NYSBA FALL 2017/WINTER 2018 | VOL. 45 | NO. 3

N.Y. Real Property Law Journal

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

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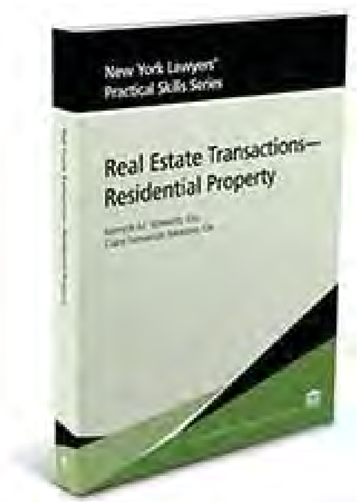
Real Estate Transactions—Residential Property



PRODUCT INFO AND PRICES*

2017-2018 / 628 pp., softbound
PN: 421408 (Book with forms)
PN: 421408E (Downloadable PDF)

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Real Estate Transactions—Residential Property is a practical, step-by-step guide for attorneys representing residential real estate purchasers or sellers. Claire Samuelson Meadow, Esq., an experienced real estate practitioner, prepared the first editions of this easy-to-read, informative reference. Numerous practice guides and a comprehensive collection of forms, including examples of forms used in daily practice, make *Real Estate Transactions—Residential Property* an excellent reference for new and experienced attorneys alike.

This practice guide addresses financing, statute of limitations on litigation matters, help for senior homeowners converting equity in home to cash, and more. Forms have been reviewed and updated as needed. This practice guide also includes a set of Downloadable Forms. The 2017-2018 release is current through the 2017 legislative session.

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Table of Contents

Message from the Chair

Since the publication of the last issue of the *Journal*, we were saddened by the loss of Jon N. Santemma. Jon was a valued member of the RPLS Executive Committee for many years. He was renowned for his knowledge in the condemnation and eminent domain field. He will be missed as both a colleague and a friend.

As I write this message for the Fall issue of the *Journal*, our weather has already dipped into the teens and snow flurries have greeted us on several occasions. As we move from Fall to Winter, the Section committees, task forces and district representatives have been busy with a variety of activities.

The RPLS Student Internship Program continues to grow. Many of the students participating in this program are matched with law firms to provide them with real property law experiences. Contact David Berkey, Shelby Green or Ariel Weinstock if your firm has a potential placement to provide a student with this invaluable "real life" experience. Opportunities are also available for students to work on a project with a committee or task force of the Section.

RPLS committees also continue to be involved in planning and presenting CLE programs. Continuing education programs that will be offered in the coming weeks include commercial leasing, advanced real estate topics and a real estate case law update. As in past years, the Section's Condo and Coop Committee and Not-for-Profit Entity Committee will each offer a CLE program during the Annual Meeting week in January. These programs have been standing room only in past years, and can be expected to be equally popular and informative again this year.

Not to be outdone by our committees, our district representatives also have been planning and offering CLE programs. The Third and Fourth Districts joined with the Young Lawyer's Section to offer a morning CLE in Saratoga followed by an afternoon outing at Saratoga Race Track. District Representatives from the greater New York City area are working together on a CLE to be offered in early 2018, so stay tuned for more details on that event.

But District Representative events have not been limited to CLE programs in recent months. A first for our Section was the Ninth District's participation in a Habitat for Humanity project. Lisa Stenson Desamours coordinated this event, which took place in September. Nine volunteers spent a day ripping out walls and providing other manual labor on a house renovation project.

John Jones has been spearheading the Local Practice Guide for Residential Real Estate Transactions, which is posted on our web site. To date it includes the local customs of approximately half the counties in New York State. This guide, which is available only to our Section's members, offers a valuable resource when handling a residential closing in one of the counties outside their usual geographic area. If you practice in a county that has not yet shared its local customs, please reach out to John so that we can complete this information for all counties in the state.

Finally, mark your calendars for RPLS events which will occur during the NYSBA Annual Meeting week. Our Section's annual business meeting will be held on Thursday, January 25. At that meeting a resolution will be presented to amend our bylaws to add two out of state attorneys to our Executive Committee. As in past years, a CLE program will follow the business meeting. Tom Hall has arranged a program of timely topics and excellent speakers. We look forward to a meaningful meeting. This year the luncheon after the CLE program will be held at 54 Below located at 254 West 54th Street. The full schedule is available on the Association's website. I look forward to seeing many of you at these events.

So, until January, I wish you all a wonderful holiday season and a happy, healthy and prosperous New Year.

Trish Watkins

Save the Dates!

Real Property Law Section Programs during the NYSBA Annual Meeting
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For registration and more information on the above events,
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Navigating the Amazon: The Impact of E-Commerce on Retail Lease Strategies

By S.H. Spencer Compton and Diane Schottenstein

Every real estate industry headline today seems to trumpet the decline of retail leasing and the advent of ecommerce: the so-called "Amazon Effect."[1] One recent article recounts the impact of Amazon on traditional retailers such as Walmart and concludes that:

> It is apparent the Amazon Effect has left America with far more storefronts than needed. Stand-alone stores are being shuttered, with no alternative use for most buildings. Malls and shopping centers go begging as traffic drops, tenants leave, lease rates collapse and the facilities end up wholly or nearly empty. This means you don't want to invest in retail real estate REITs. But it also means that neighborhoods, and sometimes entire towns, will be impacted as these empty buildings reduce interest in housing and push down residential prices.[2]

Amazon has changed the way consumers shop. Shopping center owners have reacted by repositioning their properties in a variety of ways. Some traditional malls are being used as back offices.[3] Other large mall operators have upgraded their properties to create "experiential retail" spaces with attractive entertainment options such as restaurants, meeting spaces, theatres and skating rinks.[4]

Will e-commerce and changing consumer patterns result in a permanent negative impact on the retail market? Can failing retail centers be rehabilitated or are there too many brick and mortar stores chasing too few live retail customers? Whatever the answers to these questions may be, economic downturns in the past have taught us that a well-represented tenant will have a lease exit strategy. Although most leases contain assignment and sublet provisions, if they are not carefully crafted they may not result in a satisfactory lease exit strategy. Provisions such as terminations rights, gross sale thresholds and co-tenancy requirements should be considered and negotiated before the lease is executed.

Keep in mind that time-honored leverage factors (business track record, size of premises, balance sheet/desirability of tenant, desirability of premises, etc.) will always control all negotiations.

Termination Rights

Unless the tenant is a government agency, the landlord is unlikely to agree to a blanket termination right. After all, any bank evaluating making a loan to that landlord will assume the lease will be terminated and give it minimal value in assessing the property's income stream. However, a lease with a termination right narrowly tied to a particular event (such as the death of a key operator or the merger or acquisition of the business in a larger corporate transaction) will receive a higher valuation. Tenant's counsel should identify specific events that would trigger its right to terminate and propose the termination right as a remedy for those circumstances only. This calculus is highly fact specific and should be carefully considered.

"A mall tenant pays rent based upon an agreed set of circumstances. If a key anchor tenant goes dark, there will be less foot traffic and the location will become less valuable."

The tenant might also request a termination right if the landlord becomes insolvent. Although a subordination, non-disturbance and attornment agreement (SNDA) may give the tenant some comfort if the landlord is foreclosed upon, the SNDA will probably not require the bank to fulfill certain landlord obligations, including those relating to unpaid work allowances. The tenant may want the SNDA to provide it with a rent credit equal to any such unpaid allowance. A powerful tenant could require escrowed funds to cover same.

Gross Sales Thresholds

Under certain circumstances, a landlord might agree to a termination right where a specified sales point is not achieved by a certain date. This makes sense both for a tenant concerned about the viability of a location and for a landlord who seeks to share in tenant's sales through percentage rent. The landlord will require prior notice of a termination election and recoupment of costs such as improvement allowances and brokerage. No termination right would be available to a tenant who failed to operate at full capacity; otherwise an intentional slowing down or "going dark" could trigger a termination right.

Co-Tenancy Requirements

A co-tenancy provision requires the landlord to have certain occupants open and operating at its mall as of the tenant's lease commencement date and throughout the term. For example, a high-end fashion retailer may require that its lease not commence until specified other high-end retailers are open and operating. Today it is customary for a space lease in a new mall to require that the anchor stores and a negotiated percentage of retail stores be open and operating as of the commencement date. Sometimes a lease will commence but only percentage rent will be payable with base rent not being due until the co-tenancy threshold has been met. The agreed rationale is that, sufficient foot traffic (e.g. customers) at a mall is necessary to justify rent payments for a tenant.

"To avoid the uncertainty as to what is a reasonable withholding of consent, some leases specify permissible factors that a landlord may consider in deciding whether to refuse consent to an assignment or sublet."

Similarly, a co-tenancy requirement can apply throughout the life of a lease. A mall tenant pays rent based upon an agreed set of circumstances. If a key anchor tenant goes dark, there will be less foot traffic and the location will become less valuable. To protect itself, the landlord will often negotiate for time and flexibility in order to get a replacement anchor tenant (or percentage of other tenants, as the case may be) before a termination right is triggered. Since department stores are on the decline, a landlord may negotiate that an anchor department store can be replaced by two or more smaller stores or by other draws to the mall such as a destination restaurant. The retail tenant, when negotiating the lease provision relating to a hypothetical anchor replacement, must determine if the new tenant will generate the right kind of foot traffic for its business. The landlord, too, needs to be careful in the drafting or it may be left with no viable replacement. For example, if the lease provides that a departing Barnes & Noble must be replaced with a Borders Books or an equivalent national bookseller, such a retailer will be difficult to find. Likewise, a replacement tenant provision that is too narrowly drawn can backfire on landlord: where a provision requires a national food retailer, a strong regional food store such as B.J.'s Warehouse will not qualify as a replacement. To ease the landlord's anchor replacement process, a reduced rent period can be a tenant's remedy before its actual termination right is triggered. Some landlords will require tenants to demonstrate economic harm before a co-tenancy termination right can be exercised.

Subletting and Assignment

Assignment and subletting rights can be reliable exit mechanisms, but the devil is in the details. In an economic downturn, it is likely that the tenant is competing to sublet with several other tenants and may not be able to obtain a suitable sublessee to pay all the rent. Generally, the landlord will not release the tenant from its lease obligations. Besides the actual assignment and subletting provisions, the provisions relating to use, trade names signage and alterations can also create hurdles to subletting or assigning.

In any event, the tenant will want the broadest assignment and subletting rights as possible. If the lease imposes no restriction at all, then the tenant has an unlimited right to assign or sublet because the law generally does not favor restrictions on the alienability of real property. However, in New York, if the lease just requires the landlord's consent, the courts have ruled that the landlord may refuse consent arbitrarily and for any reason or no reason at all and it may even extract a payment as a condition for the consent.[5] There is no inferred landlord obligation to act reasonably unless the lease specifically so requires.[6]

"It is typical for a retail lease to specify a limited use for the property. However, if a tenant can only sublet to a store with the same use and all stores with that use are under economic pressure, tenant could be effectively left with no exit."

The tenant will want the landlord to agree not to unreasonably withhold, delay or condition consent to an assignment or sublet. As expected, there are hundreds of cases interpreting what constitutes reasonable behavior in different circumstances, so a trier of fact is the ultimate arbiter of what is reasonable. In *American Book Co. v. Yeshiva University Development Foundation*, the court set out four factors that are reasonable for a landlord to consider in determining whether to agree to an assignment or sublet: 1) financial qualification of the proposed subtenant; 2) the identity or business character of the subtenant—i.e. its suitability for the particular premises; 3) the proposed use; and 4) the nature of the occupancy.[7] We shall consider each factor below.

Financial qualification is the most objective criteria. A landlord is entitled to satisfy itself that the proposed subtenant has the economic ability to fulfill its obligations to pay rent and to perform the lease obligations. This can require an evaluation of net worth and liquidity. To review the subtenant's identity/business character, considering whether the proposed subtenant has relevant business experience or is a current tenant of the landlord has been found to be reasonable. For use: Is the proposed use prohibited by the other tenant's exclusive rights? Will such use overburden the premises or parking?

What factors might a court deem unreasonable? Unreasonable grounds for denying consent include considerations of mere taste and personal idiosyncrasies of the landlord. In *American Book Company v. Yeshiva University Development Foundation, Inc.*, the Court found that the landlord could not withhold consent based on a philosophical and ideological objection to the proposed tenant's business.[8]

To avoid the uncertainty as to what is a reasonable withholding of consent, some leases specify permissible factors that a landlord may consider in deciding whether to refuse consent to an assignment or sublet. These lists can be long and detailed. For example, the landlord may require a particular net worth threshold, restrict assignments to government offices such as the Department of Motor Vehicles, or reject any proposed subtenant that had previously negotiated for space directly with landlord in the last six months.

Additionally, the landlord usually requires the tenant to reimburse its expenses in connection to an assignment or sublet, and pay any sublease profit to landlord. In any such provision, tenant should be sure that profit is defined as *net* profit so that brokerage, alterations, marketing, legal, free rent and other expenses incurred in connection with the sublet are offset against the income. Further, tenant's profit participation payments to the landlord should be due only to the extent tenant actually receives them. If there are installment payments, and the subtenant or assignee defaults, tenant should be able to stop paying and perhaps be entitled to claw back any payments already made.

"If tenant is not strapped for cash, but is unhappy with a particular location, it could offer to buy out its lease."

Process and timing of a consent request can be critical. Often, the lease will require a fully executed assignment or sublease to be submitted to the landlord for review. Try to have the lease provide that a signed term sheet will suffices to initiate the consent review period instead of waiting for a final fully executed sublease that ultimately may not be approved. Similarly, notwithstanding landlord push-back, try to have the lease provide a time certain by which the landlord must respond to an assignment or sublet consent request. Failure to so timely respond will be deemed consent granted. Remember, delay can foil a deal.

Even if there is a broad assignment or subletting right, a retail tenant can be thwarted by a narrowly drawn use clause that can block an otherwise satisfactory exit transaction. It is typical for a retail lease to specify a limited use for the property. However, if a tenant can only sublet to a store with the same use and all stores with that use are under economic pressure, a tenant could be effectively left with no exit. The tenant should try to negotiate a broader use provision in the event of an assignment or sublet even though the landlord may resist, claiming it knows best concerning what retailers should be in its mall.

A lease provision requiring tenant to operate its business under a specified trade name only can also hinder assignment or subletting. Such a requirement may block a satisfactory exit plan unless the tenant sells its business to an entity that will continue to operate it under the same trade name.

Keep in mind that landlords typically reserve certain rights relating to exterior and interior signage and alterations. Similarly, some leases provide that renewal rights and an expansion option do not accrue to a sublessee or assignee. Such restrictions might make tenant's space less palatable to a replacement tenant.

Other Solutions

If tenant is not strapped for cash, but is unhappy with a particular location, it could offer to buy out its lease. The buyout price would be determined by negotiation and would turn on several factors including landlord's ability to find another tenant, the remaining term of the lease, and landlord's unamortized construction and brokerage costs.

Sometimes a struggling tenant will ask for a temporary rent reduction or decrease in percentage rent. The landlord might consider such a request given the totality of the circumstances, but might couple it with a termination option if the landlord finds another tenant. The landlord would likely not allow tenant to sublet at the reduced rent without the profit going to the landlord, notwithstanding such any rent concession.

The tenant should review the lease and current circumstances for a landlord default that could allow the tenant to terminate the lease. For example, if the landlord is not providing all services required under the lease this might give rise to a tenant termination right. Note that it is just as likely that an attempt to terminate the lease for a landlord default will end up in litigation absent a clear right or egregious lease violation.

"Pre-negotiated, creative and even-handed lease termination provisions can save both sides a lot of pain and expense."

The Lender's Role

A behind-the-scenes party in a lease exit negotiation can be the landlord's lender. Applicable loan documents may require that certain debt service covenants be met. Similarly, there may be certain reserve requirements in connection with brokerage commissions and tenant improvements that can hinder the landlord's flexibility. Likewise, a lender may have approval rights over any lease modification. The tenant should evaluate the lender's role before embarking on any lease exit strategies.

Conclusion

Although the Amazon effect has changed the course of retail leasing, other events over the years have disrupted retail markets: economic downturns, fads and even inventory shortages. Both retail tenants and landlords need to be optimistic and nimble to succeed in their businesses. In the past, many lease terminations occurred because shoppers did not want to buy what the retail tenant was selling. Today, many lease terminations occur because shoppers do not need to leave their homes to buy almost anything. Given the magnitude of both a landlord’s and a tenant’s investment in a retail store at a time of such uncertainty, both sides should be creative and accommodating when faced with failing results. Pre-negotiated, creative and even-handed lease termination provisions can save both sides a lot of pain and expense.

Endnotes

1. *See* Matthew Flamm, *Amazon and High Rents are Killing New York City Retailers*, Crain’s New York Business, Jan. 23, 2017, http://www.crainsnewyork.com/article/20170123/RETAIL_APPAREL/170129978/amazon-and-high-rents-are-killing-new-york-city-retailers-like-laytners-linen-home-leaving-industry-watchers-to-wonder-when-the-carnage-will-end; *see also* Derek Thompson, *What in the World Is Causing the Retail Meltdown of 2017?* The Atlantic, April 10 2017, https://www.theatlantic.com/business/archive/2017/04/retail-meltdown-of-2017/522384/.
2. Adam Hartung, *How The ‘Amazon Effect’ Will Change Your Life and Investments*, Forbes, Feb. 28, 2017, https://www.forbes.com/sites/adamhartung/2017/02/28/how-the-amazon-effect-will-change-your-life-and-investments/#6394a8fb5e76.
3. *See* Esther Fung, *Retailers’ Call Centers Bring Life to Dead Mall Space*, Fox Business, April 25, 2017, http://www.foxbusiness.com/features/2017/04/25/retailers-call-centers-bring-life-to-dead-mall-space.html; *see also* Ashlee Kieler, *Deserted Malls Find New Use as Retail Call Centers*, Consumerist, April 25, 2017, https://consumerist.com/2017/04/25/deserted-malls-find-new-use-as-retail-call-centers/
4. *See* Sarah Halzack, *How Malls Are Reinventing Themselves for the E-commerce Era*, The Washington Post, Dec. 19, 2014, https://www.washingtonpost.com/news/business/wp/2014/12/19/how-malls-are-reinventing-themselves-for-the-e-commerce-era/?utm_term=.daba19f4e1fd; *see also* Phil Wahba, *Simon Property Group Fights to Reinvent the Shopping Mall*, Fortune, Dec. 2, 2016, http://fortune.com/simon-mall-landlord-real-estate/; *see also* Roberto Fantoni, Fernanda Hoefel & Marina Mazzarolo, *The Future of the Shopping Mall*, McKinsey & Company, Nov. 2014, https://www.mckinsey.com/business-functions/marketing-and-sales/our-insights/the-future-of-the-shopping-mall; *see also How Malls Are Reinventing Themselves: Not Just Shopping, but Places to Have Fun*, AmusementRC, https://www.amusementrc.com/2017/04/06/how-malls-are-reinventing-themselves-not-just-shopping-but-places-to-have-fun/ (last visited, Oct. 31, 2017).
5. *See Mann Theatres Corp. v. Mid-Island Shopping Plaza Co.*, 94 A.D.2d 466, 464 N.Y.S.2d 793 (2d Dep’t 1983), *aff’d*, 62 N.Y.2d 930, 479 N.Y.S.2d 213, 468 N.E.2d 51 (1984).
6. *Id.*
7. *Am. Book Co. v. Yeshiva Univ. Dev. Found. Inc.*, 59 Misc. 2d 31, 297 N.Y.S. 2d 156, 160 (Sup. Ct., New York Co. 1969).
8. *Id.*

Sheltering the Homeless in Rent Stabilized Units

By Adam Leitman Bailey and Dov Treiman

As the City of New York seeks to phase out its notorious use of rent stabilized apartments as shelters for homeless people,[1] the organizations that administer this program struggle for funding, and the courts struggle to find the correct theoretical framework to determine if the units are still rent stabilized and, once the homeless persons are gone and replaced with conventional tenants, what legal category into which to place the new occupants. The race is on. With homeless populations continuing to swell[2] and charitable organizations looking to place these people under some kind of roof, a thorough understanding of the applicable principles of rent stabilization is becoming increasingly essential. The recent decision of the Appellate Term, First Department in *2363 ACP Pineapple, LLC v Iris House, Inc.*[3] highlights practitioners' misunderstanding of the theoretical issues.

"Clearly, in these shelter situations, the sheltering organization may *enter into an agreement with the sheltered person setting forth the parameters of the relationship."*

Pineapple

In *Pineapple*, in under 1000 words, the Appellate Term for the First Department ruled in a case where at the behest of the City, a private landlord rented premises to a City funded program for the temporary housing of homeless persons. Assured that such units were exempt from rent regulation, at the conclusion of the lease, the landlord sought to evict the occupants, using one of the charitable use exceptions to rent stabilization. The court refused to allow it.

Basic Principles

The basic principle of rent stabilization in New York City,[4] is, with certain exceptions, that it applies to *all* apartments "except (certain classes of) housing accommodations for so long as they maintain the status" that gives them the exemption.[5] These categories of exemption are (a) rent control, (b) government ownership, (c) Mitchell Lama and similar programs, (d) small buildings, (e&o) substantially rehabilitated buildings, (f) apartments held by affiliates of charities, (g) certain hotels, (h) motels and trailers, (i) boarding houses, (j) charitable accommodations, (k) nonprimary residences, (l) cooperatives and condominiums, (m) employee occupied apartments, (n) nonresidential apartments, (p) expired 421-a in small buildings, (q) exempt lofts, (r&s) luxury decontrolled units, (t) units specifically deregulated by other laws. [6]

Theories of Shelter Exemption

For private landlords, this presents three conceivable categories for deregulation of these apartments, each with its own problems.[7]

Fully stated, the categories are as follows:

> (f) housing accommodations owned, operated or leased or rented pursuant to governmental funding by a hospital, convent, monastery, asylum, public institution or college or school dormitory or any institution operated exclusively for charitable or educational purposes on a nonprofit basis and occupied by a tenant whose initial occupancy is contingent upon an affiliation with such institution; however a housing accommodation occupied by a nonaffiliated tenant shall be subject to the RSL and this Code;[8]
>
> (j) housing accommodations in buildings operated exclusively for charitable purposes on a nonprofit basis;[9]
>
> (k) housing accommodations which are not occupied by the tenant not including subtenants or occupants as his or her primary residence as determined by a court of competent jurisdiction;[10]

Affiliation Exemption

The first of these, § 2520.11(f), is the so-called "affiliation exemption," most fleshed out in cases involving Columbia University and New York University. This grants an exemption to apartments that are owned by certain kinds of educational institutions and charities for apartments rented to these organizations' affiliates. That case law does little to reflect what "affiliation" is, but typically it means either as a member of the staff of the institution or as an enrolled consumer of the institution's services—thus, in the scenarios described, typically faculty and students.[11] Clearly, in these shelter situations, the sheltering organization *may* enter into an agreement with the sheltered person setting forth the parameters of the relationship. However, the *Pineapple* case points out that the exemption can only be claimed by the institution, not by the private landlord overleasing *to* the institution. In this regard, *Pineapple* says, "The exemption was not intended to allow a for-profit landlord to evict an educational or charitable institution."[12] There is a problem with this kind of analysis. RSC § 2520.11 in its preamble says, "This Code shall apply to all or any class or classes of housing accommodations made subject to regulation pursuant to the RSL or any other provision of law, except the following housing accommodations for so long as they maintain the status indicated below:"[13]

Note that the applicability of Rent Stabilization is to "housing accommodations." It is not applicable or non-applicable to natural or artificial *persons*. That is to say that rent stabilization is *in rem* (meanings acting on the premises rather than on any particular person) and not *in personam* (meaning acting on a particular person). Note that even in purely personal considerations like primary residence, the effect of the nonprimary residence is not to make the *tenant* unstabilized, but to make the apartment such. So, if the exemption is *in rem*, as the plain wording of the regulation indicates, then it matters not who is invoking the exemption. Thus, it appears that *Pineapple's* analysis is flawed. However, we note as a matter of proof, that the landlord would not normally be in possession of the agreement between the shelter provider and the sheltered and getting it may be difficult in light of the highly restricted discovery rules in summary proceedings. Even if the landlord prosecutes this as a relatively expensive plenary proceeding in state supreme court, easier discovery rules do not guaranty that the landlord will be able to obtain possession of a lease with an affiliation clause. The landlord has no control over what the lease does and does not say; only the sheltering organization does.

"While somewhat cumbersome, these cases may be the very ones that call for that kind of procedure. After all, this is not a disputed question as to whether the human tenant is actually spending the correct amount of time in the subject premises."

Charitable Use Exemption

The second exemption, § 2520.11(j), is the "charitable use" exemption. However, where only a portion of a building is being used for this purpose, according to the terms of the exemption, requiring that the building itself be "operated exclusively for charitable purposes," it is inapplicable.[14] This is particularly significant in the current political atmosphere where the use of these buildings some for shelter and some for conventional tenants has become a matter of particular controversy.[15] Landlords are faulted for mixing the use, but only the pure use of the building for sheltering allows for a landlord to invoke this exemption. However, it should be noted that if the landlord net leases the building to the sheltering organization, HPD, under certain circumstances, insists that the apartments be registered with the DHCR as rent stabilized, even though this provision of the Code explicitly says that these apartments are at least temporarily exempt.[16] However, the law is clear that if an apartment is exempt, it is exempt, even if registered as stabilized.[17]

Primary Residence Exemption

The third exemption, § 2520.11(k), is the "primary residence" exemption. This has always been a widely misunderstood exemption and the mischief lies in the qualifying phrase, "as determined by a court of competent jurisdiction."[18] In standard landlord-tenant litigation practice, in bringing a summary proceeding to evict a tenant for failing to maintain the apartment as a primary residence, the petition usually sets forth that the premises *are* subject to rent stabilization.

The theory behind this is that at this moment, the premises have not *already* been adjudicated a nonprimary residence and therefore the "as determined by a court of competent jurisdiction" criterion has not yet been met.[19] So, in order to invoke this exemption during a subsisting tenancy, it virtually has to be in the context of a completed declaratory judgment action in supreme court. Of course, such a proceeding is bound to be lengthy and expensive. With *615 Co. v. Mikeska,*[20] the Court of Appeals ruled that the supreme court action has to be commenced during the so-called "Golub period," between 90 and 150 days prior to the expiration of an extant lease, at least if the proceeding contains more than a mere declaration and also contains a cause of action for eviction.[21]

However, *Mikeska* does not address the idea that the landlord could obtain a naked declaration and then bring a summary proceeding in due course afterwards with the actual question of primary residence one already established under principles of collateral estoppel. While somewhat cumbersome, these cases may be the very ones that call for that kind of procedure. After all, this is not a disputed question as to whether the human tenant is actually spending the correct amount of time in the subject premises. Rather, this is the straightforward question whether the wording of a corporate lease calls for a particular human being to dwell in the premises as that particular human's primary residence. That is a pure legal matter of reading the lease, one perfect, therefore, for summary judgment and one which, one notes, the shelter provider cannot, in good faith, oppose.

During the Relationship

To this point, this article has implicitly focused on ending the relationship. However, nonpayment proceedings[22] *during* the relationship share with holdover proceedings[23] certain procedural difficulties. Under the common law of RPAPL § 741(4), a landlord is required to plead the regulatory status of residential premises that are the subject of a summary proceeding in the New York City Civil Court.[24] Thus, for these sheltering apartments, the landlord faces an impossible choice between getting the petition dismissed for claiming the premises are not regulated in a claim that the court does not sustain for the reasons we stated above or claiming that the premises *are* regulated, requiring the landlord to offer a renewal lease when the lease is set to expire.[25] Thus, unless the landlord

Adam Leitman Bailey is the founding partner of Adam Leitman Bailey, P.C. Dov Treiman is a partner at the firm.

is willing to accept a legal determination that the premises are subject to rent stabilization, the landlord risks having no coercive method by which to collect the rent, except through the expensive and slow plenary ejectment action.

The Word on the Street

The word on the street is that *Pineapple* has ruled that all apartments that are rented as homeless shelter space are now under rent stabilization. That vastly overstates the case but there is a case pending in Brooklyn to declare exactly that.[26] Clearly, if an entire building is being used as such a shelter, the landlord has a safe path to regarding the building as temporarily exempt from rent stabilization. The other theories are less certain. However, under rent stabilization, lease renewal is mandatory. So, landlords who listen to this word on the street and are scared into refusing to renew leases for such purposes may find that *Pineapple* becomes an aggressive tool by which to require that the landlord stay in such an uneasy business association. Worse than that for landlord interests, a finding of rent stabilization in such units would lay limits on the amounts of rent that could be charged and how much it could be increased on renewal. Thus, any landlord who is renting out such an apartment is strongly incentivized to fight any theory under which the apartment could be considered subject to rent stabilization. The very least effect that *Pineapple* has had on the real estate industry is to make increasing numbers of legitimate landlords absolutely unwilling to rent to these homeless programs, providing temporary shelter for 11,000 people.[27]

Conclusion

The *Pineapple* decision has created great panic amongst a large swath of landlord interests. There are errors of analysis in that decision that should incentivize those landlords to pursue these theoretical issues in other appellate courts. However, *Pineapple* does not for all landlords renting to homeless shelters create an untenable situation. To that extent landlords' panic is overstated, but the situation is such that landlords now cooperate with the City and with charitable agencies at their peril.

Endnotes

1. Vivian Yee, *Homeless Families Endure Roaches, Mice and Failed Promises*, N.Y. Times, Aug. 28, 2015, https://www.nytimes.com/2015/08/29/nyregion/new-york-relies-on-housing-program-it-deplores-as-homeless-ranks-swell.html.
2. A recent year saw a nearly 20% rise in homeless shelter populations. *See* Ford Fessenden, *A Homeless Epidemic in New York? Thousands Hit the Cold Streets to Find Out*, N.Y. Times, Feb. 8, 2016, https://www.nytimes.com/interactive/2015/10/21/nyregion/new-york-homeless-people.html.
3. *2363 ACP Pineapple, LLC v Iris House, Inc.*, 55 Misc. 3d 7, 49 N.Y.S.3d 216 (1st Dep't 2017).
4. The Rent Control Law of 1969, New York City, Local Law No. 16-1969, originally §§ YY 51-1.0 *et seq.* (The City Record, May 13, 1969); The Emergency Tenant Protection Act of 1974, L.1974, c. 576.
5. N.Y. Comp. Codes R. & Regs. tit. 9, § 2520.11 (2017).
6. *Id.*
7. That each would present a problem is unsurprising. The designers of Rent Stabilization through the years never envisioned having to deal with a scenario in which the occupant was *meant* to pay *no* rent.
8. N.Y. Comp. Codes R. & Regs. tit. 9, § 2520.11(f) (2017).
9. N.Y. Comp. Codes R. & Regs. tit. 9, § 2520.11(j) (2017).
10. N.Y. Comp. Codes R. & Regs. tit. 9, § 2520.11(k) (2017).
11. *Pineapple*, *supra* note 3.
12. *Pineapple*, *supra* note 3 at 9.
13. N.Y. Comp. Codes R. & Regs. tit. 9, § 2150.11 (2017).
14. N.Y. Comp. Codes R. & Regs. tit. 9, § 2520.11(j) (2017).
15. Nathan Tempey, *Thousands of Rent-Stabilized Apartments at Risk as NYC Phases Out Controversial Homeless Shelter Program*, Gothamist, June 29, 2017, http://gothamist.com/2017/06/29/cluster_site_rent_stabilized.php.
16. *See* N.Y. Comp. Codes R. & Regs. tit. 28, § 6-01 (2017) (exempting these units from being considered hotels and thus, according to HPD, rendering them apartments, subject to DHCR registration if the building is part of the 421-a program).
17. *512 East 11th St. HDFC v. Grimmet*, 181 A.D.2d 488, 581 N.Y.S.2d 24 (1st Dep't 1992).
18. N.Y. Comp. Codes R. & Regs. tit. 9, § 2520.11(k) (2017).
19. *Id.*
20. *615 Co. v. Mikeska*, N.Y.2d 987, 557 N.Y.S.2d 262 (1990).
21. This period is named for *Golub v. Frank*, but the case's holding, that one must serve a notice of intent not to renew during the period one would normally be offering a lease renewal, was codified into the modern Rent Stabilization Code when it was issued in 1987. 65 N.Y.2d 900, 493 N.Y.S.2d 451 (1985).
22. N.Y. Real Prop. Acts. § 711(2) (McKinney 2017).
23. N.Y. Real Prop. Acts. § 711(1) (McKinney 2017).
24. While *MSG Pomp Corp. v. Doe*, is of dubious continued value as to its doctrine of nonamendability of mispleaded status, it remains solid law for the proposition that one must, in New York City Civil Court, in residential proceedings plead the regulatory status of the premises. 185 A.D.2d 798, 586 N.Y.S.2d 965 (1st Dep't 1992).
25. Offered during the aforesaid *Golub* period. *See Golub*, *supra* note 21.
26. Carl Campanile, *Thousands of Homeless New Yorkers Could be Treated as Legal Tenants*, New York Post, Aug. 27, 2017, http://nypost.com/2017/08/27/thousands-of-homeless-new-yorkers-could-be-treated-as-legal-tenants/
27. Nathan Tempey, *NYC Will Phase Out Infamous Apartment Building Homeless Shelters*, Gothamist, Jan. 4, 2016, http://gothamist.com/2016/01/04/homeless_cluster_site.php.

May an Attorney Refer the Attorney's Real Estate Clients to a Title Agency Owned by the Attorney? The Battle for New York

By Marvin N. Bagwell

With all due respect to our friends from the Commonwealths of Massachusetts, Pennsylvania and Virginia, many of the highways, byways and roads to American independence ran through the State of New York. By the end of junior high, every New York student by rote can recite the names of winners and losers in the battles for independence fought in what would become the Empire State. At Fort Ticonderoga, Vermont's Green Mountain boys, under the command of Ethan Allen (the fighter and not the furniture chain) and New Yorkers commanded by Benedict Arnold (the later turncoat) defeated the British. At Saratoga, the British first won, but eighteen days later, they were defeated at Bemis Heights. General Washington met defeat at the hands of the British at the Battle of Long Island a/k/a Brooklyn or Brooklyn Heights according to one's provenance. From upstate to downstate, during the War for Independence, troops from both sides travelled the roads of New York.

Two centuries after Lord Cornwallis met defeat on a Virginia peninsula at the hands of the same General Washington who lost Brooklyn, New York's roads, especially those that ran from upstate though Albany downstate to the New York City metropolitan region bore witness to a new skirmish. Although not as bloody as the Revolutionary War, the combatants on both sides of the issue were as equally passionate regarding the rightness of their position, as were their revolutionary predecessors. This time, the combatants were real property practitioners, among the most considerate, well-mannered, and thoughtful members of the general bar. The battle, and we can rightfully call it that, lasted far longer than the Revolutionary War. Indeed, for many members of the real property bar, their way of life and their livelihoods were at stake. Just as a question regarding taxation and representation ignited the Revolutionary War, a single question led to a call to bear arms: may a lawyer put his or her client's title work through a title company owned by the lawyer? Upon the answer to this question, kingdoms and riches would be lost or perhaps, gained.

The Creation of an Upstate-Downstate Divide

From its inception in the late 19th and early 20th centuries, the business of title insurance has been local in nature. This was the case because the buying and selling of real property was local and importantly, lawyers handled the transactions. The primarily rural nature of the landscape did not demand much more than the local or county focus on conveyancing. Lending to prospective homebuyers was local as well. Robin Paul Malloy and Mark Kaplow have best described the state of affairs as one where up to the late 1970s, "[t]he residential mortgage lending market thus resembled the situation at the Bailey Building and Loan in Frank Capra's classic, *It's a Wonderful Life*. Local depositors provided the money that local lenders used to make mortgage loans to local homebuyers. The localized nature of the real estate financing patterns tended to insulate real-estate law, and thus real estate lawyers, from many of the pressures of changing standards in the areas of the law."[1] Malloy and Kaplow write, "[a]s a consequence of flaws in our system of land title, there is always a risk that what appears to a valid title is, in fact, not."[2] They write further that, "[t]he three methods of title assurance that cover [the risk] are the title abstract, the lawyer's title opinion and title insurance."[3] Whereas title insurance and hence, title companies, became the "go to" in downstate New York, in upstate New York, perhaps because of the greater preponderance of a more localized residential real estate marketplace[4], title abstracts and attorney opinions continue to exist even to this day.[5]

Malloy and Kaplow point out that the development of the secondary mortgage market spelled the death knell of local mortgage financing.[6] It took a little longer in upstate New York, but the secondary market took hold there as well. To sell their residential mortgages on the secondary market, upstate lenders had to provide a loan, mortgagee or lender's policy with the mortgage. Title companies came into existence in upstate New York, but only to issue loan policies. Attorneys started to issue loan policies as well. As a result, in upstate New York, for quite some time, the situation was one where attorneys provided abstracts or title opinions to their residential homebuyer clients but title policies to the lenders.[7] The times do change. Perhaps because of the influence of Malloy and Kaplow's article that suggested it would be malpractice for attorneys not to provide their clients with a fee or owner's policy, upstate attorneys now issue title policies to their residential home-buying clients.[8] As to the title insurance business, the road between upstate and downstate New York is one barely travelled.

Ethical Questions Come to the Fore

Downstate, title companies, usually owned by non-attorneys, provided title policies to attorneys. In upstate, attorneys provided title policies to their clients. Forward thinkers on both sides of the aisle began to sense concerns with their business models. The customers of non-attorney title agencies were attorneys. Therefore, for the attorneys who formed a title agency, this meant a loss of business.

For the attorneys who owned title agencies, a second question began to percolate in their minds. With the development of various canons of ethics, was it right or proper for attorneys to put their client's title business through the title agency that they owned? Was it ethical? Did the referrals create a conflict of interest? Both non-attorney owned title agencies and attorney-owned title agencies had an interest, admittedly different ones, in finding the answer to the question, "May an attorney put his client's title business through the title agency owned by the attorney?" And in New York, so quite innocently, began anonymous inquiries to the New York State Bar Committee on Professional Ethics. It must be noted that the Opinions of the State Bar's Ethics Committee are advisory in nature and do not have the force of law behind them. But within legal circles, the Opinions carry great weight.[9] Over time, quite a bit of time as it turns out, as the writers of the Opinions became more certain of their thinking regarding the ethical quandary, attorneys who referred their clients to title companies owned by the attorneys began to take notice. Neither the members of the Bar Committee nor the attorneys who were its audience could have suspected that the tea-laden ships were on their way from the British Isles to Boston Harbor.

In the initial Opinion where the question was first posed, the Committee responded that an, "[a[n attorney may act as … agent for a title company in a real estate transaction where he represents a party, provided it is clear that there is no conflict of interest between the client and the title company, that both parties consent after the attorney makes full disclosure to both, and the client either given credit for the amount of any fees paid to the attorney by the company, or the client expressly consents to the retention of such fee."[10]

This Opinion has to be admired for its brevity. The Committee's opinion consisted of a single page. The foregoing was the full analysis given by the Committee to the question. Note that in 1974 only men were thought of as being attorneys.

A decade later, the question to the Committee became more exact: "May an attorney who represents a seller, buyer, or mortgagee in a real estate transaction also serve as agent for the title insurance company that issues the policy in connection with the transaction? If so, may the attorney receive or retain as compensation from the title insurance company a portion of the premium paid for the policy?"[11] This time the Committee offered a five-page opinion in which it concluded that:

> FIRST: …every lawyer has an underlying duty not to allow his interest in receiving a fee to override the basic interest of a client in not incurring unnecessary fees and expenses…
>
> SECOND: …full disclosure to the client is required...
>
> THIRD: … informed consent of the client is clearly required…
>
> FOURTH: Even with informed consent after full disclosure, a lawyer may not represent multiple clients unless it is obvious that he can adequately serve the interest of each...
>
> FIFTH: …it is unlawful and therefore, unethical for the lawyer to receive any compensation from the title insurer except for services rendered…[12]

Subject to the qualifications set forth above, the Committee affirmatively agreed that an attorney may represent a seller, buyer or mortgagee in a real estate transaction and may also serve as agent of the title company that issues a policy in connection with the transaction.[13]

You might think that the Ethics Committee was finished with the subject. You would be wrong. Opinion 576 was not the final word or even close to it. One of its most important and cited Opinions was yet to come.

In Opinion 595 the Committee considered two questions with the second being more relevant to this discussion: "May the law firm refer clients to the newly formed [title] company for title insurance work and the like after full disclosure to and consent of such client is obtained?"[14] In this Opinion, the Committee drew a distinction between the work performed by a lawyer-owned abstract company that merely involves title searching and a lawyer-owned title company that performs services in addition to the searching title such as title report showing exceptions to title and resulting in the issuance of a title policy.[15] In the former case, the Committee stuck to its prior requirements of disclosure, informed consent and a credit of overlapping title and legal fees to the client. [16]

However, in the instance where the lawyer owned title company clears exceptions to title and issues a title policy, the Committee found that an inherent conflict of interest exists.[17] At the risks of boring the reader, the most important parts of the Committee's decision are quoted below:

> If the abstract company discovers defects in title, it and the purchaser or lender client have manifestly differing interests in the negotiating process toward which a closing of, or decision not to close, the transaction is made by the parties. Indeed, if the transaction is closed in such a case, a serious defect in the title is discovered, the law firm's clients may wish to learn whether the abstract company in which its lawyers are principals were negligent in the performance of the title search, contrary to the

> lawyer-owned abstract company's interests in such an event.[18]
>
> The type and kind of conflict posed here is so significant that the provision of consent is inadequate to protect the client interests which converge with the law firm's business as an abstract company.[19]
>
> We are convinced that the dynamics of the real estate transaction in which the abstract company proposed here is a protagonist provides for too great a danger, indeed than a 'reasonable probability' that the representation of the client will be affected adversely.[20]

In other words, the Committee had decided that it was unethical for lawyers to refer their firm's real estate clients to the title agency owned by the lawyers.

To say that the lawyers who owned title agencies were upset is an understatement. "Aghast" and "going ballistic" were better descriptions of the generated emotions. You would have thought that the discussion was now concluded. Again, this being New York, you would be wrong. The tea ships were now halfway across the Atlantic.

The Real Property Law Section of the New York State Bar Association asked the Ethics Committee to reconsider Opinion 595. The Ethics Committee held a full day hearing in which many of the thinkers and luminaries of the title industry testified. The advice to first year law students, "in court, never ask a question to which you do not know the answer," comes to mind. Not only did the Ethics Committee re-affirm Opinion 595, it offered a new basis for the decision; "[m]oreover, if the attorney is not happy with the result reached on behalf of his or her real estate client by the employees of the abstract company vis-à-vis the omission of exceptions or the issuance of affirmative insurance, the attorney must then negotiate with his or her owned abstract company, i.e. with 'himself' as to the ultimate resolution, with the attorney's company's participation in the insurance premium hanging in the balance."[21] The Committee rejected the ethical propriety of this arrangement.

Ingenuity being what it is, some attorneys put the ownership of their title companies in their spouses' names. The attorney may have thought that this would exempt them from the ethical violation. The Ethics Committee rejected this thinking in Opinion 738 on the basis that "the intimate relationship and economic interest of husband and wife are inseparable; the acts of one directly affects the other."[22]

In 2002, New York adopted a new disciplinary rule, DR 1-106, that addressed the responsibilities of lawyers or law firms had when providing non-legal services to their clients.[23] The Committee was asked whether its prior Opinions regarding lawyer-owned title companies still applied. The Committee replied in the affirmative.[24]

In Ethics Opinion 753, the Committee re-affirmed its prior Opinions writing that:

> A lawyer owning mortgage brokerage and title abstract businesses may not, even with informed consent, represent buyer or seller and act as mortgage broker in the same transaction or act as the title abstract company with respect to non-ministerial tasks but may, where the client consents after full disclosure, act as an abstract company with respect to purely ministerial work. The lawyer may, with informed consent, represent the lender in the same transaction in which the lawyer's company acts as mortgage broker, but may not represent the lender in transactions in which the lawyer's title company acts in other than a ministerial capacity.[25]

As of 2002 and for approximately a decade later, the ethical rules in New York as decided by the Committee on Professional Ethics were that a lawyer could not refer their clients to a title company owned by the lawyer except for the ministerial work of abstracting titles.[26] However, the Ethics Opinions are advisory only. It is impossible to know definitively how they are followed in the real world, especially a decade or more after their issuance. The battle for hearts and minds was not over but moved to another venue, the pages of *N.Y. Real Property Law Journal*. The ships were just outside of Boston Harbor.

War by Any Other Name

In regard to the regulation of title insurance agents, New York was an outlier, in that the state had no regulations. New York, through its Department of Insurance, regulated only title underwriters and not title agents.[27] Title agents began to see this as a clear disadvantage. National title agents were beginning to enter the state and were siphoning off business especially re-finances, from local agents. New York agents who were attempting to develop national operations were stymied by state reciprocity rules. New York agents could not "waive into" other states because agents from other states could not "waive into" New York. Basically. because since New York did not issue title agent licenses, there was no basis to claim reciprocity.

In effect, New York agents could not enter into business in other states based upon license reciprocity but agents from other states agents could enter into New York without any regulatory control because New York did not have licensing. Further, agents came to believe that kickbacks between title agents and their customers were becoming epidemic in New York because the Insurance Department did not have the resources to enforce New York's anti-kickback statute, Insurance Law

§ 6409(d).[28] Plus, the owners of many real estate affiliated businesses, real estate brokers, mortgage brokers began to form their own title insurance agencies. Independent title agents perceived these joint business or affiliated business arrangements as threats to their livelihood. "Controlled business" became the term to describe the foregoing arrangements. Because of the foregoing events, New York's title agents threw aside their aversion to regulation and in 2007, through the New York State Land Title Association and the agents' allies in the State Legislature, introduced bills in both houses of the Legislature establishing title agent licensing. A firestorm ensued, particularly within the State Bar.

William P. Johnson, a highly respected real property attorney based in upstate Amherst, New York, and an editor of the *N.Y. Real Property Law Journal,* wrote an article in the Journal that encapsulated the entire situation.[29] The author will permit Mr. Johnson's words to speak for themselves:

> The bill's purpose is to license and regulate title agents. Many of the bill's provisions seek to repair problems in the title insurance industry involving both attorney and non-attorney agents. These reforms include creating educational requirements for non-attorney title insurance agents and preventing title insurance premiums from being shared when core title insurance work is not performed (unearned kickbacks and referral fees). The bill also restricts a title insurance premium from being shared between a title insurance agency and an affiliated referral source unless the agency has multiple and significant other sources of title insurance business besides the referral source. Under the bill's definitions, an attorney who operates a title agency as an adjunct to his or her law practice would be deemed an 'originator' of the title insurance order and the attorney would be a "title insurance agent"…. Effectively this provision prevents an attorney from having a financial interest in the attorney's own ability to be paid for writing title if the only source of the title insurance business is the law firm's own clients.[30]

Mr. Johnson bookended his article as follows:

> Moreover promoting this incorrect position, if successful would result in the eliminating most private practice attorneys from the title agent role and leave nearly all the title insurance business to underwriters and non-law firm agencies…While there may be problems in the title insurance industry which should be reformed by a title insurance agency licensing law, the practice of attorneys providing a modern and financially backed version of a title opinion through title insurance is a practice which should be encouraged rather than outlawed.[31]

In between the bookends of his article, Mr. Johnson wrote that the Land Title Association's argument that the Bar Committee Ethics Opinions prohibited an attorney from writing title insurance for his or her client is based on a misreading of Opinions of 576, 595 and 621.[32] These Opinions, Mr. Johnson argues,"…[a]llows an attorney to represent a party and act as title insurance agent as part of his/her law practice as long as certain requirements regarding potential conflicts of interest, disclosure and segmented billing are satisfied."[33] In effect, the Opinions were not incorrect, and the interpretations were erroneous.

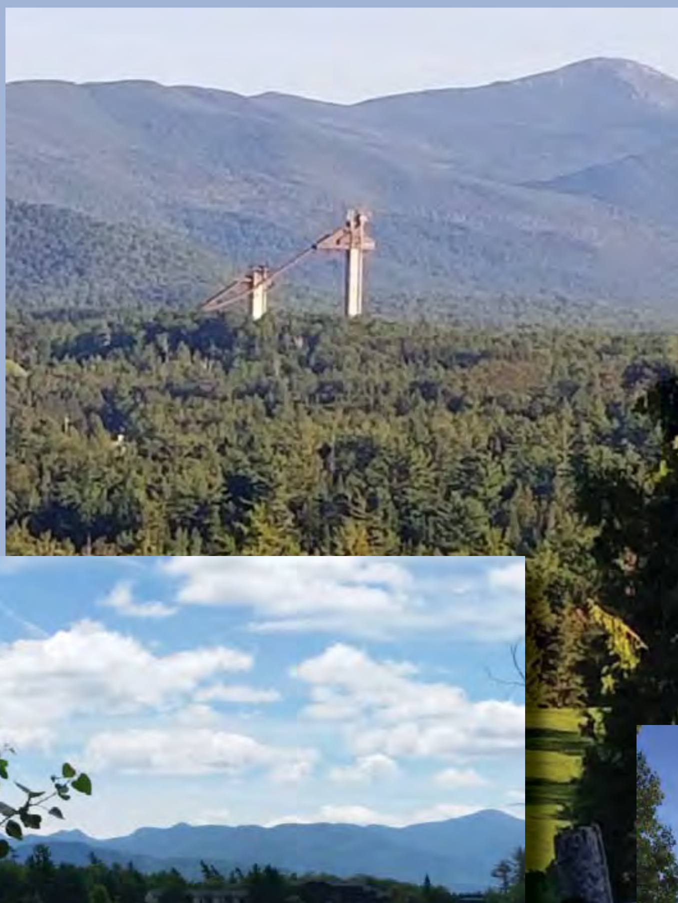
In any event, the Land Title Association and the State Bar were unable to resolve their differences regarding the controlled business issue. The licensing legislation died.

The next step in the skirmishes was to set aside the Opinions themselves. Effective April 1, 2009, the Appellate Divisions of the Supreme Courts (the State's intermediate appellate courts) adopted the Rules of Professional Conduct as drafted by the State Bar's Committee on Standards of Attorney Conduct. Karl Holtzschue, a prominent Manhattan based real estate practitioner and former Chair of the State Bar's Real Property Section, wrote an article for the *N.Y. Real Property Law Journal* in which he argued that Rule 5.7(d) and its Commentary made clear that a referral by a lawyer to abstract company owned by the lawyer was consentable by the client.[34] The problem that Mr. Holtzschue had to face was that the Appellate Divisions did not adopt Rule 5.7(d) and therefore the Rule did not go into effect.[35] However, Mr. Holtzschue argued that the State Bar adopted the Comment to the Rule that said that the client may consent to the provisions of legal and non-legal services in the same transaction.[36] Mr. Holtzschue's conclusion was that since the Bar Association adopted the Rule and the Comment, the Committee on Professional Ethics should be guided accordingly and permits an attorney to provide legal and non-legal (abstracting) services in the same transaction.[37]

It was not long before another counsel with a different take on the Appellate Courts omission of 5.7(d) authored a counterpoint. Kenneth F. Jurist, a real property partner in a major Westchester law firm, argued in his article that it was not the deletion of 5.7(d) that was key, but the deletion of paragraph 5.7(c).[38] Paragraph 5.7(c) provided that "[A] lawyer or law firm shall not, whether directly or through an affiliated entity, provide both legal or nonlegal services to a client in the same matter or in substantially related matters unless (i) the lawyer or law firm complies with Rule 1.8(a) regarding the provision of the nonlegal services, (ii) the lawyer or law firm reasonably believes that it can provide competent and diligent representation to the client, and (iii) the client gives informed consent,

continued on page 21

Real Property Law Section Summer Meeting



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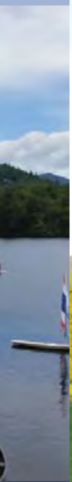


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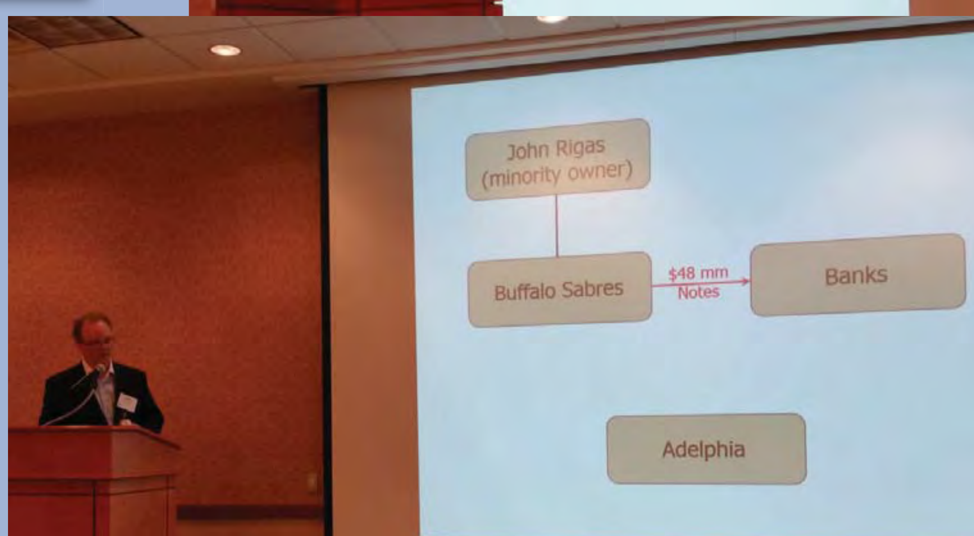
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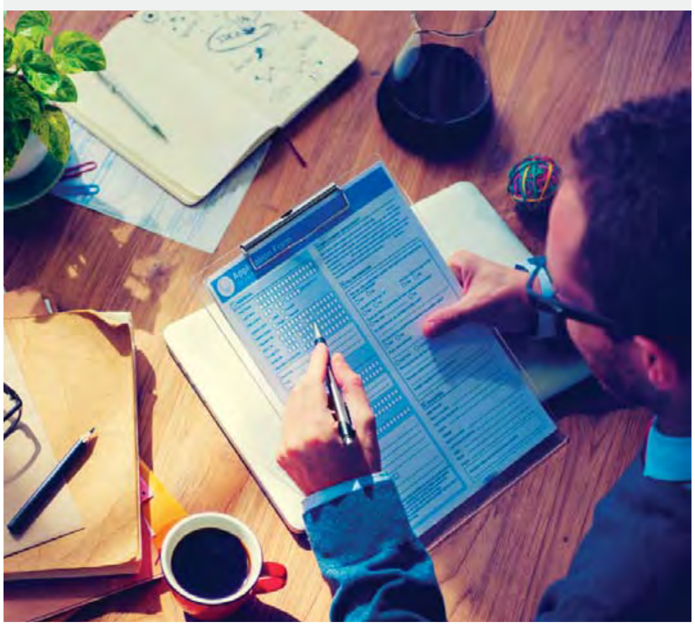

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continued from page 16

confirmed in writing."[39] Mr. Jurist noted that the ethics professor who wrote the Reporters Notes accompanying Proposed Rule 5.7, as well as others involved in the drafting of the Rule confirmed that the deletion of 5.7(c) did not constitute a rejection by the Bar Association of Opinions 752, 753 and 755."[40] The Appellate Courts did not adopt Rule 5.7(c).[41]

Mr. Jurist wrote that "In the absence of (1) the adoption of Proposed Paragraph (c), (2) any modification of Opinions 752, 743 and 755, or (3) any other difference between the Rules and the Code, that would provide to the contrary, those *certain cases* [so in the original] continue to include providing in the same transaction, the legal and nonlegal services described in those Opinions. Otherwise, it would now be consentable for an attorney to act as a real estate broker and represent a purchaser in the same transaction."[42]

In support of his position that by not adopting 5.7(c), the Rules did not overturn Opinions 752, 753 and 755, Mr. Jurist cited agreement with his argument from a representative of the Appellate Division and a speaker at a Bar Panel on the Rules who both confirmed that the Appellate Division was unwilling to overrule the Opinions referenced above.[43]

It may not have been as intense as the Revolutionary War, but the battle for the hearts and minds of the legal community remained ongoing, or maybe not. Then the tea ship entered Boston Harbor.

Peter Coffey, a distinguished and highly respected member of the real property law bar based in Schenectady, New York, a former chair of the Real Property Section of the State Bar, and a member of the Commission that drafted the previously discussed Rule 5.7(d), wrote an encyclopedia-like article that was brilliant in its breath, but also, (I am trying to think of an appropriate word, "eviscerated" works) all of the "traditionalists" who took issue with his thinking.[44] Mr. Coffey's argument can be cogently stated as "[T]he provision of ancillary services to a client [such as abstracting and title insurance policies] to a client in the same transaction is permitted assuming there is the proper disclosure of conflicting interests and consents obtained."[45]

Mr. Coffey's thesis was,

> The world of the legal profession has changed, and that is an understatement. It is a cliché but there is no looking back-back to the outmoded ideas and practices of long-ago time. Those who would be traditionalists 'wishing to live in a world that no longer exists' are directors of the guild tenaciously clinging to outmoded ideas and rules-lacking the imagination and boldness **and most particularly hope** to face the new world and undertake and accept the changes that are necessary in this new world. **These traditionalists will render the legal profession a footnote in the history of the provision of legal services every bit as much as the guilds became a footnote in the history of industrial production**.[46] [Boldface in original]

The "traditionalists" apparently include, the members of the New York State Bar Association Committee on Professional Ethics, and the judges of the Appellate Divisions who failed to adopt Sections 7(c) and (d) of the proposed Rules.

In support of his position that the provision of ancillary services only requires disclosure to and consent from the attorney's clients, Mr. Coffey cited Richard Posner (in favor of a pragmatic approach to the law), Mary Ann Glendon (desires imaginative lawyers who are knowledgeable, imaginative, bold and painstaking), Professor Russell Pearce of Fordham University (the legal community must move to a paradigm offering better service to clients) and the member of the Commission that drafted the 1992 MacCrate Report on Preserving the Core Values of the American Legal Profession (adopted a permissive approach to the provision of ancillary services by law firms to their clients).[47] Basically, Mr. Coffey concluded that modernity required that lawyers had no choice but to provide both legal and ancillary non-legal services to their clients. To do otherwise might bring about a 'collapse' of our profession."[48] To no great surprise, Mr. Coffey wrote that Opinions 752, 753 and 755 are "wrong and without probative value,"[49] that the Committee on Standards of Attorney Conduct (COSAC) did indeed want to and in effect, did repeal the aforementioned Ethics Opinions.[50] Finally, Mr. Coffey "hoisted the courts on their own petard" by citing instances where attorneys who provide abstract or title services were brought up on charges to the various Grievance Committees. Mr. Coffey noted that in every cited case, the provision of ancillary services was not an issue for the courts but the failure of the attorneys to obtain the consent of the clients after full disclosure was the deciding factor.[51]

Mr. Coffey's response to our initial question of whether an attorney could refer his clients to a title agency that he or she owned, was an unequivocal "Yes." However, his writing was not in accordance with the gentility of those who wrote the Declaration of Independence of the Constitution (although this author is among the first to state that in a quite a few cases, such as slaves only being 3/5's of a person, they got it wrong). It was more like Sherman's March to the Sea. Only scorched earth remained.

And Now, Crates of Tea Are Floating in Boston Harbor

In his poem, *The Hollow Men*, T.S. Eliot famously wrote, "[t]his is how the world ends, not with a bang but with a whimper."[52]

In 2013, the New York State Land Title Association again returned to the State Legislature seeking legislation to license title insurance agents. As noted above, the initial effort in 2007, failed due mainly to the State Bar's opposition to the legislation's controlled business provision. This time, controlled business was not so much on the table although the legislation continued to include the requirement that title agents had to have "multiple and significant" (whatever that means) sources of business. According to sources that were involved in the negotiations, the State Bar had four objectives that it wanted to achieve in return for its support of the agency licensing legislation. One of those items was legislative approval of the practice of attorneys placing their title business through title agencies owned by the attorneys. Therefore, the Legislature added the following provision as Section 2113(e) to the legislation: "[f]or purpose of this chapter, an attorney or his or her law firm may represent a client in a matter and may also act as a title insurance agent in such matter subject to applicable law."[53]

"The question could not possibly be one faced by New York alone. Other states must have considered the issue as well."

No one is sure what "applicable law" means. Does it mean the Ethics Opinions? However, they are not laws. Is the phrase a nullity because there are no applicable laws? We do not know.

What started as an ethical issue over which attorneys fought over for close to four decades ended with the stroke of Governor Cuomo's pen, resolving the question not necessarily ethically, but governmentally. After the war that was ignited with boxes of tea being tossed into Boston Harbor in 1773, the Treaty of Paris concluded the War for Independence in 1783. The Battle for New York on a question of legal ethics, which also ended with the stroke of a pen, percolated to the surface in 1974 but did not conclude until 2016 thereby taking over four times the amount of years, as did the Revolutionary War. To its credits, the battle among New York's lawyers over a question of law did not result in the loss of lives, as did the Revolutionary War, but in terms of animosity the question remains open.

Independent non-attorney title agents left Albany with one question on their minds; now that every attorney can open a title agency, would they do so and drive non-attorney title agents out of business? Only time will tell.

And Elsewhere

Above, we have spent a great deal of time recounting the 40-year "war" that New York's attorneys and title agents waged to decide whether an attorney ethically could place the business of the attorney's real estate clients through a title agency owned by the attorney. The armistice occurred not through a considered ethics opinion but by legislative fiat. The question could not possibly be one faced by New York alone. Other states must have considered the issue as well. The author approached members of ALTA's Form's Committee and asked of them how their respective states answered the question. In return for straightforward responses, the author promised anonymity.[54] The result is not a treatise, but a sampling of how several states other than New York, have answered the posed question.[55] Here goes.

Connecticut: In the Nutmeg State, by law, only attorneys may be title agents. There is no ethical issue with an attorney representing a party and also acting as a title agent, provided that there is full disclosure.[56] It is standard practice for attorneys to write title insurance for their real property clients.

The Rest of New England: While there is no prohibition against an attorney referring her or his real estate to a title agency owned by the attorney, full disclosure in writing must be given to the client. In addition, the better practice is to have the client acknowledge receiving the disclosure if and when the client decides to use the title agency.

Illinois: Essentially, the Prairie State is a disclosure state. The Attorneys' Title Guaranty Fund, Inc. ("ATG") Disclosure Statement discloses that the member/agent has a financial interest in ATG and providing an estimate of the fees and charges that will be made in connection with the title or escrow services.[57] The Illinois State Bar Association ("ISBA") has stated that an ATG member's disclosure of her or his interest in ATG to the seller is sufficient to satisfy the requirement of the Bar's conflict of interest rules.[58] In ISBA Opinion No. 93-1, the ISBA found that other title companies attorney programs that are similar to ATG's do not violate the Rules of Professional Conduct provided that the attorney avoids conflicts of interest, charges reasonable fees and observes the rule on solicitation.[59] Under Section 18 of Illinois's Title Insurance Act, the title agent must disclose the agent's financial interest in the title company to the buyer and seller.[60]

North Carolina: In the Tar Heel State, the Rules of Professional Conduct prohibit an attorney from issuing an opinion to a title agency in which the attorney has an ownership interest.[61] RPC 185, adopted October 21, 1994, quoting from CPR 101, held "[T]hat it is unethical for a lawyer who owns a substantial interest, directly or indirectly, in a title insurance company, agency, or agent, who acts as a lawyer in a real estate transaction insured by such title insurance company or through such agency, or agent to receive any commission, fee, salary, dividend, or other compensation or benefit from the title insurance company, agency, or agent, regardless of whether the ownership interest is disclosed to the client for whom the services are performed."[62] There is no doubt where the North Carolina bar stands.

Ohio: In Ohio, it is very common and in fact, historical, that individual attorneys as well as law firms own interests in title agencies and issue policies on behalf of law clients. Columbus and Cincinnati are particular hotspots for this type of activity; Cleveland to a lesser degree. The respondent was not aware of any adverse court or ethics opinions or challenges to attorneys putting their clients' real estate's title business through agencies owned by the lawyers.

South Carolina: Unlike its neighbor to the north, the Palmetto State permits an attorney to represent one or more parties at a real estate closing and also act as agent for the title insurer. In South Carolina Bar Ethics Advisory Committee Ethics Advisory Opinion 92-03 dated May 1992, the Committee summarized its thinking as follows:

> A lawyer who serves as attorney for one or more parties, including the buyer or lender, at a real closing normally may also serve as title insurance agent. However, an impermissible conflict is possible when the lawyer serves in both capacities, and, at the outset of the representation of the buyer, the lawyer must advise the client fully of (i) any potential adverse impact on the lawyer's professional judgment caused by the lawyers' duties to the insurer as its agent or the lawyer's own financial interest in receiving a commission, (ii) the availability of coverage from other insurers, and (iii) the opportunity to seek independent counsel. The lawyer should remain alert to circumstances in which the interests of the insurer or of the lawyer may interfere materially with the representation of the client, and, in those cases, comply with the requirements of Rule 1.7(b)[63]

Texas[64]: The Lone Star State's response is complicated. In Ethics Opinion 408 (1984), the State Bar of Texas Committee on Professional Ethics was asked the following question: "[u]nder what circumstances may an attorney representing a party to a real estate transaction accept a fee consisting of a percentage of the title insurance premium from the title insurer?"[65] First, the Committee found that the fee arrangement gave rise to an attorney –client relationship between the lawyer and the title company. Therefore, the fee had to be reasonable. More responsive to our question, the arrangement caused the title company to become a client of the attorney; multiple client representations may arise if the attorney also represents the conflicting interests only after full disclosure to the clients and obtaining consent from each of them.[66]

A Texas attorney faces another ethical risk when he or she represents a client and is also a part owner of the title company, and that is participating in the unauthorized practice of law by the title company. In order to extricate him or herself from this ethical dilemma, the attorney must disclose his relationship as the title agent to his clients and separate his or her legal practice from the title agency by maintaining separates books, not sharing fees from the law practice with the employees of the title company and more interesting, typing his or her own documents.[67]

> *"Change is inevitable. It is probably not wise to predict where our professional ethics will be a hundred or even ten years from now. For those of us on the surface of this earth today, the professional ethics of the future may be wondrous to behold or they may cause us to blanch."*

However, an earlier Texas case held that when a title company, through its officers, agents, or employees, prepares deeds, notes, liens releases, or other instruments affecting the title to real estate, and the charge is included in the premium, the title company might be considered to be practicing law.[68] In preparing the documents for the title company, the attorneys were agents of the title company and their loyalty thereby was to the company. The conveyances affected other parties who were not a party. Therefore, a lawyer who represents a title company in preparing a title opinion has a conflict of interest if he or she later drafts documents for a party to the transaction.[69]

Virginia: The Old Dominion (which by the way, is my home state) permits attorney to refer the attorney's client to a title agency owned by the attorney or his or her law firm. The operative ethics opinion is Legal Ethics Opinion No. 1564.[70] The operative holding within the Opinion is "When an attorney has an ownership or other financial interest in an Attorney Agency, other title agency or any other business other than his or her law practice, and conducts a law practice on the same premises, the Committee believes that it is incumbent upon the attorney to maintain separate signage and telephone listings, separate and secure client files, and separated office space. [cite omitted] Furthermore, when the two entities employ the same individuals, great caution should be taken to avoid any inadvertent disclosure to client confidences and secrets."[71]

Other recommendations are that title insurance agencies may not practice law; the attorney may not be compensated by a title insurance agency in which the attorney in a manner that is directly related to the volume of business or the number of referrals the attorney generates for the agency or premiums paid for policies; the attorney may not receive a fixed salary unless the salary is substantially related to the services performed for the agency; but the attorney may receive compensation from the agency in dividends on stock, legitimate fees based upon services to the title agency, or reimbursement of reasonable expenses. However, the major requirement is that prior to using the title agency, the attorney is "required to make a full and adequate disclosure to the client."[72] Virginia is therefore a disclosure state.

West Virginia: The Mountain State permits an attorney to refer the attorney's real property clients to a title agency owned by the attorney. Rule 5.7(a) of the West Virginia Rules of Professional Conduct subjects an attorney to the Rules of Professional Conduct with respect to law related services. Comment 9 of the Rule provides "[A] broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law related services. Examples of law related services include *providing title insurance*, financial planning, accounting, trust services, real estate consulting, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting (emphasis added)." There is no mention of disclosure to clients.

And Here the Road Trip Comes to an End

Pages ago, we started on our road trip in upstate New York, following General Washington's generals and ragtag troops from Fort Ticonderoga to Brooklyn. We noted the parallels from his journey during the Revolutionary War to the war among attorneys that resulted in a legislative fiat that answered the subject question with a whimper and not a bang. We ended our road trip appropriately in the Virginas (West Virginia had to wait until a later war before it came into existence) where the Revolutionary War ended. What have we learned?

> *"The lesson is that as society becomes more complex, so does the practice of law. Change is inevitable."*

First, that the Empire State with its legislative solution and North Carolina with its absolute probation, are outliers. The other states that we discussed lie somewhere between the opposite ends of the spectrum with most states answering in the affirmative and requiring some form of disclosure of the title agency—attorney relationship to the client. But there is more to the analysis.

Let us start with Virginia where the operative Opinion begins with the sentence "[t]he Committee is cognizant that a number of Virginia attorneys are associated with or have a relationship with a title insurance Agency in some capacity."[73] Then, let us follow I-64 westward to West Virginia where a third-party observer would have difficulty naming an occupation in which professional ethics prohibit an attorney from engaging. In both states there is recognition of the present and existing practices. It is clear, at least to the author, that professional ethics are taken seriously in every state that we covered, but for the most part, the ethics evolve from an absolute "No" in the Tar Heel State to everything but the kitchen sink in the Mountain State (no offense intended to either). Only the Tar Heel State remained true to the starting point where every state's ethical opinions start with a "No" and then through thorough analysis and considered thinking as to why the answer should be "Yes"; an attorney ethically may place his or client's real estate transaction through a title agency that the attorney owns. As Virginia and West Virginia illustrate, the reality of what is actually happening in the real world today may have an impact upon the ethics of tomorrow. And that brings us back to New York, whose forty-year "war" from "Yes" to "No" and back again to "Yes" illustrates that what may be the height of ethical purity today may yield to greater insight in the not so distant future. Peter Coffey[74] may be correct after all.

The lesson is that as society becomes more complex, so does the practice of law. Change is inevitable. It is probably not wise to predict where our professional ethics will be a hundred or even ten years from now. For those of us on the surface of this earth today, the professional ethics of the future may be wondrous to behold or they may cause us to blanch. As members of the bar, while we remain earth bound, it is our duty, responsibility and indeed, our sacred obligation to promote the former so that we do not leave this world feeling the latter.

This article first appeared in* The ACREL Papers*, Spring 2017, Austin, TX and is reprinted with the permission of the American College of Real Estate Lawyers.

Endnotes

1. Robin Paul Malloy & Mark Kaplow, *Attorney Malpractice for Failure to Require Fee Owner's Title Insurance in a Residential Real Estate Transaction*, 74 St. John's L. Rev. 407, 411-12 (2000).
2. *Id*. at 434.
3. *Id*. at 435.
4. On June 1, 1883, the German-American Loan and Trust Company of New York wrote the first New York City title policy. The following year, the Company changed its name to The Title Guarantee and Trust Company, then to Title Guarantee Company and is now known as Ticor. James P. McAndrews, *History of Title Insurance and ALTA Forms*, GPSolo eReport (last visited Nov. 13, 2013), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2012/march_2012/title_insurance_alta_forms.html; although details are sketchy, it appears that Monroe Abstract Company, which was founded in 1922, but changed its name to Monroe Abstract and Title Company in 1939 and in the same year, may have issued the first title policy in upstate New York. Monroe Title, *Our History*, http://www.monroetitle.com/AboutUs/OurHistory/tabid/85/Default.aspx, (last visited Nov. 13, 2016). Therefore, as to the existence of title company issued title policies, downstate New York may have had as much as a 40-year lead over the upstate area.
5. Robin Paul Malloy & Mark Klapow, *supra* note 1. Statistics provided by the Title Insurance Rate Service Association, Inc.'s Rate Manual, which sets premium rates, other rules and regulations that govern title underwriters in New York, maintains the downstate-upstate division.

The downstate region (Zone 2) is comprised of the counties of Albany, Bronx, Columbia, Greene, Kings, Nassau, New York, Orange, Putnam, Queens, Rensselaer, Richmond, Rockland, Suffolk, Sullivan, Ulster and Westchester. The remainder of New York's 62 counties comprise the upstate region. However, some Manhattan centric denizens consider any place north of 96th Street to be upstate.

6. Robin Paul Malloy & Mark Klapow, *supra* note 1.
7. Wags within title companies have been known to quip that the only time that title companies could sell an owner's policy upstate is when the title is really bad.
8. William P. Johnson, *Title Insurance Agent Licensing Law Controlled Business Restrictions Should Not Apply to Attorneys Who Provide Title Insurance to Clients*, N.Y. Real Prop. L.J., Vol. 35, No. 1, 26-27 (2007).
9. On the New York State Bar Association's website, the following preface appears; "[t]hese opinions have been issued by the NYSBA Committee on Professional Ethics. Opinions of the committee are advisory…" New York State Bar Association, http://www.nysba.org/Ethics/ (last visited, Oct. 31, 2017).
10. NYSBA Comm. on Prof'l Ethics, Formal Op. 351 (1974).
11. NYSBA Comm. on Prof'l Ethics, Formal Op. 576 (1986).
12. *Id.*
13. *Id.*
14. NYSBA Comm. on Prof'l Ethics, Formal Op. 595 (1988).
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. NYSBA Comm. on Prof'l Ethics, Formal Op. 621 (1991).
22. NYSBA Comm. on Prof'l Ethics, Formal Op. 738 (2001).
23. *See* Code of Professional Responsibility DR 1-106 (22 N.Y.C.R.R. 1200.5-b) *amended by* Rules of Professional Conduct Rule 5.7.
24. NYSBA Comm. on Prof'l Ethics, Formal Op. 753 (2002).
25. *Id.*
26. *Id.*
27. Johnson, *supra* note 8, at 26.
28. N.Y. Ins. Law §6409(d) (McKinney 2014).
29. Johnson, *supra* note 8, at 26.
30. *Id*.
31. *Id*. at 26-27.
32. *Id.*
33. *Id.* at 26.
34. Karl B. Holtzschue, *N.Y. Rules of Professional Conduct Make It Consentable for a Lawyer to Refer a Client of the Lawyer's Title Abstract Company*, N.Y. Real Prop. L. J., Vol. 38, No. 1, 15 (2010).
35. *Id.*
36. *Id.*
37. *Id.*
38. Kenneth F. Jurist, *Because Rule 5.7(c) was not Adopted, It Is Not Consentable for a Lawyer to Refer a Client to the Lawyer's Title Abstract Company*, N.Y. Real Prop. L. J., Vol. 38, No. 4, 23-27 (2010).
39. *Id.* at 23.
40. *Id.*
41. *Id.* at 24.
42. *Id.* at 25.
43. *Id.* at 26.
44. Peter V. Coffey, *NYSBA Ethics Opinions 752, 753 and 755—Written by Traditionalist Who Wish to Live in a World that No Longer Exists*, N.Y. Real Prop. L. J, Vol. 40, No. 3, 15-30 (2012).
45. *Id.* at 18.
46. *Id.* at 17.
47. Mr. Coffey's conclusion is based on his previous extensive discussion of these authors. *See id.* at 15-18.
48. *Id.* at 29 (quoting Anthony T. Kronman, *The Lost Lawyer –Failing Ideals of the Legal Profession* (1993), at 354).
49. *Id.* at 23.
50. *Id.* at 23-26.
51. *Id.* at 27.
52. T.S. Eliot, The Hollow Men (1925).
53. N.Y. Ins. Law § 2113(e) (McKinney 2014).
54. For this reason, the names of the contributors are not cited, as some also requested. Because of the brevity of the author's survey, the complexities of a state professional ethics opinions may not be fully explored.
55. As you might expect, the responses provided by member of ALTA's Forms Committees are quite thorough. Out of necessity for brevity, the author has had to shorten the responses. Any resulting lack of clarity is the fault of the author and not that of the respondent.
56. Conn. Prof'l Ethics Comm., Informal Op. 1987-06 (1987).
57. Disclosure Statement—Controlled Business Arrangement, Attorneys' Title Guaranty Fund, Inc., https://www.atgf.com/sites/default/files/forms/3000/3017-Ai.pdf.
58. ISBA Advisory Opinion No. 841 (1983)
59. ISBA Advisory Opinion No. 93-01 (1994)
60. 215 Ill. Comp. Stat. Ann. 155/18 (West 2017).
61. N.C. St. Bar Eth. Op. RPC 185 (1994).
62. *Id.*
63. *Ethics Advisory Opinion 92-03*, S.C. Bar, https://www.scbar.org/lawyers/legal-resources-info/ethics-advisory-opinions/eao/ethics-advisory-opinion-92-03/ (last visited Oct. 22, 2017) (describing that rule 17(b) prohibits a lawyer from representing a client if the representation may be materially limited by the lawyer's to another client or to a third person, unless the lawyer reasonably believes the representation will affected adversely and the client consents after consultation. In this author's considered opinion, the South Carolina Bar's caveats may have swallowed the whole).
64. Bradford W. Irelan, *Fee Attorneys Fiduciary Duties & Conflicts of Interest*, Res Ipsa, http://www.res-ipsa.com/seminars/TLTA-2014/SeminarPapers/G_FeeAttorneys.pdf (last visited Oct. 22, 2017) (presented to the State Bar of Texas, 24th Annual Robert C. Sneed Texas Land Title Institute, December 4-5, 2014).
65. *Id*. at 12.
66. *Id*.
67. *Id*. at 12-13 (citing *Amarillo Abstract and Title v. Unauthorized Practice Comm.*, 332 S.W.2d 349 (Tex. Civ. App. 1959)).
68. Irelan, *supra* note 62, at 13 (citing *Hexter Title & Abstract Co. v. Grievance Comm.*, 179 S.W.2d 946 (Tex. 1944)).
69. Irelan, *supra* note 62, at 13 (citing *Hexter*, 179 S.W.2d 946 (Tex. 1944)).
70. V.S.B., Legal Ethics Op. 1564 (1995).
71. *Id.*
72. *Id.*
73. *Id.*
74. Introduced previously, whose influential article in the *N.Y. Real Property Law Journal* on current legal practices helped to change the static opinion on ethics in New York.

When a Foreclosing Lender Skips a Defendant, and Avoiding a Tale of Woe

By Bruce J. Bergman

As emphasized in a recent case,[1] reforeclosure is a methodology to save a lender when a defendant who should have been served was not. As a sidelight, two lenders incurred considerable difficulty through lack of dedication.

First, to the facts and the tale of woe.

A lender began a mortgage foreclosure in 1991. But it did not proceed to judgment until 2009! The explanation was that they had difficulty in locating the borrowers and in determining whether one of the borrowers had died. This, however, is not likely the real story; if there is an issue like that there are ready solutions, publishing the summons among them. In any event, a foreclosure of 18 years duration is surely going to beget mischief, and of course that happened here.

Somewhere in the middle of the long journey the borrowers conveyed the property to A. A conveyed to B and B obtained a mortgage loan from a hapless lender, who later assigned it to a major mortgage holder.

When finally the foreclosure was completed in 2009 the new mortgage holder had not been cut off by the foreclosure. So the foreclosing lender, who now owned the property, brought a reforeclosure—more on that in a moment.

Unfortunately for the new bank (the holder of the more recent mortgage), it defaulted in the reforeclosure action and when it finally awakened here was its story as to why that happened. It gave the defense of the action to another bank in accordance with a pooling and servicing agreement and sent the summons and complaint to that other bank. The recipient bank then sent the papers to one of its departments located in California and then to another department in Florida where the papers were somehow misplaced and could not be found – certainly no way to run an airline.

This meant that the new mortgage holder needed to vacate its default by showing both an excuse and a meritorious defense. The court did not comment on the reasonableness of the excuse, but jumped to the supposed defense to the reforeclosure action and rejected that, so that the problem with the wayward papers wasn't that much of an issue anyway.

All can be summed up now with a quick mention of the reforeclosure process. If a defendant was not cut off by a foreclosure, the purchaser at the sale (whether the foreclosing party or a third party) can use one of two methodologies in New York to now extinguish the missed party: a strict foreclosure or a reforeclosure.[2] The differences between the two are poorly understood both by most practitioners and the courts, but then it is all very obscure. For the purposes of this review, an assumption can be made that they are quite similar and here's the theory. If the missed party *had* been named in the foreclosure, the only thing it could have done was to pay off the mortgage to save itself. So in the reforeclosure or strict foreclosure, they are given the opportunity to do that, failing in which their interest is then permanently extinguished, as it would have been if they were named in the original foreclosure in the first place.

What was so compelling here, and is probably the ultimate message, is the court's observation that the New York statute provides that the right to reforeclose is *absolute*.[3] So it wouldn't have mattered what defense the new mortgage holder had, it was going to lose.

In addition, and contrary to the new mortgage holder's contention, the reforeclosure is properly maintainable even if the statute of limitations barred an action to foreclose on the original mortgage.[4]

Thus, the reforeclosure process is almost (but not quite) unassailable. It is certainly something to consider when a defendant who should have been in the action is missed.

Endnotes

1. *Targee Street Internal Medicine Group, P.C. v. Deutsche Bank National Trust Company*, 92 A.D.3d 768 (2d Dept. 2012)
2. For a further exploration of these methodologies, attention is invited to 4 *Bergman On New York Mortgage Foreclosures*, Chap. 32, LexisNexis Matthew Bender (rev. 2017).
3. *Targee Street Internal Medicine Group, P.C. v. Deutsche Bank National Trust Company, supra*, citing *2035 Realty Co. v. Howard Fuel Corp.*, 77 A.D.2d 870, 871, 431 N.Y.S.2d 57 (1980); *6280 Ridge Realty v. Goldman*, 263 A.D.2d 22, 29, 701 N.Y.S.2d 69 (1999).
4. Citing RPAPL § 1503.

Mr. Bergman, author of the four-volume treatise, *Bergman on New York Mortgage Foreclosures*, LexisNexis Matthew Bender, is a member of Berkman, Henoch, Peterson, Peddy & Fenchel, P.C. in Garden City. He is a fellow of the American College of Mortgage Attorneys and a member of the American College of Real Estate Lawyers and the USFN. His biography appears in *Who's Who in American Law* and he is listed in *Best Lawyers in America* and *New York Super Lawyers*.

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ISSN 1530-3918 (print) ISSN 1933-8465 (online)

Cite as: *N.Y. Real Prop. L.J.*

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