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N.Y. Real Property Law Journal

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

A Message from the Outgoing Section Chair

Matthew Leeds

As the Bar Association celebrates the beginning of its next administrative year this June, new officers are installed and members of the Section are entitled to an update. So here it is:

The state of the Section is good.

- Our membership has been increasing and looks like it can approach 5,000. We remain one of the three largest Sections in the Association.
- More engines for communication with members have been established. In particular, the Computerization and Technology Committee's Chair, Michael Berey, has created Internet capacity for rapid communication of new developments to members and for members to interact. You should be hearing more about this soon.
- Although we do not have statistics on diversity, the Section's efforts are poised to bear fruit, as Membership Committee Chairs Richard Fries and Karen DiNardo lead various initiatives for recruitment.

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A Message from the Incoming Section Chair

Dorothy Ferguson

I am honored to serve as this year's Chair of our Section, and grateful to many. First, the leadership of our immediate past Chair, Matthew Leeds, has been exemplary. The well-being of the Section was the driving force behind all of Matthew's decisions and actions as Chair. I thank him for keeping us on track—and for doing it with flair.

I'm also grateful to my fellow officers, Joshua Stein, Harry Meyer and Karl Holtzschue, for their outstanding service and dedication to the Section over the years. Each has distinguished himself as a real estate practitioner, and we are fortunate to have them as leaders. I look forward to working with this great team.

The members of the Section's Executive Committee continue to impress and inspire me. Their expertise and their efforts to advance the practice of real estate law deserve recognition. They spend many hours preparing for CLE seminars, writing legislative reports, traveling to meetings and producing articles for this publication and

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It is gratifying that these developments reflect the goals that had been specifically identified for the past year. It is further heartening that the Section's Executive Committee and its officers, led by incoming Chair Dorothy Ferguson, have committed to continued priority for the related themes of communication and recruitment for increased membership and diversity.

It does not seem productive merely to restate here the numerous matters that passed by the officers on the Executive Committee during the past year. Instead, for insight into that work, please take full advantage of the resources of the Section, including those Internet references that should be communicated to you in the upcoming year that will describe projects, developments and Committee minutes.

Please also find out how you can benefit from service on a committee. Contact any officer or chair named in this *Journal*. It remains true that the lifeblood of the Section is its committee work and the lifeblood of a committee is its membership. That means you and me and us.

Your participation can range from using the educational resources in committee meetings, to voicing your opinion when a committee discusses current issues, to taking the lead on special issues that arise before a committee, to assuming even more far-ranging leadership.

To identify all of the individuals who should be thanked for their help in making an officer's difficult job workable and pleasant would merely be to repeat the list of most of the members of the Executive Committee and of the Association's Staff. Unfortunately, space does not allow for that. Well, so what, I have to make space to tell an unkept secret that the person really in charge of the whole shebang is the Section's longtime Ultimate Liaison with the State Bar Association, Kathy Heider, who everybody in the Section should recognize, along with our other best friends in Albany, Lori Nicoll and Ron Kennedy.

As a continuing member of the Section and some of its committees I look forward to continued work with my colleagues and friends, and I invite you to join me under the incoming officers, Chair Dorothy Ferguson, Vice-Chair Joshua Stein, Second Vice-Chair Harry Meyer and Secretary Karl Holtzschue. The Section and its members will benefit from these guys being in charge.

I am not sure I have ever had the chance to write a 30 Column before, so for those of you who know what this means:

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Matthew J. Leeds

Message from the Incoming Section Chair
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others. Former Chairs of the Section also give generously of their time and talents, to our great benefit.

I urge all Section members to get involved—pick a committee that interests you and commit some time and energy to it. I can tell you from experience that it will benefit you in ways you never thought possible. In 1994, at the suggestion of John Blyth, I became Co-Chair, with Steve Horowitz, of the Attorney Opinion Committee. Among the very active Committee members were Karl Holtzschue and David Zinberg. After my term concluded, I became Co-Chair, with Joshua Stein, of the Commercial Leasing Committee. The mentoring given me by John, Steve, Karl, David and Joshua has been invaluable in my practice. The friendships formed through committee work are a bonus.

The Co-Chairs arrange excellent Committee meetings throughout the year—some offering CLE credit. Recognizing that it is difficult for many upstate members to travel to New York City for these meetings, I have asked the co-chairs to schedule at least one committee meeting this year in an upstate location. Please be on the lookout for a meeting in your area and try to attend.

Finally, I must mention the women who have served as Section Chairs and as role models for me. I am pleased and proud to follow in the path forged by Flora Schnall, Maureen Lamb, T. Mary McDonald and Lorraine Power Tharp. As Chairs, they worked diligently on behalf of the Section, and, as former Chairs, they all continue to be actively involved. I strongly support our Section's commitment to increase all types of diversity in the legal profession, and I look forward to furthering that initiative.

Best wishes for an enjoyable summer and a great year ahead!

Dorothy H. Ferguson

Anthony "Tony" Kuklin

1929-2004

We mourn the loss of our colleague, Tony Kuklin, former Chair of this Section, President of the American College of Real Estate Lawyers, Chair of the Section of Real Property Probate and Trust Law of the American Bar Association, Chair and founder of the Anglo-American Real Property Institute, member of the firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP, scholar, teacher and friend.

Memorial Service

Harvard Club

June 28, 2004

Letter from David Alan Richards

Tony was my "father-in-the-law," in attracting me to the practice of real estate law thirty-three years ago this month, when I was a summer associate (one of only a dozen!) at Paul, Weiss. He had the gift of making my first assignments in the real estate department both serious and fun, and the research for the opinion letter I drafted for him for the sale of the Grand Central Station air rights became the foundation for my *Yale Law Journal* Note the following year. I never wavered thereafter, either in my devotion to the practice area he led me into, or in my belief that I had stumbled upon the teacher of teachers for my chosen profession.

He was always a gentle man, and only hinted at the firmness with which he could argue a point or defend a position, if you hadn't ever seen it (as I did many times), with a sly joke: I once asked him what kind of a name was Kuklin, and he said, looking grim, "It's like Lenin, and Stalin . . ."

But I found that firmness more expressed throughout his life, not in his debating points so much as in his manner of engaging the world. He simply made no concessions, never gave up, where something could be shaped, or cajoled, or advanced to the point he envisioned.

He made no concessions to the quotidian. All our writing had to be polished, and elegant, not merely serviceable, and he fought "legalese" in the documents we produced, wherever we could escape the demands of such writing's conventions.

He made no concessions to boredom, and delighted in the many colors and varieties of life, and literature, and fashion, and history. He was famous among his friends for the brightness and daring of his ties, and had his passions for collecting miniature soldiers (we went out looking every Christmas at the model shop, after picking up something else for you!), and modeling clay figures, and reading the latest in mystery stories featuring foreign detectives, and histories of Western trappers and traders.

He made no concessions to the sometimes-perceived lack of respect for the worthiness of our shared specialization in real estate law. He was amused by the thought of assembling a super real estate firm, made up of our friends across the country that we knew through the American College of Real Estate Lawyers, and the Anglo-American Real Property Institute. Tony truly enjoyed working hard on continuing legal education programs and programme materials for those organizations and for the ABA, and of course capped his career of active practice with teaching real estate at his alma mater Columbia Law School as an adjunct professor. His helping to found the American College and the Anglo-American Institute, and serving as one of the first Chairs of each, was part of that same enthusiasm for educating his fellow practitioners, and himself. Like Chaucer's clerk, "Gladly would he learn, and gladly teach."

And finally, he made no concessions to the ill health that attended his last years, until he was overwhelmed. He did not go gently into that good night, although he went too soon.

Tony gave, for every day, some good account, as a lawyer, husband, father, and valued friend. We remember and celebrate him.

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Memorial Service

Harvard Club

June 28, 2004

Remarks by Steven Simkin

I met Tony in 1973 when I joined Paul, Weiss. For 31 years, he had been my mentor, my partner and my friend. Given Tony's modesty, I am not sure he would approve of what I am about to say. He was an extraordinary man. He was an extraordinary lawyer. His record of professional accomplishments is not likely to ever be broken. He was Chairman of the Real Property and Probate Section of the ABA. He was Chairman of the Real Property Section of the New York State Bar Association. He was Chairman of the Real Estate Section of the International Bar Association. He was President of the American College of Real Estate Lawyers. He was Chairman of the Anglo-American Real Property Institute and a member of numerous other organizations. He was, without any doubt, the most well known, the best-respected and the most-liked real estate lawyer in the country. I remember going with Tony to an ICSC conference in Scottsdale. There were over 800 real estate lawyers in attendance from all over the world. Not only was he the host and moderator, but virtually everyone knew him on a first-name basis. It was extraordinary to see. Tony loved the real estate bar and they loved him. He taught thousands of real estate lawyers, young and old, all across the country the art he had mastered. Believe it or not, while Tony was practicing law full time, Tony gave an average of ten lectures a year for over a fifteen-year period and wrote countless numbers of articles and books during that same time period.

Tony joined Paul, Weiss in 1961, having spent his six prior years as an associate at Dwight, Royal, Harris, Koegel & Caskey—the predecessor to Rogers & Wells, now Clifford Chance. I am not going to recount Tony's many, many professional accomplishments. I thought I would mention just a few of his more significant clients: Penn Central Railroad Company, Northville Industries, American Cyanamid Company, Industrial Bank of Japan, Long Term Credit Bank of Japan, Prudential Life Insurance Company and Mitsubishi Corporation. During my early years working with Tony, I was indispensable, but he did not know it. His secretary, Mae Beverly, could not read his handwriting and every day she would come into my office and ask me what Tony had written, even on deals I had nothing to do with. I repeatedly asked her to check with Tony and she repeatedly told me that Tony was much too busy and much too important to be bothered deciphering his own handwriting. I was told that was my job, and in those days I did what I was told.

Despite his many accomplishments, Tony was a humble man, very low-key, and rarely, if ever, raised his voice. He was an anomaly in the raucous world of real estate negotiations. Tony loved subtlety. I remember a time when I sat next to Tony for an entire morning negotiating an agreement with three of the toughest and nastiest adversaries

you could imagine. These three guys were yelling and screaming at me the entire time. Tony said virtually nothing and let me take all of the abuse. When we took a break for lunch, I told Tony that I could really use some support when we reconvened. He looked at me somewhat surprised. He then said to me, "Didn't you see how I moved my eyebrows just before the break? Don't worry," he said, "they got the message. They now know they cannot push us around." I was physically drained and Tony moved his eyebrows. Tony's approach may have been unusual, but surprisingly our adversaries must have gotten the message because things did go more smoothly after the break.

While he was subtle and subdued, Tony was also fiercely competitive. As an example, in his mid-40s he was still pitching shutouts for the Paul, Weiss softball team. A feat he was most proud of.

The best part of closing a big deal for Tony was, of course, the celebratory dinner that followed. Tony always paid, and never spared any expense. Our favorite restaurant for these dinners was LeCygne—now closed, but one of the best ever. Tony was so well known that when he arrived, a magnificent silver swan with his initials "ABK" would always be placed on our table. During one such evening, after our fourth dessert (and I have a witness because Vivienne was there), Tony suggested we try just one more dessert. He said, "Don't worry, I know you are full, but this one you are really going to like." I finished the dessert, and we talked about it for months and years afterwards.

We all knew Tony was well known in the elite real estate circles, and certainly in the better restaurants in New York, but he was always surprising me. He and I were in Charleston, S.C., closing a deal. When we were done, he mentioned that there was a restaurant that he had frequented years earlier when he was in the Army and would love to see if it was still there. It was called Perditas. Tony directed the cab driver to take us to Perditas (the driver had never heard of it). Undaunted, Tony directed the driver through the back roads of Charleston. Sure enough, he finds it, and, sure enough, it is open. Tony steps inside this very elegant establishment and the maitre d' looks up and says, "Monsieur Kuklin—so good to see you again." You would have thought it was staged, but it was not.

Tony loved to tell jokes and he knew thousands of them, one funnier than the next, but most of all Tony loved dry humor, especially under stressful circumstances. In the mid-1970s, we were hired by the American Cyanamid Company to represent its wholly owned subsidiary, The Ervin Company—the second-largest real estate development company in the country. Its assets were in the billions. The problem was the liabilities of The Ervin Company exceeded its assets by hundred of millions of dollars and our job was, outside of bankruptcy, to liquidate the company and settle up all debts so that its parent company, American Cyanamid, would have no liability. In other words, this was a big deal. The Ervin Company was located in Charlotte, N.C. Before we left for our very first meeting with the client, Tony told me and the other associates not to wear a suit (in those days we all dressed rather formally), but to go out and buy a sports jacket, colored shirt and loafers and look very casual since we were going to a real estate office in the South and we did not want to look intimidating or too "New York-like." We did as Tony instructed. We all looked like country bumpkins (including Tony). When we arrived at the company headquarters, we were told to go down the hall to the boardroom. We opened the door and sitting at the conference table were four people dressed to the nines with dark blue three-piece suits, white shirts, handkerchiefs, wing-tipped shoes, etc. There was the President of American Cyanamid Corporation, the CFO and two other senior officers. They looked at us—initially no words were exchanged and then one of them said to Tony, "You must be in the wrong place, the sales meeting is down the hall." Tony immediately turned to me and said, "It doesn't appear that we made a favorable first impression." Tony in his gracious way then explained that we were their New York lawyers, despite all appearances to the contrary. Of course, the President of Cyanamid had a pretty good laugh when Tony finished the explanation.

My professional and personal life was truly enriched by my friendship with Tony. Working with Tony was a complete experience. When you worked with him you ate together, drank together, traveled together, laughed together and shopped together. You were in his orbit, day and night. Tony was a joy to work for and a joy to work with. More important than teaching me to be a good lawyer, Tony taught me that it was OK to have significant interests outside the law and to pursue those interests. Tony loved his New York Giants, miniatures, model trains, modeling clay, Civil War history and so much more. He loved life and he loved people. Most of all, I know he loved his family and extended family. Vivienne and his girls were always the center of his life and deservedly so. He was the most optimistic and gracious man I ever met. Despite his years of suffering, he never complained, always smiled, always said he was doing fine and always made you feel better. I will miss Tony dearly, but I feel that he will always be with me, because of the degree to which he shaped, molded and influenced my life.

Tributes

Tony Kuklin was one of my favorite people and I considered him my friend. He was an outstanding lawyer and was always willing to pass on his knowledge and expertise by his teaching, writings and lectures on behalf of various bar groups and the Practising Law Institute. It was also my great pleasure to participate with him on numerous programs. Over and above his professional accomplishments, he was a fine gentleman, a pleasant person and was always a joy to be with. I will miss him and he will be missed by everyone who knew him or worked with him.

Jim Pedowitz

* * *

My first encounter with Tony was when he, around 1980 and upon the recommendation of Tom Moonan from Rochester, asked me to become a member of the Executive Committee of the Real Property Law Section of the New York State Bar Association. At the time, Tony was a partner at Paul Weiss Rifkind Wharton & Garrison in New York City and appeared to know everything about real property. As I later learned, he did. Tony instructed me to participate in the work of the Section and to write four learned articles a year. I did the former but never lived up to the latter.

Others will comment on his undergraduate (Columbia) and legal (Harvard) education and upon the fact that he was a charter member of the American College of Real Estate Lawyers (ACREL), its past president and a recent award winner. Prominent in his firm, Tony was a rainmaker who, with his Australian-born wife, Vivienne, traveled the world drumming up business. He was the first practitioner I ever met who used international title insurance twenty years ago. He explained it simply: "There was too much riding on the deal and I wanted somebody riding shotgun with me." He knew foreign types all over the world.

We frequently encountered each other at professional meetings and gradually we began to meet socially at breakfast before a meeting. Tony liked to meet at the Harvard Club, but, when I could not reciprocate there, we would go next door to the Algonquin Club. It was during those social meetings that we learned that we were both in the U.S. Army Counter Intelligence Corps (CIC, aka Chi Iota Chi, aka Christ I'm Confused). He was stationed in the U.S. and I in Germany and we discovered that neither of us ever lost an opportunity to attend a party. We contributed greatly to the national defense during those difficult years.

We also learned that we were both adjunct law professors (he at Columbia and I at Cornell) so we began swapping ideas, texts, methods, terminology and war stories. He used to send me copies of his final exams and I am eternally grateful that I never had to take one of them.

I never had a deal with Tony, but I listened to him lecture on many occasions. He knew his subject, all of it, with all the exceptions. I hope that those lectures are written down somewhere and that they can be published for the benefit of us all.

John E. Blyth

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Tony was a good friend, a brilliant lawyer, and an able teacher with a wonderful dry, acerbic wit. Tony was a leader and guide in the real estate field. He was either the Chair or President of the Real Property Probate and Trust Section of the American Bar Association, The American College of Real Estate Lawyers and The Anglo American Real Property Institute. In each organization he brought not only his encyclopedic real estate knowledge, but also deft leadership skills. He will be much missed, not only by the real estate professors and real estate mavens, but also by all "dirt" lawyers.

John A. Gose

* * *

Tony Kuklin was unique. He was a brilliant lawyer, a true professional and an exceptionally kind, thoughtful and considerate person. He was always there. When I was asked to chair a special project of the American College of Real Estate Lawyers in 2002, twenty years after Tony served as its President, my first call was to Tony for assistance, which he gave me willingly, enthusiastically and with the same extraordinary perspicacity that defined his long career. Tony simply did everything well, with good sense and good judgment, but also with good humor, a light touch and always with humility. We should all be more like Tony.

Robert Hetlage

How Much Protection Does a Leasehold Mortgagee Need?

By Joshua Stein

Every real estate attorney, developer, or investor who negotiates a long-term ground lease (a "*Lease*")[1] knows it must be "financeable." That means the Lease must contain certain provisions ("*Leasehold Mortgagee Protections*") to protect the interests of a future Leasehold Mortgagee. Those interests boil down to assuring that a Leasehold Mortgagee can always:

- Take and readily enforce a Leasehold Mortgage;
- Preserve the Lease and its value, even if part of the transaction goes into default or surprises occur; or
- Walk away from a bad investment.[2]

To achieve these goals, a Tenant (or Leasehold Mortgagee) and its counsel might decide they want a Lease to contain: (a) every possible Leasehold Mortgagee Protection any real estate lawyer has ever imagined; (b) absolute clarity and full detail about every facet of those Leasehold Mortgagee Protections, leaving not even the slightest uncertainty to be resolved later and no possible hypothetical sequence or confluence of events unaddressed; and perhaps (c) as many words and pages as possible devoted to protecting future Leasehold Mortgagees.

Such an approach, if carefully and intelligently implemented, should minimize the likelihood that any prospective Leasehold Mortgagee or its counsel will ever find a way to disapprove a Lease. This approach can, however, also produce complexity, verbosity, excessive negotiations, and risk of error.[3]

At the opposite extreme, a Tenant (or Leasehold Mortgagee) and its counsel might decide a Lease should contain only the minimum Leasehold Mortgagee Protections needed to satisfy the literal requirements and expectations of the rating agencies. The Lease would simply parrot the express requirements of the rating agencies (just the words in their published criteria for Leases). In any securitization, the Lease should then match up to the published words and pass without objection. This approach keeps everything simple and minimal and avoids problems.

"Minimal" Leasehold Mortgage Protections can work only if: (a) Landlord and its counsel do not try to festoon the "minimal" Leasehold Mortgagee Protections with too many conditions, limitations, procedures, qualifications, requirements, and restrictions (leading to complexity, fine-tuning, and risk of new mistakes); and (b) no future "B-piece" buyer, Leasehold Mortgagee, participant, purchaser, rating agency, rating agency counsel, or syndicate member ever decides the Lease needs more than the bare minimum Leasehold Mortgagee Protections as the rating agencies defined them at Lease signing.[4]

The author has published Leasehold Mortgagee Protections at both the "maximum" and "minimum" extremes.[5] This article, in contrast, offers a "middle ground" set of Leasehold Mortgagee Protections, which could be copied into a Lease and customized as necessary to dramatically shorten and simplify negotiation of Leasehold Mortgagee Protections for that Lease. These "middle ground" Leasehold Mortgagee Protections seek to give any Tenant and Leasehold Mortgagee a reasonably succinct, simple, straightforward, "fair," and nearly always adequate way to address typical concerns of a typical Leasehold Mortgagee. For each issue, these Leasehold Mortgagee Protections offer a balanced outcome that all parties will usually accept.

These "middle ground" Leasehold Mortgagee Protections omit many of the following items that often inflate and complicate the treatment of these issues in Leases:

- *Options.* "Bells and whistles" for unusual or nonstandard structures;
- *Negotiations.* Landlord-oriented concessions or qualifications, beyond the bare minimum necessary to (a) achieve a reasonable result on each issue; and (b) prevent laughter by Landlord or its counsel; and
- *Details.* Extremely detailed procedures, time limits, notice requirements, and other provisions, and extreme levels of clarity, specificity, and completeness.

Even after those omissions, these "middle ground" Leasehold Mortgagee Protections should adequately cover every typical "financeability" issue.[6] If a transaction requires "bells and whistles," though, these "middle ground" Leasehold Mortgagee Protections will not provide them. The author's "maximum" Leasehold Mortgagee Protections can fill such gaps.

By leaving out some details, these "middle ground" Leasehold Mortgagee Protections increase the risk of uncertainty and surprises, hence the risk of litigation if some unusual circumstance or sequence of events occurs. Most details omitted here, though, relate to very unlikely events. In the real world, Landlords, Tenants, and Leasehold Mortgagees can and do negotiate reasonable resolutions for most issues that arise, assuming each has some leverage.[7]

These model Leasehold Mortgagee Protections omit a few provisions that sometimes appear in Leasehold Mortgagee Protections. Each such omitted provision would

have added too much detail, burdened Landlord unreasonably and unnecessarily, or covered a topic highly unlikely to become relevant—and one that probably can be dealt with in some other reasonable way if it ever does become relevant.

Most Leasehold Mortgagee Protections serve a Leasehold Mortgagee's interests without directly benefiting the Tenant. Beyond such "pure" Leasehold Mortgagee Protections, a Leasehold Mortgagee considering a Lease as collateral will care about all other terms of the Lease. A Leasehold Mortgagee will consider nearly every issue in the Lease. Any such issue, if handled badly enough, can make a Lease "unfinanceable."

Covering all such issues in a discussion of Leasehold Mortgagee Protections would lead to a general discussion of Leases, not the intention of this article. Nevertheless, a Tenant and a Leasehold Mortgagee share a few fundamental concerns. The issues on that "short list" are often regarded as Leasehold Mortgagee Protections, even though one might more aptly describe them as fundamental to any decent Lease. These "medium" Leasehold Mortgagee Protections cover a few of those fundamental "shared issues"[8] before turning to issues oriented more directly toward Leasehold Mortgagees.

The footnotes in these model Leasehold Mortgagee Protections describe some judgment calls that went into these Leasehold Mortgagee Protections. Anyone can argue for some other judgment call. Anyone can deem any omitted issue to have been worth covering.[9] These risks are inevitable in trying to define any "middle ground" legal document.

Beyond offering a "reasonable" set of Leasehold Mortgagee Protections, the following model seeks to demonstrate straightforward, simple, and comprehensible legal writing, consistent with the author's published pleas for use of Plain English even in sophisticated commercial real estate transactional documents.[10] No law requires lawyers to write legal documents in a weird and perverted form of pompous quasi-English, marked by long sentences, convoluted verb structures, graceless word piles to describe simple concepts, profligate use of the passive voice, redundancy, and gratuitous complexity.[11]

The author welcomes comments on these Leasehold Mortgagee Protections, both substantive and stylistic. Comments should be directed to joshua.stein@lw.com.

Definitions

1. "**Bankruptcy Sale**" means a sale of any property, or any interest in any property, under 11 U.S.C. § 363 or otherwise in any bankruptcy or insolvency proceeding affecting the owner of such property.

2. "**Bankruptcy Termination Option**" means Tenant's right to treat this Lease as terminated under 11 U.S.C. § 365(h)(1)(A)(i) or any comparable provision of law.

3. "**Fee Estate**" means Landlord's fee interest in the Premises,[12] including[13] Landlord's reversionary interest, all subject to this Lease.

4. "**Foreclosure Event**" means any: (a) foreclosure sale (or trustee's sale, assignment in lieu of foreclosure, Bankruptcy Sale, or similar transfer) affecting the Leasehold Estate or[14] (b) Leasehold Mortgagee's exercise of any other right or remedy under a Leasehold Mortgage (or applicable law) that divests Tenant of its Leasehold Estate.

5. "**Lease Impairment**" means Tenant's: (a) canceling, modifying,[15] surrendering, or terminating this Lease, including upon Loss; (b) consenting, or failing to object, to a Bankruptcy Sale by Landlord; (c) determining that a Total Loss has occurred; (d) exercising any Bankruptcy Termination Option; (e) subordinating this Lease or the Leasehold Estate to any other estate or interest in the Premises; or (f) waiving any term(s) of this Lease.

6. "**Lease Termination Notice**" means a notice[16] stating this Lease has terminated, and describing in reasonable detail any uncured Tenant Defaults.

7. "**Leased Fee Value**" means the fair market value of the Fee Estate, considered as if unimproved[17] and subject to this Lease.[18]

8. "**Leasehold Mortgage**" means any collateral assignment, deed of trust, mortgage, or other lien (each as modified from time to time) encumbering this Lease, the Leasehold Estate, and Tenant's Preemptive Rights.[19] A Leasehold Mortgage shall not attach to the Fee Estate.

9. "**Leasehold Mortgagee**" means a holder of a Leasehold Mortgage (and its successors and assigns), provided: (a) it is not an Affiliate of Tenant;[20] and (b) Landlord has received notice of its name and address and a copy of its Leasehold Mortgage.[21]

10. "**Loss**" means a casualty or condemnation affecting the Premises.

11. "**Loss Proceeds**" means any insurance proceeds or condemnation award paid or payable for a Loss.

12. "**New Lease**" means a new lease of the Premises and related customary documents such as a memorandum of lease and a deed of the Improvements. Any New Lease shall: (a) commence immediately after this Lease terminated; (b) continue for the entire remaining term of this Lease, as if no termination had occurred, subject to any Preemp-

tive Rights; (c) give New Tenant the same rights to the Improvements that this Lease gave Tenant; (d) have the same terms, including Preemptive Rights, and the same priority, as this Lease, subject to any subsequent written amendments that bind New Tenant; and (e) require New Tenant to cure, with reasonable diligence and continuity, within a reasonable time, all Tenant Defaults (except Tenant-Specific Defaults) not otherwise cured or waived.

13. "**New Tenant**" means Leasehold Mortgagee or its designee or nominee, and any of their successors and assigns.

14. "**Preemptive Right**" means any expansion, purchase, or renewal option; right of first refusal or first offer; or other preemptive right this Lease gives Tenant.

15. "**Remaining Premises**" means any Premises that Landlord continues to own after a Total Loss.

16. "**Tenant Default**" means Tenant's uncured default or breach under this Lease.

17. "**Tenant Default Notice**" means Landlord's notice of a Tenant Default, describing the Tenant Default in reasonable detail.

18. "**Tenant-Specific Default**" means any Tenant Default that: (a) arises from any lien or encumbrance attaching solely to the Leasehold Estate (not the Fee Estate) but junior to the Leasehold Mortgage; or (b) Leasehold Mortgagee or New Tenant cannot reasonably cure.

19. "**Termination Option Loss**" means any Loss that occurs during the last _____ months of the Term or would cost[22] more than $_____ (beyond Loss Proceeds to be made available) to restore.

20. "**Total Loss**" means any condemnation that affects all or substantially all the Premises or, in Tenant's reasonable determination (with Leasehold Mortgagee's consent) any: (a) Loss after which Tenant cannot legally restore the Improvements as an architectural whole for economic use for their previous purpose; or (b) casualty after which, because of changes in Legal Requirements, Tenant cannot legally restore the Improvements to substantially their previous size.

Use

Tenant may use the Premises for any lawful purpose.[23]

Assignment

Without Landlord's consent, Tenant may assign this Lease at any time, provided only that Tenant or the assignee gives Landlord a copy of the assignment and also, except in the case of any Leasehold Mortgage or an assignment through a Foreclosure Event, Tenant: (a) has achieved and paid for Substantial Completion of Development; and (b) causes the assignee to deliver to Landlord an assumption of this Lease.

Subleases

Without Landlord's consent, Tenant may sublease the Premises in whole or in part at any time(s). If this Lease terminates, Landlord shall not disturb the possession, interest, or quiet enjoyment of any Subtenant not in default beyond applicable cure periods under its Sublease,[24] provided such Subtenant is not related to Tenant, at least one Leasehold Mortgagee has granted such Subtenant nondisturbance protection, and the Sublease either: (a) does not demise all or substantially all the Premises and was on commercially reasonable and fair market terms (including fixed subrent that cannot decline except upon Loss) when such Subtenant became legally bound; or (b) demises the entire Premises and is in all material respects at all times no less favorable to Landlord than this Lease.

Loss[25]

If a Loss occurs: (a) the party that first becomes aware of it shall notify the other; (b) the parties shall direct the payor to pay all Loss Proceeds to Leasehold Mortgagee;[26] (c) Loss Proceeds shall be applied as follows until exhausted; (d) each party's rights to receive Loss Proceeds shall be subject to the rights of its mortgagee(s); and (e) the parties shall have the following rights and obligations.[27]

Landlord's Costs. First, Landlord shall receive Loss Proceeds to reimburse Landlord and Fee Mortgagee for their reasonable costs and expenses (including attorneys' fees and expenses), incurred because of the Loss.[28]

Total Loss. Second, if a Total Loss occurs, this Lease shall terminate. Landlord may require Tenant to use Loss Proceeds to remove all debris from, fill any substantial excavations in, and return to a level and vacant condition any Remaining Premises. Landlord shall then receive Loss Proceeds equal to the Leased Fee Value measured as if no Loss had occurred, less the value of the Remaining Premises after completion of the work described in the previous sentence. Tenant shall then receive all remaining Loss Proceeds.[29]

Termination Option Loss. Third, if a Termination Option Loss occurs, Tenant may (subject to the provisions of this Lease on Lease Impairments) terminate this Lease by notice to Landlord.[30] Landlord shall then receive all Loss Proceeds.[31]

Revaluation. Fourth, upon any condemnation of the Premises, except a temporary condemnation or a Total Loss: (a) future Rent under this Lease shall decrease by the product of such future Rent (measured as if the condemnation had not occurred) times the percentage of the Premises taken, by value; and (b) Landlord shall receive Loss Proceeds equal to the diminution in value of the Fee Estate.

Restoration. Fifth, if a Loss does not terminate this Lease, Tenant shall apply Loss Proceeds to restore the Improvements substantially as they existed before the Loss (subject to changes this Lease allows), to the extent reasonably possible under the circumstances.[32]

Disbursement. To the extent this Lease requires Tenant to apply Loss Proceeds for a specified purpose, Loss Proceeds shall be disbursed: (a) from time to time under reasonable and customary disbursement procedures as Leasehold Mortgagee (or, absent any Leasehold Mortgagee, Landlord) reasonably requires, except as this Lease otherwise provides; and (b) to Tenant, only if and when Tenant has accomplished the specified purpose.

Fee Mortgages[33]

Every Fee Mortgage shall be, and state that it is, subject and subordinate to this Lease and any New Lease,[34] and shall attach only to the Fee Estate. A Foreclosure Event shall impair no estate or right under any Fee Mortgage[35] and shall transfer only the Leasehold Estate.

Leasehold Mortgages

Without Landlord's consent, at any time(s): (a) provided that any Event of Default has been, or simultaneously is, cured, Tenant may grant Leasehold Mortgage(s);[36] (b) any Leasehold Mortgagee may initiate and complete any Foreclosure Event and exercise any other rights and remedies against Tenant and the Leasehold Estate (but not the Fee Estate) under its Leasehold Mortgage; and (c) any transferee through a Foreclosure Event, and its successors and assigns, may assign this Lease.

Lease Impairments

Any Lease Impairment made without Leasehold Mortgagee's consent shall be null, void, and of no force or effect, and not bind Tenant, Leasehold Mortgagee, or New Tenant.[37]

Notices

Any notice from Landlord to Tenant shall have no effect unless Landlord gives a copy to Leasehold Mortgagee. If any Tenant Default occurs for which Landlord intends to exercise any remedy, Landlord shall promptly give Leasehold Mortgagee a Tenant Default Notice.

Opportunity to Cure[38]

Landlord shall accept Leasehold Mortgagee's cure of any Tenant Default[39] at any time until __ days[40] after both: (a) Tenant and Leasehold Mortgagee have received the Tenant Default Notice for that Tenant Default; and (b) Tenant's cure period for that Tenant Default has expired. If Leasehold Mortgagee cannot reasonably cure the Tenant Default within Leasehold Mortgagee's cure period under the preceding sentence, it shall have such further time as it reasonably needs so long as it proceeds with reasonable diligence. If Leasehold Mortgagee cannot reasonably cure a Tenant Default without possession, or if any Tenant-Specific Default(s) occur(s), Leasehold Mortgagee shall be entitled to such additional time as it reasonably needs to consummate a Foreclosure Event and obtain possession, provided Leasehold Mortgagee timely exercises its cure rights for all other Tenant Defaults. If Leasehold Mortgagee consummates a Foreclosure Event, Landlord shall waive all Tenant-Specific Defaults.

Cure Rights Implementation

Whenever Leasehold Mortgagee's time to cure a Tenant Default or consummate a Foreclosure Event has not expired, Landlord shall not terminate this Lease, accelerate any rent, or otherwise interfere with Tenant's or Leasehold Mortgagee's possession and quiet enjoyment of the Leasehold Estate. Leasehold Mortgagee may enter the Premises to seek to cure a Tenant Default. This right or its exercise shall not be deemed to give Leasehold Mortgagee possession.

New Lease

If this Lease terminates for any reason (except with Leasehold Mortgagee's consent or because of a Total Loss), even if Leasehold Mortgagee failed to timely exercise its cure rights for a Tenant Default,[41] Landlord shall promptly give Leasehold Mortgagee a Lease Termination Notice. By giving notice to Landlord on or before the day that is ___ days after Leasehold Mortgagee receives Landlord's Lease Termination Notice, Leasehold Mortgagee may require Landlord to promptly enter into a New Lease with New Tenant. Landlord need not do so, however, unless New Tenant has, consistent with the Lease Termination Notice: (a) cured all reasonably curable Tenant Defaults (except Tenant-Specific Defaults); and (b) reimbursed Landlord's reasonable costs and expenses (including attorneys' fees and expenses) to terminate this Lease, recover the Premises, and enter into the New Lease.[42]

New Lease Implementation

If Leasehold Mortgagee timely requests a New Lease in conformity with this Lease, then from the date this Lease terminates until the parties execute and deliver a New Lease, Landlord shall not: (a) operate the Premises in an unreasonable manner; (b) terminate Sublease(s) except for the Subtenant's default; or (c) lease any Premises except to New Tenant. When the parties sign a New Lease, Landlord shall transfer to New Tenant all Subleases (including any security deposits Landlord held), service contracts, Premises operations,[43] and net income Landlord collected from the Premises during the period described in the previous sentence, and Landlord shall cause every Fee Mortgagee to subordinate unconditionally to the New Lease.

Tenant's Leasehold Rights

If Tenant's period to exercise any Preemptive Right expires, Landlord shall promptly notify Leasehold

Mortgagee. Until __ days after Leasehold Mortgagee receives such notice, Leasehold Mortgagee may exercise such Preemptive Right for Tenant. Notwithstanding anything to the contrary in this Lease, so long as Leasehold Mortgagee's time to obtain a New Lease has not expired, it may exercise Tenant's rights (including Preemptive Rights) under this Lease,[44] even if a Tenant Default exists.[45] Tenant irrevocably assigns to Leasehold Mortgagee:[46] (a) to the exclusion of Tenant and any other person, any right to exercise any Bankruptcy Termination Option;[47] and (b) any right of Tenant to object to any Bankruptcy Sale by Landlord.[48]

Certain Proceedings[49]

If Landlord or Tenant initiates any appraisal, arbitration, litigation, or other dispute resolution proceeding affecting this Lease, then the parties shall simultaneously notify Leasehold Mortgagee. Leasehold Mortgagee may participate in such proceedings on Tenant's behalf, or exercise any or all of Tenant's rights in such proceedings, in each case (at Leasehold Mortgagee's option) to the exclusion of Tenant.[50] No settlement shall be effective without Leasehold Mortgagee's consent, unless Tenant simultaneously pays the settlement, the amount at issue does not exceed $_____, and the claimant has released (or does not assert) any claim against Leasehold Mortgagee.

No Merger

If the Leasehold Estate and the Fee Estate are ever commonly held, they shall remain separate and distinct estates (and not merge) without Leasehold Mortgagee's and Fee Mortgagee's consent.

No Personal Liability

No Leasehold Mortgagee or New Tenant shall ever have any liability under this Lease beyond its interest in this Lease, even if it becomes Tenant or assumes this Lease. Any such liability shall: (a) not extend to any Tenant Default that occurred before such Tenant took title to this Lease (or a New Lease), except as identified in a Tenant Default Notice (or Lease Termination Notice) delivered to Leasehold Mortgagee before such Tenant took title; and (b) terminate if and when any such Tenant assigns (and the assignee assumes) or abandons this Lease (or a New Lease).

Multiple Leasehold Mortgagees[51]

If at any time multiple Leasehold Mortgagees exist: (a) any consent by or notice to Leasehold Mortgagee refers to all Leasehold Mortgagees; (b) except under clause "a," the most senior Leasehold Mortgagee may exercise all rights of Leasehold Mortgagee(s), to the exclusion of junior Leasehold Mortgagee(s); (c) to the extent that the most senior Leasehold Mortgagee declines to do so, any other Leasehold Mortgagee may exercise those rights, in order of priority;[52] and (d) if Leasehold Mortgagees do not agree on priorities, a written determination of priority issued by a title insurance company licensed in the State shall govern.

Further Assurances

Upon request from Tenant or any Leasehold Mortgagee (prospective or current), Landlord shall promptly, under documentation reasonably satisfactory to the requesting party: (a) acknowledge any Subtenant's nondisturbance and recognition rights (provided such Subtenant joins in such agreement); (b) agree directly with Leasehold Mortgagee that it may exercise against Landlord all Leasehold Mortgagee's rights in this Lease; (c) certify that (subject to any then exception reasonably specified) this Lease is in full force and effect, no Lease Impairment has occurred, to Landlord's knowledge no Tenant Default exists, the date through which Rent has been paid, and such other similar matters as may be reasonably requested; and (d) provided that Tenant reimburses Landlord's reasonable attorneys' fees and expenses, amend this Lease as any current or prospective Leasehold Mortgagee reasonably requests, provided such amendment does not materially adversely affect Landlord or reduce any payment.

Miscellaneous

Notwithstanding anything to the contrary in this Lease, Leasehold Mortgagee may: (a) exercise its rights through an affiliate, assignee, designee, nominee, subsidiary, or other Person, acting in its own name or in Leasehold Mortgagee's name (and anyone acting under this clause "a" shall automatically have the same protections, rights, and limitations of liability as Leasehold Mortgagee); (b) refrain from curing any Tenant Default; (c) abandon such cure at any time;[53] or (d) withhold consent or approval for any reason or no reason, except where this Lease states otherwise. Any such consent or approval must be written. To the extent any Mortgagee's rights under this Lease apply after this Lease terminates, they shall survive such termination.

Endnotes

1. The sample Leasehold Mortgagee Protections below define many but not all capitalized terms. "Lease" should include permitted amendments.
2. A Tenant might not worry itself about Leasehold Mortgagees—at least if the Tenant knows with absolute certainty that it, and its successors and assigns, will never need leasehold financing. A more typical Tenant will care very much about Leasehold Mortgagee Protections, because by making a Lease financeable they make it more attractive to a wider universe of future debt and equity investors.
3. It also causes headaches, according to counsel for at least one Landlord.
4. The rating agencies' published standards do not always track their current practices.
5. *See* Joshua Stein, *Model Leasehold Mortgagee Protections*, The American College of Real Estate Lawyers Papers, Oct. 1999. This article has been updated and reprinted extensively. *See, e.g.*, Chicago Title Insurance Company continuing legal education program (2000); Ass'n of the Bar of the City of New York (2000); N.Y.S. Bar Ass'n Real Property Law Sec-

tion, Advanced Real Estate Practice (2000); and N.Y. Mortgage Bankers Ass'n (2001). Except the 1999 publication, each included both the "maximum" and the "minimum" Leasehold Mortgagee Protections. Each also contains a general discussion of ground lease issues, alternatives, negotiations, and closing procedures. The author periodically updates the various Leasehold Mortgagee Protections and related materials. Current versions may be obtained from the author and will appear in the author's book on ground leases to be published by the American Law Institute/American Bar Association in late 2004 or early 2005.

6. This is not a representation or warranty. Any prospective Leasehold Mortgagee or its counsel can almost always find some objection to any Lease.

7. The negotiation process can, however, sometimes be painful and expensive.

8. Beyond the "shared issues" covered here, a Leasehold Mortgagee would look next at these issues: remaining term, transferability, rent adjustment (starting with the absolute clarity of any revaluation formula), unusual obligations, alterations, demolition, insurance, and environmental matters.

9. Whatever topics these Leasehold Mortgagee Protections omit are generally covered, often at length, in the author's "maximum" Leasehold Mortgagee Protections.

10. *See* Joshua Stein, *Writing Clearly and Effectively: How to Keep the Reader's Attention*, N.Y.S. Bar Ass'n Journal, July–Aug. 1999, at 44; *Template for a Template: A Checklist To Prepare or Improve Any Model Document*, The Practical Lawyer, Apr. 2000, at 15, *reprinted in* Real World Document Drafting: Form, Style, and Substance (ALI-ABA professional skills course materials), Dec. 2001, at 131 and Apr. 2002, at 151; *How to Use Defined Terms to Make Transactional Documents Work Better*, The Practical Lawyer, Oct. 1997, at 15; and *Cures for the (Sometimes) Needless Complexity of Real Estate Documents*, Real Estate Review, Fall 1995, at 63.

11. *See* Joshua Stein, *Short and Simple*, The American Lawyer, Oct. 2002, at 59. Here, the author suggests seven principles for better legal writing: (1) shorten long sentences; (2) get rid of words, sentences, and paragraphs you do not need; (3) prefer verbs to nouns; (4) question use of any word that includes "here"; try to substitute something less legalistic; (5) use simple words if you can; (6) use the active voice; and (7) write larger numbers as numerals. These principles are hardly new. *See, e.g.*, William Strunk, Jr. & E.B. White, The Elements of Style (4th ed. 2000). The legal profession still seems mostly oblivious to them.

12. "Premises" should include appurtenant air rights and development rights.

13. The Lease should say once that "include" means "without limitation."

14. The Lease should say once that "or" includes "and."

15. Though "modification" seems synonymous with "amendment" or "change," one often sees all three words piled together. It hardly seems necessary.

16. The Lease should say once that "notice" means "written notice" delivered in a certain way.

17. This assumes the Lease originally demised raw land. Valuation of the leased Fee Estate raises many issues, including nuances such as how to treat changes in zoning or tax incentives after the Commencement Date.

18. For this and other value-related provisions, the Lease should establish appraisal procedures. Usually the parties find three appraisers, who must choose either Landlord's or Tenant's proposed result—"baseball arbitration." Many believe this process gives both parties an incentive to act reasonably.

19. Mezzanine lenders may also want Leasehold Mortgagee Protections. Landlord may say a mezzanine lender is just an equity investor and should rely on its rights as an equity investor—the same rights it relies on for repayment—instead of bothering Landlord. Landlord may want to limit the amount, number, purpose, or type of loan(s) that Leasehold Mortgages secure. Such limitations are generally not market standard or appropriate, at least after Tenant has completed and paid for initial development. After that: (a) any Leasehold Mortgage of any size to any Leasehold Mortgagee merely creates a possible future Lease transfer through a Foreclosure Event; (b) Landlord should not care; and
(c) even if overleverage creates some theoretical possibility of temporarily deferring Landlord's rental income, Landlord's concerns are not compelling. Tenant will usually agree that any Leasehold Mortgagee must: (1) be "institutional;" (2) have a minimum net worth; (3) not be related to Tenant, with some exceptions; and (4) meet other objective and reasonable criteria. These concessions will cause definitional issues, complexity, and risk of obsolescence (for example, see a typical definition of "institutional lender" in 1975).

20. Depending on circumstances, Tenant may want to provide for joint venture partners that might also hold Leasehold Mortgages.

21. Landlord may also want copies of unrecorded loan documents and future amendments. Neither request seems justified.

22. Who estimates restoration cost? Omission of a detailed estimation procedure leaves a tolerable level of uncertainty, much like any other uncertainty about whether some condition has been satisfied or fact exists.

23. A Leasehold Mortgagee will usually tolerate a somewhat narrower permitted use. Any such narrowing affects the value of the Lease, not its fundamental financeability, provided the permitted uses still make sense, allow reasonable flexibility, and will not intolerably limit Leasehold Mortgagee's resale of the Lease after a Foreclosure Event.

24. Landlord may also want Subtenant to agree to pay Subrent (and any Sublease termination payments) directly to Landlord. Landlord (and its Fee Mortgagees) may hesitate to "nondisturb" (or "recognize") all future Subtenants, even under the conditions stated. Landlord may argue that once the Lease terminates, Landlord should recover clear possession, without worrying about any bits or pieces of Tenant's failed development plans. Tenants and Leasehold Mortgagees usually look ahead to the agenda of any future major Subtenant; reject Landlord's position; and win that discussion despite Landlord's good arguments.

25. The possibility of a Loss and its variations often consume many pages in a Lease or loan agreement. Landlords, Tenants, Leasehold Mortgagees, and counsel to all of them can negotiate this topic, creating new categories, conditions, and distinctions, to whatever degree they want or can stand. Of all the issues Leasehold Mortgagee Protections cover, treatment of Loss is the one least suited to a "one size fits all" resolution, but also the one where cost-benefit considerations most cry out for it. These Leasehold Mortgagee Protections make a valiant effort. One lawyer has proposed, not entirely as a joke, that the government should: (a) ban condemnation clauses; (b) require any condemnor to compensate each holder of an interest in the condemned property separately for the value lost; (c) collect a minuscule fee from each real estate transaction to establish a "condemnation undercompensation protective fund"; and (d) use that fund to make whole any owner or lender ever undercompensated for a condemnation. (In some states, total silence on condemnation, and a lack of typical language saying any condemnation terminates a Lease, may produce the right result. No Leasehold Mortgagee would ever rely on that proposition, however.)

26. Even if Landlord has agreed to allow just anyone to be Leasehold Mortgagee, Landlord can legitimately set standards for who may hold Loss Proceeds. If a third party might hold Loss Proceeds,

Leasehold Mortgagee will have similar concerns.

27. On the issue of a temporary condemnation, silence will usually suffice.

28. Tenant may want to cap or narrow these expenses, or argue they are just a risk of ownership.

29. Leasehold Mortgagees often want Loss Proceeds to pay all Leasehold Mortgages in full first. Many observers regard this position as extreme, for these reasons. A condemnation clause should give each party a package reflecting the value and relative risks/benefits of its position under the Lease, as if the Lease had continued. Neither party should find itself in a better position, wealthier, after a condemnation than before. Absent condemnation, Landlord would hold a low-risk high-priority relatively fixed annuity much like a first fee mortgage. *See, e.g., Special Report: CMBS: Moody's Approach to Rating Loans Secured By Ground Leasehold Interests* (Oct. 23, 2001). In contrast, Tenant and Leasehold Mortgagees, as holders of a higher-risk and lower-priority interest in the real estate, bear the risk of "first loss" if the value and cash flow of the property cannot adequately support Landlord, Tenant, and their various mortgagees. To do justice to these positions after an unexpected "liquidation" of the Premises from a Loss, Landlord should have first claim to Loss Proceeds, but only to the extent of the value of its low-risk annuity under the Lease, including the reversion. Tenant should own everything else, including both the risk of inadequate Loss Proceeds and the possible windfall of excessive Loss Proceeds. In response to issues like these, some Leases require Landlord and Tenant to share Loss Proceeds in proportion to the relative values of their positions. Landlord may fear that any formula tied to the value of Landlord's position at the moment of condemnation may undercompensate Landlord, especially for a condemnation that occurs during high interest rates or an anomalous real estate market, like that of 1991. This undercompensation parallels the loss a mortgagee suffers under 11 U.S.C. §§ 506(a) and 1129(a)(7). Those sections let a debtor "cram down" a mortgagee based on current adverse circumstances—fleeting impairment of value of the mortgagee's collateral—from a temporarily bad market at the moment of a bankruptcy filing. The mortgagee suffers that loss even though it thought it had bought into the real estate for the long haul. The condemnation formula can set a floor for Landlord's share of the award, taking into account such things as the remaining Lease term, maximum discount rate, and minimum projected residual value. Any such Landlord protections will create a corresponding risk for Tenant and its Leasehold Mortgagees (a "zero-sum game"). Insurance might cover some of this risk.

30. Without a specific decision deadline, the courts will infer a "reasonable" time, creating tolerable uncertainty. In a fully nonrecourse Lease: (a) Tenant has a termination option at all times; (b) a further termination option might just waste words, so long as Tenant must unambiguously leave behind all Loss Proceeds if Tenant just "walks away"; and (c) a Loss-based termination becomes interesting only when Tenant or Leasehold Mortgagee wants the right to terminate for a partial Loss, yet keep some Loss Proceeds, a possibility not offered here.

31. A "Termination Option Loss" lets Tenant decide whether to terminate. Landlord would reasonably argue that Landlord should keep Loss Proceeds, or Tenant should nevertheless restore, and Landlord's claim for the value of the Improvements should defeat the claim of Tenant and Leasehold Mortgagee, who "walked away." If, however, Tenant and Leasehold Mortgagee had no real choice, Landlord's "expectation"-based claim to Loss Proceeds becomes less compelling. For example, if a 60-story office building was originally a "legal nonconforming use" but current code allows restoration only as a single-family residence, or if the condemnor took 95% of the site (either, a "Total Loss"), Landlord still has a first-priority claim for any resulting diminution in the Leased Fee Value, but any remaining Loss Proceeds (typically more or less the value of the Improvements) go to Tenant and its Leasehold Mortgagee.

32. Tenant and Leasehold Mortgagee cannot "take the money and run." Landlord has an independent interest in restoration. But what if Loss Proceeds will not cover restoration? Typically a Lease will require Tenant to make up the shortfall before starting work, but will not require a guaranty of that obligation at Lease signing. Tenant can "walk away." Landlord receives the remaining Loss Proceeds, licks its wounds, and finds another tenant—a residual risk of ownership. The Leasehold Mortgage loan documents will also have something to say. Landlord will want some ability to control how Tenant restores—raising issues like those in any other major construction project and usually justifying similar outcomes.

33. These Leasehold Mortgagee Protections do not require all Fee Mortgages to be "subordinate" to all Leasehold Mortgages. That issue opens a can of worms caused mostly by confusion about leasehold transactions. Instead, this paragraph tries to explain succinctly how Fee Mortgages, the Lease, and Leasehold Mortgages should interact.

34. Tenant should agree, in the Leasehold Mortgage, not to subordinate the Lease to any Fee Mortgage. Landlord or a Fee Mortgagee may suggest that the Fee Mortgagee: (a) be superior and prior to the Lease, but (b) enter into an absolute and unconditional nondisturbance agreement with Tenant and any Leasehold Mortgagee. Tenants and Leasehold Mortgagees typically reject that proposition, in part for fear it might be deemed an executory contract in the Mortgagee's bankruptcy. They may, however, reluctantly tolerate a prior Fee Mortgage if Fee Mortgagee "joins in" the Lease when the parties sign it—a joinder in the present creation of a property interest rather than an "executory" promise to do something later. As another option, the Fee Mortgage could be expressly subordinate to the Lease, except during any period when Fee Mortgagee is bound by a fully effective nondisturbance agreement. If the nondisturbance agreement goes away, then the Lease subordination goes away.

35. Fee Mortgagee may want the right to cure Landlord defaults. Given the limited scope of Landlord's obligations, Fee Mortgagee's cure rights can be simpler than Leasehold Mortgagee's. Fee Mortgagee's cure rights are neither relevant to financeability nor uniformly included in Leases. The same applies to other possible Fee Mortgagee protections.

36. The parties may want to say that a Leasehold Mortgagee's rights end when Tenant repays its loan. This seems obvious and hence unnecessary. Silence avoids the need to analyze, carve out, and define certain loan repayments that should not terminate a Leasehold Mortgagee's rights (e.g., those resulting from a Foreclosure Event).

37. Without Leasehold Mortgagee's consent, any Lease amendment cannot even bind Landlord and Tenant. Though perhaps "overkill," this concept does prevent complexity, controversy, and issues that might arise if some amendments bound Landlord and Tenant but did not bind Leasehold Mortgagee or New Tenant.

38. Although Leasehold Mortgagees want extensive cure rights, they will rarely exercise them, because of: (a) fear of liability; (b) general free-floating anxiety; (c) institutional inertia and delays; (d) bank group dissension; (e) lack of funds; (f) unrecoverability; and (g) an inclination to rely on a court-appointed receiver. In reality, cure rights are probably more a monitoring mechanism than a Lease preservation mechanism.

39. If the parties disagree about an alleged Tenant Default, a Leasehold Mortgagee may want the right to pay under protest and potentially obtain a refund. Such a provision probably duplicates what courts would allow anyway. Its absence should create only tolerable risks, hence

not impair financeability. Leasehold Mortgagee will want Tenant to have ample cure periods and dispute rights even before Leasehold Mortgagee's cure period begins.

40. Landlord may want a shorter cure period for failure to insure. This sounds compelling, but probably not practical or necessary. Landlord should rely on its own (and Leasehold Mortgagee's) monitoring; a requirement for prior notice of cancellation from the carrier; and the right to force-place single-interest coverage quickly at Tenant's cost.

41. Landlord may argue that this gives a Leasehold Mortgagee too many bites at the apple and, for example, Leasehold Mortgagee should lose its New Lease rights if at any time any monetary obligation was more than ___ days past due. Leasehold Mortgagees usually win this discussion.

42. If a dispute exists about any of these items, Leasehold Mortgagee may want a New Lease even while the parties fight. Whether this is reasonable may depend in part on the nature of the dispute.

43. From Lease termination until New Lease execution, the Lease could control Landlord's interim leasing program, Subleases, and operations. Given how rarely (if ever) any Landlord has ever terminated a Lease and then entered into a New Lease, the topic probably does not merit the attention and verbiage it can receive. These Leasehold Mortgagee Protections cover it in a minimal and "broad brush" way.

44. This concept is not standard, but some secondary market players want it.

45. Landlord may argue that certain rights of Tenant under the Lease should go away while Tenant is in default, even though Leasehold Mortgagee might want the right to exercise them.

46. This assignment should also appear in the Leasehold Mortgage and loan documents.

47. Many Leases address the Bankruptcy Termination Option at great length. Everything they say boils down to this sentence and the definition of Lease Impairment. Looking ahead, if Landlord rejects the Lease and Tenant exercises no Bankruptcy Termination Option, the bankruptcy code lets Tenant offset damages against rent. Incorrect offsets can conceivably produce Lease terminations. Thus, some Leases let Leasehold Mortgagee approve each offset. These Leasehold Mortgagee Protections contain no such procedures, because such offsets are quite rare, and if problems arise Leasehold Mortgagee can reasonably protect itself through normal notices of default and, if necessary, preemptive litigation.

48. A recent Seventh Circuit case allowed a Landlord to destroy a Lease by selling the leased property through a Bankruptcy Sale—a Lease destruction technique that ground lease practitioners had never before envisioned. *See Precision Industries v. Qualitech*, 327 F.3d 537, 547 (7th Cir. 2003). The result sounds quite alarming, especially if one believes the hysteria that many law firms expressed on their websites. The tenant in that case could, however, easily have prevented the problem, and saved its Lease, just by asserting its rights under the Bankruptcy Code. It apparently failed, forgot, or decided not to exercise those rights, hence lost its lease. *Qualitech* stands for only three principles. First, anyone who holds an interest in real estate must monitor its position and act proactively to protect it when necessary. Second, surprises never end in the world of ground leases. Third, bad cases produce longer documents.

49. Much like cure rights, a Leasehold Mortgagee's rights under this paragraph may be more theoretical—monitoring devices—than ever likely to be used.

50. Tenant will want any Leasehold Mortgagee not to exclude Tenant unless the Loan is in default, and perhaps not even then. Such concepts belong in the loan documents, not the Lease.

51. The senior Leasehold Mortgagee may want more control than this paragraph grants. All Leasehold Mortgagees need an intercreditor agreement.

52. This clause "c" governs as between Landlord and Leasehold Mortgagees as a group. The most senior Leasehold Mortgagee might want to go further, reserving the right to decide that no one at all shall exercise a particular Leasehold Mortgagee Protection. That issue belongs in an intercreditor agreement, not Leasehold Mortgagee Protections.

53. Landlord may want Leasehold Mortgagee to commit at some point that Leasehold Mortgagee will in fact eventually cure a Tenant Default, especially if construction-related. Leasehold Mortgagee, though, will want a "right to walk" at any time, regardless of how long Landlord may have had to "wait around," and will point out that all monetary obligations will have always been kept current. The outcome varies.

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The Illegal Multiple Dwelling in New York City

By Gerald Lebovits and Daniel J. Curtin, Jr.

> The issue of additional occupancy of legal one- and two-family buildings is a constant happening . . . evidence of the City's reluctance to crack down on this practice which for decades has provided additional, albeit illegal, housing in a tight housing market, as well as a silent recognition of the likely need by many owners for additional rental income to maintain these structures.[1]

> There are a number of reported decisions in this area. After extensive research, the Court has found that many of the decisions are conflicting . . . .[2]

Introduction

Common are the proceedings involving the use and occupation of illegal multiple dwellings, including efforts to collect rental arrears from or to remove occupants of illegal units. Uncommon is the disparity with which the courts resolve the issues surrounding illegal dwellings, commonly called "illegal threes" or de facto multiple dwellings. This article explores the uncertainty that the courts' splits have engendered in summary nonpayment and holdover proceedings involving de facto multiple dwellings.

The Basics

This much is certain: A multiple dwelling, according to the Multiple Dwelling Law (MDL), is a "dwelling which is rented, leased, let or hired out, to be occupied, or is occupied, as the residence or home of three or more families living independently of each other."[3] The MDL requires landlords and owners to register all multiple dwellings located in New York City.[4] Failure to register these dwellings results in barring the landlord from collecting rent.[5] A multiple dwelling may not be occupied absent a duly issued certificate of occupancy (c/o) attesting to MDL compliance.[6] Landlords that rent an illegal apartment—premises not covered by an existing c/o, either with no c/o or with a c/o but nonconforming use—violate the MDL and are subject to penalties.[7] Penalties include that "[n]o rent shall be recovered by the owner of such premises for said period, and no action or special proceeding shall be maintained therefor, or for possession of said premises for nonpayment of such rent."[8] Tenants may not, however, recoup money voluntarily paid as rent for the illegal premises or to obtain a stay.[9]

The certainty ends here. Everything else is uncertain.

Illegal dwellings are illegal threes when a c/o allows two units but the building contains three. The illegal unit is the third apartment. Other illegal apartments come up: illegal twos, nicknamed "mother-daughters." When a premises has a c/o that permits one-family use, creating or adding a separate unit in the premises not covered by the c/o results in an illegal two. When seeking rent arrears from or the removal of an occupant of an illegal two, questions about the MDL do not come into play. A one-unit building converted to a two-unit building is not a multiple dwelling.[10] Thus, for mother-daughters, summary proceedings in the Civil Court's Housing Part are permitted—holdovers[11] and nonpayment proceedings.[12] Significant questions arise, however, when the dwelling is a two-family home and someone adds an illegal unit. The addition of the problematic unit—the "illegal three"—brings the building within the MDL's purview. The same holds true when the building is a multiple dwelling and an additional, illegal unit is added, creating an illegal four. Once three or more units exist in a building, the MDL and attendant inquiries and issues surface.

A New York City Civil Court rule requires a landlord to plead compliance with the MDL and the New York City Housing Maintenance Code (HMC) in a summary proceeding seeking rent arrears in New York City.[13] The court rule provides that

> [i]n every summary proceeding brought to recover possession of real property pursuant to section 711 of the Real Property Actions and Proceedings Law, the petitioner shall allege either: (1) that the premises are not a multiple dwelling; or (2) that the premises are a multiple dwelling and, pursuant to the Administrative Code, sections 27-2097 et seq., there is a currently effective registration statement on file with the office of code enforcement in which the owner has designated a managing agent, a natural person over 21 years of age, to be in control of and responsible for the maintenance and operation of the dwelling. The petitioner shall also allege the following information: the multiple dwelling registration number, the registered managing agent's name, and either the residence or business address of said managing agent. The petitioner may (optionally) list a telephone number which may be used to call for repair and service.[14]

Pleading MDL compliance is unnecessary in a holdover proceeding when no use and occupancy is sought[15] or when no landlord-tenant relationship exists.[16]

When MDL compliance must be pleaded, a landlord must also prove MDL compliance.[17] Recital errors in the petition regarding multiple-dwelling registration (MDR) are amendable if the landlord can demonstrate that a valid MDR existed when the proceeding began and if the tenant was not prejudiced.[18] For example, inadvertently omitting the name and telephone number of the building's manager may be corrected by amendment.[19] The complete failure to register as the MDL requires will, however, allow a tenant to stay all proceedings or to assert the failure as a defense to a proceeding for rent.[20]

Failure, therefore, to comply with the MDL results in a landlord's being unable to collect rent.[21] Slightly different, but just as damaging to a landlord's demand to collect rent, is a c/o violation. That failure might result in the landlord's being unable to win a summary nonpayment proceeding to collect arrears.[22] In practical terms, there might be no real difference between not being able to collect rent and not being able to sue for rent. As one court stated, if "pleading and proving" the existence of a valid multiple dwelling registration insulated landlords from other illegalities in a premises—like occupancy in violation of a c/o—"then the larger public policy issue . . . would be subverted."[23] Landlords might then find themselves "in a legal conundrum where they are unable to evict a tenant in a summary proceeding or collect use and occupancy in a Civil Court action."[24]

Although some courts view an MDR lapse as correctable,[25] the proceeding might be dismissed if the landlord commits a significant error in pleading MDL compliance.[26] Many courts hold that when commencing a nonpayment proceeding, "a landlord . . . must allege either that the building is not a multiple dwelling or that it is a multiple dwelling and that there is a currently effective registration statement conforming to [MDL] § 325 on file with the New York City Department of Housing Preservation and Development. To omit these allegations from the petition is to state facts insufficient to constitute a cause of action."[27] Although the HMC requires that a copy of the MDR receipt be annexed to all petitions, omitting to do so is de minimis.[28]

Landlords must plead MDL compliance, but the failure to do so does not implicate the court's subject-matter jurisdiction. In *Chan v. Adossa*,[29] an owner sought to recover possession of a premises predicated on owner's use. After interposing an answer, the tenant moved to dismiss on the ground that the landlord had an invalid MDR; the managing agent's address on file was a post-office box. Civil Court had held that MDRs are jurisdictional in nature and that the failure to have a valid registration on file at the proceeding's commencement deprived the court of jurisdiction. The Appellate Term, First Department, disagreed. The Appellate Term held that the court rule requiring pleading MDL compliance "neither creates nor extirpates, neither increases nor diminishes the jurisdiction accorded to this court as prescribed by the Constitution of the State of New York and as is particularly outlined in the New York City Civil Court Act and other legislative enactments. Court rules are promulgated to regulate and facilitate practice and have nothing whatever to do with a court's jurisdiction."[30]

One problem is that in illegal-three cases, landlords often lie in Housing Part petitions. Because landlords can secure a judgment only if they plead MDL compliance, they or their attorneys must verify that the unit is or is not located in a multiple dwelling and then state that a valid MDR is on file, concede that no MDR is on file, or invent an MDR number and hope that the fraud will go uncovered. Alternatively, if a landlord verifies that the building is not a multiple dwelling because only two legal units are in a three-unit building, the pleading is improper because three units turn a building into a multiple dwelling. Either way, MDL compliance has not been, or will not be, pleaded as required. The question is whether it is a lie to verify that a three-unit building is not a multiple dwelling, given that an illegal conversion prevents valid registration. And assuming falsity, should not the case be dismissed solely on the ground that it is wrong to lie in a Housing Part proceeding to mask an illegal conversion in order to seek rent or use and occupancy that might not be collectable in a proceeding that might not be sustainable?

It is unsurprising that courts have rendered conflicting decisions on the topic of the illegal three. In few areas of the law will a court grapple all at once with issues of pleadings, forums for adjudication, the public's need for affordable housing, and a landlord's right to receive rent versus a tenant's right to live in a safe home.

Proceedings for Arrears

In light of the MDL's language, tenants inhabiting illegal units and sued for not paying rent defend against these proceedings by arguing that the landlord has failed to comply with the MDL's c/o requirement.[31] Whether the argument will be viable depends on where the proceeding is maintained and against whom it is maintained.

The First Department

Illegal-three cases in the First Department are less common than in the Second Department.[32] But First Department jurisprudence offers insight into whether rent arrears may be recovered when a landlord fails to comply with the MDL. When a landlord seeks to collect arrears from a tenant residing in an illegal unit, First Department courts do not always apply MDL § 302's bar to collections.[33] Applying the MDL's rent-forfeiture provision is usually

based on the existence of certain circumstances. In applying the penalty, courts generally find that the subject illegal unit—often located in a basement, where health and safety issues are heightened—endangers the occupants and that because of those conditions, the landlord is forbidden to collect the rent sought in the petition.[34] As the Appellate Term, First Department, has noted, "assuming that the rent forfeiture provisions of the [MDL] apply in [a] case . . . it must be shown that [conditions] in the building adversely affected the structure's integrity and threatened tenant's health and safety before a complete abatement of the rent is imposed."[35]

The groundwork for the First Department caselaw is that MDL § 302's rent-forfeiture provisions derogate the common law and are penal in nature. In the First Department, MDL § 302 must be construed strictly, not liberally to effect their remedial and beneficial goals.[36]

In other words, First Department courts will not enforce the rent penalty when the noncompliance has no negative impact on the subject unit.[37] The key aspect is that in the First Department, the irregularity over the c/o must directly impact or relate to the unit for which rent arrears are sought.[38] Otherwise, the landlord might be permitted to recover arrears.

Sometimes a landlord will not be subject to rent forfeiture despite a c/o or MDR violation. Assume that the c/o permits residential occupation of a unit and that the landlord commences a nonpayment proceeding against that unit's tenant, although illegal apartments are elsewhere in the building. When the landlord is pursuing the "legal" tenant, the courts of the First Department do not always impose the MDL's rent-forfeiture provision, and arrears may be sought despite the c/o defect.[39] For example, the Appellate Term, First Department, has held that if an illegal basement apartment does not affect a tenant's sixth-floor occupancy, the landlord's petition for arrears against the legal apartment need not suffer dismissal based on the illegal unit.[40]

The basis of this rule is that some question whether the legal tenants are within the class of persons the MDL is meant to protect. As one author has observed, "tenants who assert an MDL 302 defense to nonpayment proceedings are in essence raising contradictory claims. On the one hand they claim their occupancy is dangerous or illegal; on the other, they claim that they should be permitted to remain in occupancy, rent free . . . . when there is nothing wrong with their own premises."[41]

But the reasoning behind allowing landlords to seek arrears from tenants not in an illegal apartment, or legal tenants, has been questioned, particularly in the Second Department, where one court has observed that the "heightened risks and fire, health and safety issues are not limited only to the so-called illegal apartment."[42] Additionally, permitting tenants in legal apartments successfully to defend nonpayment proceedings on the basis of MDL defects might work a windfall for them. Thus, "the tenants of these [legal] apartments are unjustly enriched by not being within the court's jurisdiction in a nonpayment suit."[43] Whether nonpayment proceedings may be maintained against legal tenants is more hotly contested in the Second Department.[44] In the First Department, they are often allowed.

There are other instances when the courts of the First Department allow a landlord to recover rent from a tenant who occupies premises in violation of the building's c/o. First, a landlord can maintain a cause of action for arrears when a tenant is complicit in converting a portion of a building into an illegal unit or when the tenant enters into occupancy of premises the tenant knows is illegal.[45] If so, it will not matter whether the premises has conditions that threaten the occupants' health, welfare, and safety or whether the unit at issue is legal or illegal in light of the c/o.

Second, the tenant might be required to pay the rent sought if the landlord can quickly obtain a proper c/o. Pay to the court, that is. In one case, the Appellate Division, First Department, conditioned the tenant's payment of rent into court "while stimulating plaintiff's expeditious completion of the actions necessary to legalize the premises."[46] The court noted that the tenant did "not claim the premises pose[d] a threat to his health and safety" or that the premises' condition adversely affected the tenant's occupation.[47]

Third, according to the First Department's Appellate Term, "[t]he rent withholding sanction is not available to tenants who are themselves impeding the compliance with the [c/o] requirements,"[48] and that is the law statewide, for the Court of Appeals held in *Chatsworth 72nd St. Assocs. v. Ragai*, ultimately affirming the order of Civil Court, New York County, that rent may not be forfeited when the tenants' refusal to vacate thwarts the landlord's attempt to secure a permanent c/o.[49]

In the First Department, therefore, a landlord not in compliance with the MDL and against whose building a c/o or MDR violation exists will be barred from collecting rent. But for the forfeiture to apply, the conditions must warrant punishing the landlord for allowing the conditions to exist, arrears must be sought only for the illegal unit, and the tenant must not be complicit in the existence and maintenance of the illegal apartment.

The Second Department

In the Second Department, courts hold fairly consistently that no rent may be recovered when the MDL is violated and when the nonconforming use relates to the c/o. One court has gone so far as to note that "a

review of the Second Department caselaw shows that the literal meaning of MDL [section] 325 is still the proper standard to be applied."[50] In so noting, that court rejected the landlord's contention that "there is a trend to 'liberalize' the requirements of the [MDL],"[51] despite the landlord's arguing that cases like *B.S.L. One Corp. v. Rubenstein*[52] support that view.

In *B.S.L.*, a cooperative tenant entered into possession of an illegal apartment knowing about the improper c/o. The landlord was awarded arrears because the tenant prevented the landlord from obtaining a proper c/o. Although this decision seems to bring the Second Department in line with the First, *B.S.L.*'s extenuating circumstances take the case outside not only the MDL's rent-forfeiture provision but also outside the First Department's occasional deviations from the "no rent" rule. Specifically, the *B.S.L.* court was worried that "[r]espondent's attempt to recover eight years back rent paid from the time she purchased the shares [would place] an unnecessary burden upon petitioner, [and] may cripple the co-operative or threaten its viability to the detriment of all shareholders including respondent herself."[53] The *B.S.L* court was primarily interested in preserving the cooperative. As noted in *Shahid v. Doe*,[54] the *B.S.L.* court stated that "[i]n the absence of certain circumstances described earlier, which may excuse a landlord from a strict mechanical reading of MDL § 302 to avoid a tenant's unjust enrichment, equitable construction of the statute's rent forfeiture penalties generally requires a literal application of the statute."[55] Without these extenuating circumstances and considerations—such as proof "that the failure of the landlord to have a Certificate of Occupancy was the result of an error by the Department of Buildings"[56]—the rule in the Second Department is strict compliance with MDL § 325 with respect to illegal apartments. Absent strict compliance, all rents are forfeited under MDL § 302 in the Second Department.

Courts in the Second Department are at odds, not only with the courts in the First Department, but also with themselves over whether rent arrears may be sought from tenants in legal apartments when illegal units are elsewhere in the building. Some Second Department courts hold that rent arrears may be sought in those situations while others hold that all rents—from legal or illegal units—are forfeited when a c/o or MDR violation exists.

In *Mannino v. Fielder*, the court determined that literally applying the MDL was called for in all nonpayment proceedings, not only those in which rents were sought from tenants in illegal units.[57] The court rejected the landlord's contention that other cases from courts in the Second Department suggest that rent might be sought from tenants occupying legal apartments. The landlord had relied upon *Chan v. Kormendi*, a Queens County case that holds that the MDL's purposes of protecting tenants from unsafe conditions and identifying the owner are met with respect to legal units and thus that the MDL's rent-forfeiture provision was inapplicable.[58] The *Mannino* court instead adopted the reasoning of *Manabhal v. Talavera*, in which a holdover proceeding was dismissed against a tenant who resided in a legal apartment in premises also containing an illegal unit.[59] In *Manabhal*, the court discounted the landlord's arguments, analogous to those the landlord made in *Mannino*, and in dismissing the holdover found that any changes to the MDL and its requirements should come not from the courts but from the legislature.[60] The *Mannino* court determined that the same result is warranted in nonpayment proceedings.

Although *Totaram v. Cordero*[61] and *Marrocco v. Lugero*[62] cited *Mannino* with approval, another court split the difference. In *Skala v. Edlich*, the court held that because the tenant lived in the legal unit, the tenant was responsible for the arrears—after the landlord corrected the MDL violation.[63] But illegality is often incapable of cure, or is curable only at significant expense.

Finally, stipulations of settlement with monetary judgments are unenforceable—at least in the Second Department, where there is authority on the subject. In two cases, tenants residing in illegal apartments consented to monetary judgments for rental arrears that accrued while the premises in which they were residing did not conform to the c/o. When the Appellate Term, Second Department, addressed these cases, it vacated the monetary aspects of the stipulations. The Appellate Term reasoned that the "proscription provided for in [MDL] § 302, deemed penal in nature and strictly applied, constitutes a regulatory restraint on landlord[s] that may not be 'waived' by stipulation."[64] In a third Second Department case, the Appellate Term refused to vacate the possessory aspect of a stipulation that converted a nonpayment proceeding into a holdover proceeding even though the petition did not allege a proper MDR.[65] The First Department has yet to speak on this issue.

What all this means is that courts in the Second Department have yet to determine with finality whether rent may be collected from a tenant in a legal unit when illegal units exist elsewhere in the subject multiple dwelling. This, although "the Second Department caselaw shows that the literal meaning of MDL [section] 325 is still the proper standard to be applied."[66]

Actions and Proceedings for Possession

As if uncertainty with respect to nonpayment proceedings were not enough, the existence of an illegal unit in a multiple dwelling also impacts possessory proceedings. A question exists whether a possessory proceeding may be brought by a

summary holdover proceeding or whether an ejectment action is the appropriate mechanism to remove a tenant who resides in an illegal apartment. If ejectment is elected or appropriate, there are two forums for these cases: Supreme Court and Civil Court. A landlord should bring an ejectment action in Civil Court when the amount of the dispute—the tax-assessed value of the premises at issue—is $25,000 or less,[67] the Civil Court's jurisdictional limit. In all other instances, landlords should bring their cases in Supreme Court, which has original, general jurisdiction and thus no jurisdictional limit on the action's monetary value.[68] The MDL itself makes no mention of possessory proceedings, aside from providing that "no action or special proceeding shall be maintained . . . for possession of said premises for nonpayment of such rent."[69] It therefore seems from the governing statutory language that a defect in MDL compliance would not impact actions or proceedings seeking possession alone. But exceptions and distinctions abound.

Judges—though not all, and not in all cases, as explained below—often find that summary holdover proceedings may not be maintained absent compliance with the MDL's registration requirements.[70] As one court put it, "in the world of summary proceedings in New York City, the housing court refuses to entertain 'holdover' proceedings in regard to tenants in illegal apartments."[71] It is not the MDL noncompliance that prohibits a holdover proceeding. Rather, when creating the illegal apartment results in

> a "de facto" multiple dwelling (one which in fact contains three or more dwelling units, but has a certificate of occupancy only as a one- or two-family dwelling) . . . the remedy of a holdover under Real Property Actions and Proceedings Law [RPAPL] § 711 becomes unavailable. This is not because the [MDL] bars a proceeding in this situation, but because the petition fails to allege multiple dwelling registration as required pursuant to 22 NYCRR 208.42 (g) and, thus, fails to state a cause of action.[72]

Accordingly, adding an illegal apartment to a building that otherwise constitutes a duly registered multiple dwelling will not defeat the landlord's prior, proper registration or any future holdover proceeding.[73]

A policy argument supports disallowing holdovers when an MDL violation exists. If an expeditious summary proceeding were available and the landlord successfully removes the tenant, the landlord could re-let the illegal premises before anyone reports the unlawful space, "and the cycle of illegality [would] continue."[74]

Yet some courts have found that landlords may maintain holdover proceedings to recover premises occupied in violation of a c/o.[75] This might be a logical conclusion. Because the MDL's purpose is to ensure safe housing,[76] permitting a tenant to remain in an illegal apartment would defeat not only that goal but might also work an unjust enrichment to the tenant because the landlord might be precluded from collecting rent or use and occupancy.[77] One court that held that holdover proceedings may be maintained despite an MDL violation reasoned that when there is an otherwise valid c/o and the requisite pleadings appear in the petition, the court is powerless to strike the c/o or deem the MDR invalid.[78] Thus, with the requisite pleadings made, and without specific statutory authority prohibiting a holdover proceeding, the proceeding might be maintained.

For example, in *Meaders v. Jones*, a co-author of this article, sitting in Richmond County, denied a tenant's motion to vacate a stipulation in which the tenant consented to a judgment of possession and some future payment of use and occupancy.[79] On appeal, the Appellate Term, Second Department, modified in part. While vacating that portion of the stipulation relating to use and occupancy, the Appellate Term upheld the possessory judgment.[80] The litigants had fought over the possessory judgment; if the Civil Court's Housing Part had no jurisdiction to hear the dispute, the stipulation might have been vacated, and if so the landlord would have been forced to bring a slower ejectment action, thus affording the tenant more time to reside in his apartment, or well past six months.

The Appellate Term, finding that the Housing Part had jurisdiction all along, wrote that "it is well settled that a landlord may maintain a holdover proceeding to recover premises occupied in violation of the certificate of occupancy requirements."[81]

The Appellate Division, Second Department, granted leave to appeal in *Meaders* on December 23, 2003. As of June 17, 2004—the date this article was completed—oral argument is scheduled for September 2004.

Nii v. Quinn[82] presents a scenario similar to the one in *Meaders*. The landlord in *Nii* registered the premises and had a c/o. The tenant, however, occupied the premises in violation of the c/o. After the landlord began a holdover proceeding for arrears, use and occupancy, and possession, the parties entered into a stipulation in which the tenant consented to monetary and possessory judgments. On appeal, the Appellate Term, Second Department, found that the landlord had made no effort to obtain a conforming c/o and that as a result, the landlord could not collect any arrears sought in the petition.[83] But the court also found that "inasmuch as landlord is entitled to maintain a holdover proceeding to recover possession of premises occupied in violation of a certificate of occupancy and the remaining terms of the settle-

ment stipulation are severable from the unenforceable terms and constitute a proper disposition of the parties' rights and interests, we find no basis to strike the portion of the stipulation which awards landlord possession."[84] With that, the court found, at least implicitly, that holdover proceedings may be maintained to recover illegal units.

The Appellate Term's decision in *Meaders*, despite affirming the Housing Part's central ruling, has been the subject of debate. One authority has written that "[i]t is difficult to reconcile the holding in *Meaders v. Jones* with the holdings in *Santos v. Aquasvivas* and in *Blackgold Realty Corp. v. Milne*."[85] The Appellate Term had held in *Santos* held that "[a]s a condition precedent to maintaining a holdover proceeding, the landlord must allege the registration requirements pursuant to Multiple Dwelling Law § 325 . . . ."[86]

Moreover, without in any way suggesting that the Appellate Term decided *Meaders* incorrectly (or even correctly, because a discussion of *Meaders*'s merits is not the authors' goal[87]), a tenant's attorney might argue that three cases the Appellate Term cited in *Meaders* do not support the proposition that landlords may maintain summary holdover proceedings in the Housing Part to remove tenants from illegal apartments. *Hornfeld v. Gaare*, for example, did not uphold a landlord's right to bring a holdover proceeding against a tenant. Rather, the *Hornfeld* court awarded the landlord a declaration that the tenant had to vacate illegally occupied premises.[88] That was akin to an order for ejectment, a plenary mechanism to remove tenants from illegal premises.[89] Additionally, *99 Commercial St. v. Ulewellen* confirms a landlord's right to bring an ejectment action, not a holdover proceeding against tenants occupying illegal units.[90] And *Nii v. Quinn*, which allows a landlord to maintain a holdover, itself cites *Hornfeld*,[91] which, as noted above, does not say that the Housing Part may hear holdover proceedings to evict tenants who live in illegal dwellings.

Meaders has already begun to have offspring. In June 2004, the Appellate Term, Second Department, decided two cases, *Esposito v. Ango*[92] and *Furman v. DeGeorge*[93]—both resolved below by a co-author sitting in Richmond County—that raise questions about illegal dwellings.

In reviewing *Esposito*, the Appellate Term, citing *Meaders* with approval, declined to vacate the possessory aspect of a stipulation concerning what it termed an illegal multiple dwelling (and which the landlord argued was a lawful two-family house)—but only because the tenant had already vacated the premises. The court did, however, vacate the monetary provisions of the settlement, consistent with *Meaders*. The same day *Esposito* was published, *Furman* was published. *Furman*, another dwelling the landlord argued was a two-family house, followed *Meaders* in allowing for a possessory judgment in stipulations involving illegal multiple dwellings. But unlike *Esposito*, *Furman* upheld the possessory judgment, not because the tenant had vacated, but because, under *Meaders*, a landlord may maintain a holdover for an illegal dwelling. The *Furman* court, as opposed to the *Esposito* court, never reached whether the dwelling was legal.

Furman raises a second issue. The Appellate Term declined to order money returned because the court found that the tenant paid the monies voluntarily under the terms of a stipulation by which the tenant obtained a stay. Given *Furman*, one can ask why a court would vacate the monetary aspect of a stipulation in which a tenant agrees to remit rent or use and occupancy in the first place.[94]

If the Housing Part has no jurisdiction over these proceedings, landlords still have remedies, and tenants still have protections. For example, a landlord may request that the Department of Buildings (DOB) inspect the premises. The New York City Administrative Code provides that the DOB may "order and immediately cause any building, structure, place or premises (i) to be vacated; and, also, if the commissioner determines such action is necessary to the preservation of life and safety, (ii) to be sealed, secured and closed."[95] A DOB determination is difficult to overrule or change. Absent "a clear showing . . . that the administrative determination . . . to issue [a] Vacate Order[] is arbitrary and capricious or in any way irrational, such determination should not be disturbed."[96] Once made, the order is self-executing, and the tenant will be required to vacate forthwith.

If the DOB does not enforce its order, the court may order the agency to allow the landlord the opportunity to cure the illegality or keep the premises vacant.[97] This is good for landlords, if the illegality can be cured without great cost, because it might be faster than a summary proceeding and cheaper than an ejectment action, even with any fines assessed for the illegal premises. But purposely seeking a vacate order places the landlord in the position of contacting a regulatory agency to report wrongdoing—its own wrongdoing. Some may find this result undesirable. Tenants, however, are in a weak position to defend that action.

Ejectment actions present a seeming middle ground between Housing Part summary proceedings for possession and vacate orders. Landlords may still obtain speedy resolutions by way of summary-judgment motions filed shortly after the issue is joined, although additional costs are associated with these actions, including various filing fees, particularly in Supreme Court. Tenants, whether or not they receive a stay of the ultimate judgment for ejectment in the landlord's favor,[98] may still seek to renew, reargue, or appeal any adverse determination and thereby obtain a stay, and in the meantime no rent is col-

lectable from them, at least in the Second Department.

But what matters, according to the Appellate Term, Second Department, in *Nii v. Quinn*, *Meaders v. Jones*, and *Furman v. DeGeorge*, is that landlords may maintain holdover proceedings in the Civil Court's Housing Part to recover possession of illegal apartments,[99] given that MDL registration and pleading requirements do not implicate the court's jurisdiction. Landlords, although in one sense not punished for having an illegal apartment, benefit from an expeditious adjudication with fewer costs. Together, these three cases recognize that tenants, although forced to vacate their homes without awaiting a lengthy ejectment action, will leave dangerous premises, and the Housing Part might have the power to award the tenant a stay of up to six months to effect a peaceful vacatur from the illegal unit even if the tenant pays no use and occupancy.[100] And under *Nii*, *Meaders*, and *Furman*, the Housing Part, charged with enforcing laws affecting the housing stock to protect that inventory, will comply with that mandate.

Conclusion

A hodgepodge of decisions has wreaked havoc on landlord-tenant proceedings involving illegal threes. Until the Appellate Division in each department in which the MDL is at issue releases a series of definitive rulings, or until the legislature redrafts and clarifies the MDL, practitioners, landlords, and tenants alike will continue to muddle through the refractory and conflicting issues surrounding illegal multiple dwelling in New York City.

Endnotes

1. *Hall v. Burroughs*, 159 Misc. 2d 481, 485, 604 N.Y.S.2d 684, 687 (Hous. Part Civ. Ct., Kings County 1993).
2. *Mannino v. Fielder*, 165 Misc. 2d 605, 608, 629 N.Y.S.2d 651, 653 (Hous Part. Civ. Ct., Kings County 1995).
3. N.Y. Mult. Dwelling L. § 4(7); *see also Jalinos v. Ramkalup*, 255 A.D.2d 293, 294, 679 N.Y.S.2d 419, 419 (2d Dep't 1998) (mem.) ("[P]laintiff is the owner of a two-family home which contains three separate apartments, one of which was occupied by the defendants. The premises therefore constitute a multiple dwelling as defined by Multiple Dwelling Law § 4(1) and (7)."). A "family" includes a single-person household. N.Y. Mult. Dwelling L. § 4(7).
4. N.Y. Mult. Dwelling L. § 325(2).
5. *Id.*
6. *Id.* § 301(1).
7. *See generally id.* § 302 (providing penalties for violating registration requirements).
8. *Id.* § 302(1)(b).
9. *Id.* § 325(2); *e.g.*, *Furman v. DeGeorge*, N.Y.L.J., June 10, 2004, at 29, col. 1 (App. Term. 2d Dep't, 2d & 11th Jud. Dists., mem.); *Baer v. Gotham Craftsman Ltd.*, 154 Misc. 2d 490, 493, 595 N.Y.S.2d 604, 606 (App. Term 1st Dep't 1992) (per curiam) (dismissing counterclaim to return back rent voluntarily paid); *but cf. Carcione v. Rizzo*, 154 Misc. 2d 13, 593 N.Y.S.2d 152 (App. Term 2d Dep't, 2d & 11th Jud. Dists. 1992) (mem.) (holding summary judgment improper when issues of fact arise whether payments were voluntary or tenant alleges fraud and misrepresentation).
10. *See supra* at note 3 (defining multiple dwellings).
11. *E.g.*, *Wokal v. Sequin*, 167 Misc. 463, 465, 4 N.Y.S.2d 86, 88 (Mun. Ct., Queens County 1938).
12. *E.g.*, *Corsini v. Gottschalk*, N.Y.L.J., Dec. 20, 1999, at 32, col. 2 (App. Term 2d Dep't, 9th & 10th Jud. Dists.) ("The fact that landlord had a certificate of occupancy for a one-family dwelling rather than a two-family did not bar recovery of rent in the instant case.") (internal citations omitted); *Rose v. Leverich,* N.Y.L.J., June 9, 1997, at 32, col. 1 (App. Term 2d Dep't, 9th & 10th Jud. Dists.) (mem.) ("The absence of a certificate of occupancy is not a bar to seeking the recovery of rent.") (mem.); *Tuzel v. Reilert,* N.Y.L.J., Dec. 3, 1996, at 26, col. 3 (App. Term 2d Dep't, 10th & 11th Jud. Dists.) (mem.) ("The statutory bar to recovery of rent . . . is no bar where a one-family home is used as a two-family.") (internal citations omitted) (awarding judgment of possession and money); *Herzog v. Thompson*, 50 Misc. 2d 488, 490, 270 N.Y.S 2d 469, 471 (Civ. Ct., N.Y. County 1966); *but see Fantuzzi v Todras*, N.Y.L.J., Feb. 27, 2002, at 24, col. 5 (Civ. Ct., Richmond County) (barring rent collection for illegal twos, but citing no authority for its holding).
13. *See* 22 N.Y.C.R.R. § 208.42(g).
14. *Id.*
15. *See, e.g.*, *Chan v. Adossa*, 195 Misc. 2d 590, 592, 760 N.Y.S.2d 609, 611 (App. Term 1st Dep't 2003) (mem.) ("[I]t is clear that the requirement that a petition . . . include the MDR allegation was not intended to and cannot affect the jurisdiction of the Civil Court, particularly with respect to holdover proceedings."); *Citibank, N.A. v. Garcia*, N.Y.L.J., Nov. 6, 1998, at 23, col. 2 (App. Term 2d Dep't, 2d & 11th Jud. Dists.) (mem.) ("The instant proceeding was brought pursuant to RPAPL § 713. Thus, the requirement that petitioner allege that the premises were not a multiple dwelling or the multiple dwelling registration number is not applicable"); *Freedman v. Hahn*, N.Y.L.J., Mar. 31, 1989, at 21, col. 3 (App. Term 1st Dep't) (per curiam) ("The absence from landlord's proof of a rent registration statement . . . was not fatal to this holdover proceeding seeking possession on the basis of tenant's alleged nonprimary residence."); *see generally* Andrew Scherer, Residential Landlord-Tenant Law in New York § 7:138, at 7-56 (2004 ed.); Daniel Finkelstein & Lucas Ferrara, Landlord and Tenant Practice in New York § 15:467, at 15-216 (2003 ed.).
16. Scherer, *supra* note 15, at § 12:40, at 12-16, 12-17.
17. *Id.* at § 7:139, at 7-57.
18. *Lin v. Rivas*, N.Y.L.J., May 26, 1998, at 30, col. 5 (App. Term 2d Dep't, 2d & 11th Jud. Dists.) (mem.) (finding "pleading infirmities" relating to MDRs amendable absent "prejudice to the respondent"); *Whitehall Apts. Co. v. Zeigler*, N.Y.L.J., Jan. 26, 1993, at 22, col. 1 (App. Term 1st Dep't) (per curiam) (finding variance due to transcription error in petitioner's name between MDR and petition not fatal to proceeding).
19. *390 W. End Assocs. v. Raiff*, 166 Misc. 2d 730, 733, 636 N.Y.S.2d 965, 966 (App. Term 1st Dep't 1995) (per curiam).
20. N.Y.C. Admin. Code § 27-2107(b).
21. N.Y. Mult. Dwelling L. § 325(2).
22. *Id.* § 302(1)(b).
23. *Frank Pizza Irrevocable Trust v. Burns*, N.Y.L.J., Oct. 7, 1998, at 29, col. 1 (Civ. Ct.,, Kings County).
24. *Aponte v. Santiago*, N.Y.L.J., June 7, 1995, at 26, col. 6 (Civ. Ct., Bronx County).
25. *Beacway Operating Corp. v. Hult*, N.Y.L.J., Mar. 13, 1992, at 21, col. 1 (App. Term 1st Dep't) (mem.); *Borglum v. Rich*, N.Y.L.J., Jan. 18, 1990, at 23, col. 3 (App. Term 1st Dep't) (per curiam); *128 E. 83rd St. v. Kagan*, N.Y.L.J., Oct. 6, 1987, at 14, col. 1 (App. Term 1st Dep't) (per curiam).
26. *Little v. Steginsky*, N.Y.L.J., Oct. 22, 1998, at 28, col. 5 (App. Term 1st Dep't) (per

curiam) ("In a summary proceeding brought under RPAPL § 711, the petitioner must plead and prove . . . that a currently effective registration statement is on file . . . .").

27. *Jocar Realty Co. v. Rukavina*, 130 Misc. 2d 1009, 1010, 498 N.Y.S.2d 244, 245 (Hous. Part Civ. Ct., N.Y. County 1985), *aff'd per curiam*, 137 Misc. 2d 1045, 526 N.Y.S.2d 49 (App. Term 1st Dep't 1987).

28. N.Y.C Admin. Code § 27-2107(b); *Oceana Apts. v. Spielman*, 164 Misc. 2d 98, 100, 623 N.Y.S.2d 724, 726 (Hous. Part Civ. Ct., N.Y. County 1995) ("This court found no cases that hold that the failure to annex the registration receipt as is required under the law constitutes a substantial defect that is sufficiently prejudicial to merit or mandate a dismissal of the petition. Rather, this court believes it represents the kind of error that the appellate courts would find to be minor, nonprejudicial and therefore correctable.") (citations omitted).

29. 195 Misc. 2d at 592, 760 N.Y.S.2d at 611.

30. *Id.* 195 Misc. 2d at 595, 760 N.Y.S.2d at 612.

31. *See, e.g.*, *Hornfeld v. Gaare*, 130 A.D.2d 398, 400, 515 N.Y.S.2d 258, 260 (1st Dep't 1987) (mem.) (noting tenant's argument that landlord was "not entitled to collect rent or use and occupancy because the [c/o] prohibits the residential use"); *Missry v. Ehlich*, 1 Misc. 3d 723, 723, 765 N.Y.S.2d 176, 177 (Civ. Ct., N.Y. County 2003) ("Respondent . . . moved for summary judgment dismissing this commercial nonpayment proceeding . . . Respondent alleges that the premises are an interim multiple dwelling (IMD) lacking a [c/o] for residential use . . .").

32. These cases arise regularly in the Bronx but only occasionally in Manhattan.

33. *E.g.*, *Hakim v. Von Walstrom*, 198 A.D.2d 139, 604 N.Y.S.2d 733 (1st Dep't 1993) (mem.), which affirmed the order of the Housing Part, which had held that MDL rent forfeiture "will not be enforced under all circumstances" regarding a building occupied without a c/o.

34. *See, e.g.*, *Mathurin v. Jackson*, N.Y.L.J., Dec. 12, 1990, at 23, col. 2 (Hous. Part Civ. Ct., N.Y. County) (holding MDL § 302 sanctions warranted when c/o was absent and building conditions were grossly substandard.); *40 Clinton St. Assocs. v. Dolgin*, 126 Misc. 2d 373, 375, 481 N.Y.S.2d 960, 962 (Civ. Ct., N.Y. County 1984) (holding MDL § 302 sanctions applicable when no c/o existed but dangerous conditions did).

35. *Gottlieb v. Marco*, N.Y.L.J., Apr. 28, 1995, at 28, col. 3 (App. Term 1st Dep't) (per curiam) (citations omitted).

36. *See, e.g.*, *Goho Equities v. Weiss*, 149 Misc. 2d 628, 572 N.Y.S.2d 836 (App. Term 1st Dep't 1991) (per curiam) (disagreeing with McCooe, J., dissenting, who argued for a liberal, not strict, interpretation of MDL § 302, *id.* at 632, 572 N.Y.S.2d at 838).

37. *50 E. 78th Corp. v. Jire*, N.Y.L.J., Dec. 2, 1991, at. 25, col. 1 (App. Term 1st Dep't) (per curiam) ("Such a violation does not . . . provide these tenants with a complete defense against landlord's rent claim, since it neither adversely affected the structural integrity of the building nor rendered tenant's residential occupancy unlawful.").

38. Bruce M. Solomon, *Multiple Dwelling Law: The Matter of the Misplaced Decision*, 1 Landlord-Tenant Prac. Rep. 4, 14 (2000).

39. *Little v. Joseph*, N.Y.L.J., May 4, 1992, at 27, col. 4 (App. Term 1st Dep't) (per curiam) ("Any alleged nonconforming use on the second and third floors does not warrant a complete rent forfeiture, and dismissal of the nonpayment proceeding under Sections 301 and 302 of the [MDL] was in error.").

40. *Shoretown Realty Corp. v. Kahill*, N.Y.L.J., Oct. 28, 1993, at 27, col. 3 (App. Term 1st Dep't) (per curiam).

41. Warren A. Estis, Real Estate Update: Landlord/Tenant Law, *The Rent Forfeiture Statute—Courts Take Conservative Approach to Applying MDL 302*, N.Y.L.J., Dec. 8, 1993, at 5, col. 2.

42. *Mannino*, 165 Misc. 2d at 610, 629 N.Y.S.2d at 654.

43. *Id.* at 611, 629 N.Y.S.2d at 654.

44. *See* discussion of that issue, *infra*.

45. *Zafra v. Sawhuck*, N.Y.L.J., Jan 9, 1995, at 27, col. 2 (App. Term 1st Dep't) (per curiam); *Lipkis v. Pikus*, 96 Misc. 2d 581, 409 N.Y.S.2d 598 (Civ. Ct., N.Y. County 1978), *modified per curiam*, 99 Misc. 2d 518, 520, 416 N.Y.S.2d 694, 696 (App. Term 1st Dep't), *aff'd mem.*, 72 A.D.2d 697, 421 N.Y.S.2d 825 (1st Dep't 1979), *lv. dismissed*, 51 N.Y.2d 874, 414 N.E.2d 399, 433 N.Y.S.2d 1019 (1980).

46. *Zane v. Kellner*, 240 A.D.2d 208, 209, 658 N.Y.S.2d 289, 290 (1st Dep't 1997) (mem.).

47. *Id.* at 209, 658 N.Y.S.2d at 290.

48. *Amdar Co. v. Armenti*, N.Y.L.J., June 23, 1994, at 28, col. 4 (App. Term 1st Dep't) (per curiam).

49. 35 N.Y.2d 984, 324 N.E.2d 888, 336 N.Y.S.2d 531 (1975), *aff'g*, 71 Misc. 2d, 336 N.Y.S.2d 604 (Civ. Ct., N.Y. County 1972).

50. *Shahid v. Doe*, N.Y.L.J., Dec. 24, 1997, at 24, col. 6 (Hous. Part Civ. Ct., Kings County).

51. *Id.*

52. *B.S.L. One Corp. v. Rubenstein*, 159 Misc. 2d 903, 606 N.Y.S.2d 979 (Civ. Ct., Richmond County 1994).

53. *Id.* at 910, 606 N.Y.S.2d 984–85.

54. *Shahid*, N.Y.L.J., Dec. 24, 1997, at 24, col. 6.

55. *B.S.L. One Corp.*, 159 Misc. 2d at 910, 606 N.Y.S.2d at 985.

56. *St. George Hotel Assocs. v. Jaye*, N.Y.L.J., Aug. 11, 1993, at 24, col. 2 (Hous. Part Civ. Ct., Kings County).

57. *Mannino*, 165 Misc. 2d at 609, 629 N.Y.S.2d at 654.

58. 118 Misc. 2d 1026, 1032–33, 462 N.Y.S.2d 943, 947–48 (Civ. Ct., Queens County 1983).

59. N.Y.L.J., Aug. 18, 1993, at 24, col. 3 (Civ. Ct., Kings County).

60. *Maninno*, 165 Misc. 2d at 609, 629 N.Y.S.2d at 654–55 (discussing *Manabhal*).

61. 2003 N.Y. Slip Op. 50663(U), 2003 N.Y. Misc. LEXIS 315 (Civ. Ct., Kings County 2003).

62. N.Y.L.J., Oct. 6, 1999, at 31, col. 2 (Civ. Ct., Richmond County).

63. 2002 N.Y. Slip Op. 50129(U), 2002 N.Y. Misc. LEXIS 577 (Civ. Ct., Richmond County 2002); *see also Christos v. Papastefanou*, N.Y.L.J., Apr. 4, 2000, at 31, col. 4 (Hous. Part Civ. Ct., Bronx County).

64. *Nii v. Quinn*, 195 Misc. 2d 821, 759 N.Y.S.2d 841 (App. Term 2d Dep't, 2d & 11th Jud. Dists. 2003) (mem.) (citations omitted) (disapproving of *Holder v. Williams*, 188 Misc. 2d 73, 725 N.Y.S.2d 793 (Hous. Part Civ. Ct., Kings County 2001) (using balancing test to decide whether to vacate stipulation concerning de facto multiple dwelling); *accord Meaders v. Jones*, 2003 N.Y. Slip Op. 51123(U), 2003 N.Y. Misc. LEXIS 933 (App. Term 2d Dep't, 2d & 11th Jud. Dists.) (mem.) ("While not implicating the court's jurisdiction, such violations bar the recovery of rent or use and occupancy, and these proscriptions may not be 'waived' by stipulation. Thus, the stipulation's terms awarding landlord rent and use and occupancy, as well as the money judgment entered thereon, are stricken, and the cause of action seeking a money judgment is dismissed.") (citations omitted); *see also* Finkelstein & Ferrara, *supra* note 15, at §§ 14:275, 15:259, at 15-130.

65. *Willoughby v. Dance-Lonesome*, 2003 N.Y. Slip Op. 51058(U), at 2, 2003 N.Y. Misc. LEXIS 822, at 2 (App. Term 2d Dep't, 2d & 11th Jud. Dists.) (mem.).

66. *Shahid*, N.Y.L.J., Dec. 24, 1997, at 24, col. 6.

67. *Fazio v. Kelly*, N.Y.L.J., Sept. 24, 2003, at 20, col. 5; *Cippollone v. Torres*, N.Y.L.J., June 16, 199, at 33, col. 6 (Civ. Ct., Queens County); *Frank Pizza*, N.Y.L.J., Oct. 7, 1998, at 29, col. 1; *Aponte*, N.Y.L.J., June 7, 1995, at 26, col. 6.

68. David D. Siegel, New York Practice § 12, at 15 (3d ed. 1999).

69. N.Y. Mult. Dwelling L. § 302(1)(b) (emphasis added).

70. *E.g.*, *Tan Holding Corp. v. Weber*, N.Y.L.J., May, 15, 2002, at 19, col. 2 (Civ. Ct., N.Y. County).

71. *Fazio*, N.Y.L.J., Sept. 24, 2003, at 20, col. 5.

72. *Khelawan v. Corneil*, 190 Misc. 2d 621, 623, 739 N.Y.S.2d 557, 559 (Hous. Part Civ. Ct., Queens County 2002).

73. *Id.* at 622, 739 N.Y.S.2d at 557.

74. *Fazio*, N.Y.L.J., Sept. 24, 2003, at 20, col. 5.

75. *Nii*, 195 Misc. 2d at 822, 759 N.Y.S.2d at 842 (citing *Hornfeld*, 130 A.D.2d 398, 515 N.Y.S.2d 258).

76. *Wash. Square Prof'l Bldg, Inc. v. Leader*, 68 Misc. 2d 72, 74, 326 N.Y.S.2d 716, 719 (Civ. Ct., N.Y. County 1971).

77. *See* nonpayment discussion, *supra*.

78. *Khelawan*, 190 Misc. 2d at 624, 739 N.Y.S.2d at 559–60.

79. For a discussion of *Meaders*, see *Clinton Hill Lofts 1, LLC v. Reid*, N.Y.L.J., Aug. 6, 2003, at 23, col. 1 (Hous. Part Civ. Ct., Kings County).

80. *Meaders*, 2003 N.Y. Slip Op. 51123(U), *3, 2003 N.Y. Misc. LEXIS 933, at *3.

81. *Id.* (citing *99 Commercial St. v. Ulewellen*, 240 A.D.2d 481, 483, 658 N.Y.S.2d 130, 132 (2d Dep't) (mem.), *lv. denied*, 90 N.Y.2d 686 N.E.2d 1366, 664 N.Y.S.2d 271 (1977); *Hornfeld*, 130 A.D.2d at 400, 515 N.Y.S.2d at 260; *Nii*, 195 Misc. 2d at 822, 759 N.Y.S.2d at 842).

82. *Nii*, 195 Misc. 2d 821, 759 N.Y.S.2d 841.

83. *Id.* at 822, 759 N.Y.S.2d at 842.

84. *Id.*, 759 N.Y.S.2d at 842.

85. Scherer, *supra* note 15, at § 7:138, at 7-57 (View from the Bench, by Hon. Fern Fisher) (citing *Santos v. Aquasvivas*, N.Y.L.J., July 10, 1997, at 32, col. 5 (App. Term 2d Dep't, 2d & 11th Jud. Dists, mem.); *In re Blackgold Realty Corp. v. Milne*, 69 N.Y.2d 719, 504 N.E.2d 392, 512 N.Y.S.2d 25 (1987)).

86. *Santos*, N.Y.L.J., July 10, 1997, at 32, col. 5.

87. Mr. Curtin wrote the preceding five paragraphs, this paragraph, the following three paragraphs, and the last paragraph in this section, including the attached endnotes. Judge Lebovits, who decided *Meaders* in first instance, does not wish to express any views on the case.

88. *Hornfeld*, 130 A.D.2d at 400, 515 N.Y.S.2d at 260.

89. *Totaram*, 2003 N.Y. Slip Op. 50663(U), * 4–5, 2003 N.Y. Misc. LEXIS 315, at *4–5.

90. *99 Commercial St.*, 240 A.D.2d at 483, 658 N.Y.S.2d at 132.

91. *Nii*, 195 Misc. 2d at 822, 759 N.Y.S.2d at 842.

92. N.Y.L.J., June 10, 2004, at 29, col. 1 (App. Term 2d Dep't, 2d & 11th Jud. Dists., mem.).

93. N.Y.L.J., June 10, 2004, at 29, col. 1.

94. Mr. Curtin wrote this paragraph, the next two paragraphs, and the last paragraph in this section, including the attached endnotes. Judge Lebovits, who decided *Esposito* and *Furman* in first instance, does not wish to express any views on these cases.

95. N.Y.C. Admin. Code § 26-127(b).

96. *E. 13th St. Homesteaders' Coalition v. Wright*, 217 A.D.2d 31, 39, 635 N.Y.S.2d 958, 963 (1st Dep't 1995).

97. *Koroma v. Kempster*, 2001 N.Y. Slip Op. 50012(U), 2001 N.Y. Misc. LEXIS 1325 (Civ. Ct., Richmond County 2001).

98. *See, e.g.*, *Totaram*, 2003 N.Y. Slip Op. 50663(U), 2003 N.Y. Misc. LEXIS 315. In *Totaram*, the Civil Court, Kings County, stayed the execution of a warrant of eviction in an ejectment action even though, under RPAPL 753 (1) & (2), a stay must be conditioned on the tenant's paying use and occupancy, and in the Second Department a tenant may not be ordered to pay use and occupancy for an illegal unit.

99. *See Fazio*, N.Y.L.J., Sept., 24, 2003, at 20, col. 5 ("[T]here is nothing in the statute to support the Housing Court rejection of jurisdiction and requiring institution of an [RPAPL] Article 6 [ejectment] proceeding.") (citing *Meaders*).

100. *Cf. Totaram*, 2003 N.Y. Slip Op. 50663(U), 2003 N.Y. Misc. LEXIS 315. If the Civil Court's plenary part may grant a stay, by analogy so may the Civil Court's Housing Part.

Gerald Lebovits is a judge of New York City Civil Court, Housing Part, in New York County and an adjunct professor at New York Law School. Judge Lebovits decided in first instance three cases mentioned in this article: *Meaders v. Jones*, *Esposito v. Ango*, and *Furman v. DeGeorge*. He expresses no view about these cases and did not write the passages or endnotes about them. Daniel J. Curtin, Jr., is an associate at Finkelstein Newman LLP in Manhattan, the principal research and writing assistant for Finkelstein and Ferrara's *Landlord and Tenant Practice in New York* (West), and an adjunct professor at New York Law School.

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Bundled Real Estate Services and Closing Cost Estimates: Give Clients a Straight Answer

By Peter T. Roach

It has been almost a thousand years since William the Conqueror first gave land to his most faithful followers and, with it, the right to transfer and convey that land. We have come far, indeed, from the days when conveyances were "recorded" by ceremonial dances or the passage of a twig, with no writings, no documents, not even a Disclosure or HUD-1 form! Conveyance of real estate today has become complex. Even the simplest transaction, the sale of a one-family home, requires a multitude of services from many different providers. So many that it becomes difficult, if not impossible, to calculate in advance the total cost associated with all of the various services provided. Yet, the real estate attorney still must face the client's question: "How much money will I need at the closing?" Lawyers often find themselves at a loss when this question arises. The attorney is forced to explain that the total can't be calculated or even accurately approximated. The client is put in the awkward situation of not knowing the total amount of money that will be needed to complete the transaction. With each service provided on an "a la carte" basis, there are simply too many different services from too many different providers to enable the lawyer to conjure an estimate.

Regulatory Responses: HUD and RESPA

For many years, regulatory agencies such as HUD (the United States Department of Housing and Urban Development) have wrestled with ways to resolve the problem of the vast range of fees associated with financing consumer real estate transactions. By requiring lenders to provide estimates of all fees in advance, RESPA (Real Estate Settlement Procedures Act) represented a positive step towards enabling the consumer to understand and intelligently compare closing costs. Unfortunately, it has proved a small step due to the inherent problem faced by consumers: the lack of *standardization* of the closing costs associated with a real estate transaction. Although lenders are already required to provide "good faith estimates" of closing costs, they are not required to adhere to the estimates, which are often inaccurate. Few consumers understand the "good faith estimates" and fewer understand the HUD-1 form, which itemizes all of the actual closing costs. Furthermore, lenders can charge the consumer a myriad of fees as long as they are disclosed, without conformity to any regulations or industry standards.

HUD has attempted to respond to increased consumer disapproval of the current system, in which last-minute, unexpected settlement fees may add hundreds or thousands of dollars to the cost of a closing, by advocating an amendment to RESPA prohibiting lenders from deviating from their good faith estimates. HUD's proposal to the OMB (Office of Management and Budget) was withdrawn in March in response to concerns of certain consumer and industry groups. While it will undoubtedly be reconsidered as the agency continues its attempts to simplify the closing process, the likelihood is that other ideas and the forces of the marketplace will drive providers to join together and to standardize their fees long before HUD acts to require lenders to do so.

Bundling Services

Specifically, "bundled" real estate services, through which a single entity charges one flat fee in exchange for a long list of services, will put an end to the "questioning" associated with closing costs. Typically, bundled real estate services involve title insurance companies partnering with lenders in an effort to co-ordinate the many services required for each real estate transaction. These various services are provided together, as a suite, at a fixed cost, with the fees for those services to be determined in advance, well before the day of the closing. A single entity charges the consumer for all of the different services from different providers. It works because, with today's technology, the entity can statistically project its costs, and determine one flat fee to the consumer.

Of course, since attorneys are prohibited from any such "fee-sharing" arrangements, the lender's legal fees are paid directly to the lender's lawyer by the borrower from the closing proceeds. However, under the bundled services concept, only lawyers who agree to accept a flat fee for their services in connection with the real estate transaction will be retained. These fees are negotiated in advance between the settlement company and the attorney, allowing the settlement company to offer the consumer a single price for all services.

The table below illustrates how bundled services compare to an "a la carte" fee schedule.

Service	Bundled Fee	"A la carte" Fee
Discount Points	Included	0%
Application Fee	Included	150
Lender's Title Insurance	Included	1,043
Settlement Costs	Included	350
Lender's Attorney	Included	650
Recording Fee	Included	225
Credit Report	Included	30
Survey	Included	100
Flood Certification	Included	18
Tax Service Fee	Included	73
Underwriting Fee	Included	300
Document Preparation	Included	295
Processing Fee	Included	100
Appraisal	Included	300

Benefits to the Consumer

Bundled services simplify the real estate finance process and make the complexity of the transaction less of an obstacle for the consumer by obviating the need for the consumer to develop expertise in real estate finance. Across the marketplace, buyers have neither the time nor the inclination to navigate the real estate transaction on their own. Yet the attorney's role does not typically begin until after all the "business terms" have been fully negotiated and agreed upon. Bundling alleviates the buyer's need to understand and negotiate the closing costs of the real estate transaction and avoids the necessity of explaining the pros and cons of many minor decisions regarding the settlement services that will be needed.

In addition to knowing the total closing costs in advance, the consumer receives another indirect benefit. With no compensation possible for additional time and expense, the providers in a bundled real estate services transaction are motivated to expedite the deal in a more cost-effective and efficient manner. By paying a flat fee, the consumer is assured that the services required to consummate the transaction will be provided without the delay or confusion that might otherwise result if payment authorization was required.

Benefits to Lawyers

Bundled real estate services can be a strong marketing tool for every participating service provider. Companies benefit from the competitive advantage of providing a service designed to meet consumer demand. Consumers are also becoming more and more knowledgeable, computer literate, and willing to search to locate providers who meet their requirements. Increased competition is forcing title companies, law firms and lenders to work together so that borrowers are able to complete their transactions as quickly, as easily, and as cost effectively as possible.

Beyond the competitive advantages, bundled real estate services offer other benefits to the lawyer as well. As the number of real estate transactions conducted in any given time frame will not be affected by "bundling" services and the need for a lawyer's services likewise will not change, the aggregate business for real estate lawyers should remain constant. Yet, the time the lawyer has to devote to each transaction should be reduced as efficiency improves.

For example, it is not unusual for the mortgage and judgment payoffs to approach the total proceeds available to satisfy them. In other instances, unforeseen closing costs reduce the available proceeds to an amount insufficient to satisfy the existing liens. These are situations where the ability to identify the actual total of closing costs in advance could have a real impact. The time wasted in scheduling, preparing documents and attending a closing in abortive transactions would be avoided. With one fixed fee, negotiated in advance, that covers all closing costs, attorneys will know well before the closing exactly how much money will be available to satisfy mortgages, judgments, or any other liens. Labor-intensive calculations by the lender and its attorney will be drastically reduced, and, because bundled real estate services avoid the need for multiple invoices to be reviewed and explained to the client, the attorney's responsibilities at the closing itself will be reduced.

In addition, new business is likely to result from the strategic alliances that are formed by the many different providers involved in bundling. Appraisers, title insurance companies, lenders and law firms will no doubt increase their activity and develop relationships with each other as well as each other's clients. The players will shift. Different entities will emerge to place attorneys on lists reflecting their willingness to work with a bundled fee group. New alliances will form. Some lawyers will receive more business,

while others will receive less. Whether bundled real estate services become a dominant marketing strategy, or become mandated by regulations, the attorneys who will benefit the most are the ones who adopt this new strategy.

A Look at the Marketplace

Title insurance companies typically offer a variety of services, many of which are not required in each and every transaction. At the other extreme, certain transactions require multiple searches of different names, properties or entities, which would typically result in additional charges. Under the bundled real estate services concept, the consumer's total closing costs would be determined and fixed in advance, no matter how many searches must be performed. In addition to the actual insurance policy, for which the title company charges a premium established by the New York State Superintendent of Insurance, title insurance companies also perform a host of ancillary services, such as providing surveys, survey inspections, municipal searches, New York City departmental searches, certificates of occupancy and completion, recording services, title or lien discharge services, document pickup, delivery services, etc. Traditionally, the consumer has been charged for each of these services on an a la carte basis, with little or no government regulation.

Presently, the real estate closing is a work session where the buyer's and seller's debits and credits are reconciled. Various charges, including closing costs and real estate costs, are calculated and paid. The phrase "closing costs" refers to the costs associated with services provided by professionals in connection with the real estate transaction, and should not be confused with the phrase "real estate costs," which refers to the transaction itself. Closing costs include items such as lender's legal fees, title examination fees, appraisal fees, credit inspector's fees, bank application fees, escrow fees, etc. Real estate costs, on the other hand, consist of contract deposits, real estate tax adjustments, concessions, etc.

At the closing, the parties are typically confused, bewildered and overwhelmed, rarely understanding what is transpiring, what they are paying for, or why. The HUD-1 form, prepared by the lender's attorney and designed to "simplify and explain" the closing and its associated expenses, is rarely understood. In the past, the HUD-1 form was completed after the closing was prepared and all costs associated with the transaction were determined. Today, it is commonly prepared simultaneously with the other closing documents and often must be faxed to the lender for approval prior to the funding of the transaction. In the future, bundling services will permit the HUD-1 to be prepared in advance of the closing with on-line, error-correcting, auto-intelligent software.

The Technological Imperative

The law firms best suited to participating in bundled services programs will be those that have upgraded their information management systems. By partnering with tech-savvy title companies, these law firms will be able to reap the benefits of increased efficiency through automation and become the technological leaders in the real estate industry. We have seen regular mail replaced by overnight delivery, overnight delivery replaced by facsimiles, and facsimiles replaced by e-mail as our desired means of communication and transmittal of data. What was an acceptable delay yesterday is no longer acceptable today and what is acceptable today will not be tolerated in the future.

Ideally, the bundled real estate services provider will maintain a sophisticated, private, and secure wide-area networked computer system with 24-hour Internet connectivity. Its internal processing systems should provide paperless automation and delivery. An automated title application tracking system will automatically route work orders and track their progress. Tracking systems will assign policy numbers to insured applicants and identify underwriters used in each state. The bundled services provider will obtain all abstract and municipal searches, automatically and without paper.

As technology advances, bundled real estate services will become the norm. Indeed, there are already lenders originating mortgages in New York featuring guaranteed fixed closing costs.

In today's competitive real estate environment, technology creates knowledge-sharing, new forms of transacting business, faster means of communicating, and significant efficiencies of scope and scale. Electronic communication forces all players to rethink their business and adapt. By becoming technological leaders, the firms that align themselves with bundling real estate services will empower themselves and their clients.

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Jennifer and *Pullman*—A Dynamic Duo for The West Gate Coop

By Robert E. Parella

In the last two years, the New York Court of Appeals decided two very important and provocative cases involving housing cooperatives. In *Jennifer*,[1] the Court held that a complaint, alleging that the sponsor had undertaken a contractual duty to sell the "unsold shares" in the cooperative corporation, sufficiently pleaded a cause of action. In *Pullman*,[2] the pertinent proprietary lease provided for termination of a tenant-shareholder's tenancy upon a two-thirds shareholder vote that the tenant-shareholder was undesirable because of objectionable conduct. The Court held that such a termination is subject to limited review under the "business judgment" rule, rather than independent judicial evaluation.[3] Recently, the West Gate coop invoked the two decisions in tandem.[4] Initially West Gate sought a declaration that the defendant successor to the sponsor (hereinafter "sponsor") violated its contractual and statutory duties to sell the unsold shares held by it. Subsequently, and while the action was pending, the West Gate board voted to terminate the defendant's leases based on "objectionable conduct," i.e., failure to sell the unsold shares. Simply stated, the Supreme Court sustained the plaintiff-coop's action and the First Department has now unanimously affirmed.[5] But *West Gate* is anything but simple, analytically, and requires a full statement. Although the decision raises several questions, the focal point of this short piece is whether *Pullman* should be applicable in such a case. The conclusion here is that it should not be, and that the Court of Appeals should revisit *Pullman* and, at least, limit it to its facts.

In *West Gate*, the defendant-sponsor owned a little more than 50% of the shares and of the apartments. In early 2003, the sponsor learned that a board member was renovating his apartment without consent of the board. An attempt by the sponsor to have him removed from the board resulted in a deadlocked vote of the board. Subsequently, the board adopted a resolution to commence an action against the sponsor; the declaratory judgment action noted above was commenced, alleging breach of a contractual and statutory obligation to sell the unsold shares.

While the action was pending, the board voted to terminate leases held by the sponsor on the ground of objectionable conduct, i.e., failure to sell the shares for those apartments, which was the gist of the pending action. Defendant-sponsor then sought a Yellowstone injunction, seeking to enjoin termination during the pendency of the action, and arguing various grounds including likelihood of success and irreparable harm.

The Supreme Court denied injunctive relief. The court found that defendant had not demonstrated a likelihood of success on the merits. In support of this finding, the court found that the notice of termination was duly adopted; it also relied upon *Jennifer* and provisions in the offering plan as a basis for the defendant's obligation to sell.[6] The court also found that defendant would not suffer irreparable injury because its monetary losses could be calculated if it later prevailed.[7] In a short memorandum, the Appellate Division, First Department unanimously affirmed.[8]

As indicated above, the focus here is whether *Pullman* should be available in matters such as the *West Gate* litigation. The conclusion here is that it should not, as a matter of presumed intent and sound policy. Specifically, *Pullman,* i.e., a lease termination, eviction and forced sale of shares predicated upon objectionable conduct, should not be available when there is a conventional, traditional cause of action for which the coop has a conventional, traditional remedy.

The starting point for analysis is that *Pullman* is a questionable holding. Section 711(1) of the Real Property Actions and Proceedings Law, enacted in 1920, is applicable to an eviction proceeding pursuant to a provision in a lease giving the landlord the right to terminate the lease if the landlord "deem[s] the tenant objectionable." The proceeding cannot be maintained "unless the landlord shall by competent evidence establish to the satisfaction of the court that the tenant is objectionable."[9] In *Pullman,* the Court stated that the statute was not irrelevant, but it should be tailored to the facts of a cooperative setting. The Court held that "the cooperative's determination as to the tenant's objectionable behavior stands as competent evidence necessary to sustain the cooperative's determination,"[10] subject only to scrutiny under a very narrow "business judgment" rule. That conclusion seems to violate both the letter and the spirit of section 711(1). "Competent evidence" has long been understood to mean evidence admissible in court under the rules of evidence.[11] A majoritarian, or super-majoritarian, democratic exercise simply does not fit the legislative text. Additionally, the legislative policy clearly proscribes a unilateral determination in conventional landlord-tenant relationships. The Court apparently sees a difference in

coops, predicated upon a presumed greater need to defer to the "landlord" in a communal ownership setting. But the other side of the balance is the greater interest of the individual shareholder-owner in the coop setting than that of a tenant in a conventional, often short-term leasing arrangement. For the shareholder, there is typically a substantial equity investment in a very valuable asset. It is surprising that the Court did not simply apply the statute and require independent judicial scrutiny.

There are other reasons for limiting *Pullman*. The "business judgment" rule is most appropriate for policy choices, exercises of judgment and discretion, and application of standards to undisputed facts. In *Pullman* there were many disputed "adjudicative facts"—who did what to whom with what intent—and that was noted in the Supreme Court's denial of summary judgment, and the Appellate Division's dissenting opinion.[12]

It is also surprising that a unanimous Court was so willing to defer to the coop determination, not only of factual matters, but also apparently to the definition of "objectionable" conduct. That latter term is incorporated in the statute and this implies a legal standard and definition. It is fundamental to the common law tradition and to the very nature of the judicial power that the courts "say what the law is." This is especially seen when there is a deprivation of a valuable property right in the balance.[13] There are numerous instances of this tradition in connection with judicial review of administrative action that the legislature seemingly foreclosed.[14] As between private parties, the courts scrutinize waivers and contracts of adhesion routinely. Finally, the hurdle of the "business judgment," as articulated by the Court in *Pullman*, is a very low one.[15] In light of all of the above, it is difficult to see why coops need this tremendous leverage, and on the least expensive basis, for what is most likely an infrequent problem.

If *Pullman* is at least debatable, then its application in *West Gate* is very troubling. Simply stated, the coop effected a boot-strap operation of sorts. It first alleged that the sponsor breached its obligation to sell unsold shares. Then, while that litigation was pending, the board voted to terminate certain leases of the sponsor for "objectionable conduct," i.e., failure to sell the shares for those apartments. The troubling aspect is two-fold. First, the defendant is denied the opportunity to litigate fully the merits of the underlying cause of action, including the appropriateness of a particular remedy. Rather, the coop has become a judge in its own cause. Second, the tactic is objectionable even if the court is able to resolve, or has resolved, the underlying merits in favor of plaintiff-coop. The coop regime is built upon a plethora of rights and duties, which constitute the agreement and expectation of each member. But it is likewise the ordinary understanding that violation of any such right is justiciable with respect to evidentiary support, scrutiny of standards, and appropriateness of remedy. For example, suppose a shareholder is late with maintenance and the coop brings an eviction proceeding. The shareholder can effect a stay by paying the maintenance into court. Should a coop be able to declare such a shareholder objectionable, terminate the proprietary lease, and thereby circumvent the statutory stay policy?

The facts of *West Gate* are pertinent in this regard and require a brief revisiting of *Jennifer.* In *Jennifer*, the Court of Appeals expressly stated that its analysis differed from the Appellate Division's in that the Court of Appeals addressed "only the sufficiency of the contract cause of action as opposed to its merits."[16] The Court stated that "at this preanswer stage of the litigation, we need not reach the merits of plaintiffs' contract cause of action and therefore do not address the issue of whether, as alleged, the sponsor impliedly promised to sell all its unsold shares."[17] In *West Gate*, the Supreme Court denied the Yellowstone injunction partly because the defendant sponsor had not shown a likelihood of success. The court cited to provisions in the offering plan that the purpose of the offering was "sale of apartments for use as homes by purchasers on a cooperative basis" and that shares were initially being offered to existing residential tenants and thereafter "will be offered to non-tenants." In affirming, the Appellate Division seemed to go further and reprise its original holding in *Jennifer*, rejected by the Court of Appeals, that a sponsor, *per se*, has a duty to sell unsold shares:

> As the motion court held, in view of recent authority holding a sponsor liable in contract to a cooperative for not undertaking in good faith to timely sell so many shares in the building as necessary to create a fully viable cooperative (*511 W. 232nd Owners Corp. v Jennifer Realty Co.,* 98 NY2d 144, 152, 154), defendant fails to show a likelihood of success on the merits.[18]

On an intuitive basis, this writer is sympathetic to the proposition that coop purchasers have a reasonable expectation of a viable coop.[19] And it well may be that, once we get an authoritative determination on the merits, *stare decisis* will cause its applicability to many other coops because of the similarity of documents in these coops. But, again, whether the merits have been decided for the coop in a case such as *West Gate* should be immaterial. The *West Gate* type defendant should be subject only to the conventional, contemplated remedy of injunction, i.e., a court order directing sale over some period of time and circumstances, or, alternatively, a money

damages remedy if equitable relief is impractical.

It is instructive to compare the underlying claim and facts in *West Gate* with those in *Pullman*. In *Pullman* the great bulk of the alleged objectionable conduct involved Pullman's friction with another elderly tenant-couple. The conventional causes of action, arguably applicable on the facts, would seem to have been primarily available to the couple against Pullman, e.g., defamation, malicious prosecution, assault, etc. Except for possible unauthorized alterations in Pullman's apartment, which seemed relatively minor in the litigation, there may not have been a simple conventional cause of action for the coop against Pullman, and probably no adequate remedy other than eviction (assuming the allegations were true, of course). In *West Gate*—as in *Jennifer*—there was a conventional cause of action for breach of contract; and there were the conventional remedies of injunction and damages available. Indeed, in *Jennifer* those were the remedies sought.

This last suggested analysis of *Pullman* provides a very easy and prudent way to limit *Pullman* to its facts. Termination for objectionable conduct should be available only when there is no conventional cause of action and no conventional remedy. Otherwise, there would be no assurance that an alleged breach actually occurred or that a remedy would be proportionate and consistent with a particular breach. Further, the proposed limitation on *Pullman* would prevent unnecessary and unjustifiable enlargement of the opportunity for punitive, discriminatory and arbitrary action.

Endnotes

1. *511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 746 N.Y.S.2d 131 (2002).
2. *40 West 67th St. Corp. v. Pullman*, 100 N.Y.2d 147, 760 N.Y.S.2d 745 (2003).
3. *See* Joel E. Miller, *Court of Appeals Holds Courts Powerless to Review Cooperative's Findings*, 32 N.Y. Real Prop. J. 4 (2004); Vincent Di Lorenzo, *The Business Judgment Rule and Fiduciary Obligations Are Applied to Shareholder Decisions in Cooperative Housing Corporations*, *id.* at 10.
4. *West Gate House, Inc. v. 860-870 Realty LLC.*, Index No. 601678/03 (Sup. Ct., N.Y. Co. 2003), *aff'd*, 7 A.D.3d 412, 776 N.Y.S.2d 482 (1st Dep't 2004).
5. *Id*.
6. It is not entirely clear whether the court was purporting to find an obligation to sell, or only that defendant was not likely to succeed with its argument that it had no such obligation. The court stated that defendant's argument was unpersuasive, and that it was undisputed that defendant retained a majority of the shares and was renting the apartments for profit with no intention of selling them. But it also said that in the event defendant later prevails, its monetary loss can be calculated. The court also relied, rather dubiously, on the fact that the leases do not define objectionable conduct; therefore the defendant did not clearly establish that his conduct was not objectionable.
7. This finding seems unorthodox. An injury to an interest in real property, historically regarded as unique, is usually considered irreparable, and proprietary leases should fall within such rule. Further, the mere fact that a remedy at law for monetary relief is possible does not necessarily mean that it is adequate.

   The court, also dubiously, denied relief on the ground that defendant had not shown how it could cure its alleged default if the plaintiff subsequently prevailed. It would seem that the defendant could cure simply by obeying an ultimate order on the merits to start selling shares for apartments. If the court was concerned about the sponsor renting apartments during the pending of the litigation, it could have conditioned its Yellowstone injunction appropriately.
8. *Supra*, note 4.
9. N.Y. RPAPL § 711 (1).
10. 100 N.Y.2d at 154.
11. In 1963, the CPLR replaced the former Civil Practice Act. The latter required "competent proof" of all the facts in an Article 78 review of quasi-judicial action. That phrase was the basis for the legal residuum rule, requiring some evidence admissible under technical rules of evidence. The CPLR requires "substantial evidence," rather than "competent proof" so that a determination may be sustained even though the evidence relied on was not admissible under the rules of evidence. *See* Weinstein, Korn & Miller, New York Civil Practice ¶ 7803.01 (2004).
12. 296 A.D.2d 120, 742 N.Y.S.2d 264 (1st Dep't 2002).
13. It seems clear that a forced sale by the coop is a deprivation of the valuable property to retain property, or to sell at one's own price, at a time and by a method of one's choosing.
14. *See, e.g., Bd. Of Educ. of the City of N.Y. v. Allen*, 6 N.Y.2d 127, 188 N.Y.S.2d 515 (1959); *Estep v. United States*, 327 U.S. 114 (1946).
15. As articulated in *Pullman*, in order to trigger judicial scrutiny, an aggrieved shareholder must show that the Board acted (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith, 100 N.Y.2d at 155. A challenger is unlikely to succeed on either of the first two grounds unless the board got sloppy with its procedures. As to the third, occasionally a challenger succeeds, as the Court in *Pullman* noted. *Id.* at 157–58. In *West Gate*, the defendant-sponsor initially attempted to remove a board member. Presumably, even that would not constitute a showing of retaliation and "bad faith" in light of the strong coop interest in forcing sponsors to sell unsold shares.
16. 100 N.Y.2d at 151.
17. 100 N.Y.2d at 154.
18. *Supra*, note 4.
19. That expectation must be more than a unilateral, subjective one. But the offering plan and, perhaps, the entire conversion process and setting may imply an obligation to effect a viable coop. There are also some practical, but probably not insurmountable, difficulties in framing a decree that orders the sale of shares because of the risk that the parties will frequently be before the court in contempt proceedings.

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BERGMAN ON MORTGAGE FORECLOSURES: Verifying the Foreclosure Complaint?

By Bruce J. Bergman

Assuming there is a debate on this (and something must be going on or it wouldn't be worthy of discussion), the ultimate practical answer will probably depend upon the lawyer-client relationship. For large or commercial cases, counsel would surely want the client to review the complaint in any event, so soliciting the verification is hardly a burden. Even for a more mundane case, where there is a genuine lawyer-client relationship, the client would likewise read the pleading so that here, too, obtaining the verification is almost inherent in the process. In any event, under such circumstances, efforts attendant to the verification are not an impediment to progress.

Time in relation to the verification does become a factor, though, when counsel prosecutes foreclosures in volume, particularly when strict time frames are imposed by servicers or government agencies. That leads to the inquiry: Does the foreclosure complaint need to be verified (definition to follow), and if so, how best to accomplish that while preserving maximum speed in prosecuting the case?

Lenders and servicers recognize that once a file and all the requisite information and documentation is given to counsel, a foreclosure search is reviewed, the summons, complaint (and lis pendens) is prepared and filed, with process service to follow. So, short of questions, problems, or a contested matter, the mortgage servicer doesn't hear about the case until a request is made for updated figures at the referee computation stage.

There is an exception to this general rule, however, in at least three counties in New York State: Nassau, Greene and Suffolk. Unlike all other counties, each of these requires either an "affidavit of facts" to accompany the application for order of reference or a verified complaint as a substitute. A verification is defined by CPLR 3020(a) as

> . . . a statement under oath that the pleading is true to the knowledge of the deponent, except as to the matters alleged on information and belief, and as to those matters he believes it to be true.

Why this requirement? It is clear that a foreclosure complaint does *not* have to be verified. The CPLR imposes no such mandate and case law confirms that none exists. (*Logue v. Young*, 94 A.D.2d 827, 463 N.Y.S.2d 120 (3d Dep't 1983)). But another section (CPLR 3215), relating to judgments upon default, provides at subsection (f) that:

> On any application for judgment by default, the applicant shall file . . . proof by affidavit made by the party of the facts constituting the claim, the default and the amount due.

Although the foreclosure complaint contains all that information, it's not *sworn to* by anyone—unless it has been verified—and CPLR 3215(f) specifically allows a *verified* complaint to substitute for the affidavit of facts. Well, if it is not a *default* situation, this section shouldn't apply at all! And even if there is a default, the order of reference stage is not the *judgment* plateau, so employing the statute then is premature.

All this may be accurate, but if the court insists, discretion is the better part of valor. After all, the foreclosure *must* proceed. Which path, then, to follow? A verification avoids the effort of an affidavit of facts later and the possible delay if it is neglected. But the verification signed by someone on behalf of the plaintiff consumes *some* time—at least however long it takes to be transmitted to the servicer and then returned to counsel. In multiple foreclosure cases where every day counts, this is a meaningful contemplation.

To answer the question raised by the title, no, a foreclosure complaint need not be verified, but sometimes it is expeditious to do so. On balance, though, where speed is mandated, the affidavit of facts can be a more efficient means to ensure faster filing of the summons and complaint and a somewhat quicker pace to the foreclosure.

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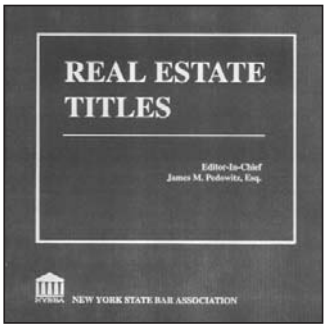

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