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N.Y. Real Property Law Journal

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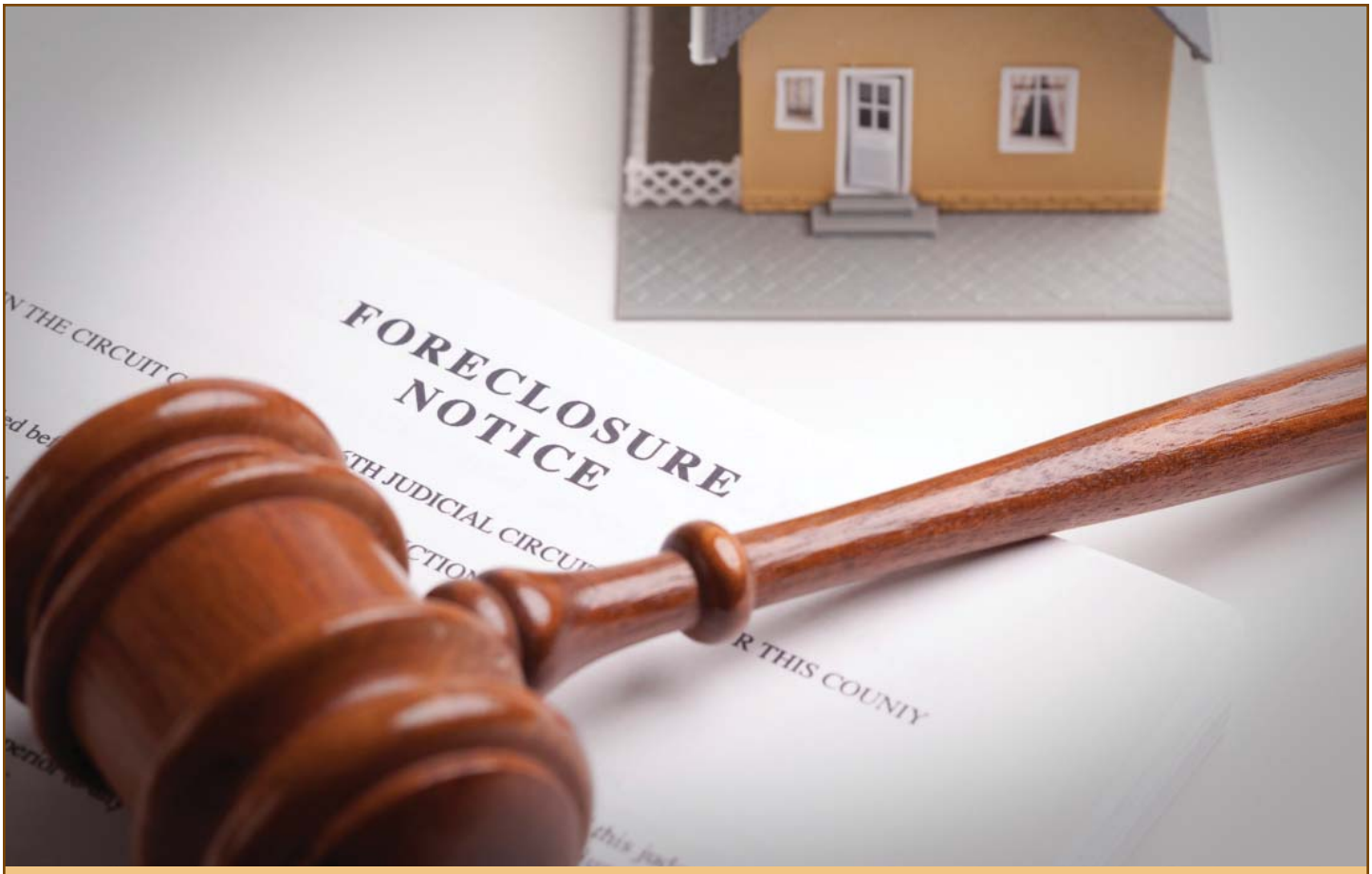

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Message from Section Chair

Time flies fast when one is having fun. I can't believe that it is almost a year since I became Chair of the Real Property Section! It has been a distinct honor and pleasure for me to lead the Section over these past twelve months.

For those of old enough to remember, there was a hit song by the Carpenters in the 1970s entitled "We've Only Just Begun." To tell the truth, that's how I feel about the tasks that I have tried to accomplish as Chair of the Section this past year. However, the time has come to pass the baton to the new and enlightened leadership of our Section.

To begin with, I want to express my heartfelt appreciation to the other officers of the Section. Anne Copps has been the best First Vice-Chair that anyone could hope to work with. I have appreciated her advice and insight on numerous issues. Her efforts in organizing phenomenal MCLE programs at our summer meeting in Ogunquit, Maine and at the Annual Meeting in New York City were just great. Ed Baer as Second Vice-Chair has been of major assistance to me and to the other officers of the Section. I can always depend upon Ed for sage and honest advice on any matter of Section business. Our newest officer, Heather Rogers, has served most commendably as Section Secretary and I valued Heather's assistance, especially in matters related to the new mortgage foreclosure legislation enacted by the State. I also wanted to single out Spencer Compton, the Section Budget Officer. Spencer has kept a careful eye on Section finances and is always available to answer questions about Section income and expenses. Truly, I had a great team working with me.

According to the Chinese calendar, we recently celebrated "The Year of the Tiger." When looking back over the activities of our Section during this past year, I would call this "The Year of the Task Force." During my tenure, we created several new all important task forces in order to address issues of importance to Section members.

We created a Task Force on Power of Attorney Legislation under the Chairmanship of Ben Weinstock. Ben was able to use his powers of persuasion on the entire "Big Bar" in getting them to adopt our Section's position on further needed amendments to the State's Power of Attorney Law. Karl Holtzschue has guided our Section as head of our Task Force on the Draft Insurance Department Regulations and Legislation. The proposals of the State Insurance Department would have a major impact on those attorneys in our Section who act as both counsel and as title agents. One of our newest task forces, the Task Force on Government-Run Title Insurance, is headed by Joshua Stein. This task force is addressing some very significant proposed legislation which would put the State of New York into the title insurance business and go head-to-head in competition with title insurance companies, abstract companies, and title agents. Our newest task force relates to a proposal to require electronic recording of land records in County Clerk's Offices throughout the State of New York. Such mandatory electronic recording would have a major impact within the State of New York. Mel Mitzner graciously agreed to head this task force.

As you are no doubt aware, the nuts and bolts of our Section's work is done in our committees. We have approximately 20 standing committees which are involved in all aspects of real property law. Although I hesitate to single out certain committees, I believe that several deserve special recognition. Our Committee on Condominiums and Coops, co-chaired by Ira Goldenberg and Dennis Greenstein, has done a great job in presenting worthwhile MCLE programs throughout the year. Our Publications Committee, co-chaired by Marvin Bagwell, Bill Colavito, Vince Di Lorenzo and William Johnson, has done an outstanding job in providing Section members with an award winning *Journal* containing numerous articles of interest to members of our Section. Our Legislation Committee, headed by Karl Holtzschue and Kathleen Lynch, has done a masterful job in keeping our Section up to date on legislative developments in Albany and supervising the preparation of memos which we submit to both the Big Bar and to the State Legislature.

Our Continuing Legal Education Committee, headed by Joe Walsh and Larry Wolk, has planned and organized most worthwhile MCLE programs for Section members. Our Commercial Leasing Committee, headed by Brad Kaufman and David Zinberg, has also been quite active in holding quarterly meetings and in organizing most worthwhile MCLE programs. One of our newest committees is the Real Estate Construction Committee, headed by Susanna Fodor, Dave Pieterse and Bob Rubin. This Committee organized its initial MCLE program this Spring. Our newest committee is the Committee on Green Real Estate, headed by Nicholas Ward-Willis and Sujata Yalamanchili. Nick organized a most unusual MCLE program last August, involving green building construction, held at Citifield, the home of the New York Mets. Nick is now working closely with representatives of the Municipal Law and Environmental Law Sections in regard to creating a Joint Task Force to deal with issues

involving green construction within municipalities throughout the State of New York.

I also wanted to single out the efforts of our Membership Committee, headed by David Burkey and Laura Monte. Both David and Laura either organized or participated in a number of membership events that were planned by our Section or by the Big Bar. As a result of the efforts of David and Laura, our Section's membership is at an all-time record high. By mentioning the above committees, this by no means detracts from the work of our other committees and their excellent chairs. Kudos to all our Committee chairs for their hard work and dedication!

I also wanted to single out Gerry Goldstein for his efforts in putting together a Section calendar each month. Some would regard this as a thankless task, but Gerry has done this for a number of years with intelligence and enthusiasm. I also wanted to thank Mindy Stern for her efforts in getting the Lorraine Power Tharp Scholarship Fund off the ground. This scholarship is a lasting monument in memory of our beloved and respected former Chair. I also wanted to thank a number of District Representatives for organizing worthwhile activities within their respective districts in order to attract new Section members. Whether it was a luncheon at Saratoga Racetrack or a Great Gatsby cocktail party in midtown Manhattan, all these events helped raise the profile and membership of our Section.

As you know, the past twelve months have not been great times for attorneys practicing real estate law. However, even during this unfortunate economic climate, I was most pleased to see that members of our Section continued to participate in Section activities by attending MCLE programs sponsored by either the entire Section or by our various committees. I was also most pleased at the great turnout which we had at the summer meeting in Ogunquit, Maine and at the Annual Meeting in New York City. I am sure that under the new leadership of the Section, we will move on to greater accomplishments in 2010-2011, which will take place in a much improved real estate climate.

So once again, thanks to all the officers and members of the Executive Committee for their support and assistance during these past twelve months and a special thanks to all Section members who participate in Section activities. Although the biggest is not always the best, I can truly say that in the case of the Real Property Law Section, we are both the biggest Section of the State Bar and the best!

I will now close my final Chair's message in the immortal words of Porky Pig, "That's all, folks."

Joel H. Sachs

Chapter 507, Laws of 2009: Enforcing Real Estate Mortgages and Cooperative Unit Security Interests

By Michael J. Berey

Chapter 507 of the Laws of 2009, enacted December 15, 2009, adds requirements for lenders enforcing mortgages against residential real property and security interests on cooperative units ("cooperative interests") in New York State. This article summarizes changes made by Chapter 507.

Notices

Chapter 507 mandates new notices and requires that the issuance of two of those notices be reported electronically to New York State's Superintendent of Banks.

A. Real Property Actions and Proceedings Law ("RPAPL") § 1303 ("Foreclosures; required notices") has been amended by Section 1 of Chapter 507, effective January 14, 2010, the thirtieth date after the date on which the Chapter was enacted, for notices required on or after such date.[1]

The "Help for Homeowners in Foreclosure" notice under RPAPL § 1303 was first required by Chapter 308 of the Laws of 2006, as amended by Chapter 154 of the Laws of 2007, to be delivered to the mortgagor with the summons and complaint in a mortgage foreclosure for owner-occupied property improved by a one-to-four family dwelling. Chapter 472 of the Laws of 2008 amended the text of the notice.[2]

Chapter 507 does not change the requirement for service on the mortgagor or the form of that notice. However, an additional notice, in Exhibit A, must be provided to "any tenant of a dwelling unit,"[3] in accordance with the requirements of new subdivision four of Section 1303.[4] This is not limited to property improved by a one-to-four-family dwelling.

In a building with fewer than five dwelling units, the notice is to be delivered to each tenant within ten days of the service of the summons and complaint, by certified mail, return receipt requested and by first class mail to the tenant's address if the identity of the tenant is known to the Plaintiff; by first-class mail delivered to "occupant" for each tenant whose identity is not known to the Plaintiff.[5] For a building with five or more dwelling units, a legible copy of the notice is to be posted on the outside of each entrance and exit of the building.[6]

Section 1303 notices are required to be on a separate page in bold, fourteen-point type printed on colored paper that is a color other than that of the paper on which the summons and complaint are printed, captioned, in bold twenty-point type, in the notice to the mortgagor, "Help for Homeowners in Foreclosure," and, in the notice to tenants, "Notice to Tenants of Buildings in Foreclosure."[7]

B. RPAPL § 1304 ("Required prior notices") has been amended by Section 1-a of Chapter 507, effective January 14, 2010, the thirtieth date after the date on which the Chapter was enacted, for notices required on or after such date.[8] This amendment is deemed repealed five years after its effective date.[9]

RPAPL § 1304 ("Required prior notices"), added by Chapter 472 of the Laws of 2008 effective September 1, 2008, has required the lender or mortgage loan servicer, when the loan is a "high-cost home loan" (as defined in Banking Law § 6-l), a "subprime home loan" or a "non-traditional home loan" (as defined in Section 1304), to provide a "You Could Lose Your Home" notice to the borrower at least ninety days before commencing a legal action, such as a foreclosure. The text of the required notice, to be in at least fourteen-point type, is in Exhibit B.

The notice is to be given when the lender, assignee, or mortgage loan servicer commences a "legal action" against the borrower and the loan is a "home loan," as defined in amended Section 1304.[10] The notice is no longer limited to the foreclosure of a "high-cost home loan," a "subprime home loan," and a "non-traditional home loan." The definition of a "home loan," as amended, is a loan, including an open-end credit plan, other than a reverse mortgage transaction, as to which:

(i) The borrower is a natural person;

(ii) The debt is incurred by the borrower primarily for personal, family, or household purposes;

(iii) The loan is secured by a mortgage on real estate improved by a one-to-four-family dwelling, or a condominium unit, in either case, used or occupied, or intended to be used or occupied wholly or partly, as the home or residence of one or more persons and which is or will be occupied by the borrower as his or her principal residence; and

(iv) The property is located in this state.[11]

The lender or mortgage loan servicer is to continue to send this notice to the borrower by registered or certified mail and also by first-class mail to the last known address of the borrower. If the borrower resides at an address other than the mortgaged property, the notice is also to be sent to the mortgaged property. Notice is considered given on the date it is mailed.[12]

The notice is still to be given once in a twelve-month period "to the same borrower in connection with the same loan."[13] The ninety-day

period does "not apply, or shall cease to apply, if the borrower has filed an application for the adjustment of debts of the borrower or an order for relief from the payment of debts, or if the borrower no longer occupies the residence as the borrower's principal dwelling."[14]

C. Subsection "(f)" ("Additional pre-disposition notice for cooperative interests") has been added to UCC Section 9-611 ("Notification before disposition of collateral") by Section 2 of Chapter 507, effective January 14, 2010, the thirtieth day after the date on which the Chapter was enacted. The subsection applies to notices required on or after such date.[15]

In addition to notices required to dispose of a cooperative interest on the enforcement of a security interest under subsection (b) of UCC § 9-611 and UCC § 9-613 ("Content and form of notification before disposition of collateral: Generally"), UCC § 9-611 has been amended to require that a pre-disposition notice be sent, in the case of a residential cooperative interest used by the debtor, to the debtor after default, not less than ninety days prior to the disposition.[16] It is assumed that this requirement applies not only when a security interest is to be enforced by a "foreclosure" sale under Article 9, but also when the cooperative interest is transferred to the secured party in full satisfaction of the obligation secured, as provided for under amended UCC § 9-620, discussed below. The form of this notice is in Exhibit C.

The notice is required to be in bold, fourteen-point type, printed on a colored paper other than the color of the notice required by UCC § 9-611(b). The title of the notice is to be in bold, twenty-point type, and the notice shall be on its own page.[17]

D. Section 1305 ("Notice to tenants") has been added to the RPAPL by Section 4 of Chapter 507, effective January 14, 2010, the thirtieth day after the date on which the Chapter was enacted. This Section applies to actions in which a judgment of foreclosure and sale is issued on or after such date.[18]

Section 1305 affords rights to tenants in occupancy of "residential real property" (other than tenants protected by rent stabilization or rent control) enabling them to continue to occupy their dwellings, and requires a "successor in interest" to provide written notice to such tenants of their rights to remain in occupancy. The rights afforded to tenants by Section 1305, and requirements for lenders to provide tenants notice of these rights, are also required for actions affected by RPAPL § 221 ("Compelling delivery of possession of real property") and under Section 713 ("Grounds where no landlord-tenant relationship exists") of RPAPL Article 7 ("Summary Proceeding to Recover Possession of Real Property"), as amended by Sections 7 and 8 of Chapter 507. There is no statutory form of this notice.[19]

"Residential real property" is defined in Section 1305 as "real property located in this state improved by any building or structure that is or may be used, in whole or in part, as the home or residence of one or more persons, and shall include any building or structure used for both residential or commercial purposes."[20]

A "successor in interest" is defined in Section 1305 as "any person or entity who or which acquires title in a residential real property as the result of a judgment of foreclosure and sale, or other disposition during the pendency of the foreclosure proceeding, or any time thereafter prior to the expiration of the time period"[21] within which a tenant may remain in occupancy under subdivision two of Section 1305. This definition presumably encompasses the transferee of a conveyance in lieu of foreclosure made after a notice of pendency to foreclose a mortgage is filed.

The notice is to set forth "(a) that they [the tenants] are entitled to remain in occupancy of such property for the remainder of the lease term, or a period of ninety days from the date of mailing of such notice, whichever is greater, on the same terms and conditions as were in effect at the time of transfer of ownership of such property; and (b) of the name and address of the new owner."[22]

"Any person or entity who or which becomes a successor in interest after the issuance of the ninety-day notice…shall notify all tenants of its name and address and shall assume such interest subject to the right of the tenant to maintain possession.…"[23]

E. Section 1306 ("Filing with superintendent") has been added to the RPAPL by Section 5 of Chapter 507, effective February 13, 2010, the sixtieth day after the date on which the Chapter was enacted. This Section applies to notices under RPAPL § 1304 and UCC § 9-611(f) mailed on and after that effective date.[24]

Within three business days of the mailing of the notice under either of RPAPL § 1304 or UCC § 9-611(f), the requirements for which are described above, the lender, assignee, or mortgage loan servicer is to file with the State Superintendent of Banks, among other information, the name, address, and last known telephone number of the borrower, the amount claimed as due and owing on the loan, and the type of the loan.[25] The information, to be provided electronically on a form to be prescribed by the Superintendent, is to be used to monitor the extent of foreclosure filings within New York State, to enable an analysis to be made of loan types subject to foreclosure, and to direct foreclosure prevention and counseling services to borrowers at risk of foreclosure.[26]

The Superintendent, with the assistance of the Commissioner of the State's Division of Housing and Community Renewal, is required to develop an electronic database to receive such filings within 180 days of the effective date of Section 5 or "such later time as the Superintendent may determine…." It is uncertain how the filings are to be made prior to the creation of that facility.[27]

Cooperative Interests Transfers "in Lieu"

Subsection "(h)" ("Special provisions for cooperative interests") has been added to UCC § 9-620 ("Acceptance of collateral in full or partial satisfaction of obligations") by Section 3 of Chapter 507, effective January 14, 2010, the thirtieth day after the date on which the Chapter was enacted.[28]

Subsection "(h)" provides that a secured party may accept the transfer of a cooperative interest in full, not partial, satisfaction of the obligations of the debtor under the loan secured by its security interest.[29]

When a secured party proposes that it receive a transfer of a residential cooperative interest used by the debtor in full satisfaction of the debtor's obligations, the proposal is required to be accompanied by the notice otherwise required by UCC § 9-611(f), described above, unless the secured party previously sent the debtor the notice. The proposal must be agreed to by the debtor in a record "authenticated" after default. The debtor may, alternatively, propose that the secured party take the cooperative interest in full satisfaction of the obligations secured.[30]

Shared Appreciation

Subdivision one of Banking Law Section 6-f ("Alternative mortgage instruments made by banks, trust companies, savings banks, savings and loan associations and credit unions") has been amended by Section 11 of Chapter 507, effective December 15, 2009.[31]

Subdivision one, as amended, authorizes the Banking Board to adopt regulations permitting a lender (within the scope of Section 6-f) to enter into a written "shared appreciation agreement" ("Agreement") with a borrower under which a lender, reducing the principal amount of a loan to assist a borrower at risk of foreclosure of a residential mortgage loan or a cooperative apartment unit loan, may receive a share of the future appreciation of the real property or cooperative apartment which is the security for the loan.[32]

The amount which the lender may receive is limited to the lesser of (i) the amount of such reduction in principal, plus interest on such amount from the date of such reduction to the date of payment at the same rate of interest as applies to the remaining principal amount of the loan, and (ii) fifty percent of the amount of such appreciation, payable when the property securing the loan is sold.[33]

The subdivision provides that "[r]ecovery of such reduction in the principal amount shall not be deemed interest for any purposes of the laws of this state."[34]

The Agreement must "expressly and conspicuously" state at the top of the agreement, in at least fourteen-point type, the following: "In this agreement, you are giving away some of the future increase in the value of your home. Please read carefully."[35]

The Agreement must also be accompanied by a notice containing disclosures required by Section 6-f and the Banking Board, on a separate page with the following heading in bold, fourteen-point type: "Important disclosures about the contract in which you agree to give away a part of any future increase in the value of your home. Please read carefully."[36]

Other Requirements

A. RPAPL § 1307 ("Duty to maintain foreclosed property") has been added by Section 6 of Chapter 507, effective the 120th day after the date on which the Chapter was enacted.[37]

Under RPAPL § 1307, a plaintiff (other than a governmental entity holding a subordinate mortgage) having obtained a judgment of foreclosure involving "residential real property" (as defined in RPAPL § 1305) which is vacant, becomes vacant after issuance of the judgment of foreclosure, or is abandoned by the mortgagor but occupied by a "tenant" (also as defined in RPAPL § 1305), "shall maintain the property" until a deed transferring the ownership of the property is recorded. The plaintiff is not responsible for maintaining the property while a receiver is serving or, if the mortgagor commences a bankruptcy proceeding, while the bankruptcy stay is in effect.[38]

The municipality in which the property is located, any tenant lawfully in possession of the property, and, if applicable, a condominium board of managers or a homeowners association have the right to bring an action to enforce such obligations, and they can assert causes of action to recover costs they incur in maintaining the property.[39]

B. Subdivision (a) of CPLR Rule 3408 ("Mandatory settlement conference in residential foreclosure actions") has been amended by Section 9 of Chapter 507, and five new subdivisions have been added to Rule 3408, effective February 13, 2010, sixty days after the date on which the Chapter was enacted. These new provisions will apply to all legal actions filed on and after that date. The amendments to subdivision (a) are deemed repealed five years after the effective date.[40]

Rule 3408(a) has required that a Court, in a residential foreclosure involving a high-cost, a subprime or a non-traditional home loan, hold a mandatory conference for settlement discussions within sixty days after the date when proof of service is filed with the County Clerk or on an adjourned date agreed to by the parties. Chapter 507 makes this requirement applicable broadly to residential foreclosures involving "home loans," as defined in RPAPL § 1304.[41]

New subsection (f) of Rule 3408 requires that "[b]oth the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible."[42]

New subsection (g) of Rule 3008 provides that "[t]he plaintiff must file a notice of discontinuance and vacatur of the lis pendens within 150 days after any settlement agreement or loan modification is fully executed."[43]

C. Section 3-a in Chapter 472 of the Laws of 2008, amended by Section 10 of Chapter 507, effective December 15, 2009,[44] expands requirements for the holding of settlement conferences.

In a foreclosure action involving a home loan (as defined in RPAPL § 1304), which is not a high-cost home loan or a subprime home loan, when a judgment of foreclosure has not yet been entered, a Court is to notify the defendant-borrower that if he or she is a resident of such property he or she may request a settlement conference.[45]

D. Chapter 507, Sections 12 and 13 amend Banking Law Section 6-l ("High-cost home loans"), and Sections 14 and 15 amend Banking Law § 6-m ("Subprime home loans"). The amendments to Section 6-l and Section 15 are effective December 15, 2009;[46] the amendments to Section 6-m by Section 14 are effective sixty days after the date on which the Chapter was enacted.[47]

Among other amendments made to Banking Law §§ 6-l and 6-m by Chapter 507, the definitions, in those Sections, of a "home loan" have been amended to (i) exclude from the definition loans made or fully or partially guaranteed by the State of New York Mortgage Agency ("SONYMA"), (ii) include (in addition to property improved by a one-to-four family dwelling which is or will be occupied as the principal dwelling of the borrower) a condominium unit and a cooperative unit which is or will be occupied as the principal dwelling of the borrower, and (iii) include "jumbo mortgages" (under FNMA conforming loan size limits).

E. Sections 20 and 21 of Chapter 507 amend Penal Law § 187.00 ("Residential mortgage fraud") and add new Penal Law Section 187.01 ("Limitation on prosecution"), effective December 15, 2009.[48]

Chapter 472 of the Laws of 2008 codified the crime of "residential mortgage fraud." Section 20 amended Penal Law § 187.00 to amend the definition of "residential mortgage loan" to include loan modifications. Section 187.01 provides that an individual applying for a residential mortgage loan, intending to occupy the residential property, is not subject to prosecution unless the borrower "acts as an accessory" to the commission of the fraud.[49]

F. Sections 16, 17, 18, 19 and 22 of Chapter 507 amend Banking Law § 590 ("Licensed mortgage bankers"), Banking Law § 595-a ("Regulation of mortgage brokers, mortgage bankers and exempt organizations"), and Real Property Law § 265-b effective December 15, 2009,[50] except for Section 16, which is effective February 13, 2010, sixty days after the date on which Chapter 507 was enacted.[51]

Sections 16, 17 and 18 of Chapter 507 relate to the licensing of "mortgage loan originators." Sections 19 and 22 of Chapter 570 concern "distressed property consultants." In particular, in Section 22, the definition of a "distressed property consultant," which has excluded "an attorney admitted to practice in the state of New York," has been amended to exclude from the definition "an attorney admitted to practice in the state of New York when the attorney is directly providing consulting services to a homeowner in the course of his or her regular legal practice."

The changes made by Chapter 507 present numerous challenges to lenders, lenders' counsel, and title insurers.

Endnotes

1. L. 2009, ch. 507, § 25(a).
2. L. 2008, ch. 472; *see* Michael J. Berey, *New N.Y. Mortgage Foreclosure Legislation*, N.Y.L.J., Sept. 11, 2008, at 4, col. 4.
3. L. 2009, ch. 507, § 1.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. L. 2009, ch. 507, § 25(a).
9. *Id.*
10. *Id.* § 1-a.
11. *Id.*
12. N.Y. Real Prop. Acts. Law ("RPAPL") § 1304(2) (McKinney 2009).
13. *Id.* § 1304(4).
14. *Id.* § 1304(3).
15. L. 2009, ch. 507, § 25(a).
16. *Id.* § 2.
17. *Id.*
18. *Id.* § 25(b).
19. *Id.* § 4.
20. L. 2009, ch. 507, § 4.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* § 25(c).
25. L. 2009, ch. 507, § 5.
26. *Id.*
27. *Id.*
28. *Id.* § 25(a).
29. *Id.* § 3.
30. L. 2009, ch. 507, § 3.
31. *Id.* § 25.
32. *Id.* § 11.
33. *Id.*
34. *Id.*
35. L. 2009, ch. 507, § 11.
36. *Id.*
37. *Id.* § 25(a).
38. *Id.* § 6.
39. *Id.*
40. L. 2009, ch. 507, § 25(e).
41. *Id.* § 9.
42. *Id.*
43. *Id.*
44. *Id.* § 25.
45. L. 2009, ch. 507, § 10.
46. *Id.* § 25.
47. *Id.* § 25(f).
48. *Id.* § 25.
49. *Id.* § 21.
50. L. 2009, ch. 507, § 25.
51. *Id.* § 25(g).

Michael J. Berey is General Counsel, Senior Vice-President, at First American Title Insurance Company of New York.

Exhibit A

RPAPL Section 1303
Notice to Tenants of Buildings in Foreclosures

New York State Law requires that we provide you this notice about the foreclosure process. Please read it carefully.

The dwelling where your apartment is located is the subject of a foreclosure proceeding. If you have a lease, are not the owner of the residence, and the lease requires payment of rent that at the time it was entered into was not substantially less than the fair market rent for the property, you may be entitled to remain in occupancy for the remainder of your lease term. If you do not have a lease, you will be entitled to remain in your home until ninety days after any person or entity who acquires title to the property provides you with a notice as required by section 1305 of the Real Property Actions and Proceedings Law. The notice shall provide information regarding the name and address of the new owner and your rights to remain in your home. These rights are in addition to any others you may have if you are a subsidized tenant under federal, state or local law or if you are a tenant subject to rent control, rent stabilization or a federal statutory scheme.

If you need further information, please call the New York State Banking Department's toll-free helpline at 1-877-BANK-NYS (1-877-226-5697) or visit the Department's website at http://www.banking.state.ny.us.

Exhibit B

RPAPL Section 1304
You Could Lose Your Home

Please Read the Following Notice Carefully

As of _____ , your home loan is ___ days in default. Under New York State Law, we are required to send you this notice to inform you that you are at risk of losing your home. You can cure this default by making the payment of _____ dollars by _____.

If you are experiencing financial difficulty, you should know that there are several options available to you that may help you keep your home. Attached to this notice is a list of government-approved housing counseling agencies in your area, which provide free or very low-cost counseling. You should consider contacting one of these agencies immediately. These agencies specialize in helping homeowners who are facing financial difficulty. Housing counselors can help you assess your financial condition and work with us to explore the possibility of modifying your loan, establishing an easier payment plan for you, or even working out a period of loan forbearance. If you wish, you may also contact us directly at _____ and ask to discuss possible options.

While we cannot assure you that a mutually agreeable resolution is possible, we encourage you to take immediate steps to try to achieve a resolution. The longer you wait, the fewer options you may have.

If this matter is not resolved within 90 days from the date this notice was mailed, we may commence legal action against you (or sooner if you cease to live in the dwelling as your primary residence).

If you need further information, please call the New York State Banking Department's toll free helpline at 1-877-BANK-NYS (1-877-226-5697) or visit the Department's website at http://www.banking.state.ny.us.

EXHIBIT C

UCC Section 9-611
Help for Homeowners at Risk of Foreclosure

New York State Law requires that we send you this information about the foreclosure process. Please read it carefully.

Notice

You are in danger of losing your home. You are in default of your obligations under the loan secured by your rights to your cooperative apartment. It is important that you take action, if you wish to avoid losing your home.

Sources of Information and Assistance

The State encourages you to become informed about your options, by seeking assistance from an attorney, a legal aid office, or a government agency or non-profit organization that provides counseling with respect to home foreclosures.

To locate a housing counselor near you, you may call the toll-free helpline maintained by the New York State Banking Department at _____ enter number) or visit the Department's website at _____ (enter web address). One of these persons or organizations may be able to help you, including trying to work with your lender to modify the loan to make it more affordable.

Foreclosure Rescue Scams

Be careful of people who approach you with offers to "save" your home. There are individuals who watch for notices of foreclosure actions or collateral sales in order to unfairly profit from a homeowner's distress. You should be extremely careful about any such promises and any suggestions that you pay them a fee or sign any papers that transfer rights of any kind to your cooperative apartment. State law requires anyone offering such services for profit to enter into a contract which fully describes the services they will perform and fees they will charge, and which prohibits them from taking any money from you until they have completed all such promised services.

Comparing New State and Federal Laws Designed to Protect Residential Tenants Against Immediate Eviction from Foreclosed Properties

By Dan M. Blumenthal

Shortly after my article on the federal Protecting Tenants at Foreclosure Act,[1] (the "Federal Act") appeared in the Fall 2009 edition of the NYSBA *N.Y. Real Property Law Journal*,[2] Governor Paterson signed a similar law, codified as Real Property Actions and Proceedings Law ("RPAPL") § 1305, effective January 14, 2010 (the "NYS Act") mandating similar notice and also granting protections for tenants in foreclosed residential properties.[3]

The relief afforded by the Federal Act shall be ineffective if "any State or local law [ ] provides longer time periods or other additional protections for tenants."[4] With this in mind, how does the NYS Act modify or clarify the duties of a foreclosure purchaser and rights of occupants of foreclosed properties?

The Federal Act protects any "bona fide" tenant, that term being defined to include anyone in possession pursuant to "an arm's-length transaction" for "fair market rent" or rent "reduced or subsidized due to a Federal, State, or local subsidy," but not "the mortgagor or the child, spouse, or parent of the mortgagor."[5] The NYS Act definition of "Tenant" is broad enough to include anyone other than the former owner, provided they are paying "not substantially less than fair market rent."[6] While the Federal Act applies to any occupancy agreement, the NYS Act is confined to agreements made with the foreclosed mortgagor.[7] We routinely encounter occupants with written or oral agreements with a party who has either been given authority from the owner facing foreclosure or is running a scam by renting out an abandoned house.[8] The occupant under a third party agreement, whether valid or fraudulent, would appear not to be entitled to protection under the NYS Act.

In what appears to be the only reported case in the state arguing for protection under the Federal Act,[9] the Suffolk County District Court correctly found that the Federal Act applies "to only those tenancies arising from dwellings or residential real property in which a federally related mortgage was foreclosed" and denied the motion by determining that the underlying mortgage was not "federally related" as required under the Federal Act.[10] The term "federally related mortgage loan" is defined in 12 U.S.C. § 2602(1) (directly referenced in the Federal Act[11]) to include a broad range of mortgages insured or made by a Federal entity,[12] intended for sale to "the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, or a financial institution from which it is to be purchased by the Federal Home Loan Mortgage Corporation,"[13] or in the definition most vulnerable to the Suffolk District Court's constitutional argument, made by any entity "who makes or invests in residential real estate loans aggregating more than $1,000,000 per year" other than a State agency.[14] The subsequent enactment of a New York State law applicable to all residential foreclosures in the State renders this analysis unnecessary.

The Federal Act applies to "any dwelling or residential real property," provided there is a federal regulatory nexus.[15] The NYS Act provides a more concise definition of "residential real property," confining the protection of the NYS Act to structures that "may be used, in whole or in part, as the home or residence of one or more persons."[16] Use of the permissive "may" suggests that illegal space is not included in scope of the NYS Act. An argument could be made that the alternate term "dwelling" in the Federal Act broadens the federal protections beyond the NYS Act to include any *de facto* dwelling. The protections of the NYS Act would seem to extend to multiple units within a dwelling, other than those covered by rent control or stabilization;[17] unlike the Federal Act, which is silent on multi-unit residences, the NYS Act expressly recognizes multi-unit residencies.[18] One interesting twist under the NYS Act that can be anticipated will be the mortgagor making a last minute lease to a family which, if rent is "not substantially less than the fair market rent," will need to be honored by the purchasers.[19]

Both acts place the notice obligations on the "successor in interest" to the foreclosed former borrower/owners.[20] The Federal Act is confined to an otherwise undefined "immediate successor in interest pursuant to foreclosure,"[21] leaving questions about subsequent grantees (for instance, the servicer for an FHA insured loan takes title and then deeds to the Secretary of Housing as part of the claim). Under the NYS Act, "successor" is defined as "any person or entity who or which acquires title in a residential real property as a result of a judgment of foreclosure and sale, or other disposition during the pendency of the foreclosure proceeding, or at any time thereafter but prior to the expiration of the time period as provided for in subdivision two of this section."[22] This would seem to place the notice requirements on any entity acquiring a property with

a foreclosure or a deed in lieu of (a pending) foreclosure granted within (the greater of) any remaining lease term or 90 days from the date of the grant by which the borrowers lost title.

The Federal Act, while mandating a notice, is vague as to timing or delivery. The NYS Act provides far greater guidance, providing that the notice must be in writing[23] and indicating delivery by mail[24] with the 90-day period counted from the date of the mailing.[25] The NYS Act would also appear to be applicable where a purchaser acquires the property in an arm's-length transaction and the property is occupied.[26]

While the Federal Act is silent on the rent obligations of eligible occupants, the NYS Act provides that the rights granted by the Act shall not abrogate any right to evict as an instance of foreclosure or for non-payment.[27] It is an open question whether an innocent, documented payment to the former owner would be a defense to a non-payment proceeding under this provision. Caution should be observed in taking rents *after* any period provided for by the NYS Act, as there can be no assurance that such payment would not be construed as establishing a statutory tenancy. The rent obligation under the NYS Act is that amount "in effect at the time of entry of the judgment of foreclosure and sale, or if no such judgment was entered, upon the terms and conditions as were in effect at the time of transfer of ownership of such property."[28] We are left to our own devices to determine the rent due for a tenancy commencing after entry of judgment, if such a tenancy has any validity.[29]

The NYS Act limits the ability of a foreclosure purchaser to terminate a lease on 90-day notice and gain possession for personal use to a single dwelling unit.[30] Every notice under the NYS Act must contain the name and address of the new owner.[31] Further, anyone taking subsequent title while an occupancy right under the NYS Act is in place must notify the occupants of the transfer with its name and address.[32]

The rights given to a tenant under the new NYS Act are in addition to any rights of such a party by reason of not being named in the underlying foreclosure,[33] such as unavailability of a writ of assistance in the foreclosure action based on due process issues.[34] An open issue is the validity and obligation of a foreclosure purchaser to honor any lease with a term greater than three (3) years, as such a lease would be deemed a conveyance[35] and otherwise unenforceable against a subsequent good-faith purchaser,[36] a definition which includes a mortgagee who properly records.[37]

Foreclosure purchasers will, as a general rule, want to send the notice required under these Acts as quickly as possible. Of interest to purchasers other than the foreclosure plaintiff (who often take title on the same day as the auction) is that a foreclosure sale bid (with deposit) makes the bidder the legal equivalent of a contract vendee and "the execution of a contract for the purchase of real estate and the making of a partial payment gives the contract vendee equitable title to the property."[38] This may be sufficient status to warrant issuance of notice.

Whatever your position on the utility and appropriateness of these Acts, the New York State legislature is to be commended for taking the important step lacking in the Federal Act of defining terms and introducing some equitable balance to the law.

Endnotes

1. Protecting Tenants at Foreclosure Act of 2009, Pub. L. No. 111–22, § 701–04, 123 Stat. 1632.
2. *See* Dan M. Blumenthal, *The New Federal "Protecting Tenants at Foreclosure Act*," 37 N.Y. Real Prop. L.J. 4 (2009).
3. N.Y. Real Prop. Acts. Law ("RPAPL") § 1305 (McKinney 2009).
4. Protecting Tenants at Foreclosure Act § 702, 42 U.S.C.A. § 1437f(o)(7)(F) (2009).
5. Protecting Tenants at Foreclosure Act § 702(b), 12 U.S.C.A. § 5220, note.
6. *See* RPAPL § 1305(2)(a) (McKinney 2006) ("fair market rent" shall mean rent for a unit of residential real property of similar size, location and condition).
7. *See* RPAPL § 1305 (1)(c).
8. Among the variations on this scam are con artists posing as landlords accepting rental deposits, as well as bolder criminals who actually show up monthly to collect rents. Invariably, these opportunistic thieves disappear before eviction proceedings are heard. *See* Karen Aho, *Renters: Beware of new twists on an old scam*, MSN.com Real Estate, http://realestate.msn.com/article.aspx?cp-documentid=20482759 (last visited Feb. 4, 2010).
9. *See Collado v. Boklar*i, 892 N.Y.S.2d 731, 2009 N.Y. Slip Op. 29447.
10. 892 N.Y.S.2d at 733.
11. Protecting Tenants at Foreclosure Act, § 702(c).
12. 12 U.S.C. § 2602(1)(B)(i), (ii).
13. 12 U.S.C. § 2602(1)(B)(iii).
14. 12 U.S.C. § 2602(1)(B)(iv).
15. Protecting Tenants at Foreclosure Act, § 702(a).
16. RPAPL § 1305(1)(a).
17. Such tenants are exempt from eviction based solely on foreclosure. *See Pisani v. Cominger*, 36 A.D.2d 593, 593, 318 N.Y.S.2d 913, 913 (1st Dep't 1971).
18. RPAPL § 1305(1)(c).
19. RPAPL § 1305(2).
20. *See* RPAPL § 1305(3); Protecting Tenants at Foreclosure Act, § 701 (codified at 12 U.S.C. § 5220, note).
21. Protecting Tenants at Foreclosure Act, § 702(a).
22. RPAPL § 1305(1)(b).
23. *See* RPAPL § 1305(3).
24. *See* RPAPL § 1305(2), (3).
25. *See* RPAPL § 1305(2)(a).
26. *See* RPAPL § 1305(2).
27. *See* RPAPL § 1305(4).
28. RPAPL § 1305(3).
29. *See* G*reen Point Sav. Bank v. Barbagallo*, 247 A.D.2d 442, 443, 668 N.Y.S.2d 678, 679 (2d Dep't 1998) ("[U]pon entry of the judgment of foreclosure and sale [ ], the mortgagors no longer had any title through which they could convey a leasehold interest.") (citation omitted).
30. *See* RPAPL § 1305(2).
31. *See* RPAPL § 1305(3)(b).
32. *See* RPAPL § 1305(3).
33. *See* RPAPL § 1305(5)(a).

34. *See Nationwide Associates, Inc. v. Brunne*, 216 A.D.2d 547, 547, 629 N.Y.S.2d 769, 769 (2d Dep't 1995).

35. *See* Real. Prop. §§ 290–291, 291-c (McKinney 2009).

36. *See Hi-rise Laundry Equip. Corp. v. Matrix Prop., Inc.*, 96 A.D.2d 930, 930, 466 N.Y.S.2d 375, 376 (2d Dep't 1983).

37. *See* N.Y. Real. Prop. Law § 291.

38. *Carnavalla v. Ferraro*, 281 A.D.2d 443, 443, 722 N.Y.S.2d 47, 48 (2d Dep't 2001).

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N.Y. Rules of Professional Conduct Make It Consentable for a Lawyer to Refer a Client to the Lawyer's Title Abstract Company

By Karl B. Holtzschue

1. Prior Article on COSAC Proposal

In the Summer 2008 issue of the *N.Y. Real Property Law Journal*,[1] I analyzed the ethics opinions and the Rules of Professional Conduct proposed by NYSBA's Committee on Standards of Attorney Conduct ("COSAC") with respect to a lawyer referring a client to an abstract company *owned* by the lawyer. Rule 5.7 deals with "Responsibilities Regarding Nonlegal Services." I concluded that proposed Rule 5.7(d) and the Official Comments and COSAC Commentary thereon made clear that such a referral was consentable, on a case-by-case basis, if the required steps were taken. I noted that the COSAC Commentary on Rule 5.7(d) *and the accompanying Comments* were meant to *overrule* NYSBA Ethics Opinions 752, 753 and 755. The COSAC Commentary said that there may be cases where a conflict in that situation is non-consentable, but *there are not entire categories of transactions (such as a lawyer acting also as a broker) in which the conflict is non-consentable*. After considerable debate, COSAC concluded that the necessity for the lawyer to comply with Rule 1.8(a) (transaction between lawyer and client fair and reasonable and informed written consent obtained) and Rule 1.7(b) (lawyer reasonably believes lawyer able to provided competent representation to each client and informed written consent obtained from each) is a *sufficient safeguard to permit the proposed practice in most cases*. Though not explicit in the COSAC Commentary, I added my own observation that the overruling of a "series" of prior opinions would include those referred to in Opinion 753, that is, Opinions 595, 621 and 738.

2. Rule 5.7 and Comment as Adopted

Effective April 1, 2009, the Appellate Divisions of the Supreme Court adopted the New York Rules of Professional Conduct, and the NYSBA House of Delegates adopted Comments drafted by COSAC. For reasons not explained, the Appellate Divisions adopted Rule 5.7 without subsection (d). NYSBA did, however, adopt Comment [5] as originally proposed. Comment [5B] says that the *client may consent* to provision of legal and nonlegal services in the same transaction if: (i) the lawyer complies with Rule 1.8(a), (ii) Rule 1.7(b), and (iii) the client gives informed consent, confirmed in writing.

Section [13] of the Scope note to the Rules explains the relationship between the Rules and the Comments: "The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule.… The Comments are intended as guides to interpretation, but the text of each Rule is authoritative." Section [6] of the Scope note states: "Comments do not add obligations to the Rules but *provide guidance for practicing in compliance with the Rules*" [emphasis added].

The bottom line seems to be that while the proposed *prohibition* (unless Rules 1.8(a) and 1.7(b) are complied with) in COSAC's proposed Rule 5.7(d) was not adopted by the Appellate Divisions as part of the new Rules, the NYSBA Comment's *permitting* of the provision of legal and nonlegal services, assuming a proper disclosure and consent, should be effective. The NYSBA Committee on Professional Ethics should be guided accordingly. The legislative history in the COSAC Commentary would still be relevant, particularly as to the intent to *overrule* prior ethics opinions that such transactions were *per se* non-consentable.

It should be noted that Opinion 576, which deals with a different fact pattern, where the lawyer acts as a title agent, approved attorney or examining counsel, not as an owner of an abstract company, continues to provide that that situation is, and always has been, consentable.

Endnote

1. Karl B. Holtzschue, *COSAC Proposes to Make it Consentable for an Attorney to Refer a Client to the Lawyer's Title Abstract Company*, 36 N.Y. Real Prop. L.J. 19 (Summer 2008).

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Special District Assessments—Who Must Pay and Who Is Exempt? The Meaning of "Benefited Property"

By Mark D. Lansing

Real Property Tax Law ("RPTL") and Town Law permit municipalities to create special districts.[1] Among other public services, special districts include ambulance and fire services, sewers, garbage removal, lighting, and highways.[2] While special districts such as highways, ambulances, and fire services benefit all residents, other special districts, such as sewers and garbage removal, provide a direct benefit to only specific parcels of real property. When real property is not benefited by the special district's services, it cannot be assessed for that special district's tax.[3] Though special district assessments may, on the surface, appear to be insignificant, such charges will quickly mount for a taxpayer that has multiple sites spread among different municipalities. This article reviews how to challenge a special district assessment, the meaning of "benefited," the different standards applied to utility and railroad properties, and the appropriate application of recent case law addressing special district assessments. Are you paying for a service that you are not receiving?

A. The Procedure for Challenging a Special District Assessment

Though, generally, an aggrieved taxpayer must challenge an assessment through Article 7 of the RPTL,[4] courts have allowed plenary actions when the taxpayer claims that the taxing authority has overstepped its power in assessing and collecting the assessment.[5] To challenge a special district assessment on these grounds, the taxpayer commences a plenary action in the Supreme Court of the county in which the real property is located.[6] A plenary action must assert that the municipality lacks statutory authority to designate the taxpayer's real property as being benefited by the special district.[7] The taxpayer does not contest the Town's right to create or maintain the challenged special district, but solely whether their real property is benefited by the services that the special district provides. In these actions, the taxpayer does not have to meet the statutory conditions precedent of, or follow the procedures set forth in, the Real Property Tax Law.[8] As one court has stated, "Where a challenge is made to the taxing authority's jurisdiction over the subject property, the settled rule that reviews of a tax assessment may be obtained only by way of the statutory certiorari procedure is not applicable."[9] Indeed, "[i]f taxing officers act without jurisdiction, their acts are illegal and void. In such a case, certiorari is not an adequate remedy or even an appropriate one."[10]

The period of limitations to commence this plenary action is four months from the date of the taxing authority's final determination that the real property was benefited for the selected tax year.[11] However, the timing for when the four-month period commences is not clear: the period may begin to run either from the filing date of the final assessment rolls of the Town or from the receipt of the special district's tax bill.[12] The preferable and more conservative time period is based on the filing of the final assessment rolls.[13]

B. Real Property Must Be Benefited

In addressing the taxpayer's challenge to special district assessment, a court must first address the nature of the district—i.e., whether its assessment constitutes a "special *ad valorem* levy" or a general tax. New York's history of distinguishing special *ad valorem* levies from general taxes can be traced back to court decisions from the 1800s.[14] Special levies finance a service providing a specific benefit to a particular property or group of properties.[15] Real Property Tax Law § 102(14) codified this distinction in its definition of "special *ad valorem* levy" as:

> [A] charge imposed upon *benefitted* real property in the *same manner and at the same time* as taxes for municipal purposes to defray the cost, including operation and maintenance, of a special district improvement or service, but not including any charge imposed by or on behalf of a city of village.[16]

In *Tuckahoe Housing Authority v. City of Eastchester*, the court observed that "[t]he Legislature has expressly excluded such levies and special assessments from the definition of tax under the RPTL."[17]

Once a court classifies the special district assessment as a special *ad valorem* levy, the only remaining inquiry is whether the real property is benefited. In *Applebaum v. Town of Oyster Bay*, while evaluating the validity of an *ad valorem* garbage collection levy, the Court of Appeals concisely stated the requirement that the property receive a direct benefit: "[B]ecause [the taxpayers] *do not receive the pertinent benefit, no basis exists* in these circumstances *for the imposition* of this ad valorem garbage collection levy."[18] In holding for the taxpayer, the Court of Appeals reiterated that "[t]his Court has allowed a property owner *to recover* ad valorem levies

paid to a Town's garbage district for garbage collection services *where the petitioner did not have the benefit of that Town's garbage collection service."*[19] In coming to its holding, the Court of Appeals affirmed the Second Department's finding that "[i]t is undisputed that although the ad valorem garbage collection taxes were being levied against the plaintiffs' respective properties, *the plaintiffs were not receiving any garbage collection services*. Where property is excluded from garbage collection services, the imposition of a garbage collection tax is invalid."[20]

C. The Two-Pronged Inquiry for Determining Whether Property Is Benefited

The necessity that the property be benefited requires an understanding of the term "benefited." The Court of Appeals has indicated the proper analysis for what constitutes a benefited parcel:

> "In determining whether a property is benefited—i.e., whether it is capable of receiving the municipal service funded by the special ad valorem levy—*we look to the innate features and legally permissible uses of the property*, not the particularities of its owners or occupants or the state of the property at a fixed point in time."[21]

By adopting this definition of "benefit," the Court of Appeals established, in essence, two classes of special district real property and the standard to be applied for each class. The two classes are (1) undeveloped or developed land that can or could use the service (presently or in the future) due to the land's innate character; and (2) utility and railroad property, whose innate characteristics determine whether they are capable of receiving a direct benefit from the special district services.

1. Non-utility Vacant or Developed Land

Vacant land situated in a sewer or garbage district cannot avoid its special district levy merely because the land presently cannot use the service: the land's value is enhanced by the presence of such districts (especially if its development would likely result in installing a sewer lateral or make it subject to garbage pick-up).[22] Similarly, neither vacant nor developed land can avoid the special district assessment merely because the taxpayer has another option for obtaining the service. For instance, septic tanks and wells will not relieve the taxpayer of paying sewer or water special district assessments. However, if the Town refuses to perform the garbage pick-up request, or its rules preclude such pick-up (e.g., weight restrictions, content restrictions, etc.), the property is not benefited and therefore cannot be assessed.[23] The Court of Appeals summarized this line of cases as follows:

> [A] lot that is vacant, but otherwise amenable to development, would be "benefited." Although undeveloped, there is no legal or practical disability to the lot's one day receiving garbage collection. Likewise, a hypothetical home whose owners never produced refuse or garbage of any kind would, for the purposes of RPTL § 102(14), be directly benefited by municipal garbage collection. By the same token, home or business owners could not opt out of a special ad valorem levy funding the local sewer or water district simply by virtue of having a septic tank or well on their properties. The same logic would apply to others who would seek to avoid special ad valorem levies under analogous circumstances. In determining whether a property is capable of receiving a benefit, our focus is on the innate characteristics of an individual property as representative of a species of property (in our last example, homes), not the conditions or proclivities of individual owners.[24]

2. Developed Utility and Railroad Real Property

The second line of cases involves utility and railroad property. When dealing with utility or railroad properties, the courts have uniformly focused on the existing use of the property, and the direct benefit that the special district's service provided to that parcel.[25] Thus, in addressing utility improvements, the courts recognize that the innate characteristics of those improvements, as a matter of law, preclude any possible use of certain special district services. For example, a utility pole or wire cannot defecate, urinate or produce solid refuse to use a town's sewer system or garbage district service. In *Long Island Lighting Company v. Office of Supervisor of Town of North Hempstead*, the Second Department stated:

> There is *no question that*… [taxpayer's] *gas and electric transmission and distribution facilitie*s located *on its fee-owned* rights of way, easements on private property and easements on special franchise property, *do not generate any solid refuse*. Therefore, these are *not benefited properties* as defined by Real Property Tax Law § 102(14) and *cannot be the subject of taxes* imposed by the appellants pursuant to Town Law § 198.[26]

The Court of Appeals also found that "indirect" benefits are not sufficient when addressing whether utility improvements are subject to special *ad valorem* levies:

> If an indirect benefit is sufficient for the purposes of RPTL § 102(14), every conceivable species of real property could be said to benefit from garbage removal, or any other municipal service. Any given municipal service will *always* exert a positive influence on a property's value—an indirect benefit under the dissent's reasoning. The Legislature's use of the modifier "benefited" plainly implies that there is some class of property that is not benefited. The dissent's interpretation of the statute would render "not-benefited real property" a nullity, and thereby defeat the legislative intent. Further, its construction disregards the plain distinction between a special ad valorem levy and a general tax.[27]

The Court of Appeals further elaborated on its rejection of an indirect benefit as follows:

> Although here, no preexisting legal agreement bars [the taxpayer's] mass properties from receiving garbage collection from the Town, the inherent characteristics of the subject properties preclude them from receiving such services. The dissent would distinguish *Applebaum* on the ground that the taxpayers in that case were required to pay both the special ad valorem levy plus the cost of private garbage collection, whereas here the [taxpayer] is responsible only for the levy from which "it derives an indirect benefit." This is a distinction without a difference. Our focus is on whether a property is capable of receiving a benefit, not what special accommodations an owner must make when a property is denied the municipal service. In this critical sense, *Applebaum* and the present case are on all fours.[28]

Similarly, railroad improvements and their fee owned corridors must directly benefit from the special district. For instance, in *People ex rel. New York Central Railroad Company v. Limburg*, the Court of Appeals upheld the striking of a town's assessment for a sewer system, as it was "legally *unavailable* for the disposal of storm water or surface water which may collect along the realtor's right of way."[29] The Court of Appeals held:

> Attempted action of a public body without power is void and may be attacked for want of jurisdiction at any time when an attempt is made to enforce claims founded upon such action.[30]

Thus, as in *Long Island Lighting Company*,[31] both the improvement and the fee-owned land comprising the railroad corridor were found not to be benefited. That is, the land, being an integral part of the railroad system, did not receive a benefit.

Finding land not benefited when the improvements are not benefited is consistent with the Court of Appeals' integrated plant rule. This rule focuses on the function of the primary property that comprises the integrated plant. The primary property's function (e.g., transmission or distribution of electricity or gas, or railway transport) defines the innate characteristic of all components comprising the integrated plant, including the underlying land. Thus, a *proper application of the theory precludes taxing any component of the integrated plant or system, even if such component were otherwise individually taxable*. Thus, when the primary property of the taxpayer is utility or railroad improvements and those improvements are not directly benefited by the special district, then neither is the fee-owned land underlying those improvements.[32]

C. Recent Cases Do Not Change These Two Lines of Cases

A recent Court of Appeals case, *Niagara Mohawk Power Corporation v. Town of Watertown*,[33] is sometimes cited by municipalities for the proposition that these two lines of special district tax cases were blurred when dealing with fee-owned land of electric transmission corridors. Such an interpretation is erroneous.

In *Watertown*, the Court of Appeals remanded for the following reasons:

> With respect to Niagara Mohawk's real property in the Town of Watertown, the record is inadequate for us to determine whether any of the properties at issue benefit from the Town's sewer district within the meaning of *New York Tel. Co.* Specifically, there are *questions of fact* as to whether Niagara Mohawk owns the land on or under which the transmission and distribution facilities are situated, and as to whether, even if Niagara Mohawk does not own the land, the sewer district encompasses storm sewers that actually or might potentially safeguard Niagara Mohawk's transmission and distribution facilities from flooding.[34]

The remand was precipitated by the taxing authority's argument that storm water drainage systems "benefited" utility lines by reducing flooding. The contention was that sewer district systems included storm water drainage systems. In reality, storm water drainage systems are

required to be separately maintained and financed by a taxing authority's highway department, not sewer department.[35] In fact, storm water drainage and sewer systems are required to be separate to preclude cross contamination.[36]

Another argument misconstruing *Watertown* is that mere ownership of land in fee by a utility makes the utility improvements and fee-owned land subject to the special district assessment as a matter of law. In fact, the case law is contrary: the Court of Appeals has held in two cases, *Long Island Lighting Company* and *Limburg*, that when the improvements were not benefited, the land was also not benefited. In both of these cases, the land was owned in fee by the utility company and the railroad.[37]

While in any particular municipality special district assessments may appear to be insignificant, for taxpayers having multiple sites over numerous and different municipalities special district assessments can be costly. Thus, in these times of over-taxation of real property, management of these costs is necessary to ensure that owners are paying only their equitable share of the taxes. Taxpayers should review their special district assessments, with an eye toward whether, according to New York law, their property is benefited.

Endnotes

1. *See* N.Y. Town Law § 190 (McKinney 2010) (granting town boards the authority to "establish or extend" more than one dozen different types of improvement districts); N.Y. Real Prop. Tax Law § 102(16) (McKinney 2010) (defining "special district" as "a town or county improvement district, district corporation or other district…intended to benefit the health, welfare, safety or convenience of the inhabitants of such district or to benefit the real property within such district). S*ee also* N.Y. Town Law § 194 (McKinney 2010) (explaining the procedures by which a town board may establish or extend a district).
2. N.Y. Town Law § 190.
3. *See* N.Y. Real Prop. Tax Law § 102(14) (McKinney 2010) (defining "special *ad valorem* levy" as "a charge imposed upon benefited real property" to defray the cost of the service); *N.Y. Tel. Co. v. Supervisor of Town of Oyster Bay*, 4 N.Y.3d 387, 392, 395, 828 N.E.2d 964, 966, 968, 796 N.Y.S.2d 7, 9, 11 (2005) ("For real property to be 'benefited,' it must be capable of receiving the service funded by the special ad valorem levy.") (discussing *Applebaum v. Town of Oyster Bay*, 81 N.Y.2d 733, 609 N.E.2d 118, 593 N.Y.S.2d 765, 609 (1992)); *Long Island Lighting Co. v. Office of Supervisor of Town of N. Hempstead*, 233 A.D.2d 300, 300–01, 649 N.Y.S.2d 717, 718 (2d Dep't 1996) (upholding an order requiring the special district to refund assessments paid by respondent because respondent did not own "benefited properties as defined by Real Property Tax Law section 102(14)").
4. N.Y. Real Prop. Tax Law § 704 (McKinney 2010); *Kahal Bnei Emunim v. Town of Fallsburg*, 78 N.Y.2d 194, 204, 577 N.E.2d 34, 39, 573 N.Y.S.2d 43, 48 (1991) ("Challenges to real property assessments [that] allege that the assessment is 'excessive, unequal, or unlawful, or that the real property is misclassified' normally must be asserted in a certiorari proceeding pursuant to article 7 of the Real Property Tax Law.") (citing N.Y. Real Prop. Tax Law § 706 (McKinney 2010).
5. *Kahal Bnei Emunim*, 78 N.Y.2d at 204–05, 577 N.E.2d at 39, 573 N.Y.S.2d at 48 (allowing a plenary action when the taxpayer asserted that "the taxing authority has exceeded its power"); *see also Averbach v. Bd. of Assessors of the Town of Delhi*, 176 A.D.2d 1151, 1152, 575 N.Y.S.2d 964, 966 (3d Dep't 1991) ("RPTL article 7 is the exclusive means for challenging individual tax assessments, but a CPLR article 78 proceeding is appropriate where [the taxpayer asserts] that the method employed in the assessment…is unconstitutional.") (citing *Krugman v. Bd. of Assessors of Vill. of Atl. Beach*, 141 A.D.2d 175, 179–80, 533 N.Y.S.2d 495, 499 (2d Dep't 1988); *Rubin v. Bd. of Assessors of Town of Shandaken*, 175 A.D.2d. 494, 572 N.Y.S.2d 950 (3d Dep't 1991)).
6. CPLR 7804 (McKinney 2007); N.Y. C.P.L.R. 506 (McKinney 2007) ("A proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of…or where the principal office of the respondent is located.").
7. *Kahal Bnei Emunim*, 78 N.Y.2d at 204–05, 577 N.E.2d at 39, 573 N.Y.S.2d at 48. Alternatively, the taxpayer can claim that the assessment was unconstitutional. *See Averbach*, 176 A.D.2d at 1151, 575 N.Y.S.2d at 965 (describing taxpayer's challenge to a specific method used to calculate assessments).
8. *Niagara Mohawk Power Corp. v. City Sch. Dist. of the City of Troy*, 59 N.Y.2d 262, 269, 451 N.E.2d 207, 210, 464 N.Y.S.2d 449, 452 (1983); *Kahal Bnei Emunim*, 78 N.Y.2d at 205, 577 N.E.2d at 39, 573 N.Y.S.2d 48.
9. *Hewlett Assoc. v. City of N.Y.*, 57 N.Y.2d 356, 363, 456 N.Y.S.2d 704, 707, 442 N.E.2d 1215, 1218 (1982).
10. *Dun & Bradstreet v. City of N.Y.*, 276 N.Y. 198, 206, 11 N.E.2d 728, 732 (1937).
11. CPLR 217 (McKinney 2010); *see, e.g.*, *Kahal Ben Emunim v. Town of Fallsburg*, 78 N.Y.2d 194, 205, 577 N.E.2d 34, 40, 573 N.Y.S.2d 43, 49 (1991) (holding that plaintiffs challenge to a tax assessment must have been brought within four months from the time the assessment became final).
12. The taxing authority has two approaches. One approach is to designate the real property as being benefited on the taxing authority's "regular" assessment rolls maintained by the assessor. *See* N.Y. Town Law § 231 (McKinney 2010). The other approach is for the Town Board to establish and maintain a separate assessment roll for the special district. *See* N.Y. Prop. Tax Law § 504(1) (McKinney 2010). *Compare Kahal Bnei Emunim*, 78 N.Y.2d at 205, 577 N.E.2d at 40, 573 N.Y.S.2d at 49, *and Averbach,* 176 A.D.2d at 1153, 575 N.Y.S.2d at 967, *and Global Frozen Food v. County of Nassau*, 153 A.D.2d 669, 670, 545 N.Y.S.2d 187, 188 (2d Dep't 1989) (holding that the four-month period of limitation begins to accrue from the date of filing the final assessment) *with Chasco Co. v. Musiello*, 153 A.D.2d 681, 682, 545 N.Y.S.2d 191, 192 (2d Dep't 1989) (holding that the four-month period of limitations does not begin "to run until the public body refuses to comply with the petitioner's demand to perform the duty in question").
13. The caveat is to make sure that the Town has not created separate special district assessment rolls, as the filing of these special district assessment rolls will control. *See Bowery Sav. Bank v. Bd. of Assessors of the County of Nassau*, 80 N.Y.2d 961, 964, 605 N.E.2d 363, 365, 590 N.Y.S.2d 876, 878 (1992); *Corbin v. County of Nassau*, 888 N.Y.S.2d 845, 846 (Sup. Ct., Nassau Co. 2009) (indicating that rules of the special districts control).
14. *See Roosevelt Hosp. v. City of N.Y.*, 84 N.Y. 108, 112 (1881); *Hassan v. City of Rochester*, 67 N.Y. 528, 533 (1876).
15. 208 A.D.2d 521, 522 (2d Dep't 1994). *See, e.g.*, *Crandall Pub. Lib. v. City of Glens Falls*, 216 A.D.2d 814, 815, 629 N.Y.S.2d 100, 102 (3d Dep't 1995) (distinguishing general taxes from an "ad valorem levy" in that the latter is "utilized to finance" services when "the property provided with the[] services received a direct tangible benefit which enhanced its value"). Whether the boundary of the special

district is coterminous with the Town boundary is not determinative or a factor as to whether the special district tax or assessment is either a special *ad valorem* levy or a general tax. *See, e.g.*, N.Y. Real Prop. Tax Law § 102(14), (15) (McKinney 2010). The sole inquiry is whether the subject real property receives a benefit from the special district services.

16. N.Y. Real Prop. Tax Law § 102(14) (emphasis added).

17. 208 A.D.2d 521, 522, 616 N.Y.S.2d 810, 811 (2d Dep't 1994) (citing N.Y. Real Prop. Tax Law § 102(20) (McKinney 2010); N.Y. Real Prop. Tax Law 102(20) ("Tax" or "taxation" means a charge imposed upon real property by or on behalf of a county, city, town, village or school district for municipal or school district purposes, but does not include a special ad valorem levy or a special assessment.). *See also L.P.A. Assoc. v. Daby*, 231 A.D.2d 827, 829 (3d Dep't 1996); *Crandall Pub. Lib.*, 216 A.D.2d at 815, 629 N.Y.S.2d 100, 102.

18. *Applebaum v. Town of Oyster Bay*, 81 N.Y.2d 733, 736, 609 N.E.2d 118, 120, 593 N.Y.S.2d 765, 767 (1992) (emphasis added).

19. *Id*. at 734–35, 609 N.E.2d at 119, 593 N.Y.S.2d at 766 (emphasis added).

20. *Applebaum,* 176 A.D.2d 773, 773, 575 N.Y.S.2d 100, 101 (2d Dep't 1991), *aff'd*, 81 N.Y.2d 733, 609 N.E.2d 118, 593 N.Y.S.2d 765 (1992) (emphasis added).

21. *N.Y Tel. Co. v. Supervisor of Town of Oyster Bay*, 4 N.Y.3d 387, 394, 828 N.E.2d 964, 967, 796 N.Y.S.2d 7, 10 (2005) (holding that "as a class of property, telephone poles can never produce or require municipal garbage collection" and therefore are not benefited) (emphasis added).

22. *See N.Y. Tel. Co.*, 4 N.Y.3d at 394, 828 N.E.2d at 967–68, 796 N.Y.S.2d at 10–11 (explaining that a vacant lot can be developed later, and there is no disability from deriving the benefit later on); *Niagara Mohawk Power Corp. v. Town of Tonawanda Assessor*, 17 A.D.3d 1090, 1092, 796 N.Y.S.2d 202, 203–04 (4th Dep't), *aff'd, Niagara Mohawk Power Corp. v. Town of Watertown*, 6 N.Y.3d 744, 843 N.E.2d 1138, 810 N.Y.S.2d 399 (2005).

23. *Applebaum*, 81 N.Y.2d at 734, 609 N.E.2d at 119, 593 N.Y.S.2d at 766 (holding an *ad valorem* levy invalid because the plaintiffs were precluded from receiving the services); *cf. Niagara Mohawk Power Corp. v. Town of Tonawanda*, 17 A.D.3d 1090, 796 N.Y.S.2d 202 (4th Dep't 2004), *aff'd*, *Niagara Mohawk Power Corp. v. Town of Watertown*, 6 N.Y.3d 744, 843 N.E.2d 1138, 810 N.Y.S.2d 399 (2005) (holding that taxpayer's property was subject to the special *ad valorem* levies for garbage collection despite that it was not currently consuming that service).

24. *N.Y. Tel. Co.*, 4 N.Y.3d at 394, 828 N.E.2d at 967–68, 796 N.Y.S.2d at 10–11 (holding that properties with utility improvements, such as telephone poles, possess innate characteristics that cannot be benefited by special district services, such as garbage collection).

25. *N.Y. Tel. Co.*, 4 N.Y.3d at 395, 828 N.E.2d at 968, 796 N.Y.S.2d at 11.

26. 233 A.D.2d 300, 300–01, 649 N.Y.S.2d 717, 718 (2d Dep't 1996), *lv. app. dismissed*, 89 N.Y.2d 1029, 658 N.Y.S.2d 244 (2007) (emphasis added) (citing *Applebaum v. Town of Oyster Bay*, 81 N.Y.2d 733, 609 N.E.2d 118, 593 N.Y.S.2d 765 (1992). This focus comports with the fundamental Real Property Tax Law principle that value and benefit of a real property parcel are determined as the property exists on the statutorily defined valuation and condition dates. *See Addis Co. v. Srogi*, 79 A.D.2d 856, 434 N.Y.S.2d 489 (4th Dep't 1980); *Kalski v. Fitzgerald*, 25 A.D.2d 573, 266 N.Y.S.2d, 620 (3d Dep't 1966).

27. *N.Y. Tel. Co.*, 4 N.Y.3d at 392, 828 N.E.2d at 96, 796 N.Y.S.2d 7 at 9, n.2 (emphasis in original) (citing N.Y. Real Prop. Tax Law § 102(20) (no benefit requirement).

28. *N.Y. Tel. Co.*, 4 N.Y.3d at 393–94, 828 N.E.2d at 967, 796 N.Y.S.2d 7 at 10.

29. 283 N.Y. 344, 348, 28 N.E.2d 865, 867 (1940) (emphasis added).

30. *People ex rel. N.Y. Cent. R.R. v. Limburg*, 283 N.Y. 344, 349, 28 N.E.2d 865, 868 (1940) (quoting *Long Island R.R. Co. v. Hylan*, 240 N.Y. 199, 208, 148 N.E.2d 189 192 (1925)).

31. *Long Island Lighting Co. v. Office of Supervisor of Town of North Hempstead*, 233 A.D.2d 300, 300–01, 649 N.Y.S.2d 717, 718 (2d Dep't 1996), *lv. app. dismissed*, 89 N.Y.2d 1029, 658 N.Y.S.2d 244 (2007).

32. *Limburg*, 283 N.Y. at 349, 28 N.E.2d at 868; *Long Island Lighting Co.*, 233 A.D.2d 300, 300–01, 649 N.Y.S.2d 717, 718 (2d Dep't 1996), *lv. app. dismissed*, 89 N.Y.2d 1029, 658 N.Y.S.2d 244 (2007). *See also Jackson v. State of New York*, 213 N.Y. 34, 35–36, 106 N.E. 758, 758 (1914) (stating that condemnation award must consider appreciation to property as a result of fixtures); *Glen & Mohawk Milk Association, Inc. v. State*, 2 A.D.2d 95, 97, 153 N.Y.S.2d 725, 727 (3d Dep't 1956) (holding that adequate compensation in a condemnation proceeding considers the current use of the property, with its improvements, as a going concern). *See also Hasnas v. Hasnas*, 91 A.D.2d 1058, 459 N.Y.S.2d 288 (2d Dep't 1983) (holding that partners' share in partnership assets should be based on the aggregate value of the real property enhanced by the improvements and not the separate valuations for each the real property and improvements).

33. 6 N.Y.3d 744, 748, 843 N.E.2d 1148, 1141, 810 N.Y.S.2d 399, 402 (2005).

34. *Watertown*, 6 N.Y.3d 744, 748, 843 N.E.2d 1148, 1141, 810 N.Y.S.2d 399, 402 (2005) (emphasis added).

35. See, *e.g.*, N.Y. Town Law §§ 202-a, 231 (McKinney 2010); Highway Law §§ 46, 218(4); *cf.* N.Y. Gen. Mun. Law §§ 452–54 (McKinney 2007).

36. For each special improvement identified and created, a separate account must also be identified and created by the Town. *See* N.Y. Town Law § 235 (McKinney 2010). The required separation of sewer and storm water systems is both physical and financial. The General Municipal Law requires that sewer funds must be separately maintained and applied solely for sewer purposes. N.Y. Gen. Mun. Law § 453 (McKinney 2007). It also classifies sewage as either industrial or domestic sewage. N.Y. Gen. Mun. Law § 451(4), (5) (McKinney 2007). The necessity for separate accounting and application of special district tax funds is further revealed by General Municipal Law § 6-c(3)(b), which precludes general town capital reserve funds for water and sewer improvements. *See also* Office of State Comptroller, Opinion 89-54 (*available at* http://www.osc.state.ny.us/legal/1989/op89-54.htm, accessed Feb. 2, 2010).

37. *Niagara Mohawk Power Corp. v. Town of Tonawanda*, 17 A.D.3d 1090, 796 N.Y.S.2d 202 (4th Dep't 2005), is not contrary, as the Fourth Department failed to address the prior utility and railroad cases dealing with land, or the integrated property rule. The Fourth Department also failed to consider the wholesale absence of benefit to the improvements, as distinct from the theoretical benefit found with respect to the land.

The New York Loft Law

By Gerald Lebovits and Linda Rzesniowiecki

I. Introduction

Nonresidential New York City buildings sometimes contain residential loft dwellings. Lofts are open, unpartitioned spaces with high ceilings in buildings formerly used as commercial, manufacturing, or warehouse space.

The Loft Law of 1982[1] and cases interpreting the Emergency Tenant Protection Act ("E.T.P.A.") of 1974[2] offer rights to residential occupants of certain lofts covered by these statutes and impose obligations on loft owners. Initially because of the needs of artists for live-work space, these laws recognize that the best use of former commercial, manufacturing, and warehouse buildings is residential loft use; that residential occupants who did substantial work to improve the raw, industrial space to make them habitable should be protected; that residential occupants who improved their space should be compensated; that some residential occupants of loft buildings without residential certificates of occupancy ("CO") might be protected from eviction without cause and have the right to continued occupancy at a regulated rent; and that building owners might be obligated to obtain a residential CO to legalize the residential use.

This article is intended to familiarize practitioners with some legal intricacies pertaining to lofts.

To understand the Loft Law, it is important to read:

- The Loft Board's Web site.[3]
- The regulations that implement the Loft Law.[4]
- Loft Board meeting minutes.[5]
- Court cases that interpret the Loft Law.
- The 3,545 cases the Loft Board has decided to date.[6]
- Proposed legislation to extend the Loft Law.[7]

Lawyers should also read two treatises on landlord-tenant law with helpful sections on the Loft Law: Daniel Finkelstein and Lucas Ferrara, *Landlord and Tenant Practice in New York*, Chapter 18 (West 2009); and Hon. Fern Fisher and Andrew Scherer, *Residential Landlord—Tenant Law in New York* §§ 6:79–6:119 (West 2009).

It is also essential to understand the rent-stabilization system. The courts read the Loft Law and the Rent Stabilization Law ("R.S.L.") and Code ("R.S.C.") *in pari materia*.[8]

"Initially because of the needs of artists for live-work space, [the Loft Law…and cases interpreting the E.T.P.A.]… recognize that the best use of former commercial, manufacturing, and warehouse buildings is residential loft use…"

II. The Loft Law

A. Brief Summary

The New York State Legislature promulgated the Loft Law, codified in the New York State Multiple Dwelling Law ("M.D.L.") at §§ 280 through 287, on June 21, 1982. The Loft Law applies to all cities of more than one million in New York State.[9] As a practical matter, the only buildings and units the Loft Law covers are in New York City, in the boroughs of Manhattan, Brooklyn and Queens.

The Loft Law introduced and defined a new concept: "interim multiple dwelling." This concept derives from "multiple dwelling," which M.D.L. § 4(7) defines as "a dwelling which is either rented, leased, let or hired out, to be occupied, or is occupied, as the residence or home of three or more families living independently of each other." The word "interim" was used because the buildings were in the process of becoming multiple dwellings and would achieve that status as soon as their owners obtained a residential CO.[10] M.D.L. § 281 applies the concept "interim multiple dwelling" to an entire building ("IMD building") or a portion of a building ("IMD unit"). The Loft Law applies to IMD buildings and IMD units.[11]

A building or part of one is an IMD if it passes a four-part test: (1) it was "at any time" occupied for "commercial, manufacturing or warehouse purposes"; (2) it lacks a CO issued under M.D.L. § 301 (a type of residential CO); (3) it was occupied from April 1, 1980, to December 1, 1981 (the "window period"), for residential purposes by three or more families living independently of each other; and (4) the building is located in a zone that allows residential use.

In 1987, the Loft Law was amended to include a new subdivision 4 to section 281. Subdivision 4 eliminated the residential-zoning requirement for IMDs so long as the IMD was residentially occupied on May 1, 1987, in addition to the April 1, 1980–December 1, 1981 window period.

The Loft Law covers buildings containing three or more units. In contrast, a building must have six or more apartments to be covered under the Rent Stabilization Law and Code.[12]

The Loft Law (1) acknowledges that occupants use some nonresidential buildings for residential purposes;[13] (2) requires owners to make the buildings and the units safe for residential uses by complying with applicable building codes and ultimately obtaining a residential CO; [14] (3) gives owners the right to collect rent from residential occupants, even when the building has no residential CO, so long as the owner is completing code-compliance steps under the Multiple Dwelling Law within specified time periods;[15] (4) gives residential occupants the right to continued occupancy, even though they are occupying their units contrary to the building's CO or to the lease's use clause;[16] (5) regulates the rent;[17] (6) gives residential occupants the right to sell the improvements they made to their units to render them habitable;[18] and (7) provides that buildings will enter into the rent-stabilization system once they obtain a residential CO.[19]

From time to time, legislators have introduced bills to expand the Loft Law by re-defining the window period to cover residential occupants who began their residential occupancy of nonresidential buildings after April 1, 1980 (the beginning of the Loft Law's window period). The Legislature has not yet passed these bills. A bill is pending[20] that would cover residential occupants who resided in their units 12 consecutive months, from January 1, 2008 to December 31, 2009.

B. The Loft Board

M.D.L. § 282 established the New York City Loft Board. The Loft Board currently consists of nine members,[21] including a chair and members of the following special-interest groups: the general public; residential occupants; owners; and the manufacturing industry. In practice, the Loft Board also includes a member who represents the New York City Department of Buildings ("D.O.B."). The Loft Board, which meets once a month, must implement regulations to effectuate the Loft Law and to resolve disputes between owners and residential occupants. The New York City Civil Court, Housing Part (commonly called the Housing Court), and the Supreme Court have concurrent jurisdiction to resolve coverage disputes.[22] No statute of limitations applies to filing a coverage claim in court[23] or with the Loft Board.[24] The Loft Board delegates to administrative law judges from the New York City Office of Administrative Trials and Hearings ("OATH") its duty to hear disputes.[25] The administrative law judges then write reports and recommendations. In one of its monthly meetings, the Loft Board will accept or reject the proposed order or remand for some purpose.

Confusingly, the agency established to support the Loft Board's work is also called the Loft Board.[26] All references in this article to the Loft Board refer to the agency called the Loft Board, unless otherwise indicated.

C. The Regulations

The Loft Board's regulations are published in Volume 29 of the Rules of the City of New York ("R.C.N.Y.").[27] The regulations are entitled:

- "Organization and Voting" (29 R.C.N.Y. § 1-01).
- "Rules and Regulations, Method of Adoption" (29 R.C.N.Y. § 1-02).
- "Meetings" (29 R.C.N.Y. § 1-03).
- "Minutes and Transcripts" (29 R.C.N.Y. § 1-04).
- "Public Access to Minutes and Record/Procedures" (29 R.C.N.Y. § 1-05).
- "Applications to the Board" (29 R.C.N.Y. § 1-06).
- "Limitations on Applications" (29 R.C.N.Y. § 1-06.1).
- "Reconsideration of Determination" (29 R.C.N.Y. § 1-07).
- "Appeal from Determination of the Director, or Determination of a Hearing Officer Under Section 2-04" (29 R.C.N.Y. § 1-07.1).
- "Ex Parte Communications on Pending Applications" (29 R.C.N.Y. § 1-08).
- "Action by the Board on Its Own Initiative" (29 R.C.N.Y. § 1-09).
- "Administrative Authority and Correspondence" (29 R.C.N.Y. § 1-10).
- "Petitioning the Board to Adopt Rules" (29 R.C.N.Y. § 1-11).
- "Code Compliance Work" (29 R.C.N.Y. § 2-01).
- "Harassment" (29 R.C.N.Y. § 2-02).
- "Hardship Applications" (29 R.C.N.Y. § 2-03).
- "Minimum Housing Maintenance Standards" (29 R.C.N.Y. § 2-04).
- "Registration" (29 R.C.N.Y. § 2-05).
- "Interim Rent Guidelines" (29 R.C.N.Y. § 2-06).
- "Interim Rent Guidelines II" (29 R.C.N.Y. § 2-06.1).
- "Sales of Improvements" (29 R.C.N.Y. § 2-07).
- "Coverage and Issues of Status" (29 R.C.N.Y. § 2-08).
- "Subletting and Similar Matters" (29 R.C.N.Y. § 2-09).
- "Sales of Rights" (29 R.C.N.Y. § 2-10).
- "Fees" (29 R.C.N.Y. § 2-11).
- "M.D.L. Section 286(2)(ii) Rent Adjustments" (29 R.C.N.Y. § 2-12).

D. Renewal Statutes

The 1982 Loft Law expired on June 21, 1992, and has been renewed several times. The most recent renewal statute passed on April 23, 2008, and expires on May 31, 2010. The legislature will likely continue to renew the Loft Law as long as buildings remain in the Loft Board's jurisdiction. A list of the buildings currently in the Loft Board's jurisdiction, approximately 300, can be found on the Loft Board's Web site.[28]

E. Registration

Owners of multiple dwellings, net lessees, and all agents in actual control of a multiple dwelling are required to register their buildings with the New York City's Department of Housing Preservation and Development ("D.H.P.D.).[29] Similarly, landlords[30] of IMDs are required to register their buildings with the New York City Loft Board.[31] Failure to register bars recovery of rent.[32] Annual renewal registration statements must be filed before June 30.[33] The annual filing fee is $500 for each IMD unit.[34]

F. Minimum Housing Maintenance Standards

The Loft Board's Minimum Housing Maintenance Regulations[35] require landlords to provide ten basic services to residential occupants: (1) water supply and drainage, (2) heat,[36] (3) hot water,[37] (4) electricity, (5) gas, (6) smoke detectors, (7) public lighting, (8) entrance door security, (9) elevator service,[38] and (10) window guards.[39] In addition, landlords must provide services specified in the lease or rental agreement in effect on June 21, 1982 (the statute's effective date), and, in addition, services not specified in the lease but which were nonetheless provided as of June 21, 1982.[40]

Loft Board inspectors—not D.H.P.D. inspectors, who enforce the New York City Housing Maintenance Code (H.M.C.)—inspect IMD buildings and units at the Loft Board's request or upon receiving a residential occupant's complaint.[41] The inspectors will place violations as necessary. A Loft Board enforcement attorney may bring an administrative proceeding against a landlord accused of violating the Minimum Housing Maintenance Regulations, and owners may be fined as much as $1,000 per violation after a hearing before an OATH administrative law judge.[42]

An IMD tenant suffering from lack of services may file a diminution-of-services application with the Loft Board, which will then refer it to OATH for a hearing. The IMD tenant also has the option of filing an HP (Housing Part or repair) proceeding in Housing Court to compel an owner to correct violations.[43]

G. Harassment

The Loft Board's regulatory definition of harassment[44] is almost identical to the Rent Stabilization Code's definition of harassment.[45] Both laws prohibit landlords from disturbing a residential occupant's "comfort, repose, peace or quiet"[46] with the intent to encourage the tenant to vacate the premises or waive any legal rights. Tenants of apartments subject to rent control or rent stabilization may file a harassment application with the New York State Division of Housing and Community Renewal (D.H.C.R.). Owners found guilty of harassment by the D.H.C.R. may be fined up to $5,000 for each violation.[47] Aggrieved residential occupants may file a harassment application with the Loft Board, which will then refer it to OATH for a hearing. A guilty landlord may be fined up to $1,000 for each violation.[48]

The Loft Board's regulations entitled "Harassment" contain several provisions peculiar to IMDs. An owner's willful violation of the code-compliance timetable[49] may be evidence of harassment,[50] actions by third-party nonresidential tenants "shall be presumed not to constitute harassment,"[51] and owners found guilty of harassment may not decontrol an IMD unit after they purchase the improvements[52] of a residential occupant.[53] The Loft Board's finding of harassment will remain in effect until the landlord files an application to terminate the harassment finding, the landlord proves at a hearing that landlord is no longer harassing the residential occupants, and the nine-member Loft Board grants the application to terminate the harassment finding.[54] Landlords seeking to terminate a harassment finding must prove that they have ceased engaging in conduct constituting harassment; that they have achieved compliance with M.D.L. Article 7B; that they have paid all civil penalties to the Loft Board; that there is no outstanding harassment, and that the building is properly registered.[55]

IMD tenants harassed by their landlords may bring an action in Supreme Court for an order enjoining the landlord from engaging in harassment.[56] Since the New York City Council's enactment of Local Law 7 of 2008,[57] tenants—including IMD tenants—also have the option of filing a Housing Court proceeding alleging harassment.

H. Sales of Improvements

Under M.D.L. § 286(6), residential occupants have the right to sell the improvements they made to the subject premises. This issue usually arises when a residential occupants wish to vacate their unit. The outgoing tenant has the option to offer the improvements for sale directly to the owner or to offer the improvements for sale to a prospective tenant, sometimes referred to as an "incoming tenant." Any offer to sell to an incoming tenant is subject to the owner's right to purchase the improvements at fair-market value.

If the owner purchases the improvements, the IMD unit may be deregulated if the unit is subject to rent regulation solely under M.D.L. Article 7-C (the Loft Law); the unit is not receiving a real-estate tax exemption or abatement; and the subject

building contains fewer than six IMD units.

The statute provides that an owner found guilty of harassment may not deregulate a unit after purchasing the improvements and that there may be only one sale for each IMD unit—that is, the incoming tenants may not sell their improvements to a second incoming tenant.

The Loft Board's regulations set forth a procedure that the outgoing tenant, the incoming tenant, and the owner must follow.[58] The procedure begins when the outgoing tenant serves the owner with a disclosure form, providing, among other things, the following information: the outgoing tenant's intention to relocate; a list and description of the improvements; a written copy of the offer to purchase, setting forth all the terms, including the price; and the incoming tenant's identity and contact information.[59]

If the owner is not properly registered with the Loft Board when an owner is served with a disclosure form, the Loft Board's regulations prohibit the owner from challenging the proposed sale between the outgoing tenant and the incoming tenant. The Loft Board's regulations also provide that the owner must file a Sales Record form with the Loft Board within 30 days after the sale.

The Loft Board allows an owner to challenge a sale on the grounds that the offer is not a bona fide arm's-length offer; the owner made or purchased the improvements offered for sale; or the offer exceeds the improvements' fair-market value. The third ground is the most common ground for a challenge. An owner who objects to the incoming tenant's suitability must initiate an action on that ground in a court of competent jurisdiction.

If an owner challenges a proposed sale without a good-faith intention to purchase the improvements or if the owner's valuation of the improvements has no reasonable relationship to fair-market value (that is, the owner makes a "low ball" offer), then the Loft Board may deny the owner's challenge application and also find the owner guilty of harassment.[60]

According to the Loft Board's regulations, residential occupants of a unit "which has been legalized and is registered with" the D.H.C.R.[61] may also sell their improvements, and the owner may deregulate the unit after buying them.

I. Sales of Rights

M.D.L. § 286(12) provides that after the effective date of the Loft Law, "an owner and a residential occupant may agree to the purchase by the owner of such person's rights in a unit." A sale of improvements allows an owner to deregulate the unit, but the owner remains obligated to obtain a residential CO for the unit. A sale of rights gives the owner the option of returning the unit to non-residential use and relieves the owner of the obligation to obtain a residential CO for the unit.[62] A sale of rights is a deregulatory event "where coverage under Article 7-C was the sole basis for such rent regulation."[63] When an owner chooses to use the unit for residential purposes after the sale of rights and the unit is subject to coverage under the Emergency Protection Act of 1974 (e.g., it is a pre-1974 building containing more than six units), the unit remains rent regulated.[64]

J. Code-Compliance Work

M.D.L. § 284 is the heart of the Loft Law. It requires owners to legalize their buildings and the individual units for residential use. The Legislature divided the legalization process into four steps and set deadlines to complete each step. The steps are filing an alteration application; obtaining an approved alteration permit; achieving compliance with M.D.L. Article 7B;[65] and taking all necessary and reasonable action to obtain a residential certificate of occupancy.

The owner's architect must describe in two ways the work that must be performed in the building's common areas and in IMD units to achieve compliance with Article 7B: in a drawing (*e.g.*, a blueprint) and in words, referred to as a "narrative statement." The owner's architect must serve the residential occupants with a copy of the narrative statement. Then the Loft Board schedules a conference to discuss the proposed plan with owners and residential occupants, along with their architects and attorneys, and gives residential occupants a deadline to dispute the plan.

Residential occupants must give access to their unit to the owner, the owner's construction crew, and owner's architect so that the owner can achieve compliance with M.D.L. Article 7-B.

M.D.L. § 284 sets forth deadlines to complete each of the four code-compliance steps for IMD owners and their architects. If the owner does not comply with the deadlines, then the Loft Board's enforcement attorney or an aggrieved residential occupant may file an application with the Loft Board. The Loft Board will refer this application to OATH for a hearing, and OATH will issue a report and recommendation that it will submit to the nine-member Loft Board. The nine-member Loft Board may issue an order imposing a civil penalty of $1,000 against the owner for each missed deadline. (The D.O.B. will, however, accept filings from owners and their architects after the deadline has passed.)

Each time the Loft Law has been renewed, the deadlines associated with the last two code-compliance steps have been extended. The result is a long list of deadlines but higher civil penalties for recalcitrant owners. In *In re Korean Ass'n of N.Y., Inc.*, Loft Board Order No. 3416 (Mar. 28, 2008), for example, the Loft Board imposed a civil penalty against the owner of a West 24th Street, Manhattan building for missing the following 14 deadlines:

Deadlines set forth in the 1992 renewal statute:	Requirement	Authority
October 1, 1992	Alteration Application	M.D.L. § 284(1)(ii) 29 R.C.N.Y. § 2-01(a)(5)(i)
October 1, 1993	Alteration permit	M.D.L. § 284(1)(ii) 29 R.C.N.Y. 2-01(a)(5)(ii)
April 1, 1995	7B compliance	M.D.L. § 284(1)(ii) 29 R.C.N.Y. § 2-01(a)(5)(iii)
October 1, 1995	CO	M.D.L. §284(1)(ii) 29 R.C.N.Y. § 2-01(a)(5)(iv)

Deadlines set forth in the 1996 renewal statute:	Requirement	Authority
October 1, 1996	Alteration Application	M.D.L. § 284(1)(iii) 29 R.C.N.Y. § 2-01(a)(6)(i)
October 1, 1997	Alteration permit	M.D.L. § 284 (1)(iii) 29 R.C.N.Y. § 2-01(a)(6)(ii)
April 1, 1999	7B compliance	M.D.L. § 284(1)(iii) 29 R.C.N.Y. § 2-01(a)(6)(iii)
June 30, 1999	CO	M.D.L. § 284(1)(iii) 29 R.C.N.Y. § 2-01(a)(7)(i)

Deadlines set forth in the 1999 renewal statute:	Requirement	Authority
September 1, 1999	Alteration Application	M.D.L. § 284(1)(iv) 29 R.C.N.Y. § 2-01(a)(7)(iv)
March 1, 2000	Alteration permit	M.D.L. § 284(1)(4) 29 R.C.N.Y. § 2-02(a)(7)(iii)
May 1, 2002	7B compliance	M.D.L. § 284(1)(iv) 29 R.C.N.Y. §2-01(a)(7)(iii)
May 31, 2002	CO	M.D.L. § 284(1)(iv) 29 R.C.N.Y. § 2-01(a)(7)(iv)

Deadlines set forth in the 2007 renewal statute:	Requirement	Authority
September 1, 1999	Alteration Application	M.D.L. § 284(1)(v) 29 R.C.N.Y. § 2-01(a)(8)(i)
March 1, 2000	Alteration permit	M.D.L. § 284(1)(v) 29 R.C.N.Y. § 2-01(a)(8)(ii)

The current renewal statute requires owners to file an alteration application by September 1, 1999; obtain a building permit by March 1, 2000; achieve M.D.L. Article 7-B compliance by May 1, 2010; and obtain a residential certificate of occupancy by May 31, 2010.

In addition to the threat of civil penalties imposed by the nine-member Loft Board, another enforcement tool, set forth in M.D.L. § 284, is the specific-performance action. Three or more residential occupants may bring a specific-performance action in Supreme Court against an owner not in compliance with the code-compliance timetable. That action, if successful, will result in a court order requiring the owner to comply with the law. Disobeying a court order will subject an owner to a civil- or criminal-contempt proceeding or both. The contempt proceeding might result in a jail term.

Owners not in compliance with the code-compliance timetable may not collect rent from residential occupants who do not pay rent for the period during which the owner is out of compliance.[66]

K. Rent Regulation

M.D.L. § 286(2) regulates the rent that may be charged to a residential occupant before the building is legalized. This section had required the Loft Board to promulgate regulations under this section within six months of the Loft Law's effective date. The resulting regulation, now published at 29 R.C.N.Y. § 2-06, is often called Loft Board Order No. 1. The first reference point in establishing the rent is either the rental amount set by the lease which was in effect as of December 21, 1982 (the regulation's effective date), or the last rent "paid and accepted by the owner" as of the regulation's effective date. The owner is then allowed one increase under 29 R.C.N.Y. § 2-06(c).

This increase may be as low as seven percent or as high as thirty-nine percent, depending on the circumstances. Generally speaking, if the last rent increase was recent, the increase will be lower; if the last rent increase happened years ago, the increase will be higher. Although the Rent Stabilization Law allows rent increases every one or two years upon a lease renewal, IMD owners may increase the rent only upon compliance with a code-compliance step. Thus, an owner may obtain a six percent increase upon filing an alteration application with the D.O.B,[67] an eight percent increase upon obtaining an approved alteration application,[68] and a six percent increase upon complying with M.D.L. Article 7-B.[69]

The code-compliance increase becomes payable on the regular rent payment date (e.g., the first day of the month) in the month following the month in which the code-compliance step is achieved.[70] This statutory and regulatory scheme is intended to provide owners with an incentive to achieve code compliance as soon as possible. The base rent results from the rent in effect as of December 21, 1982, plus the Loft Board Order No. 1 increase and the statutory code-compliance rent increases.

IMD owners are not expected or permitted to offer residential occupants renewal leases. In this respect, residential occupants of IMD units are more akin to rent-controlled tenants than to rent-stabilized tenants: they are statutory tenants.

L. Code-Compliance Rent Adjustments and Entry into Rent Stabilization System

After the owner complies with M.D.L. Article 7-B, the owner may apply to the Loft Board, on the Loft Board's official application form, for rent increases for "all necessary and reasonable costs" associated with code compliance.[71] In addition to submitting the completed Loft Board's form, the owner must enclose an itemized statement of costs, bills marked paid, cancelled checks (or receipts for work performed), construction contracts, and a certified copy of a temporary or final residential certificate of occupancy issued by the D.O.B. If an owner does not apply for a code-compliance increase within nine months of obtaining a CO, the owner is deemed to have waived its right to a code-compliance rent increase.

The Loft Board's regulations include items organized into an 11-category schedule of costs intended to include all necessary and reasonable costs of code compliance: (1) demolition, (2) masonry, (3) metals, (4) carpentry, (5) doors and windows, (6) finishes, (7) specialties, (8) equipment, (9) conveying systems (elevators), (10) mechanical, and (11) electrical. The central part of the form is Part C of the five-part application form: the schedule of costs. Rent adjustments are not allowed for curing pre-existing violations or deferred maintenance costs in common areas or commercial units. Because the allowable cost for many items is defined in terms of square footage or lineal feet, the project's architect or general contractor is best equipped to complete this section of the form. The cost schedule was composed in September 1984; the costs set forth are now out of date due to inflation. The regulations therefore provide that the costs will be "indexed annually… based upon the average of the annual percentage change reported in the Dodge Building Cost Index and the Engineering News-Record Building Cost Index for New York as of September of each year."[72]

Work performed within a specific IMD unit is allocable to the residential occupant of that unit. Each residential occupant pays an equal share of the costs for work outside the IMD units. Work performed in the common areas or in a nonresidential unit capable of serving both the residential and nonresidential units is allocated according to a three-part formula that takes the square footage of each unit into consideration.

The owner may submit to the Loft Board an application that has been pre-certified by an architect, who represents that the work has been performed, and by a certified public accountant, who represents that documentary proof has been submitted for each expenditure and that the claimed costs do not exceed the costs set forth in the Loft Board's schedule plus indexing. If the application is not pre-certified, the Loft Board's auditor fulfills the role of the certified public accountant but does not inspect the premises to ascertain whether the work has been performed. (Indeed, it would be impossible to determine, for example, whether plumbing, now hidden behind the walls, was installed.)

Once the auditor's report is complete, the Loft Board serves the residential occupants with a copy of the owner's application and the residential occupants and the owner with a copy of the auditor's report. The residential occupants have 45 days to file an answer. The answer may question whether the work was necessary and reasonable, criticize the quality of the work, or question the actual cost. The residential occupants' answer must include corroborating evidence, such as contractor's estimates, invoices, and architect's statements. If the Loft Board determines that the tenant's answer raises a genuine issue of material fact, the Loft Board may ask the owner to file additional information or evidence, inspect the premises (this is rarely done), schedule an informal conference, and, if all else fails, refer the matter to OATH for a hearing.

The tenant pays the cost of code compliance over the course of 10 years if the owner pays cash for the work, or 15 years if the owner finances the cost of construction. Thus, the total cost of code compliance attributable to each residential occupant is divided by 120 or 180 to arrive at a monthly charge.

Unlike major capital improvement (MCI) rent increases permitted by the Rent Stabilization Law and Code, the code-compliance increase drops off after 10 or 15 years and is not part of the permanent rent base.

After the owner obtains a final residential CO, the Loft Board issues a final rent order. In accordance with M.D.L. § 286(3), the final rent order sets the initial legal regulated rent; requires the owner to offer to the residential occupants leases "subject to the provisions regarding evictions and regulation of rent set forth in the emergency tenant protection act of 1974"; and requires the owner to register the building with the D.H.C.R. as a rent-stabilized building.

There are three basic components to the initial legal regulated rent: the "base rent";[73] the monthly code-compliance rent adjustment (there is a prospective and retroactive component), if any,[74] and a percentage increase applicable to either a one-year lease or a two-year leases established by the New York City Rent Guidelines Board (R.G.B.).

The R.G.B. meets once a year to establish rent increases for rent-stabilized apartments, rent-stabilized hotel units, and units formerly subject to the Loft Law. Under the current R.G.B. Order,[75] the percentage increases that apply to renewal leases are the same for rent-stabilized apartments and for lofts. In earlier years,

the percentage increase was lower for loft units.[76] A vacancy allowance applies to rent-stabilized apartments but not to lofts.

M. Differences Between Former IMD Units and Rent-Stabilized Apartments

It is important to know whether a rent-stabilized apartment was formerly subject to the Loft Law; some exemptions from rent regulation do not apply to apartments unless they became subject to the Rent Stabilization Law and Code "solely by virtue of Article 7-C of the Multiple Dwelling Law."[77] One way to find out whether a building was formerly subject to the Loft Law is to ask the Loft Board's Freedom of Information Law officer. These buildings are not listed on the Loft Board's Web site.

A rent-stabilized apartment that became vacant on or after June 19, 1997, with a legal regulated rent of $2,000 or more a month, becomes exempt from rent regulation, but this exemption does not apply to apartments that became subject to the Rent Stabilization Law and Code "solely by virtue of the Article 7-C of the Multiple Dwelling Law."[78] If the rent of a rent-stabilized apartment reaches $2,000 or more and the federally adjusted gross income of all persons occupying the apartment as a primary residence is $175,000 or more, then D.H.C.R. may issue an order of deregulation, but, here, too, this exemption does not apply to apartments that became subject to the Rent Stabilization Law and Code "solely by virtue of Article 7-C of the Multiple Dwelling Law."[79]

Owners of rent-stabilized apartments often achieve deregulation by waiting for a vacancy and imposing a vacancy increase permitted by the current R.G.B. Order; by making improvements to the apartment and then increasing the rent by an amount equal to one-fortieth of the cost of the improvements;[80] or by doing both these things. In this manner, the rent will reach $2,000 more quickly and result in deregulating the rent-stabilized apartment. Owners of former IMD units may not, however, deregulate in this fashion.

III. E.T.P.A.

Before the Loft Law was enacted, residential occupants argued, sometimes successfully, that the Emergency Tenant Protection Act (E.T.P.A.) of 1974 protected them from eviction.[81] One author explained the E.T.P.A. as follows: "In 1974, the legislature enacted the Emergency Tenant Protection Act., which enabled New York City and certain other Municipalities to regulate apartments completed before January 1, 1974. Emergency Tenant Protect Act of 1974, §§ 8621 to 8634 (McKinney's Unconsolidated Laws)…."[82] The author continued: "The Emergency Tenant Protection Act also brought under New York City's Rent Stabilization System all housing units in buildings of six of more units that had been decontrolled under the Vacancy Decontrol Law or that had been built between March 10, 1969 and January 1, 1974."[83]

Since the Loft Law's passage, residential occupants of nonresidential spaces who did qualify for Loft Law coverage sometimes have asserted claims that they are covered by the Rent Stabilization Law and Code by virtue of the E.T.P.A. In *Wolinsky v. Kee Yip Realty Corp.*,[84] residential occupants of a loft building located on Grand Street in Manhattan asserted E.T.P.A. coverage. The building did not have a residential CO. According to the New York City Zoning Resolution, the building was in an M1-5B zone, which allows light manufacturing use and use for joint living-work quarters for artists. However, the residential occupants were not artists. The residential occupants entered into commercial leases with the owner commencing in July 1997. They took occupancy of raw loft space and converted the space to residential use at their own expense. The *Wolinsky* court declined to extend E.T.P.A. coverage to "these illegally converted lofts."[85]

The *Wolinsky* court explained that the Loft Law was adopted in June 1982 and adopted an "eligibility period" (April 1, 1980 to December 1, 1981) that was "closed at the time of the enactment."[86] The Legislature thereby "demonstrated its intent to provide the benefits of the Loft Law only to existing residential tenancies and not to encourage new conversions of loft space."[87] Thus, the *Wolinsky* court appeared to shut the door on E.T.P.A. coverage for residential occupants who do not qualify for Loft Law coverage.

Some language in *Wolinsky* gave hope to tenant advocates. The Court of Appeals referred to the Appellate Division's decision on review,[88] which, according to the Court of Appeals, found that the E.T.P.A. "does not extend to tenancies that are illegal and incapable of becoming legal."[89] Tenants have used this language to argue that their tenancies are legal—in accordance with the zoning resolution—or are capable of becoming legal, if the owner of the building had applied for a zoning variance or if the building were located in a zone where the city was contemplating a zoning change. Thus, their tenancies might be subject to protection.

Following *Wolinsky*, the Appellate Division, First Department, in *Duane Thomas, L.L.C. v. Wallin* ruled that residential occupants may be subject to E.T.P.A. protection if it "appears that the unit is capable of being legalized."[90] In contrast, the Appellate Division, Second Department, in *Caldwell v. American Package Co.*, adopted a four-part test, finding E.T.P.A. coverage only where (1) the owner knew of and acquiesced in the residential conversion; (2) the conversion was undertaken at the residential occupants' expense; (3) zoning permitted residential occupancy (in other words, the occupancy was capable of becoming legalized); and (4) after the residential occupants had asserted their E.T.P.A. claim, the owner nonetheless took steps to convert the premises to residential use.[91]

One year later, in *South Eleventh Street Tenants Association v. Dov Land*,[92] the owner's motion for summary judgment was denied because the tenants presented sufficient documentary proof of ability to meet the four-prong test announced in *Caldwell*, thereby raising issues of fact precluding the grant of summary judgment to the owner.

Following *Caldwell*, the landlord-tenant bar recognized that to establish E.T.P.A. protection, the standards differ in the First and Second Departments, sometimes leading to dissonant results for loft tenants in Manhattan and Brooklyn.[93] The law in this area continues to develop.

IV. Conclusion

Any attorney handling a matter regarding a nonresidential building would do well to investigate whether there are residential occupancies. If the attorney discovers a residential occupancy, various laws and agencies might offer the occupant labyrinthine protections in that maze we call New York landlord-tenant law.

Endnotes

1. N.Y. Mult. Dwell. Law §§ 280–287 (McKinney Supp. 2010) (terminating May 31, 2010 pursuant to L.1982, c. 349, § 3).
2. N.Y. Unconsol. Laws §§ 8621–8634 (McKinney 2007). The cases include *Caldwell v. American Package Co.*, 57 A.D.3d 15, 866 N.Y.S.2d 275 (1st Dep't 2008); *Duane Thomas L.L.C. v. Wallin*, 35 A.D.3d 232, 826 N.Y.S.2d 221 (1st Dep't 2006); and *Mandel v. Pitkowsky*, 102 Misc. 2d 478, 425 N.Y.S.2d 926 (Sup. Ct., App. T. 1st Dep't 1979), *aff'd on opinion below*, 76 A.D.2d 807, 429 N.Y.S.2d 550 (1st Dep't 1980), *overruled on other grounds*, *Czerwinski v. Hayes*, 8 Misc. 3d 89, 799 N.Y.S.2d 349 (Sup. Ct., App. T. 1st Dep't 2005).
3. New York City Loft Board, http://www.nyc.gov/html/loft/html/home/home.shtm (last visited Feb. 6, 2010).
4. New York, N.Y., R.C.N.Y. tit. 29, ch. 1 §§ 1-01–1-11 and ch. 2, §§ 2-01– 2-12. (N.Y. Legal Publ'g Co. 2008), WL 29 RCNY §§ 1-01, *et seq*.
5. Minutes from October 2009 to the present are posted on the Loft Board's Web site. Earlier minutes are available by making a Freedom of Information Law request to the Loft Board. The "legislative history" behind the Board's regulations can be found in the minutes of the Board's meetings.
6. Cases decided after 1996 are available at New York Law School: CityADMIN Library, http://www.nyls.edu/centers/harlan_scholar_centers/center_for_new_york_city_law/cityadmin_library (last visited Feb. 6, 2010). Cases decided before 1996 are available by making a Freedom of Information Law request to the Loft Board or by consulting Treiman's *Loft Board Reporter*.
7. *See* A03715, A05667, A06368, S05881, *available at* http://assembly.state.ny.us/leg/?by=k&qs=loft.
8. *See, e.g.*, *Axelrod v. French*, 148 Misc. 2d 42, 45, 559 N.Y.S.2d 918, 920 (N.Y. Civ. Ct., N.Y. Co. 1990), *modified*, 154 Misc. 2d 310, 594, 594 N.Y.S.2d 518 (Sup. Ct., App. T. 1st Dep't 1992).
9. N.Y. Mult. Dwell. Law § 281 (McKinney Supp. 2010).
10. See discussion *infra* Section II. J on the owner's obligation to obtain a residential CO.
11. The regulations promulgated under the Loft Law define "multiple dwelling unit" and "IMD unit" at New York, N.Y., R.C.N.Y. tit. 29, ch. 2 § 2-07(a) (N.Y. Legal Publ'g Co. 2008), WL 29 RCNY § 2-07(a).
12. New York, N.Y., Admin. Code tit. 26, ch. 4, § 26-504(a) (West, Westlaw through L. 2008, ch. 652 and Local Law 51 of 2008); *91 Fifth Ave. Corp. v. New York City Loft Bd.*, 249 A.D.2d 248, 249, 672 N.Y.S.2d 301, 302 (1st Dep't 1998).
13. N.Y. Mult. Dwell. Law § 280.
14. *Id.* § 284.
15. *Id.* § 285(1).
16. *Id.* § 286(1).
17. *Id.* § 286(2).
18. *Id.* § 286(6).
19. *Id.* § 286(3).
20. S05881, A05667, 232nd Sess. (2009).
21. N.Y. Mult. Dwell. Law § 282 provides that the Loft Board may consist of four to nine members.
22. *Tan Holding Corp. v. Wallace*, 178 Misc. 2d 900, 903, 683 N.Y.S.2d 414, 416 (N.Y. Civ. Ct., N.Y. Co. 1998), *rev'd on other grounds*, 187 Misc. 2d 687, 724 N.Y.S.2d 260 (Sup. Ct., App. T. 1st Dep't 2001).
23. *See 180 Varick St. Corp. v. Center for Entrepreneurial Mgmt.*, N.Y. L.J., Sept. 16, 1998, at 22, col. 3 (N.Y.C. Civ. Ct., N.Y. Co.).
24. The Loft Board adopted a statute of limitations at some point but later repealed it.
25. Before 1996, the nine-member Loft Board delegated its duty to hear disputes to hearing officers under the direct employ of the agency called the Loft Board.
26. The Loft Board is located on the second floor of 100 Gold Street, New York, N.Y. Its telephone number is (212) 566-5663.
27. The regulations are found at http://24.97.137.100/nyc under the heading "Rules of the City of New York." The rules are under Title 29.
28. In 1983, 914 buildings were in the Loft Board's jurisdiction, and about currently 300 remain so. The 614 buildings that are no longer in the Loft Board's jurisdiction (because they have obtained their residential COs) are not listed on the Loft Board's Web site.
29. N.Y. Mult. Dwell. Law § 325 (McKinney 2001).
30. The regulations define "landlord" as "the owner of an interim multiple dwelling, the lessee of a whole building part of which is an interim multiple dwelling, or the agent or other person having control of such dwelling." New York, N.Y., R.C.N.Y. tit. 29, ch. 2 § 2-04 (), WL 29 RCNY § 2-04(a) (N.Y. Leg. Publ'g Co. 2008).
31. N.Y. Mult. Dwell. Law § 284(2); 29 R.C.N.Y. § 2-05(b).
32. N.Y. Mult. Dwell. § 325(2).
33. New York, N.Y., R.C.N.Y. tit. 29, ch. 2, § 2-05(b)(8); 29 R.C.N.Y. § 2-05(b)(8).
34. *Id.* § 2-05(b)(10).
35. *Id.* § 2-04.
36. The minimum temperature requirements are the same as those set forth in the New York City Housing Maintenance Code (H.M.C.). *See* New York, N.Y., Admin. Code tit. 27, ch. 2, N.Y.C. Admin. Code § 27-2029 (N.Y. Leg. Publ'g Co. 2008).
37. The temperature requirements are the same as those set forth in the H.M.C. New York, N.Y. Admin. Code tit. 27, ch. 2, § 27-2031, N.Y.C. Admin. Code § 27-2031.
38. Elevator service must be provided only to the extent that the service is legal. New York, N.Y., R.C.N.Y. tit. 29, ch. 2, § 2-04(b)(9) (N.Y. Leg. Publ'g Co. 2008). Many nonresidential buildings have elevators that are not legal for noncommercial-passenger use.
39. *Id.* § 2-04(b)(8).
40. *Id.* § 2-04(c).
41. *Id.* § 2-04(e)(2).
42. *Id.* § 2-04(e)(4).
43. N.Y.C. Admin. Code § 27-2115(h) authorizes occupants suffering from lack of services to bring an HP proceeding in Housing Court. IMD tenants may also

bring HP proceedings. *See, e.g.*, *Doukas v. Pravda Brothers Realty Co.*, N.Y.L.J., July 26, 1995, at 22, col. 4 (N.Y.C. Civ. Ct., N.Y. Co.).

44. *Id.* § 2-02(b).
45. N.Y.C.R.R. tit. 9, ch. VIII, § 2525.5 (2008).
46. *Id.*; NEW YORK, N.Y., R.C.N.Y. tit. 29, ch. 2, § 2-02(b) (N.Y. Leg. Publ'g Co. 2008).
47. Emergency Tenant Protection Act (E.T.P.A.) of 1974 § 12.a.(3)(ii), N.Y. UNCONSOL. Law § 8632a(3)((ii) (McKinney 2007).
48. NEW YORK, N.Y., R.C.N.Y. tit. 29, ch. 2, § 2-02(d)(ii).
49. *See* Section II.J. for a discussion of the code-compliance timetable.
50. NEW YORK, N.Y., R.C.N.Y. tit. 29, ch. 2, § 2-02(c)(6)(iii) .
51. *Id.* § 2-09(c)(6)(ii); *see, e.g.*, *In re Application of Latin*, No. Loft Board Order #2555 (N.Y.C. Loft Bd. July 20, 2000), *available at* http://archive.citylaw.org/loft/arch2000/LBO-2555.pdf, *aff'd on recon.*, No. Loft Board Order #2747 (N.Y.C. Loft Bd. July 30, 2002), *available at* http://archive.citylaw.org/loft/arch2002/LBO-2747.pdf.
52. *See* Section II.H. for a discussion of sales of improvements.
53. NEW YORK, N.Y., R.C.N.Y. tit. 29, ch. 2, § 2-02(c)(3) (N.Y. Leg. Publ'g Co. 2008).
54. *Id.* § 2-02(d)(2)(i).
55. *Id.*
56. N.Y. REAL PROP. Law Real Property Law § 235-d (McKinney 2006).
57. Local Law 7 of 2008 amended various H.M.C. sections and added new sections regarding harassment. *See* N.Y.C. Admin. Code §§ 27-2004(a)(48), 27-2115(h)(1), 27-2115(h)(2), 27-2115(m)(1), 27-2115(m)(2), 27-2115(m)(3), 27-2115(n), and 27-2120(b).
58. *See* NEW YORK, N.Y., R.C.N.Y. tit. 29, § 2-07 (N.Y. Leg. Publ'g Co. 2008).
59. *Id* § 2-07(f)(2).
60. See Section II.G. for a discussion of harassment and civil penalties.
61. NEW YORK, N.Y., R.C.N.Y. tit. 29, ch. 2, § 2-07(f)(1) (N.Y. Leg. Publ'g Co.).
62. *Id.* § 2-10(c)(1).
63. *Id.* § 2-10(c)(2).
64. *Acevedo v. Piano Building, L.L.C.*, 2009 WL 4672663, 2009 N.Y. Slip Op. 09168, N.Y. L.J., Dec. 15, 2009, at 37, col. 3 (1st Dep't); *315 Berry St. Corp. v. Hanson Fine Arts*, 39 A.D.3d 656, 835 N.Y.S.2d 261 (2d Dep't 2007).
65. NY MULT. DWELL Art. 7B consists of §§ 275–279. Section 277 is essentially a building code that architects must follow when renovating a loft building for residential use.
66. NY MULT. DWELL § 285 (McKinney Supp. 2010).
67. *Id.* § 286(2)(ii).
68. *Id.*
69. *Id.*
70. *Id.* § 286(2)(iv).
71. *Id.* § 286(3); 29 R.C.N.Y. § 2-01(i)(2).
72. NEW YORK, N.Y., R.C.N.Y. tit. 29, ch. 2, § 2-01(j) (N.Y. Leg. Publ'g Co. 2008).
73. The "base rent" includes the rent in effect as of Dec. 21, 1982, the Loft Board Order #1 rent increase, and the code-compliance increases (six percent, eight percent, and six percent).
74. An owner may waive its right to a code-compliance rent adjustment. NEW YORK, N.Y., R.C.N.Y. tit. 29, ch. 2, § 2-09(i)(2)(vi).
75. 2009 Apartment and Loft Order #41 (N.Y.C. Rent Guidelines Bd. June 23, 2009), *available at* http://www.housingnyc.com/downloads/guidelines/orders/AptOrder41.pdf.
76. 2002 Apartment and Loft Order #34. (N.Y.C. Rent Guidelines Bd. June 28, 2002), *available at* http://www.housingnyc.com/html/guidelines/orders/order34.html.
77. N.Y.C.R.R. tit. 9, ch. VIII, R.S.C. §§ 2520.11(r)(5)(ii) and 2520.11(s)(2)(ii). A unit is subject to the Rent Stabilization Code by virtue of Multiple Dwelling Law Article 7-B only if the unit is located in a building containing fewer than six units.
78. *Id.* § 2520.11(r)(5)(ii).
79. *Id.*
80. N.Y.C.R.R. tit. 9, ch. VIII, R.S.C. § 2522.4(a)(1).
81. *Mandel v. Pitkowsky*, 102 Misc. 2d 478, 480–81, 425 N.Y.S.2d 926, 928 (Sup. Ct., App. T. 1st Dep't 1994).
82. Andrew Scherer, *Residential Landlord-Tenant Law in New York*, §§ 6:79–6:119 (West 2009–2010 ed.).
83. *Id.* at § 4:11.
84. 2 N.Y.3d 487, 812 N.E.2d 302, 779 N.Y.S.2d 812 (2004).
85. *Id.* at 493, 812 N.E.2d at 305, 779 N.Y.S.2d at 815.
86. *Id.* at 492, 812 N.E.2d at 304, 779 N.Y.S.2d at 814.
87. *Id.* at 492–93, 812 N.E.2d at 304, 779 N.Y.S.2d at 814.
88. *See Wolinsky I*, 302 A.D.2d at 328, 756 N.Y.S.2d at 515.
89. *Wolinsky II*, 2 N.Y.3d at 491, 812 N.E.2d at 303, 779 N.Y.S.2d at 813.
90. 35 A.D.3d 232, 233, 826 N.Y.S.2d 221, 222 (1st Dep't 2006).
91. *See generally* 57 A.D.3d 15, 866 N.Y.S.2d 275 (2d Dep't 2008).
92. 59 A.D.3d 426, 872 N.Y.S.2d 514 (2d Dep't 2009).
93. *See, e.g.*, Warren A. Estis & William J. Robbins, *Courts Differ on Rights of Tenants in Illegal Lofts*, N.Y. L.J., Dec. 3, 2008, at 5, col. 2.

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Legislation: The Role of the Real Property Law Section

(RPLS Annual Meeting CLE, January 28, 2010)

By Karl B. Holtzschue

"No man should see how laws or sausages are made."

—Otto von Bismarck, 1815–1898[1]

1. Background

The Real Property Law Section (RPLS) has had a Legislation Committee for many years, focusing on submitting a handful of memoranda on bills in the legislature each year.

In May of 2004, as a newly elected RPLS officer, I attended a NYSBA Section Leaders Conference (with officers Dorothy Ferguson and Harry Meyer). At the conference, there was a presentation on communicating messages to lawmakers. Ron Kennedy, NYSBA's Director of Legislation, spoke, as did Joshua Rubenstein, the former Chair of the Trusts and Estates Law Section. Joshua described the **very extensive activities** of their Legislation Committee, including **reading weekly advance sheets, drafting memoranda on bills, proposing legislation and making lobbying trips to visit legislators in Albany twice a year**. Joshua said that we can "approve" or "disapprove" bills subject to suggested changes. I replied that some legislators did not like our reports on bills saying "approve" or "disapprove," as NYSBA has no approval rights; legislators prefer that we use the language of "support" or "oppose." Presenters explained lobbying rules. Use of **Section forums** to inform members was also described, as well as **Committee Chair manuals**. NYSBA will assist in **surveying our members**. I reported to the RPLS Executive Committee on ideas I took away from the conference.

At the 2005 Conference, we learned about the T&E Section's Legislative Alert that lists and tracks bills. Harry Meyer and Joshua Stein attended, as did RPLS Legislation Committee Co-Chairs Gary Litke and Spencer Compton. In its presentation, the Tax Section described how it meets monthly, issues 30 to 40 reports per year, and is active in commenting on tax regulations. Other presenters discussed how **amicus briefs by a Section must be approved by the NYSBA Executive Committee**. Compliance with the **State Lobbying Act** and **Guidelines to the Gift Rule** (limits on gifts to legislators) was explained.

At the 2006 Conference, we discussed how to deal with a report on a bill that has a dissent. Hank Greenberg, Chair of the NYSBA Committee on Legislative Priorities, said that NYSBA prefers reports without **dissents**, stressing that they were more persuasive with legislators. We also learned that **differences among Sections are resolved by the NYSBA Executive Committee**, usually by compromise.

At the 2007 Conference, it was announced that **Ron Kennedy** had been named Director of the Department of Governmental Affairs. Joanne Barker, Legislative Coordinator for the N.Y.S. Assembly Program and Counsel Staff, reported that when a bill is on the debate calendar, there is a 99% chance that it will pass. So you can't afford to wait until there is a debate call or the third reading of a bill.

The September/October 2007 issue of *State Bar News* had an article by Ron Kennedy that featured the work of the RPLS and an **RPLS Task Force chaired by Bob Zinman on an adverse possession bill that was ultimately vetoed by the Governor**.

On October 1, 2007, **Kevin Kerwin** became Assistant Director of Government Relations. He has spent a great deal of time on RPLS matters and has been very effective.

On November 14, 2007, NYSBA held a Workshop on Legislation and Lobbying, which I and Bob Zinman attended. Sections are free to comment on bills, which must be cleared by Ron Kennedy. **Comments by any individual Section cannot conflict with NYSBA positions**. **Affirmative legislation proposed by Sections must be approved by the NYSBA Executive Committee, and therefore must be submitted at least 45 days in advance of Executive Committee meetings**.

I published an article in the *New York Law Journal* on January 28, 2008, p. 13, col. 1, entitled "Highlights of Real Estate Legislation Projects." It highlighted adverse possession, mortgage foreclosure, MERS, subprime lending, title agent licensing and upcharges and the RPLS Web site.

At the 2008 Conference, Ron Kennedy featured the RPLS, saying that we had worked to get the Governor to veto an adverse possession bill. I reported on our RPLS Guidelines, website, blog, forum and pending matters. Additionally, there was much discussion about the legislative process. Bills ideally should be proposed before April 21, because after that they may only be introduced with the Leader's permission. Speakers outlined Ten Key Points on How to Get a Bill Passed, including (1) **a new bill should be proposed by November or December so that**

approval of NYSBA can be obtained in a timely manner; (2) a detailed justification should accompany the bill draft; and (3) an influential potential sponsor should be identified.

In 2008 Ron Kennedy reported in the *New York State Bar Journal* that 812 bills passed both houses (**552 bills passed between 6/15 and 6/25**). More than one thousand bills passed in one house (!).

Many of the tips we received from these Section Leaders Conferences and Legislation Workshop have been incorporated into our legislation effort.

Recent Co-Chairs of the RPLS Legislation Committee include: Robert Hoffman of Schenectady (1997-2005); Gary Litke of New York City (2001-2007); Spencer Compton of New York City (2005-2008); Kathleen Lynch of Buffalo (2006-); Karl Holtzschue (2008-) (following a year as Chair of the RPLS).

2. Mission of Legislation Committee

The formal Mission Statement of the Legislation Committee, dated July 10, 2007, is as follows:

General Mission: The general mission of the Committee is to monitor the flow of proposed legislation in both the State Assembly and the Senate that affects any aspect of real property law, and to forward each such bill to the RPLS Committee with relevant substantive expertise to recommend whether the RPLS should support, oppose or be neutral with respect to that bill. The Committee strives to identify and oppose those bills, which, in the opinion of the Committee, threaten to impose unjust and/or unintended consequences or otherwise impede real estate commerce. The Committee's goal is to improve the law by simplifying, clarifying and streamlining it.

Additionally, the committee strives to:

1. Educate the Bar regarding prospective legislative developments that affect real property;
2. Seek recommendations for changes in law and regulations;
3. Prepare reports, forms and proposed legislation on areas of interest for presentation to the Committee and the Section;
4. Coordinate with other groups for education or toward other common goals;
5. Communicate the activities and viewpoints of the Committee to the Section and the Bar Association and vice versa; and
6. Educate the public.

Membership: All members of the Bar are welcome to join the Committee.

Organization and Meetings: The Committee has two Co-Chairs, one from downstate and one from upstate. The Committee meets quarterly via conference call at such times as the Co-Chairs call a meeting. The Committee may meet at other times as circumstances warrant, upon notice from the Co-Chairs.

3. Legislation Chart

Taking our lead from the Trusts and Estates Section, we have been preparing a **Legislation Chart** for each two-year cycle of the legislature; 2008-2009 was the first year of the current cycle. The **current Legislation Chart**[2] lists current Assembly and Senate bill numbers; bill numbers from the prior session; names of bill sponsors; subjects of, and statutes affected by, proposed legislation; the RPLS Committee to which the bill has been referred for comment; the RPLS memo number; and comments/status of the bill (including Chapter numbers of bills signed into law). Bills introduced in both the Assembly and Senate are listed first, then Assembly bills, Senate bills and finally bills from the prior session. Charts are generally updated throughout the session, and, at the very least, for the September, December, January, April and July meeting of the RPLS Executive Committee. Copies are e-mailed to all members of the Legislation Committee. I perform the primary research and Beverly Deickler does the actual input in the charts.

RPLS Committee Chairs are asked to share the Legislation Charts with their members, requesting volunteers to write memoranda on bills of interest.

Proposed bills can also be tracked on the RPLS Web site (accessible from www.nysba.org), under the heading "**Status of Pending Legislation**." This resource, which is updated daily, lists bills of interest to the RPLS, details the action taken on each bill, and contains links to the text of each bill. Bills and detailed information on each bill are available on the Assembly website, www.assembly.state.ny.us/leg, where both Assembly and Senate bills can be accessed by bill number or topic.

4. Laws Enacted in 2009

The following laws affecting real property were enacted in 2009:

- A1132/S2350—Excludes non-business days from notice of eviction. Ch. 256
- A1569/S2967—Incentives for construction of schools/condos in mixed const. Ch. 234
- A2002/S2493—Amend civil penalties for violation of admin orders re tenants. Ch. 480
- A2089/S3337—Establish conservation easements. Ch. 296
- A2369/S800—Subcontractor's right to file claim. Ch. 224
- A2500/S2461—AG to compel compliance with GOL re money in trust. Ch. 225

- A4392/S1728—Delay effective date of Power of Attorney to 9/1/09. Ch. 4
- A5753/S5551—"Mortgage" to include second lien if purchased by U.S. agency. Ch. 432
- A6017/S3847—Court to describe stipulation in summary proceeding. Ch. 281
- A6093/S2791A—Requires all residences to have CO detector. Ch. 367
- A6924/S3725—Regulation of mortgage loan originators. Ch. 123
- A7247/S2871—New owners for which administrator appointed. Ch. 265
- A8305/S2760—Reverse mortgage fairness act. Ch. 259
- A40007/S66007—**Home mortgage loans, crime of mortgage fraud**. Ch. 507

The most important was the last, **Chapter 507**. This is another Governor's Program Bill, designed to **protect borrowers and tenants in residential mortgage foreclosures**. The bill includes measures for expanding the 90-day pre-foreclosure notice to all home loans; expanding mandatory settlement conferences to all home loans; requiring written notice to tenants in foreclosed properties; requiring plaintiffs to maintain the foreclosed property; preventing brokers offering distressed property consulting services from accepting upfront fees and permitting the award of reasonable attorneys' fees to prevailing borrowers in foreclosure actions.

Selected bills NOT enacted in 2009:

- A1364/S4672—Revises Property Condition Disclosure Act [RPLS memo in support]
- A1643/S41—Makes practicing law without admission a Class-E felony [RPLS memo in support]
- A3553/S5497—Requires applications for coops to be acted on in 45 days
- A4300/S5445—Actions for UPL to include criminal as well as civil actions [RPLS memo in support]
- A5362/S1933—Provides for recordation of modification of illegal restrictive covenants [+ several other bills] [RPLS memo in opposition]
- A6086/S5815—Provides for licensing of title agents (NYSLTA bill) [RPLS memo in opposition]
- A7127/S3550—Provides for licensing of title agents (NYSID bill) [RPLS memo in opposition unless amended]
- A8404—Requires disclosure of title insurance service charges (RPLS bill) [RPLS memo in support]

Last year, for the first time, we sent a blast e-mail in October to the entire RPLS describing laws enacted that affect real property. We plan to continue this e-mail notification in every year going forward.

5. Guidelines for Reviewing Legislation

The RPLS Executive Committee has adopted the following Guidelines for Reviewing Legislation:

In reviewing proposed legislation, rather than trying to formulate an opinion on public policy, we at the Real Property Law Section can **bring our legal expertise to bear on the legislation**. We can act as experts giving advice to the policymakers. We don't have to just consider whether we support or oppose the legislation. **We can say that we "support if amended" or "oppose if not amended."** And we can always decline to comment.

These are some questions that will guide you in reviewing legislation:

1. Will the legislation do what it purports to do? (rather than, "Should this policy be enacted?")
2. Are key statutory terms defined?
3. Is there a better way to do what the bill purports to do?
4. Do we foresee **unintended consequences**?
5. What is the **effective date**? Should it be delayed (e.g., until after the January NYSBA meetings to allow time to make it known to our members)?
6. Is the statute retroactive?
7. Does the legislation give rise to a **private right of action**? Should it?
8. Who has standing to sue?
9. Is there a **statute of limitations**? If so, what is the limitations period?
10. **What types of relief are provided for**? What types of relief are already available?
11. If a federal statute, is it intended to preempt state law?

Format for legislation memos:

Memorandum in [Support] [Opposition] [Support if Amended] [Opposition Unless Amended]

[Assembly and/or Senate bill number(s)] By: [Assemblyman and/or Senator]

AN ACT to [amend the ____ Law], in relation to [state subject matter]

LAW AND SECTION REFERRED TO: [____ Law Sections ____]

THE REAL PROPERTY LAW SECTION [SUPPORTS] [OPPOSES] [SUPPORTS IF AMENDED] [OPPOSES UNLESS AMENDED] THIS LEGISLATION

[**First paragraph of one or two sentences should succinctly state the position and reasons therefor**]

[Body of memo]

The Real Property Law Section [Supports] [Opposes] [Supports if Amended] [Opposes Unless Amended] this bill.

Person(s) who prepared this Memorandum: [insert name of preparer(s)]

Section Chair: [insert name]

6. Guidelines for RPLS Legislation Memos

The RPLS Executive Committee (XC) has adopted the following Guidelines for RPLS Legislation Memos:

1. Identification of Topics

   (a) New bills are listed under ***Status of Pending Legislation*** on the RPLS website, beginning in January each year, and steps taken by the legislature on each bill are posted daily. They are chosen for the list by the NYSBA Governmental Relations Department (Kevin Kerwin, Assoc. Dir), with additions from the Legislation Committee Co-Chairs. **Committee Co-Chairs (or their designees) are urged to review the status periodically to identify bills of interest and to monitor their progress**.

   (b) Legislation Committee Co-Chairs will prepare and distribute to the Legislation Committee and the RPLS XC a ***Legislation Chart*** of selected bills to aid in identifying and monitoring them.

2. Drafting of Memos

   (a) Legislation Committee Co-Chairs, with the help of other Committee Co-Chairs and other RPLS members, will attempt to identify bills worthy of comment by our Section and ask Committee Chairs and RPLS members to draft memos. RPLS members may volunteer on their own.

   (b) Legislation Committee Co-Chairs will notify RPLS XC members by e-mail each time a memo is assigned for drafting. It is suggested that Committee Chairs forward each e-mail to their members if they think there would be interested in the subject. If more than one person volunteers, the Legislation Committee Co-Chairs will select one or more persons to do the draft.

   (c) The memo should be: (1) in support, (2) in opposition, (3) in support if amended [specifying the amendment], or (4) in opposition unless amended [specifying the amendment]. The first sentence or two should succinctly state the reasons for the position taken in the memo, including any recommended amendments. Memos should be short (1-3 pages). The name of the drafter or drafters should appear at the end of the memo.

3. Approval of Memos

   (a) Legislation Committee Co-Chairs will review and approve each memo as to form (not substance). Once approved, Legislation Committee Co-Chairs will circulate the memo to the RPLS XC for comment within five business days (or less in emergencies). Any comments will be dealt with by the Legislation Committee Co-Chairs, in consultation with the RPLS Chair as needed to resolve any disputes.

   (b) In case of an unresolved conflict of opinion on a memo, the conflict will be resolved by the RPLS Chair, in consultation with the other officers. Consideration may be given to adding a dissenting comment to a memo in an appropriate case.

   (c) Once approved by the Chair, the name of the Chair will appear at the end of the memo after the name of the drafter(s).

   (d) The Legislation Committee Co-Chairs will then forward the memo to the NYSBA Government Relations Department for finalization and filing with the legislature.

   (e) Copies of the memos will be displayed on the RPLS website and may be posted on the RPLS blog and RPLS forum.

7. Legislative Memoranda

The RPLS has prepared memoranda on bills for several years.

In 2003–2004 the RPLS prepared eight memoranda (then called reports), five by members of the Title and Transfer Committee and three by members of the Landlord & Tenant Committee. The RPLS memos opposed seven bills and supported one; none passed.

In 2005–2006 the RPLS prepared 14 memoranda on various subjects by several members. The RPLS memos opposed 12 bills and supported two; four passed (including the Home Equity Theft Prevention Act), but one was **vetoed** by the Governor (escrow account for brokers' commissions). Gregg Pressman chaired a task force

that succeeded in eliminating some provisions of the LLC Publication Act before it was passed.

In 2007–2008 the RPLS prepared 25 memoranda under its name and one for NYSBA. The RPLS memos opposed 15, supported nine and supported two if amended; four bills became law; four bills were **vetoed** by the Governor (adverse possession and restrictive covenant modification).

In 2009–2010 the RPLS prepared 30 RPLS memoranda, two NYSBA memoranda (supporting amending the Judiciary Law to authorize the N.Y.S. Attorney General to bring both civil and criminal actions for UPL and supporting an RPLS bill requiring disclosure of title service charges) and three reports on title insurance regulations proposed by the N.Y.S. Insurance Department (drafted by members of the RPLS Task Force on Title Insurance Regulation).

Current Legislative Memoranda for 2008–2009 and 2009–2010 are available on the RPLS website.

Drafting a memo may help prevent passage of a flawed bill or support passage of a good bill. Our last defense has been asking the Governor to veto a flawed bill, and our efforts have almost always been successful.

8. Visits to Legislature

The RPLS has made four trips to Albany to visit with legislators, organized through the NYSBA Department of Government Affairs.

March 7, 2006. We met with Assemblyman Jonathan Bing (Member, Assembly Judiciary Committee), Senator John DeFrancisco (Chair, Senate Judiciary Committee), Assemblymember Helene Weinstein (Chair, Assembly Judiciary Committee), Senator Dale Volker (Chair, Senate Codes Committee), Assemblyman Ryan Karben (Member, Assembly Judiciary Committee), and John Conway and Tracy Lloyd, Counsel and Chief of Staff for Senator Skelos. RPLS members were Harry Meyer, Karl Holtzschue, Peter Coffey, Spencer Compton and Gary Litke.

April 24, 2007. We met with Senator John DeFrancisco (Chair, Senate Judiciary Committee), Assemblymember Helene Weinstein (Chair, Assembly Judiciary Committee). Assemblyman Adam Bradley (Sponsor, title agents licensing bill), Senator George Winner (Sponsor, title agents licensing bill), Michael Avella, Counsel to Senator Joseph Bruno (Senate Majority Leader), and Stephanie Sorrentino, Office of Assemblyman Canestrari (Assembly Majority Leader). RPLS members were Spencer Compton, George Haggerty, Tom Hall, Peter Coffey and Karl Holtzschue. We discussed title agents, UPL, takings, foreclosure, recording charges and LLC publication requirements.

April 29, 2008. We met with Senator George Winner (Sponsor, title agents licensing bill) and his counsel, Teresa Rossi, Amanda Hiller (Asst. Counsel to the Governor), Assemblyman Adam Bradley (Sponsor, title agents licensing bill), Kevin Engel, Counsel to Senator John DeFrancisco (Chair, Senate Judiciary Committee), Rich Ancowitz (Chief Counsel to Assembly Judiciary Committee), Clayton Rivet (Team Counsel) and Amy Maggs (Assistant Counsel) for Assemblymember Helene Weinstein (Chair, Assembly Judiciary Committee), and Senator O'Connor Little (Sponsor, adverse possession bill) and Rebecca Marion (Counsel). RPLS members were Karl Holtzschue, Harry Meyer and Joel Sachs. We discussed registration of title agents, adverse possession, disclosure of service charges, restrictive covenant modification, UPL, mortgage foreclosures, discretion of county clerks on recording mortgages, and oil and gas. Amanda Hiller suggested that we use more expressive headings for our memos than just "Support" or "Oppose," such as "Support if Amended" or "Oppose Unless Amended."

May 5, 2009. We met with Assemblymember Helene Weinstein (Chair, Assembly Judiciary Committee) and Rich Ancowitz (Chief Counsel to Assembly Judiciary Committee), Clayton Rivet (Team Counsel) and Amy Maggs (Assistant Counsel), Assemblyman Adam Bradley (Sponsor, title agents licensing bill) and Jay Peltz (Counsel), Senator John Sampson and Tim Spotts (Counsel), Evan Schneider (Counsel for Senator Neil Breslin), and Justin Wilcox (Counsel) and staff members for Assemblyman Joseph Morelle. RPLS members were Karl Holtzschue, Peter Coffey, Tom Hall, Steve Alden and Jerry Antetomaso. We delivered a packet to each of our memoranda and RPLS articles on title agents. We discussed title agent licensing, UPL, foreclosure, disclosure of service charges, disclosure of a right to home loan counseling (Senator Sampson's bill). Senator Sampson convinced us to support his bill, and we sent him some additional language.

9. Lobbying Compliance and Gift Rules

NYSBA hosted a conference call on legislation and lobbying at noon on Sep. 10, 2009. This is the second year such a meeting has been held.

Legislation. Ron Kennedy noted that Sections can independently issue reports and comments provided there is no conflict with NYSBA policy. Ron Kennedy monitors for conflicts when the reports go through his office. NYSBA's Executive Committee or House of Delegates must approve any bills proposed by Sections. He asked for Sections to propose Legislative Priorities for 2010 for the NYSBA list. He suggested that Sections have their own priority lists of the bills most important to them. He said Sections can set up through Ron's office meetings to meet with legislators and the Governor's office on bills.

Lobbying Compliance. **Contacts with legislators and government officials must be coordinated with**

Ron's office because the NYSBA has registered as a lobbyist and therefore must report bi-monthly to the Commission on Public Integrity. For this purpose, individual sections are seen as part of NYSBA. **Section members do not have to register as lobbyists if they work through Ron's office**. But if a member who drafted a bill goes to a legislator to argue for the bill, that member is required to register as a lobbyist. If Ron is present, the member need not register. Similarly, **if a member merely gives technical advice, as opposed to advocating for a bill, the member does not have to register**. Ron's rule of thumb is that more than one trip by a member raises questions as to registration.

Gift Rules. Once registered, the rules on prohibited gifts apply. **Because NYSBA is registered as a lobbyist, Ron considers all NYSBA members to be considered covered by the gift rules**. **Members cannot make gifts to legislators or governmental employees of more than nominal value** (regular coffee is ok; latte is not) (a change to a $10 limit has been proposed). We can't give an official a lunch at an event unless everyone gets lunch (the "widely attended" rule). There is much confusion over application of the gift rules. **The only safe course is to clear any contact with officials with Ron's office**. It was suggested that Section bylaws be amended to state that reimbursement of expenses of public officials must comply with law. I asked that NYSBA give out guidance on the gift rules.

Rule of Professional Conduct. A new rule says that when an attorney deals with a public official in a non-judicial context, the attorney must identify whom he represents.

Five-Day Rule. NYSBA By-Law Article 7, Sec. 5(c)(2) says that **a Section may give a notice to the NYSBA President that it wants to release a report and the President has five days to respond** with a determination whether the position, statement or report is inconsistent with policy previously adopted by the House of Delegates of NYSBA's Executive Committee.

10. Public Hearings

The Assembly and Senate occasionally hold public hearings on bills. Usually, these hearings are in Albany but sometimes they occur in New York City. I have attended three public hearings in recent years.

N.Y.S. Insurance Department (NYSID) Public Hearing on Title Insurance Practices, November 3, 2006. The NYSID News Release said that the hearing would explore: the cost to title insurance company/title agents to perform searches of records compared with the premium rates charged; the premiums paid to title insurance companies; the commissions or fees paid to title agents/attorney agents and the effect they have on the overall cost to consumer; the rationale for two rate tiers and whether that should continue; the effect on the consumer of the current compensation structure, including affiliated business arrangements and referral fees; and whether different rates should be charged for residential and commercial properties. It noted that NYSID had approved 15% title insurance rate reductions in June 2006. **Tom Hall testified orally and in writing on behalf of the RPLS**. I attended the hearing and took extensive notes, which I wrote up and distributed. Tom testified that the RPLS recommended (1) that attorneys be allowed to continue the tradition of providing title insurance services to clients; (2) stopping overcharges and upcharges on items not governed by the rate manual; and (3) requiring audits of title insurance bills. A speaker from the N.Y.S. AG's office aggressively attacked profits. I found the questions from the NYSID Commissioners very revealing: most seemed to have little understanding of how title insurance works. The comments by 19 speakers were all over the lot. **RPLS submitted Supplemental Comments and Responses, dated December 13, 2006, drafted by Tom Hall and Jerry Antetomaso**: (1) attorneys should not be impeded from performing core title services as an adjunct to their practice of law; (2) N.Y. Ins. Law § 6409(d) prohibits commissions paid for referrals, not compensation for services rendered; and (3) fees charged for services not covered by title insurance premiums should be disclosed in detail.

N.Y.S. Assembly Public Hearing on December 8, 2008 on 2008 Responsible Lending Act (Ch. 472 of 2008), enacted to assist homeowners facing foreclosure. The purpose of the hearing was to evaluate the implementation of the law and its impact. I attended and distributed notes. N.Y.S. Banking Department Superintendent Richard H. Neiman reported. The Banking Department website has a list of counselors and FAQ. The next step will be to regulate servicers. But we can't tell yet whether settlement conferences will be effective. Consumer advocates stressed that mere disclosure is not the answer and that settlement conferences should be mandatory. The N.Y.S. Bankers Association and N.Y. Association of Mortgage Brokers testified.

N.Y.S. Senate Public Hearing on Mortgage Fraud, October 28, 2009. The Notice of Hearing said the subject was gathering information concerning the types of fraud practiced on mortgage borrowers and concerning the investigation and prosecution of residential mortgage fraud in New York. I attended, took notes and distributed my notes. Suggestions including banning yield spread premiums, prohibiting steering borrowers to higher cost loans, and banning option rate mortgages. Nonprofits said they were overwhelmed. The federal modification process is tied up in knots. Settlement conferences are only starting to work. Prosecutors recommended requiring timely filing of deeds and mortgages and a database showing when closings are scheduled. ACRIS was praised for as-

sisting law enforcement and criticized for facilitating fraud by showing signatures. Senators expressed concern about the maintenance of foreclosed properties.

11. Bills Proposed by RPLS

(a) ***Property Condition Disclosure Act***. In October of 1999, the RPLS appointed a **Task Force on Property Condition Disclosure**, with me as Chair, to deal with the N.Y.S. Association of Realtors' (NYSAR) proposed property condition disclosure act, which had been around for a couple of years. The Task Force analyzed, commented on and opposed the bill as originally drafted and had several meetings with NYSAR. The RPLS issued a legislation report on in May of 2000 disapproving of the bill. Following its unexpected passage, we wrote a report asking the Governor to **veto** it, which he did on December 11, 2000. Our report also stated that we would support a modified version of the bill. The RPLS drafted its own version of the bill, which was approved by NYSBA's Executive Committee (which added an opt-out provision), but went no further. After many phone calls and trips to Albany, Sponsors Libous and Brodsky and the Governor's Counsel agreed on a revised version of the NYSAR bill, which was passed and signed by the Governor as Chapter 456 of the Laws of 2001, effective March 1, 2002. *See* Holtzschue, *Property Condition Disclosure Act Enacted*, 30 N.Y. REAL PROP. L.J. 15 (Winter 2002); Holtzschue, *Property Condition Disclosure Act: Implications of $500 Credit*, 30 N.Y. REAL PROP. L.J. 100 (Summer 2002); Holtzschue, *Property Condition Disclosure Act: First Case Has Right Result for Wrong Reasons*, 31 N.Y. REAL PROP. L.J. 5 (Winter/Spring 2003); Holtzschue, *Responses of the Legislature and the Bar Association to Court Decisions on Sales of Residences*, 33 N.Y. REAL PROP. L.J. 78 (Spring 2005) (discussing problems with PCDS questions); Holtzschue, *The Purchaser Hasn't a Ghost of a Chance: Update on PCDA Cases and PCDA Revision*, 35 N.Y. REAL PROP. L.J. 7 (Winter 2007). Recent efforts by NYSAR to make some minor improvements in the PCDA have not succeeded.

(b) ***RPLS Technical Correction Act***. As an exercise in bill drafting, the RPLS drafted a bill making technical corrections of erroneous and duplicative statute numbers. It was enacted as Chapter 94 of Laws of 2006.

(c) ***Adverse Possession***. In *Walling v. Przybylo*, 7 N.Y.3d 228 (2006), the Court of Appeals held that an adverse possessor's state of mind did not affect the running of the 10-year statute of limitations for ejectment from real property. While the decision correctly stated New York law, it was perceived by some as unfairly permitting a possessor to take property from an unsuspecting owner. In response, the legislature in 2007 passed a bill that would have prevented acquisition of property by adverse possession unless proof was shown that the claimant had no knowledge that the property belonged to another. As then-Chair of the RPLS, I appointed a **Task Force on Adverse Possession**, chaired by Robert Zinman, to urge a **veto** of the bill by the Governor, which he did. The Task Force then proposed amendments to the RPAPL, which were approved by NYSBA and introduced as S7915. Unfortunately, our proposed bill was rewritten in significant part by the legislature to reinstate the lack-of-knowledge requirement and other changes, urged in part by certain members of the New York State Land Title Association. The **Governor declined our request for another veto**, and the bill was enacted as Chapter 269 of the Laws of 2008. For a review of how the legislation as enacted has overturned hundreds of years of settled law and included drafting flaws that threaten to create havoc and litigation, ***see*** Parella and Zinman, *Adverse Possession: What Hath the New York Legislature Wrought*, 37 N.Y. REAL PROP. L.J. 27 (Winter 2009).

(d) ***Disclosure of Title Insurance Service Charges***. While reviewing the proposed bills to license title agents, it was pointed out that there was no mechanism to examine what is known in the industry as "**upcharges**," charges in addition to title insurance premiums for matters related to title insurance, such as conducting municipal searches and recording documents. Tom Hall and others drafted a bill to **require separate disclosure** of (1) payments to governmental entities, recording offices and other third parties and (2) charges made for services. During one of our visits to Albany, Assemblyman Bradley expressed interest in sponsoring such a bill. Our bill was revised and approved by the RPLS and NYSBA and introduced on May 19, 2009 as A8404 by Assemblyman Bradley. In commenting on the NYSID bill to license title agents, we have suggested adding this concept.

12. RPLS Web site, Blog and *Journal*

The RPLS Web site has many useful aspects. Its resources and features include:

- Status of Pending Legislation
- 2009-2010 Legislative memoranda
- 2008-2009 Legislative memoranda

- *N.Y. Real Property Law Journal*
- Committee pages
- Real Property Law Section Blog
- "Join the Real Property Forum"

13. Federal Legislation

We have explored expanding our monitoring, analysis and memo-writing in the field of federal legislation. However, we have not found sufficient interest to pursue this area.

Having served on the temporary committee that preceded it, I have been appointed to the **NYSBA Special Committee on Federal Legislative Priorities**. The mission of the Committee is to identify and examine the establishment of an effective structure to address federal legislative priorities that will coordinate NYSBA efforts in Sections, Committees, the Executive Committee and the House of Delegates. It will consider ways to enhance NYSBA becoming a resource to legislators and their staffs. Members of the Committee have met with several federal legislators, focusing on New York members. Priorities include adequate funding for legal services and elimination of restrictions on advocacy, repeal of the federal defense of marriage act, preservation of the attorney client relationship, Free Flow of Information Act (Shield Law) and global warming.

14. Current Efforts

(a) *Licensing of Title Agents and NYSID Regulations on Title Insurance*. A Task Force was appointed to deal with NYSID regulations on title insurance, with me as Chair. We drafted a report on the proposed NYSID regulations, a line-by-line mark-up of the regulations and had a conference call with NYSID to explain our comments. Ben Weinstock did a memo analyzing opinions on Ins. Law § 6409. We also did a line-by-line markup of the NYSID bill to license title agents, to supplement our memorandum in opposition. On December 16, Tom Hall, Ben Weinstock and I participated in a large meeting with NYSID and many other interested parties to go over the bill. Another meeting is expected.

(b) *Government Title Insurance*. A Task Force has been appointed to review the bills that propose to create government-run title insurance similar to the Iowa model (S6288 and S6290 by Senator Adams), chaired by Joshua Stein. Assemblyman Brodsky has announced his support for the effort. NYSLTA is strongly opposed.

(c) *Power of Attorney*. A Task Force has been appointed to make needed corrections to the statutory Power of Attorney, chaired by Ben Weinstock.

(d) *RPLS Bill to Amend the Highway Law*. The RPLS Executive Committee has approved a bill to amend the Highway Law to make it conform to the Eminent Domain Procedure Law. The EDPL was intended to be the exclusive means for taking private property by eminent domain. The bill corrects the inadvertent failure of the repealer act to repeal Highway Law §§ 120–123 and makes other conforming changes.

(e) *Unauthorized Practice of Law*. On our visits to the legislature, we have asked for passage of the bills to make UPL a felony (A1643/S41) and to provide criminal as well as civil actions for UPL (A4300/S5445).

(f) *Mortgage Foreclosure*. The RPLS has written several memos on various foreclosure bills, pointing out flaws in the bills. Bills that became Program Bills of the Governor have been enacted. Heather Rogers will be reporting on the status of mortgage foreclosure conferences later in the program.

(g) *NYSBA Legislative Priorities*. Each year, NYSBA asks Sections to propose topics for inclusion in NYSBA's Legislative Priorities. This year the RPLS proposed two: (1) Support Allowing Lawyers to Act as Title Insurance Agents; and (2) Support Making Unauthorized Practice of Law a Felony. NYSBA declined to adopt them as separate priorities, but will include them as part of its priority to support attorneys in the practice of law.

JOIN THE RPLS LEGISLATION COMMITTEE TO KEEP UP ON LEGISLATION! The subject is very much a moving target.

Endnotes

1. *Community Nutrition Institute v. Block*, 749 F.2d 50, 51 (D.C. Cir. 1984) (attributing quote to Bismarck).
2. On file with author and is available upon request.

Karl B. Holtzschue is Co-Chair of the NYSBA Real Property Law Section Legislation Committee.

Bergman on Mortgage Foreclosures:
Relationship of Speedy Service to Foreclosure Judgment—A Possible Trap for Mortgagees

By Bruce J. Bergman

New York has some quirky rules which can quietly create serious problems for mortgage lenders, all highlighted by a recent case holding in substance that if the borrower is not served within 30 days of initiation of the action (and absent a good excuse for that failure) a later judgment of foreclosure and sale can be successfully attacked. This then is one of those silent time bombs which explode on a foreclosure at the end, sending it all the way back to the beginning. Where does this all come from?

It tends to be a bit obscure, but can be readily understood. Here are some bullet points to explain the dilemma.

- A foreclosure in New York begins when the pleadings are filed with the court: the summons and complaint and, almost invariably, a notice of pendency (in common parlance, the *lis pendens*).
- Filing a *lis pendens* at the inception is highly recommended and almost always done because it means that anyone who thereafter obtains an interest in the mortgaged property (a new mortgagee or a new owner, for example) is bound by the foreclosure action as if they were a party. The foreclosing plaintiff need not know about them, search for them or serve them with process.
- But if a *lis pendens is* filed at the inception of the action, then the borrower must be served within 30 days. If not, and even though service is made later, the *lis pendens* is ineffective.
- A judgment of foreclosure cannot be awarded unless a valid *lis pendens* is on file for at least 20 days.

Readers can see the problem coming, all sadly highlighted by the noted recent case, *Bank of New York v. Vandermeulen*, 10 A.D.3d 624, 782 N.Y.S.2d 465 (2d Dep't 2004).

The summons, complaint and *lis pendens* were filed. Plaintiff's counsel attempted to serve borrower within 30 days but failed. They tried again almost two months later and succeeded. No one attacked the *lis pendens,* so it was on file, apparently fine. All appeared in order and so eventually a foreclosure judgment issued.

Some time after the judgment the borrower emerged, moving to dismiss on the ground that the failure to timely serve (way back at the beginning) nullified the *lis pendens* and therefore voided the judgment. In response, plaintiff argued that defendant had been in hiding and should not be allowed to argue about the failure to serve—a good legal position to take. The problem was that plaintiff was unable to back up the charge that the borrower couldn't be found and so the judgment was vacated.

There is both a lesson and a legal principle here.

The lesson: The borrower must be served in 30 days. If it cannot be done—presumably for a good reason—be able to document why this was the borrower's doing, not a failure by plaintiff.

The legal principle: If there is no excuse for failure to serve within 30 days, even though everything looks good, the judgment in that case can be successfully assaulted—not an encouraging principle for mortgagees.

Mr. Bergman, author of the three-volume treatise, *Bergman on New York Mortgage Foreclosures*, Matthew Bender & Co., Inc. (rev. 2009), is a partner with Berkman, Henoch, Peterson & Peddy, P.C. in Garden City, New York, a member of the USFN and an Adjunct Associate Professor of Real Estate with New York University's Real Estate Institute, where he teaches the mortgage foreclosure course. He is also a member of the American College of Real Estate Lawyers and the American College of Mortgage Attorneys.

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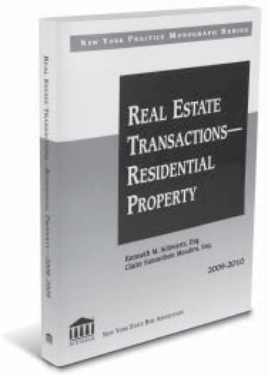

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