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MESSAGE FROM THE SECTION CHAIR

Greetings, and I wish each of you your heart's desire for the New Year!

I hope that one of your first plans for 1999 is to attend the State Bar Association's Annual Meeting in New York City the last week in January. The Real Property Law Section will have an informative program for you on Thursday, January 28, followed by a reception and luncheon. We expect very high attendance at the program due to mandatory CLE requirements, and the luncheon will provide a wonderful opportunity for attorneys from throughout the state to meet, renew old acquaintances and "talk shop."

I left you last time searching for the grammatical error in my previous message. After graduation from law school, I joined the firm of Wickes, Riddell, Bloomer, Jacobi & McGuire

in New York City (the firm subsequently merged into Morgan, Lewis & Bockius). I had the pleasure of working with a wonderful attorney, then a senior partner, named William J. Rennert. When I drafted my first memorandum of law for him, he called me into his office and began to scrutinize a certain page of my memorandum, then a certain paragraph, then a certain line—finally pointing out my mistake of having used a split infinitive! That left such an impression on me that I thought I had banned the split infinitive from my drafting, but it appeared nonetheless and I apologize to all (including Mr. Rennert).

Finding the split infinitive and thinking back to my days as a new associate led me to thoughts of mentoring. I was extremely fortunate in that I worked with a skilled attorney who took the time to guide me, not only in my writing and my research, but in how to deal with and be responsive to clients. When I moved upstate and joined McNamee, Lochner, the mentoring continued with attorneys such as

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Thomas Connolly, who taught me numerous practical real property tips, including how to read an abstract of title. (I also owe thanks to my husband, Russell C. Tharp, Jr., for that skill as well—there were many evenings spent around our kitchen table with Russ sharing the finer points of reading an abstract and plotting a description!) In addition to Tom, David Williams from my firm—a past president of the State Bar Association—was very instrumental in getting me involved in the organization. At that time, it was considered the right thing to do, both from the firm's perspective and from the attorney's perspective. If you know an attorney just starting out in practice, and you can in any way lend a hand—whether it is in connection with an area of substantive law, practice tips, pointers on how to comport oneself or how to get involved in the organized bar—please do so. You will feel good, the attorney will benefit and the overall profession will benefit. You should also know that the State Bar Association has a formal mentoring program, in which I have enrolled. To date, I have fielded various questions in real estate law from junior attorneys throughout the state, and I recommend the experience.

I recall that when I was first named to the Executive Committee of the Section, the Chair was Flora Schnall. I was a bit intimidated at my first meeting with all these icons of the real estate legal world, and it was inspiring to me that our leader was a woman. At my first Executive Committee meeting in New York City as Chair, this past September, Flora attended and brought me a flower. Remember, be a mentor, be a "rabbi," be a friend.

I look forward to seeing many of you at the Annual Meeting on January 28.

Lorraine Power Tharp

What Lender's Counsel Should Know About Loss Under a Mortgage Title Policy

by Albert E. Yorio*
New York, New York

Title insurance is not a guarantee against future risk like other types of insurance. It is a policy of indemnification against risks that are identifiable *at the time the policy is issued* and the loss and costs that may arise as a result of the loss against which you are insured.[1] A title insurance policy is a contract of indemnity under which the insurer agrees to indemnify its insured for as much as the policy amount against loss through defects of title, liens or encumbrances on realty in which the insured has an interest.[2]

Risk alone is not the sole determinant of coverage under the policy. Coverage is subject to exclusions, exceptions, conditions and stipulations that carve out particular risks from the duty to indemnify and defend and limit the insured's right to recovery. It should be noted, however, that if the insurance contract is ambiguous, limitations on the insurer's liability are normally narrowly construed against the insurer by the courts.[3]

A claim that is otherwise within the terms of the policy may fail under exclusion 3(c) of the 1992 ALTA policy, which specifically excludes from coverage "defects, liens, encumbrances, adverse claims or other matters resulting in no loss or damage to the insured claimant." For example, in *Green v. Evesham Corp.*, *supra*,[4] the insured mortgagee had no recovery under its policy because there was no actual loss, since the value of the mortgaged property exceeded the value of the insured loan even with the known defect.

A similar result was reached in the Appellate Division case of *Grunberger v. Iseson.*[5] In *Grunberger*, the policy insured that a mortgage was in a third position when it was actually fourth. However, the court did not allow recovery under the policy because the value of the premises did not equal the amount owed on the first mortgage.

When Does a Loss Become Actual Under a Loan Policy?

A series of 1990 cases from the federal First Circuit examined when, for purposes of a mortgagee's title policy, a loss becomes actual, and thus recoverable.

In *Falmouth supra*,[6] the insured filed a complaint alleging breach of the insurance policy for Ticor's failure to pay a loss. Under the standard terms of the policy as set forth in the 1987 ALTA Mortgagee's Policy Conditions and Stipulations, paragraph 11(b), which was carried into the 1992 ALTA Loan Policy, the insurer's liability had to be definitely established in order to trigger Ticor's duty to pay.

The case involved land in Mashpee, Massachusetts for which there was a purchase and sale agreement. A dispute arose between the parties to the agreement and the purchaser sued the seller. They then entered into a consent judgment fixing the date of conveyance. Difficulties arose at the closing, and when it became clear that the sale would not be completed on the date set by the consent agreement, the purchaser sought and was granted an *ex parte* order to extend time for performance. The closing was completed on the date specified in the order.

At the time of the closing, the purchaser executed a note and granted a mortgage to the Falmouth National Bank to secure the note. The note and mortgage were well in excess of the purchase price. The excess was to be advanced as a construction loan.

The seller subsequently appealed the *ex parte* granting of the purchaser's motion to extend the closing date. When the bank learned of the appeal, it notified the title insurer, Chicago Title. Chicago refused to insure any further advances on the construction loan. To get the bank to make future advances, the purchaser arranged for Ticor Title (before it was purchased by Chicago Title) to provide the bank with title insurance.

The reviewing court concluded that the trial judge lacked authority to unilaterally extend the time for performance of the closing and remanded the case for reconveyance of the property to the seller. The bank then made a claim to Ticor for payment of all losses. Ticor responded that the claim was premature and could not be asserted until such time as the amount of actual damages was established.

When Falmouth sued Ticor, the federal district court dismissed the bank's claim as premature. The First Circuit Court of Appeals affirmed the district court's dismissal without prejudice. In doing so, the First Circuit distinguished between the interest of an owner, which is immediately diminished by the presence of a defect, and the interest of a mortgagee such as Falmouth. Under a mortgage policy, the court found that actual loss can only be determined after the buyer is sued on the outstanding note and fails to pay the judgment.

Subsequently, the federal district court for Rhode Island examined the practical difficulties in applying *Falmouth*. In *American Title Insurance v. East West Financial Corp.*,[7] the district court observed that: "One of the practical difficulties in applying *Falmouth* is determining how far the insured must go in prosecuting such a suit, or, to put it another way, determining the point at which it can be said that the debtor failed to pay."[8]

The district court concluded that:

> [T]he only reasonable reading of *Falmouth* is that a mortgagee must pursue legal action against a defaulting borrower until a reasonable lender would write the debt off as uncollectible, or, to put it another way, until the anticipated cost of further proceedings against the borrower would be greater than any amount that is likely to be recovered.[9]

The Insurer's Option

The insurer has six basic options under the 1992 ALTA Loan Policy's Conditions and Stipulations for disposing of a valid claim:

1. To Defend the Title

Paragraph 4(a)—Upon written request by the insured and subject to the options contained in Section 6 of these Conditions and Stipulations, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy. The company shall have the right to select counsel of its choice (subject to the right of the insured to object for reasonable cause) to represent the insured as to those stated causes of action and shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs or expenses incurred by the insured in the defense of those causes of action which allege matters not insured against by this policy.

Note: Attorneys fees and costs account for about 40 percent of all claims payments.

2. To Establish the Title

Paragraph 4(b)—The Company shall have the right, at its own cost, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest or the lien of the insured mortgage, as insured, or to prevent or reduce loss or damage to the insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable hereunder, and shall not thereby concede liability or waive any provision of this policy. If the Company shall exercise its rights under this paragraph, it shall do so diligently.

3. To Pay the Insured the Amount of Insurance

Paragraph 6(a)(I)—In case of a claim under this policy, the Company shall have the following additional options:

— to pay or tender payment of the amount of insurance under this policy together with any costs, attorney's fees and/or expenses incurred by the insured claimant, which were authorized by the Company, up to the time of payment or tender of payment and which the Company is obligated to pay; or

4. To Purchase from the Insured the Indebtedness Secured by Mortgage

Paragraph 6(a)(ii)—In case of a claim under this policy, the Company shall have the following additional options:

— to purchase the indebtedness secured by the insured mortgage for the amount owing thereon together with any costs, attorney's fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of purchase and which the Company is obligated to pay.

5. To Pay or Settle with Other Parties

Paragraph 6(b)(I)—In case of a claim under this policy, the Company shall have the following additional options:

— to pay or otherwise settle with other parties in the name of an insured claimant any claim insured against under this policy, together with any costs, attorney's fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay; or

6. To Pay or Settle with Insured

Paragraph 6(b)(ii)—In case of a claim under this policy, the Company shall have the following additional options:

— to pay or otherwise settle with the insured claimant the loss or damage provided for under the policy, together with any costs, attorney's fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay.

If a claim is not denied or otherwise settled, the policy obligates the title insurer to defend legal actions on behalf of the insured under paragraphs 4(a) and 4(b) above. The insurer's duty to defend title is defined and limited by the claims alleged in the lawsuit brought against the insured.

While the insured may request that the insurer commence a quiet title action or other types of litigation against a third party to remove a title defect, the policy gives the insurer wide flexibility to pursue other means of curing title, such as buying off or settling with the holder of an adverse claim, which is addressed in paragraph 6(b)(I).

Although the policy provides the insurer with flexibility in the means by which it may handle an adverse claim, the duty of good faith and fair dealing implicit in every contract applies to the insurer's exercise of its options.

As previously set forth, a basic right retained by the title insurer in all of its policies is the right to cure the problem, as set forth in paragraph 4(b). Paragraph 7 also provides that if this course of action is taken, title as insured must be established "in a reasonably diligent manner." Courts look at the facts and circumstances of each case to see whether the problem was handled expeditiously. In *Diversified Mortgage Investors v. U.S. Life Ins. Co. of NY*,[10] the court found it inappropriate to make the title company discharge liens they were litigating.

On the other hand, if it is determined that either the problem was not handled within a reasonable time, regardless of outcome, or that title could not be established as insured, the court will usually award the insured all reasonably foreseeable damages resulting from the delay. In *Nebo v. Transamerica Title Co.*,[11] the court imposed delay damages on the title company even though it cleared the title of the defect because the company litigated the issue for three-and-one-half years, ultimately *lost* and had to purchase the interest anyway. The court found that under the circumstances, the defect was not removed within a reasonable time, as required by the policy. It was struck by the fact that the company chose to litigate, notwithstanding the fact that it had lost on the same issue on another property. Without saying so, the court seemed to imply that the company did not litigate the issue in good faith.

In *Citicorp Savings of Illinois v. Stewart Title Guaranty Co.*,[12] an insurer under a lender's policy who attempted to cure a title defect by tendering a deed to the insured property was held liable for the full amount of the insured mortgage loan—which at the time of the tender was greater than the value of the property—because the insurer unreasonably delayed in curing the defect while the real estate market was failing. Had the insurer made a timely tender of the property deed, the result might have been different.

What is the Measure of Damages?

What is "Actual Loss"?

"Actual loss" and "as of the date of the policy" are the pillars on which all valid title insurance claims rest. Until a loss is "actual," no claim will arise. Just what it is that constitutes "actual" loss is subject to court interpretation.

It is agreed that the mere existence of an undisclosed and unexpected lien on a mortgage policy is not enough to demonstrate loss. In many cases, an existing defect must be asserted before a loss can be proven, and in some cases, the assertion of the existing defect must be of such a nature that the insured's interest is manifestly impaired, as when a mortgagee's interest appears to be no longer secure.

Courts and commentators alike acknowledge that the term "actual loss" is a relative one,[13] and that it is elusive.[14] The measure of damages invariably involves such factors as: (1) the language of the policy; (2) the particular circumstances of the case; (3) the proof in the case; (4) the law of the jurisdiction; and (5) the nature of the defect involved.

Total and Partial Failure of Title

The appropriate rule for establishing the measure of damages under a title policy typically depends upon whether there has been a partial or total failure of title as a result of the defect. Where the failure of title is total, the measure of damages is the fair market value of the interest as insured. Where there is a complete failure of the mortgagee's title and the value of the property equals or exceeds what is due on the mortgage, recovery is measured by the amount due on the mortgage up to the face amount of the policy.

However, if the value on the mortgage is greater than the value of the property, the mortgagee can only recover up to the value of the property. In *CMEI, Inc. v. American Title Insurance Co.*,[15] the mortgagee secured title insurance coverage against loss up to $1,475,000 on secured indebtedness resulting from any title defects on the secured property. Six years later, the mortgagor defaulted and the mortgagee purchased the property at a foreclosure sale. After obtaining fee simple title, the insured discovered two outstanding easements, publicly recorded but not excepted from coverage, and brought a claim for the devaluation of his property.

Since the value of the property was more than $1,475,000 in a rising market, there was no loss in the sum owed the insured by reason of the two easements or any other encumbrances covered in the policy. There was, therefore, no "actual" loss on which to predicate a claim. Even with some market devaluation caused by the easements, there was no reduction below the amount of indebtedness secured by the mortgage. The value of the "security property" minus depreciation caused by defects still exceeded the debt owed the insured mortgagee.[16]

Furthermore, the court also explained that when an insured mortgagee becomes an owner by foreclosure, his or her policy coverage continues, but only under its original terms—upon purchase, it does not convert to an owner's policy.

Likewise, recovery under a second mortgage policy is measured against the amount by which the value of the property exceeds the amount of the first mortgage. See also *First American Realty Investors v. Peninsula Title Ins. Co.*,[17] where the court found no loss under the loan policy even though several parcels of property included in the policy were not owned by the mortgagor. The remainder of the property had sufficient value to make the lender whole.

A lender is not choosing to use its assets to invest in real estate. It is merely entering into an agreement with the borrower to extend credit pursuant to the terms of its contract (i.e., the promissory note). If the extension of credit is conditional upon the lender receiving a lien on real estate as part of the security for the repayment of the debt, then a mortgage or deed of trust also becomes part of the contract. The loan policy insures the validity, enforceability and relative priority of the lien created. The lender is not an owner subject to the risks of ownership. It has merely entered into an agreement to lend money and be reimbursed according to its terms. If repayment is made, the status of title to the property encumbered by the insured mortgage becomes irrelevant. Therefore, erroneously insuring that a mortgage encumbers property not owned by the mortgagor is only a potential claim under the policy. It only becomes relevant in the event the borrower defaults on the loan and foreclosure becomes necessary.

Date of the Loss

The loss under an owner's policy may be at a different time than the mortgagee's loss. Generally, the loss under the owner's policy is fixed as of the date of discovery of the title defect. The courts have used three different theories in fixing the date of loss under the mortgagee's policy:

a) as of the date title failed;[18]

b) as of the date of foreclosure;[19] or

c) as of the date compensation demand was made.[20]

Generally, the inquiry as to when loss is sustained and on what date damages should be measured tends to converge into a single inquiry. However, the date at which this measurement will be made varies from jurisdiction to jurisdiction and from decision to decision. The more recent and prevalent view is a line of cases which concern themselves with preventing windfall to either the insurer or the insured. In *Blackhaw Production Credit Ass'n v. Chicago Title Insurance Co.*,[21] the mortgagee contended that it suffered an actual loss recoverable under the terms of its policy because of an unreported superior lien, despite the fact that it ultimately made a profit on the sale of the insured property. The insurer contended that because the mortgagee made a profit, and its profit exceeded the face value of the policy, the mortgagee sustained no actual loss and, thus, could not recover under the policy.

The mortgagee settled with the lienholder. The court found that the settlement amount plus its costs in obtaining the settlement to be the loss incurred—despite the fact that the mortgagee later sold the property for a profit. The court stated:

> Once the value of this security interest has been determined by foreclosure or other reasonable means, the insurer should gain no added benefit because of an insured's business acumen regarding later resale for profit of improved land, but neither would its liability be increased if by poor business dealings an insured had lost money on subsequent sale of the property.[22]

The court indicated that the loss should be measured at the date of the foreclosure sale. A number of recent cases have followed *Blackhawk—Chrysler Financial Services Corp. of America v. Chicago Title Insurance Co.*[23] and *Karl v. Commonwealth Land Title Insurance Co.*[24]—in holding that the date of the foreclosure sale is the time when the mortgagee's loss is quantifiable.

Summary

To recover under a loan policy, the insured lender must show actual loss in terms of impairment of its mortgage security resulting from the covered defect or encumbrance. It is not sufficient merely to show that the defect falls within the insuring provisions of the policy. By avoiding misconceptions regarding a loan policy, lender's counsel will avoid unreasonable expectations from its clients and will isolate himself or herself from possible allegations of malpractice.

Endnotes

1. *Falmouth National Bank v. Ticor Title Insurance Company*, 920 F.2d 1058 (1st Cir. 1990).
2. *Green v. Evesham Corp.*, 179 N.J.Super. 105, 430 A. 2d 944 (1981).
3. Burke, D. Barlow, Jr., Law of Title Insurance (Little Brown & Co. 1986) §2.2.
4. 179 N.J. Super 105. 430 A.2d 944 (1981).
5. 75 A.D.2d 329, 429 N.Y.S.2d 209 (2d Dep't 1980).
6. 920 F.2d 1058 (1st Cir. 1990).
7. 817 F.Supp. 195 (D.R.I. 1993), (often referred to as "East West II"), *aff'd in part and rev'd in part*, 16 F.3d 449 (1st Cir. 1994).
8. *Id.* at p. 463.
9. *Id.* at p. 468.
10. 544 F.2d 571 (N.Y. 1976).
11. 21 Cal. App. 2d 222, 98 Cal. Rep. 237 (1971).
12. 840 F.2d 526 (7th Cir. 1988).
13. *Empire Development Co. v. Title Guarantee and Trust Co.*, 225 N.Y. 53, 121 N.E. 468 (1918).
14. Burke, Law of Title Insurance, at p. 34.
15. 447 So.2d 427 (Fla. Dist. Ct. App. 1984).
16. *Id.* at 428.
17. 355 So.2d 510 (Fla. 1978).
18. *Hillsboro Cove, Inc. v. Archibald*, 322 So.2d 585 (Fla. App. 1975).
19. *Narbett Bldg. & Loan Association v. Bryn Manor Trust Co.*, 126 Pa. Super 74, 190 A. 149 (1937).
20. *Title Ins. Co. v. Industrial Bank*, 156 Va. 322, 157 S.E. 710 (1931).
21. 144 Wis.2d 68, 423 N.W. 2d 521 (1988).
22. *Id.* at 82.
23. 641 N.Y.S. 2d 13 (A.D. 1st Dep't 1996).
24. 20 Cal. App. 4th 972, 24 Cal. Rptr. 912 (1993).

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Non-Judicial Foreclosure of Commercial Mortgages Pursuant to Article 14 of the Real Property Actions and Proceedings Law

by Richard S. Fries
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An amendment to article 14 of the Real Property Actions and Proceedings Law (RPAPL) (Chapter 231 of the Laws of 1998), authorizing non-judicial foreclosure of commercial mortgages, became effective on July 1, 1998. New York is now the 36th state in the country to enact some form of an expedited non-judicial foreclosure remedy. Article 14 remains in full force and effect until July 1, 2001, when, unless otherwise extended or renewed, article 14 will be deemed repealed.

The new legislation was enacted through the efforts of a special task force of the Real Property Section of the New York State Bar Association, which prepared the initial draft of the legislation and worked on revisions to satisfy several substantive issues raised by the state Senate and the Assembly.

By now, real estate practitioners should be aware of the new statute and at least somewhat familiar with its general purpose and use. This article will highlight the essential provisions of the statute, suggest mortgage loan provisions designed to make more effective use of the new law, and briefly explore certain potential problems and pitfalls that may arise when the new statute is used.

I. Highlights of Article 14

A. When a Mortgage May be Foreclosed Non-Judicially

A mortgage—excepting those mortgages identified below in the "excluded classes"—can be foreclosed by "power of sale" non-judicially *only if* the mortgage being foreclosed contains a provision permitting the sale of the mortgaged property.[1]

A suggested form of "power of sale" provision is set forth in section III of this article.

B. Excluded Classes—Section 1401(1), (2)

(i) a residential building containing fewer than six dwelling units;

(ii) a residential condominium unit;

(iii) a residential building owned by a cooperative apartment corporation;

(iv) a residential building located within New York City containing at least 65 percent residential tenancies; and

(v) where the mortgagee seeks to foreclose, terminate, modify or impair a tenant's interests in any leases for residential units in the mortgaged property.[2]

C. Notice of Intention to Foreclose

The mortgagee must serve a formal "notice of intention to foreclose" at least ten days before the notice of sale is published.[3] This written notice must, among other things, identify the mortgage, the defaults, the acceleration, the outstanding principal balance and accrued interest, and state that the borrower or subordinate lienor has certain rights and remedies (see section II below).

D. Notice of Pendency

Prior to the first service of the notice of intention to foreclose, the mortgagee must purchase an index number—thereby opening the court records—and file with the county clerk a notice of pendency of the non-judicial sale.[4] The notice of pendency binds all holders of interests who may appear thereafter to the non-judicial foreclosure of their liens without the need to serve the notice of sale upon them.

E. The Notice of Sale—Content, Service and Publication

Thereafter, the formal "notice of the sale" must be served, filed and duly advertised. The notice of sale must specify: the names of mortgagor and mortgagee, the particulars of the mortgage and the mortgaged property, the identity of holders of subordinate interests, the outstanding principal and accrued interest and the date, place and time of sale.[5]

Due, timely and proper notice of the sale must be served (in the manner required for personal service of a summons) upon all interested parties at least 30 days before the date of sale. An additional copy must be mailed.[6]

The mortgage may provide for another means of service, such as certified or regular mail, which constitutes acceptable service under the statute.[7] A suggested form is set forth below in section III.

A copy of the notice of sale must also be published in a newspaper of general circulation at least once in each week during the five successive weeks immediately preceding the date of sale or at least twice in each week during the four successive weeks immediately preceding the date of sale.[8]

F. Conduct of the Sale

The sale must be held at the county courthouse of the county in which the property is situated, under the auspices of a licensed auctioneer, sheriff, marshal or court-appointed official who announces the terms of the sale.[9]

A memorandum of the sale must be executed at the completion of the auction. The memorandum of sale and the terms of sale (to be attached thereto) become the binding real estate contract.[10] The mortgagee has the right to purchase the mortgaged property at the sale and can "credit" bid up to the full amount of the indebtedness secured by the mortgage being foreclosed.[11]

G. Conveyance of the Property—Form of "Power of Sale Deed"

A sale under article 14 is equivalent to a sale pursuant to a judgment of foreclosure under article 13, which enables the purchaser to obtain marketable title free and clear of subordinate liens.[12] The form of the "power of sale deed" is set forth in the statute.[13]

H. Other Provisions

The statute, drawn on years of experience with judicial foreclosure case law, practices, procedures and pitfalls, also contains comprehensive provisions for the right of redemption,[14] the distribution of proceeds of the sale,[15] the filing of a report of the sale,[16] the sale of multiple parcels securing a single debt,[17] costs and expenses,[18] the entry of a surplus money[19] or deficiency[20] judgment and the *ex parte* appointment of a receiver.[21]

II. Right to Seek Judicial Intervention

The legislature made certain the statute would afford to borrowers, tenants and lienholders substantive rights and protections and a judicial forum within which to assert these rights.

A. Prior Mortgages

In the first instance, section 1421 provides that for any mortgage executed *prior to July 1, 1998*, the mortgagor may, by written notice, *automatically require* that further foreclosure proceedings be conducted judicially.

B. New Mortgages

If the mortgagee commences a non-judicial foreclosure proceeding to foreclose a mortgage—or extension, amendment, modification or consolidation thereof—executed *after July 1, 1998*, a mortgagor seeking to invoke the judicial process must obtain a court order to do so.

The statute sets forth the criteria on which such an application must be based, including that: (1) the obligation secured by the mortgage is invalid or not otherwise due; (2) the mortgagor has a meritorious defense to the foreclosure; (3) the mortgagee has failed to comply with the statute; and (4) the non-judicial foreclosure would cause an "undue hardship" to the mortgagor.

III. Timeline for Non-Judicial Foreclosure

The following timeline identifies the *earliest* (i.e., theoretical or unopposed) dates on which each of the required non-judicial foreclosure steps can occur:

Days	**Step**
Up to Transfer of Title	
1	acceleration of the indebtedness
2	purchase index number/ notice of pendency
3	serve notice of intention to foreclose and notice of pendency
14	serve notice of sale
15-44	advertise sale twice weekly for four weeks
43	last day to object to sale
45	date of public auction
46-75	the date of closing, depending on terms of sale
After Transfer of Title	
89	prepare report of sale
104	file report of sale
124	last day for notice of claim to surplus
165	last day for deficiency proceedings

IV. Suggested Mortgage Provisions

The following provisions should be considered for all mortgage loan documentation, including extension, modification or forbearance agreements.

A. Power of Sale

"Mortgagee may, either with or without entry or taking possession of the mortgaged property as provided in this Mortgage or otherwise, personally or by its agents or attorneys, and without prejudice to the right to bring an action for foreclosure of this Mortgage, sell the mortgaged property or any part thereof pursuant to any procedures provided by applicable law, including, without limitation, the procedures set forth in Article 14 of the New York Real Property Actions and Proceedings Law (and any amendments or substitute statutes in regard thereto), and all estate, right, title, interest, claim and demand therein, and right of redemption thereof, at one or more sales as an entity or in parcels, and at such time and place upon such terms and after such notice thereof as may be required or permitted by applicable law."

B. Service of Process

"All notices hereunder or under any applicable law pertaining hereto (including, without limitation, Article 14 of the New York Real Property Actions and Proceedings Law) shall be in writing and shall be deemed sufficiently given or served for all purposes when delivered (i) by personal service or courier service, and shall be deemed given on the date when signed for or, if refused, when refused by the person designated as an agent for receipt of service, (ii) by facsimile transmission, and shall be deemed given when printed confirmation of completion of transmission is generated by the sender's facsimile transmission instrument, or (iii) by United States certified mail, return receipt requested, postage prepaid, and shall be deemed given two (2) days after being sent, to any party hereto at the following address [standard notice addresses] or such other address of which a party shall have notified the party giving such notice in writing as aforesaid. For purposes hereof, notices may be given by the parties hereto or by their attorneys identified above."

C. Non-Recourse Exception/Springing Guaranty for Section 1421 Defenses

". . . [N]othing herein shall (a) be, or be deemed to be, a release or impairment of the indebtedness evidenced by the Note or of this Mortgage, or (b) limit or otherwise prejudice in any way the rights of Mortgagee to proceed against any entity or person whatsoever with respect to any guaranties, or similar rights to payment or performance; nor shall such limitation of liability apply if and to the extent that (x) Mortgagor . . . takes any action by which Mortgagor seeks to require that further foreclosure proceedings proceed judicially under Article 13 of the New York Real Property Actions and Proceedings Law ("RPAPL") rather than non-judicially under Article 14 of the RPAPL or otherwise delays, impedes, enjoins, prevents or frustrates the non-judicial foreclosure of this Mortgage or the use by Mortgagee of its remedies under Article 14 of the RPAPL, unless Mortgagor ultimately obtains a final court order that Mortgagee was not entitled to exercise its remedies under Article 14."

V. Problem Areas—Future Considerations

Not surprisingly, the statute evolved through compromises and concessions, many of which were made by the legislature in the latter stages of the legislative session. Several provisions in the statute may need clarification or change or may be susceptible to unintended abuse. Consider the following:

A. Multi-Family Residential Carve-Out

The exclusion of residential apartment buildings in New York City was intended to protect tenants, but actually benefits defaulting landlords at the tenants' expense. Income-producing multi-family apartment buildings should be included within the ambit of the statute, without regard to location or percentage of residential tenancies. In this way, essential services can be maintained and the tenants' interests protected in the hands of a new landlord who has rescued the building (and the tenants) through an expedited foreclosure.

If the legislature is not prepared to have the statute cover multi-family residential properties, there is an alternative that would cover the uncontested or consensual foreclosure of these properties. The statute would authorize the non-judicial foreclosure of *all* residential properties but permit the borrower automatically to require that further foreclosure proceedings be conducted judicially. This would be akin to the right borrowers have under section 1421(1) regarding mortgages executed prior to the enactment of the statute.

In this way, the uncontested and consensual foreclosure of residential properties could proceed expeditiously. If property owners do not contest foreclosure, they can hardly be expected to provide services to their tenants. The tenants the legislature intended to protect will, therefore, be protected.

B. Definition of 65 Percent Residential Tenancies

The definition of the term "65 percent residential tenancies" for determining the applicability of the statute *must* be clarified. Sixty-five percent of the number of units? The income stream? The aggregate square footage? And on what date—the date of the mortgage, the service of the notice of intention to foreclose, the filing of the notice of pendency or the service of the notice of sale? This carve-out lacks precision and is subject to the widespread abuse, confusion and potential litigation the statute was designed to prevent. Further analysis of this issue is beyond the space constraints of this article.

C. The "Undue Hardship" Defense

The "undue hardship" standard for conversion to judicial foreclosure in section 1421 is an open invitation to creative pronouncements of harm that the non-judicial process strives to curtail. The borrower *should* have recourse to the judiciary if the borrower has a meritorious defense or if the lender fails to comply with the statute. But, the present subjective standard of undue hardship, unless clarified or deleted entirely, will only lead to abuse, delay, unnecessary litigation and unpredictability.

The new legislation is historic. Those who have participated in the enactment of it are optimistic that, once the few problems outlined above have been remedied, the statute will meet its intended goal—predictable foreclosure remedies that lead to an increased willingness by lenders to make mortgage loans in New York.

Endnotes

1. Real Property Actions & Proceedings Law, art. 14, § 1401(1) (hereinafter "RPAPL").
2. RPAPL 1401(2).
3. RPAPL 1402(1).
4. RPAPL 1403(1).
5. RPAPL 1404.
6. RPAPL 1406(1).
7. RPAPL 1406(2).
8. RPAPL 1405(2).
9. RPAPL 1408(1), (3).
10. RPAPL 1408(4).
11. RPAPL 1409.
12. RPAPL 1411.
13. RPAPL 1412.
14. RPAPL 1410.
15. RPAPL 1413.
16. RPAPL 1414, 1415.
17. RPAPL 1416.
18. RPAPL 1417.
19. RPAPL 1418.
20. RPAPL 1419.
21. RPAPL 1420.

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Deeds in Lieu of Foreclosure

by William P. Gardella
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The real estate market is booming, so what should a lender's attorney be contemplating? Deeds in lieu of foreclosure may not come quickly to mind, but in every wave of growth there seems to be an exception or two. Also, you may view this discussion as an exercise to be performed now and again, just to be prepared if the need to react actually arises in the distant future.

Now, assume that a lender is contacted by a borrower and is requested to accept a deed in lieu of foreclosure. This request may be made at the same time the lender first learns that its loan will become delinquent. The borrower may outline what appear to be good reasons for the lender to accept the deed, as opposed to proceeding with the expensive and time-consuming foreclosure process. How should the lender react when faced with the question of whether it should accept a deed in lieu of foreclosure? This article will briefly discuss the factors motivating the borrower, and then review the potential risks and benefits to the lender in a deed in lieu transaction.

Factors Motivating the Borrower

If a borrower informs its lender that the borrower will cooperate in the process of conveying title to the property to the lender, the borrower may hope to receive a benefit from its lender. A borrower may outline the possible disadvantages that a lender will face in completing a foreclosure. Cost and time are usually the prime factors. The borrower may also remind its lender that the severity of both of those factors can be compounded if a bankruptcy should arise. The lender, however, should be particularly cautious of proceeding with a deed in lieu arrangement if the borrower threatens bankruptcy. Bankruptcy presents particular risks in a deed in lieu transaction which will be discussed below.

> *". . . if the lender believes that it will likely recover a deficiency claim, it has little incentive to proceed with a deed in lieu."*

Having outlined the potential disadvantages that a lender may face in the foreclosure process, the borrower may then try to obtain a concession from its lender if the borrower cooperates with the lender by completing a deed in lieu of foreclosure transaction. The release of an element of personal liability for the loan, or the lender's payment of some or all of the closing costs, may be that benefit. A borrower may also ask for property management rights following the conveyance of title to the lender. Another factor that sometimes motivates a borrower to structure the transaction as a deed in lieu is the borrower's attempt to avoid the publicity associated with a foreclosure proceeding. It is more palatable for a borrower to be able to say it "sold" property to its lender, rather than explain that the lender acquired the property in foreclosure.

The Lender's Perspective

The borrower's strategies discussed above may or may not work with a particular lender, and their success will probably be dependent on the facts and circumstances involved. As a starting point, a lender has no obligation to accept a deed in lieu of foreclosure.[1] Also, the borrower's tendering of a deed in lieu of foreclosure is not a defense to the lender's foreclosure action.[2] Many lenders will oppose giving the borrower any compensation in a foreclosure situation. The lender may not have any incentive to complete the foreclosure process more rapidly than normal, particularly in situations where the lender is able to have a receiver appointed without difficulty or acquire title pursuant to a statutory power of sale process. If there is a subordinate mortgage encumbering the property, the lender will most likely decline to proceed with a deed in lieu, since a deed in lieu transaction will not terminate subordinate liens. Additionally, if the lender believes that it will likely recover a deficiency claim, it has little incentive to proceed with a deed in lieu.

If timing is not critical to the lender, a foreclosure is almost always the preferable approach. This is particularly so if the foreclosure will proceed as a "friendly," or uncontested, foreclosure. In situations where a lender is willing to entertain a deed in lieu of foreclosure arrangement, timing is often the primary factor. There are risks to be considered, though, prior to agreeing to accept a deed in lieu of foreclosure.

Risks to the Lender

The lender will be concerned that the deed in lieu transaction could be challenged and set aside. Potential grounds on which that could happen include unconscionable advantage, inadequate consideration, or that the transaction constitutes a fraudulent transfer or a preference. Transactions where a borrower conveys its property to a lender will be reviewed carefully by a court if the transaction is challenged in order to confirm that there is no fraud or duress involved.[3] Because of the potential risks involved in deed in lieu arrangements, if a lender is willing to proceed in that direction, it should proceed cautiously.

Undue Influence

It would be advantageous to the lender if the offer to enter into the deed in lieu arrangement came from the borrower. That fact will help to defend any potential claim that the lender exerted undue influence or pressure on the borrower to complete the transaction. A settlement agreement is normally entered into as one of the fundamental documents in a deed in lieu of foreclosure transaction and should memorialize the voluntary nature of the arrangement. The borrower should acknowledge the existence of the debt in the settlement agreement and confirm that it initiated the deed in lieu arrangement voluntarily, with the advice of counsel. A lender may have concerns if the proposal to enter into the deed in lieu transaction arose after a period of lengthy disputes with the borrower, or if the lender proposed the arrangement. Refuting claims of duress or undue influence may be more difficult in those situations.

Inadequate Consideration

The lender should confirm that the amount of the mortgage debt equals or exceeds the fair market value of the property to protect itself against a claim of inadequate consideration. The value of the mortgaged property is also significant in evaluating potential creditors' rights claims, which are discussed below. The lender will usually obtain an independent appraisal of the property to support the fact that the debt equals or exceeds the fair market value of the property. The borrower should acknowledge in the settlement agreement that the fair market value of the property is equal to or less than the amount of the debt.

Title Insurance Issues

The lender's attorney should contact a title insurance company to determine whether the company will impose a minimum threshold by which the mortgage debt must exceed the value of the property as a condition to issuing an owner's policy of title insurance. As an example, a title company may not be willing to insure the lender's title to the property acquired by a deed in lieu of foreclosure unless the appraised value of the property is at least a certain amount below the secured debt.

We are assuming that the lender will obtain an owner's title insurance policy, which is suggested for several reasons. One reason is that a lender's title insurance policy is not converted into an owner's policy as a result of a foreclosure or the acceptance of a deed in lieu of foreclosure. Instead, the loan policy continues to provide the same coverage as before. Since the effective date of the loan policy is not changed, the policy does not insure against matters that arose after that date. This also means that the policy will not insure the conveyance of title to the property to the lender.

Another benefit to obtaining an owner's policy of title insurance is that although a loan policy remains in effect following a foreclosure or the acceptance of a deed in lieu of foreclosure, the loan policy is subject to all of its original conditions. Those conditions are written in the context of an insured mortgage. As a result, it may be difficult to invoke certain of those conditions when the insured is attempting to assert a claim as the owner of the property. Also, in some states the cancellation of a debt may not be considered to be valuable consideration for purposes of the grantee qualifying as a bona fide purchaser for value under the recording statutes.[4] For these reasons it is advisable for the lender to obtain an owner's policy of title insurance, which should include, to the extent it is available, an endorsement that insures against fraudulent transfer claims.

Fraudulent Transfer Issues

A deed in lieu transaction involves bankruptcy risks that are not present in a foreclosure proceeding, where third parties have the opportunity to bid and acquire the property if they believe the value of the property exceeds the debt. The Supreme Court took that factor into consideration when it held that the price received at a regularly conducted foreclosure sale establishes, as a matter of law, reasonably equivalent value for purposes of fraudulent transfer claims.[5] The Court noted that "[f]oreclosure laws typically require notice to the defaulting borrower, a substantial lead time before the commencement of foreclosure proceedings, publication of notice of sale, and strict adherence to prescribed bidding rules and auction procedures."[6] There is no public sale, publication, or bidding process involved in a deed in lieu transaction. As a result, evidence of value is particularly significant.

U.S. Bankruptcy Code provides that fraudulent transfers may be set aside if made within one year prior to the filing of a bankruptcy petition.[7] State fraudulent transfer statutes typically have longer statutes of limitation.[8] In essence, to constitute a fraudulent transfer, the conveyance must be made with actual intent to hinder, delay or defraud a creditor.[9] Even if there is no intent to defraud creditors, the transfer may be constructively fraudulent if the borrower receives less than reasonably equivalent value, and if the borrower was insolvent at the time of the transfer or becomes insolvent as a result of the transfer.[10]

It is, therefore, important to secure a recent, third-party appraisal showing that the value of the property is less than or equal to the debt in order to protect against a fraudulent transfer claim. In addition, in an attempt to protect against both of the essential elements of a fraudulent transfer claim—i.e., the absence of reasonably equivalent value and insolvency—a lender may require financial statements that confirm that the borrower is not insolvent. A creditworthy principal of the borrower may be requested to provide an indemnity against losses and liabilities incurred in the event that creditors' rights claims are asserted.

Preferential Transfer Issues

Valuation of the collateral is also a key element in analyzing potential preference claims. Preferential transfers may be set aside if made within 90 days prior to the filing in bankruptcy or within one year of the filing if the transfer is made to an insider. To be classified as a preferential transfer, and to enable a creditor to obtain more than it would have received in a Chapter 7 liquidation, the transfer must be made for the benefit of a lender on account of an antecedent debt while the debtor was insolvent.[11] The debtor is presumed to be insolvent during the 90-day period prior to the filing in bankruptcy.[12] The presumption requires the party against whom it exists to put forth evidence to the contrary. However, the ultimate burden of proof rests with the party in whose favor the presumption exists.[13] In a Chapter 7 liquidation, the lender should receive the full value of the mortgaged property, up to the amount of its debt. Therefore, if the debt equals or exceeds the value of the collateral, the transfer should not constitute a preference.

"Preferential transfers may be set aside if made within 90 days prior to the filing in bankruptcy or within one year of the filing if the transfer is made to an insider."

Potential fraudulent transfer and preference claims are perhaps the most significant risks to a lender in a deed in lieu transaction. Attempts can be made to reduce those risks through appraisals, indemnity agreements, and title insurance. Some lenders may simply refuse to proceed with deed in lieu transactions because of the potential fraudulent transfer and preference risks.

Continuing Interest in the Property

The lender should be cautious in allowing the borrower to retain an interest in the property—such as a purchase option, a right of first refusal, or a below-market lease—after the conveyance. In these situations, it is possible that a court could conclude that an outright transfer of the property was not intended. A court could be persuaded that the deed was given as security for the underlying loan obligation. Courts that have examined this issue have concluded that the intent of the parties is the key. A deed, even if it is absolute on its face, will be considered to be a mortgage if the instrument was given as security for an obligation.[14] That conclusion would mean that the lender would have to foreclose its mortgage to obtain title to the property. In such a situation, the lender may also experience difficulty in recovering from its title insurance company, even if it obtained an owner's policy. The title insurance company may take the position that it has no obligation to defend such a claim since the lender's act of granting the borrower an interest in the property constitutes a "defect . . . created by the insured" within the meaning of the title policy exclusion.[15] The settlement agreement should state that an outright transfer of property is intended, and all of the other documents should clearly reflect that an outright transfer was intended by the parties.

Leases and Liens

The lender will need to carefully review all leases. A deed in lieu transaction, unlike a foreclosure, will not result in the lender having the ability to terminate subordinate leases. The same holds true for subordinate liens and other matters affecting title to the property. If a lender elects to accept a deed in lieu of foreclosure, it will acquire title to the property subject to liens, encumbrances, and other exceptions to title that arose subsequent to the date of the recording of its mortgage. That disadvantage, though, may be mitigated if the lender keeps the lien of the mortgage alive after the conveyance and then completes a foreclosure proceeding to terminate those subordinate exceptions. If a foreclosure proceeding is necessary to extinguish subordinate matters, the lender should question the utility of accepting a deed in lieu of foreclosure in the first instance.

Status of the Mortgage

There are benefits in keeping the lien of the mortgage alive, as a fail-safe mechanism, after the conveyance of title to the property to the lender. The first is that the lien may be needed if the deed in lieu transaction is set aside. Also, the lien may be used to preserve priority over subordinate liens and encumbranches. A necessary element of keeping the mortgage alive is the existence of the debt. If the debt is discharged or satisfied, so is the lien.[16] Therefore, the settlement agreement usually will not provide that the debt is satisfied, but instead often contains a covenant on the lender's part not to sue on the debt. This may be a conditional covenant; in other words, the lender agrees not to sue on the debt provided that the deed in lieu transaction is not challenged and that there is no borrower bankruptcy.

Merger

As an element of preserving the lien of the mortgage, the lender will need to consider the issue of merger. If title to the property and a mortgage encumbering that property are held by the same entity at the same time, the mortgage will be merged into the fee title to the property, unless the conveyance documents reflect an intent to avoid a merger.[17] In general, evidence of an intention to prevent a merger will be effective.[18] The lender should have its loan policy down-dated, and it should obtain an endorsement against a merger in the policy.

Other Issues

The settlement agreement should include releases of all claims that the borrower may have against the lender. All other due diligence issues and procedures involved in typical real estate acquisition transactions should be followed in deed in lieu arrangements. Those elements include reviewing title, the survey of the property, leases, service contracts, the environmental condition of the property, transfer tax issues, and perhaps re-examining the code compliance aspects of the property. In addition, the lender will want to review evidence of the borrower's authority to execute the conveyance and other closing documents. The lender will also need to analyze its income tax consequences resulting from accepting a deed in lieu of foreclosure.

Summary

There are potential risks for a lender in proceeding with a deed in lieu arrangement. The lender may be able to minimize certain of those risks, although that process may involve additional time and expense. In the end, and particularly in situations where a lender is able to proceed with a power of sale foreclosure,[19] the lender will need to determine whether the time saved by the deed in lieu arrangement outweighs those risks.

Endnotes

1. *Albany Savings Bank FSB v. Novak*, 151 Misc. 2d 956 (1991).
2. *Riley v. South Somers Development Corp.*, 644 N.Y.S.2d 784 (1996).
3. *See Martin v. New Rochelle Water Co.*, 42 N.Y.S. 893 (1896).
4. Section 272 of the New York Debtor and Creditor Law provides that the satisfaction of an antecedent debt does constitute fair consideration. *See also McNellis v. Raymond*, 329 F. Supp. 1038 (1971). The issue, as it relates to the recording statute, is not so clear. *See Groves v. George*, 123 N.Y.S.2d 192 (1953).
5. *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994).
6. *Id.* at 540.
7. 11 U.S.C. § 548(a)(1).
8. The New York Fraudulent Conveyance Law has a six-year statute of limitations. N.Y. Civil Practice Law & Rules 213(8) (hereinafter "CPLR").
9. 11 U.S.C. § 548(a)(1).
10. 11 U.S.C. § 548(a)(2).
11. 11 U.S.C. § 547(b).
12. 11 U.S.C. § 547(f).
13. Federal Rules of Evidence, Rule 301.
14. *Gioia v. Gioia*, 652 N.Y.S.2d 63 (1996); *Basile v. Erhal Holding Corp.*, 538 N.Y.S.2d 831 (1989). However, the burden rests on the claimant to prove that a deed absolute, on its face, is a mortgage. *515-2nd St. Corp. v. Bisnoff*, 295 N.Y.S. 94 (1937).
15. *See* ALTA Owner's Policy of Title Insurance, Exclusion from Coverage 3(a), and *Transamerica Title Insurance Co. v. Alaska Federal Savings & Loan*, 833 F.2d 775 (9th Cir. 1987).
16. *See Glenn on Mortgages*, section 48, ("[D]ischarge of the debt terminates the lien, whether the debt be paid or forgiven").
17. *Abra Holding Corp. v. Jackson*, 30 Misc. 2d 464 (1961).
18. *Riley v. South Somers Development Corp.*, 644 N.Y.S.2d 784 (1996); *First National Bank & Trust Co. of Ellenville v. Hyman Novick Realty Corp.*, 416 N.Y.S.2d 844 (1979). It has been held that if the mortgagee elects to keep the lien of the mortgage alive, the conveyance of the fee interest to the lender will constitute a satisfaction of the debt in an amount equal to the value of the property. *See Central Hanover Bank & Trust Co. v. Roslyn Estates, Inc.,* 42 N.Y.S.2d 130 (1943), and *American Savings and Loan Association v. Eidelberg,* 54 Misc. 2d 668 (1976). The better reading of the law, however, seems to be that the principle that the mortgagee's acquisition of the fee constitutes a satisfaction of the debt to the extent of the value of the property is only applicable where a mortgagee is attempting to both foreclose and recover a personal money judgment from the mortgagor. *See Alden Hotel Co. v. Kanin,* 387 N.Y.S.2d 948 (1976).
19. On July 7, 1998, New York Senate Bill 588 was signed into law, establishing (until July 1, 2001, unless further legislative action is taken) a revised non-judicial power of sale procedure that may be used in certain situations, but generally for non-residential properties, in New York.

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Spelling Counts When Searching Title

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In connection with almost every real estate sale, when searching for judgments against the grantor or prior grantors, the title searcher finds docketed judgments against individuals with names spelled similarly to that of the grantor. The title searcher is then confronted with the question of whether such judgments constitute valid liens against the property. Title closers usually require the grantor to submit an affidavit in which the grantor disavows any knowledge of specific judgments against individuals with similarly spelled names and may even ask the grantor to indemnify the title company if a claim is ever made based upon any such judgment. However, such indemnifications are often worthless, especially when a title claim is made, and thus the title company ends up paying off the judgment creditor.

Recently, a claim was made against Commonwealth Land Title Insurance Company's insured, Big Fun LLC, alleging that prior to the closing when Big Fun obtained title, Commonwealth knew, or should have known, that a judgment in excess of $1 million against "Israel Drizin and Fayge a/k/a Fay Drizin" constituted a lien against the transferred property. On the date the judgment was docketed, the property was owned by "Israel Drizen and Fayge a/k/a Fay Drizen." Drizen was not even Big Fun's grantor, but was its grantor's predecessor-in-interest. Moreover, not only were the first names of the two sets of husband and wife identical and the last names almost identical—Drizen on the deed and Drizin on the judgment—but the address of the judgment debtors, as docketed, was the same as that of the deed holders, as recorded.

". . . a slight misspelling of a name on a recorded judgment can still be a valid lien against real property held by the judgment debtor if the two names sound alike."

The judgment creditors tendered their judgment to the New York County Sheriff, which commenced execution procedures against the property. Big Fun, the owner of the property, commenced an action against the judgment creditors in state Supreme Court, New York County, seeking a declaration that the judgment was not a valid lien on the property, as well as a permanent injunction restraining the judgment creditors from executing their judgment against the property.[1]

The judgment creditors argued that under the common law doctrine of *idem sonans*, "a variance in the spelling of two names which sound alike is immaterial under the law,"[2] and thus, the minor misspelling between the filed judgment and recorded deed is immaterial, and the judgment constituted a valid lien against the property. The judgment creditors further argued that Commonwealth—which had insured not only Big Fun's title but also the title of Big Fun's grantor—should be deemed to have had constructive knowledge because had they conducted a computer search for judgments against "Driz!" they would have easily found the Drizin judgment and would have realized that the judgment debtor (Drizin) and the owner of the property on the date the judgment was docketed (Drizen) must be the same people, since both sets of husband and wife had identical first names ("Israel and Fayge a/k/a Fay") and both shared the same address. The judgment creditors thus asserted that Commonwealth should be deemed to have had constructive knowledge that there was a misspelling on either the prior deed or the judgment, and its knowledge should be imputed to its insured, Big Fun.

There were no New York cases directly on point addressing the precise issues raised by the judgment creditors, so on a motion for summary judgment, the judgment creditors and Big Fun referred the court to eight states that previously had ruled on the issue of whether the doctrine of *idem sonans* applies to public filings. The judgment creditors relied principally upon on point decisions from the states of Washington, Colorado and Missouri. Big Fun relied principally upon on point decisions from the states of New Jersey, New Hampshire, Ohio, Pennsylvania and California.

The judgment creditors cited to cases such as *Wilson Sporting Goods v. Pedersen,*[3] a Washington Court of Appeals decision which held that a slight misspelling of a name on a recorded judgment can still be a valid lien against real property held by the judgment debtor if the two names sound alike. In *Wilson*, the debtor's name, "Pedersen," was misspelled "Pederson" on a recorded judgment.

The Washington Court of Appeals held that, pursuant to the doctrine of *idem sonans*, the slight misspelling did not invalidate the lien against the judgment debtor's real property—held in the name "Pedersen"—since the two names sound the same and each name, as pronounced, suggests common alternate spellings. Similarly, a Colorado appellate court, also applying *idem sonans*, held that a mortgage recorded in the name of "Thomas F. Bermingham" is effective against property held in the name "Thomas F. Birmingham."[4] And, the Missouri Court of Appeals has held that a judgment entered in the judgment record as "E.G. Sibert" properly attached to property held by "Elinor G. Seibert."[5] Applying the doctrine of *idem sonans*, the court reasoned that ". . . if the record of a name spelled in one way should directly suggest to the ordinary mind that it is also commonly spelled another way, the [title] searcher should be charged with whatever the record showed in some other spelling under the same capital letter."

Big Fun, although conceding that *idem sonans* has been recognized in New York as a valid doctrine—primarily to avoid invalidating agreements merely because a name was misspelled—argued that the doctrine cannot, and should not, be applied to name indexes maintained for judgment liens because to do so would tax all land abstractors and title companies beyond reasonable limits and require them to be poets, phonetic linguists and multilingual specialists. Big Fun argued that to require every title searcher to comb through judgment records for every imaginable misspelling of a name would place an undue burden on the transfer of property in New York. It would simply wreak havoc in the New York real estate market, the busiest such market in the entire world.

Big Fun argued further that in New York, a judgment becomes a lien upon the real property of the judgment debtor only when the judgment is properly docketed with the county clerk in the county in which the property is located.[6] Therefore, a money judgment in New York is not a lien against property of the judgment debtor since the lien is created only by the proper docketing of the judgment.[7] And, since Civil Practice Law & Rules (CPLR) 5018(c), which governs the docketing of judgments, requires an entry in the proper docket book "under the surname of the judgment debtor . . . ," and not under an *idem sonans* of the judgment debtor's surname, if the name of the judgment debtor is spelled differently than the name of the property owner, the judgment lien cannot attach to the property.

". . . in New York, a judgment becomes a lien upon the real property of the judgment debtor only when the judgment is properly docketed with the county clerk in the county in which the property is located."

Big Fun thus urged the court to reject the doctrine of *idem sonans* in the context of judgment name indexes as had the states of New Jersey, New Hampshire, Ohio, Pennsylvania and California. For example, the application of *idem sonans* to judgment name indexes has been rejected by the New Jersey Appellate Division, which held that unless the name of the judgment debtor is spelled exactly as that of the record title owner, New Jersey's lien statute does not come into operation and no lien exists. The New Jersey appellate court explained that "otherwise, the statutory system of recording land titles, liens and encumbrances, would lack certainty and titles to real estate [would be] rendered hazardous and uncertain."[8]

Similarly, a New Hampshire appellate court has ruled that *idem sonans* does not apply "to attachment liens recorded in the registry of deeds."[9] The court explained that "the key to proper notice, in this index context, is the proper spelling of the attachment defendant's name and the resulting proper alphabetical placement."

Likewise, a California appellate court refused to apply *idem sonans* and allow a judgment creditor with a judgment against "Elliot a/k/a Eliot" to levy against property owned by "Elliott."[10] The court acknowledged that *idem sonans* is a recognized equitable doctrine in California, but explained that the doctrine is not applicable to names misspelled in judgment lien indexes because to require a title searcher to search the records for other spellings of the same name would place an undue burden on the transfer of property.

Judge Ira Gammerman, Supreme Court, New York County, granted Big Fun's summary judgment motion and rejected the judgment creditors' argument that the doctrine of *idem sonans* applies to filings affecting real property in New York.[11] Judge Gammerman ruled that:

> The issue in this case is whether the common law doctrine of *idem sonans* applies to filings affecting real estate in New York, specifically, a deed and a judgment. I hold that it does not. . . . [I]n New York, the question of whether or not the docketing of a judgment results in a lien upon real property does not depend upon whether anyone was misled by the failure to find

> a misspelled entry [citations omitted], or whether the entry was accurate "in substance" . . . In New York, the judgment only becomes a lien against the property of a person where the name of the judgment debtor is [correctly] entered in the docket book of the County Clerk.

Judge Gammerman, in rejecting those states that have applied *idem sonans* to judgment name indexes, explained:

> The case law cited by Defendants comes, for the most part, from times and places which have enjoyed a far more bucolic reality than New York City and the end of this century. No one would question that New York is a "world capital" in the areas of business, finance, and culture. It is also well-established that this Court is the busiest civil court in the nation. In addition, the promise of freedom in these United States, so well symbolized by the Lady in our harbor, has attracted, and continues to attract, people from all over the world to this city, resulting in a booming polyglot population not readily found anywhere else in the world.
>
> Within this context, the application of principles such as those enunciated by courts at other times and in other places could well result in practical, if not legal, absurdity . . . The practical difficulty with application of the *idem sonans* doctrine is that it rests on pronunciation of a name as to which persons may differ widely, and this "practical difficulty" can only be multiplied exponentially in the multi-cultural, multi-lingual reality that is New York. Realistically, it is not at all clear that there is only one "ordinary mind," or only one "common spelling" of a name, or even that a particular pronunciation of a name would suggest a "common" alternate spelling or spellings in this city.

The judge likewise rejected the judgment creditors' argument that if the title searcher had performed a computer search under "Driz!" the search would have turned out both the Drizin deed and the Drizen judgment. Judge Gammerman explained:

> Although, Defendants urge me to conclude differently because computer software that can search for and find variations of names is available, I decline to do so, in part because the "garbage in/garbage out" limitation of any computer program is so self-evident . . . In addition, although Defendants press for me to direct that all title searchers must use this software from now on, I decline to usurp the legislative function.

Thus, the court affirmatively held that even if the misspelled name sounds exactly like the correctly spelled name, and the spelling error involves only one letter, if the spelling of the judgment debtor's name does not exactly match the name of the owner of property, the judgment does not constitute a valid lien against the owner's property. The Court's ruling implied, but did not expressly state, that even where the misspelling is obvious and known to the title searcher—and thus the title searcher is not misled by the misspelling—the fact that the title company had actual knowledge that the intended judgment debtor was the owner of the property is irrelevant. Accordingly, although after this decision New York title searchers have much less to worry about when they find judgments docketed under names spelled similarly to those of a grantor or prior owners of the property, because the court did not affirmatively rule that this knowledge is irrelevant, title companies will still require the traditional affidavit and indemnity.

Endnotes

1. *Big Fun L.L.C. v. Elliot S. Gross et al*, Index No. 121343/97, Supreme Court of the State of New York, New York County.
2. 79 *NY Jur* 2d, *Names* §§ 16 and 17.
3. 886 P.2d 203 (Wash. 1994).
4. *Downer v. Bermingham*, 71 Colo. 245, 205 P. 948 (Colo. 1922).
5. *Green v. Meyers*, 72 S.W. 128 (Missouri).
6. Civil Practice Law & Rules 5203(a).
7. *Neimi Bros., Inc. v. Rosenbluh*, 147 Misc. 159, 263 N.Y.S. 445 (Mun. Ct. 1933).
8. *Jones v. Parker*, 258 A.2d 26, 107 N.J. Super. 235 (App. Div. N.J. 1969).
9. *Brady v. Mullen*, 139 N.H.67, 649 A.2d 47 (N.H. 1994).
10. *Orr v. Byers*, 198 Cal. App. 3d 666 (4th App. Dist. 1988).
11. *Big Fun LLC v. Gross,* New York Law Journal, Aug. 12, 1998, p. 22, col. 5, Sup. Ct., N.Y. Co., Gammerman, J.

***Arthur G. Jakoby, a partner with Herrick, Feinstein LLP in New York, represents title companies and their insureds in litigation. Herrick, Feinstein was appointed by Commonwealth Land Title Insurance Company of New York to represent and defend Big Fun's title in the case discussed in this article. Judge Gammerman's decision is being appealed by the judgment creditors.**

LaSalle Update…

Crucial U.S. Supreme Court Decision Will Significantly Affect Real Estate Investments

by Robert M. Zinman*
New York, New York

On November 2, the U.S. Supreme Court heard arguments in *Bank of America v. 203 N. LaSalle Street Partnership*[1] a case that will have a significant effect on the future of real estate investments in the nation.

Specifically, the case will decide whether there is a "new value" exception to the absolute priority rule in chapter 11 reorganizations, and what prerequisites possibly must be met before a new value plan can be confirmed. The following hypothetical situation illustrates how a new value plan of reorganization may affect a real estate mortgage.

Ace Insurance Company makes a $15 million loan to a real estate limited partnership, Law Drive Associates (LDA), whose only asset is an office building. LDA gives Ace a mortgage on the building to secure the payment of the note. A few years later, when the property value has decreased to $10 million, LDA files in chapter 11 of the Bankruptcy Code. Under section 506(a) of the Bankruptcy Code, Ace is considered a secured creditor for $10 million (the value of the collateral) and an unsecured creditor for $5 million (this unsecured claim would be available whether or not the note was recourse).

LDA has an exclusive right to submit a plan of reorganization for 120 days, which may be extended by the court for 90 days, subject to extension if the single asset loan had been no greater than $4 million. LDA proposes a plan under which (i) the mortgage is reduced to the value of the collateral ($10 million) with a "market rate" interest (since there is no market for 100 percent loan-to-value loans, the "market" rates approved by courts generally reflect the rate for normal mortgage loans on buildings of that type with perhaps some add-on); (ii) the unsecured claim of Ace is paid, say, 10 cents on the dollar ($500,000); and (iii) LDA makes an equity contribution of, say, $300,000 and retains the property free of the claims of creditors, thus wiping out $4.5 million of the mortgagee's deficiency claim.

Such a plan could be confirmed if the so-called new value exception, as applied in some recent cases, is applicable. The availability of such plans could have an extremely adverse effect on the availability and cost of real estate financing. The potential consequences for the real estate industry were articulated in the *amicus curiae* brief filed in *LaSalle* on behalf of the petitioner, Bank of America, by the American College of Real Estate Lawyers, which reads in part:

> Literally billions of dollars have been loaned to real estate developers by institutions, including insurance companies and pension plans that insure and protect millions of ordinary citizens, on the strength of real property collateral and the protection for realization on that collateral built into the Bankruptcy Code. Mortgage loans are securitized, rated and sold to investors seeking the security of mortgage collateral. These purchasers include individual investors and pension funds, as well as institutions investing policyholders' funds and deposits from individuals and corporations, all of whom make these investments based on the ability to realize the benefit of the bargain if there is a default in the income flow.
>
> The decision below can only result in the severe reduction of the availability of funds for real estate development from institutions and from the public, and higher credit standards and higher interest rates for those funds that are available or those securities that are sold. *LaSalle* not only threatens existing mortgage debt held by lenders, but also threatens the future of the real estate and real estate securities industry.

Thus, the decision in *LaSalle*[2] may be crucial to all parties involved in real estate financing. This discussion will first review the bankruptcy issues involved in the case and then discuss the arguments made before the Supreme Court.

Summary of Absolute Priority and New Value

One of the objectives of the drafters of the Bankruptcy Code was to protect real estate financing in a single asset real estate borrower's chapter 11 proceeding by requiring "absolute priority" for dissenting creditor classes impaired by the debtor's proposed plan of reorganization. These provisions were the result of the *Pine Gate* line of cases, decided under chapter 12 of the former Bankruptcy Act. In these cases, the bankruptcy courts allowed debtors to retain the mortgaged property upon payment to the nonrecourse mortgagee of the depressed value of the collateral. Under chapter 12, there was no requirement for absolute priority. Congress was asked to restore absolute priority to real estate reorganizations under the new chapter 11 of the new Bankruptcy Code in order to prevent the borrower from keeping the property without paying the debts.

Absolute priority requires that a plan be "fair and equitable" as to dissenting impaired classes of creditors. Painting the picture with a rather broad brush, the protection provided by Congress was accomplished under the provisions of section 1129(b) of the Bankruptcy Code, which essentially prohibits the confirmation of a debtor's plan under which the borrower retains property "on account of" its prior ownership interest while creditors remain unpaid.

In a 1939 Supreme Court decision, *Case v. Los Angeles Lumber Products Co.,*[3] prior to the enactment of the Bankruptcy Code, Justice Douglas rejected a plan that would have awarded an interest to "old equity" (referring to the stockholders, partners or owners of the debtor) of the debtor based on a promised contribution of expertise to the enterprise. In *dicta,* Justice Douglas indicated that where funds were essential to the enterprise, it might be possible for the plan to award an interest to old equity in return for its contribution of the needed money or money's worth, provided that the interest retained by old equity was reasonably equivalent to the contribution and that the creditors' "full right of priority"[4] was preserved. This became known as the "new value exception" to the absolute priority rule.

> *"After the adoption of the Bankruptcy Code, particularly in single asset real estate cases, a form of new value exception has often been applied."*

No reported case applied the new value exception between the 1939 dicta and the adoption of the Bankruptcy Code in 1978. This was believed to be due to the great difficulty in meeting the requirements enunciated by Justice Douglas in *Case*—necessity, reasonable equivalence and protection of creditors' priority rights.[5] After the adoption of the Bankruptcy Code, particularly in single asset real estate cases, a form of new value exception has often been applied. Under those post-Bankruptcy Code decisions that have applied the new value exception, the debtor has been able to retain the property in return for the new value contribution while creditors' claims (including the mortgagee's deficiency claim—the amount the debt exceeding the value of the collateral) remained uncompensated.

Opponents of this application of new value argue:

1. There is no new value exception in the Bankruptcy Code, since Congress adverted to and rejected the exception by requiring absolute priority only for dissenting impaired classes of creditors, thus permitting classes to agree to allow old equity to participate; and
2. The new value exception as applied in post-Bankruptcy Code cases does not meet the requirements articulated by Justice Douglas; namely, that the full priority rights of creditors be maintained (including the creditor's right to control of the enterprise); that the new value be necessary to the preservation of the enterprise; and that the interest retained by old equity not be greater than the contribution made.

In *LaSalle*, the Seventh Circuit rejected the above arguments and concluded in essence that:

1. Since Congress does not write on a "clean slate," it is apparent that without explicit language rejecting Justice Douglas' *dicta*, it applies under the Bankruptcy Code;
2. The language of section 1129(b) permits new value plans because it prohibits the retention of an interest by old equity only "on account of" its former interest, not when old equity retains an interest by offering new value; and
3. The post-Bankruptcy Code new value plan meets precode requisites set forth by Justice Douglas if the contribution is "substantial" in the judgment of the court, necessary to the confirmation of the debtor's *plan*, and reasonably equivalent to the value of the enterprise obtained by old equity

(excluding the value of control).

The Supreme Court Argument

Although both the issue of whether there is a new value exception in the Bankruptcy Code and whether the exception requirements were met by the *LaSalle* court were before the Seventh Circuit, the petitioner's brief, and virtually all of the supporting amicus briefs, concentrated on the first issue. Only the amicus brief of the American College of Real Estate Lawyers argued the second issue. Thus, it may be unlikely that the Supreme Court will rule on what might be a second string to the petitioner's bow, although this issue came up in the argument. This question of compliance with the *Case* requirements can be important because in its last important case dealing with new value, the Supreme Court declined to rule on the first issue when it found that a basic requirement of new value—the contribution of money or money's worth—had not been met.[6]

In the Supreme Court proceedings on November 2, the argument centered on the first issue—whether new value survived the adoption of the Bankruptcy Code. There seemed, to this writer, that there was a presumption in the minds of the justices that new value would be barred by section 1129(b)(2)(B)(2) unless it could be shown that the property retained was not "on account of" the junior interest. Certainly, the greatest area of contention seemed to be about the meaning of the words "on account of." The petitioner claimed that old equity had received property at least in part on account of the debtor's junior interest. The respondent appeared to argue that "on account of" meant something like "in exchange for," and that a property right is not obtained on account of a junior interest where part of the consideration includes the payment of money.

The issue of compliance with the requirements of new value was raised by the Court on two occasions, with concern expressed as to whether the new value was "necessary" to the success of the enterprise in a single asset situation. A question was asked as to whether the *LaSalle* plan was the type of new value plan contemplated by Justice Douglas in *Case,* especially in light of the fact—and making reference to the language of the American College of Real Estate Lawyers brief—that the only question in *LaSalle* seemed to be who would own the real estate.

While there is no way to determine how the Court will decide, it is this writer's guess that many of the justices may be uncomfortable in accepting the respondent's definition of "on account of." We will soon know what action the Supreme Court will take. Whatever course the Court takes, the next battle will be in Congress.

Endnotes

1. *In re 203 N. LaSalle Street Partnership*, No. 97-1418, October Term, 1998, *on writ of certiorari* to the United States Court of Appeals for the Seventh Circuit, 126 F.3d 955 (7th Cir. 1997).
2. The importance of the case can be measured in part by the number of amicus briefs submitted. In addition to the American College of Real Estate Lawyers brief, briefs were submitted in support of the petitioner by the American Council of Life Insurance, the American Bankers Association and the California Bankers Association, nine law professors and the United States; and for the defendant by the National Association of Credit Management and a joint brief on behalf of 18 state associations of credit management and two trade associations.
3. 306 U.S. 106 (1939).
4. 308 U.S. at 117 (*quoting Kansas City Terminal Ry. Co. v. Central Union Trust Co.*, 271 U.S. 445, 4534 (1926)).
5. Professors Ayer and Markell believe the requirements could never be met. John D. Ayer, "Rethinking Absolute Priority After *Ahlers*," 87 MICH. L.REV. 963, 1015 (1989), and Bruce A. Markell, "Owners, Auctions, and Absolute Priority in Bankruptcy Reorganizations," 44 STAN. L. REV. 69, 93 (1991). *Compare* Robert M. Zinman, "New Value and the Commission: How Bizarre!" 5 AM. BANKR. INST. L. REV. 477, 487-90 (1997).
6. *Norwest Bank Worthington v. Ahlers (In re Ahlers)*, 485 U.S. 197, 203 n.3 (1988).

***Bob Zinman is a Professor of Law at St. John's University School of Law. He is Chairman of the American Bankruptcy Institute and was Counsel of Record for the amicus brief submitted by the American College of Real Estate Lawyers in *LaSalle*. He is a Co-editor of this *Journal*.**

The STAR Tax Exemption

by James M. Pedowitz*
Garden City, New York

I. What is the New York State STAR (School Tax Relief) Tax Exemption?

STAR is a partial exemption of the school tax portion of real estate taxes imposed on certain residential property as set forth in Real Property Tax Law (RPTL) section 425, effective August 7, 1997.

There are two parts to the STAR exemption: the "basic" exemption, which takes effect for the 1999-2000 tax year and is applicable to all eligible residential property; and the "enhanced" exemption, applicable only to senior citizens at least 65 years of age with total annual income of $60,000 or less, which took effect for the 1998-99 tax year.

Each school district will be reimbursed by the state for the revenue lost through the exemption.

The amount of property value exempted under either the basic or the enhanced option is based upon a complex formula that converts local assessed valuation to full valuation; the school tax is figured based on a specified portion of that full value. The portion of full value exempted from tax starts at $12,500 annual income for the 1998-99 school year for the senior citizen enhanced exemption and increases in stages to $50,000 in 2001-02.

For other eligible property owners, the exemption starts at $10,000 in the 1999-2000 school year and increases in stages to $30,000 in the 2001-02 school year. The exact amount of the savings will depend on the school tax rate of the school district in which the residence is located.

II. Does the exemption also apply where the tax is all-inclusive, such as in New York City?

Yes. The tax bill should show the amount saved through the STAR exemption.

III. Does it apply to all residential property?

No. It only applies to property that includes a one-, two- or three-family residence, a farm dwelling or residential property held in condominium or cooperative form of ownership, and which serves as the primary residence of at least one owner. The exemption may also be granted to an eligible property even if it is partially used for other purposes as well.

IV. Does the property have to be owned by the individual or individuals who reside in it as their primary residence?

At least one of the owners must be an individual who uses the property as his or her primary residence. However, if legal title to the property is held by a trustee or trustees, the beneficial owner or owners are deemed to own the property for the purpose of determining eligibility for the exemption.

V. Does an owner have to be a senior citizen?

No, but senior citizens can be eligible for the "enhanced" exemption if they meet certain criteria as to age and income, which are:

> (a) Age. All of the owners must be at least 65 years of age or older as of the applicable tax status date, or in the case of property owned by husband and wife, one of the owners must be at least 65 years of age as of the applicable taxable status date.
>
> (b) Income. The combined income of all of the owners, and of any owner's spouse residing on the premises, for the income tax year immediately preceding the date of application for the exemption may not exceed $60,000. The term "income" as used herein has the same meaning as set forth in RPTL section 467, except that any deductions or exclusions from income allowed at local option for purposes of section 467 are not allowed for purposes of this section.

VI. What does § 467 include as income?

Section 467, which applies to broad real estate tax exemptions for senior citizens with limited income, provides:

> Such income shall include social security and retirement benefits, interest, dividends, total gain from the sale or exchange of a capital asset which may be offset by a loss from the sale or exchange of a capital asset in the same income tax year, net rental income, salary or earnings, and net

income from self-employment, but shall not include a return of capital, gifts, inheritances, payments made to individuals because of their status as victims of Nazi persecution, as defined in P.L. 103-286 or monies earned through employment in the federal foster grandparent program and any such income shall be offset by all medical and prescription drug expenses actually paid which were not reimbursed or paid for by insurance, if the governing board of a municipality, after a public hearing, adopts a local law, ordinance or resolution providing therefor. The provisions of this paragraph notwithstanding, such income shall not include veterans disability compensation, as defined in Title 38 of the United States Code provided the governing board of such municipality, after public hearing, adopts a local law ordinance or resolution providing therefor. In computing net rental income and net income from self-employment, no depreciation deduction shall be allowed for the exhaustion, wear and tear of real or personal property held for the production of income;

A senior citizen who has qualified for the broader section 467 exemption is also automatically qualified for the enhanced STAR exemption.

VII. How does one obtain the STAR exemption?

Every person owning residential real property should receive a notice from the school district in which the property is located reading substantially as follows:

Residential real property may qualify for a partial exemption from school district taxes under the New York state school tax relief ("STAR") program. To receive such exemption, owners of qualifying property must file an application with their local assessor on or before the applicable taxable status date. For further information, please contact your local assessor.

VIII. What if this notice is not sent or received?

The owner may lose the benefit of the STAR exemption unless he or she learns about the STAR program and obtains and timely files an application with the local assessor.

IX. What is the "applicable tax status date"?

This is the annual date as of which the taxable status of property is determined. This date varies between taxing units. In most upstate areas it is March 1; in New York City, January 1, in Suffolk County, December 1; and in Nassau County, January 2. Inquiry should be made to the applicable assessor.

X. How is the STAR exemption applied for?

All owners of the property who primarily reside thereon must jointly file an application for exemption with the local assessor on or before the appropriate "taxable status date"; if one or more of the owners has a primary residence elsewhere, that owner need not sign the application. The application may be filed by mail before the applicable tax status date. It is made on a form obtained from the assessor and should contain an agreement to notify the assessor if there is a change of primary residence while the property is receiving the exemption. If the assessor approves the application, the property is thereafter exempt until discontinued. It is not automatically discontinued on a change of ownership.

XI. How and when is the exemption discontinued?

Once approved, the basic exemption continues until it is discontinued. The enhanced exemption must be reapplied for annually.

The assessor is mandated to discontinue the exemption if it appears that (i) the property may not be the primary residence of the owner or owners who applied for the exemption, (ii) title to the property has been transferred to a new owner or owners, or (iii) the property otherwise may no longer be eligible for the exemption.

When the exemption is discontinued, it only takes effect for the next tax year. It does not terminate during a tax year as with a veteran's exemption. When the assessor determines that the exemption is to be discontinued, he or she sends a notice to the owner. An aggrieved owner may institute judicial review.

XII. What happens when the property is transferred?

The exemption does not terminate automatically on the transfer under RPTL section 520, as with certain other exemptions, such as the veteran's exemption.

Under RPTL section 574, assessors receive a monthly report from recording officers of all real property transfers within their assessing units, and at some time thereafter should mail an application for exemption to the new owner. The assessor should then discontinue the exemption for the ensuing assessment year. If it is not discontinued, the exemption may be deemed to have been continued improperly.

XIII. What if a STAR exemption was improperly obtained?

That can be trouble. RPTL section 425(12)(a) provides:

> In addition to discontinuing the exemption on the next ensuing tentative assessment roll, if the assessor determines that the property improperly received the exemption on one or more of the three preceding assessment rolls, he or she shall proceed to revoke the improperly granted prior exemption or exemptions.

The procedure to resolve this entails adding to the next assessment roll an item to recapture the exemption(s) as "omitted" taxes. The property is then chargeable for the "omitted" taxes.

In addition, there may be a penalty tax imposed, and the person(s) who made a material misstatement are to be disqualified from further STAR exemptions for five years and are subject to criminal prosecution.

XIV. What should the seller(s) and purchaser(s) do at the closing of a residential property that is receiving a STAR exemption?

The seller(s) of a property that is receiving the STAR exemption, or for which one has been applied, should notify the assessor's office promptly that the property is no longer their primary residence.

The purchaser(s), if eligible, should apply immediately for the applicable STAR exemption for the next eligible school tax year. If the closing takes place after the tax status date of a particular school tax year, it should still be accepted by the assessor for the following year because the statute does not specify how far in advance the application can be filed. However, it must be filed before the tax status date of the school tax year in which the exemption is to be obtained.

Apportionments should be made on the basis of the actual taxes, whether there is a STAR exemption or not.

XV. What proof is required to establish eligibility for the STAR exemption?

This is left up to each individual assessor. Although RPTL section 425(6)(a) provides for the application to be on a form prescribed by the state Office of Real Property Services, Nassau County uses its own form.

Proof of income of senior citizens seeking an enhanced exemption should be made with a copy of the latest federal or state income tax return. Proof of age may be made by a social security card. Proof of residence can be made with a voter registration card, but inquiry should be made of the assessor's office as to the specific requirements.

XVI. Where is other information obtainable?

Inquiry should be made from the local assessor. The Internet also has STAR information at: www.orps.state.ny.us.htm.

***James M. Pedowitz, Esq., is Counsel to Berkman, Henoch, Peterson & Peddy, P.C., in Garden City, New York.**

New York State Bar Association
Annual Meeting of the Real Property Law Section

Marriott Marquis Hotel
Thursday, January 28, 1999

The Real Property Law Section's Annual Meeting will be held on Thursday, January 28, 1999 at the New York Marriott Marquis in New York City. The chairs of the various committees will report on recent legal developments. Presentations will include updates on loan participation issues, the new foreclosure by advertisement statute, recent real estate tax cases, condominium tenants, cellular phone tower siting and mortgage contingency clauses, among others. The keynote speaker will be Rebecca Robertson, Vice President of Real Estate and Special Projects for The Shubert Organization, Inc. and former president of the 42nd Street Development Project, Inc., the state entity charged with the $1.8 billion revitalization of Times Square. She will speak on the redevelopment of Times Square.

9:00 a.m. LORRAINE POWER THARP, ESQ.
McNamee, Lochner, Titus & Williams, P.C
Albany

9:05 a.m. Program Introduction
STEVEN G. HOROWITZ, ESQ.
Cleary, Gottlieb, Steen & Hamilton
New York City

COMMITTEE CHAIR REPORTS ON RECENT DEVELOPMENTS

9:10 a.m. Mortgage Loan Opinion Report—Update
DOROTHY H. FERGUSON, ESQ.
Harter, Secrest & Emery
Rochester

LAURENCE G. PREBLE, ESQ.
O'Melveny & Myers
New York City

9:25 a.m. Review of Recent Court of Appeals Cases in Real Estate Tax Matters
JON N. SANTEMMA, ESQ.
Santemma & Deutsch
Mineola

LAWRENCE A. ZIMMERMAN, ESQ.
Helm, Shapiro, Anito & McCale, P.C.
Albany

9:40 a.m. Co-Lending and Participation Issues
LESTER M. BLIWISE, ESQ.
LeBoeuf, Lamb, Greene, & MacRae
New York City

9:50 a.m. Considerations of a Major Tenant Taking Space in a Commercial Condominium
MATTHEW J. LEEDS, ESQ.
Robinson Silverman Pearce Aronsohn & Berman LLP
New York City

10:00 a.m. Developments in the Housing Court Initiative
HONORABLE PETER M. WENDT
Civil Court of Kings County
New York City

10:10 a.m. Update on Tower Siting Under the Telecommunications Act of 1996
JOHN M. WILSON, II, ESQ.
Boylan, Brown, Code, Fowler, Vigdor & Wilson, LLP
Buffalo

10:20 a.m. Sustainable Regulations/Unconstitutional Takings: Recent Cases
SYBIL H. POLLET ESQ.
Pollet & Filleman
New York City

JOHN J. PRIVITERA, ESQ.
McNamee, Lochner, Titus & Williams
Albany

10:35 a.m. Pending Legislation
FLORA SCHNALL, ESQ.
Parker Chapin Flattau & Klimpl, LLP
New York City

10:45 a.m. Recent Developments in Low Income and Affordable Housing
BRIAN E. LAWLOR, ESQ.
New York State Division of Housing and Community Renewal
Albany

JERROLD I. HIRSCHEN, ESQ.
Hirschen & Singer
New York City

11:00 a.m. Results of Unauthorized Practice of Law Survey and Ethics Update
PETER V. COFFEY, ESQ.
Parisi, Englert, Coffey & McHugh
Albany

SUSAN ANNE MANCUSO, ESQ.
Kreisberg, Beebe, Grossman, Bergins & Mancuso
White Plains

11:15 a.m. Mortgage Contingencies: Model Contract Clause Update
KARL B. HOLTZSCHUE, ESQ.
New York City

11:25 a.m. Supervision of Legal Assistants
CHRISTINE M. KIM, ESQ.
Willkie, Farr & Gallagher
New York City

11:35 a.m. New York State Revised Article 14—Foreclosure by Advertisement
RICHARD S. FRIES, ESQ.
Bachner, Tally, Polevoy & Misher
New York City

11:45 a.m. Overview of the Silent Lease Issues: A Through Z Project
JOSHUA STEIN, ESQ.
Latham & Watkins
New York City

Silent Lease Issues: A Through C
S.H. SPENCER COMPTON, ESQ.
Paul, Weiss, Rifkind, Wharton & Garrison

12:45 p.m. Luncheon Speaker:

The Redevelopment of Times Square
REBECCA ROBERTSON
Vice President
Real Estate and Special Projects
The Shubert Organization
New York City

New York State Title Insurance Industry Proposes Continuation of Title Insurance Coverage

by William A. Colavito
New York, New York

At a recent meeting of executive officers of the Title Insurance Rate Service Association, participants concluded that the rate manual filed for use with the New York State Department of Insurance should be amended to include provisions pertaining to continuation of title insurance coverage under the owner's policy in certain defined instances.

The existing ALTA 1992 Owner's Policy Form, under the definition of insured, in effect provides for limited continuation of policy coverage as of the original date of the policy where devolution of title from the insured to others occurs by operation of law. The "insured" is defined in the policy as the insured named in Schedule A, and, subject to any rights or defenses the company would have had against the named insured, those who succeed to the interest of the named insured by operation of law—as distinguished from purchase—including, but not limited to, heirs, distributees, devisees, survivors, personal representatives, next of kin, or corporate or fiduciary successors. The owner's policy also provides that the coverage under the policy shall continue in force as of the date of policy in favor of an insured only so long as the insured retains an estate or interest in the land; or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the insured; or only so long as the insured has liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest.

The proposed amendment to the rate manual will allow for continuation of coverage under the owner's policy in a number of additional instances. Several examples include a conveyance from a parent company to a wholly owned subsidiary company; from a corporation to its stockholders pursuant to a plan of liquidation; from a partnership to its partners upon dissolution of partnership; and from a limited liability company to its members upon a dissolution of the limited liability company, provided that as a result of any transaction described above there is no change of beneficial ownership and the transaction is made for no consideration. The consideration mentioned for purposes of continuation of coverage provisions excludes the value of any lien or encumbrance remaining on land or interest at the time of transfer. Other instances where continuation of coverage provisions will apply include a conveyance by the named insured to a member of his or her immediate family as a gift and a conveyance to a trust created by the named insured in which all of the beneficiaries, lifetime and remainder, are members of the insured's immediate family. The continuation of coverage provisions will provide that the original policy coverage remain effective as of its date of issuance. However, the consequences of any post-policy transfer that occurs will not be insured.

The proposal is subject to approval by the New York State Department of Insurance.

BERGMAN ON MORTGAGE FORECLOSURES . . .

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

When a Prior Action Is Pending—A Matter of Strategy*

The pace of mortgage commerce in America is increasing the occurrence of an obscured procedural glitch in the mortgage foreclosure process (at least in New York) which heretofore had been almost unheard of—the existence of a prior foreclosure on the property as a possible bar to foreclosure now. How this happens and the available solutions are the focus here.

The overall strategic concern (at least from a mortgagee's perch) is the conspicuous one. Anything that halts a foreclosure in place is to be avoided. So, when this problem is encountered, the ability to get going is meaningful. In New York, for example, the statute governing foreclosures—Real Property Actions & Proceedings Law (RPAPL), art. 13—mandates that the complaint contain an allegation that no other action has been brought to recover any part of the mortgage debt.[1] This, in turn, relates in part to the prevalent action rule common in so many jurisdictions: You can't sue on the note (the monetary obligation) and foreclose on the mortgage at the same time.

The problem at issue, though, is not so much a prior action on the note, which would be quite uncommon, but the existence of a previous foreclosure. As an example, what sometimes happens—and lately, it seems, more often—is that a foreclosure is begun and then a forbearance agreement settles the case. Because it cannot be predicted whether the borrower will honor the agreement for its entire duration, wise lenders and servicers will not discontinue the foreclosure, but rather will hold it in place as a sword to use if a future default occurs. Especially with a lengthy forbearance, it may not be so difficult to forget that a foreclosure had been begun. And lack of awareness can be exacerbated by changes in servicing personnel, substitutions of new software or tracking systems and, perhaps significantly, assignment of the mortgage—especially in a large pool. Industry professionals recognize all the cited occurrences as familiar.

One can imagine, then, that the loan wends its way to a new servicer which, faced with a default, dutifully conveys the file to its counsel with the directive to foreclose. The foreclosure search then reveals the earlier, forgotten foreclosure action. Because the complaint is required to allege no prior action—which now isn't true—there is an apparent dilemma, and failure to so plead *is* a defect in the complaint.[2]

The safest solution, obviously, is simply to discontinue the earlier action. Sometimes, though, that cannot, or is not, so expeditiously done. The mechanics require either a motion or a stipulation, the latter to be signed by all parties who appeared in the action. Either approach can be time-consuming, depending upon a number of factors which needn't be explored here. (Suffice it to say that delays are frequent in many judicial foreclosure states.) Another impediment can even be the original law firm. Unfortunately, for some attorneys, discontinuing an old case, for no fee, for a non-client when there may be so much other work to do could induce torpor. Regardless of the underlying reason, months of delay encountered in disposing of that initial foreclosure is certainly both possible and unwelcome.

Faced with this problem, the choice is to wait, or be bolder. Contemplating the latter course, observe that the defect of failing to plead lack of jurisdiction is not jurisdictional, and neglect of any defendant to attack the complaint for failure to employ the required allegation waives any objection.[3] Although this compelling aphorism is not a panacea, it does suggest a possibly speedier alternative. Other parties may never notice the defect which, after all, is not fatal and is correctable. (Persuasive, too; the plaintiff is not trying to foreclose the mortgage twice.) If other parties do recognize the infirmity, by the time the issue surfaces, the first action may by then have been discontinued. Significantly, failure to include the statement in the complaint may merely obligate striking any offending language with leave to replead.[4] Thus, a foreclosure complaint can be drafted absent the otherwise necessary obligation.[5]

It appears, therefore, that the conundrum of the overlooked foreclosure has a practical solution. It is not immune to mishap, but when interest accrues every day, it is a path lenders and servicers may consider.

Endnotes

1. RPAPL 1301(2)
2. Again, such is the rule in New York. *Brandenberg v. Tirino*, 37 A.D.2d 713, 324 N.Y.S.126 (2d Dep't), *leave to appeal dismissed*, 29 N.Y.2d 486, 326 N.Y.S.2d 1025 (1971); *Ginsberg v. Roberts*, 19 A.D.2d 739, 242 N.Y.S.2d 861 (2d Dep't 1963); *Daint-T-Way Laundry v. Ng*, 89 N.Y.S.2d 867 (Sup. Ct. 1949).
3. *Bradenberg v. Tirino*, 37 A.D.2d 713, 324 N.Y.S.2d 126 (2d Dep't), *leave to appeal dismissed*, 29 N.Y.2d 486, 326 N.Y.S.2d 1025 (1971), *citing Szemko v. Weiner*, 176 A.D. 620, 163 N.Y.S. 382.
4. *Ginsberg v. Roberts*, 19 A.D.2d 739, 242 N.Y.S.2d 861 (2d Dep't 1963).
5. Note again that all assumptions are made based upon law in the state of New York.

****Mr. Bergman, author of the three-volume treatise, *Bergman on New York Mortgage Foreclosures*, Matthew Bender & Co., Inc. (Rev. 1998), is a partner with Certilman Balin Adler & Hyman in East Meadow, New York, outside counsel to a number of major lenders and servicers, and an Adjunct Associate Professor of Real Estate with New York University's Real Estate Institute, where he teaches the mortgage foreclosure course. He is also a member of the National Foreclosure Professionals, the American College of Real Estate Lawyers and is on the faculty of the Mortgage Bankers Association of America School of Mortgage Banking.**

New York State Bar Association
Real Property Section

Condominiums and Cooperatives Committee

Mission Statement

May 8, 1998

General Mission

The Condominiums and Cooperatives Committee has established an open membership policy welcoming all interested members of the bar. The goal of the committee generally is to represent the bar in the areas of law affecting condominiums, cooperatives and homeowners associations. The committee's intention is to draw from lawyers who counsel clients in all areas of the industry, ranging across all regions of New York state and taking into account disciplines that might affect individual owners, sellers, purchasers, residents, investors, tenants, sponsors, apartment corporations, condominium and homeowners associations, lenders, regulators, the judiciary, lawmakers, brokers, real estate professionals and any other interested parties.

The general goals of the committee are to:

1. **Educate Bar Association members regarding current and prospective developments of interest in this area of law.**
2. **Monitor and recommend changes in law and regulations.**
3. **Prepare reports, forms and proposed legislation on areas of interest for presentation to the committee and to the Real Property Section generally.**
4. **Coordinate with other groups, mostly those comprised of lawyers, for education or toward other common goals.**
5. **Provide liaison between the Department of Law Real Estate Financing Bureau and the Bar Association.**
6. **Communicate information on the activities and viewpoints of the committee to the Real Property Section and the Bar Association generally and communicate information on the activities and viewpoints of the Real Property Section and the Bar Association to the membership of the committee.**
7. **Educate the public.**

These goals are not stated in any particular order, nor are they anticipated to remain exclusive. The committee's activities are intended to be flexible and its methods fluid in order to adjust to changes in practice, the level of activity required and the actual level of member participation that is achieved.

As of May 1998, the committee had approximately 200 members; however, the committee does not intend to close its ranks. The committee would like to continue to operate as a wide clearinghouse for information, with a preference for seminar-type or open-forum type meetings, as opposed to the smaller executive session formats that are more appropriate in certain disciplines.

As part of this effort, the committee particularly would like to encourage participation from attorneys involved in this area of law who may practice in locations or offer personal backgrounds that traditionally have been underrepresented on the committee.

An general goal of the committee is to serve the public through education, the promulgation of forms and the betterment of practice and of the industry.

Organization and Meetings

The committee is headed by two co-chairs. Traditionally, one chair practices in the New York City area and the other chair is primarily engaged in practice outside of the metropolitan area. There has also been a de facto secretary—not named by the Real Property Section, but selected by the chairs—who has handled the minutes for the meetings.

The committee typically has held two or three full meetings between September and June of each year. There is usually one full committee meeting in the fall and one in the spring. The full committee usually also has a meeting in conjunction with the annual meeting of the State Bar Association during the last week of January in New York City. Depending upon attendance at the summer meeting of the Real Property Law Section (typically not held in a major commercial business area in New York state), the committee may have a shortened meeting at that time, typically a breakfast meeting, sometimes in conjunction with another committee of the Real Property Law Section.

The committee believes in documenting the learning and information conveyed at its meetings. To this end, the committee has developed and promotes the use of relatively fastidious and complete minutes that summarize in some detail the presentations made at the meetings. The minutes are also designed to recognize by name, to the extent practicable, the contributions and comments of members from the floor or in discussion at the meetings. The minutes typically include as exhibits material that is handed out at the meetings.

The committee has adopted the informal practice of having one of its members serve essentially as a recording secretary to prepare these minutes, which is an arduous, but much appreciated task. There is probably no other aspect of the committee's work during the past few years that has received more independent praise and appreciation from the Bar Association than the dissemination of minutes to the full membership. The minutes usually also serve as the committee's report to the Executive Committee of the Real Property Law Section.

Typically, the substantive portions of meetings consist of:

1. Discussion of developments communicated by the Executive Committee of the Real Property Law Section.

2. Reports of standing committees.

3. Reports of progress of special projects.

4. Updates on pending legislation and recent case law developments.

5. Presentations of topical interest made either by members of the committee or by outside speakers.

Subcommittees

Because of the size of the committee and its self-imposed mission to present education seminars to a large group, the bulk of the committee's work is performed by subcommittees. This practice differs from that of many other bar associations and many other committees of the Real Property Law Section, but the size of the committee's membership makes it impossible and undesirable for it to act in an executive fashion. Accordingly, the committee depends upon on and thrives on the participation of its members. All members are encouraged to participate on subcommittees.

The committee regularly asks its subcommittees to state their own objectives and missions. Where a subcommittee is engaged in a special project, it is suggested that a timetable be prepared and a target date set. Practice has shown that this is the best way for a subcommittee to remain focused and for the full Condominiums and Cooperatives Committee to discharge its obligation to the Real Property Law Section to complete its projects as needed.

By their nature, some subcommittees tend to be perpetual, while others are single-purpose or otherwise temporary in nature. Subcommittees also vary in size. The co-chairs are deemed to be members of all subcommittees.

Recently, the committee thanked several subcommittees that had been discharged as their work was concluded. These include the Lead Disclosure Subcommittee, the Condominium Lending Subcommittee and the Workouts Subcommittee. In addition, a subcommittee working on a joint project with the Landlord-Tenant Committee was disbanded when the subcommittee chairs decided that the project was not coming together and was irredeemable. The Alteration Agreement Subcommittee was disbanded, having accepted a presentation from the Cooperatives Committee of the Association of the Bar of the City of New York, with an agreement to negotiate a legend to be used on that document expressing the level of participation or endorsement of the form by the State Bar Association.

Subcommittees in existence as of May 1998 include:

1. **Liaison Subcommittee with the Department of Law.** Historically, this subcommittee has met regularly with the attorneys in charge of the Department of Law's Real Estate Financing Bureau to introduce and discuss areas of concern to practitioners dealing with the agency and to communicate concerns of the bureau to the Bar Association generally. The Liaison Subcommittee is long-standing, and its predecessor groups have always had a special mission in trying to communicate an objective viewpoint of the industry as a whole or the different viewpoints of the various arms of the industry. These notions are communicated by attorneys who have special insight into the concerns of all groups involved in this area of law. This subcommittee is typically composed of (i) past chairs of the full committee; (ii) the Assistant Attorney General in Charge and the chiefs of the Review and Enforcement sections of the Real Estate Financing Bureau; and (iii) at a particular meeting, individual members of the bar whose involvement would be helpful

with respect to items being discussed at that meeting.

2. **Tax Subcommittee.** The Tax Subcommittee typically updates the bar on current developments and issues relating to income taxes, transfer taxes, gains taxes, corporate taxes, association taxes and the like. Its scope includes handling the concerns of individuals, apartment corporations, condominium and homeowners associations and sponsors. The Tax Subcommittee periodically has made inquiries of appropriate agencies to determine positions regarding open areas of law.

3. **Proposed Legislation Subcommittee.** This subcommittee performs two functions. First, it helps prepare drafts of legislation that may be recommended by the full committee. Second, it reviews pending legislation brought to the committee's attention and, if appropriate, generates a response or memorandum on the committee's position. Because the latter function can require a quick response (for example, when presented with a five-day bill on the Governor's desk), the full committee has authorized its chairs—in conjunction with the Proposed Legislation Subcommittee chair and in consultation with subcommittee members whom the subcommittee chair is able to contact or members whom the chair feels should be consulted on particular legislation—to formulate a position that can serve as the position of the full committee. It is understood that the Bar Association's policy prohibits use of the names of the Real Property Law Section or the Bar Association without formal authorization, and that any presentation of the committee's position must include a disclaimer that the opinion expressed is only that of the committee and not of the section or of the full Bar Association.

4. **Current Case Law Subcommittee.** Like the Proposed Legislation Subcommittee, this subcommittee really reflects the efforts of one or two members of the full committee who bring case law of interest to the full committee for an updating presentation at regular committee meetings.

5. **Homeowners Associations Subcommittee.** This subcommittee examines and raises issues of interest relating to homeowners associations that may not otherwise be reflected in the activities of the committee.

6. **Proprietary Lease Subcommittee.** This subcommittee concentrates on (i) developing model forms of important provisions in the relatively standard forms of proprietary leases and (ii) producing a summary of items of concern for an apartment corporation considering the extension of a proprietary lease coming to the end of its term, and for lenders considering refinancing the underlying mortgage of an apartment corporation whose lease expiration is relatively imminent.

7. **Subcommittee Reviewing DHCR Regulations Regarding Rents After Foreclosure on Cooperative Apartment Buildings.** Following the issues that dramatically affect owners, tenants, associations and lenders, this subcommittee tracks the developing policies of the DHCR to determine the apartment rents in the extremely rare situation after a cooperative apartment building has been foreclosed by an underlying mortgagee. Obviously, not only is it of concern to tenants, owners and lenders as to what such rents would be, but the amount of the rents will affect valuations of all existing cooperative apartment buildings with respect to the amount of financing that will be available to them for blanket mortgages on the building, the amount of available financing on individual apartment loans and the health of the industry in general.

8. **Liens Subcommittee.** This subcommittee prepared a report, revised in June 1997, describing the law regarding the nature and priorities of liens affecting the proprietary leases of and shares allocated to cooperative apartments. The subcommittee has also begun compiling a similar report regarding liens on condominium units.

9. **Management Agreement Subcommittee.** This subcommittee will review forms of management agreements and prepare checklists for practitioners charged with preparing or reviewing management agreements for condominiums or cooperatives.

10. **Website Subcommittee.** This group is establishing its own Website, which presumably would be found within the Real Property Law Section's site. It is anticipated that available information will include citations to recent cases and publications of

interest, as well as research references and materials.

11. **Membership Subcommittee.** This subcommittee will examine methods of assuring that the segments of the bar that could benefit from contact with the committee are aware of its existence and its activities. In addition, the subcommittee will explore the possibilities of expanding diversity in the membership of the full committee.

12. **Cooperative Contract Subcommittee.** This subcommittee is reviewing the possibility of revising the current widely accepted Blumberg form of contract of sale for a cooperative apartment, to take into account recent developments.

Dated: May 8, 1998

Respectfully submitted to the Real Property Section by the Condominium and Cooperatives Committee,
Matthew J. Leeds
Joseph M. Walsh
Co-Chairs

SECTION COMMITTEES & CHAIRS

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Real Estate Transactions—Residential Property

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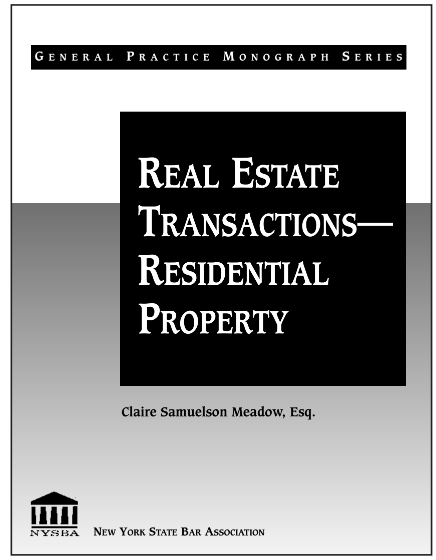

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New York State Bar Association

NYSBA

New York State Bar Association Partnership with Electronic Publisher to Make Law Library Readily Available to Lawyers

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The New York State Bar Association (NYSBA) announced that it will bring New York state law and state bar legal education publications online and on CD-ROM through a partnership with Law Office Information Systems, Inc. (LOIS), a nationally recognized leader in low-price, high-quality electronic legal research.

"We are pleased to bring the continuing legal education (CLE) publications our members already know and use into one place, and we're especially excited that LOIS has been able to hypertext link the citations within these products to the official New York and federal case law and statutes," said NYSBA President James C. Moore of Rochester.

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Links have also been activated to other LOIS products, including cases from the federal circuit courts, and the U.S. Supreme Court, and to the United States Code, the Code of Federal Regulations, and the Federal Register. New York is the 19th state to offer this service through LOIS.

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For ease of publication, articles should be submitted on a 3½" floppy disk, preferably in Microsoft Word or WordPerfect 5.1 and no longer than 8-10 pages. Please also include one laser-printed copy (dot matrix is not acceptable). The Editors request that all submissions for consideration to be published in this *Journal* use gender neutral terms where appropriate or, alternatively, the masculine and feminine forms may both be used. Please contact the Co-editors regarding further requirements for the submission of articles.

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