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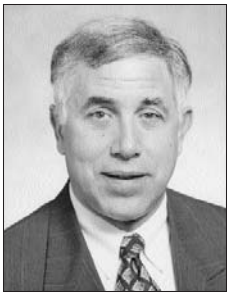
A Message from the Outgoing Section Chair



James Grossman

The end of my term as Chair of the Real Property Law Section has arrived and, as my predecessors have done, I can finally take the time to reflect on the past year, as well as the preceding ten years I have served on the Executive Committee. The undeniable conclusion I reach is that I have been truly fortunate both professionally and personally to have been involved with the Section governing body.

Remembering the first Executive Committee meeting I attended after then Chair John Blyth asked me to serve as Chair of the Condemnation, Certiorari & Real Estate Taxation Committee, I recall being astonished by the quality of intellect and creativity of thought exhibited by the other members of the Committee. I am confident that I was not the first attorney to feel that silence would be the best policy to follow. Gradually, over the course of time, my natural tendency to have an opinion on most things forced me to succumb to the urge to actively share my views with these talented attorneys. On occasion, I would submit, that I had a good idea, but more often than not, substantive issues of real estate law raised would simply elicit clear, although often complex, responses from the brilliant men and women who choose to serve the Section. What better way to grow as an attorney could exist? Yet, there are many in the profession who fail to recognize the benefits of participation in the Section and its activities.

Annual and summer meetings are an opportunity to attend informative seminars and to mingle with peers and share ideas regarding issues of common concern to

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A Message from the Incoming Section Chair

Melvyn Mitzner

At the outset I wish to express my gratitude to the outgoing Chair, Jim Grossman. Under Jim's leadership and take-charge style, the Real Property Law Section was able to persuade Governor Pataki to veto a very unfriendly, unfair disclosure bill. The Section was able to assist the governor's counsel and legislature in drafting a more evenhanded, fairer disclosure bill with a $500 buy-out provision. Special thanks to Karl Holtzschue, who led a task force in drafting and negotiating a new disclosure bill. Others who participated in this venture were Sam Tilton, Jim Grossman, Joshua Stein, Matthew Leeds and 1st Vice-Chair John Privitera, as well as yours truly.

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Inside

Photos from the Section's Summer Meeting in Saratoga Springs! See pp. 47-49.

A Message from the Incoming Section Chair *(continued from page 29)*

For the coming year, the goal of the Section is to expand our activity in needed legislation and legislative programs, as well as disseminate to our members the latest developments in real estate practice for real property attorneys. The area of legislation that needs to be promoted is the development of a uniform recording process for real property instruments on an electronic platform. The proposed legislation would mandate a uniform document format and a standard recording fee for each document submitted for recording. The legislation will help the state comply with the Uniform Electronic Transactions Act and the E-Sign Act. Cooperation will be necessary for us to work with the New York State Association of County Clerks, as well as the New York State Land Title Association and local bar associations. Other areas the Section will need to do legislative work are in the rewriting of the mortgage recording tax bill overhauling the statute and utilizing a Declaration of Preservation of mortgage recording tax in order to eliminate the proliferation of documents used in the mortgage recording process.

We will endeavor in the coming year to attract young attorneys in large, mid-size and small law firms to join the Real Property Law Section, and for the firms to allow their young attorneys to join. For too long, young real estate practitioners have been alienated from the Section because of their drive to succeed and their firm's and the real estate departments in their firms, detachment from the New York State Bar Association.

The Section will work closely with the New York State Bar Association staff in achieving our goals for the coming year. In particular, a major lobbying effort will be necessary to get the legislature to focus on the Marketable Recording Act, the change in the Rule Against Perpetuities to eliminate or limit its effects on real estate transactions. Major effort must be commenced to draft legislation that will enable developers to build rental units throughout the state.

We intend to take another look at our bylaws and to consider the effect of a three-area rotating system—Upstate; New York City, Long Island and Westchester; and the lower Hudson Valley—in electing officers. This may enable more New York suburban practitioners to be active in the Section and on the Executive Committee, as well as more being elected officers. Committees that will be more active this year will be: the Committee on Low Income & Affordable Housing, co-chaired by Jerry Hirschen and Brian Lawlor; the Task Force on Computerization & Technology, co-chaired by Michael Berey and Leonard Sienko; the Committee on Legislation, co-chaired by Bob Hoffman and Gary Litke; and the Committee on Membership, chaired by Richard Fries. The Committee on the Unlawful Practice of Law will now turn its attention to laymen practicing in the real property portion of the profession as lawyers. This is especially true in the areas of Certiorari, Real Estate Taxation and Landlord and Tenant proceedings.

The Executive Committee will attempt to deal with the issue of civility in law in the area of real property practice. The common courtesy we expect from others in a transaction should be utilized by us.

There is a need for inclusion of all types of diverse practicing real estate attorneys in the Section. We will attempt to get all real estate attorneys to join and be active in the Section. Richard Fries will be working to bring about inclusion. We invite all attorneys of every type to join us.

In closing, I would again like to thank Jim Grossman for his great leadership as the outgoing Chair, and hope the coming year will be equally successful. There is much on our plate for the new year.

Melvyn Mitzner

A Message from the Outgoing Section Chair *(continued from page 29)*

lawyers dealing with all aspects of real estate law. They also present the opportunity to meet individuals to network with and to help direct attorneys onto the correct track when novel questions arise.

Participation with the Section also allows attorneys to express their views, in a meaningful way, regarding proposed legislation and regulatory matters. The tumultuous debate the Executive Committee had over the proposed Property Condition Disclosure Act is just one example of how a group of attorneys can reach consensus to try to benefit both the legal community and the community at large.

It would be impossible to list all of the members of the Executive Committee who have helped me along the way, but I would be remiss if I failed to take this opportunity to thank John Blyth, Keith Osber, Mary McDonald, Lorraine Tharp, Maureen Lamb, Bill Colavito and John Hall for all their support over the years. Karl Holtzschue and John Privitera also have performed admirably in their work on the disclosure bill. I especially must mention the friendship and prodding of Matt Leeds and Mel Mitzner, who helped last year to be a memorable one for me.

I am confident that Mel will be an outstanding Chair this year and I wish him well. I especially encourage all members of the Section to participate actively in Section activities to help him and the Section fulfill its mission as a dynamic forum for discussion, advocacy and teaching.

James S. Grossman

Basics of Revised UCC Article 9

By Michael J. Berey

Article 9 of the Uniform Commercial Code concerns "Secured Transactions," the granting of interests in personal property to secure the repayment of indebtedness. The Article sets forth rules governing the attachment, perfection, and enforcement of a lien, or a "security interest," in personal property.

A security interest in personal property is realized only under Article 9, with certain exceptions. A lien on fixtures can be created either under Article 9 or by the grant of a lien in a real estate mortgage. Other specific state laws govern certificates of title to vehicles. Otherwise, a security interest in personal property falls under Article 9.

Personal property subject to an Article 9 security interest can include a debtor's rights in collateral such as accounts receivable, as-extracted collateral (mineral rights at the wellhead), chattel paper, consumer goods, deposit (bank) accounts, documents, equipment, farm products, fixtures, health care insurance receivables, instruments, inventory, investment property, letters of credit, manufactured homes, promissory notes, timber to be cut, and (as regards to everything else not specifically mentioned in Article 9) general intangibles. In New York, a security interest in a cooperative unit can only be perfected by filing under the UCC.

A security interest is said to "attach" to the collateral when it is enforceable against the debtor. A security interest becomes "perfected" when the "attached" security interest becomes enforceable against creditors and transferees of the debtor, and against a trustee in bankruptcy. Perfection occurs, depending on the type of collateral, when a financing statement is properly filed or there is possession or control over the collateral. The emphasis of this article is on the perfection of a security interest by filing.

The Uniform Commercial Code, including Article 9 on Secured Transactions, is national, model legislation drafted under the supervision of the National Conference of Commissioners on Uniform State Laws and adopted by the various states, with modifications, to provide rules for commercial transactions involving personal property.

"In anticipation of advances in technology, . . . [the draftspersons] . . . determined that the revision would facilitate the use of electronic commerce in the filing of financing statements and the searching of the records."

About ten years ago, a task force sponsored by the National Conference and the American Law Institute began an effort to revise Article 9. The intention of the draftspersons was to arrive at a scheme that would simplify the rules for the attachment, perfection, priority and enforcement of security interests. In anticipation of advances in technology, they also determined that the revision would facilitate the use of electronic commerce in the filing of financing statements and the searching of the records.

Revised Article 9, in substantially similar form, has been enacted in all 50 states, and in the District of Columbia and the United States Virgin Islands. It is also under consideration in Puerto Rico. In New York it was enacted as Chapter 84 of the Laws of 2001. The uniform effective date was July 1, 2001, excepting in Alabama, Florida and Mississippi, in which the effective date of the revision will be January 1, 2002, and in Connecticut, in which the effective date is October 1, 2001.

Revised Article 9 is expected to simplify the procedure to file financing statements, at least after completion of the five-year transitional period in which existing filings must be brought into compliance with the new rules. Until the end of that period, one may consider the changes to have made a confusing situation even more complicated. Some of the changes made by Revised Article 9 are set forth in the following discussion.

First, no signature is required for a financing statement. All that is necessary is that the related security (loan) agreement be "authenticated" which does not require a signature. For example, two parties negotiating a loan to be secured by personal property send e-mails to each other, hammering out the terms of the security agreement. Finally, both parties agree to the terms. If that "agreement," although electronically concluded, can be established, the agreement has been authenticated. Nothing further is required.

It does not follow, however, that a financing statement must be accepted by the filing office in electronic form. Although electronic searching and filing is authorized and even encouraged by Revised Article 9, the New York State Department of State's "Standard Forms and Procedures" for the filing of financing statements, set forth as Part 143 of Title 19 of the N.Y.C.R.R., presently authorize the acceptance for filing in that office of only written records. County filing offices in New York, in which financing statements as to real estate-related collateral are to be

filed, as noted below, may authorize filing "in any additional medium." The "UCC Rules" are on the Internet at http://www.dos.state.ny.us/corp/ucc9info.html.

Under Revised Article 9, the state in which a financing statement is to be filed is determined by the location of the debtor, not the location of the collateral, as is generally the case under former Article 9. If the debtor is an individual, the filing is to be made in the state of the debtor's principal residence. For debtors that are "Registered Organizations," such as corporations, limited partnerships, limited liability companies, and Massachusetts Business Trusts, filing is to take place in the state of the entity's organization. For businesses that are not Registered Organizations and have only one place of business, filing is required to be made in the state in which the business is conducted. If the company is not a Registered Organization and has more than one place of business, filing is required in the state in which the chief executive office is located. Financing statements against foreign entities are required, with certain exceptions, to be filed in the District of Columbia. The local use of a trade name or the fact that an entity has qualified to do business in another jurisdiction are irrelevant. Additional filings will be necessary during the period in which a financing statement is effective for it to remain in effect as to third parties if there is a change in the location of the debtor.

As a general rule, under Revised Article 9 financing statements are required to be filed in each state's Department of State; central filing replaces the need to additionally file in a local county clerk or register's office. The exceptions to this rule in New York are financing statements as to fixtures, timber to be cut and as-extracted collateral, and security interests in cooperative units. Financing statements for these real estate related types of collateral are to be filed in the local, county office in which a real estate mortgage would be recorded.

The filing officer's duties are to be ministerial. They are directed, in effect, to determine that only that the minimum requirements for completing the financing statement have been met and the filing fee has been paid. They are not to consider whether the information on the financing statement is correct, whether there is a valid security interest, or whether the filing is otherwise legally sufficient.

"Under Revised Article 9, the state in which a financing statement is to be filed is determined by the location of the debtor, not the location of the collateral, as is generally the case under former Article 9."

There are now national forms. There is a Financing Statement (UCC1), a Financing Statement Addendum (UCC1Ad), a Financing Statement Amendment (UCC3), a Financing Statement Amendment Addendum (UCC3Ad), a Correction Statement (UCC5), and an Information Request (UCC11). Form UCC3 can be filed as a termination, continuation, assignment or amendment. New York's Department of State has indicated that the forms in use prior to enactment of Revised Article 9 will not be accepted in this state.

With central filing and national forms, no longer will one have the pleasure of trying to locate for a client on a national transaction the forms of financing statements required in each applicable jurisdiction and then undertaking to file the financing statements in some of the approximately 4,300 filing offices under the prior Article 9, many with unique filing requirements.

These forms, with instructions, can be downloaded from the Department of State Web site at the Internet address above noted.

Filing offices in New York are generally required to maintain financing statements in their records on July 1, 2001 for seven years. For timber to be cut, as-extracted collateral, and fixtures covered by a financing statement, and for financing statements generally after the seven-year period expires, financing statements are to be maintained in the records of the filing office for one year after they have, or would have, absent the filing of a termination statement, lapsed by reason of the expiration of the period for which they are effective, usually five years, absent the filing of a continuation statement.

It is imperative that a search of a filing office's records for filed financing statements report as a matter of course even those financing statements which have apparently lapsed due to the passage of time and those which have been terminated by the filing of a termination statement. A financing statement may have been continued under Revised Article 9 by a filing in a new, different filing office, and there is no requirement that there be filed in the former filing office any notice that a related filing is being made in a different filing office. In addition, a debtor is authorized under Revised Article 9 to file a termination statement if the debtor believes that the filing is wrongful or is no longer in effect. It will be incumbent on a new secured party to investigate the authority of the debtor to file that termination. Only authorized filings are effective.

Thus far, one might conclude, this is pretty straightforward. Then come the rules that govern the transition to Revised Article 9. This is what makes it all very interesting!

Secured parties are required to comply with the new filing require-

ments of Revised Article 9 by June 30, 2006. They can do so by filing a new "initial" financing statement in the new filing office; by filing a "true" continuation statement, continuing a filing for five years, in the same office as the existing financing statement if no change in the location of the filing office is required under Revised Article 9; or by filing an "initial financing statement in lieu of a continuation statement" in the new filing office. An "in lieu" filing continues the effectiveness of a filing under former Article 9 in the "new" filing office for a period of five years from the date of the filing of the "in lieu" statement. An "in lieu" can be filed to continue multiple financing statements between the same debtor and secured party; it is effective even when it was filed prior to the effective date of Revised Article 9.

An amendment to a filing under the former Article 9 can be filed after the effective date of Revised Article 9 in a "new" filing office only after filing of an "in lieu" financing statement. A termination statement filed after the effective date can be filed in the prior filing office without first transitioning into the "new" filing office so long as an "in lieu" financing statement has not been filed. The new forms must be used.

Lastly, a financing statement filed under former Article 9 against an interest in a cooperative unit, which former Article 9 provided was to remain in effect until it was terminated, will only be effective until June 30, 2006 unless a Cooperative Addendum (UCC1CAD) is filed in connection with that financing statement. The Cooperative Addendum renders the financing statement effective for 50 years. For a new financing statement being filed against an interest in a cooperative unit, filing a Cooperative Addendum with the Financing Statement makes the filing effective for 50 years.

A financing statement as to a cooperative unit filed without an Addendum will be effective for only five years, subject to continuation, as is the case with most all other financing statements. This form, with instructions, can also be downloaded from the Department of State Web site.

Although the five-year transitional period will cause some degree of difficulty and legitimate concern, Revised Article 9 over the long term will function to streamline the method by which financing statements are filed and the process of searching for filed financing statements in New York State and nationally.

Michael J. Berey is Senior Underwriting Counsel and Senior Vice-President, First American Title Insurance Company of New York. Information on the Eagle 9™ UCC Insurance Policy offered by the First American Title Insurance Company of New York is on the Internet at http://www.firstam.com/eagle9/main.html.

The New Cooperative Apartment Contract of Sale

By David L. Berkey and Ronald S. Kahn

I. Adoption of the New Form of Cooperative Apartment Contract of Sale

On April 27, 2001 the Executive Committee of the New York State Bar Association's Real Property Law Section approved the new form of cooperative apartment contract of sale. This form was prepared by a Subcommittee of the Committee on Cooperatives and Condominiums, which was charged with the task of updating the October, 1989 form (Contract of Sale—Cooperative Apartment, Blumberg form M 123) that has been in use, unmodified, for 11 years. In addition to updating the prior form to reflect changes in the law, such as repeal of the Real Property Gains Tax and the adoption of new laws regarding disclosure and remediation of lead-based paint, the Subcommittee attempted to harmonize the cooperative apartment contract of sale with other forms in widespread use for the sale of single family homes (Residential Contract of Sale—Blumberg form A 125) and condominium units (Contract of Sale—Condominium Unit—Blumberg form M 146).

This latter goal proved more problematic, since the cooperative sale process involves greater interaction with a third party—the cooperative's board of directors—which has a broad right to approve or disapprove a transaction, than does the condominium unit sale (which usually only involves a condominium's waiver of a right of first refusal) or a single family house sale. In addition, the cooperative unit sale is in reality the sale of shares of stock in the apartment corporation and the assignment and assumption of an existing proprietary lease (or the issuance of a new proprietary lease to the purchaser). The cooperative contract of sale has to deal with personal property concepts, such as creation, enforcement and discharge of liens on personal property, as well as real property concepts used in connection with risk of loss rules and liquidated damages. The hybrid nature of cooperative apartment ownership required extensive study, discussion and revision of the old form contract.

"The end product, the new form of cooperative apartment sale contract, maintains the basic structure of the earlier form and strikes a balance between sellers' and buyers' needs."

The end product, the new form of cooperative apartment sale contract, maintains the basic structure of the earlier form and strikes a balance between sellers' and buyers' needs. It will be printed on 8½x11" paper by Julius Blumberg, Inc in the near future. Below, we discuss the major changes incorporated in the new contract. We also highlight areas where sellers' counsel and purchasers' counsel should pay particular attention to the specific needs of their clients. It is anticipated that the form will serve the needs of the vast majority of transactions. However, as every transaction is different, the form should be read carefully and modified by the addition of a rider if the facts of the transaction require a change from the form's basic terms.

II. Changes from the Earlier Form

Major changes to the contract are:

- The recognition of three "financing" situations (paragraph 1.20);
- Critical dates are measured from the contract "Delivery Date" (paragraph 1.22);
- The liquidated damages provisions are strengthened to counter judicial reluctance to allow a purchaser to "forfeit" his/her down payment when risks that the purchaser assumed prevent the purchaser from Closing (paragraphs 13 and 18.2);
- Some new Sellers' and Purchasers' representations have been added (paragraphs 4.1 and 4.2);
- The unconditional consent of the Apartment Corporation is now required (paragraph 6); and
- Removal of Judgments as well as Liens is required (paragraph 15).

A. New Definitions—"Personalty," "Included Interests" and "Contract Delivery Date"

The new contract attempts to define all terms and requires the parties to complete all information in paragraph 1, set forth on the first page. The old form identified personal property included in or excluded from the sale in paragraph 3. The new contract defines the term "Personalty" in paragraph 1.11 as the personal property set forth therein. Personal property excluded from the sale is identified in paragraph 1.12.

In paragraph 1.13, the new contract defines the new concept "Included Interests" as any storage unit, servant's room or parking space included in the sale, recognizing that the seller's interests in these items often are sold and transferred together with the shares and lease. The basic agreement to sell and pur-

chase the Shares, Lease, Personalty and any Included Interests is set forth in paragraph 2 of the new contract.

Another new definition is "Delivery Date" (paragraph 1.22). Now, important time periods, such as the time within which to obtain a mortgage commitment, are measured from the date when a fully executed counterpart of the contract is deemed given from Seller and received by Purchaser (or their respective attorneys, as the case may be) pursuant to the contract's notice provisions (paragraph 17.3). It is now incumbent upon the Seller (or his attorney) to send the contract by a measurable means such as courier (e.g., Federal Express) or tracked mail (e.g., Certified, Return Receipt Requested).

B. Financing the Transaction (With and Without a Financing Contingency Clause)

The financing provisions of the contract have been substantially modified, in recognition of the fact that in a tight real estate market many purchasers who seek financing do not insist upon a financing contingency clause in the contract. Although the transaction has no financing contingency, it is not an "all cash" deal because the purchaser often cannot close unless the loan proceeds are received. Because the purchaser is seeking financing, the cooperative corporation usually will not review the purchase application until a loan commitment letter is received and it will not approve the transaction if the financing guidelines set forth by the cooperative are not complied with.

The new contract, at paragraph 1.20, sets forth three types of financing situations (paragraph 1.20.1—financing allowed and contract has financing contingency; paragraph 1.20.2—financing allowed but purchaser is at risk since contract has no financing contingency, and paragraph 1.20.3—no financing permitted) and requires the parties to delete the two provisions that do not apply. The purchaser's obligations (set forth in the Financing Provisions of paragraph 18) to apply diligently and in good faith for his loan exist whether or not the contract is contingent upon financing.

"The financing provisions of the contract have been substantially modified, in recognition of the fact that in a tight real estate market many purchasers who seek financing do not insist upon a financing contingency clause in the contract."

The "Loan Commitment Date" is defined in paragraph 1.21 as an agreed number of days after the "Delivery Date," which is defined in paragraph 1.22 as the date when a fully executed counterpart of the contract is deemed given to and received by the purchaser in accordance with the delivery provisions of paragraph 17.3 (on the day delivered by hand; on the business day following the date sent by overnight delivery; on the 5th business day following the date sent by certified or registered mail; or as to the contract only, on the 3rd business day following the date of ordinary mailing).

The financing provisions have been modernized. The definition of "Institutional Lender" has been broadened so that a purchaser may apply for a loan to a mortgage banker (new contract, paragraph 18.1.1). The committee determined not to include mortgage brokers in the definition of Institutional Lender, however, the contract recognizes that purchasers usually use a mortgage broker to submit their applications to permitted Institutional Lenders (new contract, paragraph 18.2).

The definition of "Loan Commitment Letter" (new contract, paragraph 18.1.2) includes a commitment letter that is conditioned on a satisfactory appraisal once that condition is met, and includes a commitment letter that is conditioned on factors personal to the purchaser, such as the sale of his current home. A purchaser that received such a loan commitment letter accepts the risk and cannot cancel the contract if such a personal condition is not met. Purchaser's counsel would be wise to review this provision carefully with the purchaser. The purchaser is required to provide the seller with a copy of the loan commitment letter promptly after receipt (new contract, paragraph 18.2.4). If purchaser obtains a written denial of the loan application, then a copy must be provided to seller together with purchaser's notice of cancellation of the contract (new contract, paragraph 18.3.3).

A purchaser is only obligated to apply to one Institutional Lender (new contract, paragraph 18.2.5). If the contract has a financing contingency, the purchaser may cancel the contract if a lender requirement (other than one personal to purchaser) is not met, such as the failure of the cooperative corporation to provide the lender with a recognition agreement (new contract, paragraph 18.3.1.3).

The purchaser should obtain a loan commitment that expires at least 30 business days after the scheduled Closing date, since the purchaser may not object to an adjournment of the scheduled Closing date of up to 30 business days on the ground that the loan commitment letter will expire during that time period (new contract, paragraph 18.3.1.4). If the seller or the corporation attempts to adjourn the Closing for more than 30 business days and the purchaser cannot obtain an extension of the loan commitment letter without paying additional fees, then the purchaser may

cancel the contract and recover nonrefundable financing and inspection expenses, lien and title search expenses and his down payment from the seller (new contract, paragraphs 18.3.1.6 and 16.3). The purchaser is not permitted to cancel the contract if the Institutional Lender fails to fund the loan because of a requirement personal to purchaser or due to the expiration of the loan commitment letter less than 30 business days from the scheduled Closing date (new contract, paragraph 18.3.7). This provision was added to the new contract to impress upon the courts that the purchaser, not the seller, bears the risk that the lender will not fund the loan due to a personal issue pertaining to the purchaser (i.e., loss of job, failure to sell present residence).

C. Use of IOLA Accounts; Escrow Notices and Liability for Loss of Escrow

Paragraph 1.24 provides for the contract deposit to be held in an IOLA account, if the deposit is not to bear interest, and in a non-IOLA account if interest is to be earned on the deposit. The party receiving the interest is to pay any income tax due thereon.

The escrow provisions, found in paragraph 27, have been modified slightly to require the escrowee to give prompt notice to a party of any demand received from the other party; to permit the escrowee to act pursuant to directions contained in a joint notice of the parties; to release the escrowee of all obligations and liabilities upon disposition of the contract deposit in accordance with the escrow provisions; and to provide that the escrowee is not liable for actions unless made in bad faith or in willful disregard of the contract or that constitute gross negligence. If the contract deposit is lost or stolen, the party whose attorney is escrowee shall also be liable for the loss. If the escrowee is the seller's attorney, the purchaser is to be credited with the amount of the contract deposit at Closing.

D. Seller and Purchaser Representations

The seller's representations have been changed in some respects. First, seller represents that seller is sole owner of the Shares, Lease, Personalty and Included Interests, with full right and power to assign them (new contract, paragraph 4.1.1). The prior form contained no representations regarding ownership of personal property (other than the shares and lease) or other interests being transferred by the seller. The purchaser takes the unit, including the Personalty and Included Interests, "as is," as of the date of the contract. At Closing, the appliances are to be in working order and required smoke detectors are to be installed and working (new contract, paragraph 7.1).

The former seller's representation (old form, paragraph 4.1.6) that seller was unaware of any maintenance increase or assessment that was "under consideration" by the Board of Directors of the Corporation has been deleted. It was considered to be too ambiguous a concept upon which to impose liability on a seller. The seller must only disclose an actual increase in maintenance or the adoption of an assessment of which he has actual knowledge or has received written notice (new contract, paragraph 4.1.5).

The former seller's representation (old form, paragraph 4.1.9) that he has not made any alterations or additions to the unit, without any required consent of the Corporation, has been modified to provide that seller has not made any "material" alterations or additions to the unit without such required consent. In addition, seller represents that to seller's actual knowledge any material alterations or additions have been made in accordance with applicable law (new contract, paragraph 4.1.6). These representations do not survive the Closing. A careful inspection of the seller's apartment should disclose if any material alterations were performed. The purchaser would then be on notice to inquire of the managing agent or the cooperative corporation if the seller obtained any required consent or incurred new obligations that will be passed on to the purchaser (new contract, paragraph 4.1.7).

Due to the amendments to Article 16 of the New York City Civil Court Act, permitting any city marshal to enforce a money judgment obtained against an individual by levying upon an execution, it was determined that sellers should represent and covenant that at Closing, there would be no judgments outstanding against seller which have not been bonded against collection out of the Unit. This language is set forth in the new contract, at paragraph 4.1.9.1. The old form merely represented that there were no liens outstanding against the Shares and Lease, other than the Corporation's lien for unpaid maintenance. The large number of city marshals and lack of central recordkeeping makes it almost impossible to determine if a money judgment against a seller or purchaser has been converted into a lien against the seller's or purchaser's personal property.

The seller's representation that there are no agreements affecting the use and occupancy of the unit (old form, paragraph 4.1.10) has been enlarged (new contract, 4.1.7) to encompass any agreement which would be binding upon or adversely affect the purchaser after Closing, such as a sublease or an alteration agreement.

The purchaser's representations in paragraph 4.2 have been expanded to include a representation that purchaser is not and for the past seven years has not been the subject of a bankruptcy proceeding (4.2.2); that if no financing is permitted,

then purchaser will not apply for financing (4.2.3); that purchaser is over 18 years of age and is purchasing for purchaser's own account (4.2.4); and that as of the date of contract there are not and as of the date of Closing there shall not be any unpaid tax liens or monetary judgments (4.2.6).

The Committee received several suggestions for additional seller's and purchaser's representations and covenants that are not contained in the new contract form, since they expand upon the usual representations found in such contracts. These are set forth as suggested rider paragraphs for use if circumstances warrant, but are not a part of the approved form. Several deal with the purchaser's income and assets and were designed to determine prior to contract signing if the purchaser would qualify for approval by the cooperative corporation. A representation that seller has no knowledge of a condition which constitutes a default of, or might lead to a default notice of, seller's proprietary lease obligations is also set forth as a suggested rider paragraph, but is not included as a part of the form.

E. Due Diligence

The checklist of corporate documents required to be reviewed by purchaser's attorney as part of the pre-contract due diligence review (new contract, paragraph 5) has been expanded to include the minutes of shareholders' and directors' meetings. The assumption of risk language excludes items represented in the contract by seller.

F. The Approval Process; Unconditional Consent Required

The contract now clearly states that the sale is subject to the "unconditional" consent of the Corporation (new contract, paragraph 6.1). This word was inserted to clarify that cooperative corporations that issue a "conditional" approval (i.e., conditioned upon the posting of a personal guaranty or an escrow deposit) do not provide the unqualified consent necessary to compel a purchaser either to close or to forfeit the contract deposit.

The purchaser must pay the fees imposed on a purchaser in connection with the application review process (new contract, paragraph 6.2.1). All paperwork must be submitted within ten business days of the Delivery Date or, if any financing is permitted and if the cooperative corporation requires review of the loan commitment letter, then within three business days after the earlier of the Loan Commitment Date or the date of receipt of the Loan Commitment Letter. The contract now provides (new contract, paragraph 6.3) that if consent is refused, either party may cancel the contract by notice.

G. Risk of Loss Rules

The risk of loss provisions (old form, paragraph 8) have been materially altered to incorporate the provisions of General Obligations Law § 5-1311, as modified by the contract. (Note that the house contract of sale does not contain a risk of loss provision, and GOL § 5-1311 applies to such sales. The condominium unit contract of sale has a detailed risk of loss clause that is likely to be modified to follow the new cooperative form.) For risk of loss purposes, the definition of Unit includes "built-in Personalty" and "material" destruction occurs if the reasonably estimated cost to restore the Unit shall exceed 5% of the Purchase Price. Provisions are made for "Loss Notices," abatement of the purchase price and assignment of seller's rights to purchaser with regard to a loss that the Corporation may be obligated to repair or restore.

H. Closing Documents; Lost Proprietary Leases and Stock Certificates; Taxes and Fees

The new contract requires the seller to deliver to the purchaser seller's stock certificate, duly endorsed for transfer, a duly executed stock power, seller's counterpart original lease and "all assignments and assumptions in the chain of title and a duly executed assignment thereof to purchaser in the form required by the Corporation" (new contract, paragraphs 10.1.1 and 10.1.2). These documents are required if a new lease is not to be provided to the purchaser, as they are required to establish the chain of title.

In the event the seller cannot locate such documents, then the seller is obligated to provide all documents and payments required by the Corporation for the issuance of a new certificate for the shares or a new lease (new contract, paragraph 10.1.7). In many instances a seller (or his bank, which took possession of the original stock certificate and lease) cannot locate the documents. The seller is forewarned that cooperatives are now imposing rigorous requirements for issuance of replacement stock certificates and leases, including the posting of a bond to protect the cooperative against third-party claims of fraud.

If requested, the seller is obligated to provide the purchaser with an assignment of his interest in any Personalty and Included Interests (new contract, paragraph 10.1.5).

The contract has been clarified to state that the purchaser is not required to close unless a new stock certificate is issued to the purchaser by the corporation and a written statement provided which indicates the last date to which maintenance and any assessments have been paid (new contract, paragraph 10.4.2). The purchaser also is not obligated to close if there is a tax certificate/lien sale, in rem or foreclosure action pending against the cooperative corporation (new contract, paragraph 26.3).

Purchaser is required to pay any "mansion tax" or similar imposition if imposed by statute on the purchaser (new contract, paragraph 11.1.2.2). A catch-all provision (new contract,

paragraph 11.3) has been added that requires any fee imposed by the corporation and not specified in the contract to be paid by the party upon whom the fee is expressly imposed by the corporation, and if no party is specified by the corporation, then such fee is payable by the seller. A six-month limitation period is established for correcting computational errors or omissions (new contract, paragraph 11.7).

I. Remedies Upon Default

The default and remedies section of the contract has been changed to specify that principles of real property law shall apply to the liquidated damages agreement of the parties (new contract, paragraph 13.1). This language was inserted in response to recent case law that ignored the liquidated damages language of the old form and applied personal property concepts to determine whether there should be a forfeiture of the contract deposit in situations where the amount of the deposit exceeded the seller's actual damages.

The indemnification language of paragraph 13.3 has been expanded to include indemnification for reasonable attorneys' fees and expenses incurred for enforcement or collection of a judgment obtained under the indemnity.

J. Removal of Liens and Judgments

The new contract deals at greater length with removal of "Liens" (defined in paragraph 4.1.9.2 as liens, encumbrances and adverse interests affecting the Shares, Lease, Personalty and any Included Interests) and "Judgments" (defined in paragraph 4.1.9.1 as judgments outstanding against the seller which have not been bonded against collection out of the Unit). The procedure for giving notice of Liens and Judgments to seller and for seller to remove Liens and Judgments is set forth in paragraph 15 of the new contract. Purchaser may adjourn the Closing for periods of time up to 60 days, in order to remove Liens and Judgments affecting the Shares, Lease, Personalty or Included Interests (new contract, paragraph 16). If these adjournments affect the ability of the purchaser to obtain his loan, then they may trigger purchaser's right to cancel the contract, pursuant to new contract paragraph 18.3.1.4.

K. Contract Delivery and Notice Provisions

Paragraph 17.2 of the new contract recognizes that many contracts are delivered by ordinary mail, and deems the contract given and received on the third business day following the date of ordinary mailing (new contract, paragraph 17.3.4). If the contract is sent by certified or registered mail, it is deemed received on the fifth business day following the date sent by certified or registered mail (new contract, paragraph 17.3.3).

Seller may direct that the balance of the purchase price be paid to persons other than seller on "reasonable" notice to purchaser (new contract, paragraph 2.2.2), rather than on at least "3 business days' notice" as was provided in the old form.

The new contract only provides for notice by confirmed facsimile in limited instances (seller's direction how the Balance is to be paid, pursuant to paragraph 2.2.2 and seller's notice that a check has failed collection pursuant to paragraph 13.4) and does not provide for notice by electronic mail, as proof of delivery is more difficult to obtain for such methods of delivery.

The parties' attorneys are now authorized to give and to receive notices (new contract, paragraph 17.5). The old form only allowed the attorneys to give notices.

L. Gains Tax References Deleted and FIRPTA Provisions Expanded

References to Gains Tax have been removed from the old form, paragraph 26. The language dealing with FIRPTA now appears in paragraph 25 of the new contract, and has been expanded to permit delivery at Closing of a certification of non-foreign status or a withholding certificate from the Internal Revenue Service. If these documents are not delivered, then purchaser is obligated to withhold from the balance and to remit to the IRS, the amount required by law (usually 10% of the purchase price for transactions in excess of $300,000).

M. Lead Based Paint Disclosure

Paragraph 30 of the new contract provides for the completion and attachment to the contract of the fully executed Disclosure of Information on Lead Based Paint and/or Lead-Based Paint Hazards form.

We expect that the new contract will supplant the old form in the near future and hope that it will be well received by the bar.

David L. Berkey is Co-Chair of the Real Property Law Section's Committee on Condominiums and Cooperatives and a member of the Subcommittee that prepared the new form of cooperative contract of sale. Ronald S. Kahn was the Chairman of the Subcommittee. **The authors wish to acknowledge the assistance of Subcommittee members Lilian Chance, Rudolph DeWinter, Mark Hamburgh, Douglas Heller, Karl Holtzschue, Alan Kazlow, Richard Singer and Lewis Taishoff in the preparation of the new contract of sale form. Many of the Subcommittee members participated in revising the original cooperative apartment contract of sale form in 1988.**

CONTRACT OF SALE

This Contract is made as of between the "Seller" and the "Purchaser" identified below.

1 CERTAIN DEFINITIONS AND INFORMATION

1.1 The "Parties" are:

1.1.1 "Seller":

Prior names used by Seller:

Address:

S.S. No.:

1.1.2 "Purchaser":

Address:

S.S. No.:

1.2 The "Attorneys" are:

1.2.1 "Seller's Attorney"

Address:

Telephone:

Fax:

1.2.2 "Purchaser's Attorney"

Address:

Telephone:

Fax:

1.3 The "Escrowee" is the *[Seller's] [Purchaser's]* Attorney.

1.4 The Managing Agent is:

Address:

Telephone:

Fax:

1.5 The real estate "Broker(s)" (see ¶12) is/are:

Company Name:

1.6 The name of the cooperative housing corporation ("Corporation") is:

1.7 The "Unit" number is:

1.8 The Unit is located in "Premises" known as:

1.9 The "Shares" are the shares of the Corporation allocated to the Unit.

1.10 The "Lease" is the Corporation's proprietary lease or occupancy agreement for the Unit, given by the Corporation which expires on___ .

1.11 "Personalty" is the following personal property, to the extent existing in the Unit on the date hereof: the refrigerators, freezers, ranges, ovens, built-in microwave ovens, dishwashers, garbage disposal units, cabinets and counters, lighting fixtures, chandeliers, wall-to-wall carpeting, plumbing and heating fixtures, central air-conditioning and/or window or sleeve units, washing machines, dryers, screens and storm windows, window treatments, switch plates, door hardware, mirrors, built-ins not excluded in ¶1.12 and

1.12 Specifically excluded from this sale is all personal property not included in ¶1.11 and:

1.13 The sale *[does] [does not]* include Seller's interest in *[Storage]/[Servant's Rm]/[Parking Space]* ("Included Interests")

1.14 The "Closing" is the transfer of ownership of the Shares and Lease.

1.15 The date scheduled for Closing is ("Scheduled Closing Date") at M (See ¶¶ 9 and 10)

1.16 The "Purchase Price" is: $

1.16.1 The "Contract Deposit" is: $

1.16.2 The "Balance" of the Purchase Price due at Closing is: $ (See ¶2.2.2)

1.17 The monthly "Maintenance" charge is $ (See ¶4)

1.18 The "Assessment", if any, payable to the Corporation, at the date of this Contract is $__, payable as follows:

1.19 *[Seller] [Purchaser]* shall pay the Corporation's flip tax, transfer fee (apart from the transfer agent fee) and/or waiver of option fee ("Flip Tax"), if any.

1.20 Financing Options *(Delete two of the following ¶¶1.20.1, 1.20.2 or 1.20.3*

1.20.1 Purchaser may apply for financing in connection with this sale and Purchaser's obligation to purchase under this Contract is contingent upon issuance of a Loan Commitment Letter by the Loan Commitment Date (¶18.1.2).

1.20.2 Purchaser may apply for financing in connection with this sale but Purchaser's obligation to purchase under this Contract is not contingent upon issuance of a Loan Commitment Letter.

1.20.3 Purchaser shall not apply for financing in connection with this sale.

1.21 If ¶1.20.1 or 1.20.2 applies, the "Financing Terms" for ¶18 are: a loan of $_____ for a term of __ years or such lesser amount or shorter term as applied for or acceptable to Purchaser; and the "Loan Commitment Date" for ¶18 is __ calendar days after the Delivery Date.

1.22 The "Delivery Date" of this Contract is the date on which a fully executed counterpart of this Contract is deemed given to and received by Purchaser or Purchaser's Attorney as provided in ¶17.3.

1.23 All "Proposed Occupants" of the Unit are:

1.23.1 persons and relationship to Purchaser:

1.23.2 pets:

1.24 The Contract Deposit shall be held in [a non-] [an] IOLA escrow account. If the account is a non-IOLA account then interest shall be paid to the Party entitled to the Contract Deposit. The Party receiving the interest shall pay any income taxes thereon. The escrow account shall be a segregated bank account at

Depository:

Address:

(See ¶27)

1.25 This Contract is *[not]* continued on attached rider(s).

2 AGREEMENT TO SELL AND PURCHASE; PURCHASE PRICE; ESCROW

2.1 Seller agrees to sell to Purchaser, and Purchaser agrees to purchase from Seller, the Seller's Shares, Lease, Personalty and any Included Interests and all other items included in this sale, for the Purchase Price and upon the terms and conditions set forth in this Contract.

2.2 The Purchase Price is payable to Seller by Purchaser as follows:

2.2.1 the Contract Deposit at the time of signing this Contract, by Purchaser's good check to the order of Escrowee; and

2.2.2 the Balance at Closing, only by cashier's or official bank check or certified check of Purchaser payable to the direct order of Seller. The check(s) shall be drawn on and payable by a branch of a commercial or savings bank, savings and loan association or trust company located in the same City or County as the Unit. Seller may direct, on reasonable Notice (defined in ¶17) prior to Closing, that all or a portion of the Balance shall be made payable to persons other than Seller (see ¶17.7).

3 PERSONALTY

3.1 Subject to any rights of the Corporation or any holder of a mortgage to which the Lease is subordinate, this sale includes all of the Seller's interest, if any, in the Personalty and the Included Interests.

3.2 No consideration is being paid for the Personalty or for the Included Interests; nothing shall be sold to Purchaser if the Closing does not occur.

3.3 Prior to Closing, Seller shall remove from the Unit all the furniture, furnishings and other property not included in this sale, and repair any damage caused by such removal.

4 REPRESENTATIONS AND COVENANTS

4.1 Subject to any matter affecting title to the Premises (as to which Seller makes no representations or covenants), Seller represents and covenants that:

4.1.1 Seller is, and shall at Closing be, the sole owner of the Shares, Lease, Personalty and Included Interests, with the full right, power and authority to sell and assign them. Seller shall make timely provision to satisfy existing security interest(s) in the Shares and Lease and have the same delivered at Closing (See ¶10.1);

4.1.2 the Shares were duly issued, fully paid for and are non-assessable;

4.1.3 the Lease is, and will at Closing be, in full force and effect and no notice of default under the Lease is now or will at Closing be in effect;

4.1.4 the Maintenance and Assessments payable as of the date hereof are as specified in ¶1.17 and 1.18;

4.1.5 as of this date, Seller neither has actual knowledge nor has received any written notice of any increase in Maintenance or any Assessment which has been adopted by the Board of Directors of the Corporation and is not reflected in the amounts set forth in ¶1.17 and 1.18;

4.1.6 Seller has not made any material alterations or additions to the Unit without any required consent of the Corporation or, to Seller's actual knowledge, without compliance with all applicable law. This provision shall not survive Closing.

4.1.7 Seller has not entered into, shall not enter into, and has no actual knowledge of any agreement (other than the Lease) affecting title to the Unit or its use and/or occupancy after Closing, or which would be binding on or adversely affect Purchaser after Closing (e.g. a sublease or alteration agreement);

4.1.8 Seller has been known by no other name for the past 10 years except as set forth in ¶1.1.1.

4.1.9 at Closing in accordance with ¶15.2:

4.1.9.1 there shall be no judgments outstanding against Seller which have not been bonded against collection out of the Unit ("Judgments");

4.1.9.2 the Shares, Lease, Personalty and any Included Interests shall be free and clear of liens (other than the Corporation's general lien on the Shares for which no monies shall be owed), encumbrances and adverse interests ("Liens");

4.1.9.3 all sums due to the Corporation shall be fully paid by Seller to the end of the payment period immediately preceding the date of Closing;

4.1.9.4 Seller shall not be indebted for labor or material which might give rise to the filing of a notice of mechanic's lien against the Unit or the Premises; and

4.1.9.5 no violations shall be of record which the owner of the Shares and Lease would be obligated to remedy under the Lease.

4.2 Purchaser represents and covenants that:

4.2.1 Purchaser is acquiring the Shares and Lease for residential occupancy of the Unit solely by the Proposed Occupants identified in ¶1.23

4.2.2 Purchaser is not, and within the past 7 years has not been, the subject of a bankruptcy proceeding;

4.2.3 if ¶1.20.3 applies, Purchaser shall not apply for financing in connection with this purchase.

4.2.4 Each individual comprising Purchaser is over the age of 18 and is purchasing for Purchaser's own account (beneficial and of record);

4.2.5 Purchaser shall not make any representations to the Corporation contrary to the foregoing and shall provide all documents in support thereof required by the Corporation in connection with Purchaser's application for approval of this transaction; and

4.2.6 there are not now and shall not be at Closing any unpaid tax liens or monetary judgments against Purchaser.

4.3 Each Party covenants that its representations and covenants contained in ¶4 shall be true and complete at Closing and, except for ¶4.1.6, shall survive Closing but any action based thereon must be instituted within one year after Closing.

5 CORPORATE DOCUMENTS

Purchaser has examined and is satisfied with, or (except as to any matter represented in this Contract by Seller) accepts and assumes the risk of not having examined, the Lease, the Corporation's Certificate of Incorporation, By-laws, House Rules, minutes of shareholders' and directors' meetings, most recent audited financial statement and most recent statement of tax deductions available to the Corporation's shareholders under Internal Revenue Code ("IRC") §216 (or any successor statute).

6 REQUIRED CONSENT AND REFERENCES

6.1 This sale is subject to the unconditional consent of the Corporation.

6.2 Purchaser shall in good faith:

6.2.1 submit to the Corporation or the Managing Agent an application with respect to this sale on the form required by the Corporation, containing such data and together with such documents as the Corporation requires, and pay the applicable fees and charges that the Corporation imposes upon Purchaser. All of the foregoing shall be submitted within 10 business days after the Delivery Date, or, if ¶¶ 1.20.1 or 1.20.2 applies and the Loan Commitment Letter is required by the Corporation, within 3 business days after the earlier of (i) the Loan Commitment Date (defined in ¶1.21) or (ii) the date of receipt of the Loan Commitment Letter (defined in

¶18.1.2);

6.2.2 attend (and cause any Proposed Occupant to attend) one or more personal interviews, as requested by the Corporation; and

6.2.3 promptly submit to the Corporation such further references, data and documents reasonably requested by the Corporation.

6.3 Either Party, after learning of the Corporation's decision, shall promptly advise the other Party thereof. If the Corporation has not made a decision on or before the Scheduled Closing Date, the Closing shall be adjourned for 30 business days for the purpose of obtaining such consent. If such consent is not given by such adjourned date, either Party may cancel this Contract by Notice, provided that the Corporation's consent is not issued before such Notice of cancellation is given. If such consent is refused at any time, either Party may cancel this Contract by Notice. In the event of cancellation pursuant to this ¶6.3, the Escrowee shall refund the Contract Deposit to Purchaser.

6.4 If such consent is refused, or not given, due to Purchaser's bad faith conduct, Purchaser shall be in default and ¶13.1 shall govern.

7 CONDITION OF UNIT AND PERSONALTY; POSSESSION

7.1 Seller makes no representation as to the physical condition or state of repair of the Unit, the Personalty, the Included Interests or the Premises. Purchaser has inspected or waived inspection of the Unit, the Personalty and the Included Interests and shall take the same "as is", as of the date of this Contract, except for reasonable wear and tear. However, at the time of Closing, the appliances shall be in working order and required smoke detector(s) shall be installed and operable.

7.2 At Closing, Seller shall deliver possession of the Unit, Personalty and Included Interests in the condition required by ¶7.1, broom-clean, vacant and free of all occupants and rights of possession.

8 RISK OF LOSS

8.1 The provisions of General Obligations Law Section 5-1311, as modified herein, shall apply to this transaction as if it were a sale of realty. For purposes of this paragraph, the term "Unit" includes built-in Personalty.

8.2 Destruction shall be deemed "material" under GOL 5-1311, if the reasonably estimated cost to restore the Unit shall exceed 5% of the Purchase Price.

8.3 In the event of any destruction of the Unit or the Premises, when neither legal title nor the possession of the Unit has been transferred to Purchaser, Seller shall give Notice of the loss to Purchaser ("Loss Notice") by the earlier of the date of Closing or 7 business days after the date of the loss.

8.4 If there is material destruction of the Unit without fault of Purchaser, this Contract shall be deemed canceled in accordance with ¶16.3, unless Purchaser elects by Notice to Seller to complete the purchase with an abatement of the Purchase Price; or

8.5 Whether or not there is any destruction of the Unit, if, without fault of Purchaser, more than 10% of the units in the Premises are rendered uninhabitable, or reasonable access to the Unit is not available, then Purchaser shall have the right to cancel this Contract in accordance with ¶16.3 by Notice to Seller.

8.6 Purchaser's Notice pursuant to ¶8.4 or ¶8.5 shall be given within 7 business days following the giving of the Loss Notice except that if Seller does not give a Loss Notice, Purchaser's Notice may be given at any time at or prior to Closing.

8.7 In the event of any destruction of the Unit, Purchaser shall not be entitled to an abatement of the Purchase Price (i) that exceeds the reasonably estimated cost of repair and restoration or (ii) for any loss that the Corporation is obliged to repair or restore; but Seller shall assign to Purchaser, without recourse, Seller's claim, if any, against the Corporation with respect to such loss.

9 CLOSING LOCATION

The Closing shall be held at the location designated by the Corporation or, if no such designation is made, at the office of Seller's Attorney.

10 CLOSING

10.1 At Closing, Seller shall deliver or cause to be delivered:

10.1.1 Seller's certificate for the Shares duly endorsed for transfer to Purchaser or accompanied by a separate duly executed stock power to Purchaser, and in either case, with any guarantee of Seller's signature required by the Corporation;

10.1.2 Seller's counterpart original of the Lease, all assignments and assumptions in the chain of title and a duly executed assignment thereof to Purchaser in the form required by the Corporation;

10.1.3 FIRPTA documents required by ¶25;

10.1.4 keys to the Unit, building entrance(s), and, if applicable, garage, mailbox, storage unit and any locks in the Unit;

10.1.5 if requested, an assignment to Purchaser of Seller's interest in the Personalty and Included Interests;

10.1.6 any documents and payments to comply with ¶15.2

10.1.7 If Seller is unable to deliver the documents required in ¶¶10.1.1 or 10.1.2 then Seller shall deliver or cause to be delivered all documents and payments required by the Corporation for the issuance of a new certificate for the Shares or a new Lease.

10.2 At Closing, Purchaser shall:

10.2.1 pay the Balance in accordance with ¶2.2.2;

10.2.2 execute and deliver to Seller and the Corporation an agreement assuming the Lease, in the form required by the Corporation; and

10.2.3 if requested by the Corporation, execute and deliver counterparts of a new lease substantially the same as the Lease, for the balance of the Lease term, in which case the Lease shall be canceled and surrendered to the Corporation together with Seller's assignment thereof to Purchaser.

10.3 At Closing, the Parties shall complete and execute all documents necessary:

10.3.1 for Internal Revenue Service ("IRS") form 1099-S or other similar requirements;

10.3.2 to comply with smoke detector requirements and any applicable transfer tax filings; and

10.3.3 to transfer Seller's interest, if any, in and to the Personalty and Included Interests.

10.4 Purchaser shall not be obligated to close unless, at Closing, the Corporation delivers:

10.4.1 to Purchaser a new certificate for the Shares in the

name of Purchaser; and

10.4.2 a written statement by an officer or authorized agent of the Corporation consenting to the transfer of the Shares and Lease to Purchaser and setting forth the amounts of and payment status of all sums owed by Seller to the Corporation, including Maintenance and any Assessments, and the dates to which each has been paid.

11 CLOSING FEES, TAXES AND APPORTIONMENTS

11.1 At or prior to Closing,

11.1.1 Seller shall pay, if applicable:

11.1.1.1 the cost of stock transfer stamps; and

11.1.1.2 transfer taxes, except as set forth in ¶11.1.2.2

11.1.2 Purchaser shall pay, if applicable:

11.1.2.1 any fee imposed by the Corporation relating to Purchaser's financing; and

11.1.2.2 transfer taxes imposed by statute primarily on Purchaser (e.g., the "mansion tax").

11.2 The Flip Tax, if any, shall be paid by the Party specified in ¶ 1.19.

11.3 Any fee imposed by the Corporation and not specified in this Contract shall be paid by the Party upon whom such fee is expressly imposed by the Corporation, and if no Party is specified by the Corporation, then such fee shall be paid by Seller.

11.4 The Parties shall apportion as of 11:59 P.M. of the day preceding the Closing, the Maintenance, and any other periodic charges due the Corporation (other than Assessments) and STAR Tax Exemption (if the Unit is the beneficiary of same), based on the number of the days in the month of Closing.

11.5 Assessments, whether payable in a lump sum or installments, shall not be apportioned, but shall be paid by the Party who is the owner of the Shares on the date specified by the Corporation for payment. Purchaser shall pay any installments payable after Closing provided Seller had the right and elected to pay the Assessment in installments.

11.6 Each Party shall timely pay any transfer taxes for which it is primarily liable pursuant to law by cashier's, official bank, certified, or attorney's escrow check. This ¶11.6 shall survive Closing.

11.7 Any computational errors or omissions shall be corrected within 6 months after Closing. This ¶11.7 shall survive Closing.

12 BROKER

12.1 Each Party represents that such Party has not dealt with any person acting as a broker, whether licensed or unlicensed, in connection with this transaction other than the Broker(s) named in ¶1.5.

12.2 Seller shall pay the Broker's commission pursuant to a separate agreement. The Broker(s) shall not be deemed to be a third-party beneficiary of this Contract.

12.3 This ¶12 shall survive Closing, cancellation or termination of this Contract.

13 DEFAULTS, REMEDIES AND INDEMNITIES

13.1 In the event of a default or misrepresentation by Purchaser, Seller's sole and exclusive remedies shall be to cancel this Contract, retain the Contract Deposit as liquidated damages and, if applicable, Seller may enforce the indemnity in ¶13.3 as to brokerage commission or sue under ¶13.4. Purchaser prefers to limit Purchaser's exposure for actual damages to the amount of the Contract Deposit, which Purchaser agrees constitutes a fair and reasonable amount of compensation for Seller's damages under the circumstances and is not a penalty. The principles of real property law shall apply to this liquidated damages provision.

13.2 In the event of a default or misrepresentation by Seller, Purchaser shall have such remedies as Purchaser is entitled to at law or in equity, including specific performance, because the Unit and possession thereof cannot be duplicated.

13.3 Subject to the provisions of ¶4.3, each Party indemnifies and holds harmless the other against and from any claim, judgment, loss, liability, cost or expense resulting from the Indemnitor's breach of any of its representations or covenants stated to survive Closing, cancellation or termination of this Contract. Purchaser indemnifies and holds harmless Seller against and from any claim, judgment, loss, liability, cost or expense resulting from the Lease obligations accruing from and after the Closing. Each indemnity includes, without limitation, reasonable attorneys' fees and disbursements, court costs and litigation expenses arising from the defense of any claim and enforcement or collection of a judgment under this indemnity, provided the indemnitee is given Notice and opportunity to defend the claim. This ¶13.3 shall survive Closing, cancellation or termination of this Contract.

13.4 In the event any instrument for the payment of the Contract Deposit fails of collection, Seller shall have the right to sue on the uncollected instrument. In addition, such failure of collection shall be a default under this Contract, provided Seller gives Purchaser Notice of such failure of collection and, within 3 business days after Notice is given, Escrowee does not receive from Purchaser an unendorsed good certified check, bank check or immediately available funds in the amount of the uncollected funds. Failure to cure such default shall entitle Seller to the remedies set forth in ¶13.1 and to retain all sums as may be collected and/or recovered.

14 ENTIRE AGREEMENT; MODIFICATION

14.1 All prior oral or written representations, understandings and agreements had between the Parties with respect to the subject matter of this Contract, and with the Escrowee as to ¶27, are merged in this Contract, which alone fully and completely expresses the Parties' and Escrowee's agreement.

14.2 The Attorneys may extend in writing any of the time limitations stated in this Contract. Any other provision of this Contract may be changed or waived only in writing signed by the Party or Escrowee to be charged.

15 REMOVAL OF LIENS AND JUDGMENTS

15.1 Purchaser shall deliver or cause to be delivered to Seller or Seller's Attorney, not less than 10 calendar days prior to the Scheduled Closing Date a Lien and Judgment search, except that Liens or Judgments first disclosed in a continuation search shall be reported to Seller within 2 business days after receipt thereof, but not later than the Closing. Seller shall have the right to adjourn the Closing pursuant to ¶16 to remove any such Liens and Judgments. Failure by Purchaser to timely deliver such

search or continuation search shall not constitute a waiver of Seller's covenants in ¶ 4 as to Liens and Judgments. However, if the Closing is adjourned solely by reason of untimely delivery of the Lien and Judgment search, the apportionments under ¶11.3 shall be made as of 11:59 P.M. of the day preceding the Scheduled Closing Date in ¶1.15

15.2 Seller, at Seller's expense, shall obtain and deliver to the Purchaser the documents and payments necessary to secure the release, satisfaction, termination and discharge or removal of record of any Liens and Judgments. Seller may use any portion of the Purchase Price for such purposes.

15.3 This ¶15 shall survive Closing.

16 SELLER'S INABILITY

16.1 If Seller shall be unable to transfer the Items set forth in ¶2.1 in accordance with this Contract for any reason other than Seller's failure to make a required payment or other willful act or omission, then Seller shall have the right to adjourn the Closing for periods not exceeding 60 calendar days in the aggregate, but not extending beyond the expiration of Purchaser's Loan Commitment Letter, if ¶¶1.20.1 or 1.20.2 applies.

16.2 If Seller does not elect to adjourn the Closing or (if adjourned) on the adjourned date of Closing Seller is still unable to perform, then unless Purchaser elects to proceed with the Closing without abatement of the Purchase Price, either Party may cancel this Contract on Notice to the other Party given at any time thereafter.

16.3 In the event of such cancellation, the sole liability of Seller shall be to cause the Contract Deposit to be refunded to Purchaser and to reimburse Purchaser for the actual costs incurred for Purchaser's lien and title search, if any.

17 NOTICES AND CONTRACT DELIVERY

17.1 Any notice or demand ("Notice") shall be in writing and delivered either by hand, overnight delivery or certified or registered mail, return receipt requested, to the Party and simultaneously, in like manner, to such Party's Attorney, if any, and to Escrowee at their respective addresses or to such other address as shall hereafter be designated by Notice given pursuant to this ¶17.

17.2 The Contract may be delivered as provided in ¶17.1 or by ordinary mail.

17.3 The Contract or such Notice shall be deemed given and received:

17.3.1 on the day delivered by hand;

17.3.2 on the business day following the date sent by overnight delivery;

17.3.3 on the 5th business day following the date sent by certified or registered mail; or

17.3.4 as to the Contract only, 3 business days following the date of ordinary mailing.

17.4 A Notice to Escrowee shall be deemed given only upon actual receipt by Escrowee.

17.5 The Attorneys are authorized to give and receive any Notice on behalf of their respective clients.

17.6 Failure or refusal to accept a Notice shall not invalidate the Notice.

17.7 Notice pursuant to ¶¶2.2.2 and 13.4 may be delivered by confirmed facsimile to the Party's Attorney and shall be deemed given when transmission is confirmed by sender's facsimile machine.

18 FINANCING PROVISIONS

18.1 The provisions of ¶¶18.1 and 18.2 are applicable only if ¶¶1.20.1 or 1.20.2 applies.

18.1.1 An "Institutional Lender" is any of the following that is authorized under Federal or New York State law to issue a loan secured by the Shares and Lease and is currently extending similarly secured loan commitments in the county in which the Unit is located: a bank, savings bank, savings and loan association, trust company, credit union of which Purchaser is a member, mortgage banker, insurance company or governmental entity.

18.1.2 A "Loan Commitment Letter" is a written offer from an Institutional Lender to make a loan on the Financing Terms (see ¶1.21) at prevailing fixed or adjustable interest rates and on other customary terms generally being offered by Institutional Lenders making cooperative share loans. An offer to make a loan conditional upon obtaining an appraisal satisfactory to the Institutional Lender shall not become a Loan Commitment Letter unless and until such condition is met. An offer conditional upon any factor concerning Purchaser (e.g. sale of current home, payment of outstanding debt, no material adverse change in Purchaser's financial condition, etc.) is a Loan Commitment Letter whether or not such condition is met. Purchaser accepts the risk that, and cannot cancel this Contract if, any condition concerning Purchaser is not met.

18.2 Purchaser, directly or through a mortgage broker registered pursuant to Article 12-D of the Banking Law, shall diligently and in good faith:

18.2.1 apply only to an Institutional Lender for a loan on the Financing Terms (see ¶1.21) on the form required by the Institutional Lender containing truthful and complete information, and submit such application together with such documents as the Institutional Lender requires, and pay the applicable fees and charges of the Institutional Lender, all of which shall be performed within 5 business days after the Delivery Date;

18.2.2 promptly submit to the Institutional Lender such further references, data and documents requested by the Institutional Lender; and

18.2.3 accept a Loan Commitment Letter meeting the Financing Terms and comply with all requirements of such Loan Commitment Letter (or any other loan commitment letter accepted by Purchaser) and of the Institutional Lender in order to close the loan; and

18.2.4 furnish Seller with a copy of the Loan Commitment Letter promptly after Purchaser's receipt thereof.

18.2.5 Purchaser is not required to apply to more than one Institutional Lender.

18.3 If ¶1.20.1 applies, then

18.3.1 provided Purchaser has complied with all applicable provisions of ¶18.2 and this ¶18.3, Purchaser may cancel this Contract as set forth below, if:

18.3.1.1 any Institutional Lender denies Purchaser's application in writing prior to the Loan Commitment Date (see ¶1.21); or

18.3.1.2 a Loan Commitment Letter is not issued by the Institutional Lender on or before the Loan Commitment Date; or

18.3.1.3 any requirement of the Loan Commitment Letter other than one concerning Purchaser is not met (e.g. failure of the Corporation to execute and deliver the Institutional Lender's recognition agreement or other document, financial condition of the Corporation, owner occupancy quota, etc.); or

18.3.1.4 (i) the Closing is adjourned by Seller or the Corporation for more than 30 business days from the Scheduled Closing Date and (ii) the Loan Commitment Letter expires on a date more than 30 business days after the Scheduled Closing Date and before the new date set for Closing pursuant to this paragraph and (iii) Purchaser is unable in good faith to obtain from the Institutional Lender an extension of the Loan Commitment Letter or a new Loan Commitment Letter on the Financing Terms without paying additional fees to the Institutional Lender, unless Seller agrees, by Notice to Purchaser within 5 business days after receipt of Purchaser's Notice of cancellation on such ground, that Seller will pay such additional fees and Seller pays such fees when due. Purchaser may not object to an adjournment by Seller for up to 30 business days solely because the Loan Commitment Letter would expire before such adjourned Closing date.

18.3.2 Purchaser shall deliver Notice of cancellation to Seller within 5 business days after the Loan Commitment Date if cancellation is pursuant to ¶18.3.1.1 or 18.3.1.2 and on or prior to the Scheduled Closing Date or, if applicable, the adjourned Closing Date if cancellation is pursuant to ¶18.3.1.3 or 18.3.1.4.

18.3.3 If cancellation is pursuant to ¶18.3.1.1, then Purchaser shall deliver to Seller, together with Purchaser's Notice, a copy of the Institutional Lender's written denial of Purchaser's loan application. If cancellation is pursuant to ¶18.3.1.3, then Purchaser shall deliver to Seller together with Purchaser's Notice evidence that a requirement of the Institutional Lender was not met.

18.3.4 Seller may cancel this Contract by Notice to Purchaser, sent within 5 days after the Loan Commitment Date, if Purchaser shall not have sent by then either (i) Purchaser's Notice of cancellation or (ii) a copy of the Loan Commitment Letter to Seller, which cancellation shall become effective if Purchaser does not deliver a copy of such Loan Commitment Letter to Seller within 10 business days after the Loan Commitment Date.

18.3.5 Failure by either Purchaser or Seller to deliver Notice of cancellation as required by this ¶18.3 shall constitute a waiver of the right to cancel under this ¶18.3.

18.3.6 If this Contract is canceled by Purchaser pursuant to this ¶18.3, then thereafter neither Party shall have any further rights against, or obligations or liabilities to, the other by reason of this Contract, except that the Contract Deposit shall be promptly refunded to Purchaser and except as set forth in ¶12. If this Contract is canceled by Purchaser pursuant to ¶18.3.1.4, then Seller shall reimburse Purchaser for any non-refundable financing and inspection expenses and other sums reimbursable pursuant to ¶16

18.3.7 Purchaser cannot cancel this Contract pursuant to ¶ 18.3.1.4 and cannot obtain a refund of the Contract Deposit if the Institutional Lender fails to fund the loan:

18.3.7.1 because a requirement of the Loan Commitment Letter concerning Purchaser is not met (e.g., Purchaser's financial condition or employment status suffers an adverse change; Purchaser fails to satisfy a condition relating to the sale of an existing residence, etc.) or

18.3.7.2 due to the expiration of a Loan Commitment Letter issued with an expiration date that is not more than 30 business days after the Scheduled Closing Date.

19 **SINGULAR/PLURAL AND JOINT/SEVERAL**

The use of the singular shall be deemed to include the plural and vice versa, whenever the context so requires. If more than one person constitutes Seller or Purchaser, their obligations as such Party shall be joint and several.

20 **NO SURVIVAL**

No representation and/or covenant contained herein shall survive Closing except as expressly provided. Payment of the Balance shall constitute a discharge and release by Purchaser of all of Seller's obligations hereunder except those expressly stated to survive Closing.

21 **INSPECTIONS**

Purchaser and Purchaser's representatives shall have the right to inspect the Unit within 48 hours prior to Closing, and at other reasonable times upon reasonable request to Seller.

22 **GOVERNING LAW AND VENUE**

This Contract shall be governed by the laws of the State of New York without regard to principles of conflict of laws. Any action or proceeding arising out of this Contract shall be brought in the county or Federal district where the Unit is located and the Parties hereby consent to said venue.

23 **NO ASSIGNMENT BY PURCHASER; DEATH OF PURCHASER**

23.1 Purchaser may not assign this Contract or any of Purchaser's rights hereunder. Any such purported assignment shall be null and void.

23.2 This Contract shall terminate upon the death of all persons comprising Purchaser and the Contract Deposit shall be refunded to the Purchaser. Upon making such refund and reimbursement, neither Party shall have any further liability or claim against the other hereunder, except as set forth in Par. 12.

24 **COOPERATION OF PARTIES**

24.1 The Parties shall each cooperate with the other, the Corporation and Purchaser's Institutional Lender and title company, if any, and obtain, execute and deliver such documents as are reasonably necessary to consummate this sale.

24.2 The Parties shall timely file all required documents in connection with all governmental filings that are required by law. Each Party represents to the other that its statements in such filings shall be true and complete.

This ¶24.2 shall survive Closing.

25 FIRPTA

The parties shall comply with IRC §§ 897, 1445 and the regulations thereunder as same may be amended ("FIRPTA"). If applicable, Seller shall execute and deliver to purchaser at Closing a Certification of Non-Foreign Status ("CNS") or deliver a Withholding Certificate from the IRS. If Seller fails to deliver a CNS or a Withholding Certificate, Purchaser shall withhold from the Balance, and remit to the IRS, such sum as may be required by law. Seller hereby waives any right of action against Purchaser on account of such withholding and remittance. This ¶25 shall survive Closing.

26 ADDITIONAL REQUIREMENTS

26.1 Purchaser shall not be obligated to close unless all of the following requirements are satisfied at the time of the Closing:

26.1.1 the Corporation is in good standing;

26.1.2 the Corporation has fee or leasehold title to the Premises, whether or not marketable or insurable; and

26.1.3 there is no pending *lis pendens* action, tax certificate/lien sale or foreclosure action of any underlying mortgage affecting the Premises.

26.2 If any requirement in ¶26.1 is not satisfied at the time of the Closing, Purchaser shall give Seller Notice and if the same is not satisfied within a reasonable period of time thereafter, then either Party may cancel this Contract (pursuant to ¶16.3) by Notice.

27 ESCROW TERMS

27.1 The Contract Deposit shall be deposited by Escrowee in an escrow account as set forth [in ¶ 1.24 and the proceeds held and disbursed in accordance with the terms of this Contract. At Closing, the Contract Deposit shall be paid by Escrowee to Seller. If the Closing does not occur and either Party gives Notice to Escrowee demanding payment of the Contract Deposit, Escrowee shall give prompt Notice to the other Party of such demand. If Escrowee does not receive a Notice of objection to the proposed payment from such other Party within 10 business days after the giving of Escrowee's Notice, Escrowee is hereby authorized and directed to make such payment to the demanding party. If Escrowee does receive such a Notice of objection within said period, or if for any reason Escrowee in good faith elects not to make such payment, Escrowee may continue to hold the Contract Deposit until otherwise directed by a joint Notice by the Parties or a final, non-appealable judgment, order or decree of a court of competent jurisdiction. However, Escrowee shall have the right at any time to deposit the Contract Deposit and the interest thereon, if any, with the clerk of a court in the county as set forth in ¶22 and shall give Notice of such deposit to each Party. Upon disposition of the Contract Deposit and interest thereon, if any, in accordance with this ¶27, Escrowee shall be released and discharged of all escrow obligations and liabilities.

27.2 The Party whose Attorney is Escrowee shall be liable for loss of the Contract Deposit. If the Escrowee is Seller's attorney, then Purchaser shall be credited with the amount of the Contract Deposit at Closing.

27.3 Escrowee will serve without compensation. Escrowee is acting solely as a stakeholder at the Parties' request and for their convenience. Escrowee shall not be liable to either Party for any act or omission unless it involves bad faith, willful disregard of this Contract or gross negligence. In the event of any dispute, Seller and Purchaser shall jointly and severally (with right of contribution) defend (by attorneys selected by Escrowee), indemnify and hold harmless Escrowee from and against any claim, judgment, loss, liability, cost and expenses incurred in connection with the performance of Escrowee's acts or omissions not involving bad faith, willful disregard of this Contract or gross negligence. This indemnity includes, without limitation, reasonable attorneys' fees either paid to retain attorneys or representing the fair value of legal services rendered by Escrowee to itself and disbursements, court costs and litigation expenses.

27.4 Escrowee acknowledges receipt of the Contract Deposit, by check subject to collection.

27.5 Escrowee agrees to the provisions of this ¶27.

27.6 If Escrowee is the Attorney for a Party, Escrowee shall be permitted to represent such Party in any dispute or lawsuit.

27.7 This ¶27 shall survive Closing, cancellation or termination of this Contract.

28 MARGIN HEADINGS

The margin headings do not constitute part of the text of this Contract.

29 MISCELLANEOUS

This Contract shall not be binding unless and until Seller delivers a fully executed counterpart of this Contract to Purchaser (or Purchaser's Attorney) pursuant to ¶17.2 and 17.3. This Contract shall bind and inure to the benefit of the Parties hereto and their respective heirs, personal and legal representatives and successors in interest.

30 LEAD PAINT

If applicable, the complete and fully executed Disclosure of Information on Lead Based Paint and or Lead-Based Paint Hazards is attached hereto and made a part hereof.

IN WITNESS WHEREOF, the Parties hereto have duly executed this Contract as of the date first above written.

SELLER:	PURCHASER:
By:	By:

ESCROW TERMS AGREED TO:

By: _____
ESCROWEE

RIDER TO, AND PART OF, CONTRACT OF SALE
BETWEEN AS SELLER, AND
AS PURCHASER
FOR _____ UNIT AT _____

Suggested Purchaser's representations for use when applicable.

31 **PURCHASER'S ADDITIONAL REPRESENTATIONS AND COVENANTS**

31.1 Supplementing ¶4.2 of the Contract, Purchaser also represents and covenants that:

31.1.1 Purchaser has, and will at Closing have, available unencumbered cash and cash equivalents (including publicly traded securities) in a sum at least equal to (and having a then current value of) the Balance; and

31.1.2 Purchaser has, and will at and immediately following the Closing have, a positive net worth.

31.2 the Maintenance and the monthly amount of the Assessment (if any) do not aggregate more than 25% of the current total gross monthly income of the individuals comprising the Purchaser;

31.3 (if ¶ 1.20.1 or ¶ 1.20.2 applies) the monthly debt service (interest and amortization of principal, if any) of the proposed financing, together with the Maintenance and the monthly Assessment amount (if any), do not aggregate more than 35% of said current total gross monthly income.

32 Supplementing paragraph 4.1. Seller has no actual knowledge of a material default or condition which the Lessee is required to cure under the Lease and which remains uncured. If, prior to Closing, Seller acquires knowledge of a such default or condition which the Lessee would be required to cure, then Seller shall cure same at or prior to Closing. This provision shall not survive closing.

The Parties have duly executed this Rider as of the same date as the Contract.

SELLER:

☞ _____

PURCHASER:

☞ _____

Lorraine Power Tharp at the Racing Museum.

Anne Reynolds Copps, Joel Sachs and Sharon DeSalvo at the Racing Museum.

Real Property Law Section
SUMMER MEETING
Saratoga Springs, NY
July 26-29, 2001

Stephen Linde, Mel Mitzner and Donna Baer at the Racing Museum.

Welcome entertainment at the Racing Museum.

Josh Stein, T. Mary McDonald and John Mosko at the cocktail reception.

Louise Tarantino, Frank Carroll and Connie Farley at the cocktail reception.

Roslyn Sachs and Joel Sachs at the racetrack.

Sari Leeds and John Privitera at the racetrack.

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Saratoga S
July 26-

John Privitera and family with Lorraine Power Tharp off to the racetrack.

Sam Tilton and Leon Sawyko at the betting window.

Lynnette Zinberg, David Zinberg and Josh Stein at the cocktail reception.

John Hall and John Mosko at the cocktail reception.

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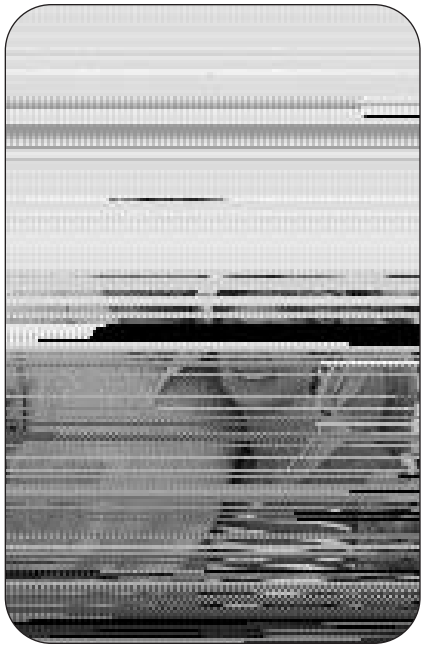

Joe DeSalvo and Sharon DeSalvo at the racetrack.

Matt Leeds and Sari Leeds at the racetrack.

Lorraine Power Tharp at the racetrack.

Julia Hall and John Hall at the racetrack.

Owners Renting Illegal Apartments May Be in for More Than They Bargained For

By R. Randy Lee

The long-standing and widespread practice of renting "illegal apartments" in New York City can have important legal ramifications for owners. Savvy tenants may exploit statutes designed to ensure safe housing in order to live rent-free for months and possibly even years.[1] Multiple Dwelling Law (MDL) § 302 allows tenants of multiple dwellings (buildings, including houses, occupied by at least three families living separately)[2] to withhold rent where no valid certificate of occupancy (CO) has been issued as required by MDL § 301 or where the building has been converted to a multiple dwelling without the owner obtaining a new CO, and bars actions and summary proceedings for rent or possession based on such non-payment. MDL § 325 requires owners, landlords and agents of multiple dwellings to register with the appropriate city agency, and likewise allows tenants to withhold rent until owners comply. Courts confronted with the inequities these laws can produce have shown some flexibility. However, there is a marked lack of uniformity in these decisions, and there is reason to doubt some of those most favorable to landlords will withstand the inevitable appellate scrutiny. The limits of the remedies available to landlords remain largely undetermined.

Tenants May Use These Statutes to Withhold Rent Despite Explicit Lease Terms Prohibiting Tenants' Proposed Illegal Occupancy

These statutes may bar proceedings by the landlord even where the lease explicitly limits the tenant to lawful use of the premises in conformity with the existing CO. In *Mandel v. Pitkowsky*, though the lease limited occupation to "artists' studios and for no other purpose" and no valid CO for residential use had been obtained, the court nonetheless held that the property had, in fact, been occupied as a multiple dwelling since 1968, and that the landlord had condoned the tenant's unlawful use of the premises for residential purposes and assured the tenant that he would take the necessary steps to legalize the occupancy.[3] The landlord had taken preliminary steps in that direction and so far had been unsuccessful. However, because the premises was a *de facto* multiple dwelling, the court held landlord's summary holdover proceeding was barred by failure to allege compliance with the registration requirement of MDL § 325.[4]

"Savvy tenants may exploit statutes designed to ensure safe housing in order to live rent-free for months and possibly even years."

The Appellate Term in *Mandel* did, in *dicta*, cite the earlier decision in *Lipkis v. Pikus* for the proposition that if, upon resubmission, the landlord is still unable to obtain a proper CO, the court can require the tenant to deposit rent with the court until such a certificate is procured.[5] However, the *Lipkis* decision, holding the MDL rent-withholding provisions inapplicable in cases of commercial to residential conversions, has been superseded by legislation explicitly bringing such situations within the ambit of the statutory scheme.[6] The *Lipkis* court also noted the inequity of permitting the tenants in that case, who freely entered into the lease knowing their occupancy was illegal, to reap the benefits of occupancy while using the illegality to avoid paying rent, particularly where there was unrebutted testimony that the buildings substantially complied with many of the minimum standards.[7] However, it is unclear whether that reasoning alone is sufficient ground to depart from strict application of the statute, and particularly whether it is sufficient ground to require tenants in such situations to pay rent. The Appellate Division, First Department's decision in *Hornfeld v. Gaare* suggests that it may not be.[8] The court there was confronted with the extreme situation of a tenant who, on the one hand, claimed a perpetual entitlement under rent stabilization laws to residential occupancy of a basement apartment in violation of the existing CO, and on the other hand asserted the same violation as a basis for withholding rent under MDL § 302. While holding that the letter of the law should not be strictly enforced in the extreme circumstance there, as it would frustrate the underlying purpose of MDL § 302 to ensure safe housing conforming to duly issued COs, the court simply required the tenant to vacate the premises. Despite the fact that the tenant's residential occupancy of the apartment was in violation of his lease, the Appellate Division denied the landlord's claim for use and occupancy because the landlord had consented to the tenant's residential use of the premises.[9] This decision suggests at least that where a tenant knowingly violates his or her lease by making residential use of an apartment contrary to the existing CO, and where the landlord tacitly consents to such unlawful use, the tenant may still assert the illegality of his occupancy as a basis, under MDL § 302, to withhold rent, though possibly not to avoid eviction.

Tenants May Withhold Rent Without Substantial Evidence of Risk or Prejudice to Themselves

At least one lower court, in *Mannino v. Fielder*, has held that even a "legal" tenant in a two-family house may raise the landlord's noncompliance with MDL § 325 as a bar to nonpayment proceedings, where the house is currently occupied illegally by a third family.[10] The landlord claimed that multiple dwelling registration under MDL § 325 was not necessary because a CO covered the structure as a two-family house with garage, and the nonpaying tenant occupied one of the otherwise legal apartments. However, because the presence of the third family made the house a multiple dwelling as defined in the MDL, the court held that MDL § 325 must be strictly applied, and therefore that the absence of a multiple dwelling registration precluded the nonpayment proceeding.[11]

The *Mannino* court considered and rejected the analysis of the Civil Court in the contrary decision in *Chan v. Kormendi*.[12] The *Chan* court refused to dismiss a nonpayment proceeding as required by the literal language of MDL § 325, citing the inequity of allowing the tenants of a legal apartment to take advantage of the presence of a third family, living elsewhere in the house, in order to live rent-free, particularly where there was no allegation of any unsafe condition.[13] The *Chan* court also stated that "arguably" the purpose of MDL § 325, ensuring that tenants and governing authorities can readily contact those responsible for the operation of a multiple dwelling, was inapplicable to a two-family house with an illegal third tenant.[14] But the court in *Mannino* held that the overarching legislative concern underlying MDL § 325, the need for the city to have notice and maintain a registry of conditions threatening public health and safety, applied because increased illegal occupancy in a building creates an inherent fire and safety risk for *all* tenants in the building.[15] Further, the court held that tenants are neither responsible for, nor experts in, detecting unsafe conditions, and that the inequity resulting from allowing a tenant to use MDL § 325 to withhold rent and denying access to summary nonpayment proceedings to landlords not in compliance did not justify the court in ignoring the legislative purpose in enacting the Multiple Dwelling Law.[16]

"[W]hether tenants may take advantage of these laws for financial gain, even where there is no concrete evidence of a health or safety risk remains unresolved, despite the apparent inequity that may be caused to landlords."

It is unclear how the appellate courts will resolve this conflict. Some other courts, citing the absence of proof of any unsafe condition, as in *Chan*, and considering also the fact that the tenant entered into the lease fully aware of the technical violation of the registration or CO requirements of the MDL, have concluded that in such circumstances tenants could not exploit MDL § 302 or 325 to withhold rent.[17] However, the appellate courts may ultimately agree with the court in *Mannino* that tenants have no burden to prove an unsafe condition exists; the statutes in question do not expressly place such a burden on tenants. Rather, they place the burden on landlords to obtain a valid CO from the city, certifying that a building complies in all respects with relevant laws, codes and regulations, and to register as required by MDL § 325. Therefore whether tenants may take advantage of these laws for financial gain, even where there is no concrete evidence of a health or safety risk remains unresolved, despite the apparent inequity that may be caused to landlords.

Landlords May Not Be Able to Recover Withheld Rent Even Where Tenants' Own Actions Prevent Landlords from Curing the Violations

What is settled, at the very least is that, in the extreme case mentioned above, where strict adherence to the letter of the law would subvert the legislature's purpose in enacting the law and otherwise accomplish injustice, the courts will not strictly adhere to the law. Concretely, this means tenants cannot guarantee themselves ongoing, rent-free occupancy by preventing landlords from curing or ending the violation that is the basis of their right to withhold rent (such as where tenants refuse to grant landlords access needed to make necessary modifications).[18] In fact, the Civil Court Act authorizes the Civil Court to compel removal of housing violations and to employ any legally authorized remedy it deems most expedient to enforce such standards.[19] One court has even held that, because of the risk to life and health of emergency workers and other third parties, even where a landlord's unwillingness to make the required modifications to the structure of a building or obtain a valid CO is the principal obstacle to ending the violation, the Civil Court may instead end the illegal occupancy by evicting the tenant.[20] However, even in situations where the landlord is prevented by the tenant's presence from curing the violation, it continues to be unclear whether courts may depart from the letter of the law to such a degree as to award rent or use and occupancy, or may only direct tenants to vacate.

A cursory reading of *Chatsworth 72nd Street Corp. v. Rigal* might lead to the hasty conclusion that the

Court of Appeals has made clear that courts may not only direct such tenants to vacate, as needed to cure the violation, but may even require tenants to pay rent notwithstanding MDL §§ 302 and 325. But a more careful reading of the history of that case reveals that its import is not so certain. In a *per curiam* order, the Court of Appeals upheld the County Court's order directing tenants to pay rent, on the opinion of Civil Court Judge Shainswit.[21] On the merits of the landlord's petition in that summary nonpayment proceeding, Judge Shainswit reasoned, "where it is the tenant who is preventing that issuance of a Certificate of Occupancy, it would be the height of fantasy to permit him to block the legislative purpose still further by continuing on indefinitely in rent free possession," and concludes "[w]here Landlord is seeking to remedy the situation, and Tenant is the one blocking compliance, [MDL § 302] simply has no application."[22] But in fact, it was not necessary for the court to reach the merits of that issue, since its principal and independent ground for directing the payment of rent was that a prior order to that effect by the Rent Commissioner was binding on the Civil Court as *res judicata*.[23] Accordingly, the effect of the Court of Appeals' *per curiam* order affirming that decision is less than certain.

While Judge Shainswit resolved the "Catch 22" by simply ruling MDL § 302 inapplicable, the subsequent Appellate Division decision in *Hornfeld v. Gaare* discussed above did so by directing the tenant to vacate, but did not direct the payment of use and occupancy insofar as the landlord had consented to tenant's unlawful use. The court in *Corbin v. Harris*, in similar circumstances, likewise only ordered the tenant to vacate.[24] This more conservative approach preserves the legislatively created incentive for landlords to legalize non-conforming structures and register multiple dwellings, namely the penalty of rent-withholding. Judge Shainswit's decision, intended to avoid subverting the legislature's purpose, not only sets aside the mechanism the legislature created, but also potentially allows the illegality to continue indefinitely, to the extent that the tenants are willing to continue paying rent. Of course, Judge Shainswit's decision was constrained by the *res judicata* effect of the earlier Rent Commissioner decision. Once again, the decision allowing for the collection of rent notwithstanding MDL §§ 302 and 325 rests on shaky ground.

Novel Theories Yet to Be Conclusively Tested Would Leave Courts with Discretion to Fashion Remedies Allowing Landlords to Recover Rent Contrary to MDL § 325 or 302 to Avoid the Inequitable Results of Strict Adherence

Even in cases where strict application of MDL § 325 does not clearly undermine its legislative purpose, one court has sought to avoid the injustice caused by rigid application of the statute, finding instead that enforcement of the rent-withholding provision of that statute is a matter of the court's discretion. The Civil Court in *Hall v. Burroughs* cited an MDL provision permitting local law to prescribe penalties and remedies inconsistent with those in the MDL, and a provision of the New York City Housing Maintenance Code (HMC) stating that where landlords fail to comply with MDL § 325 they "shall, in the discretion of the court, suffer a stay of proceedings to recover rents."[25] As the *Hall* court observed, the courts have generally ignored this discretionary language, instead viewing MDL § 325 as a strict bar to rent judgments during noncompliance. But the *Hall* court instead read MDL § 3[4][a] and HMC § 27-2107(b) carefully as placing the matter within the court's discretion.[26] The *Hall* decision, if followed by other courts, would significantly free the hands of courts to allow equity to prevail over strict application of MDL § 325. But it is yet to be determined whether this novel but cogent argument will be widely adopted by other courts or upheld on appellate review. Also, it is important to note that the authorities relied on by the court in *Hall* address only the registration requirement of MDL § 325, and not the requirement to obtain a valid CO enforced by MDL § 302. Even if the *Hall* reasoning is followed, it will likely only allow the courts such discretion with respect to MDL § 325, and not MDL § 302.

"Accordingly, though Corris *is presently the law in the First Department, there is reason to doubt whether the analysis in* Corris *will be upheld by the Court of Appeals."*

Another novel theory to avoid the inequities occasioned by these statutes, affirmed by the Appellate Division, First Department in *Corris v. 129 Front Co.*, is that whatever the statutes may say about the relief that may be granted to landlords, they do not preclude the Supreme Court from making the payment of rent a condition on the use of its equitable powers to grant injunctive relief to tenants.[27] Arguably, though, as Judge Sandler states in an opinion dissenting in part, the majority opinion in that case creates an inducement for landlords to violate the law, causing tenants to seek an injunction in Supreme Court, in order that landlords may gain substantially the same relief that the law prevents them from seeking directly.[28] Accordingly, though *Corris* is presently the law in the First Department, there is reason to doubt whether the analysis in *Corris* will be upheld by the Court of Appeals.

Conflicting Decisions Leave Uncertain the Availability of Summary Holdover Proceedings for Possession

Leaving aside the question of whether landlords may recover rent or use and occupancy, a separate question is whether, in many circumstances, landlords may bring summary proceedings at all. Decisions conflict on this question as well, despite the seemingly plain meaning of MDL §§ 302 and 325. At least it is uncontroversial that while landlords may not be able to recover rent or use and occupancy, neither MDL § 302 nor MDL § 325 bars ejectment actions in Supreme Court on grounds other than nonpayment of rent.[29] This, however, is little consolation if landlords must incur the added expense and delay of actions in Supreme Court, and receive no rent or use and occupancy during the period of months or years before their case is decided. MDL § 302, by its terms, bars only actions and special proceedings based on nonpayment of rent, and MDL § 325 mentions only the withholding of rent.

Some courts have assumed that failure of a landlord to register under MDL § 325 bars not only summary nonpayment proceedings, but summary holdover proceedings as well.[30] Notwithstanding the lack of any such provision in the statute itself, there is apparently some basis for such a holding in the Civil Court Rules, which provide that in every summary proceeding for possession under Real Property Actions and Proceedings Law § 711, landlords must allege either that the premises are not a multiple dwelling or that they are properly registered as a multiple dwelling.[31] The rule makes no distinction between proceedings for possession based on nonpayment of rent and those based on other grounds, such as holdover proceedings. As to the CO requirement of MDL § 302 (to be distinguished from the registration requirement of MDL § 325), at least one court, in *Lee v. Gasoi*, held that the statute by its terms refers only to nonpayment proceedings, and so does not bar summary holdover proceedings.[32] Unfortunately, however, that decision was affirmed *without opinion* by the Appellate Division, First Department. Therefore, whether these statutes and court rules and local enabling laws bar only summary nonpayment proceedings, or all summary proceedings for possession in general, remains unresolved, and whether such broader restriction applies only to the registration requirement of MDL § 325, or also to the CO requirement of MDL § 302.[33] Some landlords may continue to be compelled to bring actions in Supreme Court to evict holdover tenants, without receiving use and occupancy during the years their action is pending in Supreme Court.

"[I]n the most common circumstances, conflicting lower court decisions and a paucity of appellate guidance leaves landlords without clear indication as to the limits of their rights and remedies."

Conclusion

Courts have been able to rule out certain attempts to expand the application of these statutes simply by strict adherence to their plain language. Neither statute gives tenants a right to recover rent once they have voluntarily paid it.[34] While the rent-withholding provisions do apparently apply equally to commercial and residential tenants in structures meeting the definition of multiple dwellings, they are not otherwise available to commercial tenants in other structures.[35] Further, the statute will not be read liberally to apply to the unlawful conversion of *residential* space to *commercial* space, where the conversion does not affect the remaining residential space.[36]

However, in the most common circumstances, conflicting lower court decisions and a paucity of appellate guidance leaves landlords without clear indication as to the limits of their rights and remedies. The possibility remains that despite tenants' prior understanding that the proposed occupancy is prohibited, even where it violates express lease terms, tenants can use that illegality to withhold rent. Even "legal" tenants covered by a valid CO for a two-family house potentially may use the unlawful presence of a third family in a garage or basement apartment as grounds for withholding rent, even where there is no concrete evidence of a health or safety risk or nuisance to the legal tenant. Moreover, even where tenants themselves, by their refusal to vacate or grant access, prevent landlords from curing a violation, landlords may be able to recover possession, but not rent or use and occupancy. Novel theories that the courts have the discretion to allow equitable considerations to override the strictures of a statute in these cases are largely untested. Finally, despite the plain language of these statutes, landlords may be barred from bringing summary proceedings for possession, even on grounds other than nonpayment.

Endnotes

1. New York Multiple Dwelling Law § 302[1] and 325[2].
2. *See* New York Multiple Dwelling Law § 4[5].
3. 102 Misc. 2d 478, 479, 425 N.Y.S.2d 926, 927 (App. Term. 1979), *aff'd*, 76 A.D.2d 807, 429 N.Y.S.2d 550 (App. Div. 1st Dep't 1980).
4. 102 Misc. 2d at 479-80 (App. Term. 1979).
5. 102 Misc. 2d at 481. *See Lipkis v. Pikus*, 99 Misc. 2d 518, 416 N.Y.S.2d 694 (App. Term. 1st Dep't 1979), *aff'd*, 72 A.D.2d 697, 421 N.Y.S.2d 825 (App. Div. 1st Dep't 1979).
6. New York Multiple Dwelling Law § 284 and 285. *See 902 Associates, Ltd. v. Total Picture Creative Services, Inc.*, 144 Misc. 2d 316, 547 N.Y.S.2d 978 (App. Term. 1st Dep't 1989).

7. 99 Misc. 2d at 520 (App. Term. 1st Dep't 1979).
8. 130 A.D.2d 398, 515 N.Y.S.2d 258 (App. Div. 1st Dep't 1987).
9. 130 A.D.2d at 400 (App. Div. 1st Dep't 1987).
10. 165 Misc. 2d 605, 629 N.Y.S.2d 651 (Civ. Ct., Kings Co. 1995).
11. New York Multiple Dwelling Law § 4[7] (defining multiple dwelling).
12. 118 Misc. 2d 1026, 462 N.Y.S.2d 943 (Civ. Ct., Queens. Co. 1983).
13. 118 Misc. 2d at 1031-32 (Civ. Ct., Queens Co. 1983).
14. 118 Misc. 2d at 1033 (Civ. Ct., Queens Co. 1983).
15. 165 Misc. 2d at 610 (Civ. Ct., Kings Co. 1995).
16. 165 Misc. 2d at 610-11 (Civ. Ct., Kings Co. 1995).
17. *Stanley Associates v. Marrero*, 87 Misc. 2d 1011, 1013, 386 N.Y.S.2d 953, 955 (Civ. Ct., Queens Co. 1976); *Lipkis v. Pikus, supra*, 99 Misc. 2d at 520 (App. Term. 1st Dep't 1979).
18. *See Chatsworth 72nd Street Corp. v. Rigal*, 71 Misc. 2d 647, 336 N.Y.S.2d 604 (Civ. Ct., N.Y. Co. 1972), *aff'd*, 74 Misc. 2d 298, 345 N.Y.S.2d 355 (App. Term. 1973), *aff'd*, 43 A.D.2d 686, 351 N.Y.S.2d 636 (App. Div. 1st Dep't 1973), *aff'd*, 35 N.Y.2d 984, 324 N.E.2d 984 (1975) (Court of Appeals affirming on opinion of Civil Court Judge Shainswit); *B.S.L. One Owners Corp. v. Rubenstein*, 159 Misc. 2d 903, 606 N.Y.S.2d 979 (Civ. Ct., Richmond Co. 1994); *Hornfeld v. Gaare*, 130 A.D.2d 398, 400, 515 N.Y.S.2d 258, 260 (App. Div. 1st Dep't 1987); *Corbin v. Harris*, 92 Misc. 2d 480, 483-84, 400 N.Y.S.2d 309, 311-12 (Sup. Ct., Kings Co. 1977), *appeal dismissed*, 64 A.D.2d 620, 406 N.Y.S.2d 995 (App. Div. 2d Dep't 1978).
19. New York Civil Court Act §§ 203[n], 110[a][7], 110[c].
20. *Sorensen v. Ramon*, N.Y.L.J., May 17, 2000, p. 34, col. 1 (Civ. Ct., Richmond Co.).
21. 35 N.Y.2d 984, 324 N.E.2d 984 (1975).
22. 71 Misc. 2d at 653, 351 N.Y.S.2d at 611 (Civ. Ct., N.Y. Co. 1972).
23. 71 Misc.2d at 651 (Civ. Ct., N.Y. Co. 1972).
24. 92 Misc. 2d 480, 483-84, 400 N.Y.S.2d 309, 311-12 (N.Y.Sup.Ct., Kings Co. 1977), *appeal dismissed*, 64 A.D.2d 620, 406 N.Y.S.2d 995 (App. Div. 2d Dep't 1978).
25. 159 Misc. 2d 481, 604 N.Y.S.2d 684 (Civ. Ct., Kings Co. 1993); New York Multiple Dwelling Law § 3[4][a]; New York City Housing Maintenance Code § 27-2107(b).
26. 159 Misc. 2d at 484 (Civ. Ct., Kings Co. 1993).
27. *Corris v. 129 Front Co.*, 85 A.D.2d 176, 178-80, 447 N.Y.S.2d 480, 482-83 (App. Div. 1st Dep't 1982).
28. 85 A.D.2d at 181-82 (App. Div. 1st Dep't 1982, Sandler, J., dissenting in part).
29. *See Alleyne v. Townsley*, 110 A.D.2d 674, 487 N.Y.S.2d 600 (App. Div. 2d Dep't 1985); *Jordan Manufacturing Corp. v. Zimmerman*, 169 A.D.2d 815, 816, 565 N.Y.S.2d 184 (App. Div., 2d Dep't 1991); *99 Commercial Street, Inc. v. Llewelyn*, 240 A.D.2d 481, 483, 658 N.Y.S.2d 130, 132 (App. Div. 2d Dep't 1997), *leave denied*, 90 N.Y.2d 809, 686 N.E.2d 1366 (1997); *Jalinos v. Ramkalup*, 255 A.D.2d 293, 294, 679 N.Y.S.2d 419 (App. Div., 2d Dep't 1998); *J.Z. & A.E. Realty Corp. v. Putnam*, 258 A.D.2d 442, 684 N.Y.S.2d 610, 611 (App. Div., 2d Dep't 1999).
30. *Mintz v. Robinson*, 81 Misc. 2d 447, 447, 366 N.Y.S.2d 547, 548 (Civ. Ct., Kings Co. 1975). *See also Vidod Realty Co. v. Calvin*, 147 Misc. 2d 488, 491-92, 557 N.Y.S.2d 825, 827-28 (Civ. Ct., Bronx Co. 1989).
31. Uniform Civil Rules for the New York City Civil Court § 208.42[g] (22 N.Y.C.R.R. 208.42[g]).
32. 113 Misc. 2d 760, 761, 449 N.Y.S.2d 837, 838 (Civ. Ct., N.Y. Co. 1982), *aff'd*, 126 Misc. 2d 719, 488 N.Y.S.2d 628 (App. Term., 1st Dep't 1984), *aff'd*, 119 A.D.2d 1016, 501 N.Y.S.2d 290 (App. Div., 1st Dep't 1986)
33. *See Mannino v. Fielder*, 165 Misc. 2d 605, 609, 629 N.Y.S.2d 651, 653-54 (Civ. Ct., Kings Co. 1995) (finding no consistent treatment of this question).
34. *See Stanley Associates v. Marrero*, 87 Misc. 2d 1011, 1013, 386 N.Y.S.2d 953, 955 (Civ. Ct., Queens Co. 1976); *Wokal v. Sequin*, 167 Misc. 463, 465, 4 N.Y.S.2d 86, 88 (Mun. Ct., Queens Co. 1938).
35. *See Phillips & Huyler Assocs. v. Flynn*, 154 Misc. 2d 689, 585 N.Y.S.2d 975 (Civ. Ct., N.Y. Co. 1992), *aff'd*, 164 Misc. 2d 689, 585 N.Y.S.2d 975 (App. Term. 1995), *aff'd*, 225 A.D.2d 475, 640 N.Y.S.2d 26 (App. Div. 1st Dep't 1996); *Elizabeth Broome Realty Corp. v. China Printing Co.*, 157 Misc. 2d 572, 574, 598 N.Y.S.2d 138, 139 (Civ. Ct, N.Y. Co. 1993); *Ying Lung Corp. v. Medrano*, 123 Misc. 2d 1074, 1075, 475 N.Y.S.2d 772, 773 (Civ. Ct., N.Y. Co. 1984).
36. *See Washington Square Professional Building, Inc. v. Leader*, 68 Misc. 2d 72, 74, 326 N.Y.S.2d 716, 718-19 (Civ. Ct., N.Y. Co. 1971).

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The Demons of Recordation

By Bernard M. Rifkin

Some of us who are senior citizens may remember a list of 100 words that were commonly misspelled. The list was called "100 Spelling Demons." One of our more intrepid counsel, William B. Caits, based on his experience as a title expert, developed a list of the most common errors or lapses in conforming documents to the requirements of the recording offices in New York State. These offices are in all counties, the various county clerks' offices, except for four counties in New York City (New York, Kings, Bronx and Queens), and the City Register. The list which follows may help save you the annoyance, and perhaps the legal liability, involved in not being able to timely record real estate conveyances and related documents.

This list includes issues involving the Real Estate Transfer and Mortgage Recording Taxes imposed by the city of New York as well as the state of New York. The requirements noted are also generally applicable to local recording requirements (i.e., city of Yonkers, Mount Vernon and the Peconic Bay area). The following rules are often implemented administratively by recording officers to expedite the local recording process.

1. Notary stamp must be crystal clear. (Dark, but not bleeding through.)
2. *ALL* mortgages **MUST** have the property improvement clause.
3. If a deed is from or to an executor or trustee of a will, the will should be attached.
4. Address of premises **MUST** be at bottom of first page of deed *AND* Satisfactions and Assignment of Mortgages and Consolidation Agreement and *everything*.
5. Addresses of **ALL** parties *must* be after their names at the beginning of instruments.
6. Instruments **MUST** be dated.
7. New form of acknowledgement **MUST** be used.
8. Names **MUST** be *printed* under the signatures.
9. "Recording and Endorsement Page" **MUST** be **COMPLETELY** filled out with the following information:
   a. Number of pages;
   b. County (if not preprinted);
   c. Block;
   d. Lot;
   e. Address of premises;
   f. Title Company name;
   g. Title Number;
   h. R & R box;
   i. Parties ***WITH ADDRESSES.***
10. If the document needs one, attach Tax Law § 255 Affidavit (generally for modification, extensions, spreaders and consolidations of mortgage).
11. If recording a memo of lease, attach:
    a. RPT (NYC);
    b. TP-584;
    c. **FULL** copy of lease;
12. Assignment of Leases **MUST** have complete mortgage chain in document *AND* Tax Law § 255 Affidavit.
13. Fill in **ALL** tables and boxes on the NYC RPT and TP-584 including but **NOT LIMITED** to:
    a. Social Security or Employer ID Number;
    b. Date of transfer;
    c. Percentage transferred;
    d. Percent which is residential;
    e. **ALL** Lot Numbers;
    f. Condition of transfer;
    g. Type of property;
    h. Details of consideration (and don't be shy about putting O's where applicable).
14. Attach a copy of the contract if the purchase price is $400,000 or more.
15. If signed pursuant to a Power of Attorney, print under the signature who is signing for whom.
16. If the signatory is not an individual, print his or her capacity next to or under the printed name.

17. Make sure the deed (or mortgage) has a description.

18. On SATS, full and logical mortgage chain is needed. All assignments, consolidations with all parties' names in **FULL EACH TIME.** No shortcuts (i.e., "CHASE") are allowed. Put county of recording for **EACH** instrument. This applies also to Assignments, Consolidations, Modifications, Extensions, Spreaders, etc.

19. Do not put "00" as a year *anywhere*. Use "2000."

20. Fill in the addresses of ALL parties on the documents, NYC RPT and TP-584.

21. Fill in the Social Security Number or the ID Number on the signature page of NYC RPT and TP-584.

22. If the premises is **NOT** a multiple dwelling, attach the "Affidavit in Lieu of Registration." This is required for deeds and Assignment of Lease.

23. Check a box on Schedule C of the TP-584 (Credit Line Mortgage info.).

24. *Copies* of documents cannot be recorded.

25. DO NOT have the witnesses' signature (if any) notarized.

26. Don't abbreviate the county on acknowledgments. Write "Westchester," *NOT* "West."

27. Signature lines and printed lines on RPT and TP-584 **MUST** match *exactly*. (Don't print "Estate of John Smith" and write John Jones, Executor"). The same applies to Housing Preservation Department and Smoke Detector forms.

28. **PRINT NEATLY. DON'T SCRIBBLE!**

29. There is no such entity as "Estate of Muriel Mutterperl." Neither in deeds, mortgages, NYC RPT, TP-584, etc. **NOWHERE!**

30. Make sure deed has block; lot (or lots) and CORRECT condominium percentage of common elements.

31. In New York City (counties of Kings, New York, Bronx and Queens), on SATS, Assignments, Consolidations, etc., **DON'T** put down on the mortgage chain that documents were recorded in the "County Clerk's" or in the "Recorder's" office. They are recorded in the *CITY REGISTER'S* office.

32. Make sure assignments of mortgage have § 275 language. There is a requirement that either the mortgagor or any other party having knowledge (and so asserts) must state that the assignee is not acting as a nominee of the mortgagor and that the mortgage continues to secure a bona fide obligation or "This assignment is not subject to the requirements of section two hundred seventy-five of the real property law because it is an assignment within the secondary mortgage market."

33. If RPL § 275 language is done by a separate affidavit, it must be affixed within the Assignment of Mortgage and not to the front (like a Tax Law § 255 Affidavit). Also, count the RPL § 275 pages as pages to be recorded.

34. Put the names of the original parties (borrower and lender) on an assignment of mortgage.

35. To RE-RECORD a mortgage, modification agreement, consolidation, and extension agreement, spreader: you need a Tax Law § 255 affidavit.

36. NYC RPT and TP-584 **MUST** be signed.

37. Place parties' names at the beginning of all documents **NOT** "the undersigned."

38. If a transaction involves more than one condo unit in a building, and the parties want to obtain the LOWER rate for the RPT and mortgage tax, an architect's or engineer's certificate MUST accompany the papers to say that the units have been or will be combined into ONE unit with only one cooking facility.

39. Notary stamps **MUST** be **UNDER** the acknowledgment, **NOT** over it or next to it.

40. If an instrument is a mortgage with consolidation language within it, it **STILL** needs the property improvement clause.

41. Surrenders of Leases need NYC RPT and TP-584.

42. Assignments of Lease need NYC RPT and TP-584.

43. If a document covers more than one lot, put just ONE lot on the endorsement page and put the others with the block(s) and respective addresses on a separate page. Put "see attached" on the endorsement page to refer to the other lot(s).

44. Names at the beginning of documents **MUST** match exactly the signatures, including but not limited to middle initials. Also, the name in the acknowledgment **MUST** match the other two places.

45. Do not accept for recording any document executed in front of a N.Y. notary that is dated 9/1/99 or later unless it has the NEW uniform acknowledgement.

46. If signed by an attorney-in-fact, print his or her name below the signature and print "pursuant to a Power of Attorney dated _____ and intended to be recorded simultaneously herewith."

47. If a party to a document is an Executor, Trustee or Administrator, you **MUST** recite date of death, county of death and index number of the Surrogate's Court file.

48. If an SAT is signed by heirs (distributees) of a decedent, you **MUST** recite date of death, county of death, that the decedent died intestate, that no administrator has been appointed and that the signatories are ALL of the heirs.

49. If a lease or memo of lease is to be recorded, it **MUST** contain a commencement date and an expiration date. You **CANNOT** say it will commence when a Certificate of Occupancy is issued or any other indefinite term. They want **EXACT** dates. This is **NOT** negotiable with the city.

50. NYC RPT and TP-584 **MUST** accompany a lease or memo.

51. If an assignment of mortgage (or any instrument affecting a mortgage) is recorded at the same time as the mortgage, state that the mortgage is "being recorded simultaneously herewith." **NOT** "to be recorded."

Conveyancing (Deeds): An Annotated Outline

By James M. Pedowitz

I. General

1. Conveyancing is the act of performing the various functions relating to the transfer of real property. Although it includes examination of title and the preparation of many forms of documents, the deed is probably the most crucial of conveyancing documents, and this material will deal primarily with that document.

2. Most deeds are prepared on a printed form. It appears to be simple—deceptively so. You must:

   - Understand the purpose to be accomplished.
   - Assemble the necessary information.
   - Choose the proper printed form.
   - Understand the choices to be made in completing and supplementing the printed deed form.
   - Familiarize yourself with all applicable statutory requirements, both for the deed and the supplementary required documentation, i.e.,:

     New York State— TP 584 and TP 584.1

     New York State— RP 5217

   If the property is in New York City, i.e.:

     New York City— RPT

     New York City— Owner's Registration Card

   If the property is in Yonkers, Mount Vernon, the five towns of the Peconic Bay Region on Long Island, or Erie County, there are separate transfer tax forms to complete and taxes to pay.[1]

II. Preliminary Data

Before attempting to prepare the deed, assemble and ascertain as much as possible of the following documents and information:

1. Purpose of the deed.
2. Prior deed or title policy.
3. Survey?
4. Name, address, Social Security number or employer identification number of all parties. If multiple grantees—proportions and type of ownership desired.
5. Current tax bills.
6. Tax exemption information, i.e., STAR, senior citizen, veteran, other?
7. Existing mortgages and disposition, if any, and credit line mortgages?
8. Determine and advise as to transfer taxes payable.
9. Any document(s) signed during ownership, i.e., boundary agreement, deed made or received, affidavits or consents signed.
10. If decedent's real property, did decedent die testate or intestate?
    (a) Date and place of death—death certificate—Letters Testamentary or of Administration.
    (b) Probate or administration data, if any.
    (c) Was the property held by the entirety, or as a joint tenant?
    (d) Determine if an Executor's or Administrator's deed can properly be used.

III. Form of Deed

1. Any form of deed will convey the grantor's interest in the subject real property if the property is adequately described, the deed duly executed and delivered.[2]
2. "Deeds" are not defined in the Real Property Law (RPL). RPL § 240 defines a "conveyance" as every instrument other than a will by which an estate or interest in real property is created, transferred, assigned or surrendered.
3. A deed must be in writing,[3] in English,[4] contain a specific grantor and grantee, a proper designation of the property transferred, recital of consideration (preferable) and operative words manifesting an intent to convey. It need not follow any exact or prescribed form of words.[5]
4. RPL § 258 gives short forms for most forms of deeds. The statutory forms are permissive only and not mandatory.[6]
5. The statutory forms are:
   (a) Deed with Full Covenants. It not only conveys but covenants as to seisin and right to convey; quiet enjoyment; freedom from encumbrances; agreement to execute or procure further assurances of title; and a warranty of title. A Full

Covenant and Warranty Deed will also convey an after-acquired title. RPL § 253 gives statutory construction of these covenants.

(b) Bargain and Sale Deed (Without Covenant against Grantor) conveys without covenants.

(c) Bargain and Sale with Covenants against Grantor includes: "That he (it) has not done or suffered anything whereby the said premises have been encumbered in any way."

(d) Quitclaim Deed merely remises, releases and quitclaims whatever the grantor has. If grantor has title, it effectively conveys all of the title.[7] Its use may raise some questions as to reason for its use.[8]

(e) Executor's Deed recites the power and authority to convey given by the will, and also includes any individual interest of the executor.

(1) Administrator's Deed is similar to the Executor's Deed.

(f) Referee's Deed in foreclosure recites appointment and the judgment of foreclosure and sale pursuant to which it is made.[9]

(g) Referee's Deed in Partition recites appointment and the judgment in the action.[10]

6. Other Forms:

Deeds by Trustee, Sheriff, Guardian, Special Guardian, etc., are basically one of the statutory forms with appropriate recitals or modifications.

IV. Dates on Deeds

1. Execution, Acknowledgment and Recording:

(a) Lack of date of execution or that the date is erroneous does not invalidate the deed.[11]

(b) The date on the deed is *prima facie* the date of its execution,[12] and of its delivery.[13] That presumption, however, may be rebutted by evidence.[14]

(c) See § 291 of Real Property Law for definition of "purchaser" under the Recording Act. Judgment creditor is not a purchaser,[15] and money judgments filed before deed are recorded but after judgment debtor delivered deed is not a valid lien against purchaser for value.

V. Grantor and Grantee

1. Grantor and grantee must be named or be definitely ascertainable for deed to be operative as conveyance.[16]

2. Street addresses are required by RPL § 333.

3. Name of grantor should be identical with name used in acquiring title; otherwise identity is questionable; discrepancies or changes should be explained by a recital; i.e., A.B.C. Corporation (successor by merger to XYZ Corporation), etc.

4. Multiple grantees:

(a) Tenants in common.

(b) Joint tenants—including unmarried persons incorrectly identified as husband and wife.[17]

(c) Tenants by the entirety (married persons only), whether or not identified as such.[18]

Joint tenancy and tenancy by the entirety require the four unities of time, title, interest and possession. Each joint tenant has one and the same interest by one and the same conveyance made at one and the same time and held by one and the same possession. Tenancy by the entirety also requires that they be husband and wife at the time of acquisition.

(d) Husband and wife can acquire as Tenants in Common or Joint Tenants if deed so specifically provides.

VI. Consideration

1. Not essential to validity,[19] but may affect status of "purchaser for value" or rights of grantor's creditors.

2. Recitals in deed:

(a) Deed from a fiduciary should recite the full actual consideration.[20]

Actual consideration need not be stated in deed from one other than a fiduciary.[21]

(b) Presumptive evidence of consideration by recital.[22]

3. Kinds of consideration include love and affection,[23] marriage,[24] and agreement to support.[25]

4. Failure to pay complete consideration may result in an equitable vendor's lien.[26]

VII. Granting Clause

1. Operative words of conveyance or grant are required,[27] but precise words or phrases are not necessary so long as the intent to con-

vey is manifested.[28] See language of deed forms in RPL § 258.

2. The deed will convey all of the estate and interests of the grantor unless the intent to convey a lesser interest is clearly expressed.[29]

VIII. The Description

1. Adequacy. The legal description should be sufficient to identify the property with reasonable certainty from a reading of the entire deed.[30]

2. Purpose is to identify the parcel of land to be conveyed with reasonable certainty.[31]

   (a) Parole Evidence is admissible to remove uncertainty and ascertain intention of parties,[32] but not admissible if description leaves no doubt or uncertainty.[33]

3. Types of descriptions:

   (a) Lot on filed map.[34]

      (1) Reference to tax map.

   (b) Reference to bounding owners.

   (c) Metes and bounds (courses and distances) which are more precise.[35]

   (d) A general description of real property, rather than a metes and bounds or lot number description, is permissible in a deed provided it adequately identifies the property.[36]

4. Description pointers:

   (a) The fixing of the beginning point is crucial to a good description.[37] In some cases, a "same as" recital cures or clarifies a defective description,[38] but it can also diminish the estate when the prior conveyance included is less than the entire estate.[39]

   (b) Monumentation prevails over courses and distances where there is a discrepancy—stones, trees, sides of streets, streams and other physical features,[40] but the intention of the parties will prevail.[41]

   (c) Use of "more or less" does not materially affect the description or its marketability.[42]

   (d) Ambiguities are usually resolved in favor of the grantee.[43] The courts strive to ascertain the intention of the parties.

   (e) A "same as" clause can either refer to the description in a prior deed, or to the estate granted in that prior deed. Careful drafting is essential. A defective description may be cured by proper recital in the deed.[44]

   (f) Street Numbers. It is dangerous practice to describe real property in a deed by only reference to the street number, though it may be sufficient if other evidence is produced to identify the property.[45]

   (g) Attaching Survey to Deed. A survey may be attached to the deed if it is on legal size paper, legible and of sufficient size for easy reading after photocopying, and does not relate to a subdivision.[46]

   (h) Errors and Defects. Words that are not necessary or essential to a description may be disregarded as superfluous.[47]

   (i) *Caveat*: A description of a landlocked parcel may create an easement by necessity over remaining lands of grantor.

   (j) *Caveat*: Implied easements can also be created that may also affect the grantor as to a use that is of value and physically apparent.

IX. Additional Clauses

1. *Exceptions*—that which is excluded from the conveyance, though apparently included in the description as "excepting" part of land conveyed.

   Location of Excepted Property. Where a part of the real property described in the deed is excepted from the conveyance, an accurate description of the excepted parcel is essential to assure an accurate description of what the deed is intended to convey.[48]

2. *Reservations*—something included within the conveyance but taken back out of it—as "reserving" a life estate or easement.

   Note: A reservation of a power in the grantor to change the grantee, or the remainder grantees after a reserved life estate has been utilized by some estate planners. This unconventional device can create serious marketability problems because the new grantee's title is retroactive to the effective date of the original deed in which the power was created.[49]

3. "Subject to" Clauses—matters to which the property conveyed is subservient to, as encumbrances of various

kinds—i.e., mortgages, easements, restrictions, etc.

4. Covenants, Restrictions and Assumptions—some obligations assumed by the grantee may be personal only, or may also continue to bind the land if they touch and concern the land, thereby treated as "running with the land." Similar rules are applied to restrictive covenants imposed in a deed.

24. *Habendum* Clause

Not as important today as in early common law but should be read with the granting clause since it can explain or qualify what estate was intended.[50]

However, where there is an irreconcilable difference between the two clauses, the granting clause prevails.[51]

However, this is a rule of construction and not of property and where the clear intention of the grantor can be discerned from the entire body of the deed, the construction must yield to the intentions of the parties.[52]

XI. Trust Clause Provision

Lien Law § 13 gives laborers and materialmen who improve real property priority over conveyance made during the improvement or within four months after completion. However, if the deed contains the required statutory language, the grantee or mortgagee has a priority over unfiled mechanics' liens as of time of recording of deed.

XII. Execution of Deed

Deed must be subscribed by grantor or lawful agent authorized by writing.[53]

1. Signature can be any mark or sign printed, written, stamped or otherwise placed on the deed.[54]

2. Attorney-in-Fact should execute deed in principal's name as Attorney-in-Fact, to wit:

(Principal)

By:

_____

Attorney-in-Fact

Care should be taken to assure that the power of attorney is still effective at the time of delivery. Mere recitation in deed is insufficient.[55]

(a) Power of Attorney should be recorded.[56]

Note: See GOL §§ 5-1501 *et seq.* as to statutory forms.

XIII. Acknowledgment

Acknowledgment is necessary for recording and protection against a subsequent purchaser,[57] even if that purchaser has knowledge of the prior deed and is not a bona fide purchaser.[58] An unacknowledged or defectively acknowledged deed properly delivered effectively transfers title as between grantor and grantee.[59]

1. After 15 years, a deed defectively acknowledged but accepted for recording is deemed to have become duly acknowledged except as to another deed to a bona fide purchaser from grantor recorded within the 15-year period.[60]

2. Deeds acknowledged outside the state of New York no longer require a certificate of the authority of the Notary Public attached thereto.[61]

3. Effect on Recording and Law of Evidence. A deed cannot be recorded unless its execution is either acknowledged or attested.[62]

4. Unacknowledged and Defectively Acknowledged Deeds. An unacknowledged or unattested deed is still valid and enforceable between the parties.[63]

5. Attested Execution (Subscribing Witness).[64] A deed can be attested to by a subscribing witness who does so *at the same time* that the deed is subscribed by the grantor. The acknowledgment is made by each subscribing witness on a special form set forth in RPL § 309-a.

6. Foreign Acknowledgments[65]—usually before a U.S. Consular Officer who signs an Apostile attached to the document.

7. Military Acknowledgment.[66]

XIV. Delivery and Acceptance

1. To convey title by deed, there must be an unconditional delivery of the deed to the grantor and an unconditional acceptance by the grantee together with a mutual intent to pass title.[67]

(a) There must be an unconditional acceptance or intention to accept by the grantee.[68]

(b) Acknowledgment and recording is *prima facie* proof of delivery.[69]

(c) Delivery in escrow can be a delivery if the document is out of control of grantor.

2. Presumptions of Delivery. Presumption of delivery and/or acceptance occurs on establishment of certain facts, though such presumptions are not conclusive and may be rebutted by proof of facts inconsistent with intention to cure transfer of title.[70]

3. Presumption of Acceptance. There is a presumption that a deed was delivered and accepted on the execution date in the deed.[71]

4. Redelivery After Acceptance. Once title has passed by delivery and acceptance of the deed, though not recorded, title may not be returned by redelivery to grantor of the same deed.[72]

XV. Prerequisites to Recording Deeds

When a deed is presented to the County Clerk or City Register for the purpose of recording, in addition to proper indexing instructions, the following documents are also required before the County Clerk or City Register can record the deed:

1. Deed requirements compliance.[73]

***Caveat*: Deed is not properly recorded until properly indexed.**[74]

2. Credit Line Mortgage Certificate.[75]

3. Real Property Transfer Form (RP-5217).[76]

4. Transfer Taxes—N.Y. State—Article 31, Tax Law §§ 1400-1410.[77]

   (a) Rate: $2.00 for each $500 of purchase price or fraction thereof.

      (1) See special $1.00 provisions as to certain REIT transfers.[78]

   (b) Grantor liable therefor.[79]

   (c) Imposed at time of delivery.[80]

   (d) No tax if consideration $100 or less.[81]

   (e) Liens existing before and remaining after delivery are deducted[82] on transfers of 1-3 family dwelling, individual residential condo or co-op.

   (f) Exemptions (Tax Law § 1405):

      (1) Deeds to United States, New York State, United Nations, etc.

      (2) Correction or confirmation deeds, etc.

      (3) Tax sale deeds.

      (4) Mere change of identity deeds.

      (5) Deeds of partition.

      (6) Contract of sale, without use and occupancy.

      (7) Option or contract to purchase (with use of occupancy) *for less than* $200,000 where grantor used the property (1-3 family, individual residential condo or co-op) as personal residence.

   (g) Additional Mansion Tax (1% of gross) on residential real property or interest when consideration is $1 million or more.[83]

5. City, County and Other Transfer Taxes:

   (a) New York City—Tax Law § 1201(b)(I) and Chap. 21, Tax Law §§ 11-2101-2118, New York City Administrative Code—ranging from 1% to 2.625% of gross consideration depending on type of property and whether gross consideration is under, at, or over $500,000.

   (b) City of Yonkers—1.4% if gross consideration is over $25,000.

   (c) City of Mount Vernon—1% of gross consideration in excess of $100,000.

   (d) Erie County—Surcharge on New York State Transfer Tax of additional $5.00 per $1,000, except for 1-2 family dwelling owned and occupied for at least one year prior to transfer by a person over age 62.

   (e) Broome County—Additional $0.50 for each $500 of gross consideration—added to the $2.00 New York State tax, making it a total of $2.50 per $500.

   (f) Peconic Bay Region—Towns of East Hampton, Southampton, Riverhead, Southold and Shelter Island.

      (1) Separate tax return similar to TP-584 is prepared.

      (2) Exemptions vary in each town and differ for improved and unimproved properties.

XVI. Correction and Confirmatory Deeds

1. A correction deed is used to correct mistakes in a prior deed. It is suggested that the correction deed be executed and acknowledged by both grantor and grantee, to evidence its acceptance, especially if the grantee may get something less or different than what was contained in the original deed.

2. There should be an adequate recital in the correction deed explaining the correction, and dated its actual date, "but as of (date of original deed)."

3. The correction deed prevails over the original deed, and is effective as of its original date.[84]

4. A confirmation deed confirms a title that may not have properly passed, i.e., a deed given to an entity prior to the date of its legal formation.

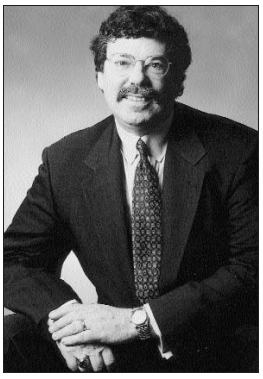
Endnotes

1. Real Estate Titles, 2d ed.—N.Y.S. Bar Ass'n, Chapter 7 "Deeds."
2. *Wallach v. Riverside Bank*, 206 N.Y. 434.
3. General Obligations Law (GOL) § 5-703(1).
4. RPL § 333(2).
5. *Cohen v. Cohen*, 188 A.D. 933, 176 N.Y.S. 893; *McGurl v. Burns*, 192 Misc. 1045, 81 N.Y.S.2d 51.
6. *Turner v. May*, 202 Misc. 320.
7. *Wilhelm v. Wilken*, 149 N.Y. 447; *Wallach v. Riverside Bank,* 206 N.Y. 434.
8. *Steinberger v. Steinberger*, N.Y.L.J., Apr. 10, 2000, p. 32 (Sup. Ct., Kings Co.).
9. Real Property Actions & Proceedings Law (RPAPL) § 342 contains favorable presumptions as to recitals in judgments.
10. *Id.*
11. *Mitchell v. Bartlett*, 51 N.Y. 447.
12. *Estep v. Kentland Coal and Coke Co.*, 39 F. 617.
13. *Hamlin v. Hamlin*, 192 N.Y. 164.
14. *Ten Eyck v. Whitbeck*, 156 N.Y. 341, 50 N.E. 963; *Tausk v. Siry*, 110 Misc. 514, 180 N.Y.S. 439.
15. See *U.S. v. Certain Lands*, 44 F. Supp. 830.
16. *Heath v. Hewitt*, 127 N.Y. 166; *Bachelor v. Brereton*, 112 U.S. 396; *Reformed Church v. Schoolcraft*, 65 N.Y. 134.
17. Estates, Powers & Trusts Law (EPTL) 6-2.2(c).
18. EPTL 6-2.2(d).
19. *Krause v. Krause*, 285 N.Y. 27; GOL § 5-1115.
20. *Smith v. Reid*, 134 N.Y. 568; RPL § 258.
21. *Binzen v. Epstein*, 58 A.D. 304, *aff'd*, 172 N.Y. 596.
22. *Berndt v. Berndt*, 192 Misc. 57.
23. *Loeschigle v. Hatfield*, 51 N.Y. 660.
24. *Johnson v. Johnson*, 33 A.D.2d 640, *aff'd*, 37 A.D.2d 904, *app. dismd.*, 30 N.Y.2d 751.
25. *Kinney v. Kinney*, 221 N.Y. 133.
26. 23 AmJur.2d Deeds § 67; *Zeiser v. Cohn*, 207 N.Y. 407; Friedman, Contracts and Conveyances, 4th ed. § 12.1(d).
27. *Cohen v. Cohen*, 188 A.D. 933, 176 N.Y.S. 893; Warren's Weed, Deeds, Vol. 1A, §§ 5.01, 5.02.
28. *Turner v. May*, *supra*.
29. RPL § 245.
30. *Pope v. Levy*, 54 A.D. 495; *Peterson v. Martino*, 210 N.Y. 412; *Horton v. Niagara, Lockport, etc.*, 231 A.D. 386.
31. *Pope v. Levy*, 54 A.D. 495; *Case v. Dexter*, 106 N.Y. 548.
32. *Orvis v. Elmira C. N.R. Co.,* 172 N.Y. 656; *Harris v. Oakley*, 130 N.Y. 1.
33. *Malin v. Ward*, 21 A.D.2d 926; *Cordua v. Guggenheim*, 274 N.Y. 51.
34. *Johnson v. Grennel,* 188 N.Y. 407.
35. *Mazzucco v. Eastman*, 36 Misc. 2d 648.
36. *Coleman v. Manhattan Beach Improving Co.*, 94 N.Y. 229.
37. *Heller v. Cohen*, 154 N.Y. 299; *Carmi v. Schaaf*, 88 A.D.2d 756; *Engelhott v. Simpson*, 50 A.D. 595.
38. *Bernstein v. Nealis*, 144 N.Y. 347.
39. *Pillmore v. Walsworth*, 166 A.D. 557.
40. *Wates v. Crandall*, 144 N.Y.S.2d 211, *aff'd*, 152 N.Y.S.2d 874.
41. *Talefer Co. v. Falk*, 105 Misc. 6, 173 N.Y.S. 251; *Morgan v. McLoughlin*, 6 Misc. 2d 434, *aff'd,* 6 A.D.2d 704, *aff'd,* 5 N.Y.2d 1041; *Towner v. Jamison*, 98 A.D.2d 970.
42. *Oakes v. DeLancey*, 138 N.Y 227; *Pope v. Levy*, 54 A.D. 495.
43. *Van Winkle v. Van Winkle*, 184 N.Y. 193.
44. *Pillmore v. Walsworth*, 166 A.D. 557, *aff'd*, 232 N.Y. 591; *Harrison v. N.Y.C.R.R.*, 255 A.D. 183, *aff'd*, 281 N.Y. 653; *Bernstein v. Nealis*, 144 N.Y. 34.
45. *Pelletreau v. Brennan*, 113 A.D. 806.
46. RPL § 333-b
47. *Johnson v. Long Island Inv. & Imp Co.*, 85 A.D. 60; *People ex. rel. v. Storms*, 97 N.Y. 364; *Laverty v. Moore*, 33 N.Y. 658.
48. *Dingley v. Bon*, 130 N.Y. 607.
49. EPTL 10-5.4.
50. *Harriot v. Harriot*, 25 A.D. 245.
51. *Mott v. Richtmyer*, 57 N.Y. 49 (1874); *Bannin v. Peck*, 291 N.Y. 717 (1943).
52. *Bates v. Virolet*, 33 A.D. 436.
53. RPL § 243; GOL § 5-703.
54. GOL § 46.
55. *Marvin v. Wilber*, 52 N.Y. 270.
56. RPL § 294.
57. RPL § 291.
58. RPL § 243; *Dunn v. Dunn*, 151 A.D. 800.
59. *Tinkel v. Parkin,* N.Y.L.J., May 31, 2000, p. 28, col. 6.
60. RPL § 306.
61. RPL § 311(2).
62. RPL §§ 291, 292; *Jackson v. Schoonmaker*, 4 Johns 161.
63. *Strough v. Wilder*, 119 N.Y. 530; *Chamberlain v. Spargur*, 86 N.Y. 603; *Dunn v. Dunn*, 51 A.D. 800; RPL § 306.
64. RPL § 243.
65. RPL § 301.
66. RPL § 300.
67. RPL, § 244; *Ross v. Ross*, 233 A.D. 626, *aff'd*, 262 N.Y. 381; *Marden v. Dorthy*, 160 N.Y. 39; *Obermeyer v. Jung*, 51 A.D. 247; *Durant v. Moore*, 198 Misc. 564; *In re Kennedy's Estate*, 56 Misc. 2d 1092.
68. *Buszozak v. Wolo*, 125 Misc. 546; *Powderly v. Aetna Casualty*, 72 Misc. 2d 251; *Williams v. Ellerbe*, 62 Misc. 2d 827.
69. *Sweetland v. Buell*, 164 N.Y. 541.
70. *Safford v. Burke*, 130 Misc. 12; *Durant v. Moore*, *supra*; *Strough v. Wilder*, *supra*; *Hamlin v. Hamlin*, 192 N.Y. 164; *Diefendorf v. Diefendorf*, 132 N.Y. 100.
71. *Ten Eyck v. Whitbeck*, 156 N.Y. 341.
72. *Herrman v. Jorgenson*, 263 N.Y. 348.
73. RPL §§ 291, 291-a, 291-b, 333.
74. RPL § 316.
75. RPL § 281.
76. RPL § 333(1-e).
77. *Moore v. Moore*, 47 N.Y. 467.
78. Tax Law § 1402(b).
79. Tax Law § 1404.
80. Tax Law § 1402.
81. *Id.*
82. Tax Law § 1401(d).
83. Tax Law § 1402-a.
84. *Builders Mtge Co. v. Berkowitz*, 134 A.D. 136, 118 N.Y.S. 804.

BERGMAN ON MORTGAGE FORECLOSURES

Mortgage Modification and the Mortgage Tax

By Bruce J. Bergman



When a borrower is in distress, lenders and servicers will frequently look favorably upon a mortgage modification as a method to save the day. This is an understandable approach, but might a borrower later have a defense to a foreclosure based upon the modification, claiming that a mortgage tax was not paid as a condition of recording that agreement? Well, if no new monies were advanced, the answer is no (a point raised in case law), although some explanation and background might be enlightening.

When a mortgage is originated in New York, a mortgage tax is, of course, due and there aren't too many situations where the tax is not paid because it is a prerequisite to recording. One way New York State assures that the tax is paid is by statute which bars issuance of a judgment of foreclosure and sale in a foreclosure case unless and until that mortgage tax is paid.[1] (And a complaint in a foreclosure action needs to allege payment of the tax.)

Turning to mortgage modification agreements: if a part of the modification is an advance of new monies to the borrower—which is not uncommon in commercial situations—then a mortgage tax *is* due to the extent of the new money and must be paid as a condition of recording that modification. Were the tax not to be paid, it likely would preclude obtaining a judgment of foreclosure and sale based upon breach of the mortgage as modified. But what if the modification is more of the typical variety where the term is extended or the interest rate is reduced, or some other provisions of the mortgage are changed—or some combination of all of those? Does that elicit payment of a mortgage tax, failing in which a defaulting borrower is presented with a defense?

Mindful that mortgagors can be exceptionally creative in crafting defenses—that the point was raised is not surprising—but the answer is no. Absent an advance of new monies, recording of the modification agreement is not a taxable event so that there is no mortgage recording tax due. If no tax is due, obviously there can be no defense to a foreclosure based upon that agreement.[2]

Endnotes

1. Tax Law § 258.
2. *Home Savings of America v. Weingrad*, 248 A.D.2d 253, 670 N.Y.S.2d 426 (1st Dept. 1998), citing Tax Law § 225; *In re Rednow Realty Corp. v. Tully*, 72 A.D.2d 621, 622, 420 N.Y.S.2d 792, *lv. denied,* 48 N.Y.2d 610, 425 N.Y.S.2d 1025, 401 N.E.2d 221.

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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 3½" floppy disk, preferably in Microsoft Word or WordPerfect 5.1 and no longer than 8-10 pages. Please also include one laser-printed copy. 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.

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