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of the New York State Bar Association

A Message from the Section Chair

On September 11, 2001, the practice of real property law and real estate law drastically changed. The focus now has become disaster damage control. I appointed 2nd Vice-Chair Matthew Leeds to lead a Subcommittee called the World Trade Center Subcommittee to deal with World Trade Center issues. While a number of Section members and a few Executive Committee members were affected by the destruction of the World Trade Center, luckily no member lost his or her life. Some of our members lost loved ones and friends in the World Trade Center destruction. Matthew has on his panel Josh Stein, Ed Baer, Karl Holtzschue, Jeff Chancas, Beatrice Lesser and John Hall. With the help of Terry Brooks at the New York State Bar Association, a series of Qs and As have been formulated and will be part of a publication issued by the New York State Bar Association on its Web site, as well as the January 2002 program book and a special-publication book. Some of the areas the Subcommittee is investigating are: areas of discrimination where a prospective lessee is Moslem or Muslim; people who have lost their jobs as a result of the WTC disaster and are unable to pay their bills and rent; instances where one spouse is "missing" in the collapse of WTC buildings and the other spouse can't make mortgage payments or pay rent; or where the surviving spouse cannot go to settlement (closing) on the purchase or sale of a home, condominium or cooperative apartment. It will also investigate problems dealing with people who are "called-up" for military duty, as well as problems concerning missing spouses, damaged real estate and the enforcement of space leases.

All of this was done at the suggestion of Steven Krane, President of the New York State Bar Association. At the Annual Meeting in January 2002, the Real Property Section will devote a large part of the program, which will be chaired by 1st Vice-Chair John Privitera, to World Trade Center issues as they affect the practicing real estate lawyer. We hope all of you will attend.

As to other, more mundane, matters, a committee consisting of members from the NYSBA Real Property Law Section, The Association of the Bar of the City of New York, the Real Estate Board and at least one county bar association have been working on a proposed bill to simplify the mortgage tax law in the state of New York. This proposal, in outline form, will be submitted to the Executive Committee of the Real Property Law Section and to the Department of Taxation and Finance of the state of New York for early comments, after which earnest drafting will be necessary.

At last glance, the new article 35-E of the General Business Law, which enacted mandatory prompt payment of construction contracts by the person with the funds—other-

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wise enormous penalties, fees and disbursements would be recoverable by a contractor who was to look to these funds, even if the person paying them objects to the amount, or to whom they are paid—was held back by Senator Bruno and the State Senate because of strong opposition by the Committee on Real Estate Financing of this Section, as well as other groups.

The Section, through its Legislative Committee, commented not only on the disclosure bill that passed Novermber 13, 2001, but on other bills, especially those which afford unfair advantage to specific pressure groups that are tying to pass their professional agendas.

The plan for the remainder of this year and into the next will to be to increase membership in the Section, to get younger attorneys as well as attorneys from the New York City suburbs more interested in the Real Property Law Section. This drive will be led by Richard Fries. Legislation proposed and worked on by the Section is being pushed for passage. The legislation includes the Marketable Record Title Act and the elimination of the Rule Against Perpetuities for commercial real estate transactions in New York State as well as New York State compliance with the Uniform Electronic Transactions Act and the E-Sign Act. The uniform recording process for real estate instruments is still on our agenda and will be worked on.

Congratulations to John Privitera for the summer meeting in Saratoga Springs, New York, July 26 through July 29, 2001. The program was very successful and a few of us, including me and Julia Stein (Joshua Stein's daughter), made money at the Saratoga racetrack. Thanks and congratulations go to Bob Zinman, Bill Colavito, Harry Meyer, Joe DeSalvo and the Student Editorial Assistance Group of St. John's University School of Law, and David Dunn, Editor-in-Chief, for another year of successful *New York Real Property Law Journals* as well as their work on the New York State Bar *Journal* for July/August 2001 and a future publication of the same *Journal*.

We will continue during this year to do and promote what is needed for our Section members.

Melvyn Mitzner

REQUEST FOR ARTICLES

If you have written an article, please send to:

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New York State Bar Association
One Elk Street, Albany, New York 12207

or to any of the co-editors listed on the back page.

Articles should be submitted on a 3 1/2" floppy disk, preferably in WordPerfect or Microsoft Word, along with a printed original and biographical information.

The New York Small Business Market After 9/11

By Paul Steinberg

It was Saturday morning, four days after the attack. As we made our way through the first checkpoint across from the courthouse, a military jet streaked overhead. Three checkpoints later, we arrived at the corner of Church and Chambers streets, and raised the gate at the Subway Sandwich store. The electricity had been restored, but it was already too late—all the food had spoiled. The store looked like a scene from the sci-fi movie "The Blob." The frozen bread dough thawed and expanded, creating a river spreading towards the door like brown lava.

As we took down the damaged awning, a passing city official advised us to don masks and goggles, since no one was sure what was in the acrid air. Television reports indicated the possible presence of asbestos, silica, fiberglass and "volatile organic compounds," whatever those are. Health officials responded that the air was safe, but the shimmering gray soot covering the awning was enough to convince us to wear the protective gear.

Almost two months after the attack, the 14,000 businesses near the World Trade Center (WTC) and World Financial Center (WFC) continue to be affected by the events of September 11. For many small businesses, the actions taken to secure the area caused significant financial hardship. The capricious nature of the National Guard checkpoints was resented by many in the area: the Guard let residents in with proper ID, but turned away business owners with a curt "Yeah, business is important but we're doing rescue work down here." The takeover of security by the NYPD improved civility, but not necessarily accessibility. Even today, businesses remain within the "frozen zone," inaccessible for the indefinite future.

Areas dependent on tourism, such as Little Italy and Chinatown, remain in an economic depression that shows few signs of abating. Tourist dollars are critically important to the WTC area: both the volume and multiplier effect of tourist spending provide significant numbers of jobs for working-class families. The lost tax revenue from tourism contributes to a city budget shortfall estimated at $3 billion for the current fiscal year,[1] and the inevitable belt-tightening will further impact the economy of the WTC area, which is home to thousands of city, state and federal office workers.

A week after the attack, the area south of Canal and east of Broadway opened, and business in that area has proven remarkably resilient. The symbolic importance of the Stock Exchange, not to mention its economic importance, led to a concerted effort by the city to restore economic activity, and the result is that the southeast sector suffered only a brief shutdown. Many of the merchants in the TriBeCa/WTC area are small businesses reliant on cash flow to cover current expenses, and quick restoration of business proved crucial to survival.[2]

As the checkpoints were loosened, some businesses actually suffered financially due to the loss of insurance coverage. In order to promote the image of a city returning to normal, the frozen zone was moved south to Chambers Street. But the area south of Worth Street was restricted to residents and business owners. The restrictions were rigidly, if unevenly, enforced, resulting in employees who had to walk around the perimeter of the restricted zone until they could find a sympathetic checkpoint that would let them get to work. For businesses able to get their employees past the checkpoints, the inability of customers to get through resulted in massive losses.

Insurance companies are balking at paying coverage under business interruption policies. Commonly, such policies are triggered when the insured is closed "by order of civil authority": since the businesses in the restricted zone were not prevented from opening, insurers claim there is no coverage, even though the businesses had no customers due to the checkpoints and traffic restrictions. Six weeks after the attack, parts of the restricted zone resemble ghost towns of the old West. In an area where small shops pay rents of $5,000-$25,000 per month, many businesses are grossing less than $100 per day. Notes one owner: "Cops on Chambers Street [are] telling people no one is open. I made $2 yesterday."[3] For food service businesses, the problem is compounded by high rates of spoilage due to an inability to sell food. Customers, it seems, have to argue their way past checkpoints to patronize their favorite shop for a donut and coffee.

New York City's $9 billion restaurant industry is the first to see large numbers of failures.[4] Heavily dependent on fall traffic to last through the slow winter, dozens of restaurants have closed or are on the brink, and 15,000 workers have been laid off,[5] adding to a city unemployment rate that has gone from 5 percent in July to 5.8 percent in August and 6.3 percent for September—*before* the post-attack layoffs.[6]

The problems facing restaurants in lower Manhattan mirror the problems of many other area businesses. The tourist restaurants of Little Italy suffer along with the hospitality industry generally;[7] the upscale restaurants such as Bouley and Nobu are off despite the restoration of taxi-

cab access and aggressive discount promotions;[8] and the small delis and franchises dependent on local impulse purchases are off 20 percent to 40 percent, but holding their own as business returns to the area. Some, such as the Golden Crust restaurant on Chambers Street, never reopened after September 11,[9] but most businesses are attempting to rebuild.

The post-attack upsurge in Web-based digital communication[10] may have serious ramifications not only for the hospitality industry, but for lower Manhattan landlords as well, if financial firms determine that the "village square" can be replicated online.[11] Venerable Dow Jones, which traces its founding to Wall Street, has now relocated most employees permanently to New Jersey,[12] and will only reoccupy three of the seven floors it occupied in the WFC.[13] Automation of the financial industry accelerated in the wake of September 11; Cantor Fitzgerald, which saw 700 employees perish, has shifted much of its business to electronic trading systems.[14] The New York Stock Exchange remains committed to the specialist[15] system, but its proposed new $727 million Exchange is on indefinite hold.[16]

Loss of employment in the financial sector is having a direct impact on some downtown luxury merchants such as Quisqueyana, a cigar shop near WTC, which had many patrons either perish or relocate. The broader impact will be felt through a loss of tax revenues; the financial services sector, decimated by the closure of the WTC and WFC, provided some of the most highly compensated jobs in New York.

Even as commercial and residential traffic returns to lower Manhattan, ominous signs are causing concern for landlords and businesses. In the weeks before the attack, the office leasing market in the WTC area was showing vulnerability,[17] with six large blocks of Class A and two of Class B space on the market.[18] Unfortunately for landlords and retailers, many office workers simply do not want to relocate near the disaster site for a host of reasons: WTC law firm Thacher, Proffit & Wood noted transit difficulties as the reason not to relocate downtown.[19]

For many firms, the unspoken truth is that already shaken employees do not want a daily reminder of the terror of September 11.[20] Cleary Gottlieb Steen & Hamilton intends to return to One Liberty Plaza, with one partner noting: "It's an emotional journey as well as a physical one. A lot of us have strong feelings about what we saw. But we'll get back there."[21]

The collapse of Internet firms in the Flatiron district provides a ready outlet for offices seeking quick deals for wired space in move-in condition, and the midtown market also has several large blocks available. Financial services giant CIBC, a WFC tenant, took over an Internet company's 105,000-square-foot lease (options up to 140,000) at 622 Third Avenue for a record-breaking $60+ per square foot, almost double what the pre-attack market had been.[22] As with other companies, CIBC did not place any relocated employees in downtown space; those who cannot fit at 622 Third will go to 425 Lexington or 280 Park, near Grand Central. Concern over possible price gouging led the Real Estate Board of New York to threaten expulsion of any member caught taking advantage of the tragedy.[23] Although midtown rents have fallen about $3 in the last year, they still average $59.85,[24] and businesses faced with relocating in the current market may not be able to afford the area.

Midtown is not the only option: Business may find that it can function just as well and at far less cost across the river in Jersey:[25] one area firm moved to Jersey after 67 years in lower Manhattan.[26] Although Mayor Giuliani is working to retain office jobs in New York and has even proposed subsidizing WTC companies,[27] such actions will do little to assist the small retailers who rely on the employees of firms relocating to midtown.[28]

In fact, talk of subsidies has fueled resentment among small businesses which perceive that they are being urged to stay in the area and take out SBA loans while law firms, brokerage firms and airlines are being given government subsidies and tax breaks.[29]

Governor Pataki has taken the opportunity to ask for "emergency" federal aid including transportation spending in upstate New York[30]—hundreds of miles from the WTC but in the middle of heavily Republican voting districts—while offering no assistance to small businesses near the Trade Center, although a little over 2 percent of the $20 billion federal aid package already approved has been earmarked for aid to small business and laid-off workers in the WTC area.[31] The Governor's actions have spoken more loudly than his words; his widely criticized flight from his Manhattan offices on October 17 "stoked the hysteria"[32] and the medically contraindicated[33] consumption of powerful antibiotics conveyed an impression of Manhattan as a place too dangerous for the governor of the state, let alone shoppers or tourists.

The failure of the government to realize the precarious position of small retail business was initially evident in the checkpoints remaining up for weeks after safety was no longer a concern. Government officials went on a media blitz touting all of the resources available to small business,[34] and took full-page ads in the newspapers stating that "New York City Is Committed to Helping Your Business."[35] The problem is that retailers need one thing above all: paying customers. The government's "assistance" to small business is to tell them to take on more debt (collateralized, of course), which ignores the inability of business to service current operating expenses, let alone current and future debt loads.

Heavy lenders to WTC area businesses include Chase, Citibank and Bank of New York. Already facing global recession, the banks have a growing concern over the quality of the small and middle-market portfolio. Chase is particularly vulnerable, since the retail and middle market accounted for almost a third of earnings last year.[36] Ironically, David Rockefeller built One Chase Plaza in the 1960s as a demonstration of faith in lower Manhattan, and was a prime booster of the construction project three blocks west of Chase Plaza that would become known as the World Trade Center. Making matters worse is that the large New York banks are members of syndicates holding rapidly deteriorating portfolios.[37] Such problems may trigger a wave of cutbacks and credit tightening at the worst possible time for local businesses.

Vendors to WTC area businesses have been lenient in collecting past due bills and tolerant of bounced checks, but the debts remain and must now be paid out of reduced revenues. Most fixed expenses remain unchanged, making for a troubling business model even if the economy stabilizes. Even franchised operations having the backing of a large franchisor, such as Subway, are at risk, since they are part of the economic ecosystem of lower Manhattan and cannot survive if their neighbors do not.

The normal Small Business Administration (SBA) response rate to loan applications mailed is 34 percent, but only 9 percent for the WTC applications.[38] The real prospect of lower revenues a year from now deters many businesses from applying for loans. New businesses such as the Quisqueyana cigar shop have an additional problem: since loans are based in part on past profitability, a new business which has been building up its customer base but running in the red will not qualify for such aid.

Several area retailers operated by first-generation immigrant families are wary of any federal agency (such as the SBA), because they have real or perceived immigration concerns. Several restaurants in the area are owned by Indian, Pakistani or Bengali immigrants, who are concerned about public attitudes toward Pakistani and Sikh residents in particular. Many retailers are food service or newsstand-type operations, which disproportionately employ persons whose literacy and command of English are impediments to applying for assistance and finding a new job, even assuming no immigration issues.

The stream of tourists visiting the area has not made an appreciable difference to the area's economy: vendors in surgical masks face stiff competition,[39] and few of the visitors stay to patronize local businesses. The opening of the N and R subway lines means that only five stations remain closed[40] and is a welcome change from earlier estimates of massive station shutdowns lasting till springtime.[41] But many visitors share the outlook of the Hollywood celebrities who come to gawk and brag about how close they can get to the horrific scene, press entourage in tow.[42] ABC-TV paid for Minnesota's governor to visit Ground Zero: Garrison Keillor noted that, in exchange, ABC "got exclusive rights to film the governor's grief and concern."[43] In a surreal scene, singer Elton John's limousine stopped on the corner of Church and Chambers streets so that Elton could take a look, and the gawking pop star was mobbed by gawking tourists.[44] Even the comic strip "Doonesbury" took note of the morbid phenomenon,[45] and *The New York Times* noted that "The ultimate velvet rope is in Lower Manhattan" . . . "The more competitive visitors will duel over who got closer and who breathed worse air."[46]

For the businesses and residents of lower Manhattan, there is nothing entertaining about life in the WTC area today. The fires continue to burn, almost two months after the tragedy, setting a national record.[47] The large amount of office furniture which continues to burn releases large amounts of toxic chemicals into the air, irritating throats and eyes. Stuyvesant High School, located at Chambers and West streets, has been the subject of 80 reported complaints ranging from lesions to coughs, and the actual number of health problems may be much higher.[48] The persistence of the fires means that simply closing windows and vents is not a solution; in fact the Board of Education indicated that one of the problems at Stuyvesant was the buildup of carbon monoxide caused by the attempt to seal the school from the outside air.[49] The Board is located in Brooklyn, which may explain the unintentionally humorous statement that opening vents upwind from toxic fires "will let in more fresh air."[50]

Civic leaders may express confidence in the quality of the air, but residents and workers in the area know differently. The stench of rotting food has mostly dissipated, but the toxic fumes remain. The city Health Department has been vigilant in inspecting area restaurants and demanding aggressive extermination to head off the explosion in the rodent population caused by food left out and rodent displacement caused by rescue work. But the area still resembles what many refer to as a "war zone," and parents are voicing concerns about the wisdom of raising children in such an environment. If residents leave, additional businesses will move as well.

It is difficult to assess whether businesses and residents will remain in the area. Landlords have been reluctant to press merchants for late rent, but landlords are facing the same taxes and debt service as before the attack. Unlike midtown, where expensive real estate is the province of major investors, the WTC area has many smaller land-

lords who may not have a portfolio diversified enough to withstand a collapse of rental prices or long-term high vacancy rates. Residential flight is also a growing concern. Even accepting the assurances as to air quality, the government's own monitoring shows the presence of benzene above permissible levels, and carbon monoxide levels which may or may not be above permissible levels, depending on whose standard is used; and detectable amounts of asbestos, PCBs, particulate matter, and an unidentified compound believed to be Freon-22.[51] Residents may prefer to move rather than risk long-term exposure to airborne carcinogens.

Battery Park City (BPC) is built on state-owned landfill from the WTC, and is home to 10,000 residents. BPC owners (both condo associations and landlords) pay steep ground lease charges to the landowner, the Battery Park City Authority. Virtually all of the tenants are market rate, and condominium ownership is predominant. Even before residents could return to the area, many said that they would not return. Particularly for those in buildings such as Gateway Plaza, the thought of awakening every day to the view of a mass grave was enough to cause them to look elsewhere. Noxious air and lack of transportation, coupled with psychological factors, leads many other residents to seek escape from their leases.

BPC landlords are taking a hard line with renters. Some concessions have been offered, ranging from one month's credit at hardest-hit Gateway Plaza (a Lefrak property) to a 15 percent reduction at River Watch (Brodsky Organization) and a 25 percent rent reduction at River Rose (Rockrose Development).[52] Lefrak is also taking the most rigid stance toward tenants seeking to break their lease: outright refusal. Brodsky is demanding three months' rent, and Rockrose a one-month reduction.[53]

Condominium owners are less likely to move out, given that most would lose huge amounts of money, even if their units were salable. There are 11 condominiums in BPC, and they are asking for a reduction in ground lease payments, with the Liberty House condo association placing the October payment in an escrow account.[54] BPC provides a critical mass of residents, which has proven instrumental in the decision of developers to site amenities such as a new movie theater in the area. The concern is that without BPC, blight could spread north to already affected TriBeCa.

Merchants north of the WTC have experienced a steady increase in business over the past several years as vacant office and light manufacturing space has been converted to residential use. The influx of families has been particularly helpful in giving a sense of community and stability. Million-dollar-plus residential deals are still being done, but many parents are avoiding the area.[55] One hopeful sign is the number of inquiries from prospective buyers, which has increased due to marginally softer prices since the tragedy.[56]

The fate of New York business and New York real estate is intertwined, and is in turn key to the economy of the tri-state region. A failure of public will to stabilize the economy of lower Manhattan could have a long-term deleterious impact on a wide scale. Conversely, a strong commitment, backed by more than photo-ops and news sound-bites, will not merely restore the vitality of the area, but will renew and invigorate the city. Lucille P. Loiselle, a worker at One Liberty Plaza, put it best:

> You really have to gird your mental loins. I try not to look. I get angry at people taking pictures. I'm conflicted. I know I can be a big girl and go down there; I prefer not to. But if life is there, you got to encourage that life.[57]

Endnotes

1. *Attack Costs Hit $40 Billion and Climb*, Crain's New York Business (hereinafter Crain's), Sept. 24, 2001, at 1, 40.
2. *See*, Lisa Fickenscher, *Small Firms Downtown Overwhelmed*, Crain's, Sept. 17, 2001, at 1, 30 (impact of closure on cash flow).
3. Melanie Lefkowitz, *Open, but Closed Off*, Newsday, (Queens Edition), Oct. 18, 2001, at A45.
4. Louise Kramer, *Eateries Face Bitter End*, Crain's, Oct. 15, 2001, at 1.
5. John Tierney, *Feeding Workers, Not Patrons*, New York Times, Oct. 19, 2001, at D1. (Also noting that restaurants had removed tables to appear more full). Job losses in turn create a "fear effect" among those still employed, further exacerbating the economic downturn, David Leonhardt, *Your Job Is Safe. So Why That Frown?*, New York Times, Oct. 21, 2001, at BU4.
6. Jessica Sommar, *Jobless Up By 6,000; NY Leads Nation*, New York Post, Oct. 19, 2001, at 39.
7. Even the Waldorf-Astoria's Peacock Alley restaurant closed, despite being located in midtown. Harlem's boom in tourism collapsed as well. *See A Long-Awaited Rebirth Hits a Sudden Slowdown*, New York Times, Oct. 21, 2001, at CY 4.
8. $20.01 lunches and $30.01 dinners, www.restaurantweek.com (visited Oct. 25, 2001). *See also Lower Prices and Helping Hands*, Newsday (Queens Edition), Oct. 19, 2001, at B23 pt. 2Q. (Noting discount promotions and continuing efforts to feed rescue workers.)
9. Louise Kramer, *Eateries Face Bitter End*, Crain's, Oct. 15, 2001, at 1. (Midtown restaurant Virot closed for good and never reopened, citing a loss of $2 million.)
10. Melinda Patterson Grenier, *Record Number of Office Workers Used Web Broadcasts Last Month*, Wall Street Journal, Oct. 15, 2001, at B8.
11. One mayoral candidate actually welcomed the disaggregation of the Financial Center, suggesting that this would spur development in Long Island City and Harlem. Parochialism prevented the candidate from realizing that Goldman or Merrill would be far more likely to move to Jersey or Fairfield than Queens or Harlem.
12. Keith J. Kelly, *DJ-ers' Fury At Jersey*, New York Post, Oct. 17, 2001, at 45. (Of 800 World Financial Center employees, only 425 will return. DJ claims that plans

were "in the works for many, many months—long before Sept. 11").

13. Paul D. Colford, *Journal Shifts to Jersey*, Daily News, Oct. 17, 2001, at 61. (CEO: "Manhattan is where this company was born, and Manhattan will remain the place where our corporate flag is planted").

14. *Cantor Fitzgerald Shuts European Offices*, Newsday, Oct. 16, 2001.

15. Using a human intermediary to match buyers and sellers, rather than the electronic system of NASDAQ. As a practical matter, the exchange is highly automated, with many smaller trades not requiring a specialist.

16. Eric Herman, *NYSE Project Put On Hold*, Daily News, Oct. 19, 2001, at 50.

17. Lore Croghan, *Brokers Battle for Role In 'Rent,'* Crain's, Sept. 3, 2001, at 23.

18. *Market Reports by Costar* (Table), Crain's, Sept. 3, 2001, at 24. (Blocks of office space greater than 125,000 square feet in the TriBeCa/WTC/Financial District; 1.3 million square feet Class A and 0.5 million Class B. In addition, a proposed block at 270 Greenwich would have added almost 1.5 million square feet of Class A space.)

19. Lore Croghan, *Refugee Firms Race To Find New Offices*, Crain's, Sept. 24, 2001. (Statement of Jack Williams).

20. Many residents are wary of being stuck in the subway in the event of an attack, and fear anthrax attacks in the subway, similar to the cult attacks in the Tokyo system. Subway ridership in New York is off 14%, Pete Donohue, *Subway Crime's Huge Decline*, Daily News, Oct. 19, 2001, at 26.

21. Hugo Kugiya, *Still Standing, Despite the Fears*, Newsday (Queens Edition), Oct. 19, 2001, at A45 Q. (Statement of Michael Ryan).

22. Braden Keil, *CIBC Pays Top Dollar on 3rd Avenue*, New York Post, Oct. 16, 2001, at 32.

23. Burton P. Resnick, REBNY Chairperson, Memo of Sept. 14, 2001, and clarification memo of Sept. 20, *available at* www.rebny.com. ("All new deals signed following the [WTC] tragedy should be at rents that were ***actually achieved*** on deals closed in the days prior to Sept. 11.") (emphasis in original).

24. *Firm Sees Tough Times For City's Office Rents*, Newsday (Queens Edition), Oct. 16, 2001, at A63 Q. (Average Manhattan-wide was $50.75 and vacancy rate at 8.4%).

25. Joseph P. Fried, *A Company Rethinks Its Mooring In the City*, New York Times, Oct. 19, 2001, at D4.

26. Motoko Rich, *Small Firms Near Trade Center Struggle to Find Homes*, Wall Street Journal, Oct. 16, 2001, at B2.

27. Philip Lentz, *NY Mulls Incentives for WTC Firms*, Crain's, Sept. 17, 2001, at 10.

28. Midtown is also suffering. Metro-North reports ridership off by a few percent during rush-hour, 5% during midday, and 10-15% on weekends, resulting in losses for area merchants, Pete Donohue, *Fewer Passengers at Grand Central*, Daily News, Oct. 18, 2001, at 36.

29. This perception is not limited to lower Manhattan, Jeffrey L. Seglin, *The 'Me, Too' Mind-Set of Disaster Aid*, New York Times, Oct. 21, 2001, at BU 4. Arguably, however, those in the WTC area have a stronger case for assistance.

30. Raymond Hernandez, *Bush Opposes More Aid Now For New York*, New York Times, Oct. 18, 2001, at D1; Kenneth R. Bazinet & Stephen McFarland, *There's No Blank Check For Pataki*, Daily News, Oct. 19, 2001, at 22 (Pataki asking for $34 billion in addition to $20 billion already approved by Congress).

31. Kenneth R. Bazinet & Stephen McFarland, *There's No Blank Check For Pataki*, Daily News, Oct. 19, 2001, at 22.

32. Andrea Peyser, *Lamest of the Famous: Celebs Skip Out In City's Time of Need*, New York Post, Oct. 19, 2001, at 3.

33. *E.g.*, Jennifer Steinhauer, *In 'Uncharted Territory,' Giuliani Campaigns Against Fear*, New York Times, Oct. 18, 2001, at B1 ("Public health experts now say there is no need to take antibiotics before being tested.").

34. *See* Valerie Block, *New Breed of White Nights*, Crain's, Sept. 24, 2001, at 3.

35. Daily News, Oct. 21, 2001, at 4A; New York Times, Oct. 21, 2001, at A27.

36. Heike Wipperfurth, *Wave of Wipeouts Threatens Banks*, Crain's, Oct. 1, 2001, at 3, 38.

37. Mitchell Pacelle, *Waiving or Drowning: Banks Face Loan Bind*, Wall Street Journal, Oct. 15, 2001, at C15 (Federal Reserve estimates likely loan defaults at 5.72% in 2001, up from 3.25% in 2000).

38. Lisa Fickenscher, *Firms Shun SBA Loans*, Crain's, Oct. 8, 2001, at 1.

39. Erika Kinetz, *Signs and Lamentations at the New Border*, New York Times, Oct. 21, 2001, at CY4.

40. Daniel J. Wakin, *2 More Stops on Subways Will Reopen*, New York Times, Oct. 27, 2001, at D3.

41. Pete Donohue, *N & R Getting Back on Track*, Daily News, Oct. 20, 2001, at 21.

42. Andrea Peyser, *Lamest of the Famous: Celebs Skip Out In City's Time of Need*, New York Post, Oct. 19, 2001, at 3 ("Rosie O'Donnell, who aired Kelsey Grammer's vomit-inducing boasts about touring that celeb hot spot—ground zero—canceled her New York-taped show this week."); *see also*, *Comic Relief*, Daily News, Oct. 18, 2001, at 34 (Photo of Robin Williams laughing on cell phone at Ground Zero).

43. Garrison Keillor, *A Governor Works In Mysterious Ways*, New York Times, Oct. 19, 2001, at A19.

44. Observations of Gerald Lescatre, manager of the Subway Sandwich shop at 165 Church Street. (It was later reported that Elton had been turned away by the NYPD, but many celebrities were admitted.)

45. *Doonesbury*, Oct. 19, 2001.

46. John Tierney, *What To Do When Sorrow Is An Attraction*, New York Times, Oct. 23, 2001, at D1.

47. Graham Rayman, *A Grim Record At Ground Zero: Fire is longest at commercial building in U.S.*, Newsday (Queens Edition), Oct. 25, 2001, at A5 Q.

48. Alison Gendar, *Stuyvesant Under Scrutiny*, Daily News, Oct. 18, 2001, at 35 (of 21 students polled by reporter, nine indicated health complaints since school reopened).

49. Nick Chiles, *Stuyvvesant's Air Being Studied*, Newsday (Queens Edition), Oct. 18, 2001, at A37 Q (Statement of spokeswoman Catie Marshall).

50. *Id*.

51. U.S. Environmental Protection Agency, Daily Environmental Monitoring Summary for Thursday, Oct. 25, 2001, *available at* www.epa.gov/epahome/wtc/data.summary.htm (visited Oct. 28, 2001).

52. Paul H.B. Shin, *Battery Park Tenants Upset Over Penalties*, Daily News, Oct. 19, 2001, at 21.

53. *Id*.

54. Eric Herman, *Rent Strike at Battery Park City*, Daily News, Oct. 18, 2001, at 34.

55. Tracie Rozhon, *TriBeCa Brokers, Waiting to Exhale*, New York Times, Oct. 18, 2001, at F1. (Quoting broker Judy Thorn.)

56. Braden Keil, *Bargain-hunters Head Downtown*, New York Post, Oct. 24, 2001, at 8; *Downtown Apts. A Bargain*, New York Post, Oct. 17, 2001, at 7.

57. Hugo Kugiya, *Still Standing, Despite the Fears*, Newsday (Queens Edition), Oct. 19, 2001, at A45 Q.

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Real Property Questions and Answers on the World Trade Center Tragedy from the State Bar Web Site

Every New Yorker—every American—wanted to react in a constructive way to the dramatic atrocity committed in downtown Manhattan in September. The New York State Bar Association immediately began efforts to reach out and use the expertise available to help. In one of those projects, various Sections of the Bar Association were asked to provide information in a question-and-answer format addressing the kinds of immediate concerns which might face individuals, practicing lawyers (whether they were directly affected themselves or they were preparing to help clients), businesses, tenants, commercial and residential owners and, most importantly, families or couples who had suffered the loss of a victim.

The response was prompt and provided fundamental information on matters such as trusts and estates, insurance and the continuation of businesses. For our part, the Real Property Law Section anticipated the greatest number of questions to come from people in households who suffered a loss and were now worried about making mortgage payments or paying the rent, renters in apartments near the site of the destruction and professionals and business people in buildings that had been destroyed or in buildings that were now inaccessible. The timing required an immediate response from members who volunteered to draft material. In particular, appreciation should be extended to: Edward Baer, David Berkey, Jeffrey Chancas, John Hall, Karl Holtzschue, Beatrice Lesser, Joshua Stein and Section President Mel Mitzner. Special recognition should be extended to Terry Brooks of the State Bar for planting the seed of the project and causing it to germinate so quickly.

The result of the Association-wide effort is the "NYSBA World Trade Center Disaster Assistance" feature on the Bar's Web site at www.nysba.org. That site includes a great deal of information and helpful links, in addition to the "frequently asked questions." The "FAQs" themselves are arranged in topics under categories such as "General" and "Lawyer Specific," and in turn are further organized by disciplines including Discrimination, Employment Issues, Health Care, Insurance, Landlord/Tenant, Legal Claims, Military Personnel, Missing Decedents and Estates, Real Estate and Tax. It is unavoidable, but not undesirable, that there is overlap in these areas. As a sample for the membership of the Real Property Law Section, following are the discussions included under the "Landlord/Tenant" and "Real Estate" headings.

It will be understood immediately that these contributions could only be general in nature. Indeed, a disclaimer was to be added to the effect that all readers must review particular situations for special aspects affecting them, that all answers include generalizations and could not be relied on as absolute full evaluations of any particular situation and that people should consult attorneys. However, to the extent people needed some guidance or could get an idea to know as to whether their impressions of talk they may have heard from friends or seen in newspapers or on television was on the right track, it was hoped that the information could help people remain calm and focused so they could effectively deal with their problems. In short, it is hoped that putting the material out to the public might do some good.

Matthew J. Leeds

Questions and Answers

QUESTION: I WAS DISPLACED FROM MY APARTMENT AS A RESULT OF THE WORLD TRADE CENTER ATTACK. HOWEVER, IN LOOKING FOR A NEW APARTMENT, ONE LANDLORD TOLD ME THAT HE WOULD NOT RENT TO ME BECAUSE I AM A PRACTICING MUSLIM. IS THAT LEGAL?

ANSWER: Discrimination based on ethnicity or religion is unlawful. While you can file an action in court alleging discrimination and seeking to obtain an order directing the landlord to rent the apartment to you or to give you damages, such an action can take a long time and can involve expense. Another way to attempt to obtain relief is to file a complaint with either the New York City Commission on Human Rights or the New York State Division of Human Rights. Cases dealing with this type of discrimination are often given priority. Either of those agencies can work with you to help you get an apartment for which you otherwise qualify (in other words, you have a sufficient amount of money per month to pay the rent) and/or to go against a landlord who refuses to rent to you for such discriminatory reasons.

QUESTION: AS A RESULT OF THE WORLD TRADE CENTER ATTACK, I HAVE LOST MY JOB BUT EXPECT TO FIND ONE SOON. HOWEVER, IN THE INTERIM, I AM UNABLE TO PAY SOME OF MY BILLS, INCLUDING MY RENT TO THE LANDLORD. WHAT CAN I DO TO PREVENT BEING EVICTED FROM MY APARTMENT DURING MY SEARCH FOR A NEW JOB?

ANSWER: Whether because of the current grave circumstances or due to any other reversal, you can always evaluate the idea of approaching your landlord to request relief, as in some form of workout of your obligations. Generally, there is no technical legal obligation of the landlord to give you relief. The availability of relief will vary among landlords and situations, and may raise issues of whether the landlord can actually vary terms of your lease without sacrificing some right the landlord might otherwise have with respect to the lease, especially under rent regulation.

You might be eligible to file a Chapter 13 or even a Chapter 7 bankruptcy petition, which would engage a court in the restructuring of your debts, with significant consequences to you. As to your lease, in many instances in bankruptcy, if you want to remain in your apartment, you might well be required to pay the landlord all of the past due money that is owed, even if you are discharged of your other obligations. However, if you wish to find another apartment, the proceeding would determine how the past due rent owed to the current landlord is handled. Be aware that the filing of either a Chapter 13 or Chapter 7 bankruptcy proceeding can have negative consequences for your credit rating. For example, you should check with your credit card companies to determine how they view such bankruptcy filings with respect to obtaining future credit. Bankruptcy is a powerful tool and can be complex, and there are prerequisites to being able to file, as well as personal decisions to be made about your willingness to do so.

QUESTION: MY SPOUSE WHO WAS WORKING AT THE WORLD TRADE CENTER AT THE TIME OF THE ATTACK HAS NOT BEEN HEARD FROM SINCE THAT TIME. WE HAD FALLEN BEHIND IN OUR MORTGAGE PAYMENTS, AND ALTHOUGH WE INTENDED TO CATCH UP, I AM UNABLE TO DO SO NOW. AM I STILL SUBJECT TO FORECLOSURE?

ANSWER: Yes. Unless your payments are brought current, the lender would have the right to accelerate the full principal balance of the loan and require it to be paid. You should contact your lender and advise it of your circumstances, with an eye towards establishing a realistic payment plan. It would be hoped that most lenders under the current circumstances would work with you. However, don't make any promise you cannot keep. It is usually better for the borrower if the lender is apprised of the situation and your desire to rectify the problem. After all, unless you tell the bank, it might not know that your spouse was a victim. Borrowers are usually well served if they are represented by counsel in dealing with a bank. After all, the workout agreement itself might have additional ways in which the borrower can fail to live up to its obligations and run into trouble again with the requirements of the recast loan.

Remember also that, as legal proceedings, foreclosures where the bank seeks to take back your house can take time and are subject to the overall application of what are referred to as general equitable principles by a court. Although it might well be that a court would be personally sympathetic to these circumstances, and that in the short term courts might be loath to force ahead, on an immediate basis, any such proceedings involving World Trade Center victims, eventually, the default will have to be addressed.

QUESTION: MY SPOUSE HAS BEEN CALLED TO ACTIVE DUTY AS A RESERVIST. OUR INCOME WILL NOW DECLINE BY A LARGE AMOUNT, AND I AM WORRIED THAT WE WILL NOT BE ABLE TO MAKE OUR MORTGAGE AND OTHER LOAN PAYMENTS. IS THERE ANY RELIEF AVAILABLE TO US?

ANSWER: Under a 1940 law known as the Soldiers' and Sailors' Civil Relief Act (50 U.S.C. §§ 501 *et seq.*), lenders are prohibited from charging interest in excess of 6 percent per annum to borrowers who are on active duty. Mortgage lenders are also prohibited from foreclosing on loans held by members of the armed forces who are on active duty, and for three months thereafter without court approval or an agreement between the lender and the borrower. In addition, there is some information that HUD Secretary Mel Martinez has requested lenders to postpone principal payments due under such loans at this time, but this pronouncement is subject to implementation.

QUESTION: I LIVE IN A HOUSE WITH A PERSON MISSING FROM THE WORLD TRADE CENTER; IT IS IN HIS/HER NAME, NOT MINE. WHAT ARE MY RIGHTS?

ANSWER: You should consult an attorney concerning ownership of the house and your right to remain in it. The following are only a few general pointers.

In part, your rights will depend on whether you are the legal spouse or other next of kin, and whether there is a will. If you have no legal relationship to the missing person (New York does not recognize "common law marriage"), then you would only have rights if the will so provides. However, if you are living

with the missing person and have children with that person, your children may have rights.

Once a death certificate is obtained, see www.nysba.org/wtc/index.htm (which process can be started at Pier 94 while that emergency facility is operating), the laws in the state where the missing person lived will govern concerning the estate of the missing person. If there is a will, then the will must be taken to the Surrogate's Court in that county. If there is no will, then the next of kin can start the process of administering the estate at the Surrogate's Court.

Generally, the assets of an estate are distributed in accordance with the will. (An exception would be if the person got married after writing a will, which will did not provide for the spouse.) If there's no will and you are the spouse of the missing person, you can expect that you and the missing person's children (if any, regardless of who the other parent is) will inherit everything that the missing person owned.

QUESTION: I RENT AN APARTMENT IN BATTERY PARK CITY. ALTHOUGH MY BUILDING IS REOPENED, I JUST DO NOT WANT TO MOVE BACK. CAN I BREAK MY LEASE?

ANSWER: First look at your lease to see what it says. It is assumed that it is not a rent-stabilized lease. Probably, on the face of it, if you were allowed back in the building within a few weeks, as was apparently the case for all but one of the residential buildings in the area, there is no legal right to cancel the lease written into the document. However, you might inquire of your landlord to see his/her reaction to your suggestion that you leave, or to ascertain whether you can negotiate a termination.

There are many very unusual circumstances particular to these buildings in operation at this time. First, you will probably find that your building is actually subject to ground leases which require payments by the owner of the building to the quasi-governmental entities which own the land the building is located on, regardless of the condition of the building or whether tenants are paying their rent. Accordingly, owners of buildings (your landlord) have an obligation to pay, and if they let tenants out of the leases, there will be no income to pay the ground lease. Second, even if a tenant left as a matter of default on the lease (or for other reasons), the landlord would normally try to relet the apartment to somebody else, to mitigate the effect of any damage the landlord would suffer from the fact that you are not paying rent. In the uncertain market in the near aftermath of this situation, it is not clear whether these apartments can be leased out readily, or what market rents will be in the next few months or whether they will recover in the future. Thus, building owners do not yet have confidence as to their ability to command previous rent levels, at least in the near future, and they are in a situation which is unusual and difficult to evaluate.

For these and other obvious reasons, the newspapers have been reporting developments which tenants should continue to watch. First, there are some organized efforts to seek political redress, and as with all political solutions, observers should seek reliable sources to obtain information about whether any relief is available on this front. Second, there has not yet been any experience with the reaction of the courts to cases involving the grim facts presented, and any developments in actual cases should be followed by your attorney.

QUESTION: I HAVE SOME LEGAL QUESTIONS ABOUT HOW THE WORLD TRADE CENTER DISASTER AFFECTS MY OBLIGATIONS OR MY COMPANY'S OBLIGATIONS AS A COMMERCIAL TENANT. HOW DO I GET ANSWERS?

ANSWER: Start by reading your lease. Although commercial leases are governed by New York state law, the first place to look to answer any question is the lease itself. It will usually address issues arising from damage to, or destruction of, the building (a "casualty"). The courts will usually enforce commercial leases in accordance with their terms, though sometimes (occasionally and unpredictably) courts may make exceptions when they think the lease is overly harsh to the tenant. If the words of the lease are not completely clear, or if you don't like what they say, consult counsel.

QUESTION: THAT ADVICE WOULD BE VERY HELPFUL IF I HAD A COPY OF OUR LEASE, BUT OUR LEASE WAS IN THE FILING CABINET IN MY OFFICE IN THE WORLD TRADE CENTER. I CAN'T GO READ IT. HOW DO I ANSWER MY QUESTIONS?

ANSWER: Your landlord probably still has a copy of the lease from files or copies maintained outside the World Trade Center. Unless and until you can obtain a copy of your lease, you may want to assume that it is on fairly typical terms, and therefore that the answers that apply generally, as summarized below, will apply to you. You will probably not go too far wrong with that approach, although this is, of course, no guarantee.

By the way, it might also be possible to ask the attorneys who handled the original lease for you if there is still a copy in their files. If the landlord cannot supply a copy, the lenders (your business lender or the landlord's mortgagee) might have required a copy for their files at one point. Conceivably, your insurance broker or your accountant might have needed a copy of the lease, as well, and might be able to find it in their files.

QUESTION: MY COMPANY LEASED SPACE IN A BUILDING DESTROYED IN THE WORLD TRADE CENTER DISASTER. MUST WE KEEP PAYING RENT? ARE WE STILL LIABLE ON THE LEASE?

ANSWER: A typical office lease (for part of a building rather than an entire building) will say that if a casualty damages the leased premises, that suspends the tenant's obligation to pay rent. The tenant doesn't have to start paying rent again until the landlord has rebuilt the building, or at least the part of it that the tenant occupied. If the landlord can't rebuild within some specified period—usually no longer than six months—then the lease will usually terminate. Although an authoritative answer to your question will require a reading and interpretation of your lease, in most cases you will have no further obligations under your lease. If the lease says nothing about casualty, which is rarely the case, then New York state law will govern—it says that when a building is destroyed, the lease terminates (New York Real Property Law § 227). Thus, in all cases, you will almost certainly be excused from your lease obligations.

As with all of this discussion, it must be remembered that this commercial area and this particular complex were unique, and the actual lease might not have given relief to tenants, as would be found in more typical leases.

QUESTION: MY COMPANY LEASED SPACE IN A BUILDING NEAR THE WORLD TRADE CENTER. ALTHOUGH THE BUILDING—AND PARTICULARLY OUR SPACE—DID NOT SUFFER MAJOR DAMAGE FROM THE DISASTER, WE HAVEN'T BEEN ABLE TO GET BACK IN AND DON'T KNOW WHEN WE WILL BE ABLE TO GET BACK IN. DO WE NEED TO KEEP PAYING RENT? CAN WE TERMINATE THE LEASE?

ANSWER: Again, the answer depends on what your lease says, but here is a summary of what commercial leases usually say. If the disaster damaged your own space or the building you occupy, your obligation to pay rent will be the same as if you occupied space in the World Trade Center, as set forth above. But if neither your space nor your building suffered actual physical damage, the answer to your question is not as easy to predict. In probably a majority of cases, your lease will say that if a casualty impairs your access to your space or prevents you from using the space, then it's the same as if the space were physically damaged. In that case, your obligation to pay rent is probably suspended. The lease probably does not, however, terminate unless the impairment of access or usability continues for some period, typically up to 180 days. In that case you will need to make an assessment of when your leased premises will become usable again. If the lease is silent on all these issues, then New York state law would govern, and its effect is not entirely clear. But such silence is rare. Therefore, if your office was in a building near the World Trade Center that will eventually reopen within some short but indefinite time, you may find that you need to arrange for other space but are still potentially liable for your old space (if the landlord can repair and deliver the space within the applicable time period). Your options then include the following:

First, you can try to negotiate a termination of your old lease. (More on that below.)

Second, you may determine, based on advice of counsel, that a court would allow you to terminate your lease under the circumstances of your particular case. You can then either use that determination as additional leverage in negotiations, or take the position that you are entitled to terminate your lease and then do so, and litigate if necessary. You need to consult counsel before you start down this road.

Third, when you arrange substitute space you may want to try to negotiate new leasing arrangements that give you flexibility to move back into your old space if it actually becomes available within the period your old lease contemplates. A substantial volume of short-term space of this type has recently been available, on favorable terms, in the market.

Fourth, you may want to explore alternative office arrangements such as greater use of telecommuting, satellite offices, executive suites, and the like, at least on a temporary basis.

QUESTION: SO FAR IT SEEMS WE CAN PROBABLY SUSPEND PAYING RENT AND TERMINATE OUR LEASE, THUS AVOIDING LIABILITY GOING FORWARD. BUT WHAT ABOUT ALL THE MONEY WE SPENT TO BUILD OUT OUR SPACE AND INSTALL FURNITURE, FURNISHINGS, AND EQUIPMENT? WILL THE LANDLORD MAKE US WHOLE FOR THAT LOSS?

ANSWER: Probably not. Although the answer always depends on the words of your lease, virtually every commercial lease excuses the landlord from any obligation to insure (or pay for the loss of) the tenant's installations and business property. Your own insurance coverage may, however, cover the loss.

QUESTION: CAN WE SUE THE LANDLORD FOR THE DISRUPTION TO OUR BUSINESS BECAUSE OF THE DISASTER? AFTER ALL, ISN'T A LANDLORD OBLIGATED TO PROVIDE A BUILDING IN WHICH WE CAN OPERATE?

ANSWER: No. But your insurance may cover the loss.

QUESTION: OUR BUILDING WAS ONLY SLIGHTLY DAMAGED AND THE LANDLORD HAS ASSURED US WE WILL BE ABLE TO MOVE BACK IN SHORTLY. BUT OUR PEOPLE DON'T REALLY WANT TO BE IN THIS AREA ANY MORE. CAN WE GET OUT OF OUR LEASE?

ANSWER: Again, it depends on what the lease says, but based on the typical treatment of these issues (as described above), you will probably still be obligated on your lease and required to pay rent as soon as the landlord has finished repairs. If you truly want to relocate, you will need to consider the usual range of "exit transactions" for commercial leases (negotiated termination or contraction, assignment, subletting, etc.).

QUESTION: OUR LEASE WASN'T REALLY A TYPICAL "OFFICE" LEASE. WE HAVE QUITE A LARGE OPERATION AND LEASED AN ENTIRE BUILDING NEAR THE WORLD TRADE CENTER FOR A LONG TERM AND HANDLED MOST BUILDING MANAGEMENT FUNCTIONS OURSELVES. I BELIEVE IT WAS CALLED A "NET LEASE" OR A "GROUND LEASE." DOES THAT CHANGE ANYTHING?

ANSWER: It might. A tenant that leases a whole building for a long period (ten years or more) will sometimes—not always—agree to maintain insurance and bear the risk of casualty. In that case, you will probably need to keep paying rent, might not be able to terminate your lease, and may even be required to repair any damage to the building. The answer to your question is not at all predictable, however, and depends totally on what your lease says. You may find that your lease obligations effectively place you in the real estate business. If you do not want to be in that business—and if your lease obligations are incompatible with your business needs—you may be able to negotiate a lease termination with your landlord. If so, your landlord will probably ask to receive all insurance proceeds to which you are entitled. You should consult a real estate attorney and a real estate broker sooner rather than later.

QUESTION: OUR COMPANY IS A PARTNERSHIP. ONE OF OUR PARTNERS WAS KILLED IN THE DISASTER. WILL THE REMAINING PARTNERS BE LIABLE ON THE LEASE? (THIS ASSUMES WE CAN'T TERMINATE THE LEASE ON SOME OTHER BASIS, AS DISCUSSED ABOVE.)

ANSWER: If the lease was in the name of the partnership or the partnership assumed the lease obligations, then the lease is an obligation of the partnership. Any obligation of the partnership is also an obligation of each and every partner individually. If one partner dies, that partner's estate becomes liable on the lease and all the other partners remain liable on the lease. As a matter of partnership law, however, the landlord may need to sue the partnership first and try to recover from the partnership's assets. If those assets are insufficient, the partners would remain liable. You may, however, be able to negotiate a termination of your lease.

QUESTION: IF WE TRY TO NEGOTIATE AN EARLY TERMINATION OF OUR LEASE (AS SUGGESTED ABOVE, IN VARIOUS CONTEXTS), DOES THE LANDLORD HAVE ANY OBLIGATION TO TRY TO ACCOMMODATE US? HOW CAN WE INCREASE THE LIKELIHOOD OF SUCCEEDING IN THOSE DISCUSSIONS?

ANSWER: Your landlord is not in any way obligated to accommodate you, but you may find your landlord to be more cooperative than you would expect. To increase the likelihood of a good result, try to do the following. Open discussions with your landlord as early as you can. If you easily can, try to locate and offer your landlord a replacement tenant at least as creditworthy as you are, but don't let this slow you down. Be prepared to pay something, but try to let the landlord suggest the first number. Then negotiate downward from there. As with other aspects of this rapidly changing situation, there might also be methods of political relief offered at some time in the future, although there is never any predictability or certainty of that.

QUESTION: BASED ON SOME OF THE ANSWERS ABOVE, WE MAY NEED TO LOOK TO OUR INSURANCE COVERAGE FOR SOME OF OUR LOSSES. WHAT DO WE NEED TO KNOW ABOUT DEALING WITH INSURANCE CARRIERS?

ANSWER: You will need to file a "proof of loss" quickly. Consult counsel, an independent insurance adjuster, or a representative of your insurance company (probably in that order of preference) as soon as possible.

QUESTION: I LIVE IN A COOPERATIVE APARTMENT BUILDING AND LOST MY SPOUSE, WHO WAS THE PRINCIPAL SOURCE OF OUR FAMILY INCOME, IN THE WORLD TRADE CENTER DISASTER. WILL THE COOPERATIVE PERMIT ME TO DELAY MAKING PAYMENTS OF MAINTENANCE UNTIL I CAN OBTAIN INSURANCE PROCEEDS OR OTHER FUNDS?

ANSWER: Many cooperatives will work with surviving family members to permit delayed payment of maintenance. You should speak with the cooperative's managing agent or a member of the board of directors to determine what your building's policy will be in such situation.

QUESTION: WHAT SHOULD I DO ABOUT MAKING THE MONTHLY PAYMENTS ON MY COOPERATIVE SHARE LOAN?

ANSWER: You should contact your lender to see if it will allow you to defer making payments until you obtain a regular source of income. Check to see if your spouse was covered with "mortgage insurance," which sometimes will pay the remaining balance due on a loan in the event of death and please take steps to obtain a death certificate, which will be required to document your loss for an insurance claim.

QUESTION: WILL THE COOPERATIVE PERMIT ME TO BECOME THE RECORD OWNER OF THE SHARES AND LEASE IF I WAS NOT LISTED AS CO-OWNER WITH MY SPOUSE?

ANSWER: Most buildings will permit a transfer of ownership of the shares and lease to a surviving spouse without the need for cooperative board approval. Some buildings also permit an estate to transfer the shares and lease to a financially responsible member of the deceased's family, without the need for board approval. You can review the proprietary lease to see if the transfer does not require board approval. Also, you should check to see if the deceased left a will which directed the transfer of the apartment to you or to another person. If the transfer is to someone other than the surviving spouse, then board approval may be required. You should obtain a death certificate and contact the managing agent or a member of the board of directors to determine what steps you will be required to follow to have the record ownership changed.

QUESTION: I AM LISTED AS A CO-OWNER WITH MY DECEASED SPOUSE ON THE SHARE CERTIFICATE AND LEASE, AND WOULD LIKE TO HAVE THE RECORDS CHANGED TO SHOW THAT I AM THE SOLE OWNER OF THE SHARES AND LEASE. HOW DO I HAVE THE RECORDS CHANGED?

ANSWER: There are three types of co-ownership. If you co-owned the shares and lease as "tenants by the entirety" or as "joint tenants with right of survivorship," then upon the death of a spouse or one joint tenant, the ownership is automatically transferred by law to the surviving spouse or surviving joint tenant, and the cooperative should change the records upon your request and presentation of a death certificate to the managing agent. If you co-owned the shares and leased as "tenants in common," then a formal transfer of ownership from the decedent's estate to the surviving tenant in common will be required. As noted above, if the surviving "tenant in common" is a spouse, the cooperative will usually permit such transfer without the need for board approval. Again, check with the managing agent or with a member of the cooperative's board of directors to determine the policy of your cooperative in such situation.

QUESTION: THE APARTMENT I OWN AND ITS CONTENTS WERE SERIOUSLY DAMAGED AS A RESULT OF THE WORLD TRADE CENTER DISASTER. I HAVE BEEN UNABLE TO OCCUPY MY APARTMENT SINCE SEPTEMBER 11, 2001. WHAT RIGHTS DO I HAVE TO WITHHOLD MAINTENANCE CHARGES OR TO GET REIMBURSED FOR MY PERSONAL PROPERTY LOSSES?

ANSWER: If you cannot occupy your apartment as a result of the disaster, then under certain circumstances, your maintenance might "abate" or stop being due for the period of time that you cannot occupy your apartment. This may not be the case for most buildings. You should check with your homeowner's insurance company to determine if your insurance carrier will cover your expense to rent another apartment, or to stay in a hotel or motel, if the expense is greater than the rent that you were paying for your cooperative apartment. (Your cooperative will seek to recover its lost rentals from its own insurance carrier.) With respect to your damaged personal property, improvements made to your cooperative apartment and any cost to clean up your apartment, you should place a claim with your homeowner's insurance company to reimburse you for your losses. The cooperative will be responsible to repair the building and to clean up all common areas of the building. Once the building has been repaired and is ready for occupancy, you will be required to resume maintenance payments to the cooperative. If the building is too seriously damaged to repair, the cooperative board may consider terminating all leases. You should check with the managing agent and with the cooperative board to determine if this is a realistic possibility.

QUESTION: I LIVE IN A CONDOMINIUM BUILDING. ARE MY RIGHTS ANY DIFFERENT?

ANSWER: If you live in a condominium building, the condominium association has an obligation to repair the common areas of the building and to clean the common areas so that the building is habitable. You should make the same claims upon your homeowner's insurance carrier to reimburse you for your cost of renting alternate space while your apartment is being repaired and for losses to your personal property and improvements made to your apartment.

QUESTION: WHAT ARE MY RIGHTS UNDER A CONTRACT OF SALE MADE BEFORE THE WORLD TRADE CENTER ATTACK FOR A HOUSE (OR CONDOMINIUM OR COOPERATIVE APARTMENT) THAT WAS DAMAGED AS A RESULT OF THE ATTACK?

ANSWER: First, check the contract for a provision on risk of loss. The standard residential contract for sale of a house has no such provision, but is governed by a state statute (General Obligations Law § 5-1311). The statute provides that, until the purchaser takes title or possession: (1) in the case of destruction of an immaterial part of the premises, the contract is enforceable by either party, but the purchase price must be abated; and (2) in the case of destruction of a material part, the seller cannot enforce the contract and the purchaser may recover his down payment. The standard condominium and cooperative apartment contracts have elaborate provisions on risk of loss which generally reach the same result, but include an option by the seller to restore the damage. Contracts of sale for commercial properties usually have an express provision, often requiring the purchaser to close, but transferring any insurance proceeds to the purchaser.

QUESTION: WHAT HAPPENS UNDER A CONTRACT OF SALE FOR A HOUSE (OR CONDOMINIUM OR COOPERATIVE APARTMENT) IF THE SELLER OR THE BUYER DIES BEFORE THE CLOSING?

ANSWER: First, check the contract for a provision on death of either of the parties. The standard residential contracts for sale of a house, condominium, cooperative apartment and commercial property each provide that it is binding on the heirs, distributees, legal representatives and successors of the respective parties. Even in the absence of such a provision, state law provides that a contract of sale may be enforced after the death of one of the parties (Surrogate's Court Procedure Act 1921). Some contracts expressly allow a party to cancel after the death of one or both of two or more purchasers (or sellers).

That is, unless the contract of sale provides differently, both you and your spouse's estate would continue to be liable under the contract. You might contact the sellers to see if they would let you out of the contract.

QUESTION: IF I HAVE SIGNED A CONTRACT TO SELL (OR PURCHASE) A HOUSE (OR CONDOMINIUM OR COOPERATIVE APARTMENT) AND THE OTHER PARTY REFUSES TO PERFORM ON THE DATE SET FOR CLOSING, WHAT CAN I DO?

ANSWER: Of course, check with the attorney representing you on the contract. The first document to check will be the contract of sale. Among other things, it will be reviewed to see if it provided that the date for closing was to be treated as a "time of the essence date." It would be unusual if it did; but if it does, you could declare the other party in default. However, standard residential contracts of sale for houses, condominiums and cooperatives do not include such a provision. In that situation, case law allows you to send a notice to the other party declaring time to be of the essence on a new date specified by you, providing that the new date gives the party a reasonable time to comply in the circumstances (normally at least two weeks after the notice). It should be noted that various enforcement remedies for a default will often end up in court where a judge will be able to exercise its powers in the nature of equitable proceedings, so sympathetic circumstances may sway the court in the application of remedies for technical violations of the rights of the parties.

Property Condition Disclosure Act Enacted

By Karl B. Holtzschue

New Law Effective March 1, 2002

On November 13, 2001, Governor Pataki signed into law the Property Condition Disclosure Act (PCDA), which becomes effective on March 1, 2002.[1] The PCDA adds a new article 14 to the Real Property Law, which requires that a Property Condition Disclosure Statement (PCDS) be delivered by the seller to the buyer of residential real property prior to the signing by the buyer of a binding contract of sale. As described below, the original bill[2] was substantially revised before its final enactment.

According to the legislative findings in the PCDA, the Legislature concluded that the prior ad hoc process for home sales created conflicts and misunderstandings and that the PCDS can supplement information provided by professional inspections and tests to provide sellers and buyers with a better basis for negotiation of a purchase and sale agreement. The PCDA does not diminish the responsibility of buyers to carefully examine the property and public records pertaining to the property.

Definitions

As defined in section 461 of the PCDA, "residential real property" means real property improved by a one- to four-family dwelling, but *not*: (a) unimproved real property upon which such a dwelling is to be constructed; (b) condominium units or cooperative apartments; or (c) property in a homeowners' association that is not owned in fee simple by the seller. "Real estate purchase contract" means, with respect to residential real property: (a) a contract for purchase or exchange; (b) a lease with an option to purchase; (c) a lease with obligation to purchase; or (d) an installment land sale contract. "Binding contract of sale" means a real estate purchase contract or offer that would, upon signing by the seller and subject to satisfaction of any contingencies, require the buyer to accept a transfer of title. "Knowledge" means only *actual* knowledge of a defect of condition by the seller. The original version of the PCDA also included "constructive" knowledge of the seller, but that was removed in the final bill, primarily due to the objections of the Real Property Law Section of the New York State Bar Association.

Property Condition Disclosure Statement

Under section 462, the seller is required to complete and sign the PCDS and cause it to be *delivered to the buyer* (or buyer's agent) *prior to the signing by the buyer* of a binding contract of sale. A *copy* of the PCDS, containing the signatures of the seller and buyer, must be *attached* to the real estate purchase contract. The PCDA expressly states that nothing in the article is intended to prevent the parties from entering into "agreements of any kind or nature with respect to the physical condition of the property" to be sold, including, but not limited to, agreements for the sale of real property "as is." The primary purpose of that statement seems to be to allow continuation of the standard practice of including an "as is" clause in contracts of sale. The standard clause states that the buyer has inspected the property and accepts it "as is" in its present condition and state of repair, subject to reasonable use, wear, tear and natural deterioration between the date of the contract and the date of the closing (transfer of title).[3] Thus, having received the PCDS before signing the contract of sale and assuming that the PCDS is true and complete, the buyer agrees to accept the present condition of the property. Not included in the final bill was a suggestion by the Real Property Law Section that would have allowed the parties to limit any potential damages or remedies by express agreement. It is not clear how far the final language would allow the parties to go in adding other language "with respect to the physical condition of the property."

48 Questions Asked

The PCDA has 48 questions, listed in four groups: (1) general (1-9); (2) environmental (10-19); (3) structural (20-25); and (4) mechanical (26-47) (Question 48 asks about the school district). In addition to answering "YES" or "NO," if the question is not applicable, the seller may check "NA"; if the answer is unknown, the seller may check "UNKN." The *general* questions include: how long has the property been owned and occupied; what is the age of the structure (with a note about lead paint if built before 1978);[4] does anyone else have rights to use or occupy the property (other than as stated in the public record); has anyone claimed title or denied the seller access to the property; are there electric or gas surcharges; are there certificates of occupancy?

The *environmental* questions are prefaced by a note to the seller, giving nonexclusive lists of petroleum products and hazardous and toxic substances and stating that hazardous or toxic substances are "products that could pose short- or long-term danger to personal health or the environment." This is a significant improvement over the use of defined terms in the original bill that were only contained in the statute, not in the PCDS itself (so that a seller would be unaware of the definitions), and made cross-references to environmental statutes and regulations published elsewhere. Though the new questions include lists that are expressly stated to be nonexclusive, they go a long way to making the PCDS more user-

friendly. The standard as to hazardous or toxic substances implies that only uses of products that pose dangers should be considered (presumably, small spills of gasoline for a lawn mower would not be reportable). The questions ask about location in a designated floodplain and a designated wetland, matters that are not always easy for a layman to determine precisely.[5] The condition of fuel storage tanks must be disclosed, one of the most likely sources of problems. Questions are also asked about conditions of which the seller may not be aware, such as landfill, asbestos, lead plumbing and radon. The environmental questions ask about testing as well as spills.

The *structural* questions address water or smoke damage, infestation or damage by pests and testing therefor, and type of roof. The questions about the roof and structural systems both ask about known "*material defects*." There is no definition of that term because the draftsmen could not come up with one that was acceptable to everyone. The longer but still vague definition in the original bill was rejected because it was not set forth in the PCDS itself and was not particularly helpful anyway.[6] Presumably, "material defects" will be limited in practice and in the courts to only those that really matter to a buyer, either by reason of a significant cost to cure or a significant impact on the occupants (such as a gas leak). Buyers are most likely to seek help from the brokers in attempting to answer these questions, and it is hoped that they will encourage sellers to answer them sensibly as well as truthfully.

The questions as to *mechanical* systems and services ask about water source, testing for water quality and/or flow rate, sewage system and electric service. The sewage system and electric service questions again use the "*material defects*" standard. Standing water is the standard on flooding, drainage or grading problems and basement seepage (as suggested by the Real Property Law Section). The 16 questions about plumbing, heating and other mechanical systems also use the "*material defects*" standard.[7] Question 48 about the school district was tacked on at the end because of the importance of the information and litigation over it.[8]

The most troublesome questions for sellers are clearly those related to environmental matters and those relating to material defects. The questions about asbestos, lead plumbing, and pest infestation and damage also expose the seller to second-guessing.

The seller is required to sign a certification that the information in the PCDS is true and complete. The buyer is required to sign an acknowledgment that the PCDS is not a warranty and not a substitute for home, pest, radon or other inspections or testing of the property, or inspection of the public records.

Section 462(3) makes clear that the article does not require a seller to undertake or provide any investigation or inspection of the home or to check public records.

Exemptions

Section 463 lists 14 exemptions from the requirement to deliver a PCDS, such as transfers pursuant to a court order, due to foreclosure, by a fiduciary, by a co-owner or spouse, by a governmental entity or of a newly-constructed property not previously inhabited.

Revised PCDS

If a seller acquires knowledge which renders materially inaccurate a PCDS previously provided, section 464 requires the seller to deliver a *revised* PCDS to the buyer as soon as practicable. Note that the "material" standard is again used. Presumably, a revised PCDS will be required only for significant changes. Section 464 makes clear that a revised PCDS is not required to be provided after transfer of title or occupancy by the buyer, whichever is earlier.

Two Remedies: $500 Credit or Actual Damages for Willful Failure

Section 465 provides two basic remedies. *First*, if the *seller fails to deliver* a PCDS before the buyer signs a binding contract of sale, the buyer is to receive upon the transfer of title a *credit of $500* against the purchase price.[9] This is similar to the remedy in Connecticut, where the amount is $300.[10] This provision allows the seller to treat it as a "buy-out" of the obligation to provide a PCDS and the resulting potential for claims by the buyer.[11] It has apparently operated this way in Connecticut, according to some reports. The "buy-out" does not accomplish all the disclosure objectives of the rest of the PCDA, but it does, in effect, provide funding for inspections and tests and for some repairs.

Second, a seller who provides a PCDS (or provides or fails to provide a revised PCDS) is liable *only* for a *willful* failure to perform as required by the PCDA (that is, to provide a PCDS that is true and complete). For a willful failure, the seller is liable for *actual* damages suffered by the buyer (e.g., not punitive damages).[12] Thus, a failure that is not willful (merely negligent, for example) will not subject the seller to liability. The goal of the sponsors[13] was to catch liars, not elderly sellers who were confused by the questions, forgetful or inadvertently mistaken. Together with the actual knowledge requirement, this standard reduces the original objection to the bill by the Real Property Law Section as a potential trap for the unwary seller. It better passes the "grandmother" test proposed by the Real Property Law Section (could your grandmother understand and successfully answer this questionnaire without unfair exposure to later claims of error?).

Rescission and Statute of Limitations

Note that subsection 2 also states that the remedy of actual damages is "in addition to any other existing

equitable or statutory remedy." In other words, the addition of this new statutory duty and remedy of actual damages is not exclusive of existing remedies, the principal one being rescission. The refusal of the sponsors to limit rescission rights and their refusal to impose a one-year statute of limitations on claims under the PCDA were strongly protested by the Real Property Law Section. On rescission, the Section proposed: (1) expressly prohibiting rescission after the transfer of title (to give security to mortgagees and title insurance companies); (2) allowing the buyer three business days to rescind if a PCDS was not received within seven days after the buyer signed the contract; and (3) allowing the buyer three business days to rescind if a PCDS was received after signing but before the transfer of title, following precedents in several other states. The sponsors adamantly refused to agree to any limits on existing remedies. This concept of not limiting existing remedies is expressly stated in section 467.

The Real Property Law Section also vigorously supported addition of a one-year statute of limitations on claims under the PCDA. The sponsors refused to agree to this limit on remedies. The result is that the applicable statute of limitations should be three years, under CPLR 214(2) for actions to recover on a liability created or imposed by statute.[14] The duty to make the disclosures required by the PCDA is a new statutory requirement that imposes a duty on the seller that did not exist under prior case law.[15] The general rule under existing case law was that the seller had no duty to volunteer any information to the buyer. Among the very few exceptions to the rule were cases involving underground sewage systems[16] and buried hazardous waste.[17] The PCDA thus imposes a new duty and potential liability on the seller.

Duty of Agent

Section 466 provides that an agent representing a seller as listing broker has the duty to "timely" inform the seller of the seller's obligations under the PCDA. An agent representing a buyer (or if the buyer is not represented, the agent representing the seller and dealing with the buyer) has the same duty to timely inform the buyer, but in any event before the buyer signs a binding contract. If the agent performs those duties, the agent has no liability to any party for a violation of the PCDA. Note, however, that the seller's agent has a duty under the agency disclosure act to disclose to the buyer "facts known to the agent materially affecting the value or desirability of the property."[18] Consequently, a seller should be aware of this duty of the agent before making any disclosures to his agent.

Legislative History

On April 30, 1991, the National Association of Realtors announced a nationwide policy to encourage enactment of statutes requiring disclosure by sellers. It was successful in many states over the next few years.[19] The PCDA was introduced in the New York Legislature at the urging of the New York State Association of Realtors (NYSAR) as early as 1998 and again in 1999 as A.1173 and S.5039. As then proposed, the PCDA: (1) required delivery of a PCDS before the *seller* signed the contract; (2) defined "knowledge" to include "*constructive*" knowledge; (3) contained in the statute (but not in the PCDS) complex definitions of "defect," "environment," "hazardous substance," "petroleum" and "release," with the environmental definitions referring to other statutes and regulations; (4) included catch-all questions; (5) provided a remedy of actual damages; and (6) had no penalty for nondelivery of the PCDS. On May 10, 1999, NYSAR issued a Memorandum in Support of the bill, noting that 29 states had similar laws and claiming that they had reduced litigation and enhanced consumer satisfaction. On July 8, 1999, the Real Property Law Section issued a Legislation Report in opposition to Senate Bill S.5039-A, objecting to the number of items, the use of catch-all questions, the lack of a penalty for failure to deliver a PCDS, the exclusion of condominiums and cooperatives, the timing of delivery and uncertainty as to rescission.

On July 17, 1999, a Task Force on Disclosure for the Real Property Law Section was formed, with the author as chair. The Task Force had several meetings to analyze and propose modifications of A.1173-C. On February 16, 2000, the Task Force recommended modifications to require delivery to the buyer before signing, defining defect to be the greater of $2,500 or one percent of the price, deletion of constructive knowledge, limiting the questions to 13, inclusion of a disclaimer option and a $500 penalty for failure to deliver a PCDS. On March 1, 2000, the Task Force met with representatives of NYSAR to discuss and attempt to agree on modifications. After other discussions and exchanges of drafts, the Executive Committee of the Real Property Law Section voted to approve the Task Force's draft, with a couple of modifications, including addition of rescission rights. No further discussions occurred with NYSAR, but on June 5 and 14, 2000, respectively, the Senate and Assembly passed A.1173-C and S.5039-A without modification. On June 28, the Real Property Law Section wrote to the Governor urging a veto. After a meeting with and numerous communications with the Office of Counsel to the Governor,[20] the Governor vetoed the bill in December, stating that his staff stood ready to work on improvements to the bill.

On January 16, 2001, the PCDA was prefiled as A.1762 by the Assembly sponsor in the same form as the prior year. The Executive Committee of the Real Property Law Section approved its own version of the PCDA on January 24, 2001. The Executive Committee of the New York State Bar Association approved that version on April 3, 2001, adding a right of the seller to "opt-out" of providing a PCDS. On May 3, 2001, NYSAR sent a draft of proposed

ammendments to A.1762, including deleting constructive knowledge, clarifying the time of delivery and adding a $750 credit to the buyer at the closing if the seller failed to deliver a PCDS. On May 14 the author sent a letter to Senior Assistant Counsel to the Governor William E. McCarthy commenting on the NYSAR draft and referring to the Governor's veto message. Later in May, the sponsors met with Mr. McCarthy to negotiate modifications to the bill.[21] After many memoranda and e-mails, a compromise was agreed on by the sponsors and the Office of Counsel to the Governor, including a reduction of the credit to $500, and on June 13 the Senate passed the compromise bill as S.5339-A. Senator Libous' Sponsor's Memorandum that accompanied the bill notes that the PCDA changes the common law by requiring the seller to give answers to questions. The bill was sent on June 13 to the Assembly Committee on the Judiciary, where it was held up, apparently due to concern about the $500 credit and concerns over its impact on elderly sellers. On October 22, 2001, it was released and passed by the Assembly.

Conclusion

Convincing the Governor to veto a flawed consumer protection bill based on reasoned criticism was an impressive achievement.[22] The final bill is much improved, even though it lacks limitations on remedies that would have made it more evenly balanced between buyers and sellers. The Real Property Law Section has good reason to be proud of the effort put into analysis and modification of this bill.[23]

Endnotes

1. A.1762-A, S.5339-A of 2001 passed by the Senate on June 13 and the Assembly on Oct. 22, 2001, attached as Exhibit A.
2. A.1173-C of 2000.
3. *See, e.g.,* par. 12 of the NYSBA Residential Contract of Sale (Blumberg form 125).
4. If the building was built before 1978, federal law requires delivery of a lead warning statement, including a ten-day inspection period that may be shortened or waived, and an EPA informational pamphlet. 42 U.S.C.A. § 4852d.
5. The Real Property Law Section unsuccessfully objected to these questions on the ground that floodplain and wetlands maps are often hard to read and should be the sole responsibility of the buyer.
6. Also rejected was a suggestion by the Real Property Law Section that a dollar threshold of the greater of $2,500 or 1 percent of the price be used to define "material."
7. The Real Property Law Section unsuccessfully suggested use of the commonly-used contract standard of "working order."
8. *See, e.g., Casey v. Masullo Bros. Builders Inc.*, 630 N.Y.S.2d 599, 600 (3d Dep't 1995) (fact issues for jury: whether reasonable inquiry would reveal the truth; if the facts were peculiarly with the knowledge of the seller and the seller willfully misrepresented, the failure to ascertain the truth by inspection the public records will not be fatal), citing *Todd v. Pearl Woods, Inc.*, 248 N.Y.S.2d 975, 977 (2d Dep't 1964) (sewer district cost assessment).
9. The sponsors of the bill originally proposed $750, but the number was reduced in the negotiations with the Governor's counsel.
10. Conn. Gen. Stat. Ann. § 20-327b.
11. When approving a version of the PCDA proposed by the Real Property Law Section, the Executive Committee of the New York State Bar Association added a provision allowing the seller to "opt-out" of providing a PCDS without any credit to the buyer. The "buy-out" performs a similar function.
12. Under the California disclosure statute, actual damages has been held to mean compensatory damages, rather than damages as measured by the benefit-of-bargain rule. *Saunders v. Taylor*, 50 Cal. Rptr. 2d 345, 347, 42 Cal. App. 4th 1538 (App. 4th Dist. 1996).
13. The principal sponsor in the Senate was Senator Libous and in the Assembly, the principal sponsor was Assemblyman Brodsky (sometimes referred to herein as the "sponsors").
14. *See, e.g., Hartnett v. N.Y. City Transit Auth.*, 657 N.E.2d 773, 779, 633 N.Y.S.2d 758 (1995); *Gaidon v. Guardian Life Ins. Co.*, 2001 N.Y. LEXIS 1060 No. 52, 53 (New York Court of Appeals May 8, 2001), 750 N.E. 2d 1078; *People v. Parkway Mobile Homes*, Inc., 666 N.Y.S.2d 335, 337 (2d Dep't 1997).
15. *See* Karl B. Holtzschue, *Caveat Emptor in Warren's Weed New York Real Property* (2001); Karl B. Holtzschue on Real Estate Contracts § 2.2.11.1 (PLI 2001); or Karl B. Holtzschue, 1 New York Practice Guide: Real Estate § 2.11[5] (2001).
16. *Young v. Keith*, 492 N.Y.S.2d 489, 491 (3d Dep't 1985), a case that is rarely cited or followed.
17. *Hi Tor Indus. Park, Inc. v. Chemical Bank*, 494 N.Y.S.2d 751, 752 (2d Dep't 1985) (underground storage tanks); *Tahini Invs. v. Bobrowski*, 470 N.Y.S.2d 431, 433 (2d Dep't 1984) (representation of premises as principally a horse farm, buried drums of hazardous waste found).
18. Real Property Law § 443.
19. Pancak, Miceli & Sirmans, *Residential Disclosure Law*: *The Further Demise of Caveat Emptor*, 24 Real Est. L.J. 291 (1996) (27 states); Washburn, *Residential Real Estate Disclosure Legislation,* 44 DePaul L. Rev. 381 (1995).
20. James M. McGuire, Counsel to the Governor, and William E. McCarthy, Senior Assistant Counsel to the Governor.
21. Also present was a representative of NYSAR and the author, at the invitation of counsel to the Governor.
22. The author and the Real Property Law Section are grateful to Messrs. McGuire and McCarthy for their leadership and willingness to listen to the Section's comments on this legislation.
23. On behalf of the Section, the author thanks the many Section members who contributed to this effort.

Karl B. Holtzschue is an attorney in New York City, a member of the Executive Committee of the Real Property Law Section of the New York State Bar Association, an Adjunct Professor at Fordham Law School, an author of books on real estate and a frequent lecturer.

STATE OF NEW YORK

5339--A

2001-2002 Regular Sessions

IN SENATE

May 17, 2001

Introduced by Sen. LIBOUS -- read twice and ordered printed, and when printed to be committed to the Committee on Rules -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the real property law, in relation to disclosure of defects by owners of residential real property upon the sale thereof

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

Section 1. Legislative findings. The legislature hereby finds and declares that residential real estate consumers, both buyers and sellers would benefit from a mechanism intended to increase their ability to obtain information concerning a home purchase and sale. The legislature recognizes that home ownership sales are often complicated by misunderstandings arising from an ad hoc transfer process and conflicting information. A uniform document that regularizes disclosure can supplement information provided by professional inspections and tests to provide sellers and buyers with a better basis for negotiating a purchase and sales agreement. A uniform disclosure statement will alert both buyers and sellers to aspects of properties which may require attention: environmental, structural, mechanical or other potential problem areas, particularly those not readily observable by a visual inspection of the property.

This act is not intended to and does not diminish the responsibility of buyers to carefully examine the property which they intend to purchase and public records pertaining to the property and, in fact, highlights the importance of professional inspections and environmental tests. This act is not intended to and does not limit existing responsibilities by a seller, buyer or agent concerning the condition of the property or potential liabilities or remedies at law, statute or in equity.

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

LBD05050-02-1

This act will significantly improve the transfer process and better serve the interests of all parties to a home purchase. It will increase clarity regarding the nature of the property and will provide greater certainty to contracts entered into by better informed buyers and sellers.

§ 2. The real property law is amended by adding a new article 14 to read as follows:

ARTICLE 14

PROPERTY CONDITION DISCLOSURE IN THE SALE OF RESIDENTIAL REAL PROPERTY

Section 460. Short title.
461. Definitions.
462. Property condition disclosure statement.
463. Exemptions.
464. Revision.
465. Remedy.
466. Duty of an agent.
467. Liability.

§ 460. Short title. This article shall be known and may be cited as the "property condition disclosure act".

§ 461. Definitions. As used in this article, the following terms shall have the following meanings:

1. "Agent" means a person who is licensed as a real estate broker or a real estate salesperson pursuant to section four hundred forty-a of this chapter and is acting in a fiduciary capacity.

2. "Binding contract of sale" means a real estate purchase contract or offer that would, upon signing by the seller and subject to satisfaction of any contingencies, require the buyer to accept a transfer of title.

3. "Knowledge" means only actual knowledge of a defect or condition on the part of the seller of residential real property.

4. "Real estate purchase contract" means any of the following:

(a) a contract which provides for the purchase and sale or exchange of residential real property;

(b) a lease with an option to purchase residential real property;

(c) a lease-with-obligation-to-purchase agreement for residential real property; or

(d) an installment land sale contract for residential real property.

5. "Residential real property" means real property improved by a one to four family dwelling used or occupied, or intended to be used or occupied, wholly or partly, as the home or residence of one or more persons, but shall not refer to (a) unimproved real property upon which such dwellings are to be constructed, or (b) condominium units or cooperative apartments, or (c) property in a homeowners' association that is not owned in fee simple by the seller.

6. "Transfer of title" means delivery of a properly executed instrument conveying title to residential real property and shall include delivery of a real estate purchase contract that is a lease or installment land sale contract.

§ 462. Property condition disclosure statement. 1. Except as is provided in section four hundred sixty-three of this article, every seller of residential real property pursuant to a real estate purchase contract shall complete and sign a property condition disclosure statement as prescribed by subdivision two of this section and cause it, or a copy thereof, to be delivered to a buyer or buyer's agent prior to the signing by the buyer of a binding contract of sale. A copy of the property condition disclosure statement containing the signatures of both

seller and buyer shall be attached to the real estate purchase contract. Nothing contained in this article or this disclosure statement is intended to prevent the parties to a contract of sale from entering into agreements of any kind or nature with respect to the physical condition of the property to be sold, including, but not limited to, agreements for the sale of real property "as is".

2. The following shall be the disclosure form:

PROPERTY CONDITION DISCLOSURE STATEMENT

NAME OF SELLER OR SELLERS:

PROPERTY ADDRESS:

THE PROPERTY CONDITION DISCLOSURE ACT REQUIRES THE SELLER OF RESIDENTIAL REAL PROPERTY TO CAUSE THIS DISCLOSURE STATEMENT OR A COPY THEREOF TO BE DELIVERED TO A BUYER OR BUYER'S AGENT PRIOR TO THE SIGNING BY THE BUYER OF A BINDING CONTRACT OF SALE.

PURPOSE OF STATEMENT: THIS IS A STATEMENT OF CERTAIN CONDITIONS AND INFORMATION CONCERNING THE PROPERTY KNOWN TO THE SELLER. THIS DISCLOSURE STATEMENT IS NOT A WARRANTY OF ANY KIND BY THE SELLER OR BY ANY AGENT REPRESENTING THE SELLER IN THIS TRANSACTION. IT IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR TESTS AND THE BUYER IS ENCOURAGED TO OBTAIN HIS OR HER OWN INDEPENDENT PROFESSIONAL INSPECTIONS AND ENVIRONMENTAL TESTS AND ALSO IS ENCOURAGED TO CHECK PUBLIC RECORDS PERTAINING TO THE PROPERTY.

A KNOWINGLY FALSE OR INCOMPLETE STATEMENT BY THE SELLER ON THIS FORM MAY SUBJECT THE SELLER TO CLAIMS BY THE BUYER PRIOR TO OR AFTER THE TRANSFER OF TITLE. IN THE EVENT A SELLER FAILS TO PERFORM THE DUTY PRESCRIBED IN THIS ARTICLE TO DELIVER A DISCLOSURE STATEMENT PRIOR TO THE SIGNING BY THE BUYER OF A BINDING CONTRACT OF SALE, THE BUYER SHALL RECEIVE UPON THE TRANSFER OF TITLE A CREDIT OF FIVE HUNDRED DOLLARS AGAINST THE AGREED UPON PURCHASE PRICE OF THE RESIDENTIAL REAL PROPERTY.

"RESIDENTIAL REAL PROPERTY" MEANS REAL PROPERTY IMPROVED BY A ONE TO FOUR FAMILY DWELLING USED OR OCCUPIED, OR INTENDED TO BE USED OR OCCUPIED, WHOLLY OR PARTLY, AS THE HOME OR RESIDENCE OF ONE OR MORE PERSONS, BUT SHALL NOT REFER TO (A) UNIMPROVED REAL PROPERTY UPON WHICH SUCH DWELLINGS ARE TO BE CONSTRUCTED OR (B) CONDOMINIUM UNITS OR COOPERATIVE APARTMENTS OR (C) PROPERTY ON A HOMEOWNERS' ASSOCIATION THAT IS NOT OWNED IN FEE SIMPLE BY THE SELLER.

INSTRUCTIONS TO THE SELLER:

(a) ANSWER ALL QUESTIONS BASED UPON YOUR ACTUAL KNOWLEDGE.

(b) ATTACH ADDITIONAL PAGES WITH YOUR SIGNATURE IF ADDITIONAL SPACE IS REQUIRED.

(c) COMPLETE THIS FORM YOURSELF.

(d) IF SOME ITEMS DO NOT APPLY TO YOUR PROPERTY, CHECK "NA" (NON-APPLICABLE). IF YOU DO NOT KNOW THE ANSWER CHECK "UNKN" (UNKNOWN).

SELLER'S STATEMENT: THE SELLER MAKES THE FOLLOWING REPRESENTATIONS TO THE BUYER BASED UPON THE SELLER'S ACTUAL KNOWLEDGE AT THE TIME OF SIGNING THIS DOCUMENT. THE SELLER AUTHORIZES HIS OR HER AGENT, IF ANY, TO PROVIDE A COPY OF THIS STATEMENT TO A PROSPECTIVE BUYER OF THE RESIDENTIAL REAL PROPERTY. THE FOLLOWING ARE REPRESENTATIONS MADE BY THE SELLER AND ARE NOT THE REPRESENTATIONS OF THE SELLER'S AGENT.

GENERAL INFORMATION

1. HOW LONG HAVE YOU OWNED THE PROPERTY?

2. HOW LONG HAVE YOU OCCUPIED THE PROPERTY?

3. WHAT IS THE AGE OF THE STRUCTURE OR STRUCTURES? NOTE TO BUYER--IF THE STRUCTURE WAS BUILT BEFORE 1978 YOU ARE ENCOURAGED TO INVESTIGATE FOR THE PRESENCE OF LEAD BASED PAINT.

4. DOES ANYBODY OTHER THAN YOURSELF HAVE A LEASE, EASEMENT OR ANY OTHER RIGHT TO USE OR OCCUPY ANY PART OF YOUR PROPERTY OTHER THAN THOSE STATED IN DOCUMENTS AVAILABLE IN THE PUBLIC RECORD, SUCH AS RIGHTS TO USE A ROAD OR PATH OR CUT TREES OR CROPS. YES NO UNKN NA

5. DOES ANYBODY ELSE CLAIM TO OWN ANY PART OF YOUR PROPERTY? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

6. HAS ANYONE DENIED YOU ACCESS TO THE PROPERTY OR MADE A FORMAL LEGAL CLAIM CHALLENGING YOUR TITLE TO THE PROPERTY? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

7. ARE THERE ANY FEATURES OF THE PROPERTY SHARED IN COMMON WITH ADJOINING LAND OWNERS OR A HOMEOWNERS ASSOCIATION, SUCH AS WALLS, FENCES OR DRIVEWAYS? YES NO UNKN NA (IF YES DESCRIBE BELOW)

8. ARE THERE ANY ELECTRIC OR GAS UTILITY SURCHARGES FOR LINE EXTENSIONS, SPECIAL ASSESSMENTS OR HOMEOWNER OR OTHER ASSOCIATION FEES THAT APPLY TO THE PROPERTY? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

9. ARE THERE CERTIFICATES OF OCCUPANCY RELATED TO THE PROPERTY? YES NO UNKN NA (IF NO, EXPLAIN BELOW)

ENVIRONMENTAL

NOTE TO SELLER - IN THIS SECTION, YOU WILL BE ASKED QUESTIONS REGARDING PETROLEUM PRODUCTS AND HAZARDOUS OR TOXIC SUBSTANCES THAT YOU KNOW TO HAVE BEEN SPILLED, LEAKED OR OTHERWISE BEEN RELEASED ON THE PROPERTY OR FROM THE PROPERTY ONTO ANY OTHER PROPERTY. PETROLEUM PRODUCTS MAY INCLUDE, BUT ARE NOT LIMITED TO, GASOLINE, DIESEL FUEL, HOME HEATING FUEL, AND LUBRICANTS. HAZARDOUS OR TOXIC SUBSTANCES ARE PRODUCTS THAT COULD POSE SHORT- OR LONG-TERM DANGER TO PERSONAL HEALTH OR THE ENVIRONMENT IF THEY ARE NOT PROPERLY DISPOSED OF, APPLIED OR STORED. THESE INCLUDE, BUT ARE NOT LIMITED TO, FERTILIZERS, PESTICIDES AND INSECTICIDES, PAINT INCLUDING PAINT THINNER, VARNISH REMOVER AND WOOD PRESERVATIVES, TREATED WOOD, CONSTRUCTION MATERIALS SUCH AS ASPHALT AND ROOFING MATERIALS, ANTIFREEZE AND OTHER AUTOMOTIVE PRODUCTS, BATTERIES, CLEANING SOLVENTS INCLUDING SEPTIC TANK CLEANERS, HOUSEHOLD CLEANERS AND POOL CHEMICALS AND PRODUCTS CONTAINING MERCURY AND LEAD.

NOTE TO BUYER - IF CONTAMINATION OF THIS PROPERTY FROM PETROLEUM PRODUCTS AND/OR HAZARDOUS OR TOXIC SUBSTANCES IS A CONCERN TO YOU, YOU ARE URGED TO CONSIDER SOIL AND GROUNDWATER TESTING OF THIS PROPERTY.

10. IS ANY OR ALL OF THE PROPERTY LOCATED IN A DESIGNATED FLOODPLAIN? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

11. IS ANY OR ALL OF THE PROPERTY LOCATED IN A DESIGNATED WETLAND? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

12. IS THE PROPERTY LOCATED IN AN AGRICULTURAL DISTRICT? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

13. WAS THE PROPERTY EVER THE SITE OF A LANDFILL? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

14. ARE THERE OR HAVE THERE EVER BEEN FUEL STORAGE TANKS ABOVE OR BELOW THE GROUND ON THE PROPERTY? YES NO UNKN NA IF YES, ARE THEY CURRENTLY IN USE? YES NO UNKN NA LOCATION(S) ARE THEY LEAKING OR HAVE THEY EVER LEAKED? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

15. IS THERE ASBESTOS IN THE STRUCTURE? YES NO UNKN NA (IF YES, STATE LOCATION OR LOCATIONS BELOW)

16. IS LEAD PLUMBING PRESENT? YES NO UNKN NA (IF YES, STATE LOCATION OR LOCATIONS BELOW)

17. HAS A RADON TEST BEEN DONE? YES NO UNKN NA (IF YES, ATTACH A COPY OF THE REPORT)

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18. HAS MOTOR FUEL, MOTOR OIL, HOME HEATING FUEL, LUBRICATING OIL OR ANY OTHER PETROLEUM PRODUCT, METHANE GAS, OR ANY HAZARDOUS OR TOXIC SUBSTANCE SPILLED, LEAKED OR OTHERWISE BEEN RELEASED ON THE PROPERTY OR FROM THE PROPERTY ONTO ANY OTHER PROPERTY? YES NO UNKN NA (IF YES, DESCRIBE BELOW)

19. HAS THE PROPERTY BEEN TESTED FOR THE PRESENCE OF MOTOR FUEL, MOTOR OIL, HOME HEATING FUEL, LUBRICATING OIL, OR ANY OTHER PETROLEUM PRODUCT, METHANE GAS, OR ANY HAZARDOUS OR TOXIC SUBSTANCE? YES NO UNKN NA (IF YES, ATTACH REPORT(S))

STRUCTURAL

20. IS THERE ANY ROT OR WATER DAMAGE TO THE STRUCTURE OR STRUCTURES? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

21. IS THERE ANY FIRE OR SMOKE DAMAGE TO THE STRUCTURE OR STRUCTURES? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

22. IS THERE ANY TERMITE, INSECT, RODENT OR PEST INFESTATION OR DAMAGE? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

23. HAS THE PROPERTY BEEN TESTED FOR TERMITE, INSECT, RODENT OR PEST INFESTATION OR DAMAGE? YES NO UNKN NA (IF YES, PLEASE ATTACH REPORT(S))

24. WHAT IS THE TYPE OF ROOF/ROOF COVERING (SLATE, ASPHALT, OTHER)? ANY KNOWN MATERIAL DEFECTS? HOW OLD IS THE ROOF? IS THERE A TRANSFERABLE WARRANTEE ON THE ROOF IN EFFECT NOW? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

25. ARE THERE ANY KNOWN MATERIAL DEFECTS IN ANY OF THE FOLLOWING STRUCTURAL SYSTEMS: FOOTINGS, BEAMS, GIRDERS, LINTELS, COLUMNS OR PARTITIONS. YES NO UNKN NA (IF YES, EXPLAIN BELOW)

MECHANICAL SYSTEMS & SERVICES

26. WHAT IS THE WATER SOURCE (CIRCLE ALL THAT APPLY - WELL, PRIVATE, MUNICIPAL, OTHER)? IF MUNICIPAL, IS IT METERED? YES NO UNKN NA

27. HAS THE WATER QUALITY AND/OR FLOW RATE BEEN TESTED? YES NO UNKN NA (IF YES, DESCRIBE BELOW)

28. WHAT IS THE TYPE OF SEWAGE SYSTEM (CIRCLE ALL THAT APPLY - PUBLIC SEWER, PRIVATE SEWER, SEPTIC OR CESSPOOL)? IF SEPTIC OR CESSPOOL, AGE? DATE LAST PUMPED? FREQUENCY OF PUMPING? ANY KNOWN MATERIAL DEFECTS? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

29. WHO IS YOUR ELECTRIC SERVICE PROVIDER? WHAT IS THE AMPERAGE? DOES IT HAVE CIRCUIT BREAKERS OR FUSES? PRIVATE OR PUBLIC POLES? ANY KNOWN MATERIAL DEFECTS? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

30. ARE THERE ANY FLOODING, DRAINAGE OR GRADING PROBLEMS THAT RESULTED IN STANDING WATER ON ANY PORTION OF THE PROPERTY? YES NO UNKN NA (IF YES, STATE LOCATIONS AND EXPLAIN BELOW)

31. DOES THE BASEMENT HAVE SEEPAGE THAT RESULTS IN STANDING WATER? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

ARE THERE ANY KNOWN MATERIAL DEFECTS IN ANY OF THE FOLLOWING (IF YES, EXPLAIN BELOW. USE ADDITIONAL SHEETS IF NECESSARY):

32. PLUMBING SYSTEM? YES NO UNKN NA

33. SECURITY SYSTEM? YES NO UNKN NA

34. CARBON MONOXIDE DETECTOR? YES NO UNKN NA

35. SMOKE DETECTOR? YES NO UNKN NA

36. FIRE SPRINKLER SYSTEM? YES NO UNKN NA

37. SUMP PUMP? YES NO UNKN NA

38. FOUNDATION/SLAB? YES NO UNKN NA

39. INTERIOR WALLS/CEILINGS? YES NO UNKN NA
40. EXTERIOR WALLS OR SIDING? YES NO UNKN NA
41. FLOORS? YES NO UNKN NA
42. CHIMNEY/FIREPLACE OR STOVE? YES NO UNKN NA
43. PATIO/DECK? YES NO UNKN NA
44. DRIVEWAY? YES NO UNKN NA
45. AIR CONDITIONER? YES NO UNKN NA
46. HEATING SYSTEM? YES NO UNKN NA
47. HOT WATER HEATER? YES NO UNKN NA
48. THE PROPERTY IS LOCATED IN THE FOLLOWING SCHOOL DISTRICT UNKN
NOTE: BUYER IS ENCOURAGED TO CHECK PUBLIC RECORDS CONCERNING THE PROPERTY (E.G. TAX RECORDS AND WETLAND AND FLOOD PLAIN MAPS)
THE SELLER SHOULD USE THIS AREA TO FURTHER EXPLAIN ANY ITEM ABOVE. IF NECESSARY, ATTACH ADDITIONAL PAGES AND INDICATE HERE THE NUMBER OF ADDITIONAL PAGES ATTACHED.

_____

_____

_____

_____

SELLER'S CERTIFICATION: SELLER CERTIFIES THAT THE INFORMATION IN THIS PROPERTY CONDITION DISCLOSURE STATEMENT IS TRUE AND COMPLETE TO THE SELLER'S ACTUAL KNOWLEDGE AS OF THE DATE SIGNED BY THE SELLER. IF A SELLER OF RESIDENTIAL REAL PROPERTY ACQUIRES KNOWLEDGE WHICH RENDERS MATERIALLY INACCURATE A PROPERTY CONDITION DISCLOSURE STATEMENT PROVIDED PREVIOUSLY, THE SELLER SHALL DELIVER A REVISED PROPERTY CONDITION DISCLOSURE STATEMENT TO THE BUYER AS SOON AS PRACTICABLE. IN NO EVENT, HOWEVER, SHALL A SELLER BE REQUIRED TO PROVIDE A REVISED PROPERTY CONDITION DISCLOSURE STATEMENT AFTER THE TRANSFER OF TITLE FROM THE SELLER TO THE BUYER OR OCCUPANCY BY THE BUYER, WHICHEVER IS EARLIER.

SELLER DATE

SELLER DATE

BUYER'S ACKNOWLEDGMENT: BUYER ACKNOWLEDGES RECEIPT OF A COPY OF THIS STATEMENT AND BUYER UNDERSTANDS THAT THIS INFORMATION IS A STATEMENT OF CERTAIN CONDITIONS AND INFORMATION CONCERNING THE PROPERTY KNOWN TO THE SELLER. IT IS NOT A WARRANTY OF ANY KIND BY THE SELLER OR SELLER'S AGENT AND IS NOT A SUBSTITUTE FOR ANY HOME, PEST, RADON OR OTHER INSPECTIONS OR TESTING OF THE PROPERTY OR INSPECTION OF THE PUBLIC RECORDS.

BUYER DATE

BUYER DATE

3. Nothing in this article shall require a seller to undertake or provide for any investigation or inspection of his or her residential real property or to check any public records.

§ 463. Exemptions. A property condition disclosure statement shall not be required in connection with any of the following transfers of residential real property:

1. A transfer pursuant to a court order, including, but not limited to, a transfer order by a probate court during the administration of a decedent's estate, a transfer pursuant to a writ of execution, a transfer by a trustee in bankruptcy or debtor-in-possession, a transfer as a result of the exercise of the power of eminent domain, and a transfer that results from a decree for specific performance of a contract or other agreement between two or more persons;

2. A transfer to mortgagee or an affiliate or agent thereof by a mortgagor by deed in lieu of foreclosure or in satisfaction of the mortgage debt;

3. A transfer to a beneficiary of a deed of trust;

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4. A transfer pursuant to a foreclosure sale that follows a default in the satisfaction of an obligation that is secured by a mortgage;

5. A transfer by a sale under a power of sale that follows a default in the satisfaction of an obligation that is secured by a mortgage;

6. A transfer by a mortgagee, or a beneficiary under a mortgage, or an affiliate or agent thereof, who has acquired the residential real property at a sale under a mortgage or who has acquired the residential real property by a deed in lieu of foreclosure;

7. A transfer by a fiduciary in the course of the administration of a decedent's estate, a guardianship, a conservatorship, or a trust;

8. A transfer from one co-owner to one or more other co-owners;

9. A transfer made to the transferor's spouse or to one or more persons in the lineal consanguinity of one or more of the transferors;

10. A transfer between spouses or former spouses as a result of a decree of divorce, dissolution of marriage, annulment, or legal separation or as a result of property settlement agreement incidental to a decree of divorce, dissolution of marriage, annulment or legal separation;

11. A transfer to or from the state, a political subdivision of the state, or another governmental entity;

12. A transfer that involves newly constructed residential real property that previously had not been inhabited;

13. A transfer by a sheriff; or

14. A transfer pursuant to a partition action.

§ 464. Revision. If a seller of residential real property acquires knowledge which renders materially inaccurate a property condition disclosure statement provided previously, the seller shall deliver a revised property condition disclosure statement to the buyer as soon as practicable. In no event, however, shall a seller be required to provide a revised property condition disclosure statement after the transfer of title from the seller to the buyer or occupancy by the buyer, whichever is earlier.

§ 465. Remedy. 1. In the event a seller fails to perform the duty prescribed in this article to deliver a disclosure statement prior to the signing by the buyer of a binding contract of sale, the buyer shall receive upon the transfer of title a credit of five hundred dollars against the agreed upon purchase price of the residential real property.

2. Any seller who provides a property condition disclosure statement or provides or fails to provide a revised property condition disclosure statement shall be liable only for a willful failure to perform the requirements of this article. For such a willful failure, the seller shall be liable for the actual damages suffered by the buyer in addition to any other existing equitable or statutory remedy.

§ 466. Duty of an agent. An agent representing a seller of residential real property as a listing broker shall have the duty to timely inform each seller represented by that agent of the seller's obligations under this article. An agent representing a buyer of residential real property, or, if the buyer is not represented by an agent, the agent representing a seller of residential real property and dealing with a prospective buyer, shall have the duty to timely (in any event, before the buyer signs a binding contract of sale) inform such buyer of the buyer's rights and obligations under this article. If an agent performs the duties and obligations imposed upon him or her pursuant to this section, the agent shall have no further duties under this article and shall not be liable to any party for a violation of this article.

§ 467. Liability. Nothing contained in this article shall be construed as limiting any existing legal cause of action or remedy at law, in statute or in equity.

§ 3. This act shall take effect on the first day of March in the year next succeeding the year in which it shall have become a law and shall apply to any real estate purchase contract entered into on or after such date.

FannieMae/FreddieMac Mortgage

Effective January 1, 2001: Defaulting Mortgagors Beware

By Steven J. Baum

The new Single-Family FannieMae/FreddieMac mortgage, to be used in all residential transactions as of January 1, 2001, contains nine additional pages compared to the last version.

The new mortgage contains definitions and covenants designed to thwart many of the defenses interposed in foreclosure actions by crafty mortgagors and their attorneys. Below is a summary of important provisions both a defaulting mortgagor's attorney and a lender's attorney should be aware of. The actual document is attached as an exhibit to this article.

For more information on this mortgage, and the new Uniform Note and the Uniform Modification Agreement, visit www.fanniemae.com.

Covenants

Borrower's Promise to Pay (Paragraph 1)

Critical language has been added to this covenant, setting forth the right of a lender to accept or reject partial payments. Defaulting mortgagors often interpose defenses such as waiver or estoppel in a foreclosure action, based on a lender's acceptance of less than the full payment due. This covenant gives the lender the right to hold on to any monies sent to it by mortgagor, without fear of waiving any of its rights to later enforce the default provisions of the mortgage.

Borrower's Obligation to Maintain Hazard Insurance (Paragraph 5)

When a mortgagor's escrow account runs dry, or if a non-escrowed mortgagor fails to pay hazard insurance, a lender commonly purchases "forced place coverage" on the property to protect its interest in the premises. This type of coverage is often significantly more costly than what mortgagors would pay for, or could obtain on their own. However, forced place coverage can be bound instantaneously, without review of a property's condition. Thus, there is greater risk for the insuring company. It also continues through the time a lender takes possession of the premises after foreclosure, adding liability coverage when title vests.

In a foreclosure action, mortgagors have raised the forced place insurance cost issue, complaining that the lender should have "shopped around" for coverage, or could have obtained coverage for less money. As insurance monies advanced by a mortgagee are secured by the mortgage, mortgagors do not like the added cost of insurance when reinstating or paying off their loan. Not being familiar with the nuances of this type of insurance, many judges have viewed the problem as an issue of fact, denying a mortgagee's summary judgment motion, further delaying the foreclosure.

The new language of the covenant clearly states that coverage purchased by a lender may in fact be much more costly than what the mortgagor could have obtained. The use of insurance proceeds is better defined in this paragraph, allowing a lender to retain insurance proceeds until it has had an opportunity to inspect the premises for repair. The lender is not obligated to immediately sign off on an insurance check until it confirms needed repairs have been completed.

In addition, if a mortgagor hires a public adjuster, they do so at their own expense; the cost may not be deducted from the insurance proceeds.

Lastly, the lender may choose to repair the property with insurance proceeds, or apply the funds to the loan. This option is particularly attractive to a lender facing a defaulting mortgagor, who "demands" repair of their home after fire or other damage to the secured premises. The insurance funds may simply be applied to the outstanding loan amount.

Borrowers Loan Application (Paragraph 8)

Fraud in the loan application, whenever discovered, is a default under the terms of the mortgage.

Mortgage Insurance (Paragraph 10)

It's common for a lender to purchase mortgage insurance from a third party on high loan-to-value mortgages. This type of policy protects the lender from certain losses if the mortgage goes into default within a certain period of time.

In a foreclosure, mortgagors have argued that the lender will be made whole by this insurance, and hence there is really no reason to pursue action against the borrowers. Tucked away as the fourth paragraph in this covenant, is the statement "Borrower is not a party to the Mortgage Insurance policy," thus

eliminating any chances of success with such a defense.

Obligations of Borrower and of Persons Taking Over Borrower's Rights or Obligations (Paragraph 13)

An obligor, even though they deeded out their interest to one who assumed their debt, may still be liable for a deficiency judgment, unless the mortgagee released them of their obligation. Mortgagors often think they can absolve themselves of liability just by having someone else assume their mortgage. They become quite surprised, when some years later, after a default by the current obligor, they find themselves named as a defendant in a foreclosure action.

This covenant warns mortgagors that unless they receive a written release from the lender, they are still obligated under the loan instrument.

Loan Charges (Paragraph 14)

When a loan goes into default, a lender needs to take various steps to protect its interest. Visual inspections of the premises once a month are common, to insure the property has not gone into a state of disrepair, or been abandoned. Whether or not a lender should foreclose may also depend on an appraisal or other form of valuation of the premises. When these costs are incurred due to a default, they are added to the amount secured by the mortgage.

In the past, mortgagors in default have argued that unless such charges are specifically allowed for in the mortgage, they may not be added to the amount due. The new language of paragraph 13 expressly acknowledges that certain costs in connection with a default may be paid for by the lender. They are part of the sums secured by the mortgage.

Notices Required Under the Security Instrument (Paragraph 15)

Always an issue in foreclosure actions is where notice of default has been sent. Despite the fact that mortgagors move, relocate, get divorced, or disappear without informing their lender, notices of default are supposed to be sent to a borrower's current address. Not anymore. Notice to one borrower is notice to all pursuant to paragraph 15. If the borrowers move, they must inform the lender of their new address. In addition, the lender is only required to send notice to the property address, unless told otherwise. And, a mortgagor can only use one designated address for notice.

It's about time someone placed an affirmative obligation on borrowers to let their lender know where they are.

Borrower's Right to Have Lender's Enforcement of the Security Instrument Discontinued (Paragraph 19)

This covenant allows a borrower the right to reinstate a defaulted mortgage under certain conditions (payment of fees and costs, execute a stipulation agreement), but only up until the judgment of foreclosure has been entered. While lenders will usually accept reinstatement, difficulties arise when they are forced to accept reinstatement—e.g., the day before sale (contacting the referee to cancel can be a problem). Defaulting mortgagors should be aware that they cannot wait until the last minute to bring the loan current.

If the mortgagor violated the due on sale clause of paragraph 18, the lender does not have to allow reinstatement.

Lender's and Borrower's Right to Notice of Grievance (Paragraph 20)

Completely new is language prohibiting a mortgagor from bringing, or being part of, a class action against the current mortgagee for alleged wrongs committed by it, unless the mortgagee is first given notice and a reasonable opportunity to cure the impropriety.

Non-Uniform Covenants (Paragraph 22)

Lest a mortgagor in default break into tears after reading the new mortgage, paragraph 22 offers them some comfort. Basically the same language as in the last version, the lender still must give a mortgagor 30 days to reinstate the mortgage before commencing a foreclosure.

Conclusion

Whether you represent a borrower, lender or servicer, you must be familiar with the new provisions of the FannieMae/FreddieMac Single-Family Mortgage. Those representing mortgagors in default are well advised to review the mortgage prior to interposing defenses in an answer to a foreclosure action. The precise language of the instrument may allow a court to easily dispose of your objections. If you represent the plaintiff in a foreclosure action, the instrument provides you with several pieces of ammunition you can use to efficiently enforce your client's interests.

The author is a member of the Executive Committee of the Real Property Law Section and past Co-Chair of the Subcommittee on Foreclosures and Workouts. Mr. Baum is also Designated Counsel for FreddieMac and Designated Counsel for FannieMae for Upstate New York evictions.

Mortgage Documents

New York - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT (Form 3033)

Type of Instrument
Mortgage

Instrument Revision Date
1/01

Instrument Last Modified
N/A

Summary Page Last Modified
7/28/00

Printing Instructions
The PDF document must be printed on letter size paper, using portrait format.

Use This Document For

State	Lien Type	Product Type	Property Type	Occupancy Type
NY	**First**	**All**	**All, except cooperatives**	**All**

Required Changes
The following changes MUST always be made to this document:

None

Authorized Changes
The following changes MAY be made to this document at the lender's option or MUST be made under certain circumstances only:

1. Lenders MAY add legends to identify the preparers of the document, consistent with the requirements of state and local laws.

2. Lenders MAY include at the bottom of each page "initial lines" on which borrowers may insert their initials to acknowledge that all pages of the document are present. If these lines are added, lenders MUST require the borrowers to initial the lines on each page of the document.

3. Lenders MAY insert the appropriate acknowledgment in the blank space after the signature lines as documents for individual mortgages are prepared or MAY print documents bearing the appropriate acknowledgment(s) in advance for use as the need arises.

4. Lenders MAY adjust cross-references to section, paragraph, or page numbers, if needed to reflect changes in section, paragraph, or page numbers that result from adding, modifying, or deleting certain language in accordance with another authorized change.
5. Lenders MAY add the words "Purchase Money" in front of or above the caption "Mortgage", if all, or any portion, of the loan proceeds are to be used to purchase the

security property. Lenders MAY also add the following in parentheses either above the caption or in the space provided for the legal description of the property:

(All or part of the purchase price of the Property is paid for with the money loaned.)

6. Lenders MAY name MERS as the mortgagee of record (as nominee for the beneficiary) in this document and, if they do, MUST make the following changes:

(a) Insert a new definition (C), which reads as follows:

(C) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS. FOR PURPOSES OF RECORDING THIS MORTGAGE, MERS IS THE MORTGAGEE OF RECORD.

(b) Redesignate the definition of "Lender" as (D) and then redesignate all subsequent definitions (as E, F, G, etc.) as required.

(c) Delete the first sentence of the first paragraph of the section titled "BORROWER'S TRANSFER TO LENDER OF RIGHTS IN THE PROPERTY" and replace it with the following sentence:

I mortgage, grant and convey the Property to MERS (solely as nominee for Lender and Lender's successors in interest) and its successors in interest subject to the terms of this Security Instrument.

(d) Revise the paragraph of the section titled "BORROWER'S TRANSFER TO LENDER OF RIGHTS IN THE PROPERTY" (as amended above) by adding the following new paragraph at the end of the section:

I understand and agree that MERS holds only legal title to the rights granted by me in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right:

(A) to exercise any or all of those rights, including, but not limited to, the right to foreclose and sell the Property; and

(B) to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

(e) Delete from the first sentence of the first paragraph of the section titled "DESCRIPTION OF THE PROPERTY" the words "I give Lender..." and replace them with the following words:

I give MERS (solely as nominee for Lender and Lender's successors in interest)...

7. Lenders MAY add the following language (as a rider or as the second and third sentences of the last paragraph in Section 9), if the mortgage is secured by a leasehold estate:

I will not give up the rights that I have as a tenant on the Property. I will not cancel or terminate my lease and I will not change or alter that lease unless Lender agrees in writing to the change or amendment.

8. Lenders MAY add to Definition (H). Riders a check-off box for "VA Rider", if they use this document for a VA-guaranteed mortgage that will be delivered to us and such a rider is required to add VA's assumability feature (which overrides the "acceleration" clause in this document).

9. Lenders MAY delete the word "Witnesses" and the two accompanying lines for witness signatures that appear to the left of the Borrower signature lines on Page 18.

10. Lenders MAY delete from the first sentence of the second paragraph under "BORROWER'S RIGHT TO MORTGAGE THE PROPERTY AND BORROWER'S OBLIGATION TO DEFEND OWNERSHIP OF THE PROPERTY" the word "general" and replace it with the word "special", if the security property is located in an area in which security instruments normally provide for a special warranty of title by the borrower (rather than a general warranty).

11. Lenders MAY add an asterisk (*) following the applicable borrower's name in Definition (B) on Page 1 and following the applicable borrower's signature on the last page of the document and then insert the following legend immediately after the execution block on this page, if a borrower is signing the document for the sole purpose of waiving dower rights:

** _____ signs as Borrower solely for the purpose of waiving dower rights without personal obligation for payment of any sums secured by this Security Instrument.*

12. Lenders MAY include the following sentence at the bottom of Page 1 to assist county clerks in identifying a mortgage that is secured by a one- or two-family property.

This Property is or will be principally improved by a one- or two-family house or dwelling only.

13. Lenders MAY add the following language at the top of Page 1 (and in 12-point type), if the mortgage triggers the disclosure requirements of Part 41 of New York's general banking regulations:

This mortgage is a high cost home loan subject to Part 41 of the General Regulations of the Banking Board of the state of New York.

Other Pertinent Information

Any special instructions related to preparation of this document, use of special signature forms, required riders or addenda, etc. are discussed below.

1. If the borrower is an *inter vivos* revocable trust, we may require: a special rider, a different signature form for the trustee signature, and a special signature acknowledgment for the settlor/credit applicant(s). (See Part V, Section 202.06, of the Selling Guide.) Lenders are responsible for making any modifications, including the use of different terminology, needed to conform to the signature forms customarily used in New York and will be held fully accountable for the use of any invalid signature form(s).

   - Each of the trustees must sign this document in a signature block substantially similar to the following, which should be inserted in the Borrower signature lines.

     _____, *Trustee of the* _____ *Trust under trust instrument dated* _____, *for the benefit of* _____ *(Borrower).*

   - Each settlor of the trust who is a credit applicant must sign a signature acknowledgment in a signature block substantially similar to the following, which should be inserted following the Borrower signature lines:

     BY SIGNING BELOW, the undersigned, Settlor(s) of the _____ *Trust under trust instrument dated* _____, *for the benefit of* _____, *acknowledges all of the terms and covenants contained in this Security Instrument and any rider(s) thereto and agrees to be bound thereby.*

     _____*(SEAL)*
     Trust Settlor

2. As an alternative to having borrowers execute a new mortgage and a new note in connection with the refinancing of a mortgage (other than a balloon mortgage that had a conditional refinance option), lenders generally may use the *New York Consolidation, Modification, and Extension Agreement* (Form 3172). However, if additional funds are advanced in connection with the consolidation, the borrowers must also execute a new mortgage and a new note.

3. As an alternative to having borrowers execute a new mortgage and a new note in connection with a fixed-rate mortgage that represents the refinancing of a maturing balloon mortgage that had a conditional refinance option, lenders may use the *New York Consolidation, Modification, and Extension Agreement* (Form 3172).

Mortgage Documents

New York Fixed Rate Note - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT (Form 3233)

Type of Instrument
Note

Instrument Revision Date
1/01

Instrument Last Modified
N/A

Summary Page Last Modified
08/25/00

Printing Instructions
The PDF document must be printed on letter size paper, using portrait format.

Use This Document For

State	Lien Type	Product Type	Property Type	Occupancy Type
NY	**First**	**FRM -- except for balloon, growing-equity, and biweekly payment mortgages; and Start-Up mortgages**	**All, except cooperatives**	**All**

Required Changes
The following changes MUST always be made to this document:

None

Authorized Changes
The following changes MAY be made to this document at the lender's option or MUST be made under certain circumstances only:

1. Lenders MAY include at the bottom of each page "initial lines" on which borrowers may insert their initials to acknowledge that all pages of the document are present. If these lines are added, lenders MUST require the borrowers to initial the lines on each page of the document.

2. Lenders MAY add the borrowers' social security numbers, if the borrowers do not want to provide this information on the security instrument.

3. Lenders MAY adjust cross-references to section, paragraph, or page numbers, if needed to reflect changes in section, paragraph, or page numbers that result from adding, modifying, or deleting certain language in accordance with another authorized change.

Other Pertinent Information
Any special instructions related to preparation of this document, use of special signature forms, required riders or addenda, etc. are discussed below.

1. If the borrower is an *inter vivos* revocable trust, we may require: a special rider, a different signature form for the trustee signature, and a special signature acknowledgment for the settlor/credit applicant(s). (See Part V, Section 202.06, of the Selling Guide.) Lenders are responsible for making any modifications, including the use of different terminology, needed to conform to the signature forms customarily used in New York and will be held fully accountable for the use of any invalid signature form(s).

   - Each of the trustees must sign this document in a signature block substantially similar to the following, which should be inserted in the Borrower signature lines.

     _____, *Trustee of the* _____ *Trust under trust instrument dated* _____, *for the benefit of* _____ *(Borrower).*

2. When completing Section 6(A). Late Charge for Overdue Payments, lenders should specify the maximum late charge percentage allowed by state law, if that amount is less than the late charge we require (as specified in Part I, Section 203.03, of the Servicing Guide). In no instance should lenders specify a late charge greater than our required late charge percentage.

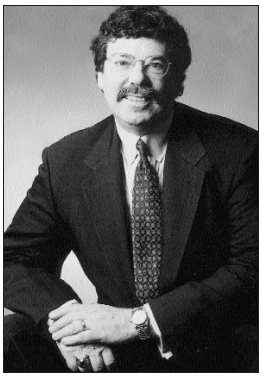
3. When a lender uses the *New York Consolidation, Extension and Modification Agreement* (Form 3172) -- instead of the otherwise applicable security instrument -- in connection with a new fixed-rate mortgage that represents the refinancing of a maturing balloon mortgage that had a conditional refinance option, there is no need for the borrower to execute a separate note.

4. When a lender uses the *New York Consolidation, Extension and Modification Agreement* (Form 3172) in connection with the refinancing of a mortgage (other than a balloon mortgage that had a conditional refinance option) as a fixed-rate mortgage, there is generally no need for the borrower to execute a separate note. However, if additional funds are advanced in connection with the consolidation, the borrower must also execute a new note and a new mortgage.

BERGMAN ON MORTGAGE FORECLOSURES

Thanks for Nothing (Or, the Danger of Being Gracious to Borrowers)

By Bruce J. Bergman



Dealing with desperate (and wily) borrowers often has its pitfalls, but lenders understandably strive to do all that is possible to mitigate losses, even up to the moment of the foreclosure sale. But then, attorneys who prosecute foreclosures with regularity probably have a jaundiced view of 11th hour settlement overtures. A borrower's zeal to save the property is understandable and usually sympathetic, but the paroxysms of assault on the foreclosure process by desperate borrowers can quickly erode compassion. There may be limits to how many times counsel and their mortgagee clients accept with equanimity orders to show cause averring no notices ever received and process service never made, multiple bankruptcy filings, complaints to governmental agencies, *ad nauseam*.

Despite the attacks, and though they may be dismayed, mortgagees nevertheless usually remain amenable to settlement efforts. That such can present some danger, however, is underscored by this scenario in a recent case.[1] Lender postponed foreclosure sales *three* times, in each instance to afford borrowers the chance to refinance. As part of a contemplated fourth adjournment, a postponement agreement was sent to the borrowers. They didn't sign, so the sale was held. About a week after the sale, the borrowers obtained a new loan from another lender and sent the proceeds to the lender bank which just held the sale. The bank rejected the check and the now chagrined borrowers moved to vacate the sale.

Well, the lower court granted the motion on the condition that the foreclosed mortgage be satisfied and that the sale purchasers be reimbursed. This was reversed on appeal, however, because the mistake was not on the part of the foreclosing lender, but was rather a miscommunication between the borrower and the rescue financier. While the good guy (the foreclosing lender) ultimately won, it was at the cost of much delay and expense as a reward for its kindness. Might the cynical point to this invoking the old saw, "no good deed goes unpunished"?

Endnote

1. *Dime Sav. Bank of New York v. Zapala*, 255 A.D.2d 547, 680 N.Y.S.2d 665 (2d Dep't 1998).

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Real Estate Titles, Third Edition

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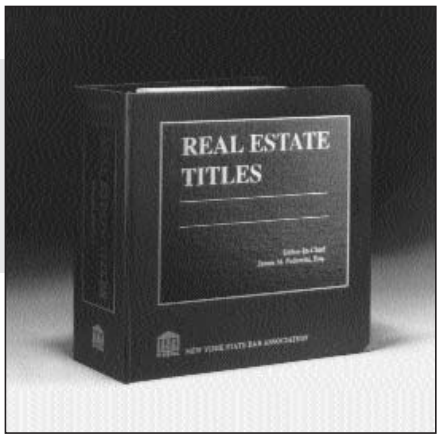

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