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Inside

NYSBA

In Memoriam
Former NYSBA President and Real Property Law Section Chair
Lorraine Power Tharp
December 28, 1947 – October 28, 2008

The familiar words, "Amazing Grace, how sweet the sound . . ." filled the tiny church where Russell and Lorraine were married and where an overflowing congregation of friends and family came to say goodbye to Lorraine. The words were so appropriate. Lorraine was grace itself in so many ways.

Lorraine's dedication to legal causes and to the advancement of women and minorities in the profession was fueled by her essential humanity. It was impossible not to like her, or not to be touched by her warmth, humor, generosity, spirit of camaraderie and *joie de vivre*. Her devotion to the Real Property Law Section continued through her tenure as President of the Association—the "Big Bar" as we call it. When she attended the Section's Executive Committee meetings we welcomed her as a conquering hero. She responded with her usual humility, full of nothing but practical advice, sound judgment and good humor. Some of us in the Section were fortunate to know her well. Others only knew her briefly. But whether Lorraine touched a life for five minutes or five years, her intelligence, compassion, and positive attitude made her a friend to everyone she met.

No matter how busy Lorraine became while she was President of the Association, she always made time for Real Property Law Section activities. Former Section Chair Lester Bliwise recalls how much of a joy it was to work with Lorraine, how much she contributed to the Executive Committee and the Section, and how much she continued to work with the Section, not only during the year she served as President of the Association, but for all of the years after. She attended our meetings and participated in CLE programs. Indeed, despite her illness, she willingly agreed to be one of the Overall Planning Chairs of the statewide Advanced Real Estate Practice program sponsored by the Section in November and December 2008. And who can forget her indelible performance as one of the three toga-clad members of the Greek chorus in the film production created for the Section's program, "Not Open to Negotiation: Reel Ethics and the Dirt Lawyer," presented at the Annual Meeting on January 29, 2004? Executive Committee member Mindy Stern asked Lorraine to participate because Mindy knew that even though Lorraine was the former President of the Association, she could always be counted on to be a good sport. She didn't let us down.

Current Section Chair Peter Coffey describes Lorraine as "being such a large person that we could all involve ourselves with her and feel we were special to her and know that indeed we were. Her love of all God's creatures, and particularly the love she showed to all the women and men she met—it was pure spirituality. To me this was the heart and soul of Lorraine." Peter fondly recalls "Lorraine's exuberance, her memory of detail about each one of us showing how much she cared, her persistence, and not in a shy way, in pushing us toward achieving a society where everyone was treated with justice."

Lorraine's many accomplishments as Chair of the Section include establishing the Not-for-Profit Entities and Concerns Committee, and appointing to the Section's Executive Committee many of the highly qualified individuals who continue in Section leadership today. Lorraine always inspired others to participate in NYSBA projects by her own fine example. When she asked former Section Chair Melvin Mitzner to allow her to appoint him as a representative from the Section, together with herself, to the committee created by the "Big Bar" to evaluate how current New York laws were affecting the equal treatment of same-sex couples, Mel questioned her choice. As he put it, "I told her that I was the last one who should be appointed, as I knew practically nothing of the problems of same-sex people. I was married for over 40 years and was a father and grandfather who didn't know much about gay people. Lorraine laughed and said, 'I have faith in you.' She won me over by just being Lorraine."

Lorraine never developed the hubris that so often follows when people are appointed or elected to positions of power. Former Section Chair Lester Bliwise reminded us that when Lorraine was appointed to co-chair the Real Property Law Section's Real Estate Financing and Liens Committee with him, her biggest concern was whether she was sufficiently knowledgeable and up to the task of chairing one of the Section's committees.

But for all of Lorraine's humility, despite all of her accomplishments, both within the Section and the State Bar, and as a terrific real estate lawyer, the hallmark of her leadership, and what we all remember most about her, was Lorraine's infectious full body laugh and her ability to make us laugh while encouraging us to do better. Former Section Chair Dorothy Ferguson remembers that when she introduced her husband, Steve, to Lorraine in 1997 at the Section's Summer Meeting, Steve asked Lorraine, "How is a 'Power Tharp' different from a manual Tharp?" Dorothy noted that Lorraine responded by expounding on the virtues of a "Power Tharp" with her usual humor and wit. And at a particularly unruly Executive Committee meeting the following year, when Lorraine chaired the Section, Lorraine pounded on the table and, with her usual diplomacy but in all seriousness, said, "I have power and I'm going to use it!" As Dorothy put it so well, "Lorraine used her power in all the best ways."

Lorraine was a constant joy to work with and spend time with, and we will truly miss her. The pleasure of knowing Lorraine was best summed up by her beloved sister, Alison Power, at Lorraine's funeral service. Alison related that she and Lorraine had loved the movie, "The Wizard of Oz." A quote from that movie best summed up why we feel such an enormous sense of loss. The Wizard said to the Tin Man, "The size of your heart is not measured by how much you love, but how much you are loved by others."

As a permanent tribute to our love for Lorraine, the Real Property Law Section will be establishing through the Bar Foundation (of which Lorraine was a fellow) a scholarship for law students in Lorraine's memory, to inspire future generations of lawyers to honor the profession as she did so well.

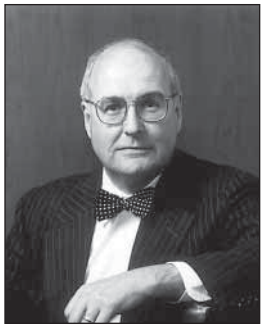
Table of Contents

A Message from the Section Chair

First of all, there is Lorraine—Lorraine Power Tharp, our friend, our joy, our former Section Chair. Mindy Stern and Anne Copps have put together a remembrance of Lorraine which appears in this issue, and I will say nothing further regarding Lorraine. However, feelings are strong and it is so wondrous that we have Mindy and Anne to help us out. Lorraine died of breast cancer, and while Gerry Goldstein, a member of our Executive Committee and a survivor, will be quick to point out that this horrendous disease is not limited to women, it is to a great extent a woman's nightmare and an annual trial with the potential of so dreaded a verdict. How wondrous that we had women to whom we could turn to compose our grief. Also, please remember Karen DiNardo in your prayers and messages—Karen is suffering from this disease and has had to leave our Executive Committee while undergoing treatment. If you get a chance, drop Karen a note or get in touch—it would mean a lot.

The major event on our calendar is the Annual Meeting in January, specifically our program on Thursday January 29. Joel Sachs is in charge and the program will focus on the economic crisis and the reaction of the federal government and the State of New York, as their actions affect our practice. Specifically, the issue of subprime mortgages will be addressed. We are also going to have a panel discussion on how the crisis and all the recent legislation affect the nitty-gritty of our practice and our clients.

Then there is the ongoing dream I have. For those of you who do not follow my Chair reports faithfully, it is my hope that this year every member who cannot personally attend our committee meetings will be able to call in and participate in that way. So far the notices have only gone out to the committee members, but next year it is our hope that notices



will go out to everyone on the Section. **Of course, we would appreciate your identifying a specific committee which pertains most particularly to your practice and join that committee.** In any event, we have had several committee meetings so far with call-ins and they have been a tremendous success. We have had individuals from all over the state—attorneys who have been members of our Real Estate Section and members of committees for many, many, many years who have never participated in any activity of our Section—call in and participate in a committee meeting. Again, I would like to thank Ira Goldenberg, his task force and Mike Berey and Gerry Goldstein for their ongoing efforts to make this a success.

"The major event on our calendar is the Annual Meeting in January, specifically our program on Thursday January 29."

By the way—have you heard of about hydrofracking and, for that matter, about horizontal drilling and the Marcellus Shale formation? Well, what it is all about is natural gas and apparently there is a lot of natural gas in that shale formation and a little hydrofracking and horizontal drilling are just what are needed. On the other hand, as usual it is not without problems. According to an article I am reading today in the *New York Post*, James Gennaro (D–Queens), a New York City Councilperson and Chairperson of the Environmental Protection Committee, does not think this hydrofracking is such a good idea. Apparently it has enormous potential adverse environmental consequences, particularly to the New York City water supply. It may also have a tremendous environmental impact wherever it is done, according to some, and little or no impact according to others. There are taking problems—ancient mineral and gas leases—but also revenues to local communities and a host of other issues. We have established a Task Force to study this issue—chaired by John Jones from Binghamton and Beth Holden from Buffalo. It is hoped that the Task Force will study the issue in depth, hold seminars where appropriate and formulate a thorough report on the matter. If anyone has a strong interest in this please contact me (pcoffey@ecmlaw.com) if you wish to be part of the Task Force.

By the time you read this we will have had our initial meeting of the Real Estate Construction Law Committee, David Pieterse of Rochester and Susana Fodor of New York City Co-Chairs. The initial meeting is going to be at the Harvard Club in New York City—**again with call-in availability.** Unfortunately, those calling in will not be able to participate in the cocktail reception after the meeting. We cannot do everything by phone although I am going to ask Ira to look into this and we will report to you as soon as we have solved the problem.

Ed Baer, our Secretary, had been out of commission for a while but is back—welcome back, Ed. Welcome also to Laura Monte, from Buffalo, the new Co-Chair of our Membership Committee.

Bernice Leber, President of our Association, has been unstinting in her push to have the State Bar, and in particular our Real Estate Section, address the mortgage foreclosure crisis—to develop programs which can assist attorneys in knowing what the

crisis is all about and knowing how to effectively render assistance to the courts and to the litigants given the new statutory foreclosure schemes. We will be turning to all of you for help—**please plan on attending a seminar on this issue and volunteering for pro bono representation at least at the initial conference stage. This is extremely important and we as lawyers have an obligation to fulfill.**

It is difficult to give a report at anytime without mentioning Karl Holtzschue and the Committee on Legislation. Karl has identified a gap in our activities and that is paying attention to federal legislation. As you would expect, Karl is going to fill it. We are working with the Bar Association and getting the information contained in the *Congressional Quarterly*. In this regard, Mike Berey, a member of the Legislative Committee, is the person Karl has turned to for help. NYSBA President Leber has created a special Committee on Federal Legislative Priorities Chaired by Steve Younger, the incoming President-elect. Karl has been appointed as the Real Estate Section representative to that Committee—congratulations. Karl.

Talking about obligations, we also have an obligation to feed our families and provide them with housing and other matters, and it is just not a good time for this. I suppose it is not encouraging to have the Chair of the Real Estate Section say he does not know what he can do about it, but in fact I do not. If misery loves company—I can report you that you are not alone—there may be some doing very well, and I am sure there are, but most attorneys I have talked to around the state indicate the same—it just is not a good time. A good number of us are struggling. On the other hand, I had a closing sent to me today from a lender I have not heard from in a year. It may be an anomaly or the first wave of high tide—oh, how I hope it is high tide.

Peter V. Coffey

Foreclosing on a Mezzanine Loan Under UCC Article 9: A Guide to Remedies and Strategies

By Peter E. Fisch, Steven Simkin and S.H. Spencer Compton

As structured real estate finance has matured over the past several years, the requirements of the rating agencies (principally motivated by bankruptcy concerns) and the realities of the secondary market have greatly increased the use of mezzanine loans, which have largely replaced second mortgages in real estate finance. This evolution has continued to the point where more sophisticated real estate financings are structured with multiple tiers of mezzanine loans held by disparate lenders with preferences for different risk positions in the capital structure, with each tier sometimes carved into separate *pari passu* notes, or into an A/B or A/B/C note structure that creates subordination within a mezzanine loan tier. The repayment obligation of the mezzanine borrower (usually a direct or indirect parent of the property owner) is typically secured by a perfected security interest in the equity interests owned by such borrower in the property owner under Article 9 of the Uniform Commercial Code (UCC). This article will focus on the remedies of a mezzanine lender under Article 9.

As real estate markets head into a downturn, mezzanine lenders, in prior loss position relative to mortgage lenders, will increasingly find themselves with borrowers in distress or default. Undoubtedly, a mezzanine lender will be constrained to act by virtue of intercreditor arrangements with the mortgage lender and any senior mezzanine lenders; but after navigating those constraints, a mezzanine lender may have to contemplate enforcement of its remedies against its collateral. Article 9 allows enforcement of a mezzanine lender's remedies through a foreclosure of the equity interest regardless of whether the lender's security interest is in (1) investment property, as either non-certificated or certificated securities, perfected by filing, possession or control under Article 9, or (2) a "general intangible" perfected only by filing under Article 9, though a secured lender will have more leverage if it holds a certificated interest.[1]

"As real estate markets head into a downturn, mezzanine lenders, in prior loss position relative to mortgage lenders, will increasingly find themselves with borrowers in distress or default."

Before entering into substantive discussions with the debtor, a mezzanine lender should obtain a pre-negotiation or "standstill" agreement to protect against potential reliance claims the debtor might interpose should the work-out negotiations or other discussions fail and foreclosure is the only course of action. If the debtor "opted into" Article 8, it is important to locate the share certificate or understand the control agreement. A mezzanine lender exercising remedies must also be cognizant of any transfer taxes that may arise on account of a transfer in foreclosure (or in lieu thereof). Reviewing the relevant transaction documents may also disclose curable problems, such as the failure to obtain a necessary endorsement to a certificated security, that might be remedied while the parties are still talking.

In planning post-default strategies, the secured party must understand the nature of the debtor's problems that led to the default, as well as the secured party's endgame. The endgame may depend on whether the secured party is a "loan to own" investor who acquired the mezzanine debt (perhaps after default) to acquire control over the real estate, or an institutional lender that may not have the interest or the capacity to own and manage the real estate and whose primary goal is to recoup as much of its investment as the asset will bear.

No step is more critical than to understand the impact that a foreclosure transfer will have on the various rights and interests underlying the mezzanine loan collateral, including the mortgage loan and any senior mezzanine loans, ground leases or material contracts pertaining to the underlying property. Any intercreditor agreements will provide the most significant input into the timing and nature of remedies. The mezzanine lender's best strategy may be to use the cure rights in the intercreditor agreement to stave off a foreclosure action by the senior lender(s). One option provided to each junior mezzanine lender in the standard intercreditor agreement, in the event the mortgage loan is accelerated, foreclosed or becomes "specially serviced," is the right to purchase at par each position senior to it.[2]

Once a secured party has accelerated its loan (or upon maturity of the loan), three remedies are available: 1) common law remedies through the courts; 2) foreclosure by disposition of collateral under Article 9; and 3) strict foreclosure under Article 9. Common law remedies would entail maintaining an action to enforce the note, obtaining a judgment, and enforcing the judgment by executing on the collateral and the other assets of the borrower (subject to any nonrecourse provisions). However, such a path is likely to be significantly more costly and time-consuming than Article 9 remedies.

Exercise of remedies under Article 9 does not require resort to the

courts or the entry of a judgment on the note, though the collateral disposition process under Article 9 allows the debtor and other parties entitled to notice the opportunity to bring an action in the courts on legal or equitable grounds to contest the secured party's exercise of remedies. Once in receipt of a foreclosure notice, debtors may also interpose lender liability claims against the secured party that can create a drag on the process, whether or not they have merit, and as a last resort, file bankruptcy to take advantage of the automatic stay.

Article 9 provides that a disposition of collateral can be accomplished by either a "public disposition" or a "private disposition." "Although the term is not defined . . . a "public disposition" is one at which the price is determined after the public has had a meaningful opportunity for competitive bidding. "Meaningful opportunity" is meant to imply that some form of advertisement or public notice must precede the sale … and that the public must have access to the sale. . . ."[3] Any advertisement for the sale of collateral at a public sale should be calculated to maximize public participation. UCC § 9-610(b) provides that a public disposition must be a "commercially reasonable" disposition with advance notice under Sections 9-611 and 9-612 to the debtor, any secondary obligor and, depending on the facts of the loan transaction, certain additional parties.[4] The forms of notice set forth in UCC § 9-613 should be used, as there is likely little benefit to any creativity by the mezzanine lender in this exercise. UCC § 9-612(b) provides a 10-day "safe harbor" for notice of public dispositions, which the Official Comment to Section 9-612 states is intended only to be a "safe harbor" and not a minimum requirement. However, in the real estate financing arena, as discussed below, the process to prepare for the sale and market the interests will usually result in a notice period far in excess of the safe harbor.

While the disposition may be either private or public, a secured party may only purchase collateral at a private disposition "if the collateral is a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations."[5] The sale of collateral consisting of privately held, limited liability company or partnership interests or shares of stock in a closely held corporation should therefore be sold at a public disposition unless the collateral falls into the description above or the secured party has no intention of purchasing it. Where a secured party is pursuing a "loan-to-own" strategy, a public disposition is clearly preferred, unless the debtor is amenable to strict foreclosure.

Both public and private dispositions must, in all aspects, be "commercially reasonable." A rule of thumb for a secured party is to market the security as a non-foreclosing seller might market the underlying property—if possible, structure the public notice and the disposition to comply with exemptions from securities laws, advertise in a way calculated to reach the highest number of likely buyers[6] (such advertisement should put forth all information typically given in similar advertisements), provide sufficient diligence materials and time to allow potential buyers to review those materials, and minimize restrictions on the sale of or future rights attaching to the collateral (which may require obtaining various consents under the mortgages or intercreditor or entity agreements). Diligence materials should include many of the materials that a buyer of a commercial property would require, such as information pertaining to the mortgage and other senior loans, a rent roll, title report, survey and structural and environmental assessments, to the extent available and subject to any confidentiality restrictions in the loan documents or the intercreditor agreement. A foreclosing mezzanine lender should consider retaining a local third-party broker or auctioneer experienced in selling property similar to the underlying real estate to handle the marketing of the interest.

In addition, the location and manner of the sale should also be appropriate. In the case of a sale of privately held, limited liability company or partnership interests or shares of stock in a closely held corporation, this may mean in an electronic forum, or in the major city nearest the underlying real property interests. The commercial reasonableness of each of these steps is a fact-specific inquiry, and depends on a cost / benefit analysis and the surrounding circumstances (for example, a reasonable period of time from the initial advertisement of the disposition and the disposition itself may depend on, *inter alia*, market conditions, the complexity of the documentation relating to the underlying assets and how long it would take a typical buyer to obtain financing). The secured party can exercise some discretion in setting the terms of the sale and assessing the *bona fides* and qualification of any bidder, and reject a higher bid on that basis (such discretion must, of course, be exercised in a commercially reasonable manner). An unscrupulous debtor could easily send an unqualified bidder to the sale without any real intention of completing a transaction in order to buy more time.

Whether the collateral is a "security" under federal and / or state securities laws is a threshold issue when contemplating acceleration and / or foreclosure. Securities laws prohibit the offering and public sale of unregistered securities. Conducting a foreclosure sale that is sufficiently public to be "commercially reasonable" without crossing the line into a public offering of unregistered securities can be challenging. Comment 8 to Section 9-610 advises:

> Although a "public" disposition of securities under this Article may implicate the registration requirements of the Securities Act of 1933, it need not do so. A disposition that qualifies for a "private placement" exemption under the Securities Act

> of 1933 nevertheless may constitute a "public" disposition within the meaning of this section.[7]

As with all other aspects of an Article 9 foreclosure sale, commercial reasonableness is the standard by which the eventual sale price is judged (not the "shocks the conscience" standard applied to mortgage foreclosures).

> The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition or acceptance was made in a commercially reasonable manner.[8]

Because the Article 9 definition of a commercially reasonable sale is vague and because a judgment as to whether or not a sale was reasonable will frequently turn on the circumstances of a particular case, many courts have held this to be a question of fact, with the burden of proof on the secured party.

The third remedy available to a foreclosing mezzanine lender is strict foreclosure, in which the secured party retains the debtor's collateral in full or partial satisfaction of the secured debt. UCC § 9-620 expressly permits "acceptance in satisfaction" for all types of collateral, and that such satisfaction can be "full or partial." Where the secured party seeks *partial* satisfaction, the debtor must affirmatively consent to the proposed acceptance of collateral as provided in Section 9-620 (c)(1) "in a record authenticated after default." A debtor's consent to acceptance of the secured party's proposal in *full* satisfaction of the debt may be passive (e.g., where the secured party sends a proposal to the debtor and does not receive an objection within 20 days).[9] Without such consent or lack of objection, strict foreclosure is not an available remedy.

"When documenting a mezzanine loan that is secured only by a partial interest in a pledged entity, it is important to obtain a recognition agreement or other consent to admission into the pledged entity from the other partners or members."

While strict foreclosure may be desirable, as it is a streamlined process that eliminates the need for a sale or other disposition and is certainly a preferred outcome for a "loan-to-own" strategy, the practical difficulty is that in most cases a debtor has little incentive not to raise an objection for strategic reasons. The presence of appropriate non-recourse carveouts in the mezzanine loan documents, and a guaranty of those carveouts by the principals of the borrower, are likely to be effective in conforming a borrower's actions in the face of a strict foreclosure to the economic realities of the situation.[10] In other cases, unpalatable as it may be for a secured party, it may make sense to compensate the debtor to incentivize cooperation.

Other Considerations

There are usually contractual limitations on the transfer of membership or limited partnership interests in the mezzanine loan borrower arising out of one or more of (1) the underlying mortgage or deed of trust, (2) the intercreditor agreement and/or (3) the borrower's operating agreement or limited partnership agreement. One of the most significant restrictions on the transfer of mezzanine collateral is a limitation under the intercreditor agreement that such transfers must be to a "Qualified Transferee," an entity generally defined in the operative document as either the mezzanine lender itself or an institutional investor meeting certain requirements.[11] This significantly restricts the potential universe of purchasers at a foreclosure sale, and the process of "qualifying" the winning bidder may inject uncertainty surrounding the ability of a buyer to close and, at a minimum, may delay the closing.

Additionally, without any necessary consents from other partners or members, the successful purchaser at a foreclosure sale cannot succeed to the rights or powers of a partner or member and is only entitled to receive proceeds and distributions. In cases in which the mezzanine lender is the beneficiary of a pledge of all of the equity interests in the subject pledged entity, this issue does not arise. In other cases, though, the lack of rights as a partner or member will seriously inhibit the purchaser's ability to enforce payment of distributions, deny such purchaser access to books and records, and undermine a claim by such purchaser for breach of fiduciary duty; moreover, the lack of a voting interest impairs the value of the collateral in a foreclosure sale. When documenting a mezzanine loan that is secured only by a partial interest in a pledged entity, it is important to obtain a recognition agreement or other consent to admission into the pledged entity from the other partners or members.

Complexities may arise due to the "carving up" of the capital structure. Many mezzanine loans are originated as part of a mortgage/mezzanine structure in the commercial mortgage-backed security (CMBS) market, with the originator selling off certain pieces and keeping others. Often, the servicing or collateral agency's rights for each tier of indebtedness are retained in the originator or its successor, who also may have significant exposure in one or more of the tiers of indebtedness. In a distress situation, this can create significant conflicts of interest between a servicer/collateral

agent that also holds an interest in a mortgage or mezzanine tranche and another holder of an interest in a mezzanine tranche. This conflict may impede the exercise of remedies by a mezzanine lender. For example, if the servicer / collateral agent or the holder of a mortgage loan also holds a blocking or controlling interest in a mezzanine tranche, and such party is in negotiations with the borrower to grant concessions under a matured or defaulted loan, that party can effectively block the exercise of remedies by the mezzanine tranche or provide any necessary consent on behalf of the mezzanine tranche, even if it is against the interests of the other holders of that tranche to do so, on the basis that such party's interest as mortgage lender is better served by making the concessions.

Regardless of its interests, the servicer / collateral agent has fiduciary obligations to its principal, the mezzanine holder, under general principles of agency law. The relevant agreements may contain express waivers of such fiduciary obligations, though it is not clear to what extent any such waivers would be enforced by a court. A prudent mezzanine lender will fight the inclusion of any waivers of fiduciary duty with vigor. In the event any conflict becomes apparent, the mezzanine lender must also put the servicer / collateral agent on notice of the conflict of interest, underscoring the fiduciary obligations of the servicer / collateral agent.

Conclusion

Foreclosure of a mezzanine loan under Article 9 offers many benefits to a secured party, chief among them the streamlined process that generally achieves the desired result both faster and more economically than a mortgage foreclosure. A foreclosing mezzanine lender should make sure that at each point in the foreclosure process its actions are carefully considered to minimize the chance of a challenge for lack of commercial reasonableness. The secured party that has followed the recommendations of Moody's Investors Service in structuring and documenting the mezzanine loan at the outset will be in the best position to negotiate a satisfying outcome in a distressed loan situation.[12]

"Once the foreclosure is completed, the mezzanine lender may find itself in the unfamiliar situation, for which it may be ill-equipped, of having to operate the property and deal with the various competing property interests."

One final note: a mezzanine lender must also be careful what it wishes for. Once the foreclosure is completed, the mezzanine lender may find itself in the unfamiliar situation, for which it may be ill-equipped, of having to operate the property and deal with the various competing property interests. Moreover, once the mezzanine lender takes control of the pledged entity, various claims against the distressed entity may only begin to come out of the woodwork.

Endnotes

1. Article 9 governs the perfection of security interests, and Article 9 refers a secured party to Article 8 in order to determine how perfection is accomplished for both certificated and uncertificated securities where the pledged entity has opted into Article 8. In general, the lender will want to qualify as a "protected purchaser" under Article 8 of the UCC in order to cut off all adverse claims in the pledged equity collateral. For further discussion, see James D. Prendergast & Keith Pearson, *"How to Perfect Equity Collateral Under Article 8"* 20 No. 6 PRAC. REAL EST. LAW. 33 (2004).
2. The industry standard intercreditor agreement can be found at http://www.cmbs.org/WorkArea/showcontent.aspx?id=10064.
3. Official Comment 7 to UCC § 9-610 (1977).
4. A UCC Foreclosure Notice Insurance Policy, certifying the identities of security interest holders and lien holders of record, will soon be available from First American Title Insurance Company.
5. UCC § 9-610(c) (1977).
6. *See Ford & Vlahos v. ITT Commercial Fin. Corp.*, 8 Cal 4th 1220 (1994).
7. For a comprehensive discussion of this issue, see Lynn A. Soukup, *Securities Law and the UCC: When Godzilla Meets Bambi*, 38 U.C.C. L.J. 1 Art. 1 (2005).
8. UCC § 9-627(a) (1977).
9. UCC § 9-620(c)(2)(C) (1977).
10. *See* John C. Murray, *Carveouts to Nonrecourse Loans: They Mean What They Say!*, 19 No. 3 PRAC. REAL EST. LAW. 19 (2003).
11. See the form intercreditor agreement (http://www.cmbs.org/WorkArea/showcontent.aspx?id=10064), at page 6. The institutional investor would need to meet a negotiated assets management threshold, be a '33 Act "qualified institutional buyer" or meet certain other related requirements.
12. *See* DANIEL B. RUBOCK, MOODY'S INVESTORS SERVICE, INC., US CMBS AND CRE CDO: MOODY'S APPROACH TO RATING COMMERCIAL REAL ESTATE MEZZANINE LOANS 3 (2007). Moody's recommends a pledge of 100% of the equity, opting in to Article 8, certificating the equity, filing a financing statement, control of the ability to opt out through hardwire or proxy and the purchase of UCC insurance.

Peter E. Fisch and Steven Simkin are partners in the real estate department of Paul, Weiss, Rifkind, Wharton & Garrison, LLP, and Spencer Compton is a Senior Vice President and Special Counsel of First American Title Insurance Company. **Emily J. Carey, an associate at Paul, Weiss, assisted in the preparation of this article. The authors wish to acknowledge the invaluable contribution of James D. Prendergast, Senior Vice President and General Counsel of the UCC Division of First American Title Insurance Company.**

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Effects of BAPCPA on Commercial Leases and Designation Rights

By David J. Kozlowski

Introduction

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) became effective for bankruptcy cases filed on or after October 17, 2005. BAPCPA fixes the time in which Chapter 11 tenant / debtors may assume or reject leases.[1] Previously, tenant / debtors had 60 days to decide, with "for cause" extensions available through the court. These extensions could delay the decision for months or years,[2] prejudicing the landlord. BAPCPA increased this initial period to 120 days, with an available "for cause" extension of 90 days. Further extensions can only be granted with the landlord's consent. Failure to decide results in the leases being deemed rejected.

This change, essentially a hard time-limit on assumption of commercial leases in bankruptcy, can cause problems for retail debtors with numerous leases over a wide geographic area, who may need more than 210 days to decide whether to assume or reject the leases.

In removing judicial discretion and capping the debtor's time to assume, Congress may have caused problems for such retail debtors who now must assume all their unexpired nonresidential leases prematurely, or risk having them rejected 210 days from the order for relief. The legislation also may have had the side effect of curtailing use of designation rights as a device to maximize the estate. The change reduces the time to find end buyers, potentially decreasing the value of the designation rights, or possibly ending their usage altogether.

A Brief Explanation of Designation Rights

Section 363(b) of the Code allows debtors, after notice and a hearing, to sell or lease property of the estate.[3] Unexpired leases are considered property of the estate and are subject to being leased or sold under section 363(b).[4] Over time, the process of selling unexpired leases developed where tenant / debtors had multiple below-market leases.[5]

"In removing judicial discretion and capping the debtor's time to assume, Congress may have caused problems for such retail debtors who now must assume all their unexpired nonresidential leases prematurely, or risk having them rejected 210 days from the order for relief."

Designation rights were defined by the court in *In re Ames Department Stores Inc*.[6] as "the right to direct the debtors to assume and assign . . . Unexpired Leases . . . to third parties qualifying under the Bankruptcy Code, after such non-end users locate ultimate purchasers of the Unexpired Leases. . . ."[7] This practice became widely used in large corporate bankruptcies with multiple leases as a way to add value to the estate. However, the benefit of designation rights extends beyond adding value, as they also "bring immediate liquidity to the bankruptcy estate while allowing the debtor to focus on issues other than marketing unwanted leases."[8]

Rejecting Property After Assumption in Bankruptcy

Occasionally, a tenant / debtor assumed a lease, only to determine it was not needed for reorganization and subsequently reject it. Upon assumption, the landlord was owed rent as an administrative expense (rather than having a general unsecured claim in bankruptcy if rejected). The question as to whether, upon subsequent rejection of the lease, the rents were still owed to the landlord as administrative expenses, or whether they became general unsecured claims was answered in *Nostas Associates v. Costich* (*In re Klein Sleep*),[9] where the court held that a landlord was entitled to be paid as an administrative expense claim from the bankruptcy estate for remaining time on a lease which had been assumed but subsequently rejected, meaning that the landlord was paid off the top, before the other creditors.[10] This remaining time was not subject to the cap applying to leases rejected outright under 502(b)(6).[11] With this precedent existing, rejecting an assumed lease became a dicey proposition, as doing so would create a potentially large and theoretically limitless administrative expense.

Klein Sleep's rule had negative implications for all parties. The constant rents as administrative expenses shrank the estate to the detriment of other creditors. Likewise, the debtor's ability to reorganize was hampered by these rents (which were on premises the debtor no longer occupied). But even landlords were hurt as debtor uncertainty prolonged the time in which a store was unoccupied, which, in the case of shopping center owners, could be worse than having only an unsecured claim but having a new tenant occupying the premises (and thus having certainty).[12] Ultimately, Congress added section 503(b)(7) to the Bankruptcy Code, settling on the following language:

> 503(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under

section 502(f) of this title, including—

(7) with respect to a nonresidential real property lease previously assumed under section 365, and subsequently rejected, a sum equal to all monetary obligations due, excluding those arising from or relating to failure to operate or a penalty provision, for the period of 2 years following the later of the rejection date or the date of actual turnover of the premises, without reduction or setoff for any reason whatsoever except for sums actually received or to be received from an entity other than the debtor, and the claim for remaining sums due for the balance of the term of the lease shall be a claim under 502(b)(6)[.][13]

365(d)(4): The Change

The Committee Report in 2005 noted that the amendments to 365(d)(4) were "to establish a firm, bright line deadline by which an unexpired lease of nonresidential real property must be assumed or rejected."[14] The Committee goes further, indicating the provision was designed to remove discretion from bankruptcy judges in granting extensions beyond 210 days.[15] The argument that section 365(d)(4) was the product of extensive negotiation over the three previous Congresses and was not hostile to lessees won out and the amendments for which the International Council of Shopping Centers lobbied were eventually enacted by BAPCPA.[16]

Survey and Results

The author conducted a survey via mail and e-mail inquiries to bankruptcy and real estate professionals. Survey questions were sent to a select group of members of the American Bankruptcy Institute and the American College of Real Estate Lawyers, who have a special interest in both real estate and bankruptcy. The 27 responders are all among the leading professionals dealing with the assumption or rejection of commercial leases in corporate bankruptcies. A list of the questions follows this article as "Appendix A." Copies of the answers to this survey are on file with the author. Those providing content were assured of their privacy—all requests for further information will be considered with the privacy of the individuals in mind.

"Under the changes there is not enough time for a debtor to determine which leases to sell, market and auction designation rights, get court approval, give the designation rights holder sufficient time to market the leases, choose designees, and have the assignments to designees approved and closed."

The survey found that in large business reorganizations, the decision whether to accept or reject leases was rarely made within 210 days. All responders to the survey indicated that leases were usually, if not always, assumed after 210 days in bankruptcies with multiple leases, and 61% noted that debtors could not have sped up the determination process.[17] This majority indicated a variety of roadblocks preventing the debtor from assuming in a more timely fashion, including the debtor needing more time to operate, needing a financial model to be in place, and needing to evaluate locations. Responders who believed debtors could speed things up fell generally into two camps—those who felt the debtor could simply decide sooner, and those who thought the process could be sped up, but the result would limit options and could devalue the property. These results indicate fundamental problems with the assumption period in BAPCPA. Major changes need to be made in the approach taken toward assumption of leases. Tenant/debtors may be forced to change their behavior or risk having the 210-day period expire, causing all unassumed leases to be deemed rejected.[18]

Of all the aspects of lease assumption or rejection affected by BAPCPA, designation rights suffer greatest. Courts were often willing to grant extra time to allow debtors to sell designation rights, as the marketing of these leases would often take a long time. Under the changes there is not enough time for a debtor to determine which leases to sell, market and auction designation rights, get court approval, give the designation rights holder sufficient time to market the leases, choose designees, and have the assignments to designees approved and closed. More than one-third of responders believed designation rights would become less valuable and harder or impossible to sell due to both the rush to sell before the expiration of the 210 days, and the inability to market and sell them in many typical cases. If debtors almost never know which leases they will be assuming and which they will be rejecting by 210 days, it is unreasonable to expect that they will know which leases they will be able to assume and assign within the same time frame. Some responders to the survey offered answers focused on beginning preparations pre-petition, thus avoiding the problem.

But there is some hope—under Section 365(d)(4)(B)(ii), the court may grant extensions beyond 210 days with the lessor's prior written consent. The survey found several circumstances in which lessors would be likely to grant written consent to extend time. One-quarter of the responders believed landlords would grant extensions if they were monetarily compensated for it. Forty percent assume the landlord would be willing to have time extended if they had no new tenant ready to lease the property. This is probably because shopping centers can ill-afford stores

"going dark" for extended periods, and because collecting rent from a debtor who is current is better than collecting no rent and simply having a general, unsecured claim in the bankruptcy proceeding. Similarly, a handful of responders felt extensions would be granted where the rent was over-market and where the debtor was conforming with the lease terms. Other answers provided included where the 210 days would occur at an inconvenient time (such as the holiday season), where assumption was being negotiated, and where the landlord feared immediate rejection. However, since many of the reasons a landlord would give consent generally do not apply to below-market leases, sale of designation rights (which are valuable when leases are below-market and can be sold at a profit) will likely still suffer.

The survey found that the changes are expected to result in debtors waiting longer to file in an effort to extend their time. These tenant/debtors may prepare better pre-petition by hiring lease consultants and financial advisors to provide analysis "so that chapter 11 is used to implement planned restructurings and not as a haven for business trial and error."[19] This is especially so since only landlords in bad markets will be likely to grant extensions to entice tenants. As a solution, half of the responders who answered believed a tenant could bargain at the lease's inception that in the event of the tenant's bankruptcy, the landlord would consent to allowing extra time to assume the lease. Several pointed out that, while conceptually accurate, tenants are optimistic when entering into lease agreements, and would likely not be considering hypothetical bankruptcy scenarios.[20]

Just under 79% of responders believed there would be any adverse affects on real estate closings. Also, responses were generally ambivalent as to whether the real estate industry would suffer any problems from this BAPCPA changes. On the other side, an overwhelming majority (90.48%) of responders were of the opinion that this particular change to the Code was negative for bankruptcy law, citing the undue pressure placed on debtors to formulate a business plan and the unfair advantages given landlords as general reasons.[21]

"There are several problems with the BAPCPA changes to section 365(d)(4), the most important of which is the 210-day maximum in which a debtor may assume or reject an unexpired nonresidential lease without written consent of the lessor."

Conclusion

There are several problems with the BAPCPA changes to section 365(d)(4), the most important of which is the 210-day maximum in which a debtor may assume or reject an unexpired nonresidential lease without written consent of the lessor. The proponents indicated that this time would be sufficient, negatively characterizing judicial discretion in granting exceptions. The empirical data show otherwise. Bankruptcies with multiple unexpired nonresidential leases most often saw leases assumed after 210 days, and most practitioners surveyed did not believe the debtor could have come to the decision sooner. While this could be solved by debtors assuming all leases for which they are "on the fence," Congress's refusal to abandon *Klein Sleep* (rather, simply limiting the court's holding) all but assures huge administrative expense claims for each assumed and subsequently rejected lease. Debtors could try to plan before filing Chapter 11, but would still run the risk of assuming leases later needing to be rejected, as the debtor would not have the benefit of operating through several business cycles or holiday seasons, and may not have settled upon a final business model or a reorganization plan.

Potentially lost in the wake of BAPCPA is the sale of designation rights. Again, it is the artificial time frame that causes the problem. Two-hundred ten days may not be sufficient to find an end buyer. Survey responders noted designation rights are expected to become harder to sell, less valuable, and a less viable option.

These problems are not completely without solutions. It is likely that more pre-pack bankruptcies will be filed, or at least better preparation and examination of leases will occur in corporations on the verge of filing. Real property attorneys need to be aware when entering lease agreements to look for clauses ensuring receipt of the lessor's written consent to an extension in the event of the corporation's filing for bankruptcy relief. Finally, the option of assuming undecided leases in the final hour with the possibility of subsequent rejection, while not the most desirable solution, will provide a way past 210 days and allow time to market designation rights, but at great expense.

Ideally, Congress would reexamine these changes. Unfettered bankruptcy judges are positives in a system that favors creativity, flexibility and elasticity. Handcuffing judges into a rigid time frame to the benefit of one group of creditors is contrary to the ideal of debtor rehabilitation. Congress should review BAPCPA and realize that what has been seen as small abuses by several judges is outweighed by the rehabilitative and "fresh start" goals of the bankruptcy system.

Endnotes

1. 11 U.S.C. § 365(d)(4)(a)(i) (2005).
2. *See* William I. Kohn et al., *Reforms Benefiting Business Creditors Generally*, 24 AM. BANKR. INST. J. 5, 6 (June 2005); Richard Levin and Alesia Ranney-Marinelli, *The Creeping Repeal of Chapter 11: The Significant Business Provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR.

L.J. 603, 623 (2005); Robert N. Zinman, *New Bankruptcy Law Affects Real Estate Investments*, 33 N.Y. REAL PROP. L.J. 4, 173 (2005).

3. 11 U.S.C. § 363(b) (2006).

4. *See* Robert N. H. Christmas, *Designation Rights-A New, Post-BAPCPA World*, 25 AM. BANKR. INST. J. 10, 62 (2006), citing *48th Street Steakhouse Inc. v. Rockefeller Group Inc.* (*In re 48th Street Steakhouse Inc.*), 835 F.2d 427, 430 (2d Cir. 1987) ("[T]he courts are in agreement that unexpired leasehold interests . . . constitute property of the bankrupt estate"), *cert. denied*, 485 U.S. 1035 (1988). Debtors have the option of assigning the lease. 11 U.S.C. § 365(f) (1979); Robert N. Zinman, *New Bankruptcy Law Affects Real Estate Investments*, 33 N.Y. REAL PROP. L.J. 4, 173 (2005).

5. *See In re Track Auto Corp.*, 367 F.3d 237 (4th Cir. 2004) (finding that benefit of assignment has been undercut, but benefit of below- market leases still exists); Pamela Smith Holleman, *Solvent Shopping Center Tenants: Reexamination in Light of In re Trak Auto Corp.: Part I*, 23 AM. BANKR. INST. J. 14, 64–65 (2005) (noting that third parties find value in these leases because they are below market and debtors historically were able to assign leases notwithstanding restrictive provisions).

6. 287 B.R. 112 (Bankr. S.D.N.Y. 2002).

7. *Id.* at 114, fn.2. A tenant / debtor would find a third party who, for a fee, markets the tenant / debtor's unwanted leases to other parties. These other parties then pay for the right to have the lease assigned to them, the third party coordinates the other parties' intent to the tenant / debtor, who then assumes and appropriately assigns the leases in question. Note that designation rights are not the sale of the power to assume leases, as that power rests solely in the trustee or debtor-in-possession, and the trustee or DIP retains that power in a designation rights scenario; this logic is not beyond reproach. *See* Elizabeth Warren and Jay L. Westbrook, *Warren & Westbrook Professors of Law: Selling the Trustee's Powers*, 23 AM. BANKR. INST. J. 325, 326 (2004). For more on the definition of designation rights, *see e.g.*, *In re Ernst Home Center, Inc.*, 209 B.R. 974 (BANKR. W.D. Wash. 1997). For a discussion of the designation rights issue in *In re Ames Department Stores Inc.*, *see generally* Daniel J. Carragher, *Smooth Sailing for Designation Rights Sales*, 22 AM. BANKR. INST. J. 26 (2003).

8. Pamela Smith Holleman, *Solvent Shopping Center Tenants: Reexamination in Light of In re Trak Auto Corp.: Part I*, 23 AM. BANKR. INST. J. 14, 64 (2005).

9. 78 F.3d 18 (2d Cir. 1996).

10. *Id.* at 28–29. *See* Thomas McIntyre Devaney, Comment, *The Klein Sleep Decision: Section 502(b)(6) Lease Damages Cap as the Rule, Not the Exception*, 4 AM. BANKR. INST. L. REV. 557, 561–63 (1996) (discussing *In re Klein* holding).

11. *See* Devaney, *supra* note 10 at 559. Section 502(b)(6) caps the claim of a lessor for damages resulting from termination of a lease at a maximum of three years. *Id.*

12. Of course, once rejected the landlord could mitigate his own loss and find a new tenant, but the idea that the debtor could reject after assuming had to be discouraging for landlords. Ideally, one imagines they would prefer the certainty of knowing as soon as possible whether the debtor will assume or reject the lease, allowing them the most time to find a willing tenant, rather than be in limbo on every assumed lease, waiting for the debtor to exercise his option of subsequent rejection. From this point of view, at least the *Klein Sleep* decision could discourage debtors from assuming then rejecting.

13. 11 U.S.C. § 503(b)(7) (1978).

14. H.R. Rep. No. 109–31 pt. 1, at 86 (2005).

15. *Id.*

16. *Id.* at 428 (noting the National Retail Federation is a strong supporter on the same side of the ICSC). *See* Kevin P. Groarke, *The Bankruptcy Amendments and Shopping Center Leases: Enhancing Use Restrictions and Curing the Incurable*, 25 SHOPPING CTR. LEGAL UPDATE: THE LEGAL J. OF THE SHOPPING CENTER INDUSTRY 2 (2005), (noting from the ICSC view, things worked out well: "On balance, however, Congress weighed the potential advantages to the bankruptcy estate of permitting freer assignability of shopping center leases against the goals of landlords to maintain occupancy and the high caliber of tenant mix and the aligned interests of the other tenants of shopping centers, and came down emphatically in reinforcing Congress's prior policy judgment in favor of landlords.").

17. Note that everyone surveyed who represented landlords believed debtors could speed it up, while 64% of those surveyed who represented tenants or debtors believed it could not be sped up.

18. "[A]n unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected . . . if the trustee [DIP] does not assume or reject the unexpired lease by . . . 120 days after the date of the order for relief . . . ." 11 U.S.C. § 365(d)(4)(A)(2006).

19. Quoting from one survey responder's answer; anonymous but on file with the author.

20. *See* Survey, Question 7.

21. *See* Survey, Question 6. Note that one responder feels the amendment "levels the playing field" for landlords, and another thinks the change is good because "it forces resolution or finality in a shorter time frame."

The author is a graduate of St. John's University School of Law and an associate at Arent Fox LLP in New York. He thanks Professor Robert Zinman, who provided the idea for, and guidance on, this article. He also thanks his wife and proof-reader, Suzanne. Any opinions expressed herein are the author's, and do not necessarily reflect the opinion of his employer.

Appendix A

General Information

Name

Address, Phone Number, E-mail

Primary Practice Area: Bankruptcy, Real Estate, Both. (If you primarily practice real estate law, do you regularly represent landlords, tenants, both?)

Empirical Study Information

1 Given your experience in bankruptcy reorganizations where assumption or rejection of multiple leases of non-residential real property was at issue prior to the adoption of the amendment, was the determination as to which leases would be assumed or rejected made before the expiration of 210 days from filing? Please indicate whether you are writing from the landlord's point of view or the tenant's.

   a. Is there anything the debtor could have done to speed up the process?

   b. Specifically, what roadblocks would have impeded or prevented (did impede or prevent) making the determination in 210 days?

2. Given that debtors sometimes sell designation rights, and that this process can often take a long time, how do you perceive that lease designation rights will be affected under the new law?

3. If coming to the 210-day mark and the determination to assume or reject certain leases still has not been made, a possible option will be to assume all leases in question, then later reject undesirable leases in the reorganization plan. What potential problems, if any, do you foresee in this proposal? Does new § 503(b)(7) limiting administrative expense claims in this situation help? Can you propose solutions to any of these problems?

4. Generally, what problems does this amendment portend for the real estate industry?

   a. Under what circumstances would a landlord be willing to grant permission to extend the time limit in the lease?

   b. Is there anything that could be done by the lessee to insulate itself?

5. Did you perceive the court's ability to grant almost limitless extensions under the old law as a positive? Why or why not?

6. Overall, is this particular change (not BAPCPA as a whole) a positive or negative change to bankruptcy law? To real estate law?

7. Do you think this amendment will have an adverse affect on closings of new real estate transactions?

8. Are there any other implications from this amendment that you believe should be considered?

The Enforceability of Cross-Default Provisions in Bankruptcy

By Nili Farzan

Introduction

One of the most notable privileges of bankruptcy filing is that the debtor in possession or the trustee has the right to reject its unprofitable executory contracts or unexpired leases and assume its profitable ones.[1] However, the debtor must reject or assume the contract in its entirety and cannot "cherry-pick" its obligations under the contract or lease.[2] Landlords, being aware of such rights and limitations under bankruptcy, often attempt to protect themselves by drafting cross-default provisions in their agreements, providing that a default under one lease triggers a default under all leases with the same tenant.[3] In bankruptcy courts, the landlords argue that the multiple agreements are essentially a single agreement, and the debtor must assume or reject the contracts in their entirety or cure a default under one lease before any other leases are assumed.[4]

Different jurisdictions have used various approaches to evaluate the enforceability of cross-default provisions.[5] Some courts have exclusively examined the enforceability of cross-default provisions under section 365 of the Bankruptcy Code. Such courts have refused to enforce cross-default provisions by analogizing them to anti-assignment[6] or *ipso facto* provisions,[7] both of which are unenforceable under section 365.[8] The majority of courts confronted with the issue of multiple contracts and cross-default provisions have recognized that divisibility of contracts should be evaluated under state law. If they find the contract severable, they invalidate the cross-default provision by citing equitable bankruptcy principles, typically without much analysis.[9] A number of courts, however, have not invoked the Bankruptcy Code or these equitable principles. Instead, they evaluate whether the cross-default provision was essential to the parties' bargain under state contract principles.[10] As a result of the different approaches invoked by various courts, courts reach contradictory outcomes when confronted with similar facts.

As most courts recognize, contract law interpretations are property interests governed by state law.[11] Cross-defaults as a term of the contract or lease should also be evaluated under state law. This note will argue that cross-defaults should be held invalid if their enforcement under state contract law would result in forfeiture for the debtor.[12] This approach will ensure that parties will receive the benefit of their bargains. Part I of this note presents a general overview of the debtor's right of assumption and rejection of executory contracts, and limitations thereof under the Bankruptcy Code. Part II examines bankruptcy cases that have relied on federal bankruptcy law rather than state law to evaluate the enforceability of cross-default provisions. This part also examines cases that purport to evaluate divisibility of contracts under state law, but ultimately rely on bankruptcy principles to invalidate the cross-default provisions if they hold the contracts divisible. This note posits that this approach, driven by so-called equitable principles, is a flawed interpretation of the Bankruptcy Code and is inconsistent with the determination of the intent and bargain of the parties. Part III explains that the concept of forfeiture under state contract law may serve as an adequate basis for evaluating the enforceability of the cross-default provision. Though there are no bankruptcy court cases that have considered the concept of forfeiture in their evaluation, there are some cases that have properly alluded to this principle by solely relying on state law and examining whether the cross-default provision is an essential element of the parties' bargain. If courts find that a cross-default provision is immaterial, then their decision to excuse the condition can be strengthened by illustrating that it would be a forfeiture for the debtor not to be able to assume the lease or contract by the virtue of the cross-default provision.

I. Assumption and Assignment of Executory Contracts and Unexpired Leases

A. General Overview of Assumption and Rejection

Under section 365(a) of the Bankruptcy Code, the trustee or debtor in possession may assume or reject an executory contract or unexpired lease.[13] The Bankruptcy Code does not define the term "executory contracts," but the legislative history of the Code defines it as a contract "on which performance remains due to some extent on both sides."[14] A majority of courts have adopted the definition of bankruptcy scholar Vern Countryman, which specifically defines an "executory contract" as "a contract under which the obligations of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other."[15] This definition is distinguishable from the generally accepted meaning of "executory contract" under non-bankruptcy law which includes any contract not fully performed, even though performance has been completed on one side.[16] Bankruptcy courts look to state law to determine whether the failure to perform an obligation under a contract constitutes a material breach.[17]

The purpose of assuming or rejecting executory contracts is to provide the debtor an opportunity to reorganize its business and eliminate disadvantageous contracts and leases.[18] By allowing the debtor to eliminate burdensome contracts and keep beneficial ones, section 365 "advances one of the core purposes of the Bankruptcy Code: 'to give worthy debtors a fresh start.'"[19] Accordingly, the debtor has broad discretion to evaluate each of its unexpired contracts or leases to determine whether it would be in its best interest to assume or reject them.[20] The court applies the "business judgment"[21] standard to approve the assumption or rejection of the contract. A mere showing of benefit to the estate is sufficient for the court to approve assumption or rejection of the contract.[22] Further, the debtor can assign the assumed lease or contract to a third party, "with a payment to the estate reflecting its excess value over the market."[23]

To alleviate the burden of an under-market contract or lease on the bankruptcy estate, the debtor's rejection is deemed a breach of contract occurring immediately before the commencement of the bankruptcy case.[24] Consequently, the non-debtor's damages as a pre-petition general unsecured claim do not receive priority over any other unsecured claims.[25] Whereas the claim for most contracts is equal to the amount of damages that the creditor suffers as the result of the rejection, damages for rejection of a real estate lease are capped at the greater of one year's worth of rent under the lease, or 15 percent of the remaining term's rent, but not exceeding three years' worth of rent.[26]

B. Restrictions on the Right of Assumption

While the debtor has broad discretion to either assume or reject contracts, section 365(b)(1) imposes some "restrictions on the debtor's power to assume executory contracts and unexpired leases."[27] Section 365(b)(1) protects the non-debtor by requiring the debtor to cure any defaults, compensates the non-debtor party for any actual pecuniary loss caused by the default, and provides adequate assurance of future performance under the contract prior to assuming the contract.[28] In contrast to rejection, where damages are regarded as unsecured claims, assumption requires the debtor to pay any outstanding defaults in full.

Another recognized restriction on the debtor's ability of assumption is that the debtor must assume or reject an executory contract or unexpired lease in its entirety.[29] That is, the debtor in possession or trustee "may not reject (i.e., breach) one obligation under a contract and still enjoy the benefits of the same contract."[30] As stated by the Supreme Court, if "the debtor-in-possession elect[s] to assume the executory contract, however, it assumes the contract *cum onere*."[31] The *cum onere* rule is expanded to apply to multiple contracts intended to form a single integrated transaction.[32] Moreover, whereas in contract law a party may sever and strike the unconscionable clauses of a contract and have the rest of the contract enforced, the *cum onere* principle in bankruptcy provides that a debtor may not sever the unconscionable part of the contract and assume the remainder of the agreement.[33] Accordingly, the lessor gets the full benefit of the bargain when the debtor assumes both the burdens and the benefits of the contract.[34]

II. Invalidation of Cross-Default Provisions Under Bankruptcy Law

Based on the aforementioned requirements of curing defaults under the Bankruptcy Code and the assumption of contracts as a whole, when a landlord drafts leases on more than one property with the same tenant, he or she may employ a cross-default provision in an attempt to integrate the multiple leases as one to prevent assumption or rejection of some of the contracts.[35] Cross-default provisions provide that a default under one lease with the lessor constitutes a default under all leases with the same lessor, and, if the default is not cured, the landlord can exercise remedies in respect to all leases.[36] That is, when the debtor rejects a contract or lease the rejection triggers a default that must be cured in order to assume another contract.[37] Under the plain meaning of section 365(b), requiring cure of all defaults and the judicial recognition of the *cum onere* principle, a cross-default provision in a contract or lease would be seemingly valid. "To hold otherwise, would construe the bankruptcy law as providing a debtor in bankruptcy with greater rights and powers under a contract than the debtor had outside of bankruptcy."[38]

Nevertheless, based on notions of equity, in order to help the debtor to rehabilitate its estate, bankruptcy courts have been reluctant to enforce cross-default provisions that prevent the debtor from assuming the profitable leases and rejecting the burdensome ones. Some courts have used justifications under the Bankruptcy Code to relieve the debtor from the enforcement of the cross-default provision. However, as the following discussion demonstrates, it is erroneous to apply these Bankruptcy sections to cross-default provisions.

A. *Per se* Invalidation of Cross-Default Provisions

1. Cross-default provision as an Anti-Assignment Clause

One justification for invalidating cross-default provisions is based on pure statutory construction of section 365.[39] To aid the debtor in reorganizing its business, the Code allows the debtor to assume its unexpired contracts with the option of keeping them for itself or assigning them to another entity where it can get the value of the lease in cash to further help its reorganization. To allow the debtor to take opportunity of this reorganization tool, section 365(f)(1) invalidates any anti-assignment clauses in contracts.[40] Section 365(f)(1) states:

> [e]xcept as provided in subsection (b) and (c)

> of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restrict, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease . . .[41]

As stated earlier, subsection (b) refers to cure of defaults. Further, subsection (c) refers to three instances where an executory contract may not be assigned. Essentially, they include personal service contracts, loan contracts, and nonresidential real property leases that have been terminated. Since cross-default provisions are not included among these exceptions, under the strict statutory interpretation of section 365(f), courts rule that cross-default provisions should be deleted because they restrict debtors' ability to assume or assign an executory contract.[42] Courts upholding this view claim that such provisions "impermissibly infringe upon the debtor's right to assume and assign leases."[43] Even when an assignment is not involved in the debtor's reorganization case, courts conclude that the section 365(f) also applies to restrictions on assumptions because "section 365(f)(2)(A) requires assumption as a predicate to assignment of a contract."[44]

In re Sambo's Restaurants, Inc. demonstrates where the court used the anti-assignment justification to invalidate the cross-default provision.[45] In this case, the lessor, Net Realty Trust, leased to Sambo's Restaurant, Inc. separate leases for 10 different locations. The leases had a cross-default provision providing a default under one lease constitutes a default under all of the leases. Before filing for Chapter 11, Sambo's closed two of its locations and continued to operate the remaining eight locations. The lessor argued that Sambo's may not assume those leases without assuming all the leases and curing the defaults under all of the leases. One issue presented before the court was whether the cross-default provision was enforceable. The court held the cross-default provision to be unenforceable based on various grounds.[46] In respect to its anti-assignment rationale, without much analysis the court stated that "[a]ny contractual restriction on assignment other than those specified in 365(c) is proscribed by 365(f)."[47]

Another case, *In re Sanshoe*, also concluded that a cross-default provision is unenforceable under the anti-assignment principle.[48] In that case, the tenant, Sanshoe, leased three separate floors under separate agreements from the landlord with cross-default provisions. The lease for the 11th floor was subleased to Hart. Upon the filing of Chapter 11, two of the leases were rejected, and the lease for the 11th floor, which was subleased to Hart, was assumed and assigned to a third party. In order to escape liability under the sublease, Hart, the sublessee, argued that the underlying assignment was void. He alleged that the cross-default provisions prevented the tenant from rejecting some leases and assuming and assigning another lease.[49] The court, without further explanation, took the same position as the Central District of California in *Sambo's*, holding that "[c]ontractual limitations on the ability to assign unexpired leases other than those specified in 365(c) are prohibited under 365(f)."[50]

2. Criticism of anti-assignment justification

Though this result is consistent with the policy of protecting debtors' rights to assume beneficial contracts only, the anti-assignment justification is highly criticized. Deleting a cross-default provision because it may consequently restrict debtors' ability to assume or assign a lease goes beyond the plain meaning of section 365(f). Some of these cases, such as *In re Sambo's*, only involved the assumption of a contract, but the court applied an anti-assignment principle.[51] In *In re UAL Corp.*, the court rejected the anti-assignment reasoning, stating that since all defaults must be cured before assumption, then any default provision in a contract could be regarded as an anti-assignment provision.[52] This "would totally gut the *cum onere* principle of any meaning whatsoever, by allowing a bankruptcy debtor to assume the benefits of an executory contract while rejecting its burdens."[53] As such, even if the landlord proves without any doubt that the agreements were intended to be integrated as one, the court may still refuse to enforce the cross-default provision solely because the debtor is potentially restricted to assign the contract or lease.

In line with their equitable considerations, bankruptcy courts have invalidated other types of provisions in agreements based on the rationalization that the provisions are *de facto* anti-assignment provisions. For example, a landlord's right of first refusal regarding any assignment of the lease has also been rejected as a restriction on assignment.[54] However, the court in *In re E-Z Serve Convenience Stores, Inc.*[55] offers a proper response to flat rejection of *de facto* anti-assignment provisions. In that case, the court rejected the trustee's assertion that the lessor's right of first refusal to purchase improvements a tenant made on a leased property is a *de facto* anti-assignment provision.[56] The court acknowledged that many courts have refused to enforce de facto anti-assignment clauses that come in various versions, "including lease provisions that limit the permitted use of the leased premises, lease provisions that require payment of some portion of the proceeds or profit realized upon assignment, and cross-default provisions."[57] However, this court ruled that when a lease provision does not expressly prevent assignments, the court must carefully analyze the facts of the agreement to ensure that the bargain of the non-debtor party is not harmed.[58] By reviewing the circumstances of the transaction, the court noted the provision cannot be excised because it was fully negotiated as a significant element of the parties' bargain.

3. Cross-default provisions as *ipso facto* provisions

Courts have also refused to enforce cross-default provisions by holding that the cross-default provision is an exception to the requirement of cure of defaults as an *ipso facto* clause, also known as bankruptcy termination clauses.[59] Section 365(e) invalidates *ipso facto* clauses, namely, clauses that terminate or modify an executory contract due to insolvency or the debtor's financial condition. It provides that

> [n]otwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified and any right or obligation not be terminated or modified and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on (A) the insolvency or financial condition of the debtor at any time before the closing of the case; or (B) the commencement of a case under this title; or (C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.[60]

The statute has been broadly construed to incorporate clauses that do not even mention bankruptcy, but terminate the contract or lease based on some financial condition.[61]

In an attempt to hold cross-default provisions unenforceable, "several courts have analogized cross-default provisions to *ipso facto* clauses."[62] In addition to its holding that the cross-default provision was a *de facto* anti-assignment provision, *In re Sambo's* also held that the cross-default provision was a financial condition.[63] The reason to characterize cross-default provisions as financial conditions provisions is that "a debtor cannot be faulted for failing to accomplish these conditions or for failing to use its best efforts, when the event which prevented satisfaction of these conditions was the debtor's insolvency and need for bankruptcy relief."[64] The court in *In re Sambo's* reasoned that section 365(e)(1)(A) "renders ineffective any contractual provision conditioned upon the financial condition of the debtor. The cross-default provisions operate as financial condition clauses. The inability to perform under one lease is indicative of SRI's financial problems."[65] The court further analogized other provisions that have been rejected by courts under section 365(e)(1)(A).[66] The following types of provisions have been voided in contracts based on the principle that they are bankruptcy termination clauses: a clause in a limited partnership agreement converting a debtor's general partnership interest into limited partnership interest as a result of bankruptcy filing; a clause accelerating payment of principal and accrued interest under an indenture; a clause declaring due the entire balance of a retail installment contract.[67]

4. Criticism of cross-defaults as *ipso facto* clauses

Interpretation of cross-default provisions as ipso facto provisions are criticized just like anti-assignment provisions. Payment defaults must be distinguished from financial condition defaults. Financial condition provisions "are traditionally written to require that specified numerical goals are to be achieved (a net worth test), or specified ratios are to be maintained (debt to equity, current assets to current liabilities, etc.), and are not couched in terms of performance under other agreements."[68] Many times, nonperformance of covenants in a lease will stem from the "tenant's financial inability to perform the covenant rather than from a desire to willfully default under the provision in question."[69] If cross-default provisions are characterized as financial condition clauses, then nearly every provision in a lease, including the rent clause, is a financial covenant. As such, when a contract provides that a payment default under one lease is considered as a default under another lease, this may not flatly be generalized as a financial condition default.

The legislative history of section 365(e) also sheds light on its proper application to cross-default provisions.[70] While Congress intended to avoid any burden on a debtor's ability to assume a contract, the legislative history prompting the inclusion of the sections 365(e)(1) and 365(b)(2) indicates that Congress did not want to frustrate the benefits of bargain given to the non-debtor under the contract.[71] Congressional Reports declared:

> [t]he unenforceability of ipso facto or bankruptcy clauses proposed under this section will require the courts to be sensitive to the right of the non-debtor party to executory contracts and unexpired leases. If the trustee is to assume a contract or lease, the court will have to insure that the trustee's performance under the contract or lease gives the other contracting party the full benefit of his bargain.[72]

Accordingly, invalidating a cross-default provision as an ipso facto clause without evaluating the bargain between a lessor and a lessee contradicts the Congressional intent.

5. Balancing of bankruptcy courts' policies

Courts that have broadly interpreted the application of financial conditions or anti-assignment provisions to include cross-default provisions have essentially based their interpretation on an equitable policy

of bankruptcy. These courts reason that if cross-defaults are enforced, debtors' rights to reorganize the bankruptcy estate, by assuming profitable contracts and rejecting unprofitable contracts, would be frustrated. Many courts may justify their ends by referring to the pre-Code Supreme Court decision that declared, "[t]he bankruptcy court does not look with favor upon forfeiture clauses in leases. They are liberally construed in favor of the bankrupt lessee so as not to deprive the estate of property which may turn out to be a valuable asset."[73] However, it is more important to note that

> the Supreme Court has made clear that Congress's comprehensive modernization, reform, and codification of the federal bankruptcy laws in the 1978 legislation enacting the Bankruptcy Code means "that whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."[74]

Even though bankruptcy courts are courts of equity providing a debtor various ways to rehabilitate its business under the Bankruptcy Code, the courts must ensure that the non-debtor receives the benefit of the bargain. After all, the purpose of curing upon assumption of an executory contract under section 365(b) is to preserve the bargain for the non-debtor,[75] and "equity will not countenance the debtor's exercise of § 365 to relieve itself of conditions which are clearly vested by the contracting parties as an essential part of their bargain and which do not contravene overriding federal policy."[76] Therefore, analysis of cross-default provisions as *ipso facto* or anti-assignment provisions would ignore the Bankruptcy Code's goal of finding the balance between equity and the non-debtor's bargain.

B. Examination of Contract Divisibility Under State Law but Ultimate Reliance on Bankruptcy Principles

In contrast to the cases mentioned above that have flatly rejected cross-default provisions under the Bankruptcy Code, most bankruptcy courts acknowledge that contract divisibility is a question of state law.[77] The courts, by applying their respective state laws, generally first determine whether the parties intended to integrate the multiple leases.[78] Nevertheless, the driving force of equitable policy to aid the debtor becomes even more evident when the courts factually examine the divisibility of the contracts under state law, and if they conclude that the contracts are in fact severable, they disregard the cross-default provision.[79]

As the Court in *In re Plitt Amusement Co. of Wash.*[80] explained succinctly:

> The legal regime governing bankruptcy cases is a mixture of federal and state law. Federal bankruptcy law determines some rights of the parties. Where bankruptcy law does not govern, the underlying non-bankruptcy law (usually state law) determines the rights of the parties. *Cf. Butner v. United States*, 440 U.S. 48, 54-55, 59 L. Ed. 2d 136, 99 S. Ct. 914 (1979) (holding that property interests are created and defined by state law; unless some federal interest requires a different result, there is no reason why such interest should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding). Frequently the best method of analysis is to begin by examining the rights of the parties outside of bankruptcy, usually based on state law. After this analysis, we then examine the impact of applicable bankruptcy law, to determine whether it changes those rights.[81]

1. Factors considered under state law to determine divisibility of contracts

Most courts confronted with the issue of divisibility among multiple contracts begin their analysis by applying different factors under their respective state's contract interpretation laws to determine whether the parties intended the contracts to be integrated or divisible. To evaluate intent, courts consider many factors, including:[82] interdependence of the agreements, the language used in the contract,[83] contemporaneous execution of the documents by the same parties,[84] nature and purpose of the various agreements,[85] termination clauses, type of consideration, and presence of cross-default provisions. "In short, courts attempt to recreate the objective intent of the parties by examining the documents, facts, and circumstances under which they were signed."[86]

2. Application of factors by courts

For instance, the trustee in *In re Plitt Amusement Co. of Washington*[87] wanted to reject one lease that was part of a transaction involving five other documents, including a purchase agreement, a promissory note, a security agreement, and two other non-residential leases. The leases and the promissory note were governed by Washington law while the purchase agreement was governed by California law.[88] The court examined both states' laws and stated that "[a]bsent ambiguity in the terms of the instruments, the intent . . . must be gleaned from the terms contained within four corners of the documents involved."[89] The court concluded that the leases were distinct and severable from the sales transaction since the duration of the lease was different from the duration of the sale agree-

ment. Further, each lease operated independently since "each contains provisions regarding rent amount, rent due date, commencement and termination dates of the lease, and location of the leased real property."[90]

While the court in *In re Plitt Amusement Co. of Washington* analyzed the divisibility of the multiple contracts under the respective applicable state laws, the court contradicted its own analysis by stating in a footnote that "[n]o federal case has specifically held that state law governs whether obligations in a transaction are severable. Rather, the cases that have applied state law to the severability issue have done so incidentally to their holdings."[91] The court cited to *In re Sambo's* and stated "that, in the bankruptcy context, cross-default provisions do not integrate otherwise separate transactions or leases . . . the cross-default provisions must be disregarded in the bankruptcy law analysis, because they are impermissible restrictions on assumption and assignment."[92] This justification has indeed been so well recognized by courts that once courts establish that the contracts are severable under state law, without much further reasoning the courts cite to the cross-default rule, which essentially comprises the anti-assignment and / or *ipso facto* justification.

Similarly, the court in *In re Convenience USA, Inc.*[93] first evaluated the divisibility of 27 lease locations and determined that the leases were divisible based on the intention and conduct of the parties. Nevertheless, in addition to holding that "cross-default provisions do not integrate executory contracts or unexpired leases that otherwise are separate or severable," the court, without further elaboration, cited to section 365(c) and section 365(f), as well as to *In re Sambo's* and *In re Sanshoe,* proclaiming that any contractual limitations on assumptions and limitations are invalid.[94]

The unenforceability of cross-default provisions as anti-assignment provisions has also been applied to loan and lease agreements in a very recent case. In *Papago Paragon Partners, LLC v. Three-Five Sys.*,[95] Three-Five sold a commercial building and real property to Papago. In addition to paying upfront for some of the costs of the property, Papago executed a promissory note and gave a deed of trust as collateral. Simultaneously, the parties executed a lease by which the property was leased back by Papago to Three-Five. The note had a cross-default clause providing "that Papago's payment obligations on the note are to be excused if Three-Five defaults on the lease and fails to cure its default."[96] Upon filing of Chapter 11, Three-Five rejected the lease and Papago argued that the loan and the lease were indivisible agreements; thereby the cross-default provision was enforceable. After the court factually evaluated the agreements and concluded that the contracts were in fact divisible, it declared that the cross-default provision was unenforceable in bankruptcy as long as it prohibits the debtor's option to assume or reject a contract.[97]

Similarly, the court in *In re Adelphia Business Solutions, Inc.* first determined that the leases were severable under state law but ultimately applied the cross-default rule to hold the cross-default provision unenforceable.[98] The debtor in this case had leased two separate offices from the same landlord in the same building. When the debtor moved to reject one lease and assume the other, the landlord claimed that the leases were integrated. The court interpreted the contract under Missouri law, evaluating the parties' intent by reviewing "all relevant evidence, including prior or contemporaneous negotiations and agreements."[99] The court concluded that the leases pertained to distinct properties, provided for separate consideration, and their relevant terms were different. After the court found that the leases were not "integrally related," the court, citing to *In re Sanshoe*, held that the cross-default provision was unenforceable.[100]

III. Enforceability of Cross-Defaults Under State Law

A. Analysis Under Forfeiture Law

Most courts presented with the issue of divisibility of contracts analyze the issue under state law. If the courts establish that the contracts are severable, they simply turn to the well-established justification that cross-default provisions are unenforceable, based on anti-assignment or *ipso facto* principles. Rather than evaluating the enforceability of the cross-default provision under the Bankruptcy Code, the proper approach should be to continue the analysis under non-bankruptcy contract law.[101] Under Restatement (Second) of Contracts § 229, "[t]to the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of the condition unless its occurrence was a material part of the agreed exchange." [102] Accordingly, a court should evaluate whether the cross-default provision is in fact an essential part of the parties' bargain. If it is not a material element of the parties' agreement, then not allowing the debtor to choose between its agreements "would cause disproportionate forfeiture."[103] "'[F]orfeiture' is used to refer to the denial of compensation that results when the obligee loses his right to the agreed exchange after he has relied substantially, as by preparation or performance of the expectation of that exchange."[104] Accordingly, just as the bankruptcy courts have been factually examining whether the parties intended the multiple contracts to be severable, the courts should also factually determine whether the parties intended the cross-default provision to be an essential part of their bargain. If it is not an essential element, but the contract is not allowed to be assumed, then the debtor would be forfeiting an important contract.

B. Whether the Cross-Default Provision Is a Material Term of the Contract

Even though bankruptcy courts have not cited to the Restatement, the

materiality standard used by some courts is similar to the forfeiture justification. Some courts have concluded "that where two agreements are 'necessary' or 'essential' or 'fundamental' elements of the same transaction, the cross-default provisions found within the two agreements must be enforced."[105]

These courts have articulated the evaluation of the necessity of the cross-default provision among multiple agreements in terms of the economic interdependence of the contracts, which the cross-default provision links.[106] That is, the courts ask whether the "non-debtor party would not have entered into one agreement without the other."[107] If the facts establish that the consideration of one agreement supports the other, then the courts conclude that the cross-default provision is an essential term of the parties' bargain.[108] On the other hand, if the facts establish that the agreements are not interdependent, they do not deem the cross-default provision as an essential term of the contract.

In re FFP Operating Partners is an example of a case[109] where the court did not resort to the anti-assignment or *ipso facto* grounds to conclude that the cross-default provision is unenforceable. In this case, the debtor moved to reject 10 of its leases with the same landlord. The landlord opposed the rejection, contending that there was one single agreement consisting of the different properties. Though the testimony of the landlord was clear that he intended the leases to be integrated, the court pointed out various provisions in the lease that indicated otherwise.[110] By analyzing the testimony of the parties and the express terms of the lease, the court pointed out that the separate agreements could operate independent of each other based on the fact that the rent was apportioned to certain schedules, and that the leases allowed the landlord to sell any one of the subject properties under the lease without affecting the balance of the other leases. Further, if any one of the properties were to be destroyed or condemned, the balance of the leases would not terminate under the terms. Based on these observations, and without using the rationalization under the Bankruptcy Code, the court disregarded the cross-default provision as an immaterial element of the transaction.

Even though *In re Wolflin Oil, L.L.C.*,[111] like *In re FFP Operating Partners*, did not discuss forfeiture law, it too examined the materiality of the cross-default provision. In this case, a cross-default provision linked six separate leases for "quick lube stores," as part of an Asset Purchase Agreement, but the leases were eventually assigned to Wolflin Oil without the assignment of the Asset Purchase Agreement. When the debtor moved to reject two of the unprofitable stores, the court focused on whether the non-debtor would have entered into the agreement without the presence of the provision. The court concluded that the cross-default provision was not an essential element of the leases because the eventual assignment of the six leases to the debtor did not incorporate the terms of the original Asset Purchase Agreement. In addition, at one point, the assignor to the debtor remained in possession of some of the leases, while he assigned the rest of them. Furthermore, each location was operated independently with separate staff and rent calculations. The court concluded that based on such factors it was evident that the lessor would have entered into the agreement without the cross-default provision.[112]

In contrast to *In re FFP* and *In re Wolflin Oil*, the court in *In re Karfakis* found the cross-default provision to be a fundamental element of the agreement.[113] The provision was between a lease and a franchise agreement of a Dunkin' Donuts business. The court considered both the contemporaneous execution and coterminous nature of the documents to conclude that the franchise agreement and the lease were interdependent, meaning that the franchise agreement would not have had any use without the lease and vice versa.[114] The court pointed out that "[t]he Franchise Agreement permits the Debtor to operate a specific location which is simultaneously leased to the Debtor / Franchisee by a Dunkin Donuts affiliate as Lessor."[115] The court concluded that the parties would not have executed the agreements if the agreements were not considered unified.[116] In this case, the court determined that the "Franchise Agreement and the Lease are inextricably interwoven,"[117] such that if one of them was terminated pursuant to its terms, and the other was viable, the whole agreement remained viable.

In re FFP, *In re Wolflin Oil*, and *In re Karfakis* illustrate that it is possible for courts to determine the enforceability of cross-default provisions based on the parties' non-bankruptcy rights and obligations. Courts finding a cross-default provision immaterial can further refer to forfeiture principles under state contract law to bolster their decisions to invalidate the provision. Analysis of cross-default provisions under forfeiture principles is consistent with the recognition that contract interpretations should be evaluated under state law. It is important to undertake this analysis because it ensures that beneficial contracts for the bankruptcy estate are not forfeited while it preserves the non-debtor's expectation of an indivisible contract. If a material cross-default is disregarded, a non-debtor's expectation of a united contract is frustrated when the non-debtor is left with an unsecured claim as a result of the debtor's rejection of only the unattractive leases.

Conclusion

The cross-default provision is a term of a contract negotiated and drafted by the parties, and it has to be enforced if the parties intended it to be an essential term of the contract. Parties who draft cross-default provisions in their agreement are sophisticated parties, cognizant of a debtor's rights under bankruptcy. The bankruptcy courts' general adherence to invalidate the cross-

default provision as a restriction on assignment and or financial condition provision is unjustified. The limitations found within the Bankruptcy Code, its legislative history, and the judicial recognition of the *cum onere* principle indicate that the Bankruptcy Code does not address cross-default provisions. Cross-default provisions are terms of contracts and contract rights must be evaluated under state law. Under state law, it is possible to disregard a contract provision if the provision creates forfeiture for any of the parties. It may be a forfeiture for the debtor not to be able to use his contracts or leases to reorganize the bankruptcy estate. Nevertheless, this has to be counterbalanced against the necessity of the cross-default provision for the bargain of the contracting parties.

Endnotes

1. 11 U.S.C. § 365(a) (2007); *see* Kristin Schroeder Simpson, *Fifth Circuit's Executory Contract Standards Deconstructed: The Mirant Lessons*, 26 MISS. C. L. REV. 225, (2006/2007) (contending that some file bankruptcy so they can use the Bankruptcy Code to reject contracts and leases, or assume and assign them to third parties).
2. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984).
3. *See generally* Jerry M. Markowitz, *Contracting to Avoid-Assumption: A Review of the Availability of Certain Contractual Provisions that may be Employed to Assist Landlords in Asserting and Enforcing Bargained-For Rights*, 11 J. BANKR. L. & PRAC. 155 (2002).
4. *See, e.g.*, *In re Sanshoe Worldwide Corp.*, 139 B.R. 585, 597 (Bankr. S.D.N.Y. 1992); *In re Brainiff, Inc.*, 118 B.R. 819 (Bankr. M.D. Fla. 1990); *In re Wheeling-Pittsburgh Steel Corp.*, 54 B.R. 772 (Bankr. W.D. Pa. 1985); *In re Sambo's Restaurants, Inc.*, 24 B.R. 755 (Bankr. C.D. Cal. 1982).
5. *See* Jerald I. Ancel, *All For One and One For All? The Assumption and Rejection of Multiple Intertwined Executory Contracts and Unexpired Leases*, 18 AM. BANKR. INST. J. 16, (1999).
6. 11 U.S.C. § 365(f)(1) (2006) (invalidating anti-assignment clauses in contracts of debtor).
7. 11 U.S.C. § 365(e) (2006) (providing clauses which terminate or modify an executory contract due to insolvency or the debtor's financial condition are unenforceable in bankruptcy).
8. *See, e.g., In re Sanshoe Worldwide Corp.*, 139 B.R.at 597 (Bankr. S.D.N.Y. 1992); *In re Brainiff, Inc.*, 118 B.R. 819 (Bankr. M.D. Fl 1990); *In re Wheeling-Pittsburgh Steel Corp.*, 54 B.R. 772 (Bankr. W.D. Pa. 1985) (indicating cross-default provisions are *de facto* anti-assignment provisions because they restrict debtor's ability to assign lease or contract); *In re Sambo's Restaurants, Inc.*, 24 B.R. 755 (Bankr. C.D. Cal. 1982).
9. *See, e.g., In re Adelphia Bus. Solutions, Inc.*, 322 B.R. 51 (Bankr. S.D.N.Y. 2005); *In re Plitt Amusement Co. of Wash., Inc.*, 233 B.R. 837 (Bankr. C.D. Cal. 1999) ("It is well-settled that . . . cross-default provisions do not integrate otherwise separate transactions or leases.").
10. *See, e.g., In re FFP Operating Partners, LP*, No. 03-90171, 2004 Bankr. Lexis 1192, (Bankr. N.D. Tex. Aug. 12, 2004); *In re* Wolflin Oil, L.L.C., 318 B.R. 392 (Bankr. N.D. Tex. 2004).
11. *See In re Karfakis*, 162 B.R. 719, 725 (Bankr. E.D. Pa. 1993) ("[C]ontract interpretation is a matter of state law and, therefore, bankruptcy courts should rely on applicable state law to determine whether an agreement is indivisible."); *see also In re Pollock*, 139 B.R. 938, 940 (B.A.P. 9th Cir. Cal. 1992); *In re* Cafe Partners/Washington 1983, 90 B.R. 1, 5 (Bankr. D. D.C. 1988).
12. *See* Ralph Brubaker, *Cross-Default Provisions in Executory Contracts and Unexpired Leases: Assumption Cum Onere and Unenforceable Ipso Facto Provisions*, 26 No. 11 BANKR. LAW LETTER 1 (Nov. 2006) (discussing applicability of forfeitures under contract law to cross-default provisions).
13. 11 U.S.C. § 365(a) (2006) (providing "[e]xcept as provided in . . ., the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor"); see Kristin Schroeder Simpson, *Fifth Circuit's Executory Contract Standards Deconstructed: The Mirant Lessons*, 26 MISS. C. L. REV. 225, 226 (2007) (listing debtor's or trustee's options to be: "(1) reject the contract; (2) assume the contract; (3) assume and assign the contract to a third party; or (4) do nothing and let the contract 'ride through' the bankruptcy").
14. S. Rep. No. 95-989, at 58 (1978); H.R. Rep. No. 95-595, at 347 (1977).
15. Vern Countryman, "*Executory Contracts in Bankruptcy*," Part I, 57 MINN. L. REV. 439, 460 (1973) (offering the prevailing definition of executory contracts).
16. 6 NORTON BANKR. L. & PRAC. 3d § 119:13 (William L. Norton, Jr. ed., 2007).
17. *See In re Worldcom*, 343 B.R. 486, 495 (Bankr. S.D.N.Y. 2006) (referring to state law to conclude materiality of non-debtor's obligation to refrain from making a motion to vacate judgment coupled with debtor's material obligations establishes the executory nature of the amended settlement agreement subject to assumption).
18. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) ("[T]he authority to reject an executory contract is vital to the basic purpose [of] a Chapter 11 reorganization, because [it] can release the debtor's estate from burdensome obligations that can impede a successful reorganization."); *In re Bradlees Stores*, 194 B.R. 555, 558 n.1 (Bankr. S.D.N.Y. 1996) (stating "[t]he right of a debtor in possession to reject certain contracts is fundamental to the bankruptcy system because it provides a mechanism through which severe financial burdens may be lifted while the debtor attempts to reorganize").
19. *Eagle Ins. Co. v. Bankvest Capital Corp. (In re Bankvest Capital Corp.)*, 360 F.3d 291, 296 (1st Cir. 2004) (*quoting In re Carp*, 340 F.3d 15, 25 (1st Cir. 2003)).
20. *In re Plitt Amusement Co. of Wash., Inc.*, 233 B.R. 837, 840 (Bankr. C.D. Cal. 1999) (pointing out "[s]ection 365 establishes a structure under which a trustee may evaluate the advantages and disadvantages of an executory contract or unexpired lease" by "reviewing the net performance on both sides").
21. *See Orion Pictures Corp. v. Showtime Networks* (*In re Orion Pictures Co.*), 4 F.3d 1095, 1099 (2d Cir. 1993) (noting that the business judgment rule is the same test applied to judicial review of corporate decisions outside of bankruptcy). *But see In re Maxwell Newspapers, Inc.*, 981 F.2d 85, 90 (2d Cir. 1992) (holding that, with regard to a collective bargaining agreement, under section 1113 an employer "has the burden of proving that its propos[ed modifications] are necessary").
22. *In re Orion Pictures Co.* 4 F.3d at 1098.
23. *In re UAL Corp.*. 346 B.R. 456, 467 (Bankr. N.D. IL. 2006) (citing U.S.C § 365(f)(2)(a)).
24. 11 U.S.C. §§ 365(g)(1), 502(g) (2006); *In re FBI Distrib.*, 330 F.3d 36, 42 (1st Cir. 2003); *In re O.P.M. Leasing Servs., Inc.*. 79 B.R. 161, 163 (Bankr. S.D.N.Y. 1987) (indicating that a breach of contract "is treated as occurring immediately preceding the date of the petition"); *see In re Annabel*, 263 B.R. 19, 25 (Bankr. N.D.N.Y. 2001).
25. *See* 11 U.S.C. §§ 365(g), 502(g); Simpson, *supra* note 1, at 227 (contrasting bankruptcy law from non-bankruptcy law where the breaching party would be responsible for full contract damages).
26. 11 U.S.C. § 502(b)(6)(A) (2006).
27. *In re Eagle Ins. Co. v. Bankvest Capital Corp. (In re Bankvest Capital Corp.)*, 360 F.3d 291, 296 (1st Cir. 2004).
28. 11 U.S.C. § 365(b)(1) (2006).
29. *In re Nat'l Gypsum Co.*, 208 F.3d 498, 506 (5th Cir. 2000); *Stewart Title Guar. Co. v.*

Old Republic Nat'l Title Ins. Co., 83 F.3d 735, 741 (5th Cir. 1996).

30. *In re Comdisco, Inc.*, 270 B.R. 909, 911 (Bankr. N.D.Ill. 2001) (explaining assumption of contracts in entirety is grounded in contract law rather than in bankruptcy code).

31. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531 (1984).

32. *See In re Karfakis*, 162 B.R. 719, 725 (Bankr. E.D. Pa. 1993) (finding that debtor could not assume real property lease without assuming related franchise agreement); *see also In re Braniff, Inc.*, 118 B.R. 819, 844 (Bankr. M.D. Fla. 1989) ("Multiple contract documents may form one uniform agreement.").

33. *See In re Plaza*, 363 B.R. 517, 522 (Bankr. S.D. Tex. 2007).

34. *See In re Harry C. Partridge, Jr. & Sons, Inc.*, 43 B.R. 669, 671 (Bankr. S.D.N.Y. 1984).

35. *See* 6 NORTON BANKR. L. & PRAC. 3D § 119:13, at 119-61 (William L. Norton, Jr. ed., 2007) (pointing out corporations operating several hospitals in buildings rented from a single landlord may have leases incorporating cross-default provisions).

36. *See id.*

37. See COLLIER LENDING INSTITUTIONS AND THE BANKRUPTCY CODE ¶ 2.02, at 2-9 (Alan N. Resnick et al. eds., 2007) (discussing various other transactions utilizing cross-default provisions including single loan transactions consisting of several documents and executory contracts or unexpired leases serving as collateral to secure loans of borrower).

38. *Cottman Transmissions, Inc. v. Holland Enters., Inc.* (*In re Holland Enters., Inc.)*, 25 B.R. 301, 303 (E.D.N.C 1982).

39. *See* 6 NORTON BANKR. L. & PRAC. 3D § 119:13, at 119-64 (William L. Norton, Jr. ed., 2007).

40. *See id.*

41. 11 U.S.C. § 365(f)(1) (2006).

42. *See EBG Midtown S. Corp. v. McLaren/Hart Envtl. Eng'g Corp.* (*In re Sanshoe Worldwide Corp.*), 139 B.R. 585, 597 (S.D.N.Y. 1992); *In re Brainiff, Inc.*, 118 B.R. 819, 845 (Bankr. M.D. Fla. 1989); *In re Wheeling-Pittsburgh Steel Corp.*, 54 B.R. 772, 778 (Bankr. W.D. Pa. 1985) (indicating cross-default provisions are *de facto* anti-assignment provisions because they restrict debtor's ability to assign lease or contract); *In re Sambo's Rests., Inc.*, 24 B.R. 755, 757 (Bankr. C.D. Cal. 1982).

43. *In re Kopel*, 232 B.R. 57, 64 (Bankr. E.D.N.Y. 1999).

44. *Id.* Section 365(f)(2)(A) states that "the trustee may assign an executory contract or unexpired lease of the debtor only if—the trustee assumes such contract or lease in accordance with the provisions of this section." 11 U.S.C. § 365(f)(2)(A) (2006).

45. *In re Sambo's Rests., Inc.*, 24 B.R. at 757.

46. *Id.* at 756–58 (refusing to enforce the cross-default provision, reasoning it was an anti-assignment clause, a financial condition imposition, and its enforcement would be inconsistent with the damage limitations set forth under section 502(b)(7) of the Bankruptcy Code).

47. *Id.* at 757.

48. *In re Sanshoe Worldwide Corp.*, 139 B.R. 585, 590, *aff'd*, 993 F. 2d 300 (2d Cir. 1993).

49. *Id.* at 596.

50. *Id.* at 597.

51. *See id.*; *see also Papago Paragon Partners, LLC v. Three-Five Sys., Inc.*, 2007 U.S. Dist. LEXIS 48041 (D. Ariz. July 2, 2007).

52. *In re UAL Corp.*, 346 B.R. 456, 468 (Bankr. N.D. Ill. 2006).

53. *See* Ralph Brubaker, *Cross-Default Provisions in Executory Contracts and Unexpired Leases: Assumption Cum Onere and Unenforceable Ipso Facto Provisions*, 26 No. 11 BANKR. LAW LETTER 1 (Nov. 2006).

54. *In re Mr. Grocer, Inc.*, 77 B.R. 349, 352–53 (Bankr. D.N.H. 1987).

55. 289 B.R. 45 (Bankr. M.D.N.C 2003).

56. *Id.*

57. *Id.* at 50 (citing *In re Jamesway Corporation*, 201 B.R. 73 (Bankr. S.D.N.Y. 1996) (stating lease provision requiring tenant to pay landlord 50% to 60% of the "profits" received by tenant from the assignee or sublessee is unenforceable pursuant to section 365(f)(1)); *see, e.g.*, *In* re Convenience USA, Inc., 2002 WL 230772, at *7 (Bankr. M.D.N.C. Feb. 12, 2002) (providing when a debtor is a party to a number of unexpired leases, cross-default clauses that would prevent the debtor from assuming some of the leases without assuming others are unenforceable under § 365(f)); *In re Howe*, 78 B.R. 226, 228 (Bankr. D.S.D. 1987) (invalidating provision of executory sale contract conditioning consent to assignment upon payment by debtor of "assumption fee" equal to 4% of amount outstanding under contract); In re U.L. Radio Corp., 19 B.R. 537 (Bankr. S.D.N.Y. 1982) (noting that debtor could assume and assign its lease to assignee who would operate premises as a small bistro even though lease contained clause providing that lessee could use premises only for television service and sales store).

58. *In re E-Z Serve Convenience Stores*, 289 B.R. at 51 (pointing out in addition to evaluation of non-debtor's bargain, facts of case must be examined carefully to determine whether first-refusal clause in fact restricts debtor to reorganize).

59. 3 COLLIER ON BANKRUPTCY, ¶ 365.07 (Alan N. Resnick et al. eds., 15th ed. rev. 2007) (noting that in contrast to unenforceability of anti-assignment clauses under former Bankruptcy Act, *ipso facto* clauses terminating leases upon filing of bankruptcy were enforceable).

60. 11 U.S.C. § 365(e) (2006); *see* 11 U.S.C. § 365(b)(2) (providing exception to requirement of cure when "default that is a breach of a provision relating to (A) the insolvency or financial condition of the debtor at any time before the closing of the case; (B) the commencement of a case under the title; (C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or (D) the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform non-monetary obligations under the executory contract or unexpired lease").

61. *See, e.g.*, *In re Thomas B. Hamilton Co.*, 969 F.2d 1013 (11th Cir. 1992); *see also In re Bulldog Trucking, Inc.*, 173 B.R. 517 (Bankr. W.D.N.C. 1994); 1-2 COLLIER LENDING INSTITUTIONS & BANKRUPTCY CODE ¶ 2.02 (2004) (showing certain financial conditions such as debt to net-worth ratio has been recognized as ipso facto clauses).

62. ROBERT J. ROSENBERG ET AL., COLLIER LENDING INST. & BANKR. CODE ¶ 2.02-1(F) (2004).

63. *In re Sambo's Restaurants, Inc.*, 24 B.R. 755, 757 (Bankr. C.D. Cal. 1982).

64. Am. jur. 2d. Bankruptcy § 2345 (2008).

65. *In re Sambo's*, 24 B.R. at 757.

66. *See, e.g.*, *In re U.L. Radio Corp.*, 19 B.R. 537 (Bankr. S.D.N.Y. 1982) (refusing to enforce a use clause).

67. *Id.*

68. LAURENCE D. CHERKIS ET AL., COLLIER REAL ESTATE TRANS. & BANKR. CODE ¶ 3.06-6 (2005) (discussing reasons for not characterizing cross-default provisions as *ipso facto* provisions).

69. *Id.*

70. 6 NORTON BANKR. L. & PRAC. 3D § 119:13 (William L. Norton, Jr. ed., 2007).

71. *Id.*

72. H.R. Rep. No. 95-595, at 348 (1977).

73. *Finn v. Meighan*, 325 U.S. 300, 301 (1945) (evaluating financial condition clauses in leases prior to adoption of *ipso facto* invalidation under the Bankruptcy Code).

74. Ralph Brubaker, *Cross-Default Provisions in Executory Contracts and Unexpired Leases: Assumption Cum Onere and Unenforceable Ipso Facto Provisions*, 26 BANKR. LAW LETTER 6 (2006) (citing *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988)).

75. William M. Winter, *Preserving the Benefit of the Bargain: The Equitable Result*, 13 BANK. DEV. J. 543 (1997) (discussing the origin

of cure provision from the Bankruptcy Reform Act of 1978).

76. *In re Matter of East Hampton Sand & Gravel Co., Inc.* 25 B.R. 193 (Bankr. E.D.N.Y 1982) (dismissing debtor's argument that "rehabilitative spirit of the Bankruptcy Code" tolerates divisibility of obligations).

77. *In re Karfakis*, 162 B.R. 719, 725 (Bankr. E.D. Pa. 1993) ("[C]ontract interpretation is a matter of state law and, therefore, bankruptcy courts should rely on applicable state law to determine whether an agreement is indivisible."). *See In re Pollock*, 139 B.R. 938, 940 (B.A.P. 9th Cir. 1992); *In re Cafe Partner/ Washington 1983*, 90 B.R. 1, 5 (Bankr. D.D.C. 1988).

78. 3 COLLIER ON BANKRUPTCY, ¶ 365.07 (Alan N. Resnick et al. eds., 15th ed. rev. 2007) (explaining "single integrated transactions" to be when breach of one contract would, independent of the cross-default provision, excuse performance under the other").

79. *See, e.g.*, *Lifemark Hosps. Inc. v. Liljeberg Enters. Inc.* (*In re Liljeberg*), 304 F.3d 410, 444-45 (5th Cir. 2002) (acknowledging authority from bankruptcy courts and district courts for the proposition that cross-default provisions do not integrate otherwise separate transactions or leases); *In re Kopel*, 232 B.R. 57, 65 (Bankr. E.D.N.Y 1999) ("Although cross-default provisions are inherently suspect, [they do not require] per se invalidation.").

80. *In re Plitt Amusement Co. of Wash., Inc.*, 233 B.R. 837 (Bankr. C.D. Ca. 1999).

81. *Id.* at 840-41.

82. Nancy A. Peterman & Robert W. Lannan, *Precautions Against "Cherry Picking" for Developers and Other Lessors of Multiple Nursing Homes Facilities*, 21-MAY AM. BANKR. INST. J. 26 (2002) (discussing various factors courts consider to determine the parties' intent).

83. *Id.* (citing *In re Karfakis*, 162 B.R. 719, 725 (Bankr. E.D. Pa. 1993)).

84. *Id.* (citing *In re Eastern Systems Inc.*, 105 B.R. 219, 228 (Bankr. S.D.N.Y. 1989)).

85. *Id.* (citing *In re GP Express Airlines Inc.*, 200 B.R. 222, 227 (Bankr. D. Neb. 1996)).

86. Risa Lynn Wolf-Smith, *The Word Game: Current Bankruptcy Developments in Leases, Licenses and IP Contracts Executory Contracts and the Franchise Relationship, American Bankruptcy Institute Ninth Annual Rocky Mountain Bankruptcy Conference* (February 5–7, 2004).

87. 233 B.R. 837 (Bankr. C.D. CAL. 1999).

88. *Id.* at 841.

89. *Id.* at 844.

90. *Id.*

91. *Id.* at 846 n.10.

92. *In re Plitt Amusement Co. of Washington*, 233 B.R. 837, 844 (Bankr. C.D. Cal.1999).

93. *In re Convenience USA, Inc.*, No. 01-81478, 2002 Bankr. LEXIS 348 (Bankr. M.D.N.C. 2002).

94. *In re Convenience USA Inc.*, 2002 Bankr. LEXIS 348, at *21.

95. *Papago Paragon Partners, LLC v. Three-Five Sys.*, No. 06-2448, 2007 U.S. Dist. LEXIS 48041 (D. Ariz. 2007).

96. *Id.* at *2.

97. *Id.* at *14.

98. *In re Adelphia Business Solutions, Inc.*, 322 B.R. 51 (Bankr. S.D.N.Y. 2005).

99. *Id.* at 55.

100. *Id.* at 63 (stating cross-default provision may restrict assignments of unrelated contracts without any explanation).

101. *See* Ralph Brubaker, *Cross-Default Provisions in Executory Contracts and Unexpired Leases: Assumption Cum Onere and Unenforceable Ipso Facto Provisions*, 26 No. 11 BANKR. LAW LETTER 1 (Nov. 2006) (discussing applicability of forfeitures under contract law to cross-default provisions).

102. Restatement (Second) of Contracts § 229.

103. *Id.*

104. Restatement (Second) of Contracts § 229 cmt. b (1981).

105. *In re Adelphia Business Solutions, Inc.*, 322 B.R. 51, 62–63 (Bankr. S.D.N.Y. 2005).

106. *See In re UAL Corp.*, 346 B.R. 456, 469 (Bankr. N.D. Ill. 2006) (citing the courts of *Liljeberg* and *Kopel*, where "the agreements linked by a cross–default clause were economically interdependent: the consideration for one agreement supported the other").

107. *Id.*

108. *See In re Kopel*, 232 B.R. 57, 59-67 (Bankr. E.D.N.Y. 1999) (enforcing cross–default provision, which said that defaults under a $350,000 Note for a purchase of a business and a consulting agreement constituted defaults under the lease and remarking seller's right to repossess the assets of the business "would have been of limited value without the corresponding entitlement to operate from the Building").

109. *In re FFP Operating Partners, LP*, 43 Bankr. Ct. Dec. (LRP) 141, (Bankr. N.D. Tex. Aug. 12, 2004).

110. *See id.* at *7 (applying the following factors under Texas law: "(1) the intent of the parties; (2) the subject matter of the agreement; and the (3) conduct of the parties," *Id.* at * 5–6).

111. *In re Woflin Oil, L.L.C.*, 318 B.R. 392 (Bankr. N.D. Tex. 2004).

112. *See id.* at 399 ("Despite Webb's self-serving testimony that he would not have entered into the leases with the Debtor without the cross-default provisions, the Court remains unconvinced.").

113. *In re Karfakis*, 162 B.R. 719, 725 (Bankr. E.D. Pa. 1993) (determining divisibility of the agreements, by applying Pennsylvania law stating, "'[t]he primary inquiry in resolving this question is whether the language employed in the contract clearly indicates the intention of the parties to be entire or severable.'" If the language is not clear, then the court can use other evidences such as the conduct of the parties. The court was "persuaded by these facts that the parties intended the two separate contracts, the Lease and Franchise Agreement, to constitute a single, contractual agreement.").

114. *See id.* ("In the instant case, the evidence established that the Franchise Agreement and the Lease are inextricably interwoven and for all practical purposes comprise a single contractual relationship. Aside from being coterminous and containing cross-default provisions, it is readily apparent that one agreement is of no utility without the other.").

115. *Id.*

116. *See id.* (resulting from the facts that both contracts were executed on the same date, "the Franchise Agreement and the Lease [were] inextricably interwoven," and "comprise[d] a single contractual relationship").

117. *Id.*

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Adverse Possession: What Hath the New York Legislature Wrought?

By Prof. Robert E. Parella and Prof. Robert M. Zinman

On July 7, 2008, Governor Paterson signed S. 7915-C into law (attached hereto as Appendix A), which makes major changes in this state's adverse possession law. Adverse possession is the doctrine that determines the running of the 10-year statute of limitations for ejectment from real property. While the new law contains some improvements to the prior law (based on portions of a rejected proposal of the Real Property Law Section of the New York State Bar Association), the new law is ambiguous, contradictory and, because it looks to the mind rather than the acts of the adverse possessor to determine the validity of the adverse possession claim, it undermines the property rights of thousands of real property owners, especially homeowners, in this state and will encourage litigation. The Real Property Law Section opposed the legislation and urged a veto. A copy of the Memorandum in Opposition by the Section is attached as Appendix B to these materials.

The New York Court of Appeals in *Walling v. Przybylo*[1] held that an adverse possessor's state of mind did not affect the running of the 10-year statute of limitations for ejectment from real property. While the decision correctly articulated the law of New York, the decision had been perceived by some as unfairly permitting a possessor to take property from an unsuspecting owner by stealth. In response to this perception the legislature in 2007 enacted legislation that would have prevented acquisition of property by adverse possession unless proof were shown that the possessor and predecessors in possession had no knowledge that the property belonged to another.

Because this knowledge approach would have potential disastrous unintended consequences for titles in New York, the Section, then under the chairmanship of Karl B. Holtzschue, urged that the Governor veto the legislation, which he did. The Section then created a Task Force on Adverse possession to propose amendments to the adverse possession law that would prevent acquisition of property through adverse possession by stealth, while at the same time preserving the sanctity of real estate titles in this state. The proposal of the Task Force was adopted unanimously by the Section's Executive Committee and the Executive Committee of the New York State Bar Association, and was introduced in the legislature as S. 7915. A copy of the NYSBA's Memorandum in support of the Task Force Bill is attached as Appendix C.

"While the new law contains some improvements to the prior law . . . [it] is ambiguous, contradictory and, because it looks to the mind rather than the acts of the adverse possessor to determine the validity of the adverse possession claim, it undermines the property rights of thousands of real property owners, especially homeowners, in this state and will encourage litigation."

The Task Force proposal was gutted and rewritten by the legislature as S.7015-C based on objections raised by a combination of individuals and certain members of the New York State Land Title Association (NYSLTA) who, in our judgment, did not appear to understand adverse possession law or the consequences of the bill, or had special motives for objecting.

Part I of these materials will discuss the *Walling* decision, which gave rise to the legislative proposals, and the origin of the Task Force proposal in the context of the history of adverse possession law in New York, and demonstrate how the newly enacted legislation has overturned hundreds of years of settled law. **Part II** will review the irresponsible drafting flaws made to the Task Force proposal, pointing out how the newly enacted legislation threatens to create havoc and endless litigation with respect to determination of ownership of real property in this state. The materials **conclude** by suggesting the urgent need for a comprehensive revision of the statute in an atmosphere in which drafters would put aside preconceived notions and personal advantage to achieve a statute that could set a precedent for enlightened adverse possession law throughout the nation.

I. *Walling*, the Task Force, and the Law of Adverse Possession

a. *Walling*

There were reasons to consider the *Walling* decision as unexceptional. First, a virtually unbroken line of authority in the Court of Appeals, over about 150 years, had held that the subjective state of mind of the adverse possessor is immaterial. Rather, it is sufficient that the possession is not permissive. Second, *Walling* was in accord with the majority rule in this country, a view recently reaffirmed this year by a Maryland

appellate court, *Yourik v. Mallonee*, 921 A.2d 869 (Md. App. 2008). Third, title by adverse possession rests upon a cause of action in ejectment on which the statute of limitations has run. The historical and logical view is that there is a cause of action in ejectment whether the adverse possessor thinks he is on his own land or knows that he is not. But *Walling* soon became controversial in certain quarters.

The losing parties, joined by some other landowners, took their fight to the legislature and the popular press. There were two principal arguments made. First, *Walling* allowed one person, who knew he or she did not own the land, to steal another's property. Second, the stealing occurred even though the record owner had no reasonable opportunity to know of the adverse possession. The fact is that there was no finding that the Wallings knew they did not have record title to the disputed strip, and the Wallings have vigorously protested that they had no such knowledge. Further, no appeal was taken from the lower court finding that there were sufficient acts to constitute possession of the improved portion of the strips. The popular press did not address these aspects of the case. The provocative and newsworthy event was an alleged legally sanctioned stealth taking of another's property, especially a taking by a knowledgeable lawyer who happened to be working in the courts.

b. The Task Force Proposal

The legislature responded with passage of a terse bill in 2007. The Section submitted a memorandum to the governor urging a veto and the governor did veto the bill. The Task Force was then organized and undertook its promised study of the law of adverse possession. The result was a proposed bill, substantially revising article 5 of the RPAPL, and a Legislative Memorandum in support. The principal recommendations were: (1) the objective standard should be retained and not replaced with a knowledge standard, and (2) stealth taking should be prevented by mandating that acts of adverse possession must be sufficiently open to give reasonable notice of an adverse claim. In addition, certain ameliorative changes were made including a significant change with regard to the troublesome problem of boundary line disputes among neighbors, and the inclusion of the first statutory definition of adverse possession.

"The Task Force was then organized and undertook its promised study of the law of adverse possession. The result was a proposed bill, substantially revising article 5 of the RPAPL, and a Legislative Memorandum in support."

With respect to state of mind, the Task Force analyzed whether the law should prevent a possessor from acquiring title if the possessor knew he was not the record or true owner. Today there is considerable support, at least with some of the public, for the proposition that knowledge should disqualify an adverse possessor because it smacks of legal larceny. The difficulty is with crafting such a statute that does not scuttle the many continuing beneficial effects of the doctrine of adverse possession. There may be some technical defect or break in the chain of title for any of several different reasons, e.g., inadvertent failure to record a deed lost or not indexed at the recorder's office. Thus there is no good paper chain back to the sovereign. In such cases the doctrine will often be protecting a true owner by making title marketable, mortgageable and insurable.

Further, a statute that requires lack of knowledge inevitably places the burden on the possessor. Often the possessor would have to prove the state of mind upon entry of a predecessor in title, perhaps an ancestor, who is missing or dead. This can easily frustrate the fundamental goals of statutes of limitations—eliminating or minimizing the dispositive effect of lost and stale evidence, and providing for repose after reasonable passage of time. In some cases there may be no effective statute of limitations at all and, consequently, loss of the value of substantial capital improvements made by a possessor or predecessor. In *Walling* itself, a trial on the issue of knowledge would have turned upon credibility and recollection of witnesses about a 1986 conversation as testified to in 2004. Walling had sworn that a certain barbed-wire tree had been pointed out as the boundary line by the developer-seller. The Przybylos submitted an affidavit from the prior owner-developer contradicting Walling and, on that basis, the lower court vacated the judgment and ordered a hearing, which never occurred. If the Wallings had inherited or purchased the property from someone who had died, there would likely be no evidence to offer in their behalf. Indeed, in a given case, a title could actually turn upon which party was the more effective or more willing perjurer.

A special case can arise in New York City and other urban areas. Parcels are often assembled for development. Frequently there are relatively small gores or strips between parcels. The common practice in the title industry is to insure, either on the existing facts or with a deed purporting to transfer the gore or strip, because passage of time will make the title secure. However, knowledge exists in these cases and a knowledge standard would place a cloud over development.

On balance, the Task Force believed there would be a greater loss with a knowledge standard, especially in routine real property transactions. It also believed that there are relatively few cases of a possessor knowingly taking possession of a tract owned by another, making expensive improvements on it, and hoping to get away with it for the required 10 years. At any time prior thereto, the adverse possessor could be easily discovered, ejected, liable

for damages for up to six years, and unable to recover the value of improvements made.

The Task Force did see boundary-line disputes between neighbors as a special, troublesome, and frequently occurring problem. These could involve a misplaced fence or shrub, or routine maintenance across a boundary line. Often these acts involve no great reliance and expenditures; they may have originated with predecessors of one or both parties, may well have been impliedly if not expressly permissive originally, and can upset record and survey boundaries over relatively minor intrusions. The Task Force proposed a new section 543. Routine acts of maintenance across a boundary line would be deemed permissive as a matter of law and thus not subject to adverse possession. Encroachments of removable fences, shrubbery and the like for up to twelve inches would be deemed permissive. The 12-inch distance was chosen because of the practice of title companies to insure against such encroachments, based upon D&B-4 of the NYSLTA Recommended Practices (1995). Further, the Monroe County Contract of Sale provides that a fence encroachment of less than one foot shall not be an objection to title.

In *Walling*, there were various acts recited in the appellate opinions although, as indicated above, the sufficiency of the acts was not before the Court of Appeals or the Appellate Division. One act recited was an underground pipe and another was placement of a birdhouse on the disputed strip. These seemed to be singled out as the basis for the complaint that a record owner could lose title without even knowing of an adverse claim. The Task Force research indicated that the law was satisfactory with respect to underground pipes and the like, and that they were typically deemed not open and notorious. The Task Force's proposed bill added a definition of adverse possession that included the familiar open and notorious requirement. But it went further and provided that the acts had to be "sufficiently open to put a reasonably diligent owner on notice." It was felt that this explicit legislative mandate would underscore the salutary purpose of the open requirement to alert record owners, and perhaps avoid any potential injustice. The Task Force believed this would prevent any taking by stealth because the adverse possessor's acts would have to be sufficient to put the owner on notice.

"It is believed here that the statute now enacted is unsound in policy, is self-contradictory, and raises very difficult if not insoluble interpretation issues."

c. The Legislative and N.Y.S. Land Title Association Response

The Task Force Memorandum and Proposed Bill (see Appendix C) were unanimously approved by both the Executive Committees of the Real Property Law Section and the Executive Committee of the NYSBA. The bill was introduced along with the Memorandum in Support and a Sponsor's Memorandum. As the legislative session was nearing its close, the Task Force was hopeful, and had some reason to be hopeful, that the bill would be enacted into law. At the eleventh hour, however, NYSLTA indicated that it wished some amendments. It then got introduced separately almost all of the Task Force bill, but with a "reasonable belief" requirement that undermined a central purpose of the bill. Under the requirement, title by adverse possession could not occur unless the possessor had a "claim of right," which was defined to mean that the adverse possessor must have had a reasonable basis for the belief the property belonged to the adverse possessor, which cut the heart out of the Task Force proposal. It also represented a departure from settled principles of law.[2]

The NYSLTA opposition was puzzling. The Task Force believed, in January of 2008, that NYSLTA had approved the proposal. Apparently some within NYSLTA, presumably the claims people, saw their version as an easy vehicle for defeating adverse-possession claims against their insureds. But title companies often rely on statutes of limitation in general, and adverse possession in particular, in writing policies in their office practice and transaction business. It would be ironic if a new cottage industry developed of opportunists who search titles to find some gap or defect in the chain. The present successor to the last record owner of 50 or more years ago could put the present possessor to proof of the state of mind of the original entrant, or perhaps the possessor's own state of mind on a matter that may never have been considered. The ironic result could be a new category of claims and litigation against insureds and their insurers.

Finally, title policy boiler plate usually excepts rights of persons in possession, thus putting the burden on the purchaser-insured so long as the title company does not negotiate away the exception. Apart from the boundary-line cases where intrusions can go undetected, it seems a small burden for a record owner to view the property at some time for open acts of possession, improvement or cultivation by another. In short, perhaps the enacted statute may indeed help defeat some claims but at a considerable price, and not on a principled, but rather on an arbitrary, basis. The State Bar submitted a Memorandum in Opposition to the amended bill (Appendix B) but this so-called amended version became the law. It is believed here that the statute now enacted is unsound in policy, is self-contradictory, and raises very difficult if not insoluble interpretation issues.

II. Irresponsible and Unintelligible Drafting

While the changes the legislature made to the Task Force proposal

(primarily the requirement that the adverse possessor must have a claim of right) were ill-conceived, the hasty drafting of the revisions to the Task Force language made the resulting legislation virtually unintelligible. The following is a summary of some of the interpretative problems the legislature left for the courts to resolve.

a. Claim of Right as Defined in § 501(3) Conflicts With the "With or Without Knowledge" Language of § 501(1).

The amended law requires in § 501(2) that the adverse possessor enter with a claim of right, which is defined in § 501(3) as requiring proof that the adverse possessor had a reasonable basis for the belief that it owned the property in dispute. However, § 501(1) retains the Task Force language that defines an adverse possessor as one who occupies property "with or without knowledge" of another's superior rights. It would seem impossible for an adverse possessor to have both knowledge of another's superior rights ***and*** no reasonable basis to believe that someone had superior rights.

The two provisions seemingly are in direct conflict. This places the heart of the modifications to the Task Force proposal in doubt. It would seem that the conflict gives the judge the ability to go any way he or she wants. We suspect that the courts may eventually conclude that a person may be an adverse possessor without a reasonable basis for belief it owns the property, but without such belief cannot acquire title even after the running of the statute of limitations.

b. Definition of "Claim of Right" Does Not Make Sense.

Although it would seem that the intention of those who objected to the Task Force proposal was to require the adverse possessor to have a reasonable basis for belief that the adverse possessor owned the property, the definition of "claim of right" in the enacted legislation doesn't say that. Section 501(3) defines "claim of right" as having a reasonable basis for the belief that the property "belongs to the adverse possessor ***or property owner***, as the case may be" (emphasis added). The quoted language literally indicates that an adverse possessor could meet the "claim of right" requirement even if the adverse possessor had a reasonable basis for belief that the *true owner and not the adverse possessor* owned the property![3]

Is "reasonable basis for belief" an objective or subjective standard, or both? Stated another way, if the adverse possessor enters knowing that someone else is the owner of record, but still has a reasonable basis for belief of ownership, has the test been met? For example, a possessor knowing who is record owner thinks an ancestor acquired title previously.

c. Inconsistent Results Due to Inconsistent Language

(i) Time of testing "claim of right." "Claim of right" is tested under § 511 (adverse possession under a written instrument) at the time the adverse possessor or its predecessors "entered" into possession.[4] "Claim of right" is tested under section 521 (adverse possession under a claim not written) throughout the continued occupation of the property.[5] Did the legislature actually intend that claim of right should be interpreted differently depending on whether or not the adverse possessor entered under a written instrument? If the statute is interpreted in accordance with its plain language, the existence of a written instrument will determine the result. For example, where claim of right is tested on entry, the occupier who enters without knowledge but subsequently acquires knowledge would nevertheless be protected when the ejectment action is brought. On the other hand, where claim of right is tested throughout the period of adverse possession, the occupier entering without knowledge of the owner's rights but subsequently acquiring such knowledge could be ejected.

Furthermore, for claim of right under a written instrument, § 511 states that the occupant "or those under whom the occupant claims" must have entered under a claim of right. Since the disjunctive is employed, if the predecessor in possession had no claim of right (i.e., deliberately took the owner's property by adverse possession), the current occupant would still be protected if the current occupant had a reasonable basis for belief that it owned the property.

(ii) Reachback of "claim of right." A related problem involves the extent of the reachback of the claim-of-right requirement. For adverse possession under a written instrument, § 511 requires a claim of right for the occupant and its predecessors at the time of entry, while for adverse possession not under a written instrument, § 521 requires a claim of right throughout the "actual continued occupation." Do these provisions mean that a claim of right must be determined for every predecessor in possession, some of whom may be dead?

With respect to § 511 (adverse possession under a written instrument), as indicated above, claim of right is required for the occupant "or those under whom the occupant claims." With respect to § 521 (adverse possession not under written instrument) claim of right is required during the "actual continued occupation of premises," which seems to refer to all possessors. At the Real Property Law Section Summer Meeting in 2008, Ben Weinstock suggested that one would have to find a claim of right for those occupying the premises only over the previous 10-year period, the statutory period for adverse possession. The Weinstock argument makes sense, and, if successful, would mitigate the impossible burden that claim of right for all occupants would place on the adverse possessor and allow possessors of property to breathe easy after 10 years under a claim of right. However, only future court decisions

will determine if the argument will succeed.

d. Other Complexities

(i) Burden of proof for claim of right. The statute is silent on who has the burden of proof as to claim of right. If the adverse possessor is bringing a quiet title action, it would seem that the adverse possessor should have the burden of showing that there was a reasonable basis for belief that it owned the property. On the other hand, in the normal situation it would be the owner who brings an action in ejectment against the adverse possessor. The adverse possessor still has the burden of proof but might then defend claiming that the owner is time barred by the statute of limitations. However, under § 501(3), the adverse possessor is not required to establish claim of right if the owner of the real property cannot be ascertained in the land records and located by reasonable means. This was apparently intended to deal with the gores and strips problem mentioned above, but the statute is not limited to such situations.

(ii) Vague language. The Task Force proposal contained some innovative approaches to avoid litigation among homeowners. Among these were provisions that would exclude as grounds for adverse possession the mowing of lawns and other acts of routine maintenance. In addition, discrepancies caused by fences, hedges and shrubbery within one foot of the property line were excluded. The one foot limitation was certainly negotiable. However, as changed by the legislation, the exclusion, somewhat modified, was limited to *de minimis* encroachments. No definition of *de minimis* is provided. Thus, the statutory language will most probably raise litigable issues of fact, and it could be interpreted differently by judges throughout the state.

(**iii) Unexplained deletions.** One of the essentials of adverse possession in the New York statute has traditionally been that the property has been "usually cultivated or improved."[6] The Task Force proposal, in order to deter stealth taking of property, added that acts of adverse possession would have to be sufficiently open to put a reasonably diligent owner on notice. When the Task Force proposal was revised by the legislature, the reference to cultivation and improvement was deleted without explanation. We understand that the deletion was a compromise between those who wanted to delete "cultivation" and those who wanted to retain both "cultivation" and "improvement."

"Our examination of the new adverse possession law in New York reveals that it is unsound in policy, raises very troublesome questions of interpretation, and should be revisited and revised by reasonable people acting in the best interest of the State of New York and its citizens."

Perhaps both cultivation and improvement are surplusage in light of the Task Force language that all acts will be tested on whether they would put a reasonably diligent owner on notice. However, the deletion without explanation raises concern that certain types of traditional cultivation might not pass muster as a sufficient basis for adverse possession.

(iv) To what does the law apply? Section 9 provides that the act shall take effect immediately, "and shall apply to claims filed on or after such effective date." Does the law apply only to actions in ejectment, or quiet title actions instituted after the effective date? Suppose a person has occupied property pursuant to the unamended statute for the period of the statute of limitations, thus giving the adverse possessor title. Can the adverse possessor be ejected after the statute has been amended on the ground that the possessor did not have a claim of right during the statutory period? If so, would this constitute a retroactive taking of property? In any case, the effective date can easily become another source of troublesome litigation.

III. Conclusion

Our examination of the new adverse possession law in New York reveals that it is unsound in policy, raises very troublesome questions of interpretation, and should be revisited and revised by reasonable people acting in the best interest of the State of New York and its citizens.

Endnotes

1. *Walling v. Przybylo*, 7 N.Y.3d 228 (2006).
2. *See Brand v. Prince*, 35 N.Y.2d 634 (1974) where the Court of Appeals stated: "Reduced to its essentials, [adverse possession] means nothing more than that there must be possession in fact of a type that would give the owner a cause of action in ejectment against the occupier throughout the prescriptive period." (citing 3 American Law of Property, § 15.3).
3. This drafting problem was raised before the Governor signed the legislation. The reaction was that there was no problem because of the words "as the case may be." This explanation appears to make as much sense as the language itself.
4. Section 511 states: "Where the occupant or those under whom the occupant claims entered into the possession of the premises under claim of right. . . ."
5. Section 521 states: "Where there has been actual and continued occupation of premises under a claim of right. . . ."
6. This was contained in section 512 as one of the essentials to adverse possession under a written instrument and in section 521 not under a written instrument.

Professor Robert E. Parella was the Reporter and Professor Robert M. Zinman was the Chair of the New York State Bar Association Real Property Law Section's Task Force on Adverse Possession. However, the opinions expressed in these materials are their own and not necessarily those of any organization with which they are associated. Professor Parella is a full-time Professor of Law at St. John's University School of Law. Professor Zinman retired as a full-time law Professor at St. John's in 2007 but continues to teach two courses a year.

Appendix A

LAWS OF NEW YORK, 2008

CHAPTER 269

[EXPLANATION—Matter in **italics** is new; matter in brackets [-] is old law to be omitted.]

AN ACT to amend the real property actions and proceedings law, in relation to adverse possession

Became a law July 7, 2008, with the approval of the Governor. Passed by a majority vote, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 501 of the real property actions and proceedings law, as added by chapter 312 of the laws of 1962, is amended to read as follows:

§ 501. [~~Action after entry. An entry upon real property is not sufficient or valid as a claim unless an action is commenced thereupon within one year after the making thereof and within ten years after the time when the right to make it descended or accrued~~.] Adverse possession; defined. For the purposes of this article:

1. Adverse possessor. A person or entity is an "adverse possessor" of real property when the person or entity occupies real property of another person or entity with or without knowledge of the other's superior ownership rights, in a manner that would give the owner a cause of action for ejectment.

2. Acquisition of title. An adverse possessor gains title to the occupied real property upon the expiration of the statute of limitations for an action to recover real property pursuant to subdivision (a) of section two hundred twelve of the civil practice law and rules, provided that the occupancy, as described in sections five hundred twelve and five hundred twenty-two of this article, has been adverse, under claim of right, open and notorious, continuous, exclusive, and actual.

3. Claim of right. A claim of right means a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be. Notwithstanding any other provision of this article, claim of right shall not be required if the owner or owners of the real property throughout the statutory period cannot be ascertained in the records of the county clerk, or the register of the county, of the county where such real property is situated, and located by reasonable means.

§ 2. Section 511 of the real property actions and proceedings law, as added by chapter 312 of the laws of 1962, is amended to read as follows:

§ 511. Adverse possession under written instrument or judgment. Where the occupant or those under whom [**~~he~~**] **the occupant** claims entered into the possession of the premises under claim of [**~~title~~**] **right**, exclusive of any other right, founding the claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court, and there has been a continued occupation and possession of the premises included in the instrument, decree or judgment, or of some part thereof, for ten years, under the same claim, the premises so included are deemed to have been held adversely; except that when they consist of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot.

§ 3. Section 512 of the real property actions and proceedings law, as added by chapter 312 of the laws of 1962, is amended to read as follows:

§ 512. Essentials of adverse possession under written instrument or judgment. For the purpose of constituting an adverse possession [**~~by a person claiming a title~~**], founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in [**~~either~~**] **any** of the following cases:

1. Where [**~~it has been usually cultivated or improved~~**] **there has been acts sufficiently open to put a reasonably diligent owner on notice**.

2. Where it has been protected by a substantial [**~~inclosure~~**] **enclosure, except as provided in subdivision one of section five hundred forty-three of this article**.

3. Where, although not [**~~inclosed~~**] **enclosed**, it has been used for the supply of fuel or of fencing timber, either for the purposes of husbandry or for the ordinary use of the occupant. Where a known farm or a single lot has been partly improved, the portion of the farm or lot that has been left not cleared or not [**~~inclosed~~**] **enclosed**, according to the usual course and

custom of the adjoining country, is deemed to have been occupied for the same length of time as the part improved and cultivated.

§ 4. Section 521 of the real property actions and proceedings law, as amended by chapter 116 of the laws of 1965, is amended to read as follows:

§ 521. Adverse possession [**~~under claim of title not written~~**] **not underwritten instrument or judgment**. Where there has been an actual continued occupation of premises under a claim of [**~~title~~**] **right**, exclusive of any other right, but not founded upon a written instrument or a judgment or decree, the premises so actually occupied, and no others, are deemed to have been held adversely.

§ 5. Section 522 of the real property actions and proceedings law, as added by chapter 312 of the laws of 1962, is amended to read as follows:

§ 522. Essentials of adverse possession [**~~under claim of title not written~~**] **not under written instrument or judgment**. For the purpose of constituting an adverse possession [**~~by a person claiming title~~**] not founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases, and no others:

1. Where [**~~it has been usually cultivated or improved~~**] **there have been acts sufficiently open to put a reasonably diligent owner on notice**.

2. Where it has been protected by a substantial [**~~inclosure~~**] **enclosure, except as provided in subdivision one of section five hundred forty-three of this article**.

§ 6. Section 531 of the real property actions and proceedings law, as amended by chapter 375 of the laws of 1975, is amended to read as follows:

§ 531. Adverse possession, how affected by relation of landlord and tenant. Where the relation of landlord and tenant has existed [**~~between any persons~~**]**,** the possession of the tenant is deemed the possession of the landlord until the expiration of ten years after the termination of the tenancy; or, where there has been no written lease, until the expiration of ten years after the last payment of rent; notwithstanding that the tenant has acquired another title or has claimed to hold adversely to his landlord. But this presumption shall cease after the periods prescribed in this section and such tenant may then commence to hold adversely to his landlord.

§ 7. Section 541 of the real property actions and proceedings law, as amended by chapter 375 of the laws of 1975, is amended to read as follows:

§ 541. Adverse possession, how affected by relation of tenants in common. Where the relation of tenants in common has existed [**~~between any persons~~**], the occupancy of one tenant, personally or by his servant or by his tenant, is deemed to have been the possession of the other, notwithstanding that the tenant so occupying the premises has acquired another title or has claimed to hold adversely to the other. But this presumption shall cease after the expiration of ten years of continuous exclusive occupancy by such tenant, personally or by his servant or by his tenant, or immediately upon an ouster by one tenant of the other and such occupying tenant may then commence to hold adversely to his cotenant.

§ 8. The real property actions and proceedings law is amended by adding a new section 543 to read as follows:

§ 543. Adverse possession; how affected by acts across a boundary line. 1. Notwithstanding any other provision of this article, the existence of de minimus non-structural encroachments including, but not limited to, fences, hedges, shrubbery, plantings, sheds and non-structural walls, shall be deemed to be permissive and non-adverse.

2. Notwithstanding any other provision of this article, the acts of lawn mowing or similar maintenance across the boundary line of an adjoining landowner's property shall be deemed permissive and non-adverse.

§ 9. This act shall take effect immediately, and shall apply to claims filed on or after such effective date.

The Legislature of the STATE OF NEW YORK **ss:**

Pursuant to the authority vested in us by section 70-b of the Public Officers Law, we hereby jointly certify that this slip copy of this session law was printed under our direction and, in accordance with such section, is entitled to be read into evidence.

JOSEPH L. BRUNO
Temporary President of the Senate

SHELDON SILVER
Speaker of the Assembly

Appendix B
Memorandum in Opposition

RPLS #XX

July 1, 2008

S. 7915-C
A.11574-A

By: Senator Little
By: M of A Gordon

Senate Committee: Judiciary
Assembly Committee: Judiciary
Effective Date: Immediately

AN ACT to amend the real property actions and proceedings law, in relation to adverse possession

LAW AND SECTIONS REFERRED TO: Sections 501, 511, 512, 521, 522, 531, 541 and 543 of the Real Property Actions and Proceedings Law.

THE REAL PROPERTY LAW SECTION OPPOSES THIS LEGISLATION

1. This bill contains the same disabilities that caused the Governor in message No. 153 of 2007 to veto S. 5364-A / A.9156 last year.

By requiring proof that the adverse possessor had a reasonable basis for believing the property belongs to the adverse possessor, the bill would, like the knowledge requirement of S. 5364-A of 2007, shift "the focus . . . from the owner's notice that the property is being occupied by someone else, to the possessor's knowledge that a third party may have an ownership interest in the property."[1]

The change from belief in S.5364-A of 2007 to "reasonable basis for belief" in the current bill makes no substantive change to allieviate the unreasonable burden on the possessor. Indeed, the possessor will still have to prove that he or she, or the persons under whom they claim believed it was their property, and in addition, prove that there was a reasonable basis for such belief. Thus, even where it is clear that the adverse possessor sincerely believed the property belonged to him or her, the possessor could lose the property if a court found that the belief by the possessor or those under whom the possessor claims, was not reasonable. What is a reasonable basis for belief is so indefinite that it would permit courts to reach different conclusions based on similar fact situations. As a result homeowners would be deprived of certainty that their property and their improvements will not be taken from them by persons claiming to be the "true owner."

Under this legislation, homeowners who may have purchased and openly occupied property for many years may be called upon to prove that they or those under whom they claim entered the property with a reasonable basis for belief that the property belonged to them, thus requiring knowledge of conversations that may have occurred decades before, or to find other witnesses to dispute claims "after memories have faded, or indeed long after they have passed away."[2] In addition this legislation contains significant drafting ambiguities and raises important issues concerning the ability of New Yorkers to own and convey real property.

This legislation, like last year's bill, was obviously sincerely introduced to remedy a perception that existing law sanctioned or encouraged willful and stealth takings of others' property. Unfortunately, the legislation, if it should become law, will have significant adverse consequences for real estate ownership in New York.

2. The perceived inequity in present law that led to the introduction of this legislation would have been remedied by S. 7915 (unamended), proposed by the New York State Bar Association after a thorough study by its Task Force on Adverse Possession.

The New York State Bar Association's Real Property Law Section established a Task Force on Adverse Possession, charged with the task of proposing language that would deal effectively with the perception (which gave rise to the vetoed proposal) that the present law enabled a person to acquire another's property through stealth. After many months of deliberation and study, the Task Force's conclusions were unanimously approved by the Executive Committee of the New York State Bar Association and resulted in the introduction of S. 7915 (unamended). Under this proposal, acquisition of property by adverse possessors without a reasonable belief the property belonged to the acquirer was made so uneconomic as to render any attempt of acquisition by stealth extremely remote if not highly irrational.

S. 7915 (unamended) would have accomplished this by limiting acquisition by adverse possession to situations where the adverse possessor's actions were "sufficiently open to put a reasonably diligent owner on notice." Under this specific statutory direction to the courts, the "willful" adverse possessor would have been required to expend funds and effort

sufficient to alert the owner that someone was on the property, in the vain hope, over a ten year period, that he or she would not be ejected, while risking extensive damage liability and loss of all improvements. S. 7915 (unamended) would have had none of the adverse consequences of the legislation now before the Governor, and would have protected the innocent homeowner whether that person is the "true owner" or the one who acquired defective title. Attached is a copy of the New York State Bar Association's memorandum in support of S.7915 (unamended), which explains how the proposal would have worked in greater detail and why any attempt to require an analysis of the mind of the adverse possessor would create severe problems of the people of New York.

3. The legislation before the Governor contains numerous inconsistencies, ambiguities and confusing changes that will result in extensive litigation.

In addition to the basic problem of looking to the mind rather than the actions of the adverse possessor discussed above, the bill that passed the legislature represented a hurried attempt at compromise that resulted in numerous drafting problems that will only increase litigation and costs. For example:

(a) The definition of claim of right is unclear in that it requires a reasonable basis for the belief that the property belongs to the adverse possessor ***or*** the property owner. While apparently not intended, the language indicates that an adverse possessor would have a claim of right if the true owner had a reasonable basis for belief that he or she was the true owner. This makes no sense and will only lead to increased litigation.

(b). The words "usually cultivated and improved," long a part of New York's adverse possession law and also a part of the concept of possession from the beginnings of Anglo-American jurisprudence, have disappeared from the legislation without any explanation or justification, leaving only the requirement proposed by the New York State Bar Association in S. 7915 (unamended) relating to the acts of the adverse possessor and intended as a limitation on the words "usually cultivated and improved." There is no indication as to why those words were removed and it is not clear how the courts will interpret that deletion in the litigation that will surely follow.

(c). "Claim of right" is tested under Section 511 for adverse possession under a written instrument at the time the adverse possessor or its predecessors entered into possession. Under Section 521 "claim of right" for possession not under a written instrument is tested throughout the "actual continued occupation" of the property. Similarly, "claim of right" by those under whom the occupant claims is provided in Section 511 but not in Section 521. Extensive litigation will be required as parties try to resolve these issues.

(d) Section 543 deems certain *de minimis* non-structural encroachments, including fences, to be permissive. It is unclear what *de minimis* means. One court might find that a one foot encroachment is not *de minimis* while another may find two feet to be *de minimis*. The *de minimis* language replaced the suggested 12 inch permissive requirement in the New York State Bar Association bill. While 12 inches is certainly open to negotiation, the use of *de minimis* creates confusion and uncertainty and will lead to litigation in very many encroachment situations.

(e) We note that the reference to knowledge in section 501(1) is inconsistent with the insertion of claim of right in Section 501(3). We do not know how the courts will handle this conflict, but are certain that there will be extensive and conflicting decisions as a result of the litigation that will follow.

RECOMMENDATION

The New York State Bar Association Real Property Law Section respectfully requests that the Governor veto this hastily negotiated legislation and urges all parties in interest to sit down and draft an acceptable statute that would protect the interests of all the people of New York.

Endnotes

1. *See* Veto Message No. 153. The veto message went on to conclude that this shift of focus "adds an element for measuring this statute of limitations that will often be unknown and unknowable to a true owner." The message also states: "In many instances, an invidivual who purchased property in good faith may believe that he or she is the rightful owner of the property, and may openly occupy and improve the property for many years. As a result, it is appropriate to place time limits on the ability of others to claim that they are the 'true' owner of the property. Indeed, given the frequency with which property is sold and transferred, the imposition of strict time limits on the ability of owners to seek to eject possessors of property is the only way to give homeowners throughout New York State the comfort of knowing that their homes cannot be taken away from them. . . ."
2. *Id.*

Memorandum Prepared by: Prof. Robert M. Zinman
Section Chair: Peter V. Coffey, Esq.

Appendix C
Memorandum in Support of Legislation

(X) Memo on original draft of bill

( ) Memo on amended bill

BILL NUMBER: Assembly Senate

SPONSORS: Member(s) of Assembly:
Senators:

TITLE OF BILL:

An Act to amend Article 5 of the Real Property Actions and Proceedings Law relating to Adverse Possession.

PURPOSE OR GENERAL IDEA OF BILL:

1. Need for Revision

The New York Court of Appeals in *Walling v. Przyblo*, 7 N.Y. 3d 228 (2006) held that an adverse possessor's state of mind did not affect the running of the ten year statute of limitations for ejectment from real property. While the opinion correctly articulated the law of New York, the decision was perceived by some as unfairly permitting a possessor to take property of an unsuspecting owner (the actual acts of ownership in the *Walling* case were not before the Court of Appeals).

As a result of this concern, the New York legislature enacted S.5364-A, A.9156, designed to protect the property owner. The approach taken by the legislature would have overturned *Walling* to prevent acquisition of title by adverse possession unless proof were shown that the possessor or predecessor possessor (who may no longer be alive) had no knowledge that the property belonged to someone else. While well intentioned, the approach taken would have placed an impossible burden on the possessor of property, and would virtually have eliminated a statute of limitations for actions of ejectment from real property in New York, placing a cloud on real estate titles in this state.

Our Section submitted a letter to the Governor urging veto of the legislation and pointing out that Chairman Holtzschue had appointed a Task Force on Adverse Possession to review the law and recommend changes that would prevent unsuspecting property owners from losing their property while preserving the essentials of adverse possession law in New York. In his veto message, Governor Spitzer referred to the establishment of this Task Force and its mission. The attached proposed amendments are the result of the work of the Task Force.

2. Thrust of the Proposed Legislation

The mission of the Task Force was to preserve the viability of adverse possession law in New York while protecting the innocent landowner from stealth takings of his property. The approach of the proposed legislation was to look to the acts, rather than the mindset of the adverse possessor, and permit the statute of limitations to run only when the adverse possessor's acts were sufficiently open throughout the ten year statutory period so as to put a reasonably prudent owner on notice.

The changes also provide that minor property discrepancies of less than one foot would be deemed permissive for ten years before the statute of limitations would begin to run, and that mere mowing of lawns would be considered permissive without limitation on time.

The existing section 501, which was difficult to understand and largely meaningless, was deleted and in its place the Task Force inserted a definition of "adverse possession" that would reflect the virtually continuous line of authority in this state and avoid future misinterpretations of those lines of authority.

Other technical changes made by the Task Force included elimination of the word "under claim of title exclusive of any other right" where they appear as being a source of controversy and confusion under existing law. Each change proposed by the Task Force is analyzed in the comments that follow each section of the amended law.

3. Recommendation.

The Task Force on Adverse Possession respectfully recommends that the Executive Committee approve this Report at its December 7, 2007 meeting for submission to the Executive Committee of the New York State Bar Association at its January meeting.

SUMMARY OF SPECIFIC PROVISIONS:

NEW YORK REAL PROPERTY ACTIONS AND
PROCEEDINGS LAW ARTICLE 5
ADVERSE POSSESSION

§ 501 [Action after entry.] Adverse Possession Defined.

[An entry upon real property is not sufficient or valid as a claim unless an action is commenced thereupon within one year after the making thereof and within ten years after the time when the right to make it descended or accrued.]

(a) Adverse Possessor. A person is an "adverse possessor" of real property when the person occupies real property of another with or without knowledge of the other person's superior ownership rights, in a manner that would give the owner a cause of action for ejectment.

(b) Acquisition of Title. An adverse possessor gains title to the occupied real property upon the expiration of the statute of limitations for ejectment from real property as specified in N.Y.C.P.L.R. sections 211 and 212, provided that the occupancy, as described in sections 512 and 522 of this Article has been adverse, open and notorious, continuous, exclusive and actual.

§ 511 Adverse possession under written instrument or judgment.

Where the occupant or those under whom he claims entered into the possession of the premises [under claim of title, exclusive of any other right], founding the claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court, and there has been a continued occupation and possession of the premises included in the instrument, decree or judgment, or of some part thereof, for ten years, under the same claim, the premises so included are deemed to have been held adversely; except that when they consist of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot.

§ 512 Essentials of adverse possession under written instrument or judgment.

For the purpose of constituting an adverse possession by a person claiming a title founded upon a written instrument or judgment or decree, land is deemed to have been possessed and occupied in [either] any of the following cases:

1. Where it has been usually cultivated or improved, by acts sufficiently open to put a reasonably diligent owner on notice.
2. Where it has been protected by a substantial [i]enclosure.
3. Where, although not inclosed, it has been used for the supply of fuel or of fencing timber, either for the purposes of husbandry or for the ordinary use of the occupant.

Where a known farm or a single lot has been partly improved, the portion of the farm or lot that has been left not cleared or not inclosed, according to the usual course and custom of the adjoining country, is deemed to have been occupied for the same length of time as the part improved and cultivated.

§ 521 Adverse possession [under claim of title not written.] not under written instrument or judgment.

Where there has been an actual continued occupation of premises, [under a claim of title, exclusive of any other right], but not founded upon a written instrument or judgment or decree, the premises so actually occupied, and no others, are deemed to have been held adversely.

§ 522 Essentials of adverse possession [under claim of title not written.] not under written instrument or judgment.

For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases: [and no others]

1. Where it has been usually cultivated or improved, by acts sufficiently open to put a reasonably diligent owner on notice.
2. Where it has been protected by a substantial [i]enclosure.

§ 531 Adverse possession, how affected by relation of landlord and tenant.

Where the relation of landlord and tenant has existed between any persons the possession of the tenant is deemed the possession of the landlord until the expiration of ten years after the termination of the tenancy; or, where there has been no written lease, until the expiration often years after the last payment of rent; notwithstanding that the tenant has acquired another title or has claimed to hold adversely to his landlord. But this presumption shall cease after the period prescribed in this section and such tenant may then commence to hold adversely to his landlord.

§ 541 Adverse possession, how affected by relation of tenants in common.

Where the relation of tenants in common has existed between any persons, the occupancy of one tenant, personally or by his servant or by his tenant, is deemed to have been the possession of the other, notwithstanding that the tenant so occupying the premises has acquired another title or has claimed to hold adversely to the other. But this presumption shall cease after the expiration of ten years of continuous exclusive occupancy by such tenant, personally or by his servant or by his tenant, or immediately upon an ouster by one tenant of the other and such occupying tenant may then commence to hold adversely to his cotenant.

§ 543 Adverse Possession, how affected by acts across a boundary line.

(a) Placement of non-permanent enclosures including fences, shrubbery, plantings, and similar additions no more than twelve inches into an adjoining landowner's property shall be deemed permissive. But this presumption shall cease after the expiration of ten years at which time the ten year period of limitations shall begin to run, or after an assertion of title communicated to the adjoining landowner, whichever is earlier.

(b) Acts of lawn mowing or similar maintenance for short distances across a boundary line and onto an adjoining landowner's property shall be deemed permissive.

Summary of Statutory Changes

Section 501 is new and constitutes a definition of adverse possession. Paragraph (a) embodies the well-settled view that the subjective state of mind of the adverse possessor is immaterial. Rather the focus is upon the acts of the adverse possessor. Paragraph (b) restates the familiar requirements that, in addition to being adverse, the possession must be open and notorious, continuous, exclusive, and actual. The word "hostile" is not used because, properly understood, it is synonymous with adverse. However, it has occasionally been used in the past for holding that possession under a good faith mistake is not adverse.

The phrase "claim of title," has been deleted where it appeared in the statutes, i.e., text of § 511; title and text of § 521; and title of § 522. It has at times been erroneously relied upon by some courts, which also add the phrase "claim of right," as a basis for inquiring into the subjective state of mind of the adverse possessor.

Sections 512 and 522 list usual cultivation or improvement among the essentials of adverse possession. The phrase "by acts sufficiently open to put a reasonably diligent owner on notice" has been added to cultivation and improvement to emphasize the importance of opportunity for awareness on the part of the putative true owner.

Section 543 in entirely new. It tracks § 541 which addresses adverse possession as between or among tenants in common. Relatively minor intrusions on a neighbor's property, by fences, shrubbery and the like, and in routine mowing, arise quite frequently. Neither party may be aware of the true boundary line. Paragraph (a) would cause certain intrusions of twelve inches or less to be deemed permissive for ten years, and thus require twenty years of occupation in most cases. Paragraph (b) establishes a rule that mowing or similar acts for short distances across a boundary line are permissive.

The former § 501 has been deleted in its entirety because it has proved inscrutable and not meaningful. In § 512, "either of the following cases," followed by three cases, was ungrammatical and replaced with "any" of the following cases. In §§ 512 and 522 "enclosure" was substituted for "inclosure," which seemed somewhat archaic.

JUSTIFICATION:

A new § 501 defines adverse possession. This formulation states the objective standard and rejects the subjective state of mind approach. The statutory definition would reinforce the settled law as it was, prior to *Van Valkenburgh v. Lutz*, 304 N.Y. 95 (1952), and reaffirmed in *Walling*. As early as 1840, the Court of Appeals held that mere knowledge that another holds title will not defeat an adverse possessor's claim. *Humbert v. Trinity* Church, 24 WEND. 587 (1840). IN *Belotti v. Bickhardt*, 228 N.Y. 296, 302 (1920), the court stated that adverse possession, even when held by mistake, can ripen into title. In *Ramapo Mfg. Co. v. Mapes*, 216 N.Y. 362, 370-371 (1915), the court stated that "the bona fides of the claim of the occupant is not essential and it will not excuse the negligence of the owner in forbearing to bring his action until after the time in the Statute of Limitations shall have run against him to show that the defendant knew all along that he was in the wrong." We would have an unbroken line of authority from the earlier precedents were it not for *Van Valkenburgh*. In two conclusory sentences, without analysis or citation of authority, the court implicated the subjective state of mind. The court , in the course of holding against the possessor, stated that Lutz knew the small shed was not on his land, and that he thought the garage was entirely on his own land. *Van Valkenburgh* was a 4-3 decision with the unruly and unusual fact of an adverse possession claimant who had previously obtained a judgment establishing a prescriptive easement (a right to use someone else's land) over the very land as to which he was now claiming title and ownership. Additionally, the acts in question arguably did not constitute cultivation, improvement, or an enclosure.

In *Walling* the Court referred to the statement in Van Valkenburgh about knowledge as "perhaps mistaken dictum" that did not change the law. 7 N.Y.3d at 233. See also *West v. Tilley*, 33 A.D.2d 228 (4th Dep't 1970) (*Van Valkenburgh* deemed distinguishable).

There are several reasons in support of the objective standard, apart from the fact that it has been the settled law in New York for more than a century and one-half. First, any requirement that the possessor must prove that he, and those under whom he claims, entered without knowledge that another had title would undermine the functioning of the statute of limitations. These statutes eliminate or minimize the dispositive impact of stale and lost evidence in litigation. They also provide for repose after a sufficiently long period of time. If the subjective state of mind were material in adverse possession cases, often it would be the mind-set of some ancestor or predecessor who was deceased or missing. There would be no effective period of limitations in many cases.

The reasoning above is underscored by the fact that very often the doctrine of adverse possession promotes the interest of a true owner. There may be some technical defect in the chain of title such that there is no unbroken chain back to the sovereign. Perhaps a deed was lost or not indexed at the recorder's office. Perhaps it was not offered for recording. There could have been an installment sale but no deed was obtained when the last installment was paid. In these and other cases the putative adverse possessor is in fact the true owner; there is no *bona fide* thirty party claimant. The issue here will most often arise in office practice, i.e., whether the apparent owner has a marketable title and is able to sell his property. Thus it is the doctrine of adverse possession that enables a buyer to purchase, a lender to finance, and a title company to insure the interest of both. The objective standard of adverse possession also enables parties, especially in urban areas, to market and develop commercial property even though there may be an unusually small "gore" or strip between assembled parcels.

The doctrine also gives legal sanction to long-settled boundaries and the reasonable expectations of persons who may have improved property over a period of time. In that regard, a possessor or the possessor's predecessor may have expended substantial money and effort in making capital improvements. If a statute of limitations has not and cannot run in favor of the improver, he can be ejected and will have no restitution claim against the "true owner" who will now be unjustly enriched. See, e.g., *Miceli v. Riley*, 79 A.D.2d 165, 436 N.Y.S.2d 72 (2d Dep't 1981).

Governor Spitzer, in his Veto Message—No. 153 referenced above in the Purpose of the Bill, indicated that "adverse possession is an essential mechanism for resolving disputes regarding title to property." He noted that a homeowner could be sued by a third party who claims to be a "true owner" and who asserts that the homeowner, or a predecessor, was told or knew of the claim many years earlier. The homeowner would have to recall or find witnesses to such a conversation after memories faded or witnesses had died. In *West v. Tilley*, *supra*, the lower court judgment in the ejectment action was entered in 1969 in favor of Mrs. Tilley, the adverse possession claimant. A critical fact was the construction of a breakwater wall in 1925 by Mrs. Tilley's father, apparently deceased at the time of the litigation. It would have been an impossible burden for Mrs. Tilley to establish her father's subjective state of mind more than forty years earlier.

Walling itself is pertinent in this regard. Plaintiff Walling claimed title to a long triangular wedge used as his northerly side yard. He testified that he had been told that a certain barb-wired tree that formed the northwestery point of the triangle was his boundary point. After the lower court granted his motion for summary judgment, the defendants moved

to renew. They relied upon a new affidavit from the predecessor in title of both parties, a Mr. Maine, who had been on extended vacation in New Mexico. Maine's affidavit contradicted Walling's testimony about the tree being pointed out to him. The lower court then amended its earlier order and held that there was a disputed and material issue of fact as to whether Walling knew he did not have title to the disputed strip when he entered. (Respondents' Brief and Appendix in the Appellate Division.) Thus, the title could have turned upon credibility and recollection of witnesses about a 1986 conversation as testified to in 2004. If Walling had transferred title at any time in that span, his testimony may not have been available at all. The factual dispute was never resolved because the only issue in the Appellate Division and in the Court of Appeals was whether such knowledge on the part of an adverse possessor is material.

A true owner's burden will ordinarily be easily met. A purchaser routinely inspects property before buying. Indeed, failure to do so may subject a purchaser to unrecorded claims because of the familiar doctrine of inquiry notice. Further, there will generally be a survey, often updated, and a title report showing survey exceptions. Finally, the ten year period is longer than any other limitations period, including those of many other states.

For all the above reasons, the well-settled rule, that the subjective state of mind is immaterial, is sound and also in accord with the great majority rule in the United States. Nonetheless, there is a particular category of cases involving relatively minor intrusions on a neighbor's property by a fence, shrubbery, or the like that is troublesome. One or both parties may be unaware of the true boundary line; they may have expressly or impliedly assented to the structure on the assumption that it is on the boundary line. A subsequent claim of title can easily result in contentious neighbors warring over a strip that title companies would consider *de minimis*. Therefore, a new § 543, which tracks § 541 dealing with tenants in common, is included. It would deem such intrusions of twelve inches or fewer as permissive for ten years, thus requiring twenty years of possession unless there had been an express assertion of title communicated to the owner. This was the interpretation of § 541 in *Myers v. Bartholomew*, 91 N.Y.2d 630, 674 N.Y.S.2d 259 (1998). For similar reasons, the new section would also deem routine acts of mowing and similar maintenance to be permissive. Such acts are usually sporadic rather than continuous in any event, but the new provision could alleviate the concern of a neighbor about any need for legal action.

As indicated above, the only issue before the Appellate Division and the Court of Appeals was whether Plaintiff-Appellant Walling's possible knowledge was material. Whether the acts were sufficient to constitute cultivation or improvement as a matter of law, and thus justify summary judgment, was not before either court because the defendants did not cross appeal. But various acts were recited in the two appellate opinions. The acts included clearing a hay field; bulldozing and depositing fill and topsoil; digging a trench and installing PVC pipe to carry water from plaintiff's property to and under the disputed parcel; an underground dog wire fence; mowing, grading, raking, planting, and watering the grassy area, none of which was done by defendants; placing a birdhouse on a 10 foot pole; and installing an underground pipe that surfaced in a swale. The judgment found title in Walling only to "the improved portion of the parcel" and not the wooded area. Nonetheless, some of the recited acts, e.g., the underground pipe, have raised concern about whether an owner could lose title without opportunity to know of the possession.

With respect to underground pipes, sewers, etc., the leading case is still *Treadwell v. Inslee*, 120 N.Y. 458 (1890), decided over a century ago. The court held that an underground sewer did not give rise to a prescriptive right because the owner must know, or the adverse use must be so visible open and notorious that knowledge of such use will be presumed. In *Albany Garage Co. v. Munson*, 218 A.D. 240, 218 N.Y. Supp. 78 (3d Dep't 1926) the owner discovered an underground sewer when excavating its property. The court held that there was no knowledge by the owner and no basis for charging the owner with knowledge citing *Treadwell*. In *Town of Irondequoit v. Fischer*, 267 A.D.2d 1016, 701 N.Y.S.2d 548 (4th Dep't 1999) again the court held that an underground sewer was not open and notorious, citing *Treadwell*. Recently, in *City of Kingston v. Knaust*, 287 A.D.2d 57, 733 N.Y.S.2d 771 (3d Dep't 2001) the court found use of underground caves not to be open and notorious. In *Carr v. Fleming*, 122 A.D.2d 540, 504 N.Y.S.2d 904 (4th Dep't 1986), the court cited *Treadwell* and held that the existence of a manhole cover, on the ground above a sewer system, created at best an issue of fact as to whether it imputed knowledge to the owner.

There are two other pertinent cases. In *Panzica v. Galasso*, 285 A.D. 859, 136 N.Y.S.2d 554 (4th Dep't 1955) tenants of the claimant caused their automobiles' front and rear wheels to cross onto the owner's driveway. The court held that such use was of a limited nature and not open and notorious. In *Stupnicki v. Southern New York Fish & Gone Ass'n. Inc.*, 41 M2d 266, 244 N.Y.S.2d 558 (1962), occasional walking over a road and night use for hunting were sporadic uses and not open and notorious.

It seems clear that we have a continuous line of authority that underground pipes and sewers, as well as sporadic acts, are not open and notorious. Consequently, there is nothing wrong with existing law. Nonetheless, the bill would amend the standard of cultivation or improvement. It adds the requirement that the acts be "sufficiently open to put a reasonably diligent owner on notice." This phrase added to §§ 512 and 522 is consistent with existing law but would underscore the importance of the "open and notorious" requirement in insuring that an owner have opportunity to know of the adverse possession.

Finally, the new § 501, defining adverse possession, would replace the prior section, which would be repealed. The latter enigmatic section speaks of the necessity for an action in ejectment within one year of an entry, but also within ten years of the accrual of the original cause of action. It is very clear law that an actual retaking of possession by a true owner will interrupt the running of the statute. Any new and subsequent possession by the adverse claimant will merely cause the statute to start anew. However, a "mere entry" will not constitute an interruption. *Landon v. Townshend*, 129 N.Y. 166, 29 N.E. 71 (1891). Apparently, early statutes in some states confused these two concepts and simply required that an action be brought within one year of entry. See III American Law of Property § 15.9, pp. 809-811 (Casner ed. 1952). Other states, including New York, added the requirement of an action within ten years in all cases. Thus the statute neither shortens nor lengthens the period in the case of a "mere entry" and is superfluous. Repealing the section will eliminate the confusion it has at times created.

Very Respectfully,
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Title Insurance: Disclosure to and Consent by Client

At the 2008 Annual Meeting of the NYSBA, the Real Property Law Section (RPLS) included in its CLE program a presentation regarding an attorney acting as an agent for a title insurer, with a particular emphasis on title insurance for the attorney's own clients. The RPLS, through its Title and Transfer Committee, determined that it could assist the Section members by preparing and disseminating a recommended form for disclosure to, and consent by, such clients regarding title insurance provided by their own attorney, acting as an agent, in an effort to comply with the requirements of the Real Estate Settlement Procedures Act (RESPA), the N.Y. Insurance Law § 6409, and the relevant Disciplinary Rules and Opinions of the NYSBA Ethics Committee pertaining to title insurance and excessive compensation.

The form below has been approved by the Title and Transfer Committee and the Executive Committee of the RPLS. It is intended for use in both residential and commercial transactions involving title insurance. However, in most residential transactions, it will be unusual for the portion of the title premium retained by or paid to the attorney (pursuant to the attorney's agency agreement) to be in an amount so as to require adjustment of the legal fee as Ethics Opinion No. 576 and succeeding related Opinions mandate.

In utilizing this form, the attorney should consider, *inter alia*, the following issues:

1. This is only a suggested form, which each attorney may need to revise as may be appropriate for each transaction.
2. Section 8 of RESPA prohibits compensation for anything other than the performance of "core title services." Similarly, Section 6409(d) of the New York Insurance Law prohibits compensation for referrals of title insurance business.
3. An attorney must provide not only a credit for any "duplication of services," but also must comply with Disciplinary Rule 2-106(a) of the New York Code of Professional Responsibility which prohibits an attorney from receiving an "excessive fee." Whether a fee arrangement with a client violates the Disciplinary Rule is determined on a case-by-case basis.
4. In large commercial transactions where the title insurance premium is substantial, and the portion to be retained by, or paid to, the attorney greatly exceeds the value of the legal services, the method of crediting the client for duplicative services, avoiding excessive compensation and protecting one's independent legal judgment will require careful consideration.
5. Client acknowledgment and return of the disclosure form, although not required by the Ethics Opinions set forth below, is (a) recommended to confirm the client's receipt and consent to the terms of the disclosure; and (b) necessary for the client to request an owner's title insurance policy.
6. The form may be used, with appropriate revision, by an attorney acting as an agent, examining counsel or closing counsel, and for any other ethically permitted direct agency relationship between an attorney and a title underwriter.

The attorney also should read carefully and be familiar with the following Ethics Opinions (as the digests may not accurately represent the full import of each opinion):

NYSBA Opinion #351 (1974): attorney may act as title examiner and agent for a title company where he also represents a party if there is full disclosure and consent.

NYSBA Opinion #576 (1986): proper for an attorney representing a seller, buyer or mortgagee to act also as a title insurance agent provided such conduct is legal, no prohibited conflict exists, consent is obtained from all parties after full disclosure, legal fee is reduced by remuneration for the title company absent express consent to the contrary from the client and the legal fee is not excessive.

NYSBA Opinion #595 (1988): improper for law firm that represents real estate clients, and that has formed and is a principal in an abstract company, to refer clients to the title abstract company except for purely ministerial title searches.

NYSBA Opinion #621 (1991): improper for an attorney to refer a client to an abstract company in which the attorney has an ownership interest (clarifies #595) (*but see dissent*).

NYSBA Opinion #626 (1992): lawyer representing a lender in a transaction where fee is paid by borrower must disclose to borrower that the lawyer also will receive compensation from title insurer for representing its interests at closing; lawyer may retain the total fees paid by the borrower and title insurer so long as the lender-client consents and the total amount is not excessive.

NYSBA Opinion #631 (1992): proper for lawyer serving as agent of title insurance company to represent a County Resource Recovery Agency and offer title insurance for a bonded project if each consents after full disclosure, and no conflicting interests are present.

NYSBA Opinion #731 (2000): lawyer may not compensate lawyer's employees for soliciting clients to engage

services of title insurance agency in which lawyer has ownership interest in transactions in which the lawyer represents the lender. This follows from N.Y. State 595 and 621.

NYSBA Opinion #738 (2001): Improper for attorney to refer client to title abstract company owned by attorney's spouse. For the reasons stated in N.Y. State 595, as clarified and amplified in N.Y. State 621, the opinion adheres to the same *per se* non-consentable result.

NYSBA Opinion #753 (2002): Where client uses ancillary business owned by the lawyer, rules applicable to personal conflicts of interest and transactions between clients and lawyers continue to apply after DR 1-106. Under those rules, lawyer owning mortgage brokerage and title abstract business may not, even with informed consent, represent buyer or seller and act as mortgage broker in the same transaction or act as title abstract company with respect to non-ministerial tasks, but may, where the client consents after full disclosure, act as abstract company with respect to purely ministerial abstract work.

NYSBA Opinion #755 (2002): provisions of DR 5-104(A), relating to business transactions between lawyer and client, should not apply to lawyer's recommendation that client employ a distinct lawyer-owned ancillary business (or referral from the business to the lawyer), where lawyer takes steps to ensure that client understands that protections of attorney-client relationship do not apply to the non-legal services, as provided for in DR 1-106(A).

The Model Title Insurance Disclosure Form reflects the consensus of the members of an Ad Hoc Subcommittee of the Title and Transfer Committee created for the purposes of preparing the attached form. It does not necessarily reflect the views of individual members of the Subcommittee or their respective law firms and / or organizations. The Model Title Insurance Disclosure Form is intended to represent a good-faith effort on the part of the Subcommittee to draft a form that complies with the various ethics opinions issued by the Committee on Ethics of the New York State Bar Association. We note, however, that we do not examine what legal duties and restrictions are imposed upon an attorney / title agent. An attorney / agent should well consider the statutory restrictions and limitations of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et seq.* and Section 6409 of the New York Insurance Law before undertaking an attorney / agency relationship with a client.

Model Title Insurance Disclosure Form

Thank you for the opportunity to represent you in connection with your real estate matter. We are required by our code of ethics, the *Lawyer's Code of Professional Responsibility* adopted by the New York State Bar Association, to disclose some important information to you regarding the requirements for title insurance in connection with your transaction. As a part of your real estate financing transaction, your mortgage lender will require you to obtain title insurance to protect the Lender's interest in the property, but not your interest as owner. **[Optional: In addition, if you so elect, we will obtain an owner's policy of title insurance to protect your ownership interest in the property]**. We will make arrangements for this title insurance coverage and you will pay an insurance premium (which is a one-time charge payable at the closing) in the approximate amount of $_____ for a mortgage policy based on a mortgage amount of $_____. [**Optional: Please note that there is a substantial discount should you elect to purchase the mortgage title insurance policy at the same time as you purchase an owner's title insurance policy. Based on a purchase price of $_____, the "simultaneous issue rate" for both policies would be $_____.]** Title insurance premium rates throughout New York State are established in accordance with a rate schedule filed by title insurance companies and approved by the New York Superintendent of Insurance.

In addition to representing your interests in this matter, we will serve as agent for the title insurance company. The title insurance company will compensate us for our services rendered to it including, but not limited to, [**Tailor to reflect services to be performed by attorney/agent: e.g., examining the title, issuing the title commitment, clearing underwriting objections and preparing the final policy]**. Our compensation from the title insurance company for performing the foregoing services and our assumption of responsibility as agent will be ___% of the estimated title insurance premium noted above (approximately $_____ for the mortgage policy **[Optional: and $_____ for both an owner's and mortgage policy]**).

Our code of ethics prohibits us from being compensated twice for the same services if there is any duplication of services in the work we do for you and the title insurance company. Therefore, to the extent that there is any duplication of services, we are required to reduce our legal fee by the amount attributable to the same services for which we are also being compensated by the title insurance company. This reduction will be reflected as a credit on your statement for legal services rendered.

Although unlikely and we do not expect it, a situation may arise in which our representation of your interest in this transaction would create a conflict of interest with our obligations to the title insurance company. In most cases, conflicts can be readily resolved by communication between us and the title company. However, if a conflict arises which cannot be resolved, we would withdraw from acting as title agent and would arrange for the title insurance to be issued by another insurance company. In the unlikely event that an actual conflict cannot be resolved by placing the title insurance with another title insurance company, we would be required by our code of ethics to withdraw from our representation of you and the title insurance company. It is important to us that our representation of you be based on a duty of undivided loyalty and zealous representation.

Should you have any questions about this arrangement, please feel free to contact us or another independent attorney to discuss our proposed arrangement. You have the right not to consent to this arrangement. However, if you elect not to proceed with this arrangement, you will still be required to obtain title insurance to protect your mortgage lender's interest in the property **[OPTIONAL: and, if you elect, we will still obtain title insurance to protect your interest in the property]**. As a result, the overall cost of the title insurance will be unchanged regardless of whether or not you consent to this arrangement.

We look forward to representing you and to working with you in connection with your real estate transaction.

[LAW FIRM NAME]

By: _____
Name:
Title:

By signing below, you acknowledge that you have read a copy of this disclosure and consent to the foregoing arrangements. In addition, in order to authorize us to obtain an owner's policy of title insurance for you in addition to the mortgage title insurance policy required by your lender, please check the appropriate box on the enclosed copy of this title insurance disclosure, sign below and return it to us.

I/We want an owner's policy of title insurance and authorize you to obtain such policy on my/our behalf.

I/We do not want an owner's policy of title insurance. I/We acknowledge that you will not provide an opinion of title to me/us.

Dated: _____

_____
Name:

_____
Name:

When Is It Company? When a Crowd?

By Adam Leitman Bailey and Dov Treiman

Adam Leitman Bailey

With Governor Paterson's recent announcement that New York would accord administrative recognition to same-sex unions solemnized in jurisdictions that recognize such unions, notably in every jurisdiction with which New York shares a border except for Pennsylvania, the focus is once again placed on nontraditional families. In the groundbreaking decision of *Braschi v. Stahl*, the New York Court of Appeals granted administrative recognition to nontraditional families for purposes of rent regulation.[1] While arising in the context of a gay household, *Braschi* was clear that its protections were not limited to gay persons and equally clear that its protections were not to be defined by sexual conduct.[2] As *Braschi* law developed, it became obvious that the types of relationships that would receive these kinds of protections were by no means limited to quasi-spousal relationships. *Braschi* protections have been granted in relationships that were conducted similarly to those of grandparent / grandchild, parent / child, and sibling / sibling.[3] The largely open question that has until now remained unanswered is how *many* people can be in a *Braschi*-protected family.

Recent court decisions have demonstrated a pattern of growing recognition that while "marriage," as accepted in North America since the admission of Utah as a State, is limited to precisely two persons, many other well-recognized familial relationships are not: siblings, children, cousins, grandparents. Since *Braschi* never purported to recognize an alternative to *marriage*, but rather expanded the meaning of "family," it therefore stands to reason that those seeking *Braschi* recognition need not be limited to those seeking recognition of a relationship consisting of only two persons. What complicates this issue even further is that when one has a multi-person nontraditional family, one is rather likely to have multiple noncontiguous apartments involved.

The highly traditional, and indeed, ancient convent or monastery exemplifies the evolvement in the court's adoption of the "nontraditional" family. The presiding member of such institutions, in Christian society, is nearly universally referred to by a parental title and the denizens of the institution are generally referred to by a sibling title. If one actually examines the way these institutions live out their communal lives, one will discover that they meet nearly the full criteria set forth in *Braschi* in determining whether the unit in question is a "family." While individual brothers and sisters may have taken a vow of poverty, the income derived by members of the convent or monastery accrues to the institution and certainly can be viewed as each member of the institution being financially interdependent with every other. In one of the very few cases to discuss such living arrangements, *Melohn v. The New York Province of the Society of Jesus*,[4] the court declined to rule whether the collection of brethren living together was a monastery. The court simply viewed the lives of all the "brothers" as spreading over the various apartments and recognized each "brother" as having a primary residence in the apartments individually.[5] Notably, the *Braschi* criteria were never mentioned in the decision.[6] But, what of groups that are bound together by nonspiritual ties?

Dov Treiman

While New York City is, on the whole, more comfortable with gay couples than the rest of the nation, popular culture in New York City does not yet appear to recognize committed relationships that extend beyond a two-person bond. The word for such bonds, in the sexual context, is "polyamory," which has been defined by the Unitarian Universalists for Polyamory Awareness (UUPA), among others, as "the philosophy and practice of loving or relating intimately to more than one person at a time with honesty and integrity."[7] According to a *New York Times* report of the UUPA's position, "[t]he group is quick to distinguish polyamory from 'swinging' or 'cheating.' Polyamory 'involves intentional open long-term loving relationships,' not recreational or covert sexual activity."[8] How remarkably similar this is to the language of *Braschi* that says "it is the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties which should, in the final analysis, control,"[9] and also in the language of the regulations that codified it: "In no event would evidence of a sexual relationship between such persons be required or considered."[10]

In multi-person families, there is no greater need to consider evidence of sexual relationships than there is in two-person families. Rather, the standard is to be found in the UUPA report regarding "long-term loving relationships,"[11] which is further clarified in *Braschi* as "dedication, caring and self-sacrifice of the parties."[12] Just as *Braschi* is flexible about the kinds of relationships that can be mimicked

without *jural imprimatur*—spousal, filial,[13] fraternal, *inter alia*—so, too, can polyfamilies show equal flexibility.

It is probably unsurprising that situations dealing with a polyamorous relationship would require the court to address the issue regarding whether the combination of several noncontiguous apartments can be viewed as one primary residence. After all, more people need more space and there is no limit on the amount of space they may need or be entitled to.[14]

The law is well established that two or more apartments[15] can be combined to form a single living space for a family.[16] For such to occur, it is unnecessary that the apartments share a common wall or be at all physically capable of connection without passage through the common areas of the building.[17] However, whether the apartments are contiguous or not, the court is obliged to examine the usage of each unit. For example, if one of the units is simply used for storage, it will not be regarded as dwelling space and therefore is not entitled to be considered part of the one apartment unit spread over noncontiguous spaces.[18]

The more interesting question is whether two or more apartments may represent a single primary residence when those apartments are located in separate buildings. While one would be hard-pressed to imagine a scenario that establishes a house in the Hamptons as being but a single primary residence with an apartment in New York City, it is entirely possible that a family—even a traditional family—could arrange its life so that it performs some family functions at one apartment and some other family functions at another one, a few blocks removed. The family may, for example, dine and entertain company in one apartment and sleep in the other. Or, again for example, one particularly loudly snoring family member may be banished to sleep at a sufficient distance so as to allow the remainder of the family to sleep insulated from the gentle sounds of a sawmill. Given the scarcity of large affordable apartments, many families may find themselves relegated to this multi-block scenario. Intriguingly, there is nothing in the reported decisions to contradict such a possibility.[19]

It is relatively easy to demonstrate that a set of parents—married or otherwise, gender diverse or otherwise—living together with their brood of children—natural, adopted, foster, or step—forms a single cohesive family for purposes of rent regulation. They can retain that ease of analysis whether they are in a single apartment or spread over more than one—provided the children are minors. However, complications begin when a relationship that is non-marital but traditional, or non-traditional, is spread over multiple apartments. The proof may be unclear as to whether the lives are being led as a single family or as a multiplicity of families with close ties—extended families,[20] for whom the law accords no protection.[21]

For multiple persons to claim *Braschi* protections, they will have to show that not only do they fully meet the *Braschi* criteria with respect to each other, but also, where applicable, that their apartments are being used as multiple rooms of the most elusive of concepts, one single home.

Endnotes

1. 74 N.Y.2d 201, 212-13, 543 N.E.2d 49, 54-55, 544 N.Y.S.2d 784, 789–90 (1989).
2. *Braschi*, 74 N.Y.2d at 212-13, 543 N.E.2d at 55, 544 N.Y.S.2d at 790.
3. *See id.* (citing as examples: "*Athineos v. Thayer*, NYLJ Mar. 25, 1987, at 14, col 4 (Civ. Ct. Kings County), *aff'd* N.Y.L.J., Feb. 9, 1988, at 15, col. 4 (App. Term 2d Dep't) (orphan never formally adopted but lived in family home for 34 years); *2-4 Realty Assocs. v. Pittman*, 137 Misc. 2d 898, 902 (two men living in a "father-son' relationship for 25 years); *Zimmerman v. Burton*, 107 Misc. 2d 401, 404 (unmarried heterosexual life partner); *Rutar Co. v. Yoshito*, No. 53042/79 (Civ. Ct NY County) (unmarried heterosexual life partner); *Gelman v. Castaneda*, NYLJ Oct. 22, 1986, at 13, col .1 (Civ. Ct. N.Y. County) (male life partners).").
4. 17 HCR 93A, N.Y.L.J., Mar. 27, 1989, at 25, col. 4 (Civ. Ct. N.Y. County).
5. *See id.* (concluding that the petitioner "failed to raise a single factual issue that the premises [were] not being used as primary residences for respondents").
6. *Id.*
7. Unitarian Universalists for Polyamory Awareness, http://uupa.org (last visited Sept. 30, 2008).
8. Peter J. Steinfels, *Beliefs; Among struggles with boundaries are those facing Godless Americans and advocates of 'polyamory,'* N.Y. TIMES, Aug. 17, 2002, at B6.
9. *Braschi*, 543 N.E.2d at 55.
10. N.Y. COMP. CODES R. & REGS. TIT. 9, § 2520.6 (2008).
11. Unitarian Universalists for Polyamory Awareness, *supra* note 7.
12. *Braschi*, 543 N.E.2d at 55.
13. For example, legally unrelated persons could structure their household to consist of two parents and two children for a total of four people.
14. *See Pultz v. Economakis*, 40 A.D.3d 24, 26, 830 N.Y.S.2d 101, 102 (1st Dep't 2007) (positing that "the case law in this Department has consistently recognized that 'the Legislature has as yet placed no limitation on the amount of space a given owner may regain for personal use'") (citing *Sobel v. Mauri*, N.Y.L.J., Dec. 12, 1984, at 10, col. 4 (App. Term 1st Dep't)), *aff'd*, 10 N.Y.3d 542, 890 N.E.2d 880, 860 N.Y.S.2d 765 (2008).
15. *224 E. 18th St. Assocs. v. Sijacki*, 138 Misc. 2d 494, 499, 524 N.Y.S.2d 964, 968 (N.Y.C. Civ. Ct. 1987).
16. *See, e.g., C.H. Page Assocs., v. Dolan*, 12 HCR 257B, N.Y.L.J., Nov. 8, 1984, at 4, col. 2 (App. Term 1st Dep't); *Handy v. Renzulli*, 141 A.D.2d 351, 525 N.Y.S.2d 609 (1st Dep't 1988); *R.A.S. Ventures v. McCracken*, 23 HCR 70A, N.Y.L.J., Feb. 3, 1995, at 25, col. 4 (App. Term 1st Dep't); *Nick v. DHCR*, 244 A.D.2d 299, 664 N.Y.S.2d 777 (1st Dep't 1997); *Noto v. Bedford Apts. Co.*, 21 A.D.3d 762, 801 N.Y.S.2d 21 (1st Dep't 2005); *Kassell v. Bakst*, 14 HCR 185A, N.Y.L.J., Jun. 2, 1986, at 7, col. 2 (App. Term 1st Dep't).
17. *See G & G Shops, Inc. v. NYC Loft Board*, 193 A.D.2d 405, 405, 597 N.Y.S.2d 65, 65 (1st Dep't 1993). The treatment of two noncontiguous apartments as a single residence was proper upon finding that the apartments were not used for mere purposes of convenience. 193 A.D.2d at 405, 597 N.Y.S.2d at 65; *see also 10 W. 66th St. Corp. v. DHCR*, 184 A.D.2d 143, 149, 591 N.Y.S.2d 148, 151 (1st Dep't 1992). It is recognized that two noncontiguous rental apartments may constitute as a single residential unit. 184 A.D.2d at 149, 591 N.Y.S.2d at 151.

18. *See Briar Hill Apts. Co. v. Teperman*, 165 A.D.2d 519, 523, 568 N.Y.S.2d 50, 53 (1st Dep't 1991) (noting that the usage of a noncontiguous apartment must be "maintained . . . as an integral part of their residence" in order to be considered a primary residence); *see also Greenwich Vill. W. Realty Co. v. Rosenthal*, 21 HCR 201A, April 2, 1993 (N.Y.C. Civ. Ct.) (stating that a tenant can be evicted from a noncontiguous apartment if evidence shows that it is no longer used as his or her primary residence).

19. *Cf. Kassell v. Bakst*, 14 HCR 185A, N.Y.L.J., June 2, 1986, at 7, col. 2 (App. Term 1st Dep't) (declining to find apartments in noncontiguous buildings as a single primary residence because the individuals in question were not actually *using* them as a single residence for a single family).

20. Uncles, aunts, nieces, nephews, and cousins are unprotected by rent regulation unless they *also* meet the *Braschi* criteria.

21. *See W. 93rd St. Partners v. Zobel & Zobel*, 18 HCR 105A, Aug. 31, 1988 (N.Y.C. Civ. Ct.) (concluding that "however noble be the mission or deeply felt the filial devotion" between the grandmother and the grandchildren, evidence was insufficient to prove that the apartment in question was the primary residence of the grandchildren); *see also Wonko Realty Corp. v. Estate of Dreisch*, 150 Misc. 2d 1046, 1047–48, 572 N.Y.S.2d 276, 277–78 (N.Y.C. Civ. Ct. 1st Dep't 1991) (holding that the claimant was not entitled to succeed deceased sister's apartment for lack of proof that the apartment was her primary residence).

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Guardians Ad Litem in Housing Court

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I. Introduction

Each year, thousands of adults suffering from physical, mental, or other incapacities are found incapable of adequately defending or prosecuting their rights in proceedings before New York City Civil Court, Housing Part, commonly called Housing Court. Many of these adults are elderly.[1] Many suffer from physical debilitation, mental illness, and substance addiction.[2] Many are victims of physical, mental, and financial abuse. Many are unable to receive benefits to which they are entitled. Many have no one who will help them. Many cannot even come to court.

As dictated by Civil Practice Law and Rules (CPLR) Article 12, Housing Court must appoint a guardian ad litem (GAL) to advocate for and assist the incapacitated person, who is then known as a ward.[3] The standard under CPLR 1201 is that Housing Court must appoint a GAL for "an adult incapable of adequately prosecuting or defending his rights." All involved must aid the incapacitated using the least restrictive means to intervene in their lives. Governmental agencies like Adult Protective Services (APS),[4] a division of the New York State Department of Social Services (DSS), and the court itself affect the ability of GALs to advocate for their wards.

Consequences, including involuntary relocation and the eviction of those who deserve protective services, come not only from the merits of Housing Court litigation but also from incapacitated litigants' lack of legal representation;[5] the lack of affordable housing in New York City; tenants, landlords, charities, and government personnel scrambling over scarce resources; the poverty suffered by most Housing Court litigants with diminished capacity; and the hectic pace of Housing Court proceedings. Those who serve as GALs perform an invaluable service defending societal values and maintaining the integrity of the Housing Court and summary eviction proceedings by protecting those most in need. But simply appointing a GAL does not resolve all the problems for the incapacitated, the adverse parties, or the court itself. Frustrations and delays beset too many cases involving GALs.[6]

This article discusses the role GALs play in Housing Court and the law affecting GALs, wards, and potential wards.

II. The GAL's Duties

Until 1962, when CPLR 1201 was enacted, GALs were called "special guardians" when they served in special proceedings like summary nonpayment and holdover proceedings. Whether in a special proceeding or a plenary action, a GAL is "an officer of the court with powers and duties strictly limited by law and he may act only in accordance with the instructions of the court and within the law under which appointed."[7] Translated from Latin, ad litem means "for the suit."[8]

Housing Court may appoint a guardian on its own initiative,[9] even when a potential ward opposes the motion. The CPLR contains no requirement that a prospective ward agree with the appointment, and case law permits the appointment. In the 1998 case of *Anonymous v. Anonymous*, for example, the Appellate Division, First Department, affirmed the Supreme Court's appointment of guardian ad litem despite the defendant's objection.[10] It is difficult in practical terms to appoint a GAL without the ward's consent and cooperation, and it makes the GAL's work challenging if the ward does not consent. The GAL will nevertheless help the court by presenting an objective assessment after an investigation. Due process will be satisfied by the GAL's and the court's always considering the ward's best interests; by allowing the ward to speak and be heard, at least to an adequate extent, on whether to appoint a GAL and on any other relevant issue that might arise during the proceeding; and by permitting the ward to hire an attorney.

In appointing a GAL, the court may set out the GAL's duties in a court order. Doing so can help assure that the GALs will do what they are required to do in each specific case, assuage the opposing party that the proceeding will move relatively expeditiously, and assure the public that appointing the GAL is appropriate.

The GAL's primary obligation "is to act in his or her ward's interest."[11] Although the scope of the GAL's duties is narrow, the GAL takes on a variety of roles, acting simultaneously as an advocate, social worker, and liaison between the ward, APS, social service agencies, the marshal, the ward's family, opposing counsel, and the court. The GAL is often called upon to establish a relationship with the ward to understand the ward's concerns and wishes.

The GAL might also engage in settlement negotiations, become familiar with what benefits the ward may receive, and assure that the ward receives required services from appropriate agencies. The GAL may not control the ward's finances, but the GAL intervenes with social service agencies, the Social Security Administration, the New York City Housing Authority, SCRIE, Section 8, and APS, among others. The GAL might hire an attorney for the ward, perhaps by seeking the aid of The Legal Aid Society, Legal Services for New York City, MFY Legal Services, Inc., Northern Manhattan Improvement Corp. Legal Services, or a law school clinic like Cardozo Bet Tzedek Legal

Services. The GAL might also proceed to trial, with or without an attorney representing the ward.

A GAL's role is limited to the action or proceeding before the court. The role of a Mental Hygiene Law (MHL) Article 81 guardian, often called a "community guardian," is far broader. An Article 81 guardian can be appointed after a Supreme Court proceeding as a guardian of the ward's property, person, or both, and not merely for a piece of litigation. GALs are also different from law guardians who represent children in Supreme Court matrimonial actions, from family court law guardians, and from family court and surrogate's court guardians.[12]

MHL Article 81 guardians have more expansive powers, such as the ability to relocate a ward, than Housing Court GALs. For an MHL Article 81 guardian to be appointed, the ward must be found incapacitated or agree that appointing an MHL Article 81 guardian is necessary.[13] In MHL Article 81 proceedings, proof of the ward's incapacitation must be based on clear and convincing evidence that "the person is unable to provide for personal needs and/or property management; and the person cannot adequately understand and appreciate the nature and consequences of such inability."[14] Because MHL Article 81 guardians have greater powers over their wards than Housing Court GALs do, the law establishes the higher standard of competency to appoint an Article 81 guardian, as opposed to the lower standard of incapacity to defend or prosecute rights in order to appoint a Housing Court GAL.

The incompetency standard for a Housing Court GAL appointment is less than and different from the incompetency standard for an MHL Article 81 guardian. Were the law otherwise, GALs would be appointed only after the Supreme Court declared an individual incompetent.

MHL Article 81 sets out a method for the courts to determine a litigant's competency, and "until that is done the courts should not have to decide case by case whether a particular party is of sufficient mentality to be a suitor or defendant."[15]

Once appointed, a Housing Court GAL is assigned to a specific proceeding. In a nonpayment proceeding, a ward routinely has rental arrears, often sizeable by the time a GAL is appointed, and might also not be paying ongoing use and occupancy. A ward who meets APS guidelines and becomes an APS client is entitled to receive services. These services include APS's applying on the ward's behalf for a grant to cover arrears and for voluntary or involuntary financial management, a program by which APS will oversee paying the rent and housing bills with the ward's funds to assure that the rent will be paid and not squandered or allowed to sit unused. If the ward is not an APS client, these applications may be made to another social service agency like Self Help or the Jewish Association for Services for the Aged (JASA).

Holdover proceedings are often initiated because of alleged nuisances, sometimes caused by outstanding psychological or physiological conditions like obsessive-compulsive disorder, dementia, or Alzheimer's. Common nuisances include having unmanageable pets or hoarding, called a Collyer's condition after the Collyer brothers, who hoarded in a New York townhouse in the 1950s. These nuisances might create a fire hazard, odors, or a rodent or garbage infestation. In cases of a tenant-ward's unmanageable-pet problem, inappropriate behavior, or hoarding, the GAL, working with APS and the landlord, will coordinate with the necessary agencies or third parties, such as Animal Control, a psychiatrist, JASA, or a company to which APS contracts out for a cleaning to resolve the nuisance. Although the court has the power in a pending proceeding to grant access to a landlord to effect repairs, the Housing Court GAL does not, however, have the authority to allow cleaners into the apartment without the ward's consent and may not force the ward to comply. Only an Article 81 guardian may force compliance.

Under a March 2007 Civil Court Advisory Notice[16] and a March 2007 binding directive[17] from the New York City Civil Court's Administrative Judge, issued in response to a 2007 decision of the Appellate Term, First Department, in *BML Realty Group v. Samuels*,[18] GALs must fill out a GAL Case Summary form,[19] which they must retain in their files for three years. The Case Summary form documents the GAL's contacts with the ward, the GAL's advocacy efforts, and the steps the GAL took to follow through with the plan set forth in any stipulation of settlement. The court may require the GAL to submit the case summary form or may question the GAL on the record. If the court requires the GAL to submit the case summary form, the judge may direct on the GAL appointment order that the GAL submit it. The case summary form is not intended to be placed in the court file unless the file is sealed. The GAL might be asked to give the administrative judge a copy of the summary.

III. Conflicts Arising from the GAL's Role

As an officer of the court, the GAL is required to investigate fully and fairly and to keep the court informed about the information obtained during the investigation of the ward.[20] GALs who advocate for litigants with diminished capacities often face moral and ethical dilemmas arising from that investigation and from the tension between advocating for their wards and being officers of the court. Can the GAL both report objectively to the court and still always advocate in the ward's best interests? May the GAL's judgment be substituted for the ward's?

If the GAL and the ward disagree on how to handle the case, should the GAL go forward if doing so means contradicting the ward's wishes? If a ward is in a nursing home, hospital, or rehabilitative institute and is unlikely to resume tenancy at the location in dispute, should a GAL be

allowed to enter into a stipulation of settlement on the ward's behalf in which the ward surrenders the apartment if the ward opposes that settlement? If a landlord offers significant incentives for the tenant to surrender possession, may a GAL sign a stipulation to relocate the ward if the ward refuses to leave? If a ward wants a trial in a nonpayment case but has no valid defense, and the GAL can get a stipulation of settlement offering the ward needed time to pay the arrears, may the GAL act contrary to the ward's intentions and risk an eviction post-trial for failure to pay a possessory judgment in five days?

No apparent or uniform answer exists for these questions. Addressing these questions was a New York County Lawyers' Association (NYCLA) Task Force on Housing Court Resources Subcommittee, which held a conference in October 2004 and issued a report on Housing Court GALs.[21] NYCLA's Board of Directors approved the Task Force's final report, called *Report on Resources in the Housing Court*, on February 5, 2007.[22] The final report incorporates all the subcommittee's recommendations.[23]

NYCLA's final report, tracking its Subcommittee Report, advises that "[i]f there is no agreement between the GAL and the respondent (and counsel for the respondent, if any), the Housing Court Judge is to evaluate the respondent to determine whether the respondent has sufficient capacity to decide how the case should be resolved."[24] If the ward has sufficient capacity, NYCLA would urge the court to refer the case for trial or another proceeding. If not, NYCLA would urge the court and the GAL to refer the case to APS for an Article 81 proceeding.[25] Only Article 81 guardians have the power to compel wards to accept settlements.

Other authorities and practitioners agree with NYCLA's position. According to those who hold this view, GALs are not vested with the authority to settle cases. CPLR 1207, they argue, "grants authority to the representatives of an infant or a person judicially declared incompetent to settle claims, but does not include guardians ad litem among the representatives with settlement authority."[26] They contend that a fair reading of CPLR 1207 is that "the legislature did not authorize guardians ad litem to settle claims on behalf of the individuals they represent, unless the ward has been declared incompetent."[27] For support, they cite *In re Estate of Bernice B.*, in which the New York County Surrogate's Court found in 1998 "that a GAL cannot bind her adult ward to a settlement of which the ward disapproves unless the ward's incapacity to participate in the litigation (or in its settlement) has been established under the special procedural safeguards afforded by the [MHL]."[28] They also cite *Tudorov v. Collazo*, in which the Appellate Division, Second Department, wrote, as to CPLR 1207, that if a ward objects to a GAL's attempt to settle a case, "a guardian ad litem is not authorized to apply for approval of a proposed settlement of a party's claim. . . ."[29] They additionally note that the concept of a GAL's "stepping into the ward's shoes" appears in "training manuals" only and has no case law support.[30]

Others have a different opinion. They might agree that the GAL may not settle a proceeding without court approval. But, they argue, the court may approve a GAL's proposed settlement of any proceeding, including ones that surrender possession, and the ward's desires are relevant but not determinative. For proponents of this view, the relationship between a GAL and a ward is different from that of attorney-client, in which the attorney must follow the client's wishes but in which a GAL might be obliged out of necessity to act contrary to the ward's desires and to support a settlement position adverse to what the ward wants.

Some courts have allowed GALs to act contrary to their wards' wishes. The Appellate Division, Third Department, in *In re Feliciano v. Nielson*, for example, quoting from dictum from the Court of Appeals in *In re Aho*, held that "a guardian ad litem is not to be viewed as an 'unbiased protagonist of the wishes of an incompetent' and may even act contrary to the wishes of its ward."[31]

Many judges agree with *Feliciano*. One, in a law journal article, has written that "[t]he GAL steps into the shoes of the ward. . . ."[32]Another, in a training outline, has explained that "[a]lthough the ward's desires are relevant, they are not determinative. Thus, a guardian ad litem may have to act contrary to the ward's desires and maintain a position adverse to the ward."[33] A third, Justice Fern A. Fisher, the New York City Civil Court Administrative Judge, whose office oversees the GAL program, submitted a Comment in opposition to the NYCLA Subcommittee Report, arguing that a GAL must act in the ward's interests but may act in opposition to the ward's preferences.[34] The Comment notes the difference in the statutory procedure to settle claims by infants, judicially declared incompetents, and conservatees and the role of the judge and GAL in settling claims against respondent-tenants not judicially declared incompetent but who nevertheless are incapable of adequately defending their rights.[35] The Comment looks to the CPLR's legislative intent and argues that "the legislature considered and rejected CPLR 1207 and 1208's application to actions where the GAL is appointed to defend the interests of a party," including respondent-tenants in Housing Court.[36] Justice Fisher argues that if the ward and the GAL disagree, and the judge does not find that an Article 81 proceeding is warranted, the case should not be sent out for a trial that can lead to an eviction.

Justice Fisher opines, therefore, that the judge should determine whether to so-order a settlement or recommendation if the ward disagrees with the settlement the GAL recommends.[37] In making that determination, the court and the GAL should consider the least-restrictive alternatives when intruding into the ward's autonomy.

Practical concerns underlie the belief that a GAL, supervised by the

court and acting with the court's permission, should be allowed to urge a court to disregard a ward's irrational wishes. Just because the court or a GAL wants to refer the matter for an Article 81 guardian does not mean that APS will accept the case or that the Supreme Court will appoint an Article 81. GALs and Housing Court judges are not the wards' attorneys and do not prepare the papers for Supreme Court. The ward might be evicted if an Article 81 guardian is not appointed. Not accepting a fair stipulation that a GAL negotiates might also result in possible injustices because Article 81 proceedings are lengthy, drawn-out affairs. Even if the Housing Court matter is stayed pending an Article 81 proceeding, possible injustices might include denying landlords legitimate use and occupancy (which APS will not pay if it seeks an Article 81 guardian) and forcing the ward's neighbors to tolerate the ward's allegedly intolerable behavior.

After NYCLA issued its Subcommittee Report and Justice Fisher issued her Comment, the Subcommittee issued a Minority Report but adhered to its majority views.[38] NYCLA's final report, approved, as mentioned above, in February 2007, considered and rejected Justice Fisher's Comment.

The reality is that GALs, to some valid extent, make decisions that affect their wards. In striving to "protect and assist a party, [GALs] do substitute their judgment and decisions for the decision making that the party otherwise would exercise in a proceeding and curtail the party's autonomy and freedom in that respect."[39] This curtailment of the ward's autonomy ranges from invasions into the ward's financial independence in the form of APS involuntary financial management, to the GAL's coordinating a heavy-duty cleaning, to emergency hospitalization or institutionalization of the ward, to the GAL's recommending an MHL Article 81 guardianship proceeding. In an Article 81 guardianship proceeding, the Article 81 guardian is even more involved in the ward's life than a Housing Court GAL may ever be.

When a disagreement between the GAL and the ward's attorney arises over how to handle the ward's case, should the GAL, as an officer of the court, report this to the court, and whose position should prevail? One author has opined "that [the lawyer] can seek judicial removal of the present guardian [ad litem] and appointment of a new guardian ad litem . . . [and] then the attorney can seek judicial resolution of the disagreement with the guardian [ad litem], or can withdraw from the case."[40] According to a civil court advisory opinion, "a GAL should allow the attorney to handle all the legal paperwork related to the case unless the attorney takes action contrary to the ward's welfare."[41] If there is a conflict, or when the GAL believes that the attorney is not doing the work, the GAL should notify the judge, and the matter should be discussed and resolved on the record.[42] Disagreements between the GAL and the ward's attorney might develop because they have different practical and ethical obligations toward the ward and might differ about what is in the ward's best interests.

Attorneys also experience conflicts. As the New Jersey Supreme Court in *In re M.R.* explained, "[g]enerally, the attorney should advocate any decision made" by the incapacitated person, and "[o]n perceiving a conflict between that person's preferences and best interests, the attorney may inform the court of the possible need for a guardian *ad litem*."[43] But if the client opposes a GAL, the attorney may move for a GAL only if the client is incapacitated and "if there is no practical alternative, through the use of a power of attorney or otherwise, to protect the client's best interests. . . ."[44] If that happens, the attorney may not be a witness at a contested hearing.[45]

A question exists whether a GAL may perform purely legal work on the ward's behalf, such as drafting a memorandum of law. Some GALs who are attorneys will perform legal work out of kindness to their wards and generosity to the court. Although it is often difficult to find an attorney for the ward, the better practice is for GALs not to perform legal work and, instead, to do their best to retain an attorney. As three experts explain:

> Even when the guardian ad litem is a lawyer, he or she cannot take on the dual role of acting as both guardian ad litem and legal counsel. Guardians ad litem and counsel for defendants perform different roles. The guardian ad litem is an officer of the court whose role is to protect the interests of the ward and report to the court. The attorney, while an officer of the court as well, must be a zealous advocate for the client in an adversarial process. The two roles are distinct, as are the obligations.[46]

It is difficult for an attorney-GAL to see a defect in the pleadings and not point it out to the court. Courts often tolerate GALs who do legal work. It would be unseemly for a court, having heard a GAL argue a meritorious legal issue for a ward, to disregard the argument, not because of its merits, but because the GAL perhaps should not have been the one to make it. The line between an attorney-GAL and an attorney is sometimes blurred.

Another issue arising out of the GAL's role is whether private legal malpractice insurance will protect GALs. GALs need not be lawyers.[47] GALs should be indemnified by legal malpractice insurance, some argue, because GALs are involved in legal proceedings and perform at least quasi-legal, if not fully legal, work to protect their wards. The NYCLA Task Force on Housing Court Resources Subcommittee's report notes, however, that "[t]here is a diversity of opinion among private attorneys with regard to whether private legal malpractice insurance will cover

work performed as a *pro bono* GAL in Housing Court."[48]

The New York State Attorney General has issued an opinion stating that court-certified volunteer GALs are entitled to state indemnification under the Public Officers Law § 17(1)(a) because they are state-sponsored volunteers.[49] Under Public Officers Law § 17(1)(a), GALs are entitled to state indemnification only if they are deemed an "employee" and not independent contractors. If the court determines that GALs, paid or unpaid, are independent contractors, then GALs would not be entitled to state indemnification. Under a New York State Attorney General Advisory Opinion dated October 24, 2006, paid GALs will not be indemnified under the Public Officers Law because they are not volunteers.[50] Unless the Attorney General issues a different opinion or the Legislature amends the law, some compensated GALs, who are at risk of being sued by incapacitated, paranoid wards, might be disinclined to serve. Other GALs will serve but will be victimized by frivolous litigation. Several groups, including the New York State Bar Association's Real Property Law Section's Landlord and Tenant Proceedings Committee, have therefore proposed legislation to compel the state to indemnify Civil Court GALs.[51]

GALs have some protection, however, from lawsuits by their wards. The Civil Court in *Lau v. Berman* has held that a ward may not sue a GAL absent the ward's first obtaining court approval, and that the ward's failure to do so must result in dismissing the action: "Once a court appoints a guardian to represent an incapacitated person, litigation against the guardian as representative of the incapacitated person may not proceed without permission of the court which appointed the guardian."[52] The court found that a suit against a GAL for breach of duty, conspiracy, and defamation for acting against the ward's interests must be treated differently from other actions because "[a] guardian ad litem may be obliged to act contrary to the wishes of the incompetent and adopt a position that is adverse to the position of the ward."[53]

IV. Who May Be Appointed to Serve as a GAL?

Because issues involving incapacitated litigants are critical to the court, the litigants, and the public, the New York City Civil Court has a GAL program in place. The court trains and certifies GALs, serves as a liaison to other agencies and stakeholders, and in general administers the GAL program.

To become a certified Civil Court GAL, the appointee must undergo a court-approved daylong training program. The training, overseen by the Civil Court Administrative Judge's office, is currently offered twice each year in two live training sessions, usually in January and June. Video replays of the trainings can be viewed in between the scheduled live sessions.[54] Attorneys admitted to the bar for at least two years can receive a total of six free Continuing Legal Education (CLE) credits for completing the training.[55]

Applications to serve as a Housing Court GAL are available online.[56]

Court certification is not necessary for trained pro bono professionals associated with social service agencies"[57] or for students affiliated with a law school's elder-law clinic.[58]

Courts must take the proposed GAL's financial ability into account under CPLR 1202(c) when determining whether the GAL can provide for the ward's best interests.[59] Before a court may make an appointment, the proposed GAL must sign an affidavit "stating facts showing his ability to answer for any damage sustained by his negligence or misconduct."[60] These facts include the GAL's assets, income, and liabilities.[61] CPLR 1202(c) is not always used in summary proceedings, in which Housing Court GALs have vastly fewer powers than Supreme Court Article 81 guardians and in which Housing Court monitors its GALs more closely than other courts do. GAL appointment orders in Housing Court sometimes provide that the GAL will serve without bond. Some appointment orders even provide that GALs need not comply with CPLR 1202(c) affidavit requirement.[62] The fear is that compelling GALs to submit these affidavits is an onerous demand that might decrease the available pool of GALs who could assist Housing Court litigants. A Civil Court directive provides, however, that "Judges must insure that [a CPLR 1202(c)] affidavit is filed."[63]

Housing Court GALs need not file a notice of appointment under § 36.2(c) of the Rules of the Chief Judge, but judges; judicial hearing officers; and their spouses, children, and parents are disqualified from service as a GAL.[64]

It is widely agreed that private law firms should be encouraged to serve as GALs, given the level of legal training and expertise that attorneys possess. Private attorneys serving as GALs increase the efficiency of the GAL appointment and training process.[65] But a GAL need not be an attorney.[66] Nor must a GAL be a doctor when the ward is mentally impaired.[67]

V. How GALs Are Appointed

A GAL may be appointed upon APS motion under CPLR 1202(a), or the court may appoint a GAL on motion or "at any stage of the action upon its own initiative."

CPLR 1201 lists three categories of persons who must appear by a GAL: (1) certain infants; (2) certain adjudicated incompetents or conservatees; and (3) individuals "incapable of adequately prosecuting or defending [their] rights." This article addresses the third category.

As to potential wards who might be incapable of adequately defending their rights, the court should hold a hearing to ascertain the need to appoint a GAL for them even when they have competent counsel or when they and their attorneys object to appointing a GAL.[68] The court in *Fran Pearl Equities Corp. v. Murphy* found that a hearing is required to determine

whether to appoint a GAL.[69] According to *Silver & Junger v. Miklos*,[70] the court may appoint a GAL without a hearing if it relies on APS's psychiatric documents and the petitioner's letter to APS supporting the need for a GAL. A hearing is not required if the proposed ward and opposing party agree, on consent, that a GAL is needed or would be helpful to resolve the proceeding. No hearing is required when GAL appointment can be based on the court record and documentation that raise no issues of fact.

If the court before which the proceeding is pending does not appoint a GAL, an application for a GAL may also be made under CPLR 1202(a)(1) on motion by "an infant party if he is more than fourteen years of age." CPLR 1201 additionally provides that unless the court appoints a GAL, an infant shall appear by a parent having legal custody or, if there is no parent, by another person or agency having legal custody. The phrase "having legal custody" refers to judicially determined custody. Allowing a parent or legal guardian to appear without appointing a GAL eliminates an unnecessary application to the court. Appointing a GAL is required if "the right to custody exists neither by parenthood or by decree."[71]

CPLR 1202(a)(2) provides that a motion to appoint a GAL may be brought by a "relative, friend or a guardian, committee of the property or conservator." A government agency like APS or DSS has standing to move for a GAL, given its duties under Social Services Law § 473 and 18 N.Y.C.R.R. 457. APS has standing as a friend of the court to move to appoint a GAL without moving to intervene in the proceeding.[72]

Under CPLR 1012(a)(1), a court must permit a person to intervene as a party when a state statute confers the right to do so.[73] A protective services agency must have a network of professional consultants and service providers and may be involved with health, mental health, aging, and legal and law-enforcement agencies.[74] The Social Services Law does not give a protective services agency the right to intervene to seek a GAL for a party.[75] In a special proceeding in the Housing Court, therefore, APS intervention is permitted only by leave of the court.[76]

CPLR 1202(a)(3) provides that a motion to appoint a GAL may be brought by "any other party to the action if a motion has not been made under paragraph one or two within ten days after completion of service."[77] The "other party" may be the opposing one or the opposing party's counsel. Courts interpret CPLR 1202(a)(3) to require a party who knows, or believes, that the opposing party suffers from a mental condition to bring that condition to the court's attention.[78] This is especially true of the opposing side's attorney, who is an officer of the court. The opposing side has a duty to inform the court of an adversary's incapacity, especially when evidence in a prior proceeding between the two parties suggested that a guardian was required. In *Jackson Gardens LLC v. Osorio*, the court found that "[t]he fact that a guardian was found to be needed in a prior case, between the same parties, six months prior, clearly placed a duty on the petitioner to inform the court, and makes his failure to do same inexcusable."[79]

Even when a litigant has insufficient proof to move for a GAL, the litigant still has an obligation to bring the potential ward's mental disability to the court's attention.[80] Securing a judgment and evicting a tenant the landlord knew was mentally incapacitated and in a nursing home can subject the landlord to claims for wrongful eviction and property damage.[81] Not only does moral obligation require informing the court of a litigant's possible incapacity, but a legal one does as well.

Sometimes a landlord will have a duty to inform the court that a tenant might need a GAL if for no reason other than that the nuisance allegations that form the grounds for the holdover suggest a pattern of bizarre acts that might warrant a GAL. On the other hand, sometimes counsel will be only too glad to raise the matter of appointing a GAL so as to frazzle a nervous, unrepresented litigant or cause a court to question the litigant's rationality and good faith.

A court-approved GAL is appointed when a Housing Court judge submits a Guardian ad Litem Request form to the borough's Housing Court Supervising Judge or GAL coordinator, who maintains a list of court-approved GALs. The Housing judge may request a GAL who has particular experience or specialization. The Supervising Judge or GAL coordinator gives the appointing judge two or three names from the list, and the appointing judge's court attorney contacts the first of the two or three to assess availability and interest. The potential GAL may accept only if the court makes the initial contact; no other party to the case may arrange for the appointment. The court attorney informs the potential GAL of the basic facts of the case, including whether the ward is an APS client. If the potential GALs decline appointment, the Supervising Judge or GAL coordinator provides new names.

Once a person agrees to serve as a GAL, the appointing judge or court attorney prepares an order of appointment, which, when completed and signed by the appointing judge, is submitted to the Supervising Judge. The court attorney then mails the order and the papers in the court file to the GAL.

A judge may also directly appoint a potential ward's relative, friend, therapist, or social worker to serve as the GAL, although the judge should be on guard for the potential of a conflict of interests. A judge who makes a direct appointment need not submit anything to the Supervising Judge or GAL coordinator, and the Supervising Judge or GAL coordinator will not give the appointing judge a list of potential GALs. According to a Civil Court advisory notice, those non-court-certified individuals, "as a condition of the appointment, must participate in training specified by the Administrative Judge."[82]

CPLR 1202(c) provides that no GAL appointment is valid unless the GAL files written consent of the appointment with the court. A court may not appoint a GAL who is unwilling to serve.

VI. Housing Court's Authority to Appoint a GAL

The Civil Court, including its Housing Part, has the authority to appoint a GAL in a summary proceeding[83] and need not refer a GAL motion to a Supreme Court judge. Under CPLR 1202(a), "[t]he court in which an action is triable may appoint a guardian ad litem at any stage in the action."[84] Even if an adjudication of incompetency has not been made, the court must appoint a GAL if court intervention is required to protect the best interests of a litigant incapable of adequately asserting claims and rights.[85]

One Civil Court judge in three decisions published more than 15 years ago wrote that Housing Court does not have the jurisdiction to appoint GALs.[86] All other courts have disagreed. These courts, from the Appellate Term down,[87] have explained that Civil and Housing Court judges "ha[ve] the duty to protect a litigant who is incapable of protecting his or her interests"[88] and "'the inherent' power to appoint a guardian ad litem."[89]

VII. When Can a GAL Be Appointed?

Housing Court must appoint a GAL for litigants in a pending proceeding if the court finds, based on a preponderance of the evidence, that the litigants are incapable of adequately prosecuting or defending their rights.[90] A determination of incompetency, unlike in an Article 81 proceeding, is not required.[91] The Court of Appeals in the seminal *Sengstack v. Sengstack* found that although a GAL appointment should not be used to evade a formal declaration of incompetency, the court still has a duty to protect a litigant who might be incompetent but not formally declared incompetent.[92]

Under CPLR 1202, a GAL may be appointed at any stage of the action or proceeding. The Appellate Division, First Department, in *In re Beyer*, confirmed in 1964 that CPLR 1202(a) allows courts to appoint GALs at any stage and "to a complex of situations, some of which may antedate the technical institution of the proceeding."[93] The court may, therefore, appoint a GAL before the action or proceeding begins. That might occur when a landlord's attorney serves a petition and notice of petition and alerts the court to appoint a GAL rather than allow a tenant to be evicted for failing to answer the petition in a nonpayment proceeding or for being absent at an inquest in a holdover proceeding.

In actions or proceedings involving incompetents, the court should wait for the application of the persons entitled to move for the appointment of a GAL before the court appoints the GAL. If that procedure might endanger the incompetent's interests, then the appointment can be made at the inception of the action or proceeding—for example, in an order to show cause before the petition and notice of petition are served.[94] The court may also appoint a GAL after the parties have agreed on a settlement[95] or after a judgment is entered[96] or at the appeals stage.[97]

An action or proceeding against litigants incapable of adequately protecting their interests may not proceed without notice to the court of the litigant's incapacities and a court inquiry.[98] Following the proposition set out in *Vinokur v. Balzaretti* that "[t]he public policy of this State, and of this court, is one of rigorous protection of the rights of the mentally infirm,"[99] a hearing should be conducted whenever a question of fact arises about whether a GAL is required.[100] Questions of fact might concern a potential ward's alleged delusional behavior, poor judgment, and sub-clinical manifestations.[101] The court in *Weingarten v. State* held that when a party eligible under CPLR 1202(a) applies for the appointment of a GAL for an individual who resides in a mental institution, a rebuttable presumption arises that the individual is incapacitated.[102]

CPLR 1201 dictates that a litigant's mental impairment less than incompetency may support appointing a GAL.[103] A GAL must be appointed if a potential ward does not understand the nature of the legal proceeding or the possible consequences of the court's judgment.[104]

The proposed ward's physical impairments may also warrant appointing a GAL if the proposed ward is pro se and unable to appear in court to defend or assert a claim.[105] A GAL will also be appointed when the litigant is unable to appear in court because of incarceration.[106] In *Leibowitz v. Hunter*,[107] the court granted a motion to appoint a GAL to aid a plaintiff in a coma due to injuries sustained in a car accident. Some courts have declined to appoint a GAL if the potential ward's physical incapacity was not linked to a mental incapacity.[108]

The court will take a host of factors into account to determine whether a litigant requires a GAL. A litigant's decreased mental ability or physical agility caused by advanced age,[109] disease,[110] or drug or alcohol abuse[111] is relevant. Patients in psychiatric institutions presumptively require a GAL's assistance.[112] Courts will consider affidavits from neighbors, physicians, and others capable of attesting to the litigant's mental and physical capabilities.[113]

Not only are tenants eligible to receive a GAL, but landlords are as well. A GAL may also be appointed in any Housing Court proceeding, not just an eviction proceeding. Although GALs are seen most commonly in nonpayment and holdover proceedings, they serve in illegal lockout and HP (repair) proceedings.[114]

The GAL's role ends when the case is dismissed, discontinued, settled, or otherwise resolved. A new GAL is required for every new proceeding,[115] although the judge who believes that the GAL performed satisfactorily and developed a posi-

tive relationship with the ward may appoint the same GAL for the new proceeding.

VIII. Vacatur of Judgments

Most courts, if pressed, will vacate a final judgment of possession and warrant of eviction if they find that an individual required a GAL during the action or proceeding but did not have one, regardless of whether an attorney represented the tenant at the trial.[116] In *124 MacDougal St. Assocs. v. Hurd*, the court vacated a default judgment against a tenant who needed a GAL and an Article 81 guardian.[117] Courts have vacated foreclosure, divorce, and money judgments more than a year after the default for mentally incapacitated defendants.[118]

If the court, once notified that a tenant is incapacitated, fails to make the appointment or give careful consideration to the need for a GAL, it is "improvident and requires the reversal of the judgment."[119] Most courts will similarly vacate a judgment and restore a party to possession if they find that the party was unable to defend rights in the proceeding adequately.[120] Of import is a March 2007 Civil Court Advisory Notice stating that "if it appears that a respondent is incapable of adequately defending against a proceeding, the court should appoint a guardian ad litem and any default judgment entered prior to the appointment in most instances should be vacated. Failure to vacate the default judgment maybe [*sic*] reversible error."[121]

When APS moves for a GAL, it will often tell the court on the landlord's application that the motion to vacate the judgment may be held in abeyance. Many GALs never move to vacate the judgment. They will use the judgment's nonvacatur as a bargaining tool, if the ward will not otherwise be prejudiced, to get more time to satisfy the judgment. Often landlords consent to giving wards time to satisfy the judgment if the judgment is not vacated. Landlords also consent to GALs in close cases on the condition that the court not immediately vacate the judgment.

An out-of-court stipulation signed by a tenant incapable of adequately defending his or her rights will be vacated if the tenant required a GAL.[122] If a tenant is "unable to address a particular topic without going off on a tangent"[123] and otherwise is unable to defend legal rights, the default judgment should be vacated and a GAL appointed.

In *Roe Corp. v. Doe*,[124] the court vacated a judgment of possession after finding that the petitioner-landlord, who knew about the respondent-tenant's incapacities, had a legal obligation to inform the court that the tenant was incapacitated.[125] In *V.K.*, the court went even further, holding that '"a petitioner, in any proceeding, [must] be extremely diligent' in determining whether a party may be under a disability requiring a guardian ad litem."[126] If a party fails "to notify the court of an adversary's disability before obtaining a default judgment, [it] is a fraud on the court and a basis to vacate the judgment."[127]

IX. When GALs Are Not Required

Some courts will not vacate a judgment despite the ward's incapacitation. These courts will deny a motion to appoint a GAL even after a default and eviction, and even when the landlord knew about the tenant's infirmities.[128] In *Kalimian v. Driscoll*, the court found that the fact that counsel represented the tenant played no role in determining whether the tenant was prejudiced by the absence of a GAL,[129] but the court in *Hertwig-Brilliant v. Michetti* found that failure to appoint a GAL was harmless because competent counsel represented the litigant, who was also helped by family.[130] Some courts will not appoint a GAL when the respondent waits two years in the proceeding until the eve of the trial to move for a GAL.[131] The court in *321 W. 16th St. Assocs. v. Wiesner*, for example, refused to appoint a GAL late in the proceeding.[132]

A court will deny a motion to appoint a GAL and vacate a judgment if the potential ward does not prove an incapacity to prosecute or defend rights.[133] Thus, a motion will be denied if the letter of the psychologist who examined the tenant does "not state that [the] tenant was incapable of defending her rights or that appointment of a guardian was needed. . . ."[134]

When a motion to appoint a GAL is made, the court must balance the litigant's interests with those of third parties, such as other tenants in the building, to assess whether to appoint a GAL. At first, litigants might appear unable to defend their rights adequately. After further assessment, the court might determine that the potential ward does not need a GAL.[135]

Some courts have declined to appoint a GAL on the ground that appointing one will not help a recalcitrant litigant. *Stratton Coop., Inc. v. Fener*[136] was a nuisance proceeding in which the tenant repeatedly refused access to her home or to cure hazardous accumulations.[137] In that case, the Appellate Division, First Department, affirmed the final judgment and the decision finding that appointing a guardian (an Article 81 guardian in this instance) would not have resolved the issue of access and that the rights of the other tenants needed to be acknowledged. The court balanced the tenant's needs with the rights of the other tenants in the building whose health and safety were at risk.

Similarly, in *Pinehurst Constr. Corp. v. Schlesinger*,[138] a nuisance holdover proceeding, although the Appellate Term dissent argued that the final judgment after trial should be reversed because it appeared that the tenant was an "elderly, chronically sick, and apparently disturbed tenant,"[139] the majority found no basis to conclude that appointing an Article 81 guardian, "even if warranted, would remedy the long-standing, acute problems posed by tenant's aggressive, antisocial behavior."[140]

Having a history of mental impairment is insufficient by itself

to require either the appointment or continued service of a GAL. The incapacity could have disappeared by the time the new action or proceeding began.[141]

X. Removing a GAL

A court's disagreement with a guardian's choices is insufficient to warrant replacing the guardian. In *Sutherland v. New York*,[142] the plaintiff's mother accepted a lump sum monetary offer from the city to settle her and her child's claims, despite the trial court's view that the child's best interests required that payment be made over a period of years. The trial court entered an order removing the mother as guardian and replacing her with a GAL. The Appellate Division, First Department, reversed, finding that the disagreement was insufficient to warrant removing the natural parent as GAL.[143]

Likewise, the court in *Stahl v. Rhee* found that a plaintiff's mother's refusal to accept a settlement on her son's behalf was insufficient to replace the mother, acting as legal guardian, with a GAL.[144] The plaintiff became severely mentally retarded from his exposure to antibacterial skin cleanser prescribed for him shortly after his birth. According to the Appellate Division, Second Department, Supreme Court improperly discharged the plaintiff's mother as the plaintiff's guardian and inappropriately replaced her with a court-appointed GAL when the plaintiff's mother refused to accept a proposed settlement "under any circumstances" because it would not cover her son's expenses.[145] The Appellate Division held that the mother's decision was not unreasonable, arbitrary, or capricious, especially absent proof of a conflict of interest between the mother and the infant plaintiff. The Second Department therefore reversed the Supreme Court's decision removing the child's mother as his legal guardian.[146]

Courts have the power to remove a GAL on their own motion if a GAL, in the GAL's capacity as an officer of the court and as the person charged with protecting the ward's rights, engages in conduct that prejudices or harms the ward.[147] The court in *De Forte v. Liggett & Myers Tobacco Co.* found that "[t]he rights of an infant cannot and should not be lost through the obdurate, unreasonable and uninformed conduct and opinion of the guardian ad litem."[148] A judge who determines that the GAL is acting against the ward's best interests should remove the GAL. If the Civil Court removes the GAL from its list of certified GALs, each Housing judge overseeing a particular case decides whether to remove the GAL while the proceeding is pending. A court may further vacate a warrant of eviction and restore a tenant to possession, even after the marshal executes the warrant of eviction, if the GAL's ineffective assistance caused the eviction.[149]

A court should be wary about defaulting a ward whose GAL did not appear. Under CPLR 1203, no default may be entered until 20 days after a GAL is appointed.[150] Even after that time passes, the court should not begin to consider a default judgment against the ward until the court inquires diligently into what caused the default. If the GAL is responsible for the default, the court should consider relieving the GAL, appointing a new GAL, and informing the Administrative Judge.

Sometimes a GAL behaves egregiously, although not necessarily toward the ward. In *Hitchcock Plaza, Inc. v. Clark*, a GAL spat on an associate of the opposing side's law firm.[151] The law firm moved for sanctions against the GAL. The court denied the motion because the GAL was not a party or an attorney, sustained the spitting charge and referred the GAL to the Administrative Judge.[152]

When the judge or the Civil Court's GAL program believes that a GAL is performing inadequately, they must do their best to investigate the matter promptly. A complaint against a GAL triggers due process rights. Under § 36.3(e) of the Rules of the Chief Judge, "The Chief Administrator [of the Courts] may remove any [GAL] from any list for unsatisfactory performance or any conduct incompatible with appointment from that list, or if disqualified from appointment pursuant to this Part. A [GAL] may not be removed except upon receipt of a written statement of reasons for the removal and an opportunity to provide an explanation and to submit facts in opposition to the removal." The Chief Administrator's duties to consider removing a Civil Court GAL are delegated to the Civil Court's Administrative Judge.

XI. Proper Advocacy

The courts must determine whether a GAL has represented the ward's best interests. Courts have the continuing responsibility to supervise the GAL's work.[153] In a New York City Civil Court Advisory Notice dated March 2007, the court advised that judges must assess the adequacy of the GAL's advocacy for the ward before it may so-order a stipulation that a GAL wishes to enter into.[154] The judge must assess whether the GAL has met with the ward and attempted to have a home visit, whether the GAL has determined what the ward desires as an outcome of the case, and whether the GAL has investigated and weighed all the factors in the case and recommends a settlement in the ward's best interests. The GAL must also develop a plan to assist the ward in obtaining repairs, money, or other assistance to comply with the proposed stipulation and follow through with the plan to assist the ward. The GAL must inform the court whether the ward agrees with the proposed settlement. Finally, the GAL must try to locate a missing ward and take all possible steps to get the ward to come to court.

In making these assessments, the court must allocute on the record any significant stipulation, such as one that settles a proceeding. The court should not simply sign the stipulation as if were a two-attorney stipulation, even if the GAL is an attorney.[155]

The court's supervisory role limits a GAL's advocacy. Once again, as three experts explain:

> If a settlement does not compromise a ward's property rights (*e.g.*, if there is no provision that a default will result in the issuance or execution of a warrant of eviction, or that a property right will be surrendered), then the court may determine that a settlement is appropriate without further action to protect the ward, and the court—not the guardian ad litem—may approve the settlement. On the other hand, if the ward's property rights are implicated (*e.g.*, if the settlement provides for a warrant or surrender), the court must make an initial determination whether it can approve the settlement.[156]

The GAL's duties and the court's obligations are fact specific. The more the ward gives up in terms of a settlement, the more the GAL must investigate, advocate, and explain.[157] Likewise, the court must assure the integrity of the proceedings and protect the ward's rights by inquiring, examining, and allocuting on the record.[158]

XII. Service Issues

Before any action or proceeding may go forward, the ward or potential ward must receive the petition and notice of petition underlying the proceeding as well as any motion to appoint a GAL.[159] The RPAPL and the CPLR require service so that the ward or the ward's guardian, committee, or conservator will get notice of any pending action or proceeding.[160]

a. Service of Petition and Notice of Petition

Under RPAPL § 735, the petition and notice of petition must be personally delivered on the respondent, delivered and left with a person of suitable age and discretion who resides or is employed at the property sought to be recovered, or served by conspicuously placed service.[161] Properly serving the petition, notice of petition, and any predicate notice is especially important when the landlord knows that the tenant resides in a hospital, nursing home, or other institution.[162] The landlord's failure to mail additional copies of the petition and notice of petition to this additional, alternative address will result in a dismissal of the proceeding.[163]

In the nonpayment summary proceeding *Parras v. Ricciardi*,[164] the court vacated the default judgment awarded to a petitioner-landlord who failed to mail additional copies of the petition and notice of petition to the nursing home where the tenant-respondent was residing.[165] The court found that "when the landlord knows the tenant is living in a nursing home, the tenant must be served with the petition and notice of petition at the nursing home in order for the court to have jurisdiction over the summary proceeding."[166] The court also found that RPAPL § 735(1)(a) forbids a default against tenants not served at their other residential address even if the petitioner does not learn about the other residence until the person preparing the affidavit of nonmilitary service discovers the tenant's whereabouts in connection with preparing the affidavit of investigation.[167]

In RPAPL § 735(1)(a), "residence" "means the particular locality where the tenant is actually living at the time the summary proceeding is commenced."[168] This residence might be a location different from the premises of which the landlord seeks possession. Even proper service at the nursing home would not have been satisfactory in *Parras*, though, because the landlord knew that the respondent was mentally incompetent and did not inform the court of that fact before it obtained a default judgment.[169]

b. Service Upon the Ward of a Motion to Appoint a GAL

CPLR 1202(b) requires that a notice of motion to appoint a GAL "be served upon the guardian of [the ward's] property, upon [the ward's] committee or upon [the ward's] conservator" or, if none exists, then "upon the person with whom [the ward] resides."[170] CPLR 1202(b) also requires personal service on the potential ward if that person is over the age of 14 and has not yet been judicially declared incompetent.[171] The court must deny a motion not served on the potential ward.[172] Unless there is a judicial declaration of incompetence or court determination of the litigant's mental condition, the potential ward must be given an opportunity to be heard.[173] The court in *Beach Haven Apts. Assocs. LLC v. Riggs* held that "it is critical that the proposed ward be properly served so that he is aware of the motion and the basis upon which APS seeks the imposition of a guardian ad litem and so that he can appear in court and argue for or against the motion."[174]

XIII. Compensation for GALs

CPLR 1204 sets forth the compensation that GALs may receive for their services.[175] In proceedings in which the ward is an APS client, APS, through the New York City Human Resources Administration (HRA), will provide compensation of $600 for the entire action or proceeding, whether or not the GAL is an attorney or has special skills.[176] The GAL order should include a note that HRA will pay the GAL $600 in exchange for the GAL's services.[177] An exception to the normal APS compensation policy could entail the court's asking HRA to approve a higher fee when the GAL provides more services than usually required.[178] A court that believes that the ward is or will be an APS client may appoint the GAL immediately with the understanding that a determination whether APS will compensate the GAL will be made later.[179]

Upon either the GAL's or the GAL's attorney's filing an affidavit that shows the services rendered, the court may, in the case of a ward who is not an APS client, enter an order granting the GAL reasonable compensation. The compensation may "be paid in whole or part by any other party or from" the ward's recovery or other property.[180] If the

GAL seeks more than $500 in compensation in a non-APS case, then the GAL or the GAL's attorney "must file with the fiduciary clerk, on such form as is promulgated by the Chief Administrator, a statement of approval of compensation, which shall contain a confirmation to be signed by the fiduciary clerk that the [GAL or the attorney retained by the GAL] has filed the notice of appointment and certification of compliance."[181] No compensation may be awarded unless the GAL "has filed the notice of appointment and certification of compliance form."[182]

Details about compensation for Civil Court GALs are available on the court's Web site.[183]

Compensation "shall not exceed the fair value of services rendered."[184] What qualifies as reasonable compensation varies from case to case. So long as a GAL can support the request for compensation with an application "supported by [an] itemized documentation showing the work performed and his hourly rate"[185] and the "fees are fair and reasonable,"[186] the court will award the requested compensation. The GAL was able to meet this standard in *C.F.B. v. T.B.* and was awarded nearly $8,000.[187] In a different case, *Bolsinger v. Bolsinger*, the Appellate Division found that "[i]n fixing the fee, the dollar value for nonlegal work performed by an attorney who is appointed a guardian ad litem pursuant to CPLR 1202 should not be enhanced just because an attorney does it."[188] Rather, other factors must be considered to determine the appropriate compensation. In *Bolsinger*, the court stated that these factors include fixing the compensation "'with due regard to the responsibility, time and attention required in the performance of [the GAL's] duties,' the result obtained, and the funds available to the person who must bear the cost of the guardian ad litem's services."[189]

A court that deems a GAL's compensation excessive will reduce the amount. In *In re First National City Bank* (*In re Springett's Trust*), the court found that the GAL "rendered extensive services for a period of almost five years"[190] and that "his services were of considerable assistance to the court."[191] But the court relied on the other factors to reduce the amount awarded from the requested $8,000 to $4,000.[192]

Courts will take the paying ward's net worth into account to determine the reasonableness of the GAL's compensation. In *In re Becan*, a 1966 case, the court determined the tenant's net worth to be small because his estate totaled less than $2,500.[193] The court noted additionally that the appointed GAL expended a minimum amount of effort. The court reduced the original $250 award to the GAL to $100. The court found that because the GAL was a guardian of the court who was appearing in an accounting of the estate of an incompetent veteran, the GAL was "bound to conscientiously perform [his] respective duties, with the understanding that [he] may be asked to accept most moderate compensation for [his] services."[194]

CPLR 1204 permits GALs to be compensated from the proceeds of the ward's award and allows payment to be made by "any other party," including the party whom the GAL does not represent. In *Perales v. Cuttita*,[195] the Appellate Division, Third Department, held that the Special Term had acted within its discretion when it required the Commissioner of Social Services to pay the attorney for services rendered as a GAL for residents of adult-care facilities.

CPLR 1204 restricts the GAL's compensation to be paid from a non-party. In *In re Baby Boy O.*, the GAL went uncompensated because the mother did not receive a recovery from which the GAL could be paid.[196] Because the Commissioner of Social Services was not a party to the proceeding, moreover, the Commissioner could not be directed to pay the GAL. A party can be ordered to pay the GAL if that party's actions led to appointing the GAL. In *In re Ault*, the court found that CPLR 1204 directs that "a party may be charged with payment of the compensation of a guardian ad litem only where the actions of such party generated unnecessary, unfounded or purely self-serving litigation that resulted in the appointment of a guardian."[197]

XIV. The Role of Adult Protective Services

APS is a governmental agency created under New York's Social Services Law § 473 for New York City's five boroughs.[198] To be eligible for APS services, individuals must be at least 18 years old; not reside permanently in a hospital, nursing home, or rehabilitation facility; and as a result of mental or physical impairments be unable to meet the following three criteria. The first of these criteria is that prospective clients be unable to "meet their essential needs for food, shelter, clothing, or medical care"[199] or protect themselves from "physical, sexual, or emotional abuse, active, passive or self-neglect or financial exploitation."[200] The second criterion is that the individuals be "in need of protection from actual or threatened harm due to physical, sexual or emotional abuse, active, passive or self-neglect or financial exploitation, or by hazardous conditions caused by the action or inaction of either themselves or other individuals."[201] The third criterion is that the individuals have "no one available who is willing and able to assist."[202] APS does not consider the individuals' income in determining whether to aid them.

Title 18 N.Y.C.R.R. 457 sets forth the criteria to determine whether someone needs APS services. Individuals and organizations may refer individuals to APS, either by telephone or the Internet. APS then responds to the referral by conducting an assessment. APS will assist clients to get grants for rent arrears, medical and psychiatric care, services like Meals on Wheels and home care, public assistance, and other programs to enable clients to remain at home. APS's mission is to provide services while using the least-restrictive measures possible. APS occasionally needs to use more-restrictive measures, such as putting the client on financial

management, referring the case to its Office of Legal Affairs to appoint a GAL, and, if necessary, referring the case to an Article 81 guardian who can enforce an order to conduct a heavy-duty cleaning or to arrange to relocate a ward to a more affordable apartment or a setting with a suitable level of care.

From time to time APS will accept as a client someone whom the courts, landlords' attorneys, and tenant advocates might agree does not need a GAL. Courts, landlords' attorneys, and tenant advocates are also surprised occasionally to learn that APS will not accept someone they agree should have a GAL. One explanation for the incongruence is that the APS acceptance criteria as outlined above differ from the CPLR 1201 standard for appointing a GAL: that the person be an adult incapable of adequately prosecuting claims and defending rights.

APS assessments are designed to satisfy APS acceptance criteria and not CPLR 1201, even though APS will submit its assessment reports to Housing Court pursuant to a motion to secure a GAL under CPLR 1201 and to vacate a judgment if one exists. Judges and practitioners are occasionally stymied by APS reports that do not directly cover the factors helpful in deciding whether a potential ward has or had the physical or mental wherewithal to litigate. These factors, typically absent from APS assessments, include whether the potential ward understands the court process and the contours of the specific litigation.

When an APS assessment concludes that a potential ward is severely mentally retarded, one can assume that the potential ward is or was unable to prosecute claims and assert defenses. The ward is therefore entitled to a GAL and to vacate the judgment under CPLR 1201. Less clear is when the assessment finds the potential ward depressed. A valid assessment of clinical depression under DSM IV means that the potential ward is incapable of prosecuting and asserting claims and defenses. But mere nonclinical depression is different. Just because someone is depressed, a natural state for someone facing eviction, does not mean that the person is or was unable to prosecute claims and assert defenses, even if it might mean that the depressed person is entitled to APS services.

Similarly unhelpful is psychiatric terminology in reports that Housing judges often see using the words "rule out," as in, "rule out bipolar disorder." "Rule out" means that the psychiatrist does not rule something out—that the psychiatrist cannot say that the potential ward is not bipolar. This is different from ruling something in—that is, saying that the ward is bipolar. A "rule out" formulation is relevant, if at all, on the possibility that something cannot be or was not excluded. The formulation is inadmissible if offered as proof of a conclusion. Only if based on a reasonable degree of certainty or similar belief expressing a probability supported by a rational basis is expert medical opinion testimony admissible as a conclusion.[203]

If APS does not accept a client during the proceeding, the Housing judge who wants to appoint a GAL must find and appoint a volunteer. The typical ward cannot afford to pay for a GAL, and volunteers are hard to find.[204] But the Civil Court's GAL program makes prospective GALs aware that they are expected to accept at least three pro bono cases a year.

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Sometimes, despite the court's requests, APS will reject a client during the proceeding and, instead, seek a GAL and judgment vacatur only after the case has concluded with a final judgment, when the tenant is on the verge of an eviction. This problem also arises when the landlord or its counsel does not inform the court that a GAL might be needed or when the presiding judge or court staff abdicate their responsibility to inquire or do not possess the sensitivity to appreciate the need for a GAL.

When any of these things happen, or do not happen, cures that might have affected a proceeding at its early stage occur at the end of the proceeding and require the results to be undone and redone. That should not be the goal. The goal, as well-explained by three thoughtful commentators, is to "obviate the need for litigation at the back-end of the proceeding. Weaving a tighter safety net for tenants with diminished capacity in order to identify them earlier in the proceedings would result in: (1) greater integrity to the judicial process; and (2) judicial resources more rightfully expended at the onset of the litigation as opposed to the end, when the court is required to vacate a default or warrant and begin the proceedings again."[205]

If APS determines that a potential ward is ineligible for its services, Housing Court may not compel APS to reverse its decision. As the Appellate Term, First Department, has written, "The landlord-tenant court [is] not authorized to direct a reinvestigation or reconsideration of tenant's case."[206] To obtain a review under 18 N.Y.C.R.R. 404.1(f), the potential ward must contact the Fair Hearing Section at the New York State Office of Temporary and Disability Assistance (OTADA). The potential ward can either fill out the online fair-hearing request form at http://www.otda.state.ny.us/oah/default.asp or mail or fax the fair-hearing request form, also available on the OTADA Web site, to P.O. Box 1930, Albany, New York 12201. During the hearing, the potential ward presents reasons why APS should have accepted the case. A review of the fair-hearing determination is made by a CPLR Article 78 proceeding in Supreme Court.

APS's tool *APS Search*[207] allows authorized individuals to look up APS clients by name and address. There has been a change in the APS Search Protocol in Housing Court. *APS Search* is now limited to cases that Housing Court refers to APS. This new limitation reflects confidentiality concerns over the names of APS clients not subjects of specific search inquiries. Previously, names of all APS clients close to the search

terms would appear when searching by name or address. APS is required to keep these names and addresses confidential because they are not the subjects of the specific inquiry.

APS Eviction Units operate under an agreement with the New York City Department of investigation Marshal's Bureau. They visit and assess clients and potential clients threatened with imminent eviction. Shortly before or at the moment of eviction, marshals will alert APS to investigate if the court directs them to do so, perhaps on an order directing a landlord to direct the marshal to notify APS before an eviction, or if anyone else, including a tenant, makes a legitimate request.[208] APS develops service plans for clients eligible for APS services. APS will petition, by order to show cause, the court to appoint a GAL to assist clients with eviction proceedings in Housing Court in cases referred by a marshal.

In 2006, APS referred 1751 clients for GALs.[209] APS also petitions Supreme Court to appoint under Article 81 of the Mental Hygiene Law. In 2006, APS referred 768 clients for Article 81 guardians.[210]

If APS seeks an Article 81 guardian, its representatives, or the GAL after speaking to APS representatives, will seek a Housing Court stay of the execution of the warrant. Much litigation arises at this point because, from the landlord's perspective, APS will not pay rent in the interim and because APS, a busy agency that does not quickly seek Article 81 guardians, will perform triage, handling its most pressing, eviction-ready cases first and the rest later. Landlords will suggest that judges deny applications to stay the warrant to force APS's Office of Legal Affairs to seek an Article 81 guardian faster, but that puts the judge in an untenable position, given the possibility that a disabled tenant might be evicted because the court wanted to push APS into action. And more delays ensue once an Article 81 guardian is sought.

If the person is eligible for APS assistance based on a preliminary determination, APS will evaluate the potential ward to determine whether a GAL is required. APS will make this determination by using such methods as a home visit and through a psychiatric evaluation by one of its staff medical personnel. If APS determines that a GAL is required, APS will request that a GAL be appointed. Determining whether APS will accept a case takes four to six weeks. Referrals in Housing Court are often made by the judges, who contact the borough APS representative, who acts as a liaison and friend of the court. This process often takes another two to four weeks for a GAL to appear in court on the ward's behalf after the court signs the order appointing the GAL.

Although APS decisions affect Housing Court's ability to address a ward's needs, Housing judges lack the authority to compel APS to act or not act: "[A]n administrative determination regarding social services benefits is not reviewable in the Housing Court."[211] Consequently, the process in some cases will frustrate judges, GALs, and landlords, when APS does not initially accept a case when the court makes a referral and does so only much later, after a final judgment has been rendered.

In *Vega v. Eggleston*, a 2002 action in Supreme Court, New York County, the New York Legal Assistance Group represented a class of plaintiffs against the commissioner of HRA and others, who were represented by the New York City Corporation Counsel and the New York State Attorney General.[212] The court signed a so-ordered a consent stipulation in 2003 in which APS promised to improve its assessment and intake process in a wide variety of matters, including eviction prevention and housing relocation. As relevant to Housing Court GALs, the consent order's goal is two-fold. First to assure the "APS will address, promptly and appropriately, the eviction preventing and housing relocation service needs of clients who appear to be APS eligible while they are being assessed for APS services when delaying such services until after initial Assessment would be harmful to the client."[213] Second, to assure the APS, during the referral and assessment process, will "take all reasonable steps appropriate under the circumstances to prevent the eviction of, or to attempt to relocate, the client on or before the eviction date."[214]

XV. Conclusion

New York's adult population, especially the growing senior-citizen segment, will continue to require advocacy in Housing Court due to mental and physical impairments. The pool of qualified GALs must keep pace. What is best for the ward, landlords, GALs, the GAL program, and the court are expedient, fair resolutions. All involved in the process must strive to enable GALs to serve the ward, the court, and society and to minimize the disruptions and intrusions into the lives of incapacitated individuals with tenancies in jeopardy.

Endnotes

1. *See* New York City Dep't for the Aging, *Quick Facts on the Elderly in New York City*, *available at* http://home2.nyc.gov/html/dfta/downloads/pdf/quickfacts.pdf (last visited Aug. 11, 2007) (reporting that according to 2005 Census, approximately 943,000 New York City dwellers are over 65 and that approximately 2.4 million individuals are over 65 in New York State).
2. *See* N.Y.C. Dep't of Health and Mental Hygiene, Div. of Mental Hygiene, *Prevalence and Cost Estimates of Psychiatric and Substance Use Disorders and Mental Retardation and Developmental Disabilities in N.Y.C.* iv (2003), 9, *available at* http://www.nyc.gov/html/doh/downloads/pdf/mh/mh-2003prevalence.pdf (last visited Aug. 11, 2007) (noting that about 366,000 individuals in New York City have psychiatric and substance-abuse disorders).
3. For two excellent pieces on GAL law and practice, see JEANETTE ZELHOF, ANDREW GOLDBERG & HINA SHAMSI, *Protecting the Rights of Litigants with Diminished Capacity in the New York City Housing Courts*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 733 (2006); JUDITH J. GISCHE, *Guardian ad Litem Appointments in Civil Proceedings for Adults Incapable of Adequately Prosecuting or Defending Their Rights*, 19 WESTCHESTER B.J. 289 (1992).

4. Adult Protective Services was formerly known as Protective Services for Adults (PSA).

5. *See generally* PARIS R. BALDACCI, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City's Housing Court*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 659 (2006) (discussing problems facing pro se litigants in Housing Court).

6. One Housing Court judge has written that "[o]ur sense of concern and frustration is heightened at times by the perceived inaction, delay and bureaucratic impenetrability of government agencies and programs (Adult Protective Services [APS]) . . . [and] the perceived delay in related matters in other courts (*e.g.*, Supreme Court Article 81 proceedings). . . ." Marc Finkelstein, Guardians Ad Litem in Housing Court 4 (unpublished outline revised for N.Y. St. B. Ass'n Cttee on Landlord-Tenant Proceedings (Sept. 14, 2006) (on file with author) (alteration original).

7. *De Forte v. Liggett & Myers Tobacco Co.*, 42 Misc. 2d 721, 723, 248 N.Y.S.2d 764, 766 (Sup. Ct. Kings County 1964) (citing *Honadle v. Stafford*, 265 N.Y. 354, 356, 193 N.E. 172, 173 (1934); *Lee v. Gucker*, 16 Misc. 2d 346, 347, 186 N.Y.S.2d 700, 702 (Sup. Ct. N.Y. County 1959)).

8. BLACK'S LAW DICTIONARY 46 (8th ed. 2004).

9. *See City of N.Y. v. Tillis*, N.Y.L.J., Feb. 9, 2000, at 29, col. 4 (Hous. Part Civ. Ct. N.Y. County 2000) (noting Housing Court's bringing application for GAL on its own motion).

10. *See* 256 A.D.2d 90, 91, 681 N.Y.S.2d 494, 494 (1st Dep't 1998) (mem.).

11. *Pettas v. Pettas*, 88 Misc. 2d 955, 957, 389 N.Y.S.2d 537, 539 (Sup. Ct. Nassau County 1976).

12. In the Family Court of the State of New York in the City of New York, law guardians are private practitioners or lawyers from The Legal Aid Society, Lawyers for Children, the Society for the Prevention of Cruelty to Children, or the Children's Law Center whom the judge assigns to represent a child in Family Court under the Family Court Act. N.Y.C. BAR ASS'N, *Introductory Guide to the New York City Family Court* 4 (2006) (Gerald Lebovits, principal author), *available at* http://www.abcny.org/pdf/famguide_ms.pdf (last visited Aug. 11, 2007). For the differences between guardians in Family Court and Surrogate's Court, see *id.* at 38 ("The Family Court has similar jurisdiction and authority as the Surrogate Court about the guardianship of the person of a minor, a child 17 years or younger. Normally, guardianship petitions of the person of a minor are filed in the Family Court. The Surrogate's Court has the power over the property of a minor and may appoint a guardian of the person, the property, or both the person and the property."). For an excellent piece on legal guardians and children, see CROSS-BOROUGH COLLABORATION, THE BASICS: BECOMING A LEGAL GUARDIAN IN NEW YORK STATE (2002), *available at* http://www.brooklynbar.org/vlp/booklets/81441CBCBasicGuardiansrcb.pdf (last visited Aug. 11, 2007).

13. *See* N.Y. MENTAL HYG. LAW § 81.02(a)(2) (McKinney's 2007).

14. *Id.* § 81.02(b).

15. *Sengstack v. Sengstack*, 4 N.Y.2d 502, 509, 176 N.Y.S.2d 337, 342, 151 N.E.2d 887, 890 (1958).

16. Fern Fisher, Admin. Judge, N.Y.C. Civ. Ct., Advisory Notice, *Settlements in GAL Cases* (eff. Mar. 8, 2007), *available at* http://nycourts.gov/courts/nyc/housing/directives/AN/gal.pdf (last visited Aug. 11, 2007).

17. Fern Fisher, N.Y.C. Civ. Ct., Directives and Procedures, *GAL Case Summary* (eff. Mar. 7, 2007), *available at* http://nycourts.gov/courts/nyc/housing/directives/DRP/drp178.pdf (last visited Aug. 11, 2007).

18. 15 Misc. 3d 30, 31, 833 N.Y.S.2d 348, 349 (App. Term 1st Dep't 2007) (per curiam) (vacating judgment because GAL, despite not having met or visited tenant, entered into stipulation for judgment of possession to landlord, despite parties' knowledge that APS intended to file for Article 81 guardianship).

19. CIV-LT-57, *GAL Case Summary* (eff. Feb. 2, 2007), *available at* http://nycourts.gov/courts/nyc/housing/pdfs/gal%20pdfs/casesummary.pdf (last visited Aug. 11, 2007).

20. *Riley v. Erie Lackawanna R.R. Co.*, 119 Misc. 2d 619, 621, 463 N.Y.S.2d 986, 987 (Sup. Ct. Chautauqua County 1983).

21. N.Y. County Lawyers' Ass'n (NYCLA), *Task Force on Housing Court Resources Subcommittee Report*, *available at* http://www.nycla.org/siteFiles/Publications/Publications468_0.pdf (last visited Aug. 11, 2007) [hereinafter "*NYCLA Subcommittee Rpt.*"]. The recommendations of the groups that participated at the NYCLA conference appear at 3 Cardozo Pub. L. Pol'y & Ethics J. 591 (2006).

22. N.Y. County Lawyers'Ass'n (NYCLA), *Report on Resources in the Housing Court*, *available at* http://nycla.org/siteFiles/News/News59_1.pdf (last visited Aug. 11, 2007) [hereinafter "*NYCLA Final Rpt.*"].

23. *Id.* at 8–14, 19–21.

24. *Id.* at 12; *accord NYCLA Subcomm. Report*, *supra* note 21, at 12.

25. *Id.*

26. ZELHOF ET AL., *supra* note 3, at 745.

27. *Id.* This proposition has case law support: "Although a guardian ad litem appointed for an incapacitated adult party may prosecute or defend the claims and rights of such a party, the guardian ad litem is the only CPLR 1201 representative who is not expressly authorized by statute to apply for court approval of a proposed compromise of the claims of such incapacitated party pursuant to CPLR 1207." *DeSantis ex rel. Qualtiere v. Bruen*, 165 Misc. 2d 291, 295, 627 N.Y.S.2d 534, 537 (Sup. Ct. Suffolk County 1995).

28. 176 Misc. 2d 550, 553, 672 N.Y.S.2d 994, 997 (Sur. Ct. N.Y. County 1998) (cited in ZELHOF ET AL., *supra* note 3, at 763 n.112).

29. 215 A.D.2d 750, 750, 627 N.Y.S.2d 419, 419 (2d Dep't 1995) (mem.) (cited in Paris R. Baldacci, *Addressing the Challenge of Persons with Diminished Capacity in Housing Court: Index of Materials* 212, 213 (unpublished outline for N.Y.C. Bar Ass'n CLE, Dec. 7, 2005).

30. ZELHOF ET AL., *supra* note 3, at 762 ("MFY [legal services] attorneys have heard references during court appearances, and have seen references in training materials for guardians ad litem, to the concept of 'stepping into the shoes' of wards. An electronic search of reported cases in New York State does not provide guidance as to the content of this phrase.").

31. *Feliciano v. Nielson*, 290 A.D.2d 834, 835, 736 N.Y.S.2d 510, 512 (3d Dep't 2002) (quoting *In re Aho*, 39 N.Y.2d 241, 247, 383 N.Y.S.2d 285, 288, 347 N.E.2d 647, 651 (1976)).

32. GISCHE, *supra* note 3, at 290.

33. FINKELSTEIN, *supra* note 6, at 21.

34. *See* Fern A. Fisher, *Comment to the NYCLA Task Force on Housing Court Resources Subcommittee Report on Standardized Procedures in Cases Where GALs Are Appointed for Respondents with Diminished Capacity* 6 (2006).

35. *Id.* at 1–2.

36. *Id.* at 2.

37. *Id.* at 6.

38. *See NYCLA Subcommittee Rpt.*, *supra* note 21, at Addendum.

39. *N.Y. Life Ins. Co. v. V.K.*, 184 Misc. 2d 727, 732, 711 N.Y.S.2d 90, 95 (Hous. Part Civ. Ct. N.Y. County 1999).

40. Neil H. Mickenberg, *The Silent Clients: Legal Aid and Ethical Considerations in Representing Severely and Profoundly Retarded Individuals*, 31 Stan. L. Rev. 625, 634 (1979) (footnotes omitted).

41. N.Y.C. Civ. Ct., Advisory Notice, *GAL Cases Where There Is Also an Attorney of Record* (eff. Apr. 18, 2007).

42. *Id.*

43. *In re M.R.*, 135 N.J. 155, 177–78, 638 A.2d 1274, 1285 (1994).

44. N.Y. St. B. Ass'n, Cttee. on Prof. Ethics, Op. 746 (July 18, 2001); *accord* ABA Formal Ethics Op. 96-404, *Client Under a Disability* (Aug. 2, 1996).

45. *Id.*

46. ZELHOF ET AL., *supra* note 3, at 771.

47. *Bolsinger v. Bolsinger*, 144 A.D.2d 320, 321, 533 N.Y.S.2d 934, 934 (2d Dep't 1988) (mem.).

48. *NYCLA Final Rpt*., *supra* note 22, at 13.

49. Op. Att'y Gen. No. 2006-F3. *available at* http://www.oag.state.ny.us/lawyers/opinions/2006/formal/2006-F3.pdf (last visited Aug. 11, 2007).

50. Op. Att'y Gen. No. 2006-F5, *available at* http://www.oag.state.ny.us/lawyers/opinions/2006/formal/2006-F5.pdf (last visited Aug. 11, 2007).

51. The legislation, proposed by retired Housing Judge Bruce Gould and written by Dov Treiman, Esq., both Committee members, would provide as follows: "Subdivision (j) of section 110 of the New York City Civil Court Act is added to read as follows: (j) In actions and proceedings before the Housing Part, guardians ad litem appointed by the court pursuant to Article 12 of the civil practice law and rules shall be deemed state employees solely for the purposes of 'the Public Officers Law Section 17, titled, Defense and indemnification of state officers and employees.'"

52. *Lau v. Berman*, Index No. 18375CVN2004, at 4 (Civ. Ct., N.Y. County) (Kern, J.) (unpublished opinion) (quoting *Aho*, 39 N.Y.2d at 247, 383 N.Y.S.2d at 288, 347 N.E.2d at 651) (explaining that a "guardian ad litem may [not] be regarded as an unbiased protagonist of the wishes of an incompetent").

53. *Id.* (citing *Smith v. Keteltas*, 27 App. Div. 279, 50 N.Y.S. 471 (1st Dep't 1898)).

54. N.Y.C. Civ. Ct., Housing Part, *Prospective Guardians Ad Litem*, *available at* http://www.nycourts.gov/courts/nyc/housing/GALprospective.shtml (last visited Aug. 11, 2007).

55. *Id.*

56. *See* http://www.nycourts.gov/courts/nyc/housing/pdfs/GALapplication.pdf (last visited Aug. 11, 2007).

57. 22 N.Y.C.R.R. Part 36.1(b)(3) (Rules of the Chief Judge).

58. *Soybel v. Gruber*, 132 Misc. 2d 343, 347, 504 N.Y.S.2d 354, 357 (Hous. Part Civ. Ct. N.Y. County 1986). In *Soybel*, at issue was the then-extant Brooklyn Law School's Senior Citizen Law Office.

59. *See Backerman v. Coccola*, 189 A.D. 235, 237, 178 N.Y.S. 423, 424 (1st Dep't 1919).

60. N.Y. C.P.L.R. 1202(3)(c) (McKinney's 2007).

61. *Weingarten v. State*, 94 Misc. 2d 788, 791, 405 N.Y.S.2d 605, 607 (Ct. Cl. 1978).

62. FINKELSTEIN, *supra* note 6, at 20 ("Guardian ad litem orders do often provide that the guardian ad litem is to serve without bond. . . .") & 21 ("[I]t might be argued that the specific affidavit requirement of 1202(c) is not necessary for GAL's in Housing Court.").

63. N.Y.C. Civ. Ct., *Housing Part Guardian ad Litem*, LSM 153 (revised) (eff. Sept. 30, 2005), at 2, *available at* http://www.nycourts.gov/courts/nyc/civil/directives/LSM/lsm 153.pdf (last visited Aug. 11, 2007).

64. *Id.* at 1.

65. *NYCLA Final Rpt*., *supra* note 22, at 9. For the benefits of serving as a Housing Court GAL, see William J. Dean, Pro Bono Digest, *Service as a Guardian ad Litem*, N.Y.L.J., July 3, 2006, p. 3, col. 1 (quoting private practitioners who serve as volunteer GALs, including this: "My greatest accomplishment as a lawyer will always be my work on behalf of a mentally disabled indigent client, for whom I served as a guardian ad litem.") (quoting Lisa E. Cleary, Esq.).

66. *Bolsinger*, 144 A.D.2d at 321, 533 N.Y.S.2d at 934.

67. *Barnes v. MRG Partners*, N.Y.L.J., Nov. 29, 2000, at 29, col. 3 (Hous. Part Civ. Ct. N.Y. County).

68. *See Kalimian v. Driscoll*, N.Y.L.J., Mar. 6, 1991, at 22, col. 3 (Civ. Ct. N.Y. County) (vacating jury verdict despite presence of counsel because tenant was "unable to effectively cooperate with [counsel] at trial, post-trial and on appeal and does not fully understand the legal and practical consequences of subject summary proceedings"), *aff'd*, N.Y.L.J., July 20, 1992, at 23, col. 4 (App. Term 1st Dep't) (per curiam).

69. N.Y.L.J., Jun. 16, 1989, at 25, col. 5 (App. Term 1st Dep't) (per curiam).

70. N.Y.L.J., Aug. 24, 1994, at 23, col. 4 (Hous. Part Civ. Ct. Bronx County).

71. *Villafane v. Banner*, 87 Misc. 2d 1037, 1038-39, 387 N.Y.S.2d 183, 184 (Sup. Ct. N.Y. County 1976).

72. *N.Y. Life Ins.* 184 Misc. 2d at 731, 711 N.Y.S.2d at 93.

73. N.Y. C.P.L.R. 1012(a)(1) (McKinney's 2007).

74. N.Y. Soc. Serv. L. § 473(2)(a) (McKinney's 2003).

75. *N.Y. Life Ins.*, 184 Misc. 2d at 729, 711 N.Y.S.2d at 93.

76. *See* N.Y. C.P.L.R. 401 (McKinney's 2007); *N.Y. Life Ins.*, 184 Misc. 2d at 731, 711 N.Y.S.2d at 94.

77. N.Y. C.P.L.R. 1202(a)(3) (McKinney's 2007).

78. *See, e.g.*, *Sarfaty v. Sarfaty*, 83 A.D.2d 748, 749, 443 N.Y.S.2d 506, 507 (4th Dep't 1981) (mem.) ("[P]laintiff had the burden to bring the condition of defendant's mental state to the court's attention so that it could make suitable inquiry and determine whether a guardian should have been appointed for her to protect her interests and before a default judgment could be entered against her."); *Barone v. Cox*, 51 A.D.2d 115, 118, 379 N.Y.S.2d 881, 884 (4th Dep't 1976); *Parras v. Ricciardi*, 185 Misc. 2d 209, 214, 710 N.Y.S.2d 792, 796-97 (Hous. Part Civ. Ct. Kings County 2000) ("When a creditor becomes aware that his alleged debtor is or apparently is incapable of protecting his own legal interests it is incumbent upon him to advise the court thereof so . . . the court may thereafter in its discretion appoint a guardian ad litem to protect the defendant's interests.").

79. N.Y.L.J., July 11, 2001, at 25, col. 6 (Hous. Part Civ. Ct. Queens County).

80. *State of N.Y. v. Getelman*, N.Y.L.J., Sept. 7, 1993, at 25, col. 6 (Sup. Ct. Albany County).

81. *See Benenson v. Dimonda*, N.Y.L.J., Jan. 16, 2002, at 22, col. 1 (Civ. Ct. Kings County); *Parras*, 185 Misc. 2d at 213-14, 710 N.Y.S.2d at 796.

82. N.Y.C. Civ. Ct., LSM 153 (revised) (eff. Sept. 30, 2005), at 2, *available at* http://www.nycourts.gov/courts/nyc/civil/directives/LSM/lsm 153.pdf (revised) (last visited Aug. 11, 2007).

83. *See, e.g.*, *N.Y.C. Hous. Auth. v. Hart*, N.Y.L.J., May 16, 1990, at 29, col. 3 (Civ. Ct. N.Y. County 1990).

84. N.Y. C.P.L.R. 1202(a); *accord* Finkelstein, *supra* note 6, at 8 (noting that Housing Court judges have authority to appoint GALs).

85. *Stane v. Dery*, 86 Misc. 2d 416, 417, 382 N.Y.S.2d 607, 608 (Sup. Ct. N.Y. County 1976); *Soybel*, 132 Misc. 2d at 343, 504 N.Y.S.2d at 354.

86. *See 1199 Hous. Corp. v. Jackson*, N.Y.L.J., Mar. 20, 1991, at 22, col. 6 (Hous. Part Civ. Ct. N.Y. County) ("[T]here is no basis for a guardian ad litem to be appointed by this court. . . ."); *Silgo 22nd St. Assocs. v. Hennies*, N.Y.L.J., Apr. 24, 1991, at 22, col. 6 (Hous. Part Civ. Ct. N.Y. County 1991) (same); *Zuckerman v. Burgess*, N.Y.L.J., Mar. 13, 1991, at 22, col. 3 (Hous. Part Civ. Ct. N.Y. County 1991) (same).

87. *BML Realty Group*, 15 Misc. 3d at 31, 833 N.Y.S.2d at 349; *83 E. Assocs. v. Mager*, N.Y.L.J., Nov. 10, 1992, at 21, col. 1 (App. Term 1st Dep't) (per curiam) (finding, given documentation submitted supporting tenant's mental condition, that "it was an abuse of discretion for [Housing Court] to have denied, without a hearing, the motion to ascertain whether tenant was capable of . . . adequately defending her interests in the litigation").

88. *Soybel*, 132 Misc. 2d at 347, 504 N.Y.S.2d at 357.

89. *466 Assocs. v. Murray*, 151 Misc. 2d 472, 476, 573 N.Y.S.2d 360, 363 (Civ. Ct. N.Y. County 1991).

90. *N.Y. Life Ins.*, 184 Misc. 2d at 728-729, 711 N.Y.S.2d at 92 ("The standard of proof to establish the grounds for a guardian ad litem is a preponderance of the evidence.").

91. *In re Lugo*, 8 A.D.2d 877, 877, 187 N.Y.S.2d 59, 61 (3d Dep't 1959) (mem.), *aff'd*, 7

N.Y.2d 939, 197 N.Y.S.2d 740 (1960); *Anonymous v. Anonymous*, 3 A.D.2d 590, 594, 162 N.Y.S.2d 984, 988 (2d Dep't 1957); *Stane*, 86 Misc. 2d at 417, 382 N.Y.S.2d at 608.

92. *See* 4 N.Y.2d at 509, 176 N.Y.S.2d at 342.
93. 21 A.D.2d 152, 154, 249 N.Y.S.2d 320, 322 (1st Dep't 1964).
94. *See id.* at 155, 249 N.Y.S.2d at 324.
95. *See Riley v. Erie L. R.R. Co.*, 119 Misc. 2d 619, 619, 463 N.Y.S.2d 986, 986 (Sup. Ct. Chautauqua County 1983).
96. *See, e.g.*, *Parras*, 185 Misc. 2d at 215, 710 N.Y.S.2d at 797.
97. *See In re Application of King*, 284 A.D. 748, 749, 135 N.Y.S.2d 495, 496 (2d Dep't 1954).
98. *See id.* at 214, 710 N.Y.S.2d at 796.
99. 62 A.D.2d 990, 990, 403 N.Y.S.2d 316, 316 (2d Dep't 1978) (mem.).
100. *See Shad v. Shad*, 167 A.D.2d 532, 533, 562 N.Y.S.2d 202, 203 (2d Dep't 1990).
101. *Grasso v. Matarazzo*, N.Y.L.J., Apr. 8, 1998, at 32, col. 3 (Hous. Part Civ. Ct. Kings County); *Kings 28 Assocs. v. Raff*, 167 Misc. 2d 351, 353, 636 N.Y.S.2d 257, 258 (Hous. Part Civ. Ct. Kings County 1995).
102. 94 Misc. 2d at 790, 405 N.Y.S.2d at 607.
103. *Jonas Equities v. Brunelle*, N.Y.L.J., Feb. 6, 1991, at 25, col. 2 (Hous. Part Civ. Ct. Queens County), *rev'd on other grounds*, N.Y.L.J., Jun. 29, 1992, at 32, col. 6 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).
104. *1021-27 Ave. St. John HDFC v. Hernandez*, N.Y.L.J., May 6, 1992, at 23, col. 3 (Hous. Part Civ. Ct. Bronx County).
105. Finkelstein, *supra* note 6, at 10.
106. *Wenzel v. Wenzel*, 122 Misc. 2d 1001, 1003, 472 N.Y.S.2d 830, 834 (Sup. Ct. Suffolk County 1984).
107. *Lebowitz v. Hunter*, 45 Misc. 2d 580, 581, 257 N.Y.S.2d 434, 435 (Sup. Ct. N.Y. County 1965).
108. *See, e.g., S. Indust., Inc. v. Esray Fabrics, Inc.*, 81 A.D.2d 647, 647, 438 N.Y.S.2d 341, 342 (2d Dep't 1981) (mem.).
109. *Bird v. Citibank, N.A.*, 102 A.D.2d 718, 719, 477 N.Y.S.2d 1, 3 (1st Dep't 1984) (mem.); *Vinokur*, 62 A.D.2d, at 990, 403 N.Y.S.2d at 316.
110. *In re Christopher*, 177 Misc. 2d 352, 354, 675 N.Y.S.2d 807, 807 (Sup. Ct. Queens County 1998).
111. *Anonymous v. Anonymous*, 256 A.D.2d 90, 91, 681 N.Y.S.2d 494, 494 (1st Dep't 1998) (mem.) (appointing GAL due to defendant's "chronic irrational and agitated state attributable to alcohol and substance abuse and defendant's consequent and manifest inability to assist his attorneys in his defense").
112. *Weingarten*, 94 Misc. 2d at 790, 405 N.Y.S.2d at 607 ("[W]hen an application is made for appointment of a guardian ad litem to represent a person who resides in a mental institution, whether on a voluntary basis or pursuant to court commitment, such residence creates a presumption that the person involved is unable to adequately prosecute or defend his rights.").
113. *See, e.g., 466 Assocs.*, 151 Misc. 2d at 474, 573 N.Y.S.2d at 361.
114. *See Acosta v. Beka Realty LLC*, N.Y.L.J., Oct. 3, 2005, at 17, col. 1 (Hous. Part Civ. Ct. Kings County) (appointing GAL in HP proceeding).
115. *Kirso Prop. Co. v. Brief, Comm'r of Soc. Servs. of City of N.Y.*, N.Y.L.J., Jun. 29, 1998, at 30, col. 3 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).
116. *See, e.g., Kalimian*, N.Y.L.J., July 20, 1992, at 23, col. 4 (App. Term 1st Dep't) (per curiam) ("The fact that tenant was represented by counsel in the trial proceedings is of little, if any, relevance in determining whether she was prejudiced by the absence of a guardian ad litem.").
117. *124 MacDougal St. Assoc. v. Hurd*, N.Y.L.J. Feb. 2, 2000, at 28, col. 4 (Civ. Ct. N.Y. County).
118. *See Parras*, 185 Misc. 2d at 215, 710 N.Y.S.2d at 797.
119. *See, e.g., Rakiecki v. Ferenc*, 21 A.D.2d 741, 741, 250 N.Y.S.2d 102, 103 (4th Dep't 1964) (mem.).
120. *N.Y.C. Hous. Auth. v. Beverly B.*, N.Y.L.J., Apr. 13, 2005, at 20, col. 1 (Hous. Part Civ. Ct. Kings County).
121. N.Y.C. Civ. Ct., Adv. Notice, *Default Judgments in GAL Cases* (eff. Mar. 8, 2007), *available at* http://nycourts.gov/courts/nyc/housing/directives/AN/*default*.pdf (last visited Aug. 11, 2007) (citing, among others, *Oneida Nat'l Bank & Trust Co. Cent. N.Y. v. Unczur*, 37 A.D.2d 480, 326 N.Y.S.2d 458 (4th Dep't 1971)).
122. *See e.g., Grasso*, N.Y.L.J., Apr. 8, 1998, at 32, col. 3.
123. *Deepdale Gardens Third Corp. v. Knox*, N.Y.L.J., Oct. 1, 1996, at 26, col. 1 (Sup. Ct. Queens County).
124. N.Y.L.J., Jan. 15, 2003, at 21, col. 5 (Dist. Ct. Nassau County) [incorrectly labeled "Richmond County District Court" in N.Y.L.J.].
125. *See Id.*
126. *N.Y. Life Ins.*, 184 Misc. 2d at 737, 711 N.Y.S.2d at 97 (quoting *In re Estate of Bacon*, 169 Misc. 2d 858, 864, 645 N.Y.S.2d 1016, 1020 (Sur. Ct. Westchester County 1996)).
127. *See, e.g., Hotel Pres. v. Byrne*, N.Y.L.J., Mar. 12, 1999, at 26, col. 1 (App. Term 1st Dep't) (per curiam) (vacating default judgment because petitioner knew or had reason to know that respondent was incapable of protecting her interests when judgment was entered); *Jackson Gardens*, N.Y.L.J., July 11, 2001, p. 25, col. 6 (vacating default judgment because petitioner knew that respondent-tenant had GAL in prior proceeding); *Surrey Hotel Assocs., L.L.C. v. Sabin*, N.Y.L.J., June 29, 2000, at 28, col. 4 (Hous. Part Civ. Ct. N.Y. County) (vacating judgment because petitioner had accepted rent from APS and complained about tenant's behavior); *Glick v. Quintana*, N.Y.L.J., Nov. 30, 1992, at 27, col. 4 (Civ. Ct. N.Y. County) (vacating default judgment because petitioner knew that respondent had a GAL in two prior proceedings).
128. *See, e.g., Greene v. Resch*, 114 Misc. 2d 780, 783, 452 N.Y.S.2d 314, 316 (Hous. Part Civ. Ct. Kings County 1982) (denying vacatur of judgment even though opposing party knew about tenant's mental incapacity).
129. N.Y.L.J., July 20, 1992, at 23, col. 4 (App. Term 1st Dep't) (per curiam).
130. *In re Hertwig Brilliant*, N.Y.L.J., Nov. 9, 1993, p. 26, col. 1 (Sup. Ct. N.Y. County 1993).
131. *See, e.g., 355 W. 85th St. Corp. v. Tremblay*, N.Y.L.J., Apr. 3, 2002, at 18, col. 5 (Hous. Part Civ. Ct. N.Y. County).
132. *See* N.Y.L.J., Nov. 19, 1998, at 32, col. 4 (App. Term 1st Dep't) (per curiam).
133. *See Urban Pathways, Inc. v. Lublin*, 227 A.D.2d 186, 186, 642 N.Y.S.2d 26, 26 (1st Dep't 1996) (mem.).
134. *Wilson Han Assocs., Inc. v. Arthur*, N.Y L.J., July 6, 1999, at 29, col. 4 (App. Term 2d Dep't 2d & 11th Jud. Dists. 1999) (mem.).
135. *See S. Indus.*, 81 A.D.2d at 647, 438 N.Y.S.2d at 341 (finding that physical impairment alone did not render tenant unable to defend his interests adequately).
136. 211 A.D.2d 559, 559, 621 N.Y.S.2d 77, 78 (1st Dep't 1995) (mem.).
137. *Id.*, 621 N.Y.S.2d at 78.
138. 12 Misc. 3d 26, 816 N.Y.S.2d 815 (App. Term 1st Dep't 2006) (per curiam).
139. *Id.* at 29, 816 N.Y.S.2d at 817 (Gangel-Jacob, J., dissenting).
140. *Id.* at 27, 816 N.Y.S.2d at 816.
141. *See Arcieri v. Arcieri*, 49 Misc. 2d 223, 224, 266 N.Y.S.2d 1020, 1021 (Sup. Ct. Kings County 1966) (finding that prior institutionalization did not evidence existing incompetency).
142. 107 A.D.2d 568, 568, 483 N.Y.S.2d 307, 308 (1st Dep't 1985) (mem.).
143. *See id.* at 569, 483 N.Y.S.2d at 308.
144. 220 A.D.2d 39, 44-45, 643 N.Y.S.2d 148, 152 (2d Dep't 1996).
145. *Id.* at 43, 643 N.Y.S.2d at 151.
146. *See id.* at 46, 643 N.Y.S.2d at 153.
147. *N.Y.C. Hous. Auth. v. Maldonado*, N.Y.L.J., Apr. 13, 2005, p. 19, col. 3 (Hous. Part Civ. Ct. Bronx County).
148. 42 Misc. 2d 721, 723, 248 N.Y.S.2d 764, 766 (Sup. Ct. Kings County 1964).
149. *See Pomeroy Co. v. Thompson*, N.Y.L.J., Sept. 18, 2002, p. 20, col. 6 (Hous. Part Civ. Ct. N.Y. County) (finding that GAL, APS, and N.Y.C. Department of Investigation failed to protect ward's tenancy because

no one submitted application for grant for arrears before eviction), *aff'd*, 5 Misc. 3d 51, 784 N.Y.S.2d 278 (App. Term 1st Dep't 2004) (per curiam).

150. N.Y. C.P.L.R. 1203 provides that "[n]o judgment by default may be entered against an infant or a person judicially declared to be incompetent unless his representative appeared in the action or twenty days have expired since appointment of a guardian ad litem for him."

151. 1 Misc. 3d 906(A), 781 N.Y.S.2d 624, 2003 N.Y. Slip Op. 51524(U), at *1, 2003 WL 23109709, at *3, 2003 N.Y. Misc. LEXIS 1635 (Hous. Part Civ. Ct. N.Y. County, Dec. 19, 2003) (Gerald Lebovits, J.).

152. The GAL in the proceeding was eventually removed from the Civil Court's GAL program.

153. *BML Realty Group*, 15 Misc. 3d at 31, 833 N.Y.S.2d at 349 (*quoting N.Y.C. Hous. Auth. v. Jackson*, 13 Misc. 3d 141(A), 2006 N.Y. Slip Op. 52265(U), 2006 WL 3437858, at *1 (App. Term 2d Dep't 2d & 11th Jud. Dists. Nov. 17, 2006) (mem.)).

154. N.Y.C. Civ. Ct. Advisory Notice, *Settlements in GAL Cases* (Mar. 8, 2007) *available at* http://nycourts.gov/courts/nyc/housing/directives/AN/gal.pdf (last visited Aug. 11, 2007).

155. *Id.*

156. Jeanette Zelhof et al., *Protecting the Rights of Litigants with Diminished Capacity in the New York City Housing Courts*, 3 Cardozo Pub. L. Pol'y & Ethics J. 733, 765 (2006).

157. *See id.* at 763.

158. *See id.*

159. N.Y. Real Prop. Acts & Proc. L. 735 (McKinney's 2007).

160. *Id.*

161. *Id.*

162. *See Parras v. Ricciardi*, 185 Misc. 2d 212-13, 710 N.Y.S.2d 792, 795.

163. *Id.* at 212–13, 710 N.Y.S.2d at 795.

164. *Id.* at 212, 710 N.Y.S.2d at 795.

165. *Id.*, 710 N.Y.S.2d at 795.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*, 710 N.Y.S.2d at 796.

170. N.Y. C.P.L.R. 1202(b) (McKinney's 2007).

171. *Id.*

172. *Andrews v. Mensch*, 100 Misc. 2d 79, 81, 418 N.Y.S.2d 527, 528 (Dist. Ct. Suffolk County 1979) ("Nevertheless, CPLR 1202 requires that notice be given to the person who would be represented and since no such notice has been given in this instance, the court is inclined to deny the motion with leave to renew upon proper papers."); *see also Weingarten*, 94 Misc. 2d at 790, 405 N.Y.S.2d at 607.

173. *Bocina v. Schlau*, 125 Misc. 2d 682, 683, 480 N.Y.S.2d 93, 94 (Sup. Ct. Suffolk County 1984) (citing *Weingarten*, 94 Misc. 2d at 790, 405 N.Y.S.2d at 607)).

174. N.Y.L.J., Jul. 29, 2005, at 20, col. 1 (Hous. Part Civ. Ct. Kings County).

175. N.Y. C.P.L.R. 1204 (McKinney's 2007).

176. *See* New York State Unified Court System: Existing Guardians Ad Litem. http://www.courts.state.ny.us/courts/nyc/housing/GALexisting.shtml#forms (last visited Aug. 11, 2007).

177. *See id.*

178. *See id.*

179. *See id.*

180. N.Y. C.P.L.R. 1204 (McKinney's 2007).

181. 22 N.Y.C.R.R. 36.4(b)(1) (McKinney's 2007).

182. *Id.* 36.4(b)(2).

183. *See* New York State Unified Court System: Exisiting Guardians Ad Litem. http://www.courts.state.ny.us/courts/nyc/housing/GALexisting.shtml#forms (last visited Aug. 11, 2007).

184. 22 N.Y.C.R.R. 36.4(b)(4) (McKinney's 2007).

185. *C.F.B. v. T.B.*, 9 Misc. 3d 1105(A), 806 N.Y.S.2d 443, 2005 N.Y. Slip Op. 51412(U), at *5, 2005 WL 2185481, at *4, 2005 N.Y. Misc. LEXIS 1902, at *12 (Sup. Ct. Erie County May 24, 2005).

186. *Id.*

187. *See id.*

188. *Bolsinger*, 144 A.D.2d at 321, 533 N.Y.S.2d at 934.

189. *Id.*, 533 N.Y.S.2d at 935 (quoting *In re Becan*, 26 A.D.2d 44, 48, 270 N.Y.S.2d 923, 930 (1st Dep't 1966), and *In re Lydia E. Hall Hosp. (Cinque)*, 117 Misc. 2d 1024, 1025, 459 N.Y.S.2d 682, 683 (Sup. Ct. Nassau County 1982)).

190. 35 A.D.2d 927, 927, 316 N.Y.S.2d 575, 576 (1st Dep't 1970) (per curiam).

191. *Id.*, 316 N.Y.S.2d at 576.

192. *Id.*

193. 26 A.D.2d at 48, 270 N.Y.S.2d at 930.

194. *Id.*, 270 N.Y.S.2d at 930.

195. 127 A.D.2d 960, 961, 512 N.Y.S.2d 565, 566 (3d Dep't 1987).

196. 298 A.D.2d 677, 679, 748 N.Y.S.2d 811, 813 (3d Dep't 2002).

197. 164 Misc. 2d 272, 274, 624 N.Y.S.2d 351, 353 (Sur. Ct. N.Y. County 1995).

198. For an explanation at APS's Web site of what the agency does, see http://www.nyc.gov/html/hra/downloads/pdf/adult_protective_services.pdf (last visited Aug. 11, 2007).

199. APS Memorandum W2-244, Rev. Jan. 2005 [hereinafter "APS Memorandum"].

200. *Id.*

201. *Id.*

202. *Id.*

203. *See, e.g.*, *Matott v. Ward*, 48 N.Y.2d 455, 423 N.Y.S.2d 645, 399 N.E.2d 532 (1979).

204. The New York City Bar Association used to be a source of volunteer GALs. The City Bar's GAL program no longer exists, even though program details still appear on the City Bar's Web site. See http://www.abcny.org/CityBarFund/CommunityOutreachLawProgram.htm (last visited Aug. 11, 2007).

205. Zelhof et al., *supra* note 3, at 749.

206. *Marypat Realty Corp. v. Hernandez*. N.Y.L.J., Dec. 31, 2002, p.18, col. 1, 2002 N.Y. Slip Op. 50504(U), at *1, 2002 WL 31940717, at *1 (App. Term 1st Dep't) (per curiam).

207. *See* APS Search page, *available* at https://a069-webapps3.nyc.gov/APSearch/login.aspx (last visited Aug. 11, 2007). APS Search requires a username and password.

208. Marshals must make a "reasonable effort" before executing a warrant to determine whether a resident of a household is at risk. N.Y.C. Dep't of Investigation, *N.Y.C. Marshals Handbook of Regulations*, Ch. 4, § 6.6 (eff. Oct. 24, 1997), *available at* http://www.nyc.gov/html/doi/html/marshals/mar4.html#6s6 (last visited Aug. 11, 2007).

209. APS Memorandum, *supra* note 199.

210. *Id.*

211. *Marypat Realty*, N.Y.L.J., Dec. 31, 2002, p.18, col. 1, 2002 N.Y. Slip Op. 50504(U), at *1, 2002 WL 31940717, at *1 (citing *Jonas Equities*, N.Y.L.J., June 29, 1992, at 32, col. 6).

212. *See* index number 401210/02.

213. *Id.* at 10, at ¶ 11.

214. *Id.* at 10, at ¶ 12.

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BERGMAN ON MORTGAGE FORECLOSURES: So They Demolished Your Building (The One Where You Have a Mortgage); Who Would Do That?

By Bruce J. Bergman

Who would want to do that? Well, there are municipal authorities (particularly, although not exclusively, New York City) which seek to demolish properties which may present a danger to residents or the community.

If a property upon which a lender holds a mortgage is in such terrible shape that it may be subject to a demolition order, obviously, it is a serious situation, one which under ideal circumstances would never have gotten that far. But it does happen. Should a local governmental authority be persuaded that demolition is necessary, there is then a legal obligation that it notify those with an interest in the property of the intention to demolish. In that fashion, parties such as the owner and mortgage holders can come forward either to remedy the situation or oppose the action if it is believed to be baseless or unnecessary. Thereby, the parties can protect themselves. There are no easy answers to this, but at least there is an opportunity to preserve the integrity of the security.

What happens, though, if the municipality neglects to give notice to a mortgage holder? A recent case tells us that where the agency is aware of the existence of the mortgage, notice *must* be given to the mortgage holder. [*Home Doc. Corp. v. City of New York*, 297 A.D.2d 277, 746 NYS2d 42 (2d Dep't 2002)].

In the noted case, the mortgagee had begun a foreclosure action and named the City of New York as a defendant. And a *lis pendens* was filed. During the pendency of the foreclosure, New York City inspected the premises, recommended demolition and thereafter actually demolished the premises—without affording the mortgage holder any notice of the intention to do so. Under these circumstances, the court found it to be a violation of due process to demolish a building without giving notice and an opportunity to be heard to a party who has a valid interest in the property.

What saved the mortgage holder was that it was able to prove not only its valid mortgage, but that the city had knowledge of that mortgage. What was not clear from the case was whether the court concluded that knowledge was based upon the fact that the City was named in the foreclosure, or because of the filed *lis pendens*, or because there was a recorded mortgage on file.

Even though the decision did not make it clear, the recording of a mortgage is of course constructive notice to the world of that interest and it is that which requires a municipal authority to advise a mortgage holder of an intention to demolish.

In the end, this case offers the comfort (for what it is worth) that should a municipal authority err in not giving notice, a suit for damages by the mortgage holder who was kept in the dark would be in order

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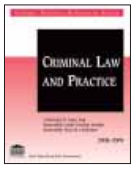

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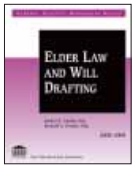

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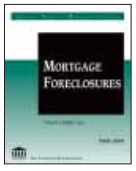

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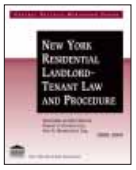

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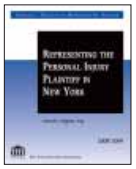

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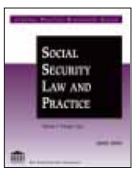

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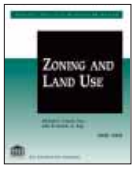

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