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## *IN MEMORIAM*

### BERNARD H. GOLDSTEIN, ESQ.
### (June 7, 1907 - March 4, 1998)

Bernard H. Goldstein introduced himself as "B.H. Goldstein - The Lawyer," and in each and every respect, he was all of that and more.

Bernie was a partner in the New York City firm of Tenzer, Greenblatt L.L.P., and practiced mainly in aspects of real estate-related law. He was unusually knowledgeable, and wrote and lectured extensively, primarily to lawyers and bar groups on real property-related subjects, with special emphasis on commercial leasing, real estate brokerage, commercial arbitration, partnership and contracts of sale.

He was an active member of the American Bar Association, New York County Lawyers Association and the New York State Bar Association, which honored him with its 50 Year Lawyer Award. When the American College of Real Estate Lawyers was formed in 1978, he became one of its charter members and always was one of its more active members.

He served our Real Property Section for many years in numerous capacities by lectures, authorship, and committee chairmanships. He was also an editor of and frequent contributor to this publication.

We will all miss his companionship as well as his sage advice and counsel.

March 1998

James M. Pedowitz

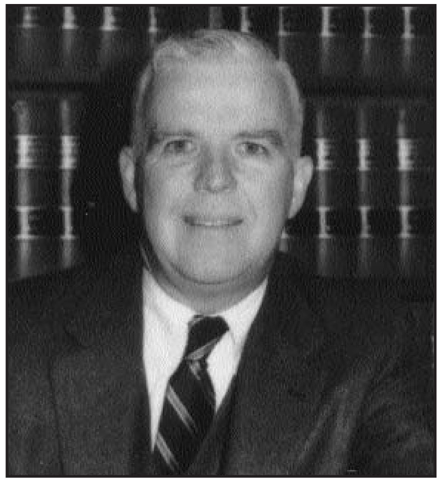
## INSIDE

# Message from the Section Chair

When I delivered my message as incoming Section Chair, I stated that I would direct my efforts primarily in two areas, namely to improve technological and computerization advances for the Section and its members and to improve the public image of lawyers.

In the area of computerization and technology I appointed John E. Blyth and Terence Kelleher as Co-Chairs of a new Committee on Computerization and Technology. Through John and Terence's efforts, the Section has been able to create a home page on the Internet. Throughout the year, Terence and John have been working to improve the home page so that members may have access to meeting notices and eventually the *Real Property Law Journal* and committee materials. We are on our way.

We have continued to distribute our pamphlet entitled "The Role of the Lawyer in a Home Purchase." In addition, through a committee chaired by Maureen Lamb and Harold Lubell, the Section produced a videotape entitled "The Role of the Lawyer in a Residential Real Estate Transaction." The videotape will be distributed to all cable T.V. outlets in the State and all local bar associations for dissemination.



Of course, no Chair could achieve its objectives without a staff of loyal and supportive officers. The First Vice Chair, Lorraine Power Tharp ran two excellent meetings, the Summer meeting at the Equinox and the Winter meeting at the Marriott Marquis. The counsel of our Second Vice Chair, Stephen G. Horowitz, was invaluable throughout the year. Jim Grossman, performed admirably as Secretary, a most demanding job.

No Section could perform well without its committees and their projects. Space limitations prevent a mention of all that the committees have achieved. Among the committee milestones was the completion of the Mortgage Opinion Letter by the Committee on Attorney Opinion Letters chaired by Larry Preble and Dorothy Ferguson.

Also Joshua Stein made great efforts in rejuvenating the Committee on Commercial Leasing.

As usual, the staff of the State Bar Association, has been magnificent. Barbara Mahan has been a positive delight to work with and nothing was ever impossible for her to do. Kim McHargue was equally responsive to our needs.

As part of my final message to members of the Section, I would like to repeat a phrase that I have frequently stated, namely, that I have gotten far more out of the Section than I have given to it. I urge you lawyers who read this *Law Journal* but do not attend meetings, to take a few days and attend our Summer Meeting at the Otesaga from July 9th to July 12th. You will have a great time, make friends and improve your professional skills.

As I leave the Chair of the Section into the very capable hands of Lorraine Power Tharp, I ask all of you to provide her with the knowledge of any developments affecting our profession which comes to your attention.

**John G. Hall**

# A Look at Yield Spread Premiums

**by John G. Hall***
**Staten Island, New York**

## I. What Are Yield Spread Premiums?

You walk into the office of a mortgage broker[1] and advise him that you need a $100,000 mortgage. You tell him that your brother-in-law recommended him and ask him whether he can be of help to you. He advises you that he can and you ask him what his charges will be. He states, "it will be one point to you."[2] He then fills out the disclosure form required by Part 38 of the Banking Regulations of the State of New York.[3] Realizing that the first option in the disclosure form is a harder sell than the second option, the mortgage broker opts for the second option, which he then completes in the following manner:

> The fee the lender will pay you is not known at this time but will be disclosed to me at the time of lock-in or when the rate is set. The maximum points paid by the lender to you, including premium pricing,[4] shall not exceed *seven* (7) points.

In addition, your broker utilizes the fourth option, which states:

> I will pay you, directly, upon my signed acceptance of a commitment or at closing a fee of 1% of the loan amount or $1,000.

When you question him about these terms he tells you that you will not be paying him more than one point. His "rate quote sheets" from different mortgage lenders are as follows:

| Lender | Rate | Points paid by Lender to Mortgage Broker | Yield to Lender[5] | Term (Years) |
|---|---|---|---|---|
| A | 9% | 0 | 9% | 20 |
| B | 9 1/4% | 2 ¼ | 9% | 20 |
| C | 9 1/2% | 3 | 9.01% | 20 |
| D | 9 3/4% | 5 ½ | 8.99% | 20 |
| E | 10% | 7 | 9.03% | 20 |

The mortgage broker has you fill out an application and provides you with the Good Faith Estimate of closing costs required by RESPA.[6] He submits your application to Lender "E," which issues a mortgage commitment two days before the mortgage contingency period in your contract for purchase expires and 15 days before the closing date set forth in the contract.

As required by Banking Law Regulation section 38.4(1)(xvi), the mortgage commitment states that Lender "E" is paying your mortgage broker $7,000 in points in addition to the $1,000 in points that you paid. You question *your* mortgage broker about this and he tells you not to worry about it, "*You* are only paying one point, the lender is paying the rest."

Being more astute, you discover that you could have received a 9% no point mortgage at Lender "A."[7] What do you do? Apply to Lender "A" with only two days left on your mortgage contingency and 15 days left until closing? Would you risk losing your contract down payment if you failed to meet the closing date or would you just close?

Let us assume that in both instances you had no other choice but to go ahead with the closing. What are your legal rights? Was the broker your agent? Was he a dual agent? Did he and the lender conspire to commit common-law fraud against you? Could disclosure cure any breach of fidelity in a dual agency? Did the lender and the mortgage broker violate the anti-kickback provision of section 8 of the Real Estate Settlement Procedures Act?[8]

## II. The Mortgage Broker As Agent

The New York State Banking Department has taken the position that in New York the mortgage broker is solely the agent of the borrower and cannot be exclusively the lender's agent.[9] Therefore, this article will not discuss the situation where a lender hires a broker as its exclusive agent, pays the broker, and the agency is adequately disclosed to the borrower. Instead we will examine the situation where the broker is the borrower's agent, or perhaps a dual agent.

Initially, one should determine whether a mortgage broker is an agent rather than an independent contractor. Representatives of the mortgage brokerage industry have taken the position that mortgage brokers do not have a fiduciary duty to borrowers. Former New York Association of Mortgage Brokers President Don Romano has asserted that the only duty a mortgage broker owes to a borrower is to obtain a mortgage, of any quality, as the services of a mortgage broker are "purely advisory and administrative in nature."[10] At the 1996 convention of the National Association of Mortgage Brokers, Andrea Sue Negronis stated that there are no definitive cases or state laws that hold that mortgage brokers have a fiduciary duty to their borrowers, as real estate brokers and stockbrokers have to their clients. She further opined that because an agency relationship by definition is voluntary, it cannot be entered into without the consent of both parties.[11] Although this is correct in principle, requisite concepts of estoppel must be considered before denying such an agency relationship.[12]

An examination of the Restatement (Second) of Agency[13] reveals the following relevant provisions:

> § 1 Agency; Principal; Agent
>
> (1) Agency is the fiduciary relation which results from the manifest consent by one person to another that the other should act on his behalf and subject to his control, and consent by the other to so act.
>
> § 15 Manifestations of Consent
>
> An agency relation exists only if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act.
>
> § 388 Duty to Account for Profits Arising out of Employment
>
> Unless otherwise agreed an agent who makes a profit in connection with transactions conducted by him on behalf of the principal is under a duty to give such profit to the principal.
>
> § 389 Acting as Adverse Party Without Principal's Consent
>
> Unless otherwise agreed, an agent is subject to a duty not to deal with his principal as an adverse party in a transaction connected with his agency without the principal's knowledge.
>
> § 390 Acting as Adverse Party With Principal's Consent
>
> An agent, who, to the knowledge of the principal acts on his own account in a transaction in which he is employed has a duty to deal fairly with the principal and to disclose to him all facts which the agent knows or should know would reasonably affect the principal's judgment, unless the principal has manifested that he knows such facts or that he does not care to know them.
>
> § 391 Acting for Adverse Party Without Principal's Consent
>
> Unless otherwise agreed, an agent is subject to a duty to his principal not to act on behalf of an adverse party in a transaction connected with his agency without the principal's knowledge.
>
> § 392 Acting for Adverse Party With Principal's Consent
>
> An agent, who to the knowledge of two principals, acts for both of them in a transaction between them has a duty to act with fairness to each and to disclose to each all facts which he knows or should know would reasonably affect the judgment of each in permitting such dual agency, except as to a principal who has manifested that he knows such facts or that he does not care to know them.

Clearly if there is an agency relationship, the mortgage broker's conduct would be governed by the principles set forth above.

Although New York case law is sparse on the issue of whether a mortgage broker is the borrower's agent, the issue was considered in *Teachers Insurance and Annuity Association of America v. Butler*.[14] In that case, dealing with long-arm jurisdiction, the court stated:

> . . . to constitute an agent for purpose of the statute, the alleged agent must have engaged in purposeful activities in this state for the benefit of and with the consent of the non-domiciliary and the non-domiciliary must exercise some element of control over the agent. . . . Sonnenblick-Goldman located in New York, was specifically and exclusively authorized by OCCA to secure on its behalf, a financing commitment from Teacher's Insurance and Annuity Association, a New York Lender.
>
> The very language employed by defendants in those authorizations would

seem to put at rest any contention that Sonnenblick-Goldman was not acting for and on behalf of OCCA and with its express authority. The defendants, however, seek to overcome the force of this documentary proof upon a claim that Sonnenblick-Goldman was merely a "conduit," a "middle man," or a "go between." However, as this Court stated in a somewhat related context, "what the parties call [Sonnenblick-Goldman] matters little—the formal trappings of agency are not as important as the realities of the situation.[15]

## III. The Anti-Kickback and Disclosure Provisions of the Real Estate Settlement Procedures Act of 1974

The Real Estate Settlement Procedures Act of 1974 ("RESPA"), as amended in 1992, governs "federally related mortgage loans."[16] RESPA was enacted to facilitate consumer engagement in mortgage transactions and to protect consumers from unnecessarily high settlement charges.[17] Settlement charges represent charges for a wide array of services provided in relation to closing a mortgage. Preparation of loan documents, taking loan applications, processing loans, and running a closing are examples of services for which settlement charges may be applied.[18] While Congress designed the scope of RESPA, it granted the Department of Housing and Urban Development (HUD) the authority to promulgate regulations to enforce the law.

RESPA utilizes a two-pronged approach to enforce its consumer protection facet. First, it mandates disclosure of the costs of all settlement services (the "disclosure prong"). Second, the statute prohibits the practice of paying kickbacks or referral fees in exchange for settlement services, even with proper disclosure (the "exclusionary prong"). In theory this two-pronged approach shields consumers from the most harmful practices (although this may impede the free market), while mandating a free flow of information regarding all payments for settlement services. Consumers use disclosed information to make informed decisions when borrowing money to buy a home. Although Congress intended RESPA to be pro-consumer and Regulation X promulgated by HUD is pro-consumer, the application and implementation of RESPA in the area of premium pricing have been weak. HUD interpretations and case law have largely ignored the consumer protection facet of the law. In fact, RESPA has led to a great deal of litigation from which no clear rule has emerged.[19]

The exclusionary prong of RESPA is set forth in section eight: *Prohibition Against Kickbacks and Unearned Fees*.[20] True to its title the section prohibits *referral* payments related to any services provided in preparation of, or consummation of, a settlement or closing for a federally related mortgage loan. RESPA dictates that all payments must relate directly to the provision of goods or service actually rendered. In cases where payments are made for settlement services, our concern here, the borrower should always be considered the payor as he ultimately bears the cost of all payments, whether directly or indirectly.[21] Valid payments under RESPA include attorneys' fees, payments by lenders to their agents, and payments "pursuant to cooperative brokerage and referral arrangements between real estate agents and real estate brokers."[22] As discussed below, while lender-paid mortgage brokerage fees, such as yield spread premiums ("YSPs"), are not included in the definition of allowable payments,[23] some courts have expanded the definition of allowable payments to include lender-paid mortgage broker fees.[24] By validating YSPs, those courts have construed the delivery of an above-market loan to be the good or service actually provided.[25]

The disclosure prong of RESPA, as set forth in 12 U.S.C. sections 2603 and 2604, provides for two types of disclosure. First, every lender or mortgage broker is required to provide to the borrower an information booklet plainly explaining the usual procedures, costs, and risks involved in borrowing money secured by real estate within three days of an application being made.[26] Included with the booklet is a "good faith estimate" of charges for settlement services.[27] Mortgage brokers must provide a good faith estimate of all charges for settlement services that must be paid at the closing and all indirect payments that the mortgage broker is expecting to receive in relation to the loan.[28] Second, a HUD-1 or HUD 1-A form which states the actual amount of all settlement charges paid, or *to be paid*, must be provided to the borrower at closing.[29] Payments received by mortgage brokers from the borrower directly or indirectly are to be included in those disclosures.[30]

YSPs have been a fertile source of recent RESPA litigation. Litigation regarding YSPs has focused on both the exclusionary and the disclosure prongs of RESPA. Plaintiffs generally make two related charges. First, that the mortgage broker failed to make a good faith estimate of the total settlement cost of the loan, and second, that the payment of all or some of the YSP constitutes an illegal kickback. The former arises when the broker charges the borrower a fee (let us assume one point), and discloses it in the Good Faith Estimate. Before accepting the loan application, the broker contracts with a lender to provide proceeds for the loan and pay the broker an additional fee (let us assume an amount equal to two points). The broker then discloses this total amount, three points, on the HUD-1 or HUD-1A, which is presented to the borrower at the closing, but not in the Good Faith Estimate. In this case, the broker is receiving three points, while only disclosing the receipt of one point up front to the borrower in the Good Faith Estimate for the cost of his services. The failure to make a complete and timely disclosure prevents the borrower from making fully informed decisions when choosing a broker or a lender and prevents the borrower from knowing the true cost of his loan at the earliest possible time—all of this despite the fact that the broker may know or should be able to surmise the amount of the payment he will receive from the lender at the time the borrower makes an application. Litigation has arisen as plaintiffs assert that the mortgage broker's failure to fully disclose violates the letter and spirit of RESPA, which was written to result "in more effective advance disclosure to home buyers and sellers of settlement costs."[31]

The second charge arises when YSPs are assailed as illegal kickbacks or payments for referrals that are prohibited by RESPA. The exclusionary, anti-kickback provision of RESPA states in pertinent part that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person."[32] However, payments are allowable payments for the fair market value of "goods or facilities actually furnished or for service actually performed."[33] Any payment in excess of the fair market value of a good or settlement service is presumed to be an illegal kickback. For example, if a title company paid a law office $200 for the use of the law office's fax machine during a closing, then the payment would be split between the fair market value of the use of the fax and an illegal kickback or referral fee.[34]

Defendants in RESPA suits typically claim that YSPs are payments "for goods or facilities actually furnished or for services actually performed or rendered by brokers before and during closings for the benefit of the lender,"[35] rather than for referrals. Section 2607(c) is an exception to the main prohibition of RESPA section 8. Defendants bolster their claim by asserting that mortgage brokers are valuable to both borrowers and lenders. They point to the fact that mortgage brokers handle nearly one-half of all mortgages in the United States.[36] Mortgage brokers claim that they could not survive without lender payments.[37] Without brokers, defendants continue, lenders would have increased overhead and that would ultimately be passed on to the borrowers. In fact, however, borrowers already bear that burden, as the cost of the YSP is ultimately born by the borrower.[38]

Two recent cases, *Mentecki v. Saxon*[39] and *Culpepper v. Inland Mortgage Co.*,[40] illustrate the lack of consensus in the courts concerning whether YSPs are prohibited or regulated by RESPA. The United States District Courts in these two cases came to opposite conclusions regarding whether YSPs constitute illegal kickbacks or referral fees.

The plaintiffs in *Mentecki* challenged payments made by national lenders, Saxon Mortgage and Crestar Mortgage, to mortgage brokers when the brokers brought above-par loans to them.[41] The plaintiffs charged that the payments were illegal kickbacks or payments for referrals. The defendants responded with a motion to dismiss that argued HUD has expressly approved YSPs as legitimate and legal payments.[42] Moreover, defendants argued that even if HUD has since changed its interpretation regarding the legality of YSPs, they are covered by the good faith safe harbor created by 12 U.S.C. section 2617(b).[43] District Court Judge Albert Bryan rejected the defendants' arguments. He found that HUD has made no statement either way regarding the legality of YSPs, and asserted that the delay in doing so by HUD has caused much confusion. Turning to the legality of YSPs, Judge Bryan held that YSPs clearly constitute prohibited referrals under RESPA. He found that the only beneficiaries of YSPs are lenders and brokers. In dicta he noted that the only possible benefit for a borrower is "the provision of a bad deal."[44] He dismissed the idea that YSPs are necessary compensation, as the borrower had already compensated the mortgage broker for his services.[45]

In contrast to *Mentecki*, the District Court in *Culpepper* rejected a challenge to YSPs.[46] In *Culpepper*, the plaintiffs, consumer borrowers, challenged payments made by Inland Mortgage Corporation ("Inland"), a national lender, to Premiere Mortgage Company ("Premiere"), a mortgage broker, as constituting kickbacks. Inland and Premiere had entered into an agreement whereby Inland would buy mortgages from Premiere long before the Culpeppers retained Premiere. Rather than Inland lending the money to Premiere, who would actually provide the money to the borrowers,[47] the agreement provided that Premiere would register the loan with Inland, which in turn would make the loan proceeds available for Premiere to disburse. As a result, Premiere never had its own funds at risk and it merely acted as an alter ego for Inland. When the loan was consummated, Premiere was then to deliver to Inland the entire loan package consisting of the promissory note, mortgage, evidence of insurance, and assignments of rights held by Premiere. Premiere was paid according to Inland's "Pricing Policy Procedure," which it published daily. The Pricing Policy established par values for loans that Inland would buy. Premiere and other brokers received a premium for above-par loans, nothing for par loans, and had to pay Inland for below-par loans.

The District Court in *Culpepper* found that the YSPs made by Inland were neither kickbacks nor referral fees, both of which are prohibited by RESPA. The court hinged its finding on the fact that the YSPs were tied directly to the market worth of the loans. It found that the fees merely served to modulate the bargain struck by Inland and Premiere. The transaction was that Premiere agreed to sell and Inland agreed to buy the loans. The fees, according to the court, just served to ensure that neither side bore too large a proportion of the risk of the deal. However, it is unclear just what risk the mortgage broker would be taking in this type of transaction. The court distinguished *Mentecki* and other conflicting cases[48] by noting that in *Culpepper* there was an unrebutted evidentiary showing that the YSP was determined by market forces and, furthermore, that here the YSP was a payment for the broker's sale of loans to the lender.[49]

Judge Hancock's decision was not well reasoned in light of the facts of the case and the intent and content of RESPA and Regulation X. Judge Hancock noted that the parties had agreed that the transaction was not a secondary market transaction,[50] yet determined that the transfer of the loan was a "good" provided as a settlement service.[51] HUD has defined a settlement to be "the process of executing legally binding documents regarding a lien on property that is subject to a federally related mortgage loan" and settlement services as "services done in connection with a prospective or actual settlement."[52] In Regulation X, HUD provides a list of settlement services including the "rendering of service by a mortgage broker including counseling, taking of applications, obtaining verifications and appraisals . . . and communicating with the borrower or the lender."[53] A mortgage broker's providing a "good deal" for the lender does not appear within the list of allowable settlement services, nor any reasonable interpretation thereof.

The main flaw in the trial court's reasoning in the *Culpepper* decision and other cases[54] which regard YSPs as legitimate payments because they are market-driven, is that the opinions ignore the intent of RESPA as well as distinctions made by the statute. It is also clear that the consumer is not a participant in the driving of market forces. Those forces consist of an interaction between lenders and mortgage brokers, not between lenders and borrowers. As discussed above, RESPA is intended to protect consumers. This intent is to be the primary guide to the issuance of interpretations of disputes arising from RESPA or Regulation X. Thus, while the YSP in *Culpepper* was linked to the fair market value of the loan, the only beneficiaries of free market forces were Premiere and Inland, the lender and broker.[55] The Culpeppers, as consumers, were left out in the cold. Essentially, the Culpeppers were duped by inadequate disclosure into bearing the cost of an above-par loan.[56] As Premiere's compensation was determined by the difference between par and the actual loan made, it was in Premiere and Inland's best interest to have the Culpeppers agree to the most expensive loan possible.[57] It is thus hard to understand how market forces could benefit the Culpeppers.

While Premiere's actions would be legitimate if it were an affiliate, an employee, or an exclusive agent of Inland,[58] they are clearly prohibited when Premiere acted as an independent contractor or at best a dual agent. The Culpeppers reasonably presumed Premiere was acting in their best interest.[59] Instead, Premiere sought to make the best deal between itself and Inland. To find such actions legal and legitimate is to abandon the goal of consumer protection and allow mortgage brokers and national lenders to benefit at the expense of uninformed consumers. National lending organizations are happy to stay out of local markets, as they can avoid overhead and can receive mortgages with higher interest rates simply by paying YSPs.[60]

Besides ignoring the consumer protection intent of RESPA, the trial court in *Culpepper* overlooked the reason why transactions by mortgage brokers and transactions in the secondary market historically receive different treatment under RESPA. Secondary market transactions occur when a lender sells a mortgage obligation to another party. This is true whether the sale occurs five minutes or five years after the mortgage is closed. The main difference between these secondary market transactions entered into by mortgage bankers and the transaction in *Culpepper* is that the mortgage banker actually lends money. This puts them at risk of interest rate fluctuations as the result of market forces or the inability to timely sell the loan for any reason whatsoever.[61] The mortgage banker has to raise capital or have a wholesale line of credit for which it is actually responsible so that it can lend money. The entire transaction need only involve the mortgage banker and the borrower. Mortgage brokers, on the other hand, need no capital. Their transactions rely completely on the funds of the lender. Consequently, the borrower is receiving the money directly from the lender and the broker is just acting as a conduit; performing a service for which the borrower pays.[62] The *Culpepper* court seemed to be unable or unwilling to discern this difference and in essence treated Premiere as a mortgage banker when it was, in fact, acting as a mortgage broker.

The United States Court of Appeals for the Eleventh Circuit dealt the mortgage brokerage industry a stunning blow when it reversed the *Culpepper* decision on January 9, 1998.[63] The court rejected the Inland-Premiere argument and stated that "[a]lthough Premiere was the nominal creditor on the loan documents, Premiere did not fund the Culpeppers' loan. Instead, Inland advanced the funds and Premiere contemporaneously assigned the loan to Inland. This type of brokerage arrangement is known as 'table funding.' Thus, Inland, not Premiere, owned the Culpeppers' mortgage from the outset."[64]

The court then stated that the narrow issue being presented was whether the payment of a yield spread premium for the referral of an above-par loan is an illegal fee under RESPA or a valid payment for goods or services.

The court in its discussion stated that the anti-kickback provisions of RESPA are violated if (1) a payment of a thing of value is (2) made pursuant to an agreement to refer settlement business and (3) a referral actually occurs. The court determined that value was given in the form of the yield spread premium and that payment was made pursuant to their ongoing contractual relationship.

The court then addressed the issue of whether or not the yield spread premium was a payment for goods. The court stated that "HUD will consider the *real* source of funding and the *real* interest of the funding lender." Mortgage broker transactions that are table-funded are not secondary market transactions."[65] The court held that the transaction therefore could not be characterized as a sale.

The court then held that the yield spread premium was not payment for services for two reasons. First, Premiere was also compensated by the borrowers and there was no evidence that this payment was not intended to be full payment. Secondly, Inland in its answers to interrogatories stated that its payment was partially for the above-par yield on its loan. The court, however, in a footnote to its opinion, stated that "[m]ortgage transactions are structured in a variety of ways, and the holding here is highly dependent upon the facts of this financial transaction."[66]

The court also remanded the case to the District Court to reconsider whether class action status should be granted.

## IV. Protecting Consumers by Challenging Illegal Payments in Court

HUD has been unable or unwilling to take a position regarding YSPs since 1992; thus, it is not protecting consumer rights regarding YSPs. Therefore, the primary enforcement of RESPA regarding YSPs has come through civil class actions maintained by private citizens.[67] Unfortunately, the colorable claims available to class plaintiffs (other than for direct violations of RESPA section 8 discussed above) pose a difficult evidentiary burden, are impractical for the typical consumer to bring, and are insufficient to protect the average consumer.

### A. Fraud

In order to bring a common-law fraud claim, a plaintiff must prove that a statement of fact was made that was untrue, that the untruth was known by the party making the statement, that the statement was made with the intent to deceive and to induce the other party to act upon the deception, and that the other party actually did rely upon the statement to act or abstain from acting in such a way as to cause damage to himself.[68] A statement of fact can be made by fraudulently concealing a material fact as well as positively stating an untruth.[69]

The evidentiary burden in these claims is heavy and fact-specific. Proving the mortgage broker's or lender's intent to defraud is especially difficult. That burden makes fraud claims an unattractive cause of action for consumers to bring in class actions. When such cases are brought by individual plaintiffs, they are usually for relatively small amounts of damages. On the other hand, the cost of bringing an individual fraud claim to trial (and such fact-specific claims often do go to trial) would almost certainly cost a substantial amount of money. With little monetary incentive, individual RESPA fraud claims are unattractive for both consumers and plaintiffs' lawyers. As discussed in subsection D below, the fact-specific nature of a fraud claim negates the possibility of plaintiffs bringing cost-effective class action lawsuits.

Alternatively, plaintiffs in YSP cases could bring a claim of constructive fraud. Constructive fraud is appropriate where the parties to a fiduciary relationship are in a fiduciary or principal and agent relationship.[70] In business transactions, the defendant in a constructive fraud case must have misled the plaintiff by making false representations concerning subjects about which the defendant has superior knowledge or expertise.[71] However, absent a ruling, statute, or documentary admission that the broker is solely the agent of the consumer, this cause of action suffers from the weaknesses discussed above.

### B. Conspiracy

A civil claim for conspiracy also does not offer consumers an attractive claim to bring against mortgage brokers. In order to sustain a civil conspiracy claim, a plaintiff must show that the conspirators expressed a common purpose to defraud or otherwise commit a wrong against a person that results in damages.[72] "[T]o constitute a conspiracy, the object of the combination must be in itself unlawful and without legal or social justification and excuse."[73] To show the common purpose to defraud or otherwise injure, the plaintiff in a conspiracy case must plead and prove both malice and intent to injure.

Thus, as with fraud claims, the fact-specific nature and high evidentiary burden of a conspiracy claim make it an unattractive claim for consumers to bring against mortgage brokers in a class action. The cost for an individual to bring such a suit, which will probably go to trial, far outweighs the possible recovery.

### C. RICO

Plaintiffs in past YSP cases[74] have brought federal claims under the Racketeering Influenced and Corrupt Organizations Act ("RICO").[75] RICO offers a cause of action if "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."[76]

To bring a claim under RICO one must be able to maintain an independent cause of action against the parties.[77] Such a claim can be brought only if one of the common-law claims discussed above can be maintained. Therefore, RICO claims are unattractive to consumer/plaintiffs as they are dependent on the underlying state claims, which are themselves difficult to maintain.

### D. The Impracticality of Class Actions

As all the practical claims plaintiffs can bring to challenge YSPs have a high evidentiary burden, they are impractical to bring as class action suits. Therefore, the most powerful tool that plaintiffs have to bring mass litigation is denied plaintiffs in YSP actions.[78]

Class action lawyers in this area typically look for claims concerning actions that are statutory or regulatory violations on their face when determining whether to bring a claim.[79] Obviously, the claims available in YSP cases do not offer such clear violations. Each claim is very fact-specific. Further, defendants in YSP cases have been active in seeking legislation to limit the right of plaintiffs to bring a class action claim.[80]

Pursuant to Federal Rule of Civil Procedure 23,[81] class plaintiffs must be able to show four prerequisites before their class can be certified and the determination of the class representative's (named plaintiff) case will bind the other class members. The class must show that there are more than 30 similarly situated borrowers (numerosity); that the common issues of the plaintiffs are more prevalent than the individual issues (commonality); that the named plaintiff's case is typical of the other plaintiffs (typicality); and that adequate legal representation is being provided. Though common sense dictates that borrowers who retained the services of a broker who secured lending for them from the same lender and were paid a kickback for doing so were deceived in the same way, the evidentiary burden in the fraud and conspiracy claims in YSP cases is such that extensive proof must be presented to show that the class plaintiffs have commonality and typicality. For example, an arguable question of fact always exists in fraud claims regarding whether the mortgage broker intended to defraud each and every borrower joined in a class action. The extensive production of evidence defeats the purpose of the class action as defendants demand that each and every plaintiff's claim be proved separately.

Consequently, even though the courts have been split over whether YSPs are illegal, they have been nearly unanimous in rejecting class certification. As the damages in most claims are very low when compared to the cost of litigation, they are too expensive to bring on an individual basis. Therefore, class action lawsuits are not a useful tool in enforcing RESPA. Meanwhile, HUD, the agency charged with protecting consumers under RESPA, sits on the sidelines.

## V. The Regulatory Process and HUD

Since revoking all previous interpretations in 1992,[82] HUD has struggled with taking a position regarding YSPs. The delay has caused stagnation and confusion in the courts and the mortgage lending industry. Since the 1992 revocation, HUD has made no formal statement about the legitimacy of YSPs under RESPA. Messages from HUD have been contradictory since then. On the one hand, YSPs would seem to violate RESPA if they are payments made to "influence the selection by any person of a provider of a settlement service or business incident to or part of a settlement service when such person will pay for such settlement service."[83] On the other hand, Appendix B of Regulation X discusses how to disclose such payments.

HUD appointed a Negotiated Rulemaking Committee in 1994 that has yet to issue final regulations. Besides the long time delay, the Rulemaking Committee has shown other irregularities, including a failure to keep stenographic transcripts of its meetings and hearings.

The Rulemaking Committee's actions reflect HUD's general actions concerning YSPs. As noted earlier, the agency was about to release a pro-lender opinion regarding YSPs in February of 1997, but withdrew under pressure from members of Congress. Then, during Senate hearings in July of 1997, Assistant HUD Secretary Nicholas P. Retsinas promised that new, pro-consumer regulations would be forthcoming.[84]

HUD's foot-dragging is significant because if states enact laws or regulations regulating YSPs, the state laws or regulations could be preempted when HUD does issue regulations.[85]

In New York, the possibility of preemption is fairly likely, as the Court of Appeals has held that federal regulations preempt state statutory, regulatory, and common law. In *Guice v. Charles Schwab & Co.,*[86] the Court held that stockbrokers' actions and disclosure are governed by the standards set by the SEC, rather than state regulatory and common law. There is no reason why the Court of Appeals would treat mortgage brokers differently than other brokers have been treated.

## VI. New York Regulatory Process Offers Consumers Greater Protection Than the Federal Scheme and Many States, But Could Be Improved

But for the possibility of being preempted at any time by new regulations from HUD as discussed above, New York's regulatory scheme for mortgage brokers embodied in the General Regulations of the Banking Board section 38.3 seems more consistent with RESPA's consumer protection intent than Regulation X and most federal courts' interpretation of the statute. The New York regulations mandate greater disclosure at an earlier time than the federal regulations. Section 38.3(a) of the New York General Regulations of the Banking Board provides that

> every mortgage broker shall disclose in writing to any applicant for a mortgage loan:
>
> (i) that such mortgage broker may not make mortgage loans or commitments;
>
> (ii) that such mortgage broker cannot guarantee acceptance into any particular loan program, nor can mortgage broker promise any specific loan terms or conditions;
>
> (iii) whether the mortgage broker places loans primarily with any three or fewer lenders, and if so, the name(s) of such lender(s);
>
> (iv) a statement to the effect that the rate, points, fees, and other terms quoted at commitment by or on behalf of the lender encompass the consideration to be received by the mortgage broker from the lender for its services. In addition, the statement shall disclose the specific maximum amount of such consideration to be received;
>
> (v) the amount of the application fee, and the registrant's good faith estimate of the credit report fee or property appraisal fee and the terms and conditions for obtaining a refund of such fees if any;
>
> (vi) the specific services which will be provided or performed for the application fee;
>
> (vii) the maximum points, including premium pricing, payable by the lender to the mortgage broker and any fees or points to be paid by the applicant directly to the mortgage broker. In those instances where broker fees and points are paid directly from the loan proceeds and are not considered to be a cost of the credit,[87] a statement in bold face type at least 12 point in size if printed and in upper case letters and underlined if typewritten must be included to the effect that such points and fees are costs of obtaining the loan which the borrower may be obligated to repay with interest over the term of the mortgage loan. Alternatively, in those instances where broker fees and points are paid directly to the broker in full at or before closing and are not considered to be a cost of the credit,[88] a statement in bold face type at least 12 point size if printed and in uppercase letters and underlined if typewritten must be included to the effect that such points and fees are costs of obtaining the loan and that they are in addition to the amount which the borrower will receive from the loan; and
>
> (viii) any premiums or bonuses to be paid to the mortgage broker by the lender and/or the basis of its eligibility to receive premiums or bonuses.[89]

The greatest weakness of the New York scheme is that there is no clear disclosure that the mortgage broker may be acting as a dual agent and that the borrower's interest rate may be higher than it otherwise would be because the broker is receiving payments from the lender.

The extent and the timing of the disclosure made by brokers regarding any and all business relationships and lender payments the brokers receive must be disclosed completely and accurately much earlier in the process in New York than under RESPA. The disclosures thus are much more likely to be able to be understood and regarded by consumers than those required by RESPA.

Nevertheless, New York's Regulations are inadequate to the extent that they do not require a disclosure of the *exact* amount of premium pricing until much too late in the closing process. This seems to violate common sense. As a *de facto* agent, the mortgage broker should charge its principal, the borrower, the full amount reasonable for its services. If the principal should choose to arrange for another payment, he should be free to do so; but the agent should not do so without the principal's full consent. Only in this way could the true "reasonable charge" be determined for the mortgage broker's services. Mortgage brokers would then compete with one another for the borrower's business. Thus the borrower would participate in and benefit from "market forces."

## VII. Conclusion

HUD promulgated its proposed regulation for mortgage broker fees on September 17, 1997.[90] The proposed regulation provides that a direct payment to a mortgage broker in a particular mortgage loan transaction is presumed to be legal provided that the following conditions are met:

1) The broker and borrower execute a mortgage broker contract in the form set forth in Appendix F of the Regulation[91] prior to the mortgage application or receipt of any payments.

2) The mortgage broker performs in accordance with the contract terms.

3) The mortgage broker discloses its maximum total compensation from both the borrower and the lender.

4) The mortgage broker has the appropriate license for the state in which he is practicing.

The proposed regulation provides that the presumption of legality may be rebutted if the broker's total compensation does not pass a non-specified test which will be published with the final regulations. The proposed regulation further provides that broker payments made when the above provisions are not complied with presumptively violate the Anti-Kickback Rule of RESPA section 8.

It is clear that the first provision requiring a written mortgage broker contract is an absolute necessity. It is also required by New York State law.[92] However, it is not sufficient to have such a contract where the parties have unequal knowledge and abilities such as between the average borrower and the average mortgage broker. The borrower should have a 10-day rescission period for such a contract so that it may be reviewed by the borrower's attorney or so the borrower may do what the regulation contemplates—shop around for the best deal.

The third provision of the contract requires that the mortgage broker disclose the *maximum* total compensation it may receive from both the borrower and the lender. HUD's statement that in these situations the contract should state that "[t]he broker will get the borrower the most favorable terms that meet the borrower's stated objectives" is well thought out and should be commended.

HUD should also clearly differentiate between mortgage brokers and mortgage bankers. If the broker does not have its own money at risk, then it is not a retail lender who can keep the differential between what the wholesale lender (ultimate mortgage owner) will take and the broker can collect. Mortgage brokers' compensation is based on service provided, while mortgage bankers' compensation is based on service provided and risk assumed.

HUD needs to promulgate an ascertainable standard as to what constitutes fair and reasonable compensation to mortgage brokers, as has been promised, or the new regulations will generate another 10 years of confusion. The standard should be a scaled percentage or specific dollar amount based on loan size and indexed for inflation. There should be a separate standard for processing brokers and non-processing brokers, as the amount of service provided is different.

Finally, HUD's resources to enforce RESPA have been woefully inadequate. HUD is now being faced with massive cutbacks. If HUD could not enforce the regulations in the past, how will it be able to do so in the future with fewer resources? The only solution is to utilize the private bar as private attorney generals. Appropriate class action legislation should be introduced to protect the public from those individuals who are in violation of the regulations. Specific provisions should be adopted to ensure that the issues of commonality and typicality can be met for similar RESPA violations.

Lenders who are paying YSPs in excess of the authorized amount should be required to forfeit three times the amount of the illegal premium and interest on that amount to maturity, as well as being responsible for legal fees, costs, and disbursements.

Yes, there may be a place for yield spread premiums, but they must be reasonable, disclosed, and free of dual agency.[93]

## Addendum

As this article was going to press, the author became aware of a settlement agreement executed between Roslyn Savings Bank and the New York State Banking Department regarding alleged racial and ethnic discrimination in mortgage lending based on the payment of alleged disparate overages or yield spread premiums being charged or paid in the case of minority or ethnic borrowers. The state alleged violation of its fair lending practices pursuant to section 296 of the Executive Law and a settlement of $5,000 was paid to each borrower. Although the facts in the settlement agreement are sparse, it appears that mortgage brokers were used, although it is not clear whether these were processing brokers. It is possible that this disparate treatment could have occurred without either Roslyn or its subsidiary being aware of the ethnic composition of the borrowers.

## Endnotes

1. A mortgage broker is a "person or entity registered . . . to engage in the business of soliciting, processing, placing or negotiating mortgage loans for others, or offering to solicit, process, place or negotiate mortgage loans for others." N.Y. Banking Law § 590(g) (McKinney Practice Commentary 1996). For the purposes of this article, the key difference between the actions of a mortgage broker and mortgage banker is that the latter actually lends consumers money before selling the mortgage in the secondary market, while the former receives payment for directing consumers to a lender and acting as a conduit between the lender and the consumer. In some states the distinction between a mortgage broker and mortgage banker is blurry.

2. A point is 1% of the mortgage, in this case $1,000.

3. In the portion dealing with broker's compensation, the form provides the following options or combination of options:

   1) The Lender will pay you ["you" refers to the mortgage broker] a fee of __% of the loan amount or $____. The compensation you will receive from the Lender for your services is included in the rate, points, fees, and terms of the loan as quoted by the Lender in its commitment. The maximum points paid, including premium pricing payable by the Lender, to you shall not exceed __ (__) points.

   2) The fee the Lender will pay you is not known at this time but will be disclosed to me ["me" or "I" refer to the borrower] at the time of lock-in or when the rate is set. The maximum points paid including premium pricing by the lender to you shall not exceed __ (__) points.

   3) I will pay you, from the loan proceeds, a fee of __% of the loan amount or $____. I authorize the Lender's attorney to collect the fee from me at the closing.

   4) I will pay you, directly, upon my signed acceptance of a commitment or at closing __, a fee of __% of the loan amount or $_____.

4. Premium pricing is another term for yield spread premiums. Other terms that are used include "overages," "back-end points," "upselling bonuses" and "service release premiums."

5. The small differences in yields to lenders C, D, and E are virtually insignificant and were used so that points could be computed using 1/4-point intervals. From Prepayment Mortgage Yield Table for Monthly Payment Mortgages, Financial Publishing Company (Fifth Edition). The yield to the lender could be adversely affected by prepayments.

6. Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et al.* The Good Faith Estimate of closing costs should reflect both borrower- and lender-paid compensation. 24 C.F.R. part 3500.7 and 3500.8. Also see Appendix B, Comment 11.

   Typically, such compensation may be shown as follows:

| | | |
|---|---|---|
| 810 | Mortgage Broker fee paid to Great Mortgage Brokerage Corp. | $1,000 |
| 813 | YSP paid from Lender "E" to Great Mortgage Brokerage Corp. P.O.C. | $7,000 |

   Note that because the yield spread premium is paid by the lender, it is not totaled in the borrower's closing costs in the HUD-1 and is marked P.O.C., meaning Paid Outside of Closing.

7. Either with or without the broker.

8. 12 U.S.C. § 2601 *et al.* This topic is discussed in detail in Section III.

9. Resulting from an inquiry by the author to the Legal Division of the New York State Banking Department. The author does not agree with this interpretation for two reasons. First, Banking Law § 590 seems to permit it. The relevant language of the statute provides that mortgage brokers may engage in the " . . . processing of an application for a mortgage loan, soliciting or offering to solicit a mortgage loan on behalf of a third party or negotiating or offering to negotiate the terms or conditions of a mortgage loan with a lender on behalf of a third party" (N.Y. Banking Law § 590(d) (McKinney Practice Commentary 1996)) and may "solicit, process, place or negotiate mortgage loans for others" (N.Y. Banking Law § 590(d) (McKinney Practice Commentary 1996)) without stating that "third party" or "others" refers solely to borrowers. In addition, it seems somewhat illogical to permit the broker to act as what appears to be a dual agent from the disclosure statement language, but does not allow the broker to act solely as an agent of the lender.

10. Don Romano, speech at the 120th Annual Meeting of the New York State Bar Association in 1997.

11. In a further attempt to define the fiduciary relationship between mortgage broker and borrower, the following voluntary broker-borrower Disclosure Statement was recently approved by the National Association of Mortgage Brokers and is awaiting approval of the Mortgage Bankers Association:

    > You, the applicant(s), agree to enter into this Mortgage Loan Origination Agreement with [name of Company] as an independent contractor to apply for a residential mortgage loan from a participating lender with which we from time to time contract upon such terms and conditions as you may request or a lender may require. You

inquired into mortgage financing with [name of Company] on [date]. We are licensed as a "Mortgage Broker" under [name of Law].

SECTION 1. NATURE OF RELATIONSHIP. In connection with this mortgage loan we are acting as an independent contractor and not as your agent. We will enter into separate independent contractor agreements with various lenders. While we seek to assist you in meeting your financial needs, we do not distribute the products of all lenders or investors in the market and cannot guarantee the lowest price or best terms available in the market.

SECTION 2. OUR COMPENSATION. The lenders whose loan products we distribute generally provide their loan products to us at a wholesale rate. The retail price we offer you—your interest rate, total points and fees—will include our compensation. In some cases, we may be paid all of our compensation by either you or the lender. Alternatively, we may be paid a portion of our compensation by both you and the lender. For example, in some cases, if you would rather pay less up front, you may be able to pay some or all of our compensation indirectly through a higher interest rate, in which case we will be paid directly by the lender. We may also be paid by the lender based on (i) the value of the Mortgage Loan or related servicing rights in the market place or (ii) other services, goods or facilities performed or provided by us to the lender.

By signing below, applicant(s) acknowledge receipt of a copy of this signed Agreement.

12. 57 N.Y.Jur.2d *Estoppel, Ratification, and Waiver* § 13. "The doctrine [of estoppel] rests upon the word or deed of one party which is rightfully relied upon by another who, as a result, changes his position to his injury, so that it would be inequitable to permit the first to enforce rights therewith. Comprehensively defined, equitable estoppel or estoppel *in pais* is the principle by which a party is absolutely precluded from denying, or asserting the contrary of, any material fact which, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another, who was excusably ignorant of the true facts and who had a right to rely upon such words or conduct, to believe and act upon them thereby, as a consequence reasonably to be anticipated, changing his position in such a way that he would suffer injury if such denial or contrary assertion were allowed. The *sine qua non* of estoppel is some inequitable or fraudulent conduct engaged in by the party sought to be estopped which is reasonably relied upon by the other party to his detriment." *Id.* Unless mortgage brokers informed borrowers that they were not looking out for the borrower's best interest, they should be estopped from denying agency. As one commentator asked: "Does anyone seriously believe that the consumer would not want to know that his or her broker is a 'double agent'?" Chamness, Robert P. *They Who Lie Down with Dogs Get Fleas*, ABA Bank Compliance (November/December 1996).

13. Restatement (Second) of Agency, American Law Institute (1995).

14. 592 F.Supp. 1097 (1984).

15. *Id.*

16. 12. U.S.C. § 2600. "Federally related mortgage loans" include loans secured by a lien on residential property designed for occupancy by one to four families that are backed by a federal guarantee program or that are made by a "creditor" as defined in section 1602(f) of Title 15 who makes more than $1,000,000.00 in loans for residential real estate annually. Refinancing of such loans also falls under RESPA. 24 C.F.R. § 3500.2

17. 12 U.S.C. § 2601 (a). Specifically, RESPA was designed to result: "(1) in more effective advance disclosure to home buyers and sellers of settlement costs; (2) in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b).

18. 24 C.F.R. § 3500.2.

19. Adding to the general confusion caused by Regulation X is HUD's failure to issue new regulations and official interpretations of the Regulations since withdrawing all official and unofficial interpretations in 1992 when the Regulation was amended. HUD convened a Negotiated Rulemaking Advisory Committee to propose regulations regarding the legality of mortgage broker fees, including YSPs, in October 1995. 60 Fed. Reg. 54794 (October 25, 1995). The Committee has failed to issue recommendations. Also, HUD was prepared to issue a very pro-broker-lender interpretation of RESPA § 8, which was to offer relief to brokers and lenders from recently filed class action suits, in February 1997, but pressure by Congressmen Henry B. Gonzalez, D-Tex.; John J. LaFalce, D-N.Y.; Bruce F. Vento, D-Minn.; and Joseph Kennedy, D-Mass. forced HUD to withdraw and reconsider the regulations. Currently, the expected date of issuance of such rules is December 1, 1997. 62 Fed. Reg. (May 17, 1997).

20. 12 U.S.C. § 2607.

21. 60 Fed. Reg. 47651, 47652 (September 13, 1995).

22. 12 U.S.C. § 2607(c). According to Regulation X "Cooperative brokerage and referral arrangements . . . refers only to fee divisions within real estate brokerage arrangements when all the parties are acting in a real estate brokerage capacity, and has no applicability to any fee arrangements between real estate brokers and mortgage brokers or between mortgage brokers." They cannot be extended to mortgage brokers. 24 C.F.R. § 3500.14(g)(v).

23. 24 C.F.R. 3500.14(g).

24. Culpepper v. Inland Mortgage Co., C.V. 96-H-917-S (N.D. Ala. Jan. 31, 1997); Barbosa v. Target Mortgage Corp., C.V. 94-1938 (S.D. Fla. June 24, 1997); Martinez v. Weyerhaeuser, C.V. 95 C 906 (C.D. Fla. June 20, 1997); Moniz v. Crossland Mortgage Co., C.V. 96-12260-WGY (E.D. Mass. July 2, 1997).

25. Such courts draw an analogy between the lender-paid mortgage broker fees (YSPs) and the profits mortgage bankers get when they sell a mortgage on the secondary market (which transactions are not covered by RESPA). Those courts ignore that mortgage bankers use their *own* money to secure the loan and bear a risk of loss due to not being able to sell the mortgage on the secondary market in a timely manner either as a result of defective documentation or a rapid change in interest rate. Mortgage brokers, on the other hand, are merely a conduit for the mortgage transaction, are paid a fee by the borrower for their service, and, most importantly, bear no risk of loss in the transaction. *See also* Frank Keating, Office of the Comptroller, Banking Bulletin 92-54 (October 13, 1992).

However, the term "goods" has always had a defined meaning in law. For example, U.C.C. § 9-105(1)(h) provides:

> "Goods" includes all things which are movable at the time the security interest attaches or which are fixtures (Section 9-313), but does not include money, documents, instruments, accounts, chattel paper, general intangibles, or minerals, or the like (including oil and gas) before extraction. "Goods" also include standing timber which is to be cut and removed under a conveyance or contract for sale, the unborn young of animals, and growing crops.

U.C.C. § 7-102(1)(f) provides:

> "Goods" means all things which are treated as movable for the purposes of a contract of storage or transportation.

and U.C.C. § 2-105(1) provides:

> "Goods" means all things (including manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107);

It appears that mortgages would not be "goods" under these definitions and therefore payments would be for services.

26. 12 U.S.C. § 2604. A revised booklet was issued in June 1997. The booklet includes a description of payments by lenders to brokers that are similar to YSPs. When describing Box 801 of the HUD-1, the booklet states: "Generally, the buyer pays the fee, unless otherwise negotiated." In the description of Box 1400 TOTAL SETTLEMENT CHARGES of the HUD-1 the booklet states: "Paid Outside of Closing ("POC"): Some fees may be listed on the HUD-1 to the left of the borrower's column and marked "P.O.C." Fees such as those for credit reports and appraisals are usually paid by the borrower before closing/settlement. They are additional costs to you [the borrower]. Other fees *such as those paid by the lender to a mortgage broker* or other settlement service providers may be paid after closing/settlement. These fees are usually included in the interest rate or other settlement charge. They are an additional cost to you. These types of fees will not be added into the total on the Line 1400 (emphasis added)." FDIC Int. Ltr. Letter FIL-61-97 (June 20, 1997).

27. 12 U.S.C. § 2604(c).

28. 24 C.F.R. § 3500.7 and Appendix C. 24 C.F.R. § 3500.7(c)(1) requires that an estimate of all charges to be listed in section L of the HUD-1 and HUD-1A be included in the Good Faith Estimate. Section L of Appendix A mandates that disclosed charges that are to be marked P.O.C. for Paid Outside of Closing include "indirect payments or back-funded payments to mortgage brokers that arise from the settlement transaction." 24 C.F.R. § 3500 Appendix A.

29. 24 C.F.R. § 3500 Appendix A.

30. *Id*. at section L. *See also* note 26, *supra*.

31. 12 U.S.C. § 2601(a)(1).

32. 12 U.S.C. § 2607(a).

33. 12 U.S.C. § 2607(c).

34. 24 C.F.R. § 3500 Appendix B, Illustration 5.

35. 12 U.S.C. § 2607(c).

36. Heather Timmons and Karen Talley, *Home Lenders Bond with Loan Brokers Under Attack*, AMERICAN BANKER (June 15, 1997).

37. *Id.*

38. *See* note 22, *supra*.

39. Mentecki v. Saxon Mortgage, Inc., CV 96-1629-A (E.D. Va 1997)

40. Culpepper v. Inland Mortgage Co., CV 96-H-917-S (N.D. Ala. Jan. 31, 1997). *Rev'd* No. 97-6109 (11th Circuit January 9, 1998).

41. Par is the interest rate a lender will accept for a particular loan without either premium or discount points.

42. The defendants, Saxon and Crestar, asserted that HUD has provided for the disclosure of the allegedly "illegal" payments and that HUD would not have provided so if the payments were prohibited or illegal payments. Defendants cite three places where HUD has implicitly approved of YSPs by mandating disclosure of such fees: 1) 24 C.F.R. § 3500, Appendix B, Illustration states, "[A]ny other fee or payment received by the mortgage broker from either the lender or the borrower arising from the initial funding transaction, including a servicing release premium or *yield spread premium*, is to be noted on the Good Faith Estimate" (emphasis added); 2) an interpretive letter from HUD general counsel regarding disclosure on the Good Faith Estimate and HUD forms stating, "[O]ther compensation paid by a lender to a mortgage broker, such as . . . yield spread premiums . . . should be disclosed"; 3) 61 Fed. Reg. 49327 (September 19, 1996), which stands for the proposition that Federal Reserve Board regulations and the Truth-in-Lending Act recognize yield spread premiums as forms of broker compensation.

43. "No provision of this chapter or the laws of any state imposing any liability shall apply to any act done or omitted in good faith conformity with any rule, regulation, or interpretation thereof." 12 U.S.C. § 2617(b).

44. Arguably the payment of points by the lender could save the borrower from paying some or all front-end points at closing, thereby decreasing the need for cash by the borrower at the time of borrowing money.

45. Judge Bryan has retreated somewhat from his strongly written opinion. On January 31, 1997, he issued a statement that his opinion should not be interpreted to mean that YSPs always constitute illegal kickbacks or referral payments, saying that a higher court should make such an interpretation as he certified the issue to be heard by the circuit court. Mentecki v. Saxon Mortgage, Inc., CV 96-1629-A (E.D. Va. Jan 31, 1997). Thus it appears that Judge Bryan is saying that YSPs are not *per se* illegal, but may be illegal if not reasonable compensation for the services provided. If YSPs are *per se* illegal, the lenders involved, their officers, and perhaps their directors if they authorized the payments, might be criminally liable for up to one year in jail and a $10,000 fine. 12 U.S.C. § 2607(d).

46. Culpepper v. Inland Mortgage Co., CV 96-H-917-S (N.D. Ala. 1997), *rev'd* 97-6109 (11th Cir. 1998).

47. Such would constitute table funding. The Court found the actions required by the Agreement to be table funding. In fact, Premiere was just acting as a proxy for Inland, in whose name the loan closed. Premiere never had receipt or control over the funds and thus bore no risk as a true lender would.

48. Briggs v. Countrywide Funding Corp., 949 F.Supp. 812 (M.D. Ala. August 7, 1996); Brophy v. Chase Manhattan Mortgage Co., 947 F.Supp 879 (E.D. Pa. Dec. 5, 1996).

49. This appears contrary to the facts. The broker never had any of its own money at risk and therefore no market forces could be at work inasmuch as the broker was merely an alter ego bringing the loan to Inland. In addition, the only mar-

ket forces at work would be which lender would pay Premiere a higher YSP to procure the loan. The borrower relying on Premiere, the broker, would not be a participant in nor a beneficiary of the "market force."

50. The distinction between secondary market transactions and table market funding is discussed below. However, the essential difference between the two is that in a secondary market transaction the mortgage banker has put up his own money and bears the risk of loss due to not being able to sell the mortgage in a timely manner, while a mortgage broker in a table funding transaction is not using his own money and bears no risk. The mortgage broker is merely a conduit for the transaction.

51. Culpepper v. Inland Mortgage Co., CV 96-H-917-S (N.D. Ala. Jan. 31,1997), *rev'd* No. 97-6109 (11th Cir. Jan. 9, 1998).

52. 24 C.F.R. § 3500.2.

53. *Id.*

54. Barbosa v. Target Mortgage Corp., 968 F.Supp. 1548 (S.D. Fla. 1997); Martinez v. Weyerhaeuser Mortgage Co., C.V. 95 C 906 (N.D. Ill. 1997); Moniz v. Crossland Mortgage Co., 175 F.R.D. 1 (E.D. Mass. 1997).

55. Though the opinion does not explicitly state so, the Court treats Premiere and Inland as primary lender and secondary market mortgage buyer rather than mortgage broker and primary lender.

56. *See* Frank Keating, General Counsel of the Comptroller, BANKING BULLETIN 92-54 (October 13, 1992). "[T]he failure to disclose may well raise the inference that a section 8 violation is being concealed."

57. Indeed, the Federal Home Bank Board addressed this issue in a letter sent in response to HUD's solicitation of responses to proposed changes in Regulation X. The letter stated in pertinent part: "[P]rice-competition might be diminished if mortgage-lending is completely exempted from the scope of RESPA, even possibly engendering 'reverse competition,' a phenomenon which Congress intended to reduce through RESPA. Under a system of reverse competition, services are sold through intermediaries or referrers such that there is little contact between the consumer and the provider of the service; providers increase marketing costs in attempting to gain referrals; and price competition does not exist because buyers do not actually choose the service provider. The classic example of reverse competition in this sector of the economy is the provision of private mortgage insurance. For example, if a real estate agent were allowed to accept referral fees from a lender, the agent would have an economic incentive to refer borrowers to that lender (which may not be fully consistent with the interest of the borrower), and the lender may compete with other lenders for 'referral service' through referral fees rather than for consumer business through price and service to the borrower." Federal Home Loan Bank Board (July 12, 1988). However, it should be noted that some risk is borne by a lender who pays full discount fees to a broker where the loan is subsequently prepaid by the borrower.

58. Regulation X exempts affiliates and employees of lenders from disclosing compensation by the lender. For exclusive agents, Regulation X provides that the agency and financial relationship between the agent and the lender be disclosed to the borrower. 24 C.F.R. § 3500.7.

59. *See* Frank Keating, General Counsel for Comptroller of the Currency, BANKING BULLETIN 92-14 (March 18, 1982). "Typically, the mortgage broker acts as the borrower's agent and helps the borrower to select a loan program and to negotiate loan terms with the lender on the borrower's behalf."

60. Matt Schultz "Lenders Divided over HUD Plan for Panel on Real Estate Rules" AMERICAN BANKER (Nov. 16, 1995).

61. For example, the proposed assignee does not honor its commitment to purchase the loan or goes bankrupt. Also, the loan documentation may be deficient in some respect, requiring curative efforts, during which period there is a rise in interest rates.

62. In short, the secondary market transaction involves risk, while the mortgage-brokered transaction does not bear risk. Frank Keating, Office of the Comptroller, BANKING BULLETIN 92-54 (October 13, 1992).

63 Culpepper v. Inland Mortgage Corp., 132 F.3d 692 (11th Cir. 1998).

64. *Id.* at 694-95.

65. *Id.* at 696.

66. *Id.* at 697 n.5.

67. Recently such class actions have been curtailed as courts have recently held that there is no private right of action for inadequate disclosure on the Good Faith Estimate pursuant to section 6 of RESPA. *See* Collins v. FMHA-USDA, 105 F.3d 1366, 1368 (11th Cir. 1997) (upheld the District Court's finding that RESPA section 6 has no implied right of action as "neither the statute nor the legislative history reveals congressional intent to create a private cause of action, and actually indicate that Congress intended not to provide such a remedy"); Brophy v. Chase Manhattan Mortgage Co., 947 F.Supp. 879 (E.D. Pa. 1996) (granted defendant's motion for summary judgment as 12 U.S.C. § 2604(c) as amended in 1976 is silent regarding private rights of action, and replaced a section that expressly granted a private right of action).

68. 60 N.Y.Jur.2d *Fraud and Deceit* § 11.

69. *Id.*

70. 60 N.Y.Jur.2d *Fraud and Deceit* § 14. In order to assert this claim the consumer needs to establish that the mortgage broker is indeed his agent. As discussed in section II, mortgage brokers certainly appear to fit into the definition of an agent. However the brokers have thus far effectively asserted that they are no one's agent. Chamness, Robert P. *They Who Lie Down with Dogs Get Fleas*, ABA BANK COMPLIANCE (November/December 1996) (NAMB studies conclude that brokers are considered, in all but two states, independent specialists who work for neither the borrower nor the lender).

71. 60 N.Y.Jur.2d *Fraud and Deceit* § 14. *citing* Brown v. Lockwood, 76 A.D.2d 721, 432 N.Y.S.2d 186 (2d Dep't 1980) (noting that such claims are rarely sustained in New York).

72. 20 N.Y.Jur.2d *Conspiracy-Civil Aspects* § 2.

73. *Id.*

74. Briggs v. Countrywide Funding Corp., 949 F.Supp. 812 (M.D. Ala. 1996).

75. 18 U.S.C. § 1962.

76. 18 U.S.C. § 1962(c).

77. Briggs v. Countrywide Funding Corp., 949 F.Supp. 812 (M.D. Ala. 1996).

78. Indeed, Judge Bryan denied class certification in *Mentecki* on July 11, 1997. The matter was subsequently remanded for reconsideration by the 11th Circuit.

79. Edwin K. O'Brien *A Consumer Lawyer Look At Lender Liability*, MASSACHUSETTS LAWYER WEEKLY, P. B5 (May 26, 1997).

80. In fact, recent cases have denied plaintiffs the right to bring a claim on RESPA section 6. *See* note 64, *supra*.

81. Fed. R. Civ. P. 23.

82. 24 C.F.R. 3500.4.

83. 24 C.F.R. 3500.14(f).

84. Mr. Retsinas testified, "Consumers do not understand their relationship with the mortgage broker, leaving them vulnerable to adverse steering. Information disclosed about lender-paid mortgage broker fees under HUD regulations is difficult to understand and comes too

late in the process to help consumers make an informed choice. Lenders struggle with uncertainty about permitted and prohibited behavior. Although last year's negotiated rulemaking was not ultimately successful at crafting a consensus on this difficult issue, it was helpful in illuminating the problems and forging some common ground. HUD will soon send to the Congress for 15-day review a proposed rule that builds on the work of the negotiated rulemaking committee and satisfies the principles that Secretary Cuomo has established." *Prepared Testimony of Nicolas P. Retsinas, Asst. Secretary for Housing*, Federal News Service, July 15, 1997.

85. A federal court in Alabama has held that if state law is more lenient concerning disclosure than federal law, then the state law applies concerning state law claims such as fraud. Briggs v. Countrywide Funding Corp., 949 F. Supp. 812 (M.D. Ala. 1996).

86. Guice v. Charles Schwab & Co., 89 N.Y.2d 674 (1996).

87. It is not clear why they should not be considered a cost of the credit.

88. It is not clear why they should not be considered a cost of the credit.

89. 3 N.Y.C.R.R. § 38.3(a).

90. Department of Housing and Urban Development Docket No. FR 3780-P-08.

91. The proposed Mortgage Broker contract reads as follows:

> This contract is between:
>
> Borrower's name ("Borrower" or "you") and
>
> Mortgage Broker Company's name and address who has authorized Mortgage Broker to enter into this contract on its behalf. In this contract, the mortgage broker company and the mortgage broker are called "I" and the entity that will provide your mortgage loan funds is called "lender."
>
> **Who do I represent?**
>
> I REPRESENT YOU
>
> Yes [ ]　　　No [ ]
>
> I am your agent and will get you the most favorable mortgage loan that meets your stated objectives. I will shop for your loan among number lender(s). For my services, I will charge you a fee, but will not receive any fee for your mortgage loan from a lender.
>
> I REPRESENT YOU, BUT I MAY RECEIVE A FEE FROM A LENDER
>
> Yes [ ]　　　No [ ]
>
> I am your agent and I will get you the most favorable loan that meets your stated objectives. I will shop for your loan among number lender(s). For my services, I may charge you a fee and I may also receive an additional fee for your mortgage loan from a lender.
>
> I DO NOT REPRESENT YOU
>
> Yes [ ]　　　No [ ]
>
> I am not your agent. I arrange loans from lender(s). For my services, I get paid by lenders and borrowers.
>
> I make mortgage loans available from:
>
> [ ] one lender: name of lender or
>
> [ ] number lenders.
>
> **What will I be paid?**
>
> For arranging your loan of up to $ amount at an interest rate of number or range%, I will receive no greater than points or compensation of $ amount so that my total compensation will be no greater than $ total amount or % of loan.
>
> My TOTAL COMPENSATION will be made up of:
>
> Fees YOU PAY me of $ total amount or % of loan
>
> plus
>
> Fees a LENDER PAYS me of $ total amount or % of loan.
>
> If you would rather pay a lower interest rate, you may pay higher upfront fees; if you pay less up front, you may pay a higher interest rate. Before you sign this contract, I can display alternatives for you.
>
> The amounts disclosed here apply only if you qualify for this loan.
>
> We agree to the terms of this contract. By signing below, the mortgage broker further certifies that the information in this contract is accurate and complies with all provisions of section 8 of the Real Estate Settlement Procedures Act and 24 C.F.R. part 3500.
>
> Signatures
>
> Notice to Borrower(s)
>
> You are entitled to a copy of this contract. Signing this contract does not obligate you to obtain a mortgage loan through this mortgage broker, nor is it mortgage loan approval.
>
> [The back of the form specifies 10 rights that the Borrower has]

92. 3 N.Y.C.R.R. § 38.3.

93. Woods v. City National Bank & Trust Co., 312 U.S. 262 (1941) ("[No fiduciary can reasonably claim] that, although he had conflicting interests, he served his several masters equally well or that his primary loyalty was not weakened by the pull of his secondary one."); Wendt v. Fischer, 243 N.Y. 439 (1926) (Cardozo J.). ("Disclosure . . . indefinite and equivocal does not set the agent free to bargain for his own account or for the account of a corporation which acts through him alone. If dual interests are to be served, the disclosure to be effective must lay bare the truth, without ambiguity or reservation, in all its stark significance.") Dual agency, as suggested by the mortgage brokers in their recently proposed voluntary disclosure, is both impractical and impossible. *See* note 12, *supra*.

***John G. Hall is chair of the Real Property Section of the New York State Bar Association and a partner at the law firm of Hall & Hall in Staten Island, New York. He would like to thank Sean O'Flaherty, a third-year law student at Fordham University, for his assistance in writing this article.**

# Mortgage Contingency Clauses: Courts Favor Purchasers

**by Karl B. Holtzschue***
**New York, New York**

Most litigation between sellers and purchasers of real estate arises out of purchasers' attempts to obtain financing. In a survey of over 100 recent cases, I found that the purchasers won almost twice as often as the sellers.[1] Even more remarkable are numerous cases where courts have allowed purchasers to obtain refunds of their down payments in circumstances where the contract provisions were silent and seemed to indicate a contrary result. This article describes the major cases and raises issues for practitioners to consider in drafting and negotiating contracts and in advising clients.

## Conditioned on Loan Commitment, not Loan Closing

Most purchasers of real estate, especially purchasers of residences, need financing to pay for the purchase. Consequently, the obligation of the purchaser to purchase under the contract of sale must be contingent on obtaining financing, as is provided in ¶8 of the New York State Bar Association's residential contract of sale printed form (11/96) (the "Multibar contract").[2] The mortgage contingency clause is usually conditioned on obtaining a mortgage commitment, however, not on closing the loan, as a superseded version of the cooperative apartment contract used to provide.[3] This would appear to put the risk of closing entirely on the purchaser, which is how most practitioners view the clause. Laymen may be surprised at this, since they need the loan to close in order to complete the purchase. As will be seen below, many courts have been sympathetic and allowed purchasers to cancel when the loan did not close through no fault of the purchaser. These cases may be a surprise to practitioners who correctly do not see that right set forth in the contract language.

## Ability of Purchaser to Qualify for Loan

Many sellers' attorneys add a representation by the purchaser to the effect that the purchaser has sufficient income and assets to qualify for the contemplated loan and does not know of any judgments, debts, claims or other matters that would impair the purchaser's ability to obtain the loan. For a preview of the information likely to be requested of a borrower by a lender, see the FHLMC/FNMA form Residential Loan Application.[4] The purchaser should be wary of making any representation about its ability to obtain the loan unless it has fully completed a prequalification process with the prospective lender.

## Loan Amount

The purchaser is obligated to apply for a specified amount on specified terms by a specified date. The safest approach for the purchaser is to verify the description of the loan and the time needed to obtain a commitment with the proposed lender before inserting that information in the mortgage contingency clause. Problems have arisen at even this first step. A purchaser who applied for an amount higher than that specified in the contract contingency clause and who was denied a commitment has been held to be in default.[5] This purchaser disregarded the contract terms at its peril. However, where the purchaser applied for a higher amount, but the lender indicated that it would not lend even the lower contract amount, the application was held to be futile, and the purchaser won.[6] There the court reached the sensible conclusion that the loan was unavailable anyway and disregarded the purchaser's noncompliance.

## Application to Institutional Lender or Mortgage Broker

Most forms require application to an institutional lender. However, many borrowers, both commercial and residential, hire mortgage brokers to find an institutional lender and negotiate their financing with the lender, and the brokers are compensated by the borrowers or the lenders.[7] Because a requirement of application to an "institutional lender" has been held not to be satisfied by application to a mortgage broker,[8] the 1996 version of the Multibar contract responded to this problem by adding ¶8(b), which permits application to a registered mortgage broker (if not deleted), and also added licensed mortgage bankers to the definition of "Institutional Lender" in ¶8(a).[9] Purchasers should note that where the mortgage broker failed to apply in turn to the institutional lender within the required time, the purchaser was held to be in default.[10] The contract usually implies that the purchaser need only apply to one lender,[11] but there are some cases that hold that a requirement to be "diligent" means that the purchaser must "pursue all reasonable sources of potential financing."[12]

## Purchaser's Duty to Apply in Good Faith

The purchaser is required to pursue the application in good faith (e.g. not to underestimate income).[13] This is the critical issue in most litigation. In several cases, the purchaser was denied summary judgment because its good faith was held a triable issue of fact.[14] In other cases the seller was denied summary judgment but the purchaser's good faith was a triable issue of fact (e.g., application for higher amount).[15] In some cases the purchaser was found not to have acted in good faith,[16] but there are more cases where the purchaser was found to have acted in good faith.[17] Where it became apparent, however, that the lender would not issue a commitment for the desired amount, the purchaser was allowed to cancel on the ground that the application was "futile," even when there was no formal written denial issued by the lender.[18] A contract providing for "diligent efforts" has been held to require more than good faith and to require the purchaser to "pursue all reasonable sources of potential financing."[19] The seller must also cooperate in good faith.[20]

## Critical Loan Underwriting Elements

The two most critical elements in underwriting a mortgage loan are (1) whether the borrower has sufficient income and assets to repay the loan and (2) whether the value of the mortgaged property is sufficient to adequately secure repayment. A mortgage loan commitment conditioned on an appraisal of value is missing a critical element (the Multibar residential contract section 8 provides that the purchaser need not accept a commitment with that condition). Commitments always contain other routine conditions to closing the loan, however. Customary conditions include no decline in the borrower's financial condition, no decline in the value of the property, satisfactory title and casualty insurance and payment of fees and expenses.

## "Firm" Commitment

Several courts have allowed purchasers to cancel on the ground that the commitment was not "firm" (i.e., unconditional), often without considering whether the contract clause specified that the commitment had to be "firm" (the Multibar contract does not do so).[21] In three of those cases, the commitment was conditioned on sale of the purchaser's prior home. In two of them the word "firm" was apparently not used in the contingency clause, but was read in by the Appellate Division, Second Department court. In *Lindenbaum*, the First Department stated that the Second Department has consistently held that a loan conditioned on sale is not "firm," citing *Kressel* and *Weaver*,[22] and further stated that "the term 'commitment' suggests a binding rather than qualified obligation. . . . A 'conditional commitment' is therefore an oxymoron."[23] Because all commitments contain customary and quite reasonable conditions, that statement must be taken as hyperbole, used in an effort to find that the purchaser had acted in good faith and should be allowed to cancel despite the absence of any contract provision allowing it to do so. A subsequent First Department opinion, *Creighton*,[24] rightly points out that the contract form is "devoid of any procedures to be followed when a commitment is later withdrawn." Most practitioners believe that this is deliberate and reflects that the risk of withdrawal is on the purchaser. Some contracts so state.[25] The sympathy of the courts probably comes as a surprise to contract draftsmen, if not to laymen. Since 1991, the prior version of the Multibar contract has required the purchaser to accept "customary commitment terms" (which would include "conditioned on sale" if customary at the time), and has stated that the contract is conditioned on obtaining a commitment letter "whether or not conditional on factors other than an appraisal satisfactory to the Institutional Lender."[26] This was intended to put the burden on the purchaser to state in the contract that a commitment conditioned on sale would not be acceptable.[27] As none of the described cases seem to have involved the language in the Multibar contract, it is not yet clear that the courts will reach the intended result of putting the risk on the purchaser.

## Right to Cancel

The contract usually allows the purchaser to cancel if the commitment is not issued by a specified date.[28] When the contract states that the purchaser may cancel if the contingency is not satisfied, the purchaser ordinarily has the right to waive the contingency unilaterally.[29] The purchaser's waiver may be oral.[30] Attorneys sometimes add an express right for the seller to cancel, to give the seller a second look at the situation and an opportunity to rescind without waiting until the closing to see if the purchaser will be able to perform. Where the contract expressly allows the seller to cancel, the seller may do so even if the purchaser attempts to waive the condition.[31] When a contract provided that it was automatically canceled if the commitment was not issued by a specified date, the seller could not cancel due to purchaser's failure to give notice when the commitment was timely obtained and notice was not required.[32] Solo practitioners sometimes prefer automatic cancellation to try to avoid any obligation to make sure that the deadline is not missed. In ordinary home sales where neither party has an alternative, automatic cancellation may not reflect their intent, however. A mutual open-ended right to cancel without a deadline to do so would allow the transaction to proceed until expressly canceled (but admittedly would not protect the purchaser from losing the purchase to a higher bidder).

The purchaser may reject a commitment if its expiration date occurs before the scheduled closing,[33] or if the contract is conditioned on a commitment for 20 years and the commitment offered is for 25 years.[34] The purchaser may cancel if the commitment is not issued by the specified date, even if the commitment is later issued.[35]

## Compliance with Deadlines

The purchaser must strictly comply with any specified deadlines for giving *notice*.[36] Actual notice has been held to be insufficient.[37] On the other hand, some courts have been lenient on the purchaser as to time periods: the time to *apply* for the loan;[38] the time to *obtain* the commitment;[39] and the time to *cancel*.[40] The parties may be treated as having *waived* the deadline for giving written notice by their actions, notwithstanding the statutory requirement in GOL section 15-301 that modifications of a written contract be in writing.[41]

## Cancellation of Commitment

Several courts have allowed a purchaser to rescind where the mortgage commitment has been canceled after issuance (and expiration of the contract condition) through no fault of the purchaser,[42] but some have not, particularly where the commitment was conditioned on sale.[43] Cancellation has been allowed where the purchaser lost his job,[44] where the purchaser was unable to comply with a commitment conditioned on sale of purchaser's prior home[45] or where the commitment was conditioned on obtaining private mortgage insurance.[46] While this result seems to fairly reflect a blameless purchaser's expectation that it will not be obligated to close if its commitment is canceled, it would probably surprise sellers and their attorneys, because the language of the usual contingency clause implies that failure to cancel removes the contingency and gives no warning of this escape route for the purchaser crafted by some courts. Most experienced practitioners have viewed the printed form clauses as putting this risk on the purchaser once the right to cancel has expired.[47]

## Loan from Seller

Where the contract was silent, the seller has been held not to have the right to take back a loan itself.[48] Where the contract provided for a loan from the seller, however, the purchaser could compel the seller to provide it,[49] and the seller could compel the purchaser to accept it.[50]

## VA and FHA Loans

The Veterans Administration requires sellers to allow purchasers to cancel if the contract price exceeds the VA's appraised value.[51] The Federal Housing Administration will not permit a borrower to pay "points" on a loan, and a court has held that the seller's implied agreement not to interfere with performance required the seller to pay them.[52]

## Refund of Down Payment

In New York if the seller simply refunds the purchaser's down payment, acceptance of the check is not an accord and satisfaction, and the seller will not be permitted to condition the refund on a relinquishment of rights.[53]

## Suggested Contract Modifications

In light of the actions of the courts, the attorneys for the seller and purchaser should consider modifying the standard printed form contract provisions on mortgage contingencies. Likely responses are also indicated.

### SELLER:

1. Add representations by the purchaser as to sufficiency of income and lack of debts and liens (i.e. purchaser has sufficient credit rating). The purchaser should be careful about this.

2. Add a right of the seller to cancel or provide the mortgage. The purchaser may want to keep the deal and take the risk of finding alternate financing, thus preventing the seller from taking advantage of a more attractive offer. The purchaser may not want to have the seller be its lender.

3. Add that the purchaser must accept a commitment conditioned on sale. The purchaser may have no alternative if lenders won't agree.

4. Add that the purchaser must accept the commitment.

5. Add that the purchaser bears the risk of loss of the commitment.

6. Add that the purchaser has no right to cancel if it loses the commitment due to loss of purchaser's employment or diminished income or other loss of credit. The purchaser may not want to take this risk.

7. Add that the purchaser has no right to cancel if it loses the commitment due to its inability to sell its prior home. The purchaser may not want to take this risk.

### FOR PURCHASER:

1. Provide that application to a registered mortgage broker is sufficient (as the 11/96 Multibar residential contract does). The seller may want to add that the broker must deliver the purchaser's written application to an institutional lender within a specified time and that any denial of the application be in writing from the institutional lender.

2. Provide that financing can be obtained from a licensed mortgage banker (as the 11/96 Multibar residential contract does).

3. Replace "diligence" with "in good faith" to prevent interpretation requiring pursuit of "all reasonable sources of financing."

4. Add that the commitment must be "firm" (i.e., unconditional). The seller should oppose an unconditional commitment, since there is literally no such thing. Acceptable conditions should be discussed.

5. Add that the purchaser is not required to pursue a futile application (i.e., informal rejection would be sufficient). The seller may be wary of the believability of an informal rejection.

6. Add a right to cancel if the commitment is canceled due to inability to sell the prior home, loss of employment or otherwise through no fault of

the purchaser. (The purchaser may be wiser not to ask for this clarification, to avoid losing the argument at the drafting stage, and just rely on favorable court decisions). The seller may insist that it is customary for the purchaser to take this risk.

7. Add that the contract is conditioned on closing the loan unless the failure to close is the fault of the purchaser. The seller's attorney will argue that this is not customary.

8. Add that seller will be liable for loss of the commitment and/or increased costs if the seller delays the closing past the expiration date for the commitment.

9. For a VA loan, add that the purchaser can cancel if the appraised value is below the contract purchase price.

10. For an FHA loan, add that the seller must pay any points.

## Amend the Contract Forms?

An obvious alternative would be to amend the printed forms to take into account some or all of the cases described above. This raises some questions. Should the requirement of "diligence" by the purchaser be deleted? Should the forms allow the purchaser to cancel if the commitment is canceled through no fault of the purchaser? That is very similar in result to the old cooperative apartment form where the contract was conditioned on funding the loan as well as on issuance of the commitment. But, as noted above,[54] some courts have not allowed the purchaser to cancel if its home could not be sold. The forms could be amended to so state. Should the purchaser be allowed to cancel if it loses its job? Should the answer depend on whether the purchaser was without fault? The sympathies of the courts are clear in this case, but not all sellers may be happy to accept this risk.

Even if the contracts are amended to deal with identified problems, practitioners should remain alert and rethink the clause in light of the circumstances of each particular transaction. The financing contingency involves so many possible permutations that it is doubtful that a perfect "one-size-fits-all" standard clause is possible, despite many efforts over the years.[55]

## Conclusion

Many of the opinions on mortgage contingencies show that outcomes in court cannot safely be predicted by relying solely on the plain language of contracts. Attorneys would do well to familiarize themselves with the cases in advance, discuss the potential problems with their clients and add riders to the standard forms to protect them.

## Endnotes

1.

| | Seller won | Purchaser won |
|---|---|---|
| Ct. App.: | 3 | 7 |
| 1st Dep't: | 5 | 13 |
| 2d Dep't: | 26 | 46 |
| 3d Dep't: | 6 | 8 |
| 4th Dep't: | 2 | 1 |
| Subtotal | 42 | 75 |

Denial of a motion for summary judgment by the other side was counted as a win. A few lower court opinions were assigned to their Appellate Divisions for this purpose.

2. Residential Contract of Sale (11/96), jointly prepared by the Real Property Section of the New York State Bar Association, the New York State Land Title Association, the Committee on Real Property Law of the Association of the Bar of the City of New York and the Committee on Real Property Law of the New York County Lawyers' Association, available from Julius Blumberg, Inc. as printed form A125 and as a Blumberg Blazer Form on computer disk. Bar association forms in the Capital Region, Erie County, and Monroe County (reproduced in the author's books and in NYSBA, PRACTICAL SKILLS: PURCHASES AND SALES OF HOMES (1997)) and Rockland County (reproduced at 25 N.Y. REAL PROP. L.J. at 153 (Fall 1997) have similar provisions. The contract of sale for a condominium unit (Blumberg form 146 (3-95), prepared by the Committee on Real Property Law of the Association of the Bar of the City of New York) ("ABCNY condominium contract") has a provision (¶23) that is nearly identical to the Multibar form. The contract of sale for a cooperative apartment (Blumberg form 123 (10-89), prepared by the Committee on Condominiums and Cooperatives of the Real Property Section of the New York State Bar Association ("NYSBA cooperative contract") is similar in most respects, but not identical.

3. Almeida v. Glick Dev. Affiliates, 171 A.D.2d 423, 567 N.Y.S.2d 3 (1st Dep't 1991) (seller entitled to retain down payment where purchaser failed to satisfy conditions in commitment). Cf. Friend v. McGarry, 141 Misc.2d 479, 533 N.Y.S.2d 357 (Sup. Ct., N.Y. Co. 1988) (cooperative apartment contract form, since superseded, conditioned contract on funding, shifting risk to seller, citing Holtzschue, NEW YORK PRACTICE GUIDE: REAL ESTATE § 2.11).

4. Blumberg form 97, to be reproduced in the next updates of the author's books.

5. Post v. Mengoni, 198 A.D.2d 487, 604 N.Y.S.2d 186 (2d Dep't 1993).

6. Katz v. Simon 216 A.D.2d 270, 627 N.Y.S.2d 763 (2d Dep't 1995).

7. See Stabile, *Mortgage Brokers Receiving Premium Pricing: Whose Agents Are They Anyway?,* 25 N.Y. REAL PROP. L.J. 47 (Spring 1997) (arguing that mortgage brokers are agents for borrowers and have a fiduciary duty to them with respect to fees).

8. Delsack v. Cumella, 189 A.D.2d 640, 593 N.Y.S.2d 2 (1st Dep't 1993). But see Ratner v. Elovitz, 198 A.D.2d 184, 604 N.Y.S.2d 82 (1st Dep't 1993) (requirement satisfied if mortgage broker employed to submit application to institutional lender and does so).

9. To protect purchasers who might not understand the difference between mortgage brokers and institutional lenders, these additions were proposed by the N.Y. State Banking Department and approved by the bar associations. Similar changes were proposed and approved for the ABCNY condominium contract and the NYSBA cooperative contract (described in note 2). Some sellers' attorneys are wary of allowing application to a mortgage broker, fearing that a broker may assist a purchaser who wants to cancel for other reasons.

10. Vafa v. Cramer, 212 A.D.2d 593, 622 N.Y.S.2d 567 (2d Dep't 1995) (application required within 10 business days). Purchasers should note that the addition to the Multibar contract of prompt application to and cooperation with a registered mortgage broker does not delete the requirement of issuance of the commitment by an institutional lender within the time required. Purchasers should make

sure that the broker promptly submits the application in turn to the lender.

11. Macho Assets, Inc. v. Spring Corp., 128 A.D.2d 680, 513 N.Y.S.2d 180 (2d Dep't 1987).

12. Vitolo v. O'Connor, *infra* note 19; Blask v. Miller, *infra* note 14. Several forms require the purchaser to be diligent. *See* note 19 *infra*.

13. Falk v. Goodman, 7 N.Y.2d 87, 183 N.E.2d 871, 195 N.Y.S.2d 645 (1959) (summary judgment for purchaser reversed due to triable issue of fact as to purchaser's good faith in fraudulently underestimating income).

14. Blask v. Miller, 186 A.D.2d 958, 588 N.Y.S.2d 940 (3d Dep't 1992) (availability of loan and purchaser's good faith in contracting when they may not have been able to afford the property; contract required purchaser to use "diligent efforts," which requires more than mere good faith; must pursue all reasonable sources of financing); BTS, Inc. v. Webny Corp., 157 A.D.2d 638, 549 N.Y.S.2d 735 (2d Dep't 1990) (good faith in submitting weak financial statement); Wilson v. City of Long Beach, 133 A.D.2d 684, 519 N.Y.S.2d 854 (2d Dep't 1987) (good faith and due diligence in obtaining permits and financing). These cases were counted as wins for the seller.

15. Creighton v. Milbauer, 191 A.D.2d 162, 594 N.Y.S.2d 185 (1st Dep't 1993) (loss of job not presumed to be bad faith merely because it results in revocation); Fuchs v. Arutt, 138 A.D.2d 673, 526 N.Y.S.2d 488 (2d Dep't 1988) (whether purchaser canceled application to lender after contract signed); Katz v. Simon, 216 A.D.2d 270, 627 N.Y.S.2d 763 (2d Dep't 1995) (good faith in applying for higher amount and delay in applying); Marx v. Shustek, 226 A.D.2d 351, 640 N.Y.S.2d 224 (2d Dep't 1996) (whether application would have been denied even if for proper amount); Zwirn v. Goodman, 206 A.D.2d 360, 613 N.Y.S.2d 942 (2d Dep't 1994) (whether seller's delay in executing contract was inordinate, whether seller only executed contract after purchaser attempted to cancel, and, when application denied due to incompleteness and insufficiency of value of property, whether purchaser made good faith effort). These cases were counted as wins for the purchaser.

16. Allen v. Smith, 124 A.D.2d 916, 508 N.Y.S.2d 331 (3d Dep't 1986) (contract required application to two lending institutions; application made by only one purchaser, not the one with greater income; purchasers did not make second application because they no longer wanted to buy); Almeida v. Glick, 171 A.D.2d 423, 567 N.Y.S.2d 3 (1st Dep't 1991) (purchaser of condo unit failed to satisfy condition in commitment to satisfy judgments; did not show good faith effort); Binks v. Farooq, 178 A.D.2d 999, 578 N.Y.S.2d 335 (4th Dep't 1991) (purchaser never applied for a commitment; breached implied duty of good faith); Lieberman v. Pettinato, 120 A.D.2d 646, 502 N.Y.S.2d 242 (2d Dep't 1986) (contract allowed either party to cancel; seller entitled to cancel when purchaser refused commitment due to 1% origination fee).

17. Berholtz v. Georgiou, 184 A.D.2d 677, 585 NYS2d 462 (2d Dep't 1992) (application turned down because purchaser borrowed down payment, but not willful default of purchaser); Byrne v. Collins, 142 A.D.2d 661, 531 N.Y.S.2d 17 (2d Dep't 1988) (contract conditioned on sale of home; purchaser lost job, made genuine effort to get another, but couldn't sell home); Lane v. Elwood Estates, Inc., 31 A.D.2d 949, 298 N.Y.S.2d 751 (2d Dep't 1969) (purchaser lost his job and commitment canceled; purchaser acted in good faith); Lindenbaum v. Royco Property Corp., 165 A.D.2d 254, 567 N.Y.S.2d 218 (1st Dep't 1991) (commitment conditioned on sale; despite best efforts unable to sell); Lunning v. 10 Bleecker St. Owners Corp., 160 A.D.2d 178, 553 N.Y.S.2d 148 (1st Dep't 1990) (commitment contingent on no material change in purchaser's financial condition; purchaser became unemployed due to illness which caused death); Macho Assets v. Spring Corp., 128 A.D.2d 680, 513 N.Y.S.2d 180 (2d Dep't 1987), *reh. den.* 69 N.Y.2d 609, 509 N.E.2d 360, 516 N.Y.S.2d 1025 (1987) (contract did not require purchaser to apply to more than one institutional lender or to accept private seller financing); Ruggeri v. Brenner, 186 A.D.2d 441, 589 N.Y.S.2d 23 (1st Dep't 1992) (purchaser not obligated to make third application).

18. Katz v. Simon, 216 A.D.2d 270, 627 N.Y.S.2d 763 (2d Dep't 1995) (triable issues of fact as to purchaser's good faith and delay in applying); Companion v. Touchstone, 88 N.Y.2d 1043, 674 N.E.2d 329, 651 N.Y.S.2d 339 (1996) (4-3, affirming 2d Dep't's 3-2 decision affirming dismissal of seller's complaint) (dissent felt purchaser's good faith was for jury, citing cases). *Accord* Elghanyan v. Mundy, 225 A.D.2d 654, 639 N.Y.S.2d 475 (2d Dep't 1996) (informal efforts of mortgage broker fruitless; application held futile due to purchaser's prior business losses); Thebaud v. Callari, 200 A.D.2d 565, 606 N.Y.S.2d 330 (2d Dep't 1994) (bank said amount too high). None of the contract forms address the form a denial must take or whether a party may cancel based on a denial issued before expiration of the contingency date.

19. Vitolo v. O'Connor 223 A.D.2d 762, 636 N.Y.S.2d 163 (3d Dep't 1996); Blask v. Miller, *supra* note 14. Diligent efforts are required of the purchaser in the Multibar, ABCNY condominium, Erie County and Rockland County forms, but not the NYSBA cooperative apartment or Monroe County forms.

20. Wells v. Meader, 192 A.D.2d 827, 596 N.Y.S.2d 506 (3d Dep't. 1993 (seller did not allow appraiser access); Merrill Lynch Realty v. Skinner 63 N.Y.2d 590, 473 N.E.2d 229, 483 N.Y.S.2d 979 (1984), *reh. den.* 64 N.Y.2d 885, 476 N.E.2d 1008, 487 N.Y.S.2d 1029 (1989) (seller did not respond to requests for access for minor repairs required by FHA).

21. Livoti v. Mallon, 81 A.D.2d 533, 438 N.Y.S.2d 81 (1st Dep't 1981) (contract required firm commitment; seller could not cancel as not firm because purchaser had 10 days to accept); Weaver v. Hilzen, 147 A.D.2d 634, 538 N.Y.S.2d 40 (2d Dep't 1989) (either party had right to cancel if "mortgage" not obtained in 45 days; after 45 days, commitment was issued that was conditioned on sale of purchaser's residence; over a month later purchaser canceled on ground she was unable to satisfy condition for a "firm" commitment ("firm" apparently read in by court)); Kressel, Rothlein & Roth v. Gallagher, 155 A.D.2d 587, 547 N.Y.S.2d 653 (2d Dep't 1989) (contract conditioned on "firm commitment"; mortgage commitment subject to sale of purchaser's home held not to be the required "firm" commitment); Munson v. Germerican Assocs., 224 A.D.2d 670, 638 N.Y.S.2d 739 (2d Dep't 1996) (contract conditioned on "satisfactory" commitment in "customary form" ("firm" read in by court); commitment conditioned on sale). A seller has also been allowed to exercise its contract right to cancel on the ground that a commitment conditioned on sale was not firm. Finkelman v. Wood, 203 A.D.2d 236, 609 N.Y.S.2d 655 (2d Dep't 1994) (contract conditioned on "firm" commitment; either party could cancel).

22. Lindenbaum v. Royco Property Corp., *supra* note 17 at 259.

23. *Id.* at 258.

24. Creighton v. Milbauer, *supra* note 15, 594 N.Y.S.2d at 187.

25. The 3/94 Monroe County form states: "The conditions of any such mortgage commitment shall not be deemed contingencies of this contract but shall be the sole responsibility of Buyer," and requires the seller to make repairs costing up to an inserted amount that are required by the commitment. The 1997 Rockland County form states that a conditional commitment shall be deemed to satisfy the mortgage contingency, expressly referring to conditions as to sale of any property or discharge of any debt.

26. Multibar contract ¶8(a). See also ¶23 of the ABCNY condominium contract and ¶19.5.2 of the NYSBA cooperative contract, both more fully described in note 2.

27. Holtzschue on Real Estate Contracts (Practising Law Institute, 1997) 2.3.1; Holtzschue, 1 New York Practice Guide: Real Estate § 2.30[2][j]; deWinter, "Revised Form of Contract Designed, Covering Residential Property Sales," N.Y.L.J., Mar. 13, 1991, p. 40, col.1.

28. Anderson v. Krupp, 199 A.D.2d 295, 604 N.Y.S.2d 273 (2d Dep't 1993).

29. Blumberg v. Florence, 143 A.D.3d 380, 532 N.Y.S.2d 548 (2d Dep't 1988) (seller's attempt to cancel without returning the deposit held ineffective).

30. Patten v. Nagy 86 A.D.2d 890, 447 N.Y.S.2d 334 (2d Dep't 1982).

31. Ingber v. Greco, 135 A.D.2d 610, 522 N.Y.S.2d 188 (2d Dep't 1987) (purchaser's attempt to waive ineffective); Ting v. Dean 156 A.D.2d 358, 548 N.Y.S.2d 357 (2d Dep't 1989) ("void" provision protects both parties); Jones v. Trice, 202 A.D.2d 394, 608 N.Y.S.2d 688 (2d Dep't 1994). Either party may cancel under the 3/94 Monroe County and Erie County forms.

32. Lane v. Penner, 150 A.D.2d 643, 541 N.Y.S.2d 518 (2d Dep't 1989).

33. Cortesi v. R & D Const. Corp., 73 N.Y.2d 836, 534 N.E.2d 313, 537 N.Y.S.2d 475 (1988) (dictum).

34. Donato v. Baltrusaitis, 56 Misc.2d 935, 290 N.Y.S.2d 659 (Sup. Ct., Queens Co. 1968).

35. Maldonado v. Moore, 135 A.D.2d 1138, 523 N.Y.S.2d 275 (4th Dep't 1987).

36. Alirkan v. Garcia, 162 A.D.2d 571, 556 N.Y.S.2d 759 (2d Dep't 1990) (received 1 day late); Maxton Builders, Inc. v. Lo Galbo, 68 N.Y.2d 373, 502 N.E.2d 184, 509 N.Y.S.2d 507 (1986) (received 3 days late); Roga v. Westin, 212 A.D.2d 685, 622 N.Y.S.2d 777 (2d Dep't 1995).

37. Perrino v. Hogan, 175 A.D.2d 478, 572 N.Y.S.2d 523 (3d Dep't 1991); *contra* Dellicarri v. Hirschfeld, 210 A.D.2d 584, 619 N.Y.S.2d 816 (3d Dep't 1994).

38. Lang v. Blumenthal, 203 A.D.2d 252, 609 N.Y.S.2d 336 (2d Dep't 1994) (purchaser failed to strictly conform to contractual time limits to apply for mortgage; where contract did not state time to be of the essence, parties are given a reasonable time to perform, regardless of whether contract specifies a particular date); Dowling v. Pierre Gohill America Corp. 209 A.D.2d 774, 617 N.Y.S.2d 992 (3d Dep't 1994).

39. Schatten v. Briedis, 163 A.D.2d 379, 558 N.Y.S.2d 110 (2d Dep't 1990) (time to obtain commitment not of the essence; since commitment, though late, obtained before seller attempted to cancel, such cancellation was ineffective).

40. Tendler v. Lazar, 141 A.D.2d 717, 529 N.Y.S.2d 583 (2d Dep't 1988) (where contract had no specific date for cancellation and time was not of the essence, purchaser had a reasonable time to do so); Greenberg v. Tekhomes, Inc. 209 A.D.2d 469, 619 N.Y.S.2d 60 (2d Dep't 1994) (purchaser entitled to cancel within a reasonable time after specified deadline to obtain commitment); Dowling v. Pierre Gohill America Corp., *supra* note 38).

41. Loper v. O'Rourke, 86 Misc.2d 441, 382 N.Y.S.2d 663 (Dist. Ct., Suffolk Co. 1976) (purchaser waived right to cancel); Jackson v. Cobert, 161 Misc.2d 33, 612 N.Y.S.2d 330 (Sup. Ct., Kings Co. 1994) (oral waiver by seller); Baker v. Norman, 226 A.D.2d 301, 643 N.Y.S.2d 30 (1st Dep't 1996) (seller waived contract cancellation date by fax; seller estopped to deny waiver; practical approach—seller got actual notice, not prejudiced).

42. Creighton v. Milbauer, 191 A.D.2d 162, 594 N.Y.S.2d 185 (1st Dep't 1993) (contract devoid of "procedures" when commitment withdrawn; revocation letter cited missing documentation and inability to verify employment and income; purchaser lost job; issue of fact as to purchaser's good faith; loss of job not presumed to be bad faith merely because it results in revocation).

43. Webster v. Di Trapano, 114 A.D.2d 698, 494 N.Y.S.2d 550 (3d Dep't 1985) (purchaser held liable because commitment, but not contract, conditioned on sale of purchaser's home); Arnold v. Birnbaum 193 A.D.2d 710, 598 N.Y.S.2d 68 (2d Dep't 1993) (after accepting commitment, purchaser could not cancel when unable to comply with commitment contingent on sale) (cites no cases).

44. Creighton v. Milbauer, *supra* note 15; Lane v. Elwood and Lunning, *supra* note 17.

45. Lindenbaum v. Royco Property Corp., *supra* note 17 (cites Kressel and Weaver, *supra* note 21). Contra Arnold v. Birnbaum and Webster v. Di Trapano, *supra* note 43. This author finds the reasoning in *Lindenbaum* to be faulty and unpersuasive on this issue. The court stated that it failed to discern a basis for enforcement of the contract against the purchaser, finding that the seller did not satisfy its burden on these facts to prove that purchaser's failure to fulfill the condition necessary to obtaining financing (sale of the home) was a mere pretext to avoid its obligations under the contract of sale.

46. Sciales v. Foulke, 217 A.D.2d 693, 630 N.Y.S.2d 325 (2d Dep't 1995) (contract conditioned upon purchasers obtaining "financing"; after purchasers received bank commitment conditioned upon obtaining private mortgage insurance, bank rescinded commitment due to purchasers' inability to obtain such insurance). Although the issue was raised in the briefs, the court, in its effort to find for the purchaser, ignored the language in section 19.5.2 of the contract of sale (*Blumberg* form 123 (10/89)) that the Loan Commitment Letter may be conditional upon any factor other than an appraisal, which implies that the purchaser has the risk of complying with conditions other than appraisal. *See* notes 25-27 and accompanying text.

47. *See* notes 27 and 25, *supra*.

48. Boyd v. Haritidis ___ A.D.2d ___, 657 N.Y.S.2d 463 (3d Dep't 1997); Baron v. P.R.V. Masonry Corp., 155 A.D.2d 638, 548 N.Y.S.2d 229 (2d Dep't 1989).

49. Leishman v. S & B Realty of Orange County, Inc., 218 A.D.2d 687, 630 N.Y.S.2d 377 (2d Dep't 1995).

50. Schreiber v. Delia 222 A.D.2d 1063, 635 N.Y.S.2d 876 (4th Dep't 1995), *app. den.* 639 N.Y.S.2d 879 (4th Dep't 1996), *app. den.* 88 N.Y.2d 806, 670 N.E.2d 226, 646 N.Y.S.2d 985 (1996).

51. Johnson v. Werner, 63 A.D.2d 422, 407 N.Y.S.2d 28 (1st Dep't 1978).

52. Walsh v. Kelly, 49 N.Y.2d 959, 406 N.E.2d 741, 428 N.Y.S.2d 883 (1980).

53. Merrill Lynch Realty v. Skinner 63 N.Y.2d 590, 473 N.E.2d 229, 483 N.Y.S.2d 979 (1984), *reh. den.* 64 N.Y.2d 885, 476 N.E.2d 1008, 487 N.Y.S.2d 1029 (1989).

54. *See* note 43, *supra*. In the author's view, these courts correctly interpreted the contracts.

55. The author was chairman of a subcommittee of the ABCNY Committee on Real Property Law that published in 1980 a mortgage contingency clause in a printed form rider to the NYBTU residential contract form then in use. Holtzschue on Real Estate Contracts 2.1.2.1 and Appendix D (Practising Law Institute 1997). The NYBTU form then had no such clause, allegedly on the theory that omitting the clause would force the parties to write a tailor-made clause from scratch each time, but that approach did not even provide a commonly accepted starting point. The author also participated in drafting the replacement of the NYBTU contact and ABCNY rider by the Multibar form.

***Karl B. Holtzschue is an Adjunct Professor at Fordham University School of Law. Mr. Hotlzschue is also the author of *Holtzschue on Real Estate Contracts* (PLI 1995) and Vol. 1, *New York Practice Guide: Real Estate* (Matthew Bender).**

# Bankruptcy Remote Clauses Are Not Ironclad

**by Paul Rubin***
**New York, New York**

Issuers of mortgage-backed securities often insist that borrowers be or become "bankruptcy remote" as a condition of lending. Bankruptcy remote clauses are designed to block a borrower's access to the bankruptcy courts. Bankruptcy remote clauses can take several forms. One of the most popular types requires the borrower to amend its bylaws: (i) to permit the lender to appoint an independent director to sit on the borrower's board of directors, and (ii) to prohibit the borrower from voluntarily seeking bankruptcy protection without the affirmative consent of every member of its board of directors. Thus, under the provisions of bankruptcy remote or "bankruptcy-proof" bylaws, the borrower would not be authorized to file a voluntary petition for relief under the Bankruptcy Code without the affirmative consent of the "independent" director selected by the lender.

Many thought that bankruptcy remote provisions effectively closed the doors of the bankruptcy courts to borrowers who agreed to such corporate governance provisions. However, in *In re Kingston Square Associates*,[1] Chief Judge Tina L. Brozman of the United States Bankruptcy Court for the Southern District of New York declined to dismiss, as bad faith filings, involuntary bankruptcy cases commenced against borrowers who had consented to bankruptcy remote provisions even though the borrowers' principal openly orchestrated the filing of the involuntary petitions together with the petitioning creditors. Judge Brozman's decision indicates that a borrower can circumvent the bankruptcy remote provisions with some simple maneuvering where: (a) the borrower is not barred by statute or court order from commencing a bankruptcy case; and (b) it appears that the borrower may have equity in its property, so bankruptcy could prevent a foreclosure sale that would wipe out the claims of unsecured creditors and the interests of the borrower's limited partners or equity holders.

The facts in *Kingston Square* are straightforward. As a result of refinancings made in 1991 and 1993 (the "Refinancings"), affiliates of Donaldson, Lufkin and Jenrette Securities Corporation (DLJ) held over $277 million in mortgages on 41 different apartment complexes controlled by Morton Ginsberg. Integral to each of these transactions was the inclusion, in the charters of each corporate borrower or the corporate general partner of each limited partnership borrower, of a bankruptcy remote provision that prohibited each borrower from seeking voluntary bankruptcy protection without the unanimous consent either of its board of directors or that of its corporate general partner. DLJ was permitted to appoint its consultant, Laurence Richardson, to serve as an "independent" director on the boards either of each borrower or the corporate general partner of each borrower. Mr. Richardson was an attorney who had previously served as a vice president of DLJ. At least a portion of his director's fee was paid by a subsidiary of DLJ.

After the borrowers defaulted in 1994, DLJ commenced foreclosure actions. By mid-1996, judgments totaling approximately $370 million had been obtained against the borrowers. To frustrate DLJ's foreclosure efforts, in the fall of 1996, Mr. Ginsberg orchestrated the filing of involuntary bankruptcy petitions against eleven of the borrowers. An entity controlled by Mr. Ginsberg advanced $75,000 to pay the fees and expenses of the counsel for the petitioning creditors. In addition, Mr. Ginsberg helped the petitioning creditors' counsel locate creditors eligible to join in the filing of the petitions, and he provided the attorneys with the information necessary to prepare the involuntary petitions.

DLJ moved to dismiss the involuntary bankruptcy petitions pursuant to section 1112(b) of the Bankruptcy Code, claiming that the debtor-induced involuntary filings were devised to "perform an end run" around bankruptcy remote clauses and required a finding that the cases were filed in bad faith. DLJ argued that the debtors' coordination of their efforts with the petitioning creditors to obtain bankruptcy protection constituted improper collusion for a fraudulent or deceitful purpose. DLJ also contended that the filing of each involuntary petition was timed either to stay a scheduled foreclosure sale or to coincide with a particular borrower's deadline in which to file an appellate pleading, thereby frustrating its attempts to enforce its rights as to each involuntary debtor's property.

Judge Brozman rejected DLJ's arguments. Initially, she noted that collusion contains two components: (i) the secret acts of at least two people; and (ii) a wrongful purpose. Accordingly, involuntary petitions should be dismissed as collusive if: (i) there is concerted action between the debtor and the petitioning creditors; *and* (ii) the parties fraudulently invoke the jurisdiction of the bankruptcy court.

Based upon Ginsberg's conduct, Judge Brozman found that the debtors did orchestrate the filing of the involuntary cases together with the petitioning creditors and their counsel. However, she observed that nothing in the bankruptcy remote provisions barred any party connected with the borrowers from acting on its own to file involuntary petitions. Furthermore, Judge Brozman relied on another recent New

York case[2] for the proposition that corporate action taken by an insider without board or shareholder authority may later be found to have been appropriate where the very existence of the corporation was seriously imperiled.

Next, Judge Brozman examined whether the jurisdiction of the court had been fraudulently invoked. The Bankruptcy Court rejected the notion that all debtor-induced involuntary filings require a finding of bad faith which, in turn, constitutes cause to dismiss the bankruptcy cases. In reviewing modern collusion cases that were dismissed as bad faith filings,[3] the Bankruptcy Court found that each case involved an attempt by a debtor to reinvoke bankruptcy jurisdiction under the guise of having an involuntary petition filed against it by friendly creditors, despite the existence of a prior court order or statute barring the debtor from gaining access to the bankruptcy courts for a second time. In contrast, the filings orchestrated by Mr. Ginsberg were not used as a method to circumvent a court order or other statutory bar against bankruptcy filings. Instead, the actions taken were merely to prevent the DLJ foreclosures, which threatened to wipe out the claims of unsecured creditors and the interests of the borrower's limited partners. Accordingly, these borrowers had not fraudulently invoked the jurisdiction of the Bankruptcy Court.

An important factor in this case was the debtors' argument that they had a reasonable belief that they could reorganize (rather than liquidate). The debtors' proof included an appraisal showing that the debtors had equity in the properties. Judge Brozman stated that this suggested that the debtors had not been acting in bad faith. Additionally, the debtors produced third parties interested in purchasing the properties (for unspecified sums)

Equally important was Judge Brozman's criticism of DLJ's "independent" director, Mr. Richardson. At a hearing on December 5, 1996, Judge Brozman had urged the borrowers' directors to meet. In fact, no meetings of the directors of the involuntary debtors had been held after the closing of the Refinancings three years earlier. The directors finally met on December 16 and 17, 1996. The Bankruptcy Court characterized Mr. Richardson's conduct at these meetings as "peculiar." He abstained on the vote concerning whether the involuntary debtors should ratify the filing of the involuntary petitions, which served as a pocket veto given the unanimity requirement for a bankruptcy filing. Thereafter, he advised the other board members that he would require additional information before deciding how to vote. Mr. Richardson then took five weeks to write an eleven-page letter to the respective counsel for the petitioning creditors, the borrowers and DLJ's agent asking extensive questions concerning issues raised in documents he was provided at the board meetings. The Bankruptcy Court saw this as a transparent stalling tactic designed to prevent ratification of the filings.

The Bankruptcy Court also criticized Mr. Richardson for other reasons. He appeared to be unaware that, when a corporation approaches insolvency, directors' fiduciary duties expand to include general creditors. The court found it "inconceivable" that he did not understand that the corporate general partners, of which he was a director, bore fiduciary obligations to the limited partners. Mr. Richardson also ignored the plight of these limited partners whose interests would be eliminated by the foreclosure actions. The court declared that his failure to ratify the involuntary filings exemplified his failure to carry out the duties he owed to creditors and limited partners. Indeed, the Bankruptcy Court found that Richardson was independent in name only, and had abdicated his fiduciary role in favor of the interests of DLJ.

In sum, the Bankruptcy Court never ruled on the enforceability of the bankruptcy remote provisions. Instead it ruled that, though a borrower's orchestration of the filing of an involuntary petition against it is suggestive of bad faith, standing alone it is not sufficient grounds for dismissal under section 1112(b) of the Bankruptcy Code. Accordingly, in Judge Brozman's view, a borrower's orchestration of the filing of an involuntary petition against it despite its consent to a bankruptcy remote provision will not be grounds for dismissal as a bad faith filing where: (a) the debtor is not barred by court order or statute from seeking to refile a bankruptcy case; and (b) there is credible evidence that the debtor has equity in its real property, and a bankruptcy case is necessary to preserve that value and prevent a mortgagee from proceeding with a foreclosure that would wipe out the claims of unsecured holders and the interests of the borrower's partners or shareholders. Moreover, an "independent" director appointed by a lender pursuant to a bankruptcy remote clause may not forsake his fiduciary obligations to the borrower, its shareholders and creditors in favor of the interests of the mortgagee, especially where the borrower's existence is threatened by the lender's foreclosure action.

*Kingston Square* has not sounded the death knell for bankruptcy remote clauses. Lenders continue to insist on their use in connection with loan refinancings that are to be included in a pool of loans for mortgage-backed securitizations. Furthermore, whether other courts will adopt the reasoning of the *Kingston Square* court remains to be seen. Nevertheless, lenders and borrowers should be aware that bankruptcy remote provisions do not guarantee that a borrower cannot gain access to the bankruptcy courts.

## Endnotes

1. 214 B.R. 713 (Bankr. S.D.N.Y. 1997).
2. Management Technologies, Inc. v. Morris, 961 F. Supp. 640 (S.D.N.Y. 1997).
3. Federal Deposit Ins. Corp. v. Cortez, 96 F.3d 50 (2d Cir. 1996); In re Winn, 49 B.R. 237 (Bankr. M.D. Fla. 1985); In re Corto, 1995 WL 643372 (W.D.N.Y. Oct. 18, 1995), *aff'd*, 112 F.2d 503 (1997).

***Mr. Rubin is with Herrick, Feinstein LLP, New York, New York.**

# Calculation of Referee's Fees Upon Sale of Real Property Pursuant to a Judgment of Foreclosure and Sale

**by Barry J. Jones**
**Glens Falls, New York**

Upon completion of a mortgage foreclosure sale of real property, a rather mundane but technically necessary calculation of the referee's fee must be made. This calculation is made pursuant to CPLR 8003(b).

Two components for the calculation of a referee's fee are set forth in CPLR 8003(b). The first component provides that a referee "is entitled to the same fees and disbursements as those allowed to a sheriff." The second component provides that "[w]here a referee is required to distribute, apply or ascertain and report upon the distribution or application of any proceeds of sale, he or she is entitled to one-half of the commissions as are allowed by law to an executor or administrator." This second component appears to be applicable in all cases since N.Y. Real Property Actions and Proceedings Law section 1355(1)[1] requires a referee to file a "report under oath of the disposition of the proceeds of the sale."

Regardless of the amount determined by the foregoing calculation, CPLR 8003(b) provides that: "a referee's compensation, including commissions, upon a sale pursuant to a judgment in any action cannot exceed $500, unless the property sold for $50,000 or more in which event the referee may receive such additional compensation as to the court may seem proper." Accordingly, the statute sets forth an ordinary calculation to determine the amount of the referee's fee and sets a maximum cap upon the amount payable. In the event the premises sell for an amount in excess of $50,000, the referee may apply for and receive additional compensation, but the amount of such additional compensation is in the discretion of the court.

The actual calculation under each of the two components requires further analysis of the respective provisions. The first component, regarding the fees a sheriff is entitled to collect, is found in CPLR 8011(g) and 8012(a).[2]

CPLR 8011(g) provides that a sheriff and accordingly a referee would be entitled to the following:

| | |
|---|---|
| 1. For posting of notice, including advertising real...property for sale . . .in pursuance of a direction contained in a judgment. . . | $10.00 |
| 2. For drawing and executing a conveyance upon a sale of real property (this amount to be paid by the grantee) | $20.00 |
| 3. For attending a sale of real. . .property | $10.00 |
| 4. For conducting a sale of real. . .property | $10.00 |
| 5. Mileage for services covered in the above | $_____ |
| The fixed fees excluding mileage subtotal | $50.00 |

Mileage fees amount to $.23 per mile pursuant to CPLR 8012(a).

In addition to mileage fees, CPLR 8012 sets forth other matters for which sheriffs are entitled to collect fees. However, none of the matters set forth would appear to authorize the collection on a mortgage foreclosure of any other fees than those set forth in CPLR 8011.

The second component in the calculation depends upon the sale price of the premises. A referee is entitled to one-half of the commissions as would be allowed by law to an executor or an administrator for receiving and paying out money. Section 2307 of the Surrogate's Court Procedure Act provides for the calculation of commissions of fiduciaries other than trustees. Specifically, SCPA 2307(1)(a) provides that, for receiving and paying out of all sums of money not exceeding $100,000 the commission is at the rate of 5%. Accordingly, a referee's commission would amount to one-half of 5% on amounts not exceeding $100,000, or 2.5% (.025). For purposes of simplified calculation, the following list of sale prices would result in the following commissions:

| | |
|---|---|
| $100 Sale @ .025 = | $2.50 Commission |
| $1,000.00 Sale @ .025 = | $25.00 Commission |
| $5,000.00 Sale @ .025 = | $125.00 Commission |
| $6,000.00 Sale @ .025 = | $150.00 Commission |
| $8,000.00 Sale @ .025 = | $200.00 Commission |
| $10,000.00 Sale @ .025 = | $250.00 Commission |
| $15,000.00 Sale @ .025 = | $375.00 Commission |
| $18,000.00 Sale @ .025 = | $450.00 Commission |
| $20,000.00 Sale @ .025 = | $500.00 Commission |
| $25,000.00 Sale @ .025 = | $625.00 Commission |
| $50,000.00 Sale @ .025 = | $1,250.00 Commission |
| $55,000.00 Sale @ .025 = | $1,375.00 Commission |

The actual amount of the referee's fee is determined by adding the fee of $50 plus mileage and disbursements to the commission. For example, if the sale price of the premises were $10,000, then the referee would be entitled to the $50 sheriff's fees (plus mileage and disbursements) plus a $250 commission for a total referee fee of $300 (plus mileage and disbursements).

The statutory maximum fee of $500 will be reached upon a sale of $18,000 or more. On such a sale, the referee would be entitled to sheriff's fees up to $50 plus commissions of $450 for a total fee of $500 (any mileage and disbursements would exceed the $500 maximum).

The language of CPLR 8003(b) refers to the referee as being "entitled" to the fees as calculated up to the maximum amount of $500. In essence, if the calculation determines any amount between $50 and $500, the referee is "entitled" to whatever amount the calculation produces. The court appears to have no discretion to award a lesser amount.

Compensation exceeding $500 for the sale may only be granted by the court where the property sold for more than $50,000 and the court determines that such additional compensation is "proper." However, since the statute authorizes the court to award additional compensation only upon sales in excess of $50,000, a question remains as to whether a court may award additional compensation for an unusually difficult and complicated sale of less than $50,000.

## Endnotes

1. RPAPL § 1355(1).
2. SCPA 2307(1)(a).

***Barry J. Jones is a solo practitioner in Glens Falls, New York. Mr. Jones is the Fourth District Representative of the Real Property Law Section Executive Committee.**

# No Lawyers Needed

**by Harold C. Hanson**
**Albany, New York**

All the cherished notions held by the residential real estate conveyancing bar are demolished by an article inelegantly entitled: "Structural Change and Inter-Professional Competitive Advantage: An Example Drawn from Residential Real Estate Conveyancing," published in the *Missouri Law Review*.[1] The author is Michael Braunstein, Professor of Law, Ohio State University. These notions as to why we, as lawyers, are necessary or important in residential real estate transactions (e.g., that a lawyer is needed to protect the purchaser, to explain complicated documents, to negotiate contracts and documents) are either vague, trivial or implausible, says the author. In essence, the author finds that lawyers do not add value to these transactions. This article should act as a tocsin to the New York Bar.

The article traces the marginalization of lawyers in real estate transactions in the vast majority of the states, which has been caused by the forces created by secondary market title insurance requirements and the imperialism of title insurance. According to the article, lawyers have simply capitulated to these forces and have witnessed the increasingly greater roles played by title insurance companies and real estate agents in these transactions. Lawyers have been relegated to "hand-holding" and performing mechanical functions in residential real estate transactions.

The article is not the usual, garden-variety law review article replete with impenetrable prose and footnotes on some esoteric point. Rather, the article is straightforward, reflecting the fact that it is the product of a grant from the National Science Foundation, entitled, "Turf Wars: National and Transnational Professional Competition in the Real Estate Market." The article is based upon surveys of lawyers and clients across the country, market surveys and a review of the applicable court cases, textbooks and other literature, all of which shows the steady demise of the lawyer's role.

Perhaps the most damning part of the article is the survey results found by Professor Braunstein. These results show that lawyers do not add value to the residential real estate transaction when the cherished notions are measured against outcomes. To quote Professor Braunstein:

> [I]ncreased lawyer involvement does not have a beneficial effect on outcomes of home purchase transactions in the following respects:
>
> (a) Purchasers who use lawyers are no better informed than those who do not.
>
> (b) Purchasers who use lawyers are no more satisfied with the purchase transaction. In fact, the general satisfaction level of those who did not use a lawyer was greater than those who did. . . .
>
> (c) Purchasers who use lawyers are just as likely to find after signing the contract that it contains matters which had not been explained to them or which they did not expect. . . .
>
> (d) Purchasers who use lawyers were no less likely to avoid disputes than those who do not. . . .[2]

Professor Braunstein concludes his article by saying:

> Lawyers have tended to become marginalized in the residential real estate transaction and it is very unlikely that this tendency will be reversed. The cause of marginalization is not hard to identify. The concept of title and the process by which the real estate purchaser is assured of good title is the most difficult and abstract part of the residential conveyance. Once title insurance companies took over this part of the residential real estate transaction, it was inevitable that the simpler and more routine parts of the transaction would be handled by others as well. If a lawyer was not needed for the hard part, it would not take the buyers and sellers of real property long to realize that the lawyer was probably not needed for the easier parts of the transaction either.[3]

Even the American Bar Association does not support the concept that lawyers are needed in real estate transactions.

> The American Bar Association has stated, "[I]t can no longer be claimed that lawyers have the exclusive possession of the esoteric knowledge required and are therefore the only ones able to advise clients [about real estate closings.] Indeed, [l]awyers' resistance to such inroads [by title com-

panies and real estate agents] for selfish reasons only brings discredit on the profession."[4]

What is the future of the New York State Residential Real Estate Conveyancing Bar? In light of the national trends described by Professor Braunstein, nobody can tell for sure and the crystal balls obviously are not clear. If Professor Braunstein's prognostications run their course in New York, and if nothing is done to stem the tide of lawyer marginalization, it is possible, if not probable, that lawyers involved in residential real estate transactions will become as extinct as dodo birds.

Professor Braunstein does admit in his article that New York is one among five states where attorneys are customarily involved in residential real property transactions in the contract stage and is one of eight states where lawyers ready the transaction for closing, though on a widely varying basis.[5] For example, in the Capital District area, contracts are rarely reviewed by attorneys within the stipulated three-day period and even more rarely prepared by attorneys, unlike the practice in other parts of the state.

All in all, the present use of lawyers in real estate transactions is not bad in New York. The New York State Bar Association's "Final Report and Recommendations to the House of Delegates by the Commission on Providing Access to Legal Services for Middle Income Customers," dated June 1996, found that half of all people surveyed used an attorney to buy or sell real estate. I suspect that if the survey had been limited to home sellers and buyers rather than the general public, the percentage using attorneys would be considerably higher. From my personal knowledge in the Capital District area, virtually all residential real estate closings commonly involve two and sometimes three lawyers.

What can be done to stop the marginalization of lawyers' services in residential real estate transactions? Be assured that the Executive Committee of the Real Property Section of the New York State Bar Association is aware of the situation and is working actively to market lawyers' services as "adding value" to these transactions. A brochure entitled "The Role of the Lawyer in Home Purchase Transactions" has been published by the Section and an informational film is being produced extolling the value which lawyers add to the residential real estate transactions. Copies of the brochure can be obtained from the New York State Bar Association. The film will probably be available by the end of this year or in the early part of 1999.

The practitioner should not look only to the organized bar for assistance. Individual opportunities can and must be pursued. The individual practitioner must seek out marketing and service opportunities that highlight and distinguish his or her practice.

Along these lines, an article of great help was published by the Association in the *State Bar News* (November/December 1997 issue), entitled "A Closer Look: Lawyers Need to Acknowledge That They Are in Business." The author, Julie Tamminen, persuasively makes the point that "[t]he most important word to clients in legal services is *service*, not legal."[6] Ms. Tamminen goes on to urge the practitioner to provide better services both substantively and in the delivery of the same, to better meet the client's needs, not the practitioner's needs. Practitioners are urged to seek "relationships" rather than "encounters" with clients in order to create opportunities to provide services. She urges that lawyers should not be content with pouring old wine into new bottles, but making new wine to be poured into new bottles. Lawyers will have to create new services and enhance existing services and effectively sell the same to buyers and sellers of residential real property.

In another article in the same issue of the *State Bar News* entitled "A Closer Look—Organizing a Marketing Effort Can Lead to Big Returns," the author, Christine S. Filip, points out an example of how a solo practitioner handling residential real property transactions has significantly improved her practice, without succumbing to a price war. In response to her prospective clients' desire to know the demographic makeup of the communities they were considering, this practitioner armed herself with a laptop computer and was able to tap into various databases to obtain census and other demographic information. She gets her clients early in their buying cycle and generates most of her practice by referrals. This practitioner recycles her research into community newspapers and speaking engagements before local groups.

I am of the opinion that avoiding and addressing problems (legal or otherwise) that may arise in the residential real estate transaction is tailor-made to be in the lawyer's province.

As New York is one of the few states where lawyers are still engaged in residential real estate transactions, both the organized bar and the individual practitioner must undertake new and innovative initiatives to keep the lawyers in such transactions, expand the lawyer's role and keep the laymen out, lest we face the situation that prevails in most of the other states.

## Endnotes

1. 62 MISSOURI LAW REVIEW 241 (1997).
2. *Id.* at 275.
3. *Id.* at 278.
4. *Id.* at 258, citing American Bar Association Report of the Commission on Professionalism 52 (1986).
5. *Id.* at 262 and 265.
6. Emphasis supplied.

# SalesNet Project:

## Something New is Happening with Real Estate Closings in Onondaga County

**by Paul Szwedo**
**Albany, New York**

### Factors Drive Change

It's generally viewed as a nuisance, another piece of paper that has to be signed at an already hectic real estate closing. Some attorneys have said that the best way to improve it is to do away with it. They were talking about the New York State Real Property Transfer Report (RP-5217). Although we've all felt this way about different things we deal with everyday, it isn't always that simple. Real Property Law section 333 requires that a transfer report form RP-5217 accompany every deed filed in New York State for all property located outside of New York City.

Believe it or not, information collected on those nuisance forms is used for a variety of programs that affect the wallets of every property owner in the state. Property sales in the open market between a willing buyer and seller are one of the best indicators of property value in a community. The New York State Office of Real Property Services (ORPS) oversees the distribution of school aid, oversees school tax exemptions under the new STAR program and calculates the level of assessment for over 1,000 assessing units in the state so that taxpayers can insure they are fairly assessed, all based on property sales.

For some time now, ORPS has been concerned with the level of effort required by the different parties to report on a transfer of real property, as well as the resulting accuracy of the information in the report. This concern is shared by many government units and representatives of the buyers and sellers who must manage reporting responsibilities. During the summer of 1996, a committee was formed to explore how new technology might be used to improve the reporting process.

ORPS joined with members of the following groups not only to look at new technology but also to reengineer the business process associated with property transfers:

NYS Bar Association
NYS Land Title Association
Governor's Office for Technology
NYS Association of County Clerks
County Directors of Real Property Tax Services Association
Local Government Information Technology Directors Association
NYS Archives and Records Administration
NYS Assessors Association
NYS Local Government Telecommunications Initiative Project (TIP)

### Taking Risks and Getting Ahead

Instead of complaining about things, five law firms in Onondaga County are now taking action as part of a pilot project called *SalesNet*. Through the use of PCs in their own offices, the following firms are using the Internet to access a program that steps them through the RP-5217 form:

Bond, Schoeneck & King, LLP
Hiscock & Barclay, LLP
Lang Law Offices
MacKenzie, Smith, Lewis, Mitchell & Hughes, LLP
Sargent, Levin, Cramer & Myers, LLP

*SalesNet* was developed in an attempt to solve some of the problems present in the existing paper filing process. The three biggest problems cited by those using the paper-based process are that data on the forms are often inaccurate, illegible and incomplete. In addition, the form is handled by many people, replicates information that is available elsewhere and is committed to electronic format two or more times by different levels of government.

*SalesNet* will prefill information for *more than half of the questions* listed on the form such as school codes, property class codes and other assessment data. It will also lead the user through the remaining items. The end result will be a one-part form that is complete, accurate and legible, and will be signed by the parties to the transfer and filed with the County Clerk. At the same time, a computer file is created with the information, thus eliminating the need for duplicate data entry at several levels of government.

With this new program, attorneys can complete the electronic form without the need to call for, or look up, assessment data for the property. They have the ability to edit, print or delete any transactions previously entered but not yet filed. The system will also show them the status of their real estate transactions, such as the date the form was completed, as well as the date, the book, and the page of the deed filing. Because each law firm has its own user code and password, data regarding pending real estate transactions is confidential to each office. The program has the added feature of allowing the lookup of assessment roll data for any property in the county regardless of whether a real estate transaction is pending.

### Type of Technology Involved

Sales data will be stored in Albany on a Sybase SQL server XI relational database. This database will reside on a Hewlett-Packard HP9000-H50 Unix server, and requests for data will be processed through a Netscape enterprise server. A PC capable of accessing the Internet is required of participants.

Sybase data will be accessed through Netscape's Live Wire Pro, an online environment for client/server application development. Java script will be the language used to communicate with Live Wire Pro, which then communicates with the database. RPS software, which is proprietary to ORPS, will be modified to interface with this system.

### Resulting Benefits

- Form preparers no longer have to look up and hand-copy assessment-related data to complete the form.
- Form preparers no longer have to struggle to line up a four-part form in the typewriter.
- The form will be reduced from four parts to a single page. This eliminates the need to distribute four paper copies of the form.
- Data entry, now performed at several levels of government, will be replaced by computer records created by the form preparer.
- Improved accuracy of assessment information contained on the form.
- Improved legibility of information—the handwritten forms cause inaccurate data entry and misinformation on files.
- Insures completeness of information—if incomplete forms are presented for filing, a deed is not accepted for recording, resulting in delays.
- Accurate data on property transfers will be available sooner.

### Timetables and Future Plans

The pilot started in November and ran through the first quarter of 1998. The timeframe may be extended depending on the volume of sales recorded through the *SalesNet* option. Pilot data will then be reviewed by the committee to evaluate the effectiveness of this reporting option.

Throughout the planning process, people have recognized the future benefits of linking the TP584 Transfer Gains Tax form to this process. Entry of information for the state could be a single program with appropriate data sent to each agency without being apparent to the public. In fact, some staff members of the Department of Taxation and Finance viewed a *SalesNet* demo at the Government Technology Conference this fall and expressed an interest in linking with this application.

This project has evolved to the pilot stage as a result of the commitment and belief by all of the participants that we can improve on the existing process. Staff from the Onondaga County Clerk's Office, County Real Property Tax Services, City of Syracuse, Town of Manlius and the other Town Assessors have all been very cooperative throughout the project. Since this is the first business application developed for the Internet by ORPS, their cooperation has proved invaluable.

With the help and interest of the participating law firms, we feel confident that we can successfully pilot this project and make life a little easier for form preparers across the state. During 1998 we hope to expand this service to other counties in the state.

If you would like more information about this project, feel free to contact Tom Rutnik or Paul Szwedo at the NYS Office of Real Property Services. They can be reached at (518) 473-7222 or at their respective e-mail addresses: tom.rutnik@orps.state.ny.us and paul.szwedo@orps.state.ny.us.

# Notes from the Chair of the Real Property Law Committee of the Association of the Bar of the City of New York

**by Mindy H. Stern***
**New York, New York**

Ironic, isn't it? We live in an era of public lawyer-bashing, with disillusionment about the legal profession (among lawyers as well as the public) at an all-time high. Yet the public has never been more fascinated with the law, and with us. Books and movies about legal issues and lawyers—the good, the bad and the ugly—sell like hotcakes. Real-life trials on Court TV and fictitious depictions of the profession are among the most widely watched programs on television. We have never heard more "talking heads" and "TV lawyers" offering commentary on the latest trial or political crisis du jour. Wondering why we are so vilified on the one hand, and so fascinating on the other, caused me to think about why I decided to become a lawyer in the first place, and a real estate lawyer in particular. It's about time we reflected on the positive contributions made by real estate lawyers over the years, to the profession as well as the public.

Our practices aren't always high-profile, and don't always attract the news media. Let's face it: arguing the constitutionality of the death penalty is perceived to be a lot sexier than lobbying to repeal the real property transfer gains tax. Yet what we "dirt lawyers" do arguably affects a lot more people than the death penalty. With the exception, of course, of the homeless, most folks in this state rent or own a residence, and many also rent or own commercial space as part of their business activities. So let's reflect on how we make a difference in their lives.

For years the state, city and county bar associations have worked, often collaboratively, on projects designed to educate the public, improve the quality of legal services, bring sanity and practicality to state and local laws affecting real property, and provide legal services to the poor. Unsung heroes have prepared, then updated, model conveyance, leasing and financing documents, lectured colleagues and the public on important legal issues and changes in the laws, lobbied Congress and state and local legislatures to revise existing laws and participated in drafting new ones, formed mediation panels to provide an alternative to litigation, and organized pro bono legal assistance for first-time home buyers and residential tenants.

The camaraderie among real estate lawyers speaks volumes about who we are and how we practice law. The bar associations have done much to promote that. We meet often, share our views about real estate-related issues of public concern, circulate periodicals like this one and *Metes and Bounds*, published by the Association of the Bar of the City of New York, and invest a significant amount of time and energy educating one another through lectures and seminars about virtually every substantive area of our practice. So many colleagues of mine generously give their time to one another in this regard that it is sometimes hard to understand the level of dissatisfaction in the profession. We are not just legal wordsmiths and technicians. We bring value and a unique perspective to the table.

We do good work. We make a difference. It's time to remind ourselves, and our clients, who we are and what we do.

***The author is a member of Schoeman, Marsh & Updike, LLP, a New York City law firm.**

# Recent Amendments to New York Real Property Law: Acknowledgment Forms

In 1997, Governor Pataki signed into law legislation that amends the Real Property Law to create a uniform acknowledgment form.[1] New section 309-a of the New York Real Property Law provides for a single form of acknowledgment rather than the variety of forms presently in use. The acknowledgment is applicable to individuals, corporations, limited liability companies, partnerships, attorneys-in-fact or execution by another entity. A similar uniform form for proof of execution by a subscribing witness was also provided for in the legislation.

The Office of the Secretary of State, in a letter to New York State County Clerks dated February 5, 1998, has provided guidelines for the use of the new form for acknowledgment taken within and outside of New York State both prior to and subsequent to September 1, 1999.[2]

A further amendment to the law has been proposed that would expressly allow the use of the new acknowledgment form as an additional option for acknowledgments taken outside of New York State involving property located within the state.

Section 309-a of the law containing the new uniform acknowledgment reads as follows:

RPL § 309-a. Uniform forms of certificates of acknowledgment or proof.

1. The certificate of an acknowledgment, within this state, of a conveyance or other instrument in respect to real property situate in this state, by a person, must conform substantially with the following form, the blanks being properly filled:

State of New York )<br>
) ss.:<br>
County of ............. )

On the ...... day of ...... in the year ... before me, the undersigned, a Notary Public in and for said State, personally appeared ......, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

(Signature and office of individual taking acknowledgment.)

2. The certificate for a proof of execution by a subscribing witness, within this state, of a conveyance or other instrument made by any person in respect to real property situate in this state, must conform substantially with the following form, the blanks being properly filled:

State of New York )<br>
) ss.:<br>
County of ............. )

On the ...... day of ...... in the year ... before me, the undersigned, a Notary Public in and for said State, personally appeared ......, the subscribing witness to the foregoing instrument, with whom I am personally acquainted, who, being by me duly sworn, did depose and say that he/she/they reside(s) in ...... (if the place of residence is in a city, include the street and street number, if any, thereof); that he/she/they know(s) ...... to be the individual described in and who executed the foregoing instrument; that said subscribing witness was present and saw said ...... execute the same; and that said witness at the same time subscribed his/her/their name(s) as a witness thereto.

(Signature and office of individual taking proof.)

## Endnotes

1. Approved July 8, 1997. Chapter 179, Laws of 1997.
2. *See* next page for the revised opinion from the Office of Department of State, Division of Licensing Services.

# Opinion of the Department of State as Set Forth in a February 5, 1998 Letter to County Clerks

The following are guidelines for implementing the recently enacted Chapter 179 of the Laws of 1997:

### General

The new uniform acknowledgment (1) is for use in relation to a conveyance or other instrument with respect to real property located in New York State, and (2) can be used *only* for acknowledgments taken within the State of New York.

### Acknowledgments taken within NYS

**Until 8/31/99:**

For all, except corporations:

Use either the new uniform acknowledgment or any form that has been acceptable in the past under New York law.

For corporations:

Use either the new uniform acknowledgment or the § 309 form.

**On or after 9/1/99:**

For all, including coprorations:

Use the new uniform acknowledgment.

### Acknowledgements taken outside NYS

**Until 8/31/99:**

For all except corporations:

Use any form that has been acceptable in the past under New York law or a form that conforms to the law of the place where the acknowledgment is taken.

For corporations:

Use the §309 form or a form that conforms to the law of the place where the acknowledgment is taken.

**On or after 9/1/99:**

For all except corporations:

Use any form that has been acceptable in the past under New York law or a form that conforms to the law of the place where the acknowledgment is taken.

For corporations:

Use the § 309 form or a form that conforms to the law of the place where the acknowledgment is taken.

# BERGMAN ON MORTGAGE FORECLOSURES . . .

**Bruce J. Bergman, Esq.****
**East Meadow, New York**

## Making a Business Decision Not to Serve a Defendant in the Foreclosure Case

Foreclosure cases in New York have more than their share of dilemmas—to say nothing of annoyances, frustrations, obfuscation and, sadly, occasional pettifoggery. But perhaps the main internal quandary pits the need to speed through the case as quickly as possible against the imperative to prosecute the case correctly—that is, in accordance with all law and practice. The reason for the first objective is obvious. The second goal is only slightly more esoteric and has dual foundations. It needs to be done right to avoid successful attack from borrowers who too often pursue any and every path—available or otherwise—to derail the case. The second need for adherence to the rules is to assure clean title when the property is conveyed at the foreclosure sale, or thereafter.

So, the foreclosing lender dots every "i" and crosses every "t" consistent with all due speed and compliance with resistance from attack upon the case or the quality of title. Might there come a time, though, when something less than slavish conformity to the apparent rules is a good idea? Of course, the answer is yes, and the concept for consideration now relates to service of process upon typical defendants or parties possessing interests junior and subordinate to the mortgage being foreclosed. But first, a preamble.

The goal of a foreclosure is to cause the title to devolve through the case in the same legal condition it was when the mortgage was delivered. When the lender first approved the loan, it knew that its (then prospective) mortgage lien would be in a certain position of superiority, i.e., a first mortgage. (It could, of course, have been intended as a second or more junior mortgage.) The key point is that the lender knew that any other interests that would later attach to the property would be inferior, and subject to extinguishment in the event the mortgage needed to be foreclosed. So, if the borrower was able later to procure a *second* mortgage, our first mortgagee was not concerned about it. Likewise, it was of little relevance if the borrower suffered judgments and liens, entered into long-term leases at the property or even sold the premises. All these interests are inferior and will be wiped out in a foreclosure—if named and served in the foreclosure action. All this leads to the correct prevailing wisdom that a foreclosing plaintiff must always name, find and serve anyone with a subordinate interest or anyone against whom relief is sought.

We prefaced "wisdom" with the adjective "correct" because that underlying goal of the foreclosure earlier mentioned always remains. Does it matter if a necessary (or permissible) party is hard to locate? The answer is yes, and that is where the business decision of the title of this piece becomes pertinent. Some examples will be food for thought.

Mr. and Mrs. Jones are the mortgagors, owning the property as tenants by the entirety. Some years after delivery of the mortgage, Mrs. Jones dies—which means her spouse becomes the sole owner of the property—and Mr. Jones defaults on the mortgage. No will was ever probated for Mrs. Jones, nor was there any administration for her estate. A foreclosure is begun. Because Mrs. Jones was liable for the mortgage debt, her estate *could* be named as a defendant in the foreclosure to be responsible for any deficiency. (The estate is a *permissible* party, not a necessary party.) In the absence of an estate representative, however, the lender would be forced to pursue what in some counties in this state is a time-consuming and sometimes expensive procedure to procure a representative for the late Mrs. Jones.

Is this really necessary? If there is some equity in the property, it is not necessary—for the now apparent reason that there won't be a deficiency, so in turn the plaintiff need not look to the estate. Even if a shortfall *is* likely, if Mr. Jones has the financial wherewithal, suing the estate is unnecessary. And, even if there is a deficiency, but Mr. Jones does *not* have the money to pay, naming Mrs. Jones' estate is efficacious only if the estate has assets. With most middle-class people, though, when one spouse dies, everything is left to the other spouse—sometimes with bequests to children as well—so that the typical estate in these circumstances has no assets to pursue. In *this* scenario, then, trying to bring the estate of one deceased mortgagor into the case would cost more than it is worth. Someone would be wise to decide against service of process.

Here is a like situation. Mr. and Mrs. Smith are the mortgagors. Although the lender never releases them and does not formally recognize the new owners, a few years later the property is sold to Mr. and Mrs. Brown, who ultimately default on the mortgage. Mr. Smith moves to a rental apartment in the neighborhood, but Mrs. Smith, after a sojourn in the Amazon, decides that a more primitive lifestyle is appealing so she takes up residence there.

The Browns are, of course, necessary parties in the foreclosure because it is their title which must be divested. As to the Smiths, while they are not necessary, they are *permissible*—because they remain liable for the debt. Because Mr. Smith is easy to serve, he should be in the action, just in case. Assuming Mrs. Smith can be served (and we think she can be), the cost is $650 and it will probably add another two or three months duration (and thus interest accrual) to the case. Is it worth it? Time for another *business* decision—the same one as in the prior example. Will there be a deficiency? If so, might Mr. Jones be able to respond in damages? If not, does Mrs. Smith have any assets or did she give up her worldly goods as part of her return to nature? The facts are really not exaggerated, urging that the best approach just might be that wise business decision otherwise at variance with legal dictates.

There is yet another permutation. Plaintiff is foreclosing a $300,000 mortgage in New York. One judgment creditor of the borrower is a Houston, Texas partnership. Although the judgment creditor is certainly a necessary party (we don't want anything burdening the title when the foreclosure concludes) it turns out that the judgment is only for $250 and was docketed nine years ago (which means that unless renewed, it will expire as a lien in one year). Moreover, the partnership was dissolved some time ago, meaning that only service by publication is available.

What all this means should be apparent. Publication is expensive and time-consuming. Particularly downstate, it could cost thousands of dollars and add months to the case. Does it make economic sense to expend such a sum and incur delay merely to eliminate a small judgment that soon won't be a lien anyway? In the end, will any foreclosure sale purchaser refrain from bidding on a $300,000 mortgage because of a $250 judgment? (We needn't answer that one.) The problem to overcome is the view of sundry bureaucracies (i.e., the clients) that title must be clear—no exceptions.

If cases can be treated on an individual basis, *some* exceptions should be entertained. There may be eight million stories in the Naked City, but there are fewer variations in the mortgage foreclosure case.



****Mr. Bergman, author of the two-volume treatise, *Bergman on New York Mortgage Foreclosures*, Matthew Bender & Co., Inc. (rev. 1997), is a partner with Certilman Balin Adler & Hyman in East Meadow, New York, outside counsel to many major lenders and servicers and an Adjunct Associate Professor of Real Estate with New York University's Real Estate Institute where he teaches the mortgage foreclosure course. He is also a member of the U.S. Foreclosure Network, the American College of Real Estate Lawyers and on the faculty of the Mortgage Bankers Association of America School of Mortgage Banking.**

# SECTION COMMITTEES & CHAIRS

**The Real Property Law Section encourages members to participate in its programs and to volunteer to serve on the Committees listed below. Please contact the Section Officers or Committee Chairs for further information about the Committees.**

**Committee on Attorney Opinion Letters**
Dorothy H. Ferguson (Co-Chair)
700 Midtown Tower
Rochester, NY 14604
(716) 231-1422
Fax: (716) 232-2152

Laurence George Preble (Co-Chair)
Citicorp Center
153 East 53rd Street
New York, NY 10022
(212) 326-2231
Fax: (212) 326-2061

**Task Force on Commercial Foreclosure Reform**
Richard S. Fries (Chair)
380 Madison Avenue
New York, NY 10017
(212) 687-7000
Fax: (212) 682-5729

**Committee on Commercial Leasing**
Joshua Stein (Chair)
885 Third Avenue, Suite 1000
New York, NY 10022
(212) 906-1342
Fax: (212) 751-4864
E-Mail: joshua.stein@lw.com

**Committee on Computerization and Technology**
John E. Blyth (Co-Chair)
510 Wilder Bldg.
One East Main Street
Rochester, NY 14614
(716) 325-6700
Fax: (716) 325-1372
E-Mail: jeb@servtech.com

Terence L. Kelleher (Co-Chair)
188 Montague Street
Brooklyn, NY 11201
(718) 875-2021
Fax: (718) 802-9360

**Committee on Condemnation, Certiorari & Real Estate Taxation**
Jon N. Santemma (Co-Chair)
120 Mineola Boulevard, Suite 240
P.O. Box 1662
Mineola, NY 11501
(516) 294-8081
Fax: (516) 294-8302

Lawrence A. Zimmerman (Co-Chair)
20 Corporate Woods Boulevard
Albany, NY 12211
(518) 465-7563
Fax: (518) 465-7646

**Committee on Condominiums & Cooperatives**
Matthew J. Leeds (Co-Chair)
1290 Avenue of the Americas
New York, NY 10104
(212) 541-2290
Fax: (212) 541-4630

Joseph M. Walsh (Co-Chair)
42 Long Alley
Saratoga Springs, NY 12866
(518) 583-0171
Fax: (518) 583-1025

**Committee on Continuing Legal Education**
Harold A. Lubell (Co-Chair)
1290 Avenue of the Americas
New York, NY 10104
(212) 541-2130
Fax: (212) 541-4630

Patricia L. Yungbluth (Co-Chair)
1800 M&T Plaza
Buffalo, NY 14203
(716) 848-1345
Fax: (716) 849-0349

**Committee on Environmental Law**
Joel H. Sachs (Co-Chair)
1 North Broadway, Suite 716
White Plains, NY 10601
(914) 946-4777
Fax: (914) 946-6868

John M. Wilson, II (Co-Chair)
2400 Chase Square
Rochester, NY 14604
(716) 232-5300
Fax: (716) 232-3528

**Committee on Land Use & Planning**
Sybil H. Pollet (Co-Chair)
10 East 40th Street, Room 3110
New York, NY 10016
(212) 448-9200
Fax: (212) 448-1291

John J. Privitera (Co-Chair)
P.O. Box 459
Albany, NY 12201
(518) 447-3337
Fax: (518) 447-3368

**Committee on Legislation**
Robert W. Hoffman (Co-Chair)
1802 Eastern Parkway
Schenectady, NY 12309
(518) 370-4743
Fax: (518) 370-4870
E-Mail: rwhooplaw@juno.com

Flora Schnall (Co-Chair)
1211 Avenue of the Americas
New York, NY 10036
(212) 704-6000
Fax: (212) 704-6288

**Committee on Low Income & Affordable Housing**
Jerrold I. Hirschen (Co-Chair)
36 West 44th Street, Room 712
New York, NY 10036
(212) 819-1130
Fax: (212) 302-8536

Brian E. Lawlor (Co-Chair)
38-40 State Street
Albany, NY 12207
(518) 486-6337
Fax: (518) 473-8206
E-Mail: blawlor@compuserve.com

**Committee on Professionalism**
Peter V. Coffey (Chair)
224 State Street
P.O. Box 1092
Schenectady, NY 12301
(518) 370-4645
Fax: (518) 370-4979
E-Mail: pcoffey1@worldnet.att.net

**Committee on Publications**
William A. Colavito (Co-Chair)
1 Robin Hood Road
Bedford Hills, NY 10507
(914) 949-3250
Fax: (914) 946-7698

Harry G. Meyer (Co-Chair)
1800 M&T Plaza
Buffalo, NY 14203
(716) 856-4000
Fax: (716) 849-0349
E-Mail: hmeyer@hodgsonruss.com

Robert M. Zinman (Co-Chair)
St. John's University School of Law
Grand Central & Utopia Parkways
Jamaica, NY 11439
(718) 990-6646
Fax: (718) 990-6649
E-Mail:
rzinman@sjulawfac.stjohns.edu

**Committee on Public Relations**
Maureen Pilato Lamb (Co-Chair)
510 Wilder Building
One East Main Street
Rochester, NY 14614
(716) 325-6700
Fax: (716) 325-1372

Harold A. Lubell (Co-Chair)
1290 Avenue of the Americas
New York, NY 10104
(212) 541-2130
Fax: (212) 541-4630

**Committee on Real Estate Financing**
Steven D. Bloom (Co-Chair)
1290 Avenue of the Americas
New York, NY 10104
(212) 541-2020
Fax: (212) 541-4630
E-Mail: blooms@rspab.com

John K. Bouman (Co-Chair)
Clinton Square
P.O. Box 1051
Rochester, NY 14603
(716) 263-1322
Fax: (716) 263-1600

**Committee on Residential Landlord & Tenant**
Edward G. Baer (Co-Chair)
377 Broadway
New York, NY 10013
(212) 431-1300
Fax: (212) 941-9214

Hon. Peter M. Wendt (Co-Chair)
141 Livingston Street, Room 409
Brooklyn, NY 11201
(718) 643-8268

**Committee on Title & Transfer**
Melvyn Mitzner (Co-Chair)
655 Third Avenue
New York, NY 10017
(212) 949-0100
Fax: (212) 983-8430

Samuel O. Tilton (Co-Chair)
44 Exchange Street
Rochester, NY 14614
(716) 454-5370
Fax: (716) 454-3968

**Committee on Unlawful Practice of Law**
Robert L. Beebe (Co-Chair)
8 Greenfield Court
Clifton Park, NY 12065
(518) 371-2318
Fax: (518) 373-0030

William P. Tucker (Co-Chair)
100 Quentin Roosevelt Boulevard
Garden City, NY 11530
(516) 357-3732
Fax: (516) 357-3887
E-Mail: wtucker@culldyk.com

# ON THE DOCKET

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in Albany and surrounding areas dial (518) 463-3724
Internet Connection: http://www.nysba.org

New York attorneys admitted after October 1, 1997, are required to complete 32 hours of MCLE credit during the first two years **after** admission (16 hours each year). Of the 16 hours of credit, the rule requires 3 credit hours in ethics, 6 credit hours in skills and 7 credit hours in practice management and various areas of professional practice. Check each of our programs for approved NY MCLE credits.

**The Bankruptcy Code and New York Matrimonial Law—Anticipating and Dealing With Insolvency in a Divorce**
(Registration: 3:00 pm — Program: 3:30-7:30 pm)
*Fulfills NY MCLE requirements (4.5): 1.0 skills, 3.5 practice management & professional practice*

| | | |
|---|---|---|
| **(M)** | **May 18** | **Buffalo** |

**Motor Vehicle Accidents—1998: A Look at Liability Issues and Coverage Concerns**
*Fulfills NY MCLE requirements (7.0): 7.0 practice management & professional practice*

| | | |
|---|---|---|
| **(W)** | **May 13** | **Uniondale, LI** |
| **(W)** | **June 3** | **New York City** |
| **(T)** | **July 14** | **Poughkeepsie (video replay)** |
| **(T)** | **August 4** | **Binghamton/Vestal (video replay)** |

**Premises Liability—1998**
*Fulfills NY MCLE requirements (7.0): 0.5 ethics, 6.5 practice management & professional practice*

| | | |
|---|---|---|
| **(F)** | **May 15** | **Albany** |
| **(F)** | **May 29** | **Buffalo** |

**Keeping Pace: A Guide for the Up-To-Date Litigator**
*Fulfills NY MCLE requirements (7.0): 7.0 practice management & professional practice*

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|---|---|---|
| **(F)** | **May 15** | **Rochester** |

**United States Sentencing Guidelines**
*Fulfills NY MCLE requirements (6.5): 6.5 practice management & professional practice*

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|---|---|---|
| **(F)** | **May 15** | **Syracuse** |
| **(T)** | **May 19** | **Melville, LI** |
| **(F)** | **May 22** | **Albany** |

**Practical Evidence**
*Fulfills NY MCLE requirements (6.5): 6.5 practice management & professional practice*

| | | |
|---|---|---|
| **(F)** | **May 15** | **New York City** |
| **(T)** | **June 2** | **Melville, LI** |
| **(F)** | **June 5** | **Albany** |
| **(T)** | **July 14** | **Buffalo (video replay)** |
| **(T)** | **August 4** | **Poughkeepsie (video replay)** |
| **(F)** | **August 7** | **Canton (video replay)** |
| **(T)** | **August 18** | **Binghamton/Vestal (video replay)** |

**Practical Skills: Collections and the Enforcement of Money Judgments**
*Fulfills NY MCLE requirements (7.0): 1.0 ethics, 2.0 skills, 4.0 practice management & professional practice*

| | | |
|---|---|---|
| **(W)** | **May 13** | **Syracuse** |
| **(T)** | **May 19** | **New York City** |
| **(W)** | **May 20** | **Uniondale, LI** |

**Practical Skills: Handling A Support Proceeding Under Article 4 of the Family Court Act**
(Albany-Registration: 8:30 am Program: 9:00 am-12:00 noon. All other sites-Registration: 6:00 pm Program: 6:30-9:30 pm)
*Fulfills NY MCLE requirements (3.0): 1.5 skills, 1.5 practice management & professional practice*

| | | |
|---|---|---|
| **(Sat)** | **May 9** | **Albany** |
| **(Th)** | **May 28** | **Buffalo, Hauppauge, LI; New York City, Syracuse** |

**Lifetime (Inter Vivos) Trusts, Estate And Gift Taxation—New Legislation and New Estate Planning Opportunities in 1998 and Beyond**
(New York City: Registration-3:30 pm; Program-4:00-8:00 pm. All other sites: Registration- 8:30 am; Program-9:00am-1:00pm)
*Fulfills NY MCLE requirements (4.5): 1.5 skills, 3.0 practice management & professional practice*

| | | |
|---|---|---|
| **(Th)** | **May 14** | **Melville, LI** |
| **(F)** | **May 15** | **Binghamton & Buffalo** |
| **(Th)** | **May 21** | **New York City** |
| **(W)** | **May 27** | **Syracuse** |
| **(Th)** | **May 28** | **Albany & Tarrytown** |
| **(F)** | **May 29** | **Rochester** |

**Administrative Practice Before the NYS Department of Environmental Conservation**
*Fulfills NY MCLE requirements (7.5): 0.5 skills, 7.0 practice management & professional practice*

| | | |
|---|---|---|
| **(F)** | **May 15** | **Uniondale, LI** |
| **(Th)** | **May 21** | **Tarrytown** |
| **(W)** | **June 3** | **Albany** |
| **(Th)** | **June 4** | **Rochester** |

**Handling A Child Custody Case From Intake to Trial**
*Fulfills NY MCLE requirements (7.5): 0.5 ethics, 2.5 skills, 4.5 practice management & professional practice*

| | | |
|---|---|---|
| **(F)** | **May 15** | **Tarrytown** |
| **(F)** | **May 29** | **Melville, LI** |
| **(F)** | **June 12** | **New York City & Rochester** |
| **(F)** | **June 19** | **Albany** |
| **(T)** | **July 14** | **Binghamton/Vestal (video replay)** |
| **(F)** | **July 24** | **Watertown (video replay)** |
| **(T)** | **August 4** | **Buffalo (video replay)** |
| **(T)** | **August 18** | **Poughkeepsie (video replay)** |

**Health Care Fraud and Abuse: Legal Implications For Attorneys and Health Care Providers**
*Fulfills NY MCLE requirements (7.5): 7.5 practice management & professional practice*

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|---|---|---|
| **(T)** | **May 19** | **Albany** |
| **(W)** | **May 20** | **New York City** |
| **(T)** | **June 2** | **Rochester** |
| **(F)** | **June 5** | **Great Neck, LI** |

**Valuation of Real Property For Taxation Purposes: Administrative and Judicial Review of Property Tax Assessments**
*Fulfills NY MCLE requirements (7.0 LI & Ttwn): 3.0 skills, 4.0 practice managgement & professional practice (7.5 Syr. & Buff): 2.5 skills, 5.0 practice management & professional practice*

| | | |
|---|---|---|
| **(T)** | **May 19** | **Uniondale, LI** |
| **(W)** | **May 27** | **Tarrytown** |
| **(T)** | **June 9** | **Syracuse** |
| **(Th)** | **June 11** | **Buffalo** |

**Advertising and Promotion of FDA-Regulated Products: Off-Label, Internet, and Rx Drug TV Commercial Standards**
(Registration: 8:30 am; Program: 9:30 am - 1:00 pm)
*Fulfills NY MCLE requirements (3.0): 3.0 practice management & professional practice*

| | | |
|---|---|---|
| **(W)** | **June 3** | **New York City** |

**Substantive Challenges and Opportunities For Elder Law Practitioners**
*Fulfills NY MCLE requirements (6.0): (ALBANY-0.5 ethics, 0.5 skills, 5.0 practice management professional practice) (ALL OTHER SITES-0.5 ethics, 1.0 skills, 4.5 practice management & professional practice)*

| | | |
|---|---|---|
| **(Th)** | **June 4** | **Tarrytown** |
| **(M)** | **June 8** | **Melville, LI** |
| **(T)** | **June 9** | **Albany** |
| **(F)** | **June 12** | **Syracuse** |
| **(Th)** | **June 18** | **Rochester** |
| **(F)** | **June 19** | **New York City** |

**Selected Issues in International Litigation**
*Fulfills NY MCLE requirements (6.5): 6.5 practice management & professional practice*

| | | |
|---|---|---|
| **(F)** | **June 5** | **New York City** |

**Landlord and Tenant Practice in New York**
*Fulfills NY MCLE requirements: (7.0): 1.0 skills, 6.0 practice management & professional practice*

| | | |
|---|---|---|
| **(M)** | **June 8** | **New York City** |

Remember, you can now save up to 27% on your CLE seminar registration fees for the next two years when you enroll in the NYSBA's CLE Seminar Passbook Plan—Call 1-800-582-2452 for more information

## PUBLICATION OF ARTICLES

The *Journal* welcomes the submission of articles of timely interest to members of the Section in addition to comments and suggestions for future issues. Articles should be submitted to any one of the Co-editors whose names and addresses appear on this page.

For ease of publication, articles should be submitted on a 3-1/2" floppy disk, preferably in Microsoft Word or WordPerfect 5.1 and no longer than 8-10 pages. Please also include one laser-printed copy (dot matrix is not acceptable). The Editors request that all submissions for consideration to be published in this *Journal* use gender neutral terms where appropriate or, alternatively, the masculine and feminine forms may both be used. Please contact the Co-editors regarding further requirements for the submission of articles.

Unless stated to the contrary, all published articles represent the viewpoint of the author and should not be regarded as representing the views of the Editors, Board of Editors or the Section or substantive approval of the contents therein.




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