d__, 676 N.Y.S.2d 351 (3d Dep't 1998), *citing River Bank Am. v. Daniel Equities Corp.*, 213 A.D.2d 929, 930, 624 N.Y.S.2d 287.

Mr. Bergman, author of the three-volume treatise, *Bergman on New York Mortgage Foreclosures*, Matthew Bender & Co., Inc. (Rev. 1998), is a partner with Certilman Balin Adler & Hyman in East Meadow, New York, outside counsel to a number of major lenders and servicers, and an Adjunct Associate Professor of Real Estate with New York University's Real Estate Institute where he teaches the mortgage foreclosure course. He is also a member of the USFN, the American College of Real Estate Lawyers and is on the faculty of the Mortgage Bankers Association of America School of Mortgage Banking.

Can Those Who Write Articles for Your Section Newsletter Get MCLE Credit? How Do They Do So? What About Editors of Newsletters?

Under New York's Mandatory CLE Rule, MCLE credits may be earned for legal research-based writing, directed to an attorney audience. This might take the form of an article for a periodical, such as your Section's newsletter. The applicable portion of the MCLE Rule, at Part 1500.22(h), says:

> Credit may be earned for legal research-based writing upon application to the CLE Board, provided the activity (i) produced material published or to be published in the form of an article, chapter or book written, in whole or in substantial part, by the applicant, and (ii) contributed substantially to the continuing legal education of the applicant and other attorneys. Authorship of articles for general circulation, newspapers or magazines directed to a nonlawyer audience does not qualify for CLE credit. Allocation of credit of jointly authored publications should be divided between or among the joint authors to reflect the proportional effort devoted to the research and writing of the publication.

Further explanation of this portion of the Rule is provided in the Regulations and Guidelines which pertain to the Rule. At Section 3.c.9 of those Regulations and Guidelines, one finds the specific criteria and procedure for earning credits for writing. In brief, they are as follows:

- the writing must be legal research-based
- the writing must be such that it contributes substantially to the continuing legal education of the author and other attorneys
- it must be published or accepted for publication
- it must have been written in whole or in substantial part by the applicant
- one credit is given for each hour of research or writing, up to a maximum of 12 credits
- only a maximum or 12 credit hours may be earned for writing in any one reporting cycle
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- only writings published or accepted for publication after January 1, 1998 can be used to earn credits
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- allocation of credit for jointly authored publications shall be divided between or among the joint authors to reflect the proportional effort devoted to the research or writing of the publication
- only attorneys admitted more than 24 months may earn credits for writing

In order to receive credit, the applicant must send a copy of the writing to the New York State Continuing Legal Education Board (hereafter, Board), 25 Beaver Street, 11th floor, NYC, NY 10004. A cover letter should be sent with the materials, and should include the following supporting documentation indicating:

- the legal research-based writing has been published or has been accepted for publication (after Jan. 1, 1998)
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- the time spent on research or writing
- a calculation of New York CLE credits earned and a breakdown of categories of credit (for the senior bar—those beyond the first 24 months of admission—there are two categories of credit: (1) ethics and professionalism; and (2) everything else (skills, practice management and traditional areas of practice)

After review of the correspondence and materials, the Board will notify the applicant by first class mail of its decision and the number of credits earned. Copies of the MCLE Rules and the Regulations and Guidelines can be downloaded from the Unified Court System web site (http://www.courts.state.ny.us/mcle.htm) or obtained by calling the New York State Continuing Legal Education Board at (212) 428-2105 (for calls outside of New York City, toll-free at 1-877-NYS-4CLE). Questions about MCLE requirements may also be directed to the Board by e-mail at: CLE@courts.state.ny.us.

2000 New York State Bar Association

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January 25-29, 2000

New York Marriott Marquis

Real Property Law Section Meeting
Thursday, January 27, 2000

Tentative Program Agenda*

Hot Tips: Revisions to the Lawyer's Code of Professional Responsibility	**Susan Mancuso/Peter Coffey**
Underground Petroleum Storage Tanks— Ticking Time Bombs	**Joel Sachs**
Fair Debt Collection Practices and Discrimination Issues for the Association Attorney	**Joseph Walsh**
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Recent Developments in Residential Landlord/Tenant Matters	**Edward Baer**
Current Proposed Legislation	**Robert Hoffman**
The Credit Line Mortgage—No Substitute for the Building Loan	**Leon Sawyko**
Conservation Easements	**Karl Essler**
Zoning Opinions	**David Zinberg**

**Program subject to change. An updated program agenda and registration information will be mailed.*

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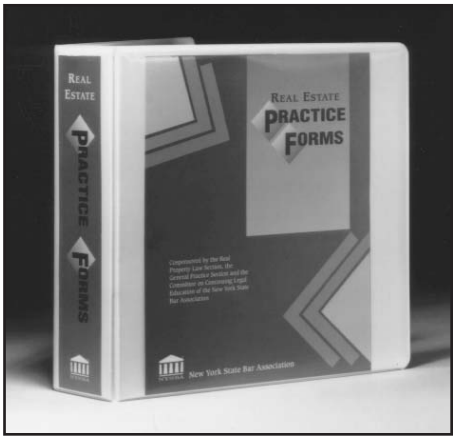
- Escrow Release Authorization—Addendum
- Cancellation and Release
- Addendum to Contract for Purchase and Sale of Real Estate—Septic System Contingency
- Addendum to Contract for Purchase and Sale of Real Estate—Well Water Flow and/or Quality Tests
- Addendum to Contract for Purchase and Sale of Real Estate—Radon Inspection Contingency
- Addendum to Contract for Purchase and Sale of Real Estate—Purchase Money Mortgage
- Addendum to Contract for Purchase and Sale of Real Estate—Governmental Approvals Contingency
- Addendum to Contract for Purchase and Sale of Real Estate—FHA Appraisal
- Addendum to Contract for Purchase and Sale of Real Estate—Real Estate Certification
- Addendum to Contract for Purchase and Sale of Real Estate—VA Appraisal
- Addendum to Contract for Purchase and Sale of Real Estate—Assumption of Mortgage Contingency
- Contingency Regarding Contract for Sale of Purchaser's Property
- Notice Regarding Secondary Contract
- Cancellation and Release
- Contingency Removal
- Extension of Contingency (Addendum)
- Cancellation and Release (Addendum)
- Residential Contract of Sale Rider Clause: Delete "Subject to" from Deed
- Residential Contract of Sale Rider Clause: Death—Purchaser
- Residential Contract of Sale Rider Clause: Death—Seller
- Residential Contract of Sale Rider Clause: Seller not Required to Incur Expenses
- Residential Contract of Sale Rider Clause: Toxic Waste
- Residential Contract of Sale Rider Clause: Risk of Loss
- Residential Contract of Sale Rider Clause: Personal Property
- Residential Contract of Sale Rider Clause: Adjournment
- New Construction: Standard Contract (Plain English)
- New Construction: Off-Site Contract Agreement



- Certificate of Occupancy and Compliance
- Commissioner's Certificate as to Taxes
- New Construction: Inspection Report
- * Lead-Based Paint EPA/HUD Fact Sheet Sample Disclosure Format
- * Notice Under Mechanic's Lien Law
- Standards for Closing a Contract for the Sale of Real Property
- Sidewalks/Curbs: Waiver
- Oil and Gas Lease: Amendment and Ratification (Sample)
- Solvency Affidavit
- Smoke Alarm Affidavit (Exec. Law § 378(5))
- * Affidavit of Compliance with Smoke Detector Requirement for One- and Two-Family Dwellings (NYC)
- * Smoke Detecting Alarm Affidavit (Exec. Law § 378(5))
- Common Driveway Agreement
- Fence & Boundary Affidavit
- Affidavit of No Judgments
- Judgment Affidavit
- Affidavit (Violation of Restrictive Covenant)
- RPAPL § 2001 Affidavit
- Affidavit: Fence Lines
- Affidavit: Fence Lines
- Affidavit Used Where Nominal Consideration is Expressed in a Deed Other Than a Fiduciary Deed
- Affidavit as to Power of Attorney Being in Full Force
- Affidavit of Title
- Survey: Affidavit of No Change
- Survey: Affidavit
- Survey Coverage Endorsement
- Title Examination
- Certification of Title
- Real Estate Power of Attorney
- Attorney General of the State of NY Model Form for Escrow Agreement
- Escrow Agreement
- Escrow for Documents
- Termination of Possession and Release of Escrow
- Escrow Release Authorization
- Escrow Release Authorization Addendum
- Memorandum of Trust Proceeds
- Attorney Opinion Letter—Good and Marketable Title
- Consent for Attorney Guarantee

** New or revised form in 1998 supplement.*

REAL ESTATE PRACTICE FORMS *(cont'd)*

- Guarantee—Water Charges
- Pre-closing Occupancy (by Buyer) Agreement
- Pre-closing Occupancy (by Buyer) Agreement (License to Occupy)
- Pre-closing Occupancy (by Buyer) Agreement/License to Occupy Premises
- Pre-closing Occupancy (by Buyer) Agreement
- Post-closing Occupancy (by Seller) Agreement
- Post-closing Possession (by Seller) Agreement
- * Power of Attorney, Durable: New York Statutory Short Form
- * Power Attorney, Nondurable: New York Statutory Short Form
- * Deed—Composite Form Showing Comparison of Deed Clauses and Forms
- * Warranty Deed with Full Covenants (Individual and Corporation)—Standard NYBTU Form 8008
- * Deed with Full Covenants (Individual): Statutory Form A
- * Deed with Full Covenants (Corporation)—Standard NYBTU Form 8009
- * Deed (Sheriff's)
- * Quitclaim Deed (Individual or Corporation)—Standard NYBTU Form 8009
- * Quitclaim Deed (Individual): Statutory Form D
- * Quitclaim Deed (Corporation): Statutory Form DD
- * Executor's Deed (Individual or Corporation)—Standard NYBTU Form 8010
- * Executor's Deed: Statutory Form E
- * Bargain and Sale Deed without Covenant against Grantor's Acts (Individual or Corporation)—Standard NYBTU Form 8006
- * Bargain and Sale Deed without Covenant against Grantor (Individual): Statutory Form B
- * Bargain and Sale Deed without Covenant against Grantor (Corporation): Statutory Form BB
- * Bargain and Sale Deed with Covenant against Grantor's Acts (Individual or Corporation)—Standard NYBTU Form 8007
- * Bargain and Sale Deed with Covenant against Grantor (Individual): Statutory Form C
- * Bargain and Sale Deed with Covenant against Grantor (Corporation): Statutory Form CC
- * Referee's Deed in Foreclosure
- * Acknowledgments (effective September 1, 1999)
- Closing Statement with Cover Letter
- Statement of Sale
- Closing Adjustments
- Uniform Residential Loan Application
- Statement of Assets and Liabilities
- Closing Letter
- Loan Settlement Statement
- New York Fixed Rate Note
- Note—FHA Multistate Note
- State Form 3233: Fannie Mae/Freddie Mac Uniform Instrument—New York Fixed Rate Note
- * Adjustable Rate Note (1-year Treasury Index—Rate Caps)
- * Adjustable Rate Rider (1-year Treasury Index—Rate Caps)
- Note (VA Loans)
- Building Loan Agreement
- Mortgage
- Mortgage Bond
- Mortgage Bond
- 1–4 Family Rider
- Building Loan Rider to the Adjustable Rate Note
- Building Loan Schedule
- Borrower's Affidavit
- Notice of Lending
- Mortgage Modification, Consolidation and Extension Agreement
- Spreader Agreement
- State Form 3033: Fannie Mae/Freddie Mac Uniform Instrument—Mortgage
- Mortgage Rider
- Mortgage Severance and Splitting Agreement
- Release of Part of Mortgaged Premises
- Acknowledgment and Release
- Covenant not to Sue Agreement
- * Assignment of Leases and Rents
- Subordination Agreement
- Assignment of Mortgage
- Discharge of Mortgage
- Exemption Affidavit: Tax Law § 253.1-a
- Extension Agreement
- Statement of Mortgagor or Assignee
- Notice of Creation, Transfer or Termination of Tax Escrow Account (NYS Bd. of Equalization and Assessment)
- Mortgage Payoff and Discharge Guaranty
- Tax Escrow Account Designation of Mortgage Investing Institution to Receive Tax Bills (Real Property Tax Law § 954) (NYS Bd. of Equalization and Assessment)

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