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N.Y. Real Property Law Journal

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

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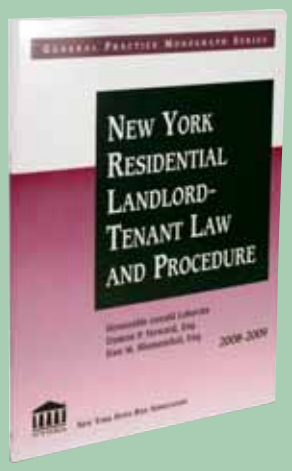

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AUTHORS

Hon. Gerald Lebovits,
New York City Civil Court, Housing Part, New York, NY

Damon P. Howard, Esq.,
Finkelstein Newman Ferrara LLP, New York, NY

Victor S. Faleck, Esq.,
Appellate Term, Second Department, NY

New York residential landlord-tenant law is daunting to newcomers and the experienced alike, given its patchwork statutory framework, discordant case law, and emotion-laden disputes involving homes, money, and the charged landlord-tenant relationship. This greatly expanded monograph introduces the fundamentals of residential landlord-tenant law and offers a guide to the procedural mechanics practitioners face in landlord-tenant disputes.

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Message from the Section Chair

One of the "joys" of being an Officer of the Section is being bombarded by the State Bar Association Headquarters in Albany with loads of monthly statistics about the Bar Association and its various Sections. As I am sure you are aware, we are the largest Section within the NYSBA, and we intend to remain in this preeminent position. Some say that bigger is not always better, but when it comes to our Section, we are clearly "the best."

What did come as a surprise while perusing the monthly NYSBA membership statistics was that a large portion of our Section membership consists of solo practitioners or two-attorney law practices. We also have a large number of Section members who practice in relatively small firms, with three to seven attorneys. However, looking at the bigger Section picture, our membership comes from small law firms, large law firms, in-house corporations, the title insurance industry, governmental agencies and public interest organizations.

The statistics that I receive from the Bar Association piqued my interest into the history of our Section. My main resource proved to be a 2003 publication of the New York State Bar Association entitled *A Practical Benefit: New York State Bar Association, 1876-2001*. The cover of the book contained a quotation by the First President of the New York State Bar Association, John K. Porter, who in 1877 wrote as follows:

> Ours is an undertaking by practical men, and it is designed to be of practical benefit to the profession and to the community at large.

When looking through the pages of this excellent book what astounded me was that even though the New York State Bar Association was founded in 1877, the Real Property Law Section was not created until 1968, over 90 years after the founding of the NYSBA. WOW!

Shortly after our Section was created, the State Bar Association declared:

> With the growing importance and complications in real estate development over the past ten years, it has become increasingly important to concentrate not only in the changes in the law, but on the basic problems that arise in every day general practice. For this reason, in 1968, the Real Property Law Section was created as a separate section of the State Bar Association.

Again, I found amazing that our Section has only been in existence for 41 years. Reading further, I learned that as of 1973 the Section had only 1,600 members. Thus, we have tripled our membership in the past 31 years.

I was also surprised to learn that we did not even have a Section Newsletter until December 1973 when Volume 1, No. 1 of the *Real Property Law Section Newsletter* was first issued. Looking at today's in-depth *N.Y. Real Property Law Journal*, we can certainly declare "You've come a long way, baby."

The Mission Statement for our Section, which was presented to the Executive Committee of the Bar Association in 1968, called for the Section to bring together Association members "interested in the law relating to interests in real property, title and transactions, in the possibilities of increased uniformity, improvements and reforms in such laws and in title and recording practices, through legislation, title standards or otherwise; and also in promoting the interests and welfare of the public and members of the Bar as well as the professional development of the bar."

Speaking of firsts and even prior to the establishment of the Real Property Law Section, there was a NYSBA Committee on Real Property Law. In 1955, one of the first major initiatives of this Committee was the creation of Standards for Title Examination in order to eliminate unnecessary delays in real estate transactions due to differences of opinion about marketability issues. These standards were revised in 1963 and revised again by the Section's Committee on Title and Transfer in 1976. Our Section continues to review these standards for potential updates.

The publication goes on to list some of the other major accomplishments of our Section, including the following:

- Providing high-quality continuing legal education programs to Section members;
- Generating NYSBA publications such as the one on Real Estate Titles, first published in 1984 and now in its Third Edition;
- Developing legal forms and form products for practitioners. These include forms created jointly by our Section, the New York State Land Title Association, the Committee on Real Property Law of the Association of the Bar of the City of New York, and the Committee on Real Property Law of the New York County Lawyers Association;
- Drafting of residential real estate forms on "Hot Docs" in conjunction with LexisNexis/Matthew Bender;
- The creation of various task forces such as the Task Force

on the Mortgage Foreclosure Statute; and

- The activities of our Section in commenting on proposed legislation in Albany.

I did not mean my Chair's message to be a history lesson, but I think it is quite interesting that the Committee on Real Property Law was not formed until 1955 and our Section was not created until 1968. This is especially unusual since in 1879, just two years after the NYSBA was founded, its Committee on Law Reform was considering issues of real property, in particular—whether legislation was needed to give notice of bona fide purchasers or mortgagees by written registration. In the 1880s and the early 1890s, according to the Publication, the Bar Association was already a leader in obtaining reforms in regard to land transfers, including advocacy for State Legislation enacted in 1908 adopting the Torrens System.

I also wanted to mention that our Section since its founding has had a distinguished number of real estate practitioners serving as Section chairs, starting with our first chair, Evert M. Barlow from Erie County in 1968 and continuing to our immediate past chair, Peter V. Coffey, from Schenectady County. Although I could single out the contributions of many of our past chairs who are still active in our Section, I did want to single out James M. Pedowitz. Jim, a founding member of our Section, was the fourth chair of the Section, serving with distinction in 1971-1972. What is most remarkable about Jim is that he has continued to actively participate in Section activities as a member of our Executive Committee and as a frequent CLE speaker and author. His passion for real estate law burns as bright in 2009 as it did in 1968. Congratulations Jim!

Yes, our Section certainly has a relatively short but productive history to build upon. We have accomplished much over the past 41 years. I am sure the ensuing years will be even better.

P.S. I would be remiss if I did not close my message without extending my warmest congratulations to Terry Brooks, the longtime director of the NYSBA CLE Department. Terry has served the State Bar Association with distinction for over 30 years and has been a very good friend of the Section. Under Terry's guidance and in working with the various chairs of our CLE Committee, our Section over the past 30 years has presented numerous worthwhile CLE programs for newly admitted and advanced real estate practitioners. In addition, Terry's department has worked with our Section in regard to Section members authoring a number of texts involving real property law issues which are on the New York State Bar Association "Best Seller List." We wish Terry all the best in his retirement!

Joel H. Sachs

DIP Financing and Other Bankruptcy Concerns for the Transactional Real Estate Lawyer

By S.H. Spencer Compton and Andrew D. Jaeger

It has been said that capitalism without bankruptcy would be like Christianity without hell (or, perhaps, more properly, purgatory). There must be a place of punishment and redemption in order to maintain faith in both God and capital markets.

"Young real estate lawyers today have little or no experience with bankruptcy matters, having only practiced in healthy, even exuberant, financial climates."

As the current economic cycle wears on (and on), as tenants either renegotiate their rents or default, many borrowers are unable to meet their debt obligations and are seeking relief in the federal bankruptcy courts. Young real estate lawyers today have little or no experience with bankruptcy matters, having only practiced in healthy, even exuberant, financial climates. This article will attempt to familiarize real estate lawyers with the basic elements of real estate related issues in connection with bankruptcies that may arise in their transactional practices. It is not intended to be an in-depth discussion of bankruptcy law, but rather a primer for real estate lawyers who find themselves working alongside bankruptcy lawyers.

A Few Definitions

"Debtor in Possession": The debtor which remains in control of operations.

"Exit Financing": Financing under a plan of reorganization that allows the debtor to exit bankruptcy.

"Petition": (Bankruptcy Petition or Petition for Relief). The document that commences a bankruptcy proceeding.

"Plan of Reorganization": A plan that sets forth the manner in which a bankrupt company intends to satisfy its creditors and exit bankruptcy.

"Prepackaged Bankruptcy": A bankruptcy case in which the debtor and certain of its creditors agree to the terms of a plan of reorganization before filing a bankruptcy petition. The court then confirms the plan and the company emerges from bankruptcy quickly.

"Pre-Petition Debt": Debt incurred by the debtor before a bankruptcy filing.

"Post-Petition Debt": Debt incurred by the debtor after a bankruptcy filing.

"Rollups": Pre-Petition Debt that is combined with/converted into post-petition debt as a condition to providing additional financing to the debtor.

"Section 363 Sale": A sale of debtor assets free and clear of liens pursuant to Section 363 of the Bankruptcy Code.

"Stalking Horse": A proposed buyer chosen by the debtor to make an initial bid on the debtor's asset(s). The stalking horse sets the bar that other bidders have to bid against, often in an auction setting. The court generally grants expense reimbursement and/or a break-up fee to the stalking horse.

Chapter 11 Reorganization

Chapter 11 of the Bankruptcy Code governs the reorganization of debtor entities, and while there are other types of bankruptcies, this article will focus on certain transactional issues related to Chapter 11 filings.

The goal of a Chapter 11 filing is to de-lever the debtor through the plan of reorganization process, with the hopes of turning it into a profitable venture. To give the debtor necessary time to propose a plan, the debtor is given the exclusive right to file a plan for a set period and § 362 of the Bankruptcy Code imposes an automatic stay on all creditor collection/foreclosure efforts.

An effective reorganization will likely require additional capital which may be obtained in two ways. The debtor may sell assets pursuant to § 363, which will be discussed below. Where practicable, the debtor also may seek Debtor in Possession ("DIP") financing. Section 364 authorizes a debtor to borrow money to preserve the estate or to further the debtor's rehabilitation efforts. Most lenders extend DIP financing on a secured basis. While the collateral may not typically be comprised of material real estate, there are transactions where real estate can be a significant part of the collateral.

There are two types of DIP Financing: defensive DIP loans extended by existing secured lenders to protect their collateral and the value of their pre-petition claims, and third-party DIPs extended by lenders seeking high returns. In addition to the traditional lender motives (e.g., collecting fees, an attractive rate of return and adequate security), potential DIP lenders may be induced by the opportunity to gain access to non-public information, to influence the debtor's management decisions, and/or to acquire equity in the debtor upon exiting bankruptcy. DIP loans can be profitable due to the debtor's immediate need for working capital. Additionally, a lender can be more certain of repayment because of DIP loan protections under the Bankruptcy Code.

DIP Financing

Section 364 provides four levels of secured financing:

First: A super-priority claim over other administrative expenses (§ 364(c)(1)); (administrative expenses typically include legal and other professional and consulting fees plus other post-petition expenses);

Second: A lien on unencumbered assets of the debtor (§ 364(c)(2));

Third: A junior lien on already encumbered assets (§ 364(c)(3)); and

Fourth: A senior or equal lien on previously encumbered assets—a priming lien (§ 364(d)).

A court will examine the loan terms to ensure that they are fair and reasonable. The court will only authorize a higher level of security if credit cannot be obtained at the lower level. The court may authorize a junior lien on the debtor's assets even where the senior lien documents prohibit a junior lien. A priming lien usually only occurs when a pre-petition senior lender becomes the DIP lender and primes itself or if adequate protection is provided to the pre-petition senior lender.

Should a Dip Lender Require a Mortgage/Deed of Trust?

Whether a DIP loan is adequately perfected by its court-ordered lien pursuant to § 364 of the Bankruptcy Code or whether mortgages or deeds of trust are required to perfect the DIP lien on real property can be a source of debate between real estate and bankruptcy attorneys.

Bankruptcy attorneys will assert that the § 364 lien on all the debtor's assets provides adequate security for the DIP loan and that, if the debtor defaults, the bankruptcy court will enforce the order granting such lien. Furthermore, mortgages and deeds of trust are expensive and time-consuming in a situation where lack of funds and urgency prevail.

Nevertheless, real estate attorneys will ask:

How can we be sure that a state court would honor the DIP lender's lien where no mortgage / deed of trust is of record? Doesn't a mortgage / deed of trust need to be recorded in accordance with applicable state law? Doesn't applicable mortgage tax have to be paid?

Further, what if in a bankruptcy with multiple debtors, an SPE subsidiary is dismissed from the bankruptcy case? If the bankruptcy court no longer has jurisdiction, how can a DIP lender enforce its lien in state court when there is no mortgage or deed of trust?

All of the foregoing appear to be questions of first impression. We have found no case law to answer them.

Although the real estate attorneys' concerns may be myriad and well-founded, in the absence of further collateral-specific issues (such as breaks in the chain of recorded title due to poorly documented corporate mergers and acquisitions), the cost, complexity and delay of creating and recording mortgages or deeds of trust are often prohibitive.

363 Sales

Another way a debtor can raise operating capital is to sell assets. Section 363 of the Bankruptcy Code allows a debtor to sell property in the ordinary course of business **without** court approval (§ 363(c)); or other than in the ordinary course of business **with** court approval (§ 363(b)). The court is empowered to order these sales to be made free and clear of existing liens (§ 363(f)).

Most often, to maximize the value of the asset to be sold, a debtor will negotiate an asset purchase agreement with a potential purchaser who will then act as a stalking horse. After evaluating all offers, the debtor enters into a contract with a proposed purchaser, which is subject to both Bankruptcy Court approval and to being out-bid, sometimes in an auction-like process. Although the stalking horse purchaser may get outbid, it nonetheless gains several advantages. The stalking horse bidder will likely receive a break-up fee and expense reimbursement as well as enjoying an inside track with the debtor, official committees, counsel and their advisors.

Alternatively, rather than use the stalking horse method, the debtor can proceed straight to auction with the outcome subject to Bankruptcy Court approval.

Exit Financing and Asset Sales Pursuant to a Plan of Reorganization

Exit financing is a loan made pursuant to a confirmed plan of reorganization in connection with the debtor's exit from bankruptcy. It is analogous to a take out loan entered into after completion of construction to pay off a higher cost construction loan. Exit financing may pay off the DIP loan, certain creditors and fund operations. Unlike DIP financing, there is no lien created by the Bankruptcy Court order. Accordingly, mortgages / deeds-of-trust are required to create the lender's lien. Exit financing, however, does not require payment of mortgage tax (§ 1146(a)).

Additionally, a debtor may sell assets pursuant to a confirmed plan of reorganization. A sale pursuant to a confirmed plan of reorganization does not require the payment of transfer taxes (§ 1146(a)) and may be free and clear of liens (§ 363(f)).

Practitioners should be aware of a recent case concerning the court ordered exemption from mortgage recording taxes and / or transfer taxes arising out of a § 363 sale.

Section 1146(a) exempts from stamp or similar taxes the delivery of a transfer instrument under a confirmed plan. The issue is whether "under a confirmed plan" includes a transfer prior to but in accordance with a subsequently confirmed plan. In *Florida Dept of Revenue v. Piccadilly*

Cafeterias, Inc., 128 S. Ct. 2326 (2008), a transfer was made by a debtor prior to a confirmed plan. The Bankruptcy Court, Federal District Court and the Eleventh Circuit all held that the transfer was exempt under § 1146(a). The Supreme Court reversed, holding that to be eligible for the § 1146(a) exemption, the plan must have been previously approved.

"[T]itle insurance companies are now taking a much closer look at Bankruptcy Courts' 'free and clear' orders before agreeing to insure."

Title Insurance Concerns

Title insurance will likely be unavailable to the DIP lender without recorded mortgages or deeds of trust. What risks does this present? In addition to raising state court enforceability questions, a Bankruptcy Court order does not confirm the ownership of real estate, the quality of title or, in some cases, the existence or priority of pre-existing liens. Furthermore, creditors improperly or not noticed in the bankruptcy action may not be bound by the bankruptcy court order authorizing the DIP financing.

Whether the transaction is a sale, a DIP financing or exit financing, involving the title insurance company early on in the transaction is advantageous. The title insurance company will review the motion, the Bankruptcy Court order and the parties noticed. The real estate attorney should point out to its client that, despite a Bankruptcy Court order authorizing a sale "free and clear" of liens, local municipalities have consistently refused to honor the Bankruptcy Court order as it applies to real estate taxes. Accordingly, real estate taxes will probably have to be paid to be removed from a municipality's tax rolls.

Because the sale of real estate in a § 363 sale is unlikely to be in the ordinary course of business, the title insurance company will probably require court approval to insure the transaction. This might not apply where the debtor is a homebuilder or a condominium sponsor, but the outcome will be fact-specific.

A recent court decision is giving title insurance companies concerns.

In it, the Bankruptcy Appellate Panel for the Ninth Circuit reversed a lower court order and held that the senior lien holder could not purchase the real property free and clear of a junior lien, notwithstanding the junior lien holder's failure to obtain a stay pending appeal of the sale order. *In Re PW, LLC*, 391 B.R. 25 (9th Cir. BAP 2008). As a result, title insurance companies are now taking a much closer look at Bankruptcy Courts' "free and clear" orders before agreeing to insure.

Lastly, there is often confusion surrounding the statutory 10-day stay of the Bankruptcy Court order for the sale of property and the 10-day right of appeal period. It is important to distinguish between these two different 10-day periods.[1]

A Bankruptcy Court order for the sale of property is stayed for 10-days. However, this may be waived by the court. (Rule 6004(g)). Note that the waiver of the stay does not vitiate the 10-day appeal period. This separate and distinct 10-day period may **not** be waived by the court. (Rule 8002). Generally, title insurance companies will not insure over the 10-day appeal period and will require that the order become final to insure. See *In Re PW, LLC*, 31 B.R. 25 (2008).

Endnote

1. The 10-day period for the stay and the 10-day appeal period will both increase to 14 days on December 1, 2009 unless Congress enacts legislation to reject, modify, or defer the proposed amendments.

S.H. Spencer Compton is a senior vice-president and special counsel, Andrew D. Jaeger is a senior vice-president and counsel, both at First American Title Insurance Company of New York.

The authors wish to acknowledge the invaluable contributions of Diane Meyers, Esq. of Paul, Weiss, Rifkind, Wharton & Garrison LLP.

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POA: The Power of Information Overload

By Adam Leitman Bailey and Dov Treiman

Introduction

As of September 1, 2009, a new subtitle in the General Obligations Law, the "Statutory Short Form and Other Powers of Attorney for Financial Estate Planning," came into effect in New York.[1] In making this law effective, New York has abolished its old general-purpose easy single-sheet statutory power of attorney form ("POA") and replaced it with a tremendously complicated new law[2] describing a highly complex new document with a misleadingly named optional rider.[3]

The old name had simply been "Statutory Short Form Power of Attorney." The new name gives a strong clue not only as to the meaning of the new short form POA, but as to its weaknesses as well.

The 1948 original drafters designed the old form and its successors until now to be general purpose forms that consumers with nothing but access to a stationery store and a notary could use with ease. The new form, designed specifically for estate planning, is so complicated that those who use it without attorney guidance do so at their peril and few attorneys will be up to full speed on the pitfalls the new form presents.[4] Indeed the new forms are so complicated that many attorneys working with them may want to be particularly vigilant that their malpractice insurance premiums are paid and up-to-date.

Among the most common places one finds POAs is in real estate transactions, especially purchases and sales of land. However, both the new law and the new form create so many problems for such transactions to proceed smoothly, that until either the Legislature restores the old law or heavily repairs the new one, the law will strangle many of these transactions in their cribs.

While the reports that led to the new law touted it as being intended to protect the aged and infirm,[5] its vast new complexities make its use nearly impossible without the assistance of an attorney. Therefore, for all its appearance as consumer protective legislation, its net effect is in actuality anti-consumer. At a time when the real estate industry needs orderly stability more than ever before, thanks to the new POA, chaos has free reign.

You Might As Well Use the Full Form

Perhaps even more important than this new form POA is the new law's insistence that any other POA, in order to be effective, must be in 12-point type and contain the statute's verbatim explanations to the power-giver[6] and the agent just as to what is happening.[7] These explanations are so fulsome—about 650-words—as to remove any incentive to use anything but the full statutory form.

Amending the New Law

Various attorneys' Internet chat spaces have been abuzz with conversations about this new law, most notably those dealing with Elder Law, Trusts and Estates, and Real Property.[8] They report that many banks are refusing to accept the new form, this in spite of a clear statutory provision making it mandatory that they do so,[9] even to the point of creating a new species of lawsuit to compel it.[10]

It has thus become clear that while at first the new POA was receiving fairly muted enthusiasm, as time has progressed with the few short weeks it has been in place, there has been resultant chaos throughout the State. Banks, title companies, and law firms are scrambling to issue internal memoranda to explain what to do and in some sectors, various institutions are refusing to recognize any power of attorney, new form or old, executed since the change in law, or before. Bar associations and industry groups are scrambling to propose amendments to it to clear up "technical" problems with it, and many are those calling for its utter repeal and restoration of the old statute.[11]

Clearly, no number of purely technical amendments will change the underlying philosophy of this law that providing the power-giver with a great mass of reading to do when signing this instrument somehow empowers the power-giver to decide whether signing it is really a good idea.[12] Ideally, a power-giver would read not only the warnings, but the text of the document itself. However, we believe in actual practice, given the sheer size of this thing, few power-givers will actually read anything but the signature line. A bold print warning of a dozen words or so might have alerted a power-giver to the magnitude of the power conveyed, but not the current form that so over-informs as to prevent informing at all. As the philosopher Diderot observed in his *Encyclopédie of 1755*, sometimes a great mass of information can camouflage the datum one actually needs or seeks.[13]

Which Form Is Valid When

Under the new statute, the old forms are still valid if they were signed on or before August 31, 2009.[14] The new law does nothing to invalidate POAs which were valid as the law stood at the time they were signed. The new forms are only valid if signed on or after September 1, 2009. So, the old forms are rendered invalid if signed too late and the new forms invalid if signed too soon.[15] Nobody is in a position to know how many people were in the loop enough

to know that the form had changed but jumped the gun by using it too early. We may therefore be hearing about cases to straighten out that bit of mess. While the statute as it currently stands obliges us to look at whether a power-giver signed the POA before or after September 1, 2009, further tinkering with the statute could create a situation where there are three or more possible periods and wordings attached to each—requiring one not only to examine the wording, but also what that wording meant under the statute in effect at the moment of signature. Therefore any action the Legislature takes to repair this mess will require even more heightened caution than the usual. Before enacting any technical corrections, the Legislature should consult with a far broader base of practicing attorneys than it used in creating the new POA.

Instability and Unreliability

The new POA, although covering an entire gamut of human activity, has the potential for enormous mischief in the area of real estate law where the two most important principles are stability and reliability—stability in the meanings of documents,[16] reliability in their authenticity.[17]

This new POA appears to violate both of those principles. As a result, numerous real estate transactions are simply not taking place or are taking place in exactly the manner the parties sought to avoid—requiring the physical presence of the very people who gave POAs because it was a hardship for them to be physically present. This can only oppress the unfortunate elderly and infirm who sought to have their affairs handled on their behalf and put a damper on an economy struggling to recover through renewed commerce. After all, sometimes a deal postponed becomes a deal canceled.

As to the stability in the meaning of the documents, the passage of the technical amendments to the new law could clear up the perceived problems in the law, but might have the effect of making one examine the date of the execution of the POA to know what it means.

For example, under the new law, the execution of a new POA revokes all previous ones unless otherwise specified.[18] Some proposed technical amendments would change that so that a POA would revoke its predecessors only when it specifically says so.[19] In the meantime, so as to prevent confusion in the meaning of any form a practitioner prepares, the preparer should expressly both override the provision revoking previous POAs and insert a provision specifically reaffirming them.

Along with the new POA is a so-called "Statutory Major Gifts Rider" ("SMGR").[20] However, while the check boxes on the new form cover real property transactions, some analysts are finding that the SMGR is required not only when the attorney-in-fact is making a gift on behalf of the power-giver, but also when there is an ordinary transfer of a real property interest. It therefore appears that so long as this new statute is around, prudent practitioners should require an SMGR with every single POA.

This makes the name of the SMGR completely misleading. Thus, here too, stability in meaning is violated from the get-go.

One solution a certain title company has implemented to limit exposure to a claim that the new POA is invalid for the lack of an SMGR is to call the power-giver on the telephone in all instances and have him or her confirm the authority of the Agent. The problem with this procedure is that the new POA is now, under the statute, unless otherwise specified, still in effect when the power-giver is no longer of sufficiently sound mind to answer such a question.[21] The person making the telephone call therefore has no way of knowing whether the person receiving the telephone call is sufficiently mentally acute to answer the question, given the fact that such acuity has no effect on the value of the POA itself.

The title company taking this approach is advising also that it will require an SMGR on a conveyance for consideration where there is an obvious disparity between the price being paid and the property's value, such that the transfer may be deemed to be, in part, a gift. It also advises that whenever a property interest is being transferred by a power of attorney, if there is no prior law POA executed and a new POA must be signed, it is prudent also to execute an SMGR. Another title insurer requires an SMGR to insure any transfer pursuant to a new POA.

Authenticity—A Law Ostensibly Protecting Against Fraud Encourages It

Authenticity turns out to be a major issue with the new POA. First, there is the obvious matter that since the POA survives the power-giver's descent into dementia, there is no way to check with a demented power-giver whether the agent is really doing the power-giver's will or whether there is some kind of scam in effect, potentially even involving a forgery of the power-giver's signature. Indeed, absent court intervention, rather than the old law which automatically revoked a demented person's POA, this new law makes it effectively irrevocable.

On the other hand, if the power-giver is demented, it becomes a difficult question of proof that the power-giver was not also demented at the time of the execution of the POA. So, while the new POA is ostensibly still in effect during dementia, its authenticity becomes a matter of difficult and expensive proof.

Second, the law allows the creation of a power which can only be exercised by two agents acting simultaneously, but creates an exception to this when two factors are present: "absence, illness or other temporary incapacity" of one of the agents and

potential "irreparable injury" to the power-giver.[22] If both of these factors are present, the new law says that the remaining able-bodied agent may act alone.[23]

Unless the closing takes place in the missing agent's hospital room, what level of proof should be considered sufficient to satisfy a title agent present at that closing that the missing agent is really absent, ill, or incapacitated? What level of proof, indeed what kinds of proof, could be presented to show that delaying this closing would inflict irreparable injury on the power-giver? Does the phrase "irreparable injury" carry with it the established meaning in the law of equity, "cannot be fixed with money?"[24] Prudent practice by the title company's representative in such a scenario might well be to refuse to recognize the validity of the present agent's authority to act alone. However, given how many problems are currently resolved at closings with an exchange of affidavits, perhaps some kind of affidavit procedure will evolve to deal with this issue as well. Some attorneys considering the issue have simply come to the conclusion that under this new statute, the giving of a power to two agents who can only exercise it jointly is simply asking for too much trouble.

A New Cause of Action

The statute purports to create a special judicial proceeding, presumably in the Supreme Court, when there is a dispute about whether to recognize the sufficiency of the POA.[25] The statute authorizes making a bank a respondent, if the bank cannot show good cause why it refuses to recognize the effectiveness of the POA.[26] Of course, the bank will have good cause if the title company deems the presence of the POA an obstacle to the title being insurable. Thus, while the bank might have problems with refusing to recognize a POA from its own customer, from across the table, it has little to fear in this new brand of lawsuit.

Under the new law, as a practical matter, anybody can refuse to honor a POA at any time. The burden of going for a court order is on the one who wants to insist that the POA is honored.[27] The one who wants to refuse to honor the POA can also get a court order,[28] but has no motivation to do so.

Let us assume, however, that the new cause of action is actually meaningful. Note, we have been discussing the emergency scenario. While the Supreme Court is perhaps better suited to handle emergencies than any other court of this State, it is still no simple matter and as difficult as emergency applications are at the trial level, emergency appeals are even worse. Few law firms have the resources to put one together; few consumers have the resources to commission such an application—especially when one considers that the statutory POA was intended particularly to serve the needs of the less affluent. In any event, the nature of this kind of activity suggests more use of CPLR 5704(a)[29] than a full-blown appeal.

Putting together affidavits by affiants with personal knowledge can prove particularly challenging in such a proceeding and may, if the real estate contract has gotten to the point that time is of the essence, be simply too late.

There may be a mechanism that gives the parties enough time to iron the situation out even if there is as little time left on a "time of the essence" letter as a single day.

When valuable commercial interests are at stake, courts of equity have the power to stop the clock and calendar.[30] Therefore, perhaps a special proceeding under the new statute brought just inside an "of the essence" deadline could take as much time as it needs to resolve the issue without the time ever expiring. But, in order to bind everyone to that clock stoppage, it would be necessary to name as respondents everyone who has touched the deal: grantor, grantee, bank, and even the title company.

If that is indeed to be the procedure, then the new POA once again appears to be a tool exclusively for those wealthy enough both to use it and to enforce it. Those who most need a POA, the less wealthy, cannot reliably use one.

The Law of Unintended Consequences: Condominiums, Business Deals and Unknown Others

Those of us who use the full power of word processors are well aware of the dangerous power of the command "change all." When one uses that feature, often one finds truly nonsensical results. This metaphor finds expression in many fields of human endeavor, and all the more strongly in complex systems. It should therefore be with only extreme caution that a legislature passes a law that reaches inside and changes a large variety of activities. There is little evidence to suggest that the Legislature exercised such caution in this particular statute.

For example, ever since the very first condominium, the St. Tropez, came into existence in New York, the scheme has included so-called "Unit POAs" issued to the Board of Managers by each new unit owner. These powers enable the Board to carry on various relatively ministerial functions without having to get the unanimous consent of the unit owners. While Unit POAs are valid so long as they were executed prior to September 1, 2009, it appears under the new law any new ones will not be valid unless they are in 12-point type and include the 650-word warnings.[31] There are currently being drafted amendments to the new law which would remove these condominium POAs from the scope of the new statute, but who is to say what other POAs are equally quietly being rendered void?

As another example, it is very common in various kinds of contracts to imbed POAs in them.[32] It appears that under the new law, such imbedded POAs are of doubtful validity. While the drafter of such contracts could redraft the document in 12-point type and incorporate the 650-word warnings so as to meet the two statutory criteria for validity, or move the POA to a rider, schedule, or exhibit, it would appear to be a safer practice to keep the POA a separate document and in the original contract insert a clause which says, "Party A has executed the Power of Attorney of even date herewith."

The Unknown Status of Powers Coupled with an Interest

Also on the stability front, previous POA law had it that a POA died with the power-giver unless it was a so-called "power coupled with an interest."[33]

While the entire range of a "power coupled with an interest" is beyond the scope of this article, suffice it to say that we are referring to powers of attorney granted to persons who are supposed to benefit from or are supposed to be protecting their own interests with the receipt of this power.

Consider this simple example of a "power coupled with an interest." D borrows $5,000 from C and signs a promissory note promising to repay the $5,000 on a schedule of payments. The note further provides that if D defaults on those payments, C has a POA to sell the shares of stock that D has placed with C as collateral to secure the loan. This POA is clearly not for D's convenience, but is rather to secure C's interest in D's property. Thus, this power (the POA) is "coupled" with the interest C has in D's property.

Such a power coupled with an interest does not die when D dies.[34]

However, under the new POA law, all POAs die with the power-giver, without exception.[35] Whether the courts will take the Legislature at its word creates an uncertainty as to whether coupling POAs with an interest will nonetheless survive death. Powers coupled with an interest were until now powerful tools throughout the world of business, but their exact status is at the moment unknown and unknowable.

As a further example of an issue relating to a power coupled with an interest, two property owners establish a single zoning lot with the developer-owner having the right to further expand the zoning lot. The property owners agree to execute any further documents that are required to do so, but, if they do not execute the documents necessary to expand the zoning lot, the developer-owner is granted a power of attorney coupled with an interest to execute them on their behalf. Such a power granted in a document executed on or after September 1, 2009 may no longer be effective.

On a related note, however, it should be observed that the new law makes no exceptions for people in genuinely desperate straits without access to a computer or stationer to get the exact wording required for an effective power of attorney.[36] For such people, it is just plain too bad; their transactions cannot go forward.

Powers of Attorney Issued by Governments and Business Entities

It should be noted that although fairly obtusely worded, the statute has no application to POAs executed by or on behalf of governments and business entities.[37] However, although the ability to transfer property frequently comes from the operating agreement, in some instances the ability to transfer property will flow from one individual to another by power of attorney. These powers, as non-statutory powers, may need to comply with the provisions of the new statute applicable to non-statutory powers.

What would such a POA look like? Consider, for example, a small corporation formed by five friends, one of whom actually has money, another of whom is the monied one's brother, and three of whom are long-term friends; the non-monied friends are supposed to run the business. The monied brother could issue a power of attorney to his non-monied brother working the business to sign all the forms the business has to sign through the year. This would be a POA for a business purpose where the power-giver wants to be a non-participating shareholder, leaving the actual participation to his brother. There could be a shareholder agreement setting forth all these details and imbedded in that agreement could be the POA we have described.

If so, any POAs executed in such contexts are invalid if they lack the 650-word warning and 12-point type the statute requires for all individuals' POAs executed on or after September 1, 2009.[38]

The Well-Meaning Troublemaker

There can be little doubt that the intent of this statute is benign and principally aimed at giving the old and infirm a cheap, simple procedure to have their affairs taken care of by a trusted friend or relative while ensuring that the helper does not become an oppressor.[39]

Perhaps a much simpler overhaul of the old statute was all that was necessary: requiring that a POA be accompanied by a contemporary photograph of the power-giver or valid identification; requiring that the power-giver incorporate a current address and telephone number.

However, as currently crafted, the statute is so riddled with problems, both substantive and procedural, that it has injected into the entire legal system huge instabilities, particularly those endangering the orderly secure transfer of real property.[40] Until the Legislature finishes the

job of amending out its kinks and the courts have had a chance to construe what all that language means, it's going to be a real mess. While they are at it, the Legislature should give serious thought to a more terse warning to the power-giver, something like the kind of text that fits on a pack of cigarettes.[41]

Endnotes

1. Ch. 644, § 21, 2008 N.Y. Laws 1588 (McKinney), *amended by* Ch. 4, § 1, 2009 N.Y. Laws 12 (McKinney Interim Update Apr. 2009).
2. The session law version of this enactment is roughly 50% larger than the United States Constitution.
3. Ch. 644, §§ 1–21, 2008 N.Y. Laws 1567 (McKinney) (codified as amended at N.Y. GEN. OBLIG. §§ 5-1501 to 5-1514 (West 2009)).
4. GOL § 5-1513 requires that the power-giver be counseled; "You should ask a lawyer…to explain it to you." This dubiously assumes one can find a lawyer who confidently and competently understands this new law. N.Y. GEN. OBLIG. § 5-1513(a) (West 2009).
5. *See* N.Y. STATE LAW REVISION COMM'N, 2008 RECOMMENDATION OF PROPOSED REVISIONS TO THE GENERAL OBLIGATIONS LAW POWERS OF ATTORNEY, at 21-24 (2008), *available at* http://www.lawrevision.state.ny.us/reports/2008_Recommendation_re_General_Obligations_Law_May_26_2008.pdf (describing generally the results of the commission's study of the laws regarding powers of attorney in NY and areas for potential reform).
6. We say "power-giver" here so as to speak to the title of the document, "Power of Attorney." The statute itself says "principal" and "agent," avoiding the rather common term, "attorney in fact." N.Y. GEN. OBLIG. § 5-1501. However, the statute makes it impossible to say "signatory" because under this new law, there are a minimum of three signatures: principal, agent, and notary and the rider, a document much more mandatory than appears at first blush, requires two witnesses. N.Y. GEN. OBLIG. §§ 5-1513(1)(m) & (o), 5-1514(9)(b).
7. N.Y. GEN. OBLIG. § 5-1501B.
8. *See, e.g.*, Shu-Ping Shen, *New York's New POA Law*, TRUSTS&ESTATES, Sept. 30, 2009, http://trustsandestates.com/wealth_watch/ny-new-power-of-attorney0930/; Try Sweeping this Power, http://www.nyrealestatelawblog.com/power_of_attorney_generally/index.html (Feb. 10, 2009, 11:00 EST).
9. N.Y. GEN. OBLIG. § 5-1504.
10. *Id.* at § 5-1510; *see* discussion *infra* "A New Cause of Action."
11. N.Y.S 5910, N.Y.A. 8392-A, 232nd Sess. (2009), *available at* http://open.nysenate.gov/openleg/api/html/bill/S5910.
12. *See* N.Y. GEN. OBLIG. §§ 5-1501B, 5-1513(1)(a).
13. Daniel Rosenberg, *Early Modern Information Overload*, 64 J. HIST. OF IDEAS 1, 1 (2003).
14. Ch. 644, § 21, 2008 N.Y. Laws 1567 (McKinney), *amended by* Ch. 4, § 1, 2009 N.Y. Laws 12 (McKinney Interim Update Apr. 2009).
15. *Id.*
16. *Holy Props. Ltd. v. Kenneth Cole Prods., Inc.*, 87 N.Y.2d 130, 134, 661 N.E.2d 694, 696 (1995).
17. Adam Leitman Bailey, *Expense of Theft Prevention Dwarfed by Cost of Fraud*, Apr. 8, 2009 N.Y. L.J., at 5; Adam Leitman Bailey & Carly Greenberg, *Growing Fraud: Self-Help Measures Can Head Off Problems*, N.Y. L.J., Jan. 31, 2007, at 5.
18. N.Y. GEN. OBLIG. §§ 5-1513(1)(h), 5-1514.
19. N.Y.S 5910, N.Y.A. 8392-A, § 3, 232nd Sess. (2009), *available at* http://open.nysenate.gov/openleg/api/html/bill/S5910.
20. N.Y. GEN. OBLIG. § 5-1513(1)(e).
21. *Id.* at § 5-1501A.
22. *Id.* at § 5-1508(1).
23. *Id.*
24. BLACK'S LAW DICTIONARY 801 (8th ed. 2004).
25. N.Y. Gen. Oblig. § 5-1510.
26. *Id.* at § 5-1504(2).
27. *Id.* at § 5-1510(2)(i).
28. *Id.* at § 5-1510(2).
29. N.Y. CPLR 5704(a) (McKinney 1995) (permitting application to an Appellate Division Justice to sign a refused ex parte application or to vacate one that was signed in Supreme Court trial term).
30. *First Nat'l Stores, Inc. v. Yellowstone Shopping Center, Inc.*, 21 N.Y.2d 630, 637, 237 N.E.2d 868, 870 (1968).
31. N.Y. Gen. Oblig. § 5-1501B(1)(a) & (d).
32. *See, e.g.*, K.C. McDaniel & Michael R. Bassett, Standard Form of Hotel Security Agreement (Including Trademarks), Modern Real Estate Transactions, A.L.I.-A.B.A. Course of Study (July 2006), *available at* SM002 ALI-ABA 1231, 1248-49 (Westlaw).
33. *Weber v. Bridgman*, 113 N.Y. 600, 605, 21 N.E. 985, 987 (1889).
34. *Terwilliger v. Ontario*, C. & S.R. Co., 149 N.Y. 86, 92–93, 43 N.E. 432, 434–35 (1896).
35. N.Y. GEN. OBLIG. § 5-1511(a).
36. *See id.* at § 5-1501B(1)(d).
37. *Id.* at § 5-1501(11) (defining a principal as "an individual who is eighteen years of age or older who executes a power of attorney").
38. *Id.* at § 5-1501B(1) & (4). Some of the provisions of the revised article may actually apply to business entities and governments, but the extent of that problem is beyond the scope of this article.
39. N.Y. STATE LAW REVISION COMM'N, *supra* note 5, at 5–9, 13–21.
40. The Law Revision Commission Report that was the genesis of the new POA failed to consider the possibility that the changes it proposed could have effects on real property law. *Id.*
41. But more informative than the original 1948 wording, "The powers granted by this document are broad and sweeping." Ch. 422, § 220, 1948 N.Y. Laws 765 (recodified 1963, repealed 2008). The most recent wording prior to this form was also criticized for being too difficult to understand. N.Y. STATE LAW REVISION COMM'N, *supra* note 5, at 38.

Adam Leitman Bailey is the founding partner and Dov Treiman is a partner of Adam Leitman Bailey, P.C.. The authors wish to thank Michael J. Berey, General Counsel and Senior Vice-President of First American Title Insurance Company of New York, for his extraordinary assistance with this article.

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Tenancy by the Entirety and Same-Sex Marriage—Continued

By James M. Pedowitz

This article is an update to my previous article, *Tenancy by the Entirety and Same Sex Marriage in New York*,[1] which was written when same-sex marriage was still not authorized in New York, and in many circumstances not recognized. For instance, where a same-sex couple that was joined in a civil union in Vermont, in accordance with Vermont law, the survivor was not recognized as a surviving spouse in New York.[2]

"Unless the statutory definition of tenants by the entirety in section 6-2.2 of the Estates, Powers and Trusts Law is also changed, the authorization or recognition of same-sex marriages in New York will still not *permit same-sex married partners to hold real estate in New York as tenants by the entirety."*

Since then, the House of Delegates of the New York State Bar Association endorsed civil marriage for same-sex couples on June 20, 2009[3] and the New York State Legislature appears to be ready to pass legislation, which Gov. David Paterson has indicated that he may approve, that will permit same-sex marriages in New York, and also to recognize them here if lawfully contracted in another state or country.[4]

As a real estate attorney who has worked on real estate titles involving joint ownership of real property for over 50 years, and who has written and lectured on the numerous differences between tenancy in common and joint tenants,[5] the legal effects of the deed are significantly different, and can be extremely important. In order for a same-sex couple to have the benefits of a tenancy by the entirety, the statutory definition of the article will have to be changed.

Unless the statutory definition of tenants by the entirety in section 6-2.2 of the Estates, Powers and Trusts Law ("EPTL") is also changed,[6] the authorization or recognition of same-sex marriages in New York will still *not* permit same-sex married partners to hold real estate in New York as tenants by the entirety. The reason is that the statutory definition of tenants by the entirety under the present statute is limited to "a husband and a wife,"[7] which would, by its terms, eliminate any possibility of both grantees being of the same sex. A "husband" must be a validly married male, just as a "wife" must be a validly married female.[8]

Many of the attributes of tenancy by the entirety have devolved from "ancient times" when the law recognized a spousal unity of a husband and a wife, and treated them as though they were collectively one person,[9] and as *Powell on Real Property* states, "the husband was the one."[10] No such history can be applied to a tenancy by the entirety where there is no male "husband," who once had the broad power that justified a husband and wife being treated as a single spousal entity.

The solution may lie in a new statute in New York that re-writes the attributes of a tenancy by the entirety, or a re-definition of tenants by the entirety in EPTL § 6-2.2 to eliminate the words "husband and wife."

A possible revision of EPTL § 6-2.2 that would eliminate the words "husband and wife" and which could accommodate same-sex marriages could include the following changes:

> When estate is in common, in joint tenancy or by the entirety, add to subsection (a) "…or is a tenancy by the entirety as described in sub-division (b) of this section."

Subsection (b) could be changed to read:

> (b)(i) A disposition of real property to two persons who are lawfully married to each other creates in them a tenancy by the entirety, in which both spouses own the entire interest in the estate, undivided, but with right of survivorship during their marriage to each other; unless expressly declared to be a joint tenancy or a tenancy in common.
>
> (ii) A tenant by the entirety shall have the power to sell or encumber his / her interest in property owned in a tenancy by the entirety, except that the survivorship right of the other spouse shall be unaffected by such conveyance or encumbrance, and the interest of the grantee from the grantor tenant by the entirety shall be treated as a tenant in common with the non-conveying tenant by the entirety.
>
> (iii) The termination of a tenancy by the entirety by the wrongful act of one of the tenants by the entirety shall not inure to the benefit of the wrongdoer.[11]

Endnotes

1. James M. Pedowitz, *Tenancy by the Entirety and Same Sex Marriage in New York*, 34 N.Y. REAL PROP. L. J. 30 (Spring 2006).
2. *See Langan v. St. Vincent's Hosp. of New York*, 25 A.D.3d 90, 94–95, 802 N.Y.S.2d 476, 479, 2005 N.Y. Slip Op. 07495 (2d Dep't 2005) (*citing Baker v. Vermont*, 170 Vt. 194, 744 A.2d 864 (1999); VT. STAT. ANN. tit. 15, §§ 8, 1201(4)).
3. Brandon J. Vogel, *House Endorses Civil Marriage for Same-Sex Couples*, 51 NYSBA STATE BAR NEWS 2 (July / August 2009).
4. *See generally* Glenn Blain, *Governor Paterson Aims to Push Bill on Gay Marriage During Special Session*, N.Y. DAILY NEWS, Sept. 5, 2009, *available at* http: / / www.nydailynews.com / news / 2009 / 09 / 05 / 2009-09-05_governor_paterson_aims_to_push_bill_on_gay_marriage_when_legislators_return.html.
5. *See* James M. Pedowitz, *Joint Tenants vs. Tenants by the Entirety: What's the Difference?*, 85 N.Y. ST. LAND TITLE ASS'N THE BULLETIN 3, 7 (Summer 2006), *available at* http: / / www.nyslta.org / news.htm.
6. *See* N.Y. EST. POWERS & TRUSTS LAW § 6-2.2 (McKinney 2002).
7. *See id.* § 6-2.2(b).
8. *See Frances B v. Mark B*, 355 N.Y.S.2d 712, 716, 78 Misc. 2d 112, 116–17 (Sup. Ct., New York Co. 1974) (mem.) (citing *Jones v. Hallahan*, 501 S.W.2d 588, 63 A.L.R.3d 1195 (Ky. Ct. App. 1973); 52 AM. JUR. 2D *Marriage* § 1; BLACK'S LAW DICTIONARY (4th ed. 1951)).
9. *See* RICHARD R. POWELL & PATRICK J. ROHAN, POWELL ON REAL PROPERTY, ¶ 620 (1968).
10. *Id.*
11. *See generally Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889) (holding that a beneficiary who murdered a testator may not inherit from the victim's estate).

James M. Pedowitz is counsel to Berkman, Henoch, Peterson & Peddy, P.C., in Garden City, New York. He has written and lectured extensively on real estate, title insurance, mortgage foreclosure and various other real property subjects.

Should the Warranty of Habitability Apply to Condominiums?

Enforcing Owners' Rights Against Delinquent Boards

By William Walzer

When an owner of a cooperative apartment in New York endures persistent leaks or other disruptions emanating from faulty building components, the remedies are clear under the New York Real Property Law.[1] However, the remedies available to a condominium owner suffering identical conditions are far less clear.[2]

The owner of a cooperative apartment receives, as one of the indicia of ownership, a proprietary lease from the building owner, the apartment corporation.[3] Because the relationship between the apartment corporation and the unit owner is one of landlord and tenant,[4] the warranty of habitability set forth in section 235-b of the Real Property Law applies.[5] It states:

> In every written or oral *lease or rental agreement* for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety.[6] (emphasis added)

The standard for a breach of the implied warranty of habitability is measured "in the eyes of a reasonable person," not in a vacuum that ignores the "essence of the modern dwelling unit."[7] The statute was intended to provide an objective standard for "those essential functions which a residence is expected to provide."[8]

"Without the same statutory support, condominium owners seeking recourse for the conditions that constitute a breach of the warranty of habitability must navigate a more circuitous and sparsely traveled route of state and local statutes, as well as case law, to achieve a damage award."

A tenant who is able to show a breach of the warranty under this section is entitled to damages. Proof of the conditions constituting the breach will result in a court's award of damages based upon a percentage reduction of the rent. Typical breach of warranty conditions include persistent leaks, holes in walls, odors, mold, and the failure of essential services such as fresh water or heat. It is not uncommon to see reductions of 10% to 50% of the rent, according to the severity of the conditions in a leased apartment. The statute specifically allows these reductions to be awarded without expert testimony as an aid to the fact finder.[9] Rent reductions are commonly made in landlord-tenant summary proceedings by Civil Court judges who are experienced with the issues relating to these conditions and the relevant law.[10]

Condominium owners, on the other hand, have a different legal relationship with their building management. Instead of a proprietary lease, Condominium owners receive a deed to evidence ownership of their condominium.[11] Condominium owners are not tenants. Thus the statutory warranty of habitability has been held inapplicable to condominiums.[12] Without the same statutory support, condominium owners seeking recourse for the conditions that constitute a breach of the warranty of habitability must navigate a more circuitous and sparsely traveled route of state and local statutes, as well as case law, to achieve a damage award. The lack of a comprehensive and straight-forward statutory remedy for condominium owners suffering from uninhabitable conditions, as there is for cooperative owners, makes enforcement by a condominium unit owner much more expensive and time consuming, and any potential damage award is far less certain. In light of the patchwork legislation currently supporting condominium owner's claims and the strength of defenses that can be asserted by the condominium boards of managers, it would make sense for the legislature to extend the warranty of habitability to cover substandard conditions in condominiums.

Laws Which Aid Condominium Unit Owners

Governance of a condominium is vested in its board of managers.[13] The key documents that dedicate a building to a regime of condominium ownership are the declaration, the bylaws, and the floor plans that show the units.[14] The declaration describes in narrative form, and the floor plans show visually, which portions of the building are the individual units (generally within the four walls of the apartment) and which building elements are common areas; the upkeep of which is a concern of all owners.[15] The declaration generally imposes

upon the board of managers the duty to maintain the common elements.[16]

The obligation of a condominium board of managers to the unit owners is one of a fiduciary.[17] In *Board of Managers of Fairways at North Hill Condominium v. Fairway at North Hills*, the Second Department held that board members of a condominium must perform their duties "in good faith and with that degree of care which an ordinary prudent person in a like position would use under similar circumstances."[18]

The Condominium Act is found in Article 9-B of the Real Property Law. Section 339-ee (1) of the Condominium Act creates an obligation on the part of all condominium boards to maintain and repair the common elements of their buildings. The section states:

> [E]ach unit owner shall be deemed the person in control of the unit owned by him or her, and the board of managers shall be deemed the person in control of the common elements, for purposes of enforcement of any such law or code, provided, however, that all other provisions of the multiple dwelling law or multiple residence law, otherwise applicable, shall be in full force and effect...[19]

Section 78 of the New York Multiple Dwelling Law imposes affirmative obligations or repair on multiple dwelling owners.[20] The section reads, in pertinent part, as follows:

> Every multiple dwelling, including its roof or roofs, and every part thereof and the lot upon which it is situated, shall be kept in good repair. The owner shall be responsible for compliance with the provisions of this section; but the tenant also shall be liable if a violation is caused by his own willful act, assistance or negligence or that of any member of his family or household or his guest. Any such persons who shall willfully violate or assist in violating any provision of this section shall also jointly and severally be subject to the civil penalties provided in section three hundred four.[21]

Similarly, the New York City Housing Maintenance Code, in § 27-2005, requires the owners of multiple dwellings in the City of New York to keep the premises "in good repair."[22]

The New York City Department of Housing Preservation and Development promulgated a list of violations deemed rent impairing, pursuant to authority given by § 302-a of the Multiple Dwelling Law.[23] This list is found in Title 28 of the New York City Rules, and includes a requirement that owners fix leaky roofs.[24]

Both New York State law,[25] and the New York City Administrative Code define a nuisance.[26] New York Multiple Dwelling Law § 309, in pertinent part, reads as follows:

> The term "nuisance" shall be held to embrace public nuisance as known at common law or in equity jurisprudence. Whatever is dangerous to human life or detrimental to health, and whatever dwelling is overcrowded with occupants or is not provided with adequate ingress and egress or is not sufficiently supported, ventilated, sewered, drained, cleaned, or lighted in reference to its intended or actual use, and whatever renders the air or human food or drink unwholesome, are also severally, in contemplation of this law, nuisances. All such nuisances are unlawful….[27]

Courts Have Viewed Condominium Boards as the "Owner" of the Common Elements

A surprisingly small number of reported court cases apply these statutes in the context of a multifamily condominium building. The condominium association was deemed the "owner" responsible for repairs of the common elements under the Multiple Dwelling Law in *Pershad v. Parkchester South Condominium*,[28] *Smith v. Parkchester North Condominium*,[29] and *Gazdo Properties Corp. v. Lava*.[30] In *Independence Community Bank v. East 86th Street, L.L.C.*, the court concluded that the condominium association was responsible to cure violations of the New York City Building Code in the common areas.[31] In *Hatcher v. Board of Managers of the 420 West 23 Street Condominium*, the court examined whether a Multiple Dwelling Law provision requiring resident superintendents in buildings having absentee landlords should apply to condominiums. The *Hatcher* court held that, since the condominium's board of managers was deemed the owner and each member of the board resided in the building, no resident superintended was required.[32]

Damages May Be Awarded Against Condominium Boards

Since condominium boards have been held responsible to make repairs, it would seem logical that their failure to make repairs should result in monetary liability in the same way that similar failures in the landlord-tenant context result in rent abatements. However, even fewer cases have held condominium boards liable to unit owners in damages for breach of their duties to make repairs to the common elements. Also troubling, the statutes and ordinances cited above, on which condominium owners may rely to support a duty owed to them, have no provisions specifying damages for violations.

Affirmative claims for damages brought by condominium owners

were allowed in *Board of Managers of Dickerson Pond Condominium I v. Jagwani*[33]and *Granada Condominium I v. Morris*.[34] Defenses asserted by owners in actions brought by their boards to recover common charges survived summary judgment in *In re Abbady (Mailman)*,[35] and *Residential Board of Managers of the Century Condominium v. Berman*.[36] But these cases provide little analysis to support their holdings. Despite a paucity of condominium cases allowing damages, case law does allow courts considerable latitude in fashioning a remedy for breaches of fiduciary duty. The First Department in *Wolf v. Rand*,[37] said:

> Since the breach of fiduciary duty was proved, the court may be accorded significant leeway in ascertaining a fair approximation of the loss,[38] as contrasted with the more precise, compensatory, standard of a contract or tort case,[39] so long as the court's methodology and findings are supported by inferences within the range of permissibility,[40] which is the case herein. After all, "[w]hen a difficulty faced in calculating damages is attributable to the defendant's misconduct, some uncertainty may be tolerated."[41]

The general principles for establishing a monetary award for damage to real property are well established. In the case of *Jenkins v. Etlinger*, the Court of Appeals stated:

> Recovery for temporary injury to real property may be measured by the value of the loss of use, which is determined by the decrease in the property's rental value during the pendency of the injury. [42]

Condominium Owners Face Litigation Hurdles

Tenants asserting a breach of the warranty of habitability need only show evidence of poor conditions, without regard to questions of negligence or active fault.[43] However, the law regarding condominiums is unclear and requires further development. One can imagine numerous issues and defenses that could be asserted by condominium boards.

First, as noted above, the primary claim of a condominium owner will be a breach of fiduciary duty by the board. Since the nature of a breach of fiduciary duty is tort ,[44] the plaintiff will have to establish all the elements of a tort claim. In any such claim, a threshold question is whether a breach occurred. Since the owner can't rely on the warranty of habitability, the court will need to struggle with the question of whether specific statutes establishing a duty were breached.

The plaintiff will then have to establish negligence on the part of the condominium board. It is unclear whether a board may claim in defense of damages that the board acted prudently despite the fact that, for example, leaks inundated an apartment for a period of months. A board might argue in defense that it took months to hire a contractor and for that contractor to prepare for and perform the repair.

Questions of proximate cause will also be at issue. Under tort doctrine, the condominium owner must establish that the board's breach of duty was the proximate cause of the injury.[45] This in turn will involve questions of burden of proof. Must the plaintiff prove exactly how water found a route into the apartment, or can she simply rely on a logical presumption that if the water came from outside the apartment it must have been the result of a failure of the common elements? Can the plaintiff meet the burden without expert witness testimony concerning the manner in which the physical damage to the apartment occurred?

Proving Damages Requires Expert Witness Testimony

To prove diminished value damages under *Jenkins*, supra, the plaintiff will need to provide the testimony of an expert witness who will assume as true the plaintiff's description of unlivable conditions within the apartment during the period it suffered from the board's inattention. A three-year limitations period applies to breaches of fiduciary duty when damages are sought, with each adverse event signaling the start of a new limitations period.[46]

The damage expert will consider the rental value of the apartment as if it were not affected by the conditions of neglect, and compare it to the rental value of the apartment as it actually was during the period of board inattention. The difference of each monthly assessment, added for the entire loss period, would yield the damages. Of course, the fact finder is not required to accept the calculation of the damages provided by the expert and can substitute its own judgment. Moreover, the board could argue that the loss calculation should be based on a diminution of the common charges payable with respect to the unit as a substitute for fair rental value, instead of the actual fair rental value as calculated by the expert. In most cases the fair rental value of an apartment would be substantially higher than the common charges.

Condominium Boards Will Assert the Protections of the Business Judgment Rule

In addition to the burden of proving case elements that a typical tenant doesn't need to address, a condominium owner squaring off against her board potentially faces a powerful defense—the business judgment rule. Under the business judgment rule, courts will not review decisions of a board made in good faith.[47] As a

general matter, the business judgment rule applies to decisions of a condominium board of managers, just as it does to other boards.[48] But the rule does not apply where the contested board action either (1) is not authorized under the condominium governing documents or state law; or (2) has no legitimate relationship to the welfare of the condominium; or (3) is in breach of fiduciary duty to unit owners.[49] It is difficult to imagine the effective assertion of this defense in a matter in which rainwater regularly inundates a condominium unit. Yet there may be circumstances where the board can assert business judgment protections for an extended period of time, such as when repairs are delayed while a contractor is engaged and a comprehensive plan of work for the entire building is finalized.[50]

"Leaks and other physical problems associated with multifamily condominium buildings often fall disproportionately on a single owner or small group of owners."

Conclusion

Leaks and other physical problems associated with multifamily condominium buildings often fall disproportionately on a single owner or small group of owners. Sometimes, litigation is the only available response to a board's inattention or sheer indifference. Yet the burdens facing a condominium owner seeking damages for having to live with uninhabitable conditions are many. While the same conditions in a cooperative apartment can result in a quick and efficient abatement award, rendered by a judge with expertise in the area, the condominium owner must proceed in a plenary action, hire experts, conduct extensive discovery to understand how the board has breached its duty, and then face uncertainties at trial concerning burdens of proof and qualitative standards of board conduct. There is no justification for this dichotomy, and the New York legislature should act by extending the protection of § 235-b of the Real Property Law to condominiums.

Endnotes

1. *See Suarez v. Rivercross Tenants' Corp.*, 107 Misc. 2d 135, 139, 438 N.Y.S.2d 164, 167 (1st Dep't 1981) (per curiam) (holding that the implied warranty of habitability is applicable to cooperative apartments); *see also* VINCENT DI LORENZO, NEW YORK CONDOMINIUM AND COOPERATIVE LAW § 2:6 (2d ed. 2007).
2. DI LORENZO, *supra* note 1, § 2:6.
3. *Id.* § 1:2.
4. *Id.* § 3:13.
5. *Suarez*, 107 Misc. 2d at 139, 438 N.Y.S.2d at 167.
6. N.Y. REAL PROP. § 235(b)(1) (McKinney 2006).
7. *Park W. Mgt. v. Mitchell*, 47 N.Y.2d 316, 328, 391 N.E.2d 1288, 1295, 418 N.Y.S.2d 310, 317 (1979) (finding that landlord's failure to provide adequate sanitation removal, janitorial and maintenance services materially impacted upon health and safety of tenants and entitled tenants to rent abatements).
8. *Poyck v. Bryant*, 13 Misc. 3d 699, 701, 820 N.Y.S.2d 774, 776 (N.Y. Civ. Ct., N.Y. Co. 2006) (quoting *Solow v. Wellner*, 86 N.Y.2d 582, 589, 658 N.E.2d 1005, 1008, 635 N.Y.S.2d 132, 135 (1995)) (holding in a secondhand smoke case that the warranty applied to a lessor of a condominium even if it didn't apply to the condominium board).
9. N.Y. Real Prop. § 235(b)(3)(a) (McKinney 2006).
10. *See e.g., Park W. Mgt.*, 47 N.Y.2d at 330, 391 N.E.2d at 1295, 418 N.Y.S.2d at 318 (upholding a Civil Court ordering a 10 percent rent reduction for the period during which unsanitary conditions persisted on the premises).
11. See Di Lorenzo, supra note 1, § 3:1.
12. *Frisch v. Bellmarc Mgt.*, 190 A.D.2d 383, 385, 597, N.Y.S.2d 962, 963 (1st Dep't 1993) (finding warranty of habitability inapplicable to condominiums).
13. *See* DI LORENZO, *supra* note 1, at § 3:2; *see also* N.Y. REAL PROP. § 339 (v)(1)(a) (McKinney 2006) (requiring that condominium bylaws provide for the nomination and election, as well as enumerate the powers and duties, of a board of managers).
14. *See* DI LORENZO, *supra* note 1, § 3:2.
15. *See* N.Y. REAL PROP. § 339(n); *see also* N.Y. REAL PROP. § 339(e)(7) (providing the statutory definition of "declaration").
16. *Bd. of Mgrs. of Fairway v. Fairway at N. Hills*, 193 A.D.2d 322, 325−326, 603 N.Y.S.2d 867, 869 (2d Dep't 1993) (noting that the board of managers governed "the affairs of the condominium" including maintenance, repair, and replacement of common elements).
17. *See* DI LORENZO, *supra* note 1, at § 3:2, n.11; *see also* 193 A.D.2d at 324-325, 603 N.Y.S.2d at 869.
18. 193 A.D.2d at 324, 603 N.Y.S.2d at 869 (quoting N.Y. BUS. CORP. LAW § 717) (noting that although the Condominium Act is silent, a fiduciary duty akin to that imposed in B.C.L. § 717 is imposed on the initial board of managers); N.Y. BUS. CORP. LAW § 717 (McKinney 2003).
19. N.Y. REAL PROP. § 339-ee (McKinney 2006).
20. N.Y. MULT. DWELL. LAW § 78(1) (McKinney 2006).
21. *Id.*
22. *See* NEW YORK, N.Y., ADMIN. CODE tit. 27, ch. 2, § 27–2005 (2008).
23. N.Y. MULT. DWELL. LAW § 302-a(2)(b) (McKinney 2006).
24. *See* NEW YORK, N.Y., ADMIN. CODE tit. 28, ch. 25 § 25–191 (2008).
25. N.Y. MULT. DWELL. LAW §309 (McKinney 2006).
26. *See* NEW YORK, N.Y. ADMIN. CODE tit. 17, ch. 1 § 17–142 (2008).
27. N.Y. MULTI. DWELL. LAW § 309(1)(a) (McKinney 2006).
28. *Pershad v. Parkchester S. Condo.*, 174 Misc. 2d 92, 94–95, 662 N.Y.S.2d 993, 995–96 (N.Y. Civ. Ct., New York Co. 1997), *aff'd per curiam*, 178 Misc. 2d 788, 683 N.Y.S.2d 708 (Sup. Ct. App. T. 1st Dep't 1998) (incorrectly noted in Official Reports as New York County) (finding condominium association's duty to maintain premises in good repair is non-delegable and that condominium unit owner's action against condominium association, seeking removal and or correction of water leaks due to faulty drainage pipes, stated a valid cause of action).
29. 163 Misc. 2d 66, 67–69, 619 N.Y.S.2d 523, 524–25 (N.Y. Civ. Ct. Bronx County 1994) (finding Housing Part proceeding available when violation stems from defective conditions in common area in condominium association's exclusive control).
30. 149 Misc. 2d 828, 831−33, 565 N.Y.S.2d 964, 966−67 (N.Y. Civ. Ct., Kings Co. 1991) *appeal dismissed mem.*, 150 Misc. 2d 1019, 579 N.Y.S.2d 305 (App. Term 2d Dep't 1991) (holding condominium managing board or agent responsible for common areas).
31. 34 A.D.3d 219, 219, 824 N.Y.S.2d 33, 34 (1st Dep't 2006).

32. *Hatcher v. Bd. of Mgrs.*, 420 W. 23rd St., 12 Misc. 3d 78, 819 N.Y.S.2d 374 (Sup. Ct. App. T. 1st Dep't 2006), *order aff'd*, 30 A.D.3d 436, 835 N.Y.S.2d 112 (1st Dep't 2007) (holding that the board of managers and managing agent are not responsible for maintenance inside the individual units but are responsible for the common areas).

33. 250 A.D.2d 717, 717, 673 N.Y.S.2d 445, 446 (2d Dep't 1998) (mem.) (noting that if a roof was substantially completed, it would create an obligation on the part of condominium's board of managers to maintain and repair the roof).

34. 225 A.D.2d 520, 521, 639 N.Y.S.2d 91, 92 (2d Dep't 1996) (mem.) (holding that an owner of a condominium unit was entitled to offset monthly common charge payments based upon water damage to unit).

35. 216 A.D.2d 115, 116, 629 N.Y.S.2d 6, 7 (1st Dep't 1995) (mem.) (holding that the "warranty of habitability does not apply to individual unit within condominium, and individual unit owner cannot withhold payment of common charges and assessments in derogation of condominium's bylaws based on defective conditions in his or her unit or in common areas, or disagreement with actions lawfully taken by board of managers.").

36. 213 A.D.2d 206, 633 N.Y.S.2d 478 (1st Dep't 1995) (mem.) (finding that the mere fact that unit owners could not withhold payment of common charges and assessments based on defective conditions in their unit or in common areas did not mean that unit owners were precluded from interposing defenses to the Board's action for foreclosure).

37. 258 A.D.2d 401, 685 N.Y.S.2d 708 (1st Dep't 1999). A fiduciary must make whole the beneficiary of the trust for any damage resulting from a breach of the fiduciary's duty. *See, e.g., In re Rothko*, 43 N.Y.2d 305, 320–322, 401 N.Y.S.2d 449, 455, 372 N.E.2d 291, 296–97 (1977) (holding that children of deceased painter could obtain restitution to estate for paintings executed by painter and owned by him at time of his death, where evidence was sufficient to support an award of almost $10,000,000 for the value of paintings wrongfully sold by executors and not returned). The proper measure of damages for such breach requires putting the beneficiary "in the same condition in which he would have been if the wrong had not been committed and the trustee had done his duty." GEORGE GLEASON BOGERT, LAW OF TRUSTS AND TRUSTEES § 701 (3d ed. 2009).

38. *See Milbank, Tweed, Hadley & McCloy v. Boon*, 13 F.3d 537, 543 (2d Cir. 1994).

39. *Diamond v. Oreamuno*, 24 N.Y.2d 494, 498, 301 N.Y.S.2d 78, 248 N.E.2d 910 (1969).

40. *Whitney v. Citibank*, 782 F.2d 1106, 1118 (2d Cir. 1986).

41. *Wolf v. Rand*, 258 A.D.2d 401, 403, 685 N.Y.S.2d 708, 710 (*Whitney*, 782 F.2d at 1118).

42. 55 N.Y.2d 35, 40, 432 N.E.2d 589, 591, 447 N.Y.S.2d 696, 698 (1982) (citing *Reisert v. City of N.Y.*, 174 N.Y. 196, 66 N.E. 731 (1903); *see also Park W. Mgmt. v. Mitchell*, 47 N.Y.2d 316, 91 N.E.2d 1288, 418 N.Y.S.2d 310 (1979) (measure of damages for landlord breach of warranty of habitability is diminution in rental value for the period of the breach*); Guzzardi v. Perry's Boats, Inc.*, 92 A.D.2d 250, 460 N.Y.S.2d 78 (2d Dep't 1983) (damages for nuisance arising from zoning violation denied because plaintiff failed to present sufficient evidence to overcome a motion for summary judgment); *Bailer v. Ringe*, 255 A.D. 976, 976, 8 N.Y.S.2d 99, 100 (2d Dep't 1938) (finding nuisance from illegal use, and holding that the loss of rental value of the plaintiff's property is the proper measure of damages, "even though plaintiff's dwelling was not rented, and [even though] plaintiff did not seek to rent it")

43. *Greenwich Realty v. Meltzer*, 18 Misc. 3d 133(A), 856 N.Y.S.2d 498, 2008 WL 162162, 2008 N.Y. Slip Op. 50119(U), at *1 (Sup. Ct. App. T. 1st Dep't 2008) (per curiam) (finding the warranty violated by water leaks into a cooperative apartment over a period of years) (citing N.Y. REAL PROP. § 235(b) (McKinney 2006)).

44. *Pergament v. Roach*, 18 Misc. 3d 1141(A), 859 N.Y.S.2d 898, 2008 WL 586253, at *4 (Sup. Ct. Nassau Co. 2008) (citing sources).

45. *Id.* (citing *Northbay Constr. Co. v. Bauco Constr. Corp.*, 38 A.D.3d 737, 738, 832 N.Y.S.2d 280, 281 (2d Dep't 2007)); *see also Laub v. Fassell*, 297 A.D.2d 28, 30–31, 735 N.Y.S.2d 534, 536 (1st Dep't 2002) (citing *R.M. Newell Co. v. Rice*, 236 A.D.2d 843, 844–45, 653 N.Y.S.2d 1004, 1005 (4th Dep't 1997) (dismissing plaintiff's complaint because the plaintiff's injury was not proximately caused by the fiduciary's breach of his duty)).

46. *Kaymakcian v. Bd. of Mgrs. Charles House*, 49 A.D.3d 407, 407–408, 854 N.Y.S.2d 52, 53 (1st Dep't 2008) (citing *Kaufman v. Cohen*, 307 A.D.2d 113, 118, 760 N.Y.S.2d 157 (1st Dep't 2003)).

47. *Levandusky v. One Fifth Ave. Apt. Corp.*, 75 N.Y.2d 530, 537–538, 553 N.E.2d 1317, 1321, 554 N.Y.S.2d 807, 811 (1990) ("The business judgment rule prohibits judicial inquiry into actions of corporate directors 'taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.'") (quoting *Auerbach v. Bennett*, 47 N.Y.2d 619, 629, 393 N.E.2d 994, 1000, 419 N.Y.S.2d 920, 926 (1979)).

48. *See Levandusky*, 75 N.Y.2d at 537–38, 553 N.E.2d at 1321, 554 N.Y.S.2d at 811 (adopting the business-judgment rule for cooperatives, and in strong dicta, for condominiums); *see also Hunt v. Sharp*, 83 N.Y.2d 883, 649 N.E.2d 1201, 626 N.Y.S.2d 57 (1995) (applying the business judgment rule to condominium boards but holding that individual board members cannot avail themselves of the business-judgment rule after first failing to act upon defendants' application within the time required by the bylaws, and then acting in bad faith by denying defendants' application to make the basement garage unit a fiscally efficient operation).

49. *See Levandusky*, 75 N.Y.2d at 538, 553 N.E.2d at 1322, 554 N.Y.S.2d at 812.

50. It is self-evident that a board can't shift blame to its own managing agent. In addition, a board can't shift blame to the professionals or contractors it hired to make the repairs. As the Court stated in *Jacobson v. 142 E. 16 Coop. Owners, Inc.*, 295 A.D.2d 211, 211, 743 N.Y.S.2d 500, 500 (1st Dep't 2002):

> Pursuant to Multiple Dwelling Law § 78(1) defendant landlord *and managing agent* were under a nondelegable duty to maintain the premises at issue, "including its roof or roofs, and every part thereof and the lot upon which it is situated…in good repair," and are thus "vicariously liable for any negligence on the part of the independent contractor" in effecting repairs.

Id. (emphasis added) (quoting *Dowling v. 257 Assoc.*, 235 A.D.2d 293, 652 N.Y.S.2d 736 (1st Dep't 1997)).

William Walzer is a partner in Davidoff, Malito & Hutcher, LLP, practicing in the areas of real estate and corporate law from the firm's Garden City office.

Evidentiary Issues in the New York City Housing Court

By Gerald Lebovits and Julia Marter

I. Introduction

New York State rules of evidence apply in all summary proceedings in the New York Civil Court Housing Part,[1] commonly called the New York City Housing Court. Housing Court judges, like all judges, often have great discretion over whether to admit evidence presented to them at hearings and trials.[2] Housing Court judges base their decision to allow or exclude evidence on whether the proponent of the evidence has laid a proper foundation by showing: the item is relevant,[3] the evidence is accurate and authentic,[4] and the probative value of the evidence substantially outweighs any prejudice.[5]

Evidence comes in several forms: testimony, exhibits, admissions, stipulations, and facts judicially noticed.[6]

Direct evidence directly supports the truth of an assertion.[7] Eyewitness testimony recounting the actual event, for example, is direct evidence.[8] Indirect, or circumstantial, evidence is direct evidence of a collateral fact from which the court may infer a fact in issue.[9] Expert testimony is an example of circumstantial evidence.[10] Courts proceed cautiously when a case rests solely on circumstantial evidence.[11]

After evidence is marked or deemed marked for identification, a petitioner's exhibit is called Petitioner 1 (and then 2, 3, and so on) for identification[12] and, if admitted, Petitioner's 1 (and then 2, 3, and so on) in evidence.[13] A respondent's exhibit is called Respondent's A (and then B, C, and so on) for identification and, if admitted, Respondent's A (and then B, C, and so on) in evidence.[14] A court exhibit is called Court's 1 for identification or Court's 1 in evidence.

Before evidence is admitted, the opposing party may conduct a voir dire—question the witness to ascertain whether the evidence may be admitted.[15] A voir dire is different from cross-examination.[16] A voir dire tests the admissibility of the evidence, not its weight.[17] Cross-examination, on the other hand, occurs after direct-examination and tests the reliability and truthfulness of the testimony offered on direct-examination.[18] Cross-examination must be directed to matters raised on direct-examination.[19] If not, the cross-examination is deemed outside the scope of the direct-examination.[20]

Anything that will help prove or disprove a material fact in dispute should be introduced into evidence—on direct or cross—including written agreements, deeds, leases, registration statements, violation reports, bills, receipts or other proof of payment, photographs, and witness testimony.[21] Lawyers and unrepresented litigants should anticipate evidentiary issues to ensure that their proof is accepted, admitted, credited, and given the appropriate weight—and to assure that inadmissible evidence is excluded or discredited.

This article discusses the admissibility of documents and testimony commonly offered into evidence during Housing Court hearings and trials.

II. Motions in Limine

Since the 1997 Housing Court Initiative, Housing Court comprises two branches: resolution parts and trial parts.[22] Resolution parts handle issues related to settlement, orders to show cause, disclosure, and motions.[23] Trial parts conduct hearings and trials.[24] In conducting hearings and trials, trial parts resolve trial evidentiary issues[25] and motions in limine, which are pretrial requests to allow the introduction of evidence or to prevent evidence from being referred to or offered at trial.[26] Resolution parts faced with an evidentiary issue filed as a motion in limine should deny the motion without prejudice to renew before a trial part.

A ruling on a motion in limine does not preserve evidentiary error for appellate purposes.[27] To raise an error on appeal, an opponent should formally object when the evidence is offered or excluded during the trial.[28]

III. Relevance and Prejudice

Housing Court trials are bench trials.[29] Cases requiring a jury are referred to the Civil Court's Plenary Part. Because there are no juries in Housing Court, Housing Court judges will often admit evidence in a close case and give the evidence the weight it deserves—sometimes none at all.

For evidence to be relevant in New York, it must tend to make the existence of a relevant fact more probable than it would be without that evidence.[30] Determining relevancy is more a question of experience and logic than of law.[31] The same can be said for deciding whether, on balance, the danger of unfair prejudice of a piece of evidence substantially outweighs its probative value.[32]

Even relevant evidence will be excluded if it is remote, misleading, or substantially prejudicial.[33] In Housing Court, where there is no jury to be confused, misled, or prejudiced, judges rarely reject evidence as unfairly prejudicial.

IV. A Word About Prima Facie Evidence

Prima facie evidence is given significant weight in Housing Court. It is "[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced."[34] Prima facie evidence is treated as a rebuttable presumption that shifts the burden of production to the opponent.[35] A judge who accepts a document as prima facie evidence assumes

that the contents of that document are true unless the opponent provides evidence to the contrary. The opponent must be given an opportunity to rebut.[36]

As opposed to prima facie evidence, some documents are admissible as mere demonstrative evidence.[37] Demonstrative evidence explains or illustrates oral testimony.[38] It is not real evidence.[39] Videotapes, photographs, and other visual aids are often considered demonstrative evidence.[40] Housing Court judges will admit demonstrative evidence that is relevant, non-prejudicial, and not misleading.[41]

V. Burdens of Proof and Objections

Petitioners bringing summary claims to Housing Court (nonpayment, holdover, HP (repair), Article 7A, illegal lockout, and harassment proceedings)[42] have the burden to prove their prima facie cases.[43] Petitioners prove their prima facie cases if they prove the elements of a petition that states a cause of action.[44] The petitioner's goal in submitting persuasive evidence to the court is to satisfy this burden.[45] If a litigant forgets to prove an element of the prima facie case, the judge might, in the court's discretion, let the party reopen the proceeding if the opposing side is not prejudiced.[46] Once petitioners establish their prima facie cases, the burden of proof shifts to the respondent to assert defenses and affirmative defenses.[47]

If the respondent proves an affirmative defense,[48] then the burden reverts to the petitioner to rebut, during its rebuttal case,[49] that affirmative defense with evidence of its own.[50]

A litigant must object to evidence it deems inadmissible to prevent its admission into evidence and to preserve for appeal the matter of its admissibility.[51] The objection must specifically state the grounds for objection—for example, hearsay.[52] If the court rejects a piece of evidence, the proponent of that evidence should make an offer of proof to protect the record on appeal.[53] An objection that is "sustained" means that the judge will not allow the question to be asked or will not admit the evidence.[54] An objection that is "overruled" means that the witness must answer the question or that the judge will allow the evidence.

VI. Public Documents and Records

Public records are easy to introduce into evidence. Because public agencies must keep their original work, most public documents submitted to the court will technically be copies.[55] To be accepted into evidence, all copies of public documents must be certified by the agency producing the documents.[56] A certification is a statement or signature by the agency head or a designated employee that the documents are true copies of an agency's records.[57] That certification must be authenticated.[58] Authentication provides a minimum assurance that the evidence is what it purports to be and what its proponent claims it to be.[59] Most public documents contain an official seal that authenticates them.[60]

Once a public record has been certified, it is prima facie evidence of its contents.[61] If a copy of a public record is unsigned, someone at the public agency should be able to tell the litigant how to certify the record.[62] If a record cannot be certified, a living witness who recognizes the document may testify that it was made in the regular course of business contemporaneous with the event it records.[63]

Some examples of public documents that require certification and which are commonly brought to Housing Court are deeds to a building, Division of Housing and Community Renewal (DHCR) rent registrations, Multiple Dwelling Registration (MDR) statements, and New York City Housing Authority (NYCHA) Board determinations.[64]

The certification rule has some exceptions. Several public documents commonly introduced in Housing Court need not be certified. For example, MDR statements can be accessed on the court's computer and, if accessed this way, are admissible under Multiple Dwelling Law § 328(3) without certification as a judicially noticed fact.[65] It is in the judge's discretion whether to access the court's computer to look at an online MDR statement; landlords are advised to bring certified MDR statements to court in case the judge will not or cannot do so. Similarly, Department of Buildings (DOB) and Department of Housing Protection and Development (HPD) inspection or violation reports, which are available on government Web sites,[66] need not be certified. A printed, computerized record of a violation is prima facie evidence of the violation's existence; the absence of that record is prima facie evidence that no violation exists.[67]

All public records affecting real property, like maps or surveys, on file with the government for more than 10 years need no additional certification.[68] These "ancient documents" are prima facie evidence of their contents.[69]

Litigants not in possession of a relevant public record may subpoena it. A subpoena duces tecum is a legal document that directs someone, including a City, State, or Federal agency, to produce a written document or record in court.[70] Section 8, DOB, DHCR, Police Department, Fire Department, and Department of Social Service (DSS) records, among many others, can be subpoenaed.[71]

VII. Personal and Business Records

Litigants must be careful about hearsay evidence. Hearsay is evidence that cannot be cross-examined because it relies on the credibility of someone other than a witness or the document's proponent.[72] Many personal records fall into this category. Hearsay evidence is inadmissible

to prove the truth of its contents[73] but admissible to prove its own existence.[74] For example, a tenant's personal record of apartment conditions is inadmissible to prove the conditions, but it might be admissible if offered to prove that the tenant notified the landlord to complain about the conditions.

There are many exceptions to hearsay.[75] The business-record rule is a frequently raised exception in Housing Court. The business-record rule provides that business records, such as reports or memorandums, may be admitted into evidence in exception to the hearsay rule if they were prepared in the ordinary course of business.[76] The rule is designed to eliminate the requirement that those who entered, recorded, or compiled the information must testify.[77] Instead, the record may be introduced through any responsible person from the same business or organization.[78]

An electronic business record[79] is also admissible in the form of a tangible exhibit that is a true and accurate representation of the electronic record.[80] In determining whether the exhibit is a true and accurate representation, the court will consider how the electronic record was stored, maintained, and retrieved.[81] Many rent breakdowns or ledgers are computerized records created in the regular course of business and thus admissible under the business-record rule.[82] A rent breakdown is admissible if the landlord printed it or verified it as a true and accurate representation of the electronic version.[83]

The rationale to admit business records is that they are generally trustworthy.[84] Businesses depend on accurate record-keeping to function effectively.[85] The reliability of business records is enhanced by the routine, systematic, and repetitive circumstances under which they are made.[86]

Laying the foundation for a document as a business record does not relieve the proponent from authenticating it.[87] Determining a document's authenticity requires a holistic assessment of the record's reliability. Testimony, signature verification, and comparison to like documents are some of the ways to authenticate a business record.[88]

The business-record exception will not apply if there is good reason to doubt the record's reliability.[89] Here are eight common reasons to object to a document offered as a business record: (1) if the document is attributable to a non-employee and thus cannot be cross-examined;[90] (2) if the record was written in anticipation of litigation;[91] (3) if the document is a personal (non-business) record;[92] (4) if the writing is a business record but received from another business entity;[93] (5) if the document is an occasional memorandum that the business does not usually make;[94] (6) if the record was not made contemporaneously with—meaning around the same time as—the event;[95] (7) if the record is not intelligible on its face;[96] and (8) if the record contains information not germane to the business.[97] All eight scenarios violate the requirement that a business record be made in the ordinary course of business.

Police reports are often offered as business records. In most cases, police reports do not qualify as business records; the witness providing the underlying information is either unidentifiable or not a Police Department employee.[98] If this is the case, the report loses its reliability as a business record; it cannot be cross-examined. A police report considered hearsay, even if certified, cannot prove the truth of its contents, but it can still be used as evidence of its own existence—to deflect a claim of recent fabrication, for example.

Tenants often bring money-order receipts to court to prove rent payments. These receipts themselves are not proof of payment. They merely prove that the money order was purchased. Money order receipts are not business records. To prove payment, tenants should trace their money orders to see whether they were cashed and who cashed them.

VIII. Leases

A debate in the Housing Court community has arisen over whether a lease counts as a business record. Some argue that leases fit under the business-record exception to hearsay evidence because they are made in the normal course of business.[99] Others argue that a lease is a contract, not a record, and accordingly is neither hearsay nor a business record.[100] According to the latter position, the lease as contract is the very agreement of the transaction at issue, not an account of it. The latter position also posits that evidence, documentary or testimonial, is not hearsay when offered to establish that a promise or other statement was made.[101]

This debate is often academic. Regardless whether a lease is considered a business-record or a contract, original, authenticated leases are always admissible.

Whether a lease is a business record or a contract, it must be authenticated, meaning established as genuine.[102] A contract's proponent may authenticate it by (1) observing it being signed;[103] (2) being familiar with the signature;[104] (3) comparing it to an authenticated signature;[105] or (4) proving its genuine character by circumstantial evidence (*e.g.*, the proponent sends the contract to the party to be bound and that party returns it signed, or the party to be bound relies on the contract).[106] Only the signature of the party to be bound (the opponent) must be authenticated.[107] It is unnecessary for a handwriting expert to compare the signature to a prototype or exemplar.[108] Any witness may authenticate a signature and express an opinion.[109]

Housing Court judges disagree over whether a witness may authenticate a tenant's signature simply by reviewing and comparing other signatures in the tenant's file. Some judges allow that testimony, subject to the tenant's good-faith denial and cross-examination over whether the signature is the tenant's. Others allow that testimony only when the witness can successfully compare the

signature at issue to an authenticated signature.

An old lease may be authenticated by the ancient-documents rule: "When a writing is thirty or more years old, is shown to be in the possession of the natural custodian, and is itself free from indications of fraud or invalidity, 'it proves itself;' that is, no other evidence of authenticity is necessary."[110]

Litigants may not say whatever they wish about the terms of a lease. The parol evidence rule forbids testimony that might add to or vary the terms of a written agreement intended to embody the parties' entire agreement.[111] Leases fall under this rule.

IX. Reproductions

For documents or pictures to be submitted into evidence successfully, litigants are advised to bring the original and two copies to trial.[112] Originals[113] are always recommended due to the best-evidence rule, which provides that when the contents of a document are disputed, the original document must be introduced. This rule protects against perjury, fraud, inaccuracies, or mistakes in copying.[114] The best-evidence rule applies only when the contents of the writing are material to the issues in the case and when the proponent must prove the contents of the writing to establish a claim.[115]

Many exceptions to the best-evidence rule exist.[116] A copy may be substituted for an original if the original's absence is sufficiently explained.[117] The proponent of the copy is under a "heavy burden" to prove good faith if the original was lost or destroyed.[118] Proof of a diligent search where the document was last known to have been kept and testimony of the person who last had custody of the original will prove good-faith loss.[119] The more important the document is to the case, the more strictly the court will require proof of good-faith destruction or loss.[120]

Several rules surround the proper submission of copies. To submit a copy as prima facie evidence, the copy's proponent must establish that it was made (1) in the regular course of business and (2) by a reliable reproduction process.[121] These copies will suffice as evidence, even if the original copy is unavailable.[122] A reliable reproduction process is one that does not permit additions, deletions, or modifications without leaving a record of the changes.[123] Copies prepared specifically for litigation are inadmissible.[124] They are not made in the regular course of business.[125] Also, "[a]n admission as to the correctness of a copy or a concession that the contents of a writing are as the opponent claims them to be, when made by the adversary on the witness stand, dispenses with the need for producing the original regardless of its availability."[126]

Tenants should bring to court copies of correspondence with landlords, superintendents, or government agencies regarding problems with their apartments.[127] When correspondence has been exchanged, tenants should, if they can, bring proof that the correspondence was mailed and received.[128]

Electronic data are admissible as evidence with the proper foundation.[129] Reproductions and copies like facsimiles and computer-generated records are admissible without the original if the reproduction process did not alter the record and if the record is authenticated.[130] For example, a computer printout is admissible into evidence "so long as the original entry of the data was at least in part for a purpose other than to prepare for litigation."[131] Internet printouts such as printed e-mails or monitor displays are admissible into evidence as electronic records.[132] Electronic records like facsimiles and e-mails are authenticated if they include electronic receipts from a reputable source (date, time, and telephone/fax number or e-mail address).[133] Or a proponent may authenticate a facsimile or e-mail by showing that it contains information known only to the sender, that it responds to prior communication from the recipient to the sender, or that the sender took action consistent with the content of the document after it was sent.[134]

Copies of copies qualify as prima facie evidence if the originals or qualifying reproductions are available for the court's inspection.[135] The same is true for enlargements and facsimiles.[136]

X. Photographs

Photographs can be excellent evidence in Housing Court. Tenants often submit photographs of their apartment's condition. Landlords often submit photographs of people entering and leaving apartments in illegal sublet, nonprimary-residence, and drug-holdover proceedings, among others.

Photographs taken during the regular course of business and contemporaneous to the event they record are admissible under the business-record rule.[137] Otherwise, to admit a photograph or other picture into evidence, someone must verify that it is a fair and accurate representation of the scene or object depicted.[138] The proponent of the photograph may attest to its accuracy,[139] or any other witness familiar with the scene depicted may lay the necessary foundation. The witness need not have taken the photograph or even have been present when the photograph was taken.[140] A photograph's proponent must also show that it is unlikely that the photograph is distorted, technically inaccurate, or portrays a different scene.[141]

When a witness can verify that a photograph accurately represents the scene as it appeared on the given day, the photograph is considered demonstrative evidence.[142] It is a visual aid that assists in presenting and interpreting the testimony.[143] The burden of proof to verify the photograph is low for mere demonstrative evidence.[144] Housing Court judges

will use their discretion to assess the sufficiency of the foundation laid.[145]

If a verifying witness can attest only vaguely to the accuracy of the scene portrayed or if no verifying witness is available, the photograph is considered substantive evidence. The photograph is its own witness for the scene being depicted. In this scenario, the photograph is entered into evidence on the silent-witness theory: The photograph is authenticated by showing—through written evidence or testimony—the reliability of the process of producing the evidence and by proof that the evidence was not altered.[146] An appropriate witness would be an operator, installer, or maintainer, expert or otherwise, of the recording equipment used.[147] Proper testimony for laying the foundation on the silent-witness theory includes (1) the manner of loading the film into the camera, (2) how the camera system works and is activated, (3) how the film was removed, (4) how the film was handled afterward, and (5) whether the process produces reliable results.[148]

When a photograph is submitted as substantive evidence, the burden of proof is much higher than for demonstrative evidence.[149] The reason is that the photograph stands on its own as evidence—there is no corroborating testimony. A photograph should not be admitted as substantive evidence unless the Housing Court judge is "relatively certain" or "convinced" of its accuracy and authenticity.[150] If possible, the photograph's date should be established.[151]

XI. The Photoshop Era

Many computer programs can change the appearance of a captured image.[152] Using a software program like Adobe Photoshop, a photograph's proponent can focus the court's attention on a particular area of a photograph or enhance or modify a detail not otherwise noticeable.[153]

The law surrounding the admissibility of digitally enhanced or modified photographs is unsettled.[154] To be safe, proponents of a digitally enhanced or modified photograph should follow Rule 901 of the Federal Rules of Evidence.[155] Rule 901 requires proof that

> (1) the computer equipment is accepted in the field as standard and competent and was in good working order, (2) qualified computer operators were employed, (3) proper procedures were followed in connection with the input and output of the information, (4) a reliable software program was utilized, (5) the equipment was programmed and operated correctly, and (6) the exhibit is properly identified as the output in question.[156]

To satisfy these evidentiary requirements, proponents of a digitally modified photograph in Housing Court should (1) give opposing counsel notice of the enhanced photograph, (2) maintain an original version of the enhanced photograph, (3) keep a log of any enhancement made to the photograph, (4) employ qualified personnel, (5) use reliable software, and (6) preserve the equipment used.[157]

XII. Video/Audio

The admissibility of videotapes and audiotapes is within the court's discretion based on whether the proponent has laid a proper foundation.[158] Proponents of video and audiotapes must "show that the tape is a true, authentic and accurate representation of the event taped without any distortion or deletion before the videotape is admissible."[159] Authentication may be proven two ways: (1) by testimony about the accuracy of the recording by an eyewitness who both saw the event and viewed the recording or (2) under the silent-witness theory by proving that the recording was made a reliable process and was not altered.[160] Both methods are described more fully above in section X (Photographs).

In determining admissibility, the judge will also consider whether the content is relevant, whether the probative value substantially outweighs any prejudice, whether the recording duplicates evidence already admitted, and whether the video contains hearsay.[161] The issue of the video's chain of custody goes to the weight of the evidence, not to its admissibility.[162]

The testimony of a person who watched a tape when the tape itself is unavailable is inadmissible under the best-evidence rule.[163] Given the complex and detailed nature of videotape footage, the testimony of witnesses who merely watched a tape would only be a summary of this interpretation of the tape and not a reliable and accurate portrayal of the tape.[164]

XIII. Witness Testimony

In Housing Court as elsewhere, litigants may testify or call witnesses to testify on their behalf.[165] Sworn testimony, including the litigant's, is admissible as evidence.[166] Witnesses may testify in person before the court if they can remember and report in a reasonably accurate manner the events about which they testify.[167]

Witnesses must have observed relevant events with their five senses (seeing, hearing, smelling, tasting, and touching) or be experts whose special knowledge and experience qualify them to offer their opinion.[168] The basis for an expert's opinion must reflect a reasonable degree of certainty and a low measure of speculation or guesswork.[169] In New York State courts, an expert witness's testimony is admissible if the fact-finder needs the expert to understand the evidence or determine a disputed fact;[170] if the proponent shows that the witness is an expert in a particular area; if the opposing party has an opportunity to conduct a voir dire to contest the proposed expert's qualifications; and if the judge declares the witness an expert.[171] Expert-opinion evidence must be based on facts in the record, personally known to a witness, derived from a profession-

ally reliable source, or from a witness subject to cross-examination.[172] Admitting expert opinion testimony falls within a trial judge's sound discretion.[173] The judge need not accept the expert's testimony.[174] The credibility of the expert's testimony, the accuracy of the expert's testimony, and what weight should be given to the expert's testimony are for the Housing Court judge to decide.[175]

An opponent may impeach a witness by proving that the witness made a prior inconsistent statement orally, in writing, or under oath.[176] The inconsistent statement must "'afford[] some indication that the fact was different from the testimony of the witness whom it sought to contradict.'"[177] The opponent must lay the same proper foundation for the prior inconsistent statement as for any other piece of evidence.[178] Prior inconsistent statements are admissible only for witness credibility.[179] They are otherwise inadmissible as evidence.[180]

Similar to prior inconsistent statements are extrajudicial admissions. An extrajudicial admission is a statement made outside of testimony that, unlike a prior inconsistent statement, is admissible on its own as evidence.[181] If the extrajudicial admission contradicts sworn testimony, the fact-finder may choose to believe the authorized admission over the testimony.[182]

Some litigants will want to submit copies of personal documents like journal entries of an apartment's condition, or dates and times of complaints filed to corroborate their testimony.[183] These prior consistent statements are inadmissible; they cannot be cross-examined.[184] They can, however, be used to contradict a claim of recent fabrication.[185]

Testifying witnesses may briefly look at a document to refresh their recollection, as long as they do not read from it.[186]

An opponent may object when the witness's proponent asks leading questions, which, with exceptions, are prohibited on direct-examination.[187] A leading question is one that assumes a fact not in evidence or which suggests facts in an answer.[188] Often these questions are long or require a "yes" or "no" answer.[189] Sometimes a question may suggest an answer merely by the tone of voice in which it is asked.[190] Leading questions are permitted on direct-examination for preliminary matters, examining an adverse or hostile witness, and questioning children, the elderly, and the mentally impaired.[191] Trial judges have substantial discretion to allow leading questioning.[192] Taking together these exceptions, the lack of a jury, the judge's ultimate discretion, and the number of pro se litigants, Housing Court judges are more apt than some other judges to allow leading questioning.[193]

An opponent may object if a question has already been asked and answered.[194] Repeating a question is permissible if doing so does not unnecessarily prolong a trial.[195] But if the repetition badgers the witness or encourages inconsistent answers, the Housing Court judge might sustain the objection.[196] In addition, an opponent may object if counsel argues with or badgers a witness.[197]Arguing with or badgering a witness is an improper attempt to change the witness's testimony[198] and an improper attempt to give unsworn testimony.[199]

The Dead Man's Statute[200] prevents interested parties from testifying at trial against an estate.[201] Parties should not be allowed to testify about their version of a communication or transaction when their adversary can no longer speak due to death or mental illness.[202] The party raising the Dead Man's Statute objection has the burden to prove that the witness's testimony would violate the Statute's strict parameters.[203]

Some communications are confidential and legally protected from disclosure.[204] Privileged communications recognized in New York include those between attorney and client,[205] physician and patient,[206] social worker and client,[207] priest and penitent,[208] and spouses,[209] among others. Although the privilege extends protection to communications, it does not protect facts; the court may compel laypersons to testify about facts they know, even if they were stated during a privileged communications.[210] To protect documents from disclosure, litigants may compile a privilege log to aid the court to assess a privilege claim.[211] As the Court of Appeals has explained, "[t]he log should specify the nature of the contents of the documents, who prepared the records and the basis for the claimed privilege."[212]

New York courts permit, but do not require, the trier of fact to draw an adverse, or negative, inference against a party who exercises a privilege. An inference is a conclusion a judge may draw from facts admitted in evidence about a matter material to the case.[213] An adverse inference allows a judge to presume, as much as the record allows, that the missing testimony would be unfavorable to the side claiming the privilege.[214] Adverse inferences may be drawn from a party's asserting the Fifth Amendment privilege against self-incrimination in a civil action[215] or from a party's refusal to testify absent any privilege.[216] A negative inference can also arise when a party fails to call a relevant or important witness within its control.[217] The court will refuse to draw an adverse inference if there is a compelling reason why the party did not testify, such as a mental or physical infirmity.[218]

In Housing Court, evidence of character or reputation is inadmissible to prove that witnesses acted in conformity with their character on a particular occasion.[219] Character evidence may be used, however, to establish something other than conforming conduct, such as when the character of the witness is itself an essential element of the accusation or defense.[220] In Housing Court, character evidence may also be admitted if it pertains to the witness's reputation for truthfulness.[221] Likewise, testimony about extrinsic acts is admissible only for purposes other than proving

the witness's propensity to commit similar acts.[222]

A signed and notarized statement cannot replace live testimony[223] except in specific circumstances.[224] Litigants unable to convince a witness to appear voluntarily may ask the court to sign a subpoena before the trial date.[225] A subpoena ad testificandum is a legal document that commands the person named in the subpoena to appear in court to testify.[226] An expert witness cannot be compelled to testify by subpoena, but a litigant may pay the expert witness to come to court to testify.[227]

XIV. Pro Se Litigants

Most tenants in Housing Court and many landlords, too, are unrepresented, pro se litigants.[228] Many pro se litigants do not even understand the adversary system,[229] let alone the rules of evidence, and are at a great disadvantage litigating against experienced attorneys.[230] A debate exists about whether and to what extent Housing Court judges should take an active role to assist pro se litigants. Scholars have noted the judge's dilemma:

> If the judge does *not* intervene on behalf of the unrepresented litigant, the party may be unable to present evidence supporting its position and manifest injustice may result. If the judge *does* intervene, he or she may be violating the duty of impartiality and denying the represented party the benefit of retained counsel.[231]

A growing number of professionals believe that judges must assist pro se litigants to level the playing field and assure equal access to justice for all.[232] Proponents of this view argue that Housing Court judges must help pro se litigants introduce evidence by explaining the necessary foundational elements and by telling them how witnesses can testify about the contents of that evidence.[233] Before trials or hearings, the judge might ask pro se litigants whether they have the evidence they need and help them get the evidence or a subpoena.[234] This might require adjourning the proceeding to give the pro se litigant time to obtain and review evidence.[235]

To assist pro se litigants, most Housing court judges allow pro se litigants to testify in narrative form[236] and then ask them questions to navigate their story.[237] Although lawyers should not let their witnesses testify in the narrative, witnesses not questioned by lawyers may testify in the narrative. So long as a pro se litigant's narrative is mostly relevant and not abusive, the judge will accept the narrative for what it is worth, even if some portions of the pro se litigant's testimony are inadmissible.[238]

Most judges will also use their discretion to adjust courtroom procedure to stop a lawyer from engaging in a barrage of interruptions or objections.[239]

Housing Court judges must follow the rules of evidence for reliability, but they may use their discretion to overrule objections on technical matters.[240] If judges sustain a represented party's evidentiary objections, they can explain to the pro se litigant the objection and articulate the reason for and the consequences of their ruling.[241]

Housing Court judges often raise and sustain their own objections if a lawyer on the other side offers inadmissible evidence or asks inadmissible questions to which the pro se litigant does not object.

The goal for all Housing Court judges, regardless of how they handle cases involving pro se litigants, is to ensure that the process produces for all litigants a consistent, honest outcome based on the law, the facts, and the merits, whether or not a party has a lawyer.[242]

XV. Final Thoughts About Admissibility and Weight

Even if a litigant is unable to lay the proper foundation to admit documents, the litigant should still bring the documents to court. Inadmissible evidence can be used at different phases of a case, such as during settlement discussion with an adversary. Questionable foundational elements like missing proof of authenticity can affect the document's weight, but not its admissibility.[243] Even when a proper foundation is laid and documents or testimony are admitted into evidence, the court need not give any more weight to that evidence than it deems proper.[244] Reversal for evidentiary error on appeal is rare due to the harmless-error rule, "which provides that appeals from evidentiary rulings will fail 'unless a substantial right of the party is affected.'"[245] Under the harmless-error doctrine, a trial judge's decision will be affirmed if the judge made only a small mistake that did not affect the correctness of the ultimate ruling. Appellate courts often defer to trial judges because evidentiary rulings are usually case-specific and often involve assessing a witness's demeanor or tone. Appellate deference also limits appellate issues and prevents parties from relitigating their cases in their entirety on appeal.

XVI. Conclusion

Housing Court is a court of law. Judges and attorneys who practice there must follow all New York State rules of evidence. Housing Court litigants should familiarize themselves with these evidentiary rules before arriving in court for a hearing or trial. Laying the proper foundation for a piece of evidence will ensure that proof is accepted, admitted, credited, and given the appropriate weight. Learning when to object to evidence will ensure that inadmissible evidence is excluded. Housing Court judges have great discretion in admitting or denying evidence presented to them, but litigants must do their part to offer evidence that is relevant, accurate, authentic, and non-prejudicial.

Endnotes

1. N.Y.C.R.R. tit. 22, ch. II, § 208.43(h) (2009) (LEXIS, NY Library, NYADMIN File).
2. HELEN E. FREEDMAN, NEW YORK OBJECTIONS: TRIAL PRACTICE, TIPS, AND CASES § 9:30 (2d. ed. 2008).
3. ROBERT A. BARKER & VINCENT C. ALEXANDER, EVIDENCE IN NEW YORK STATE AND FEDERAL COURTS § 4:2 (West 2001 & Supp. 2009−10).

   > In New York, the general rule is that all relevant evidence is admissible unless its admission violates some exclusionary rule…. Evidence is relevant if it has any tendency in reason to prove the existence of any material fact, i.e., it makes determination of the action more probable or less probable than it would be without the evidence.

   Id. (quoting *People v. Scarola*, 71 N.Y.2d 769, 777, 525 N.E.2d 728, 732, 530 N.Y.S.2d 83, 86 (1988)) (concluding that the two factors to consider are probability and exclusionary).
4. Freedman, *supra* note 2; Harold Baer, Jr., Federal Rules of Evidence and their New York State Parallels § 403 (1986).
5. Freedman, *supra* note 2.
6. *See* David M. Epstein & Glen Weissenberger, New York Evidence Courtroom Manual ch. 2-1 (Mathew Bender & Co. 2008) ("A judicially noticed fact must be one not subject to reasonable dispute…. Judicial notice may be taken at any stage of the proceeding.").
7. *See* Richard T. Farrell, Prince, Richardson on Evidence § 4-301 (11th ed. 1995 & Supp. 2008) ("Direct evidence is that which tends to establish one or more of the principal facts in issue without the intervention of evidence of any other fact.").
8. *See id.* ("Evidence is direct and positive when the very facts in dispute are communicated by those who have the actual knowledge of them by means of their senses." (citing *Pease v. Smith*, 61 N.Y. 477. 484-85 (1875))).
9. *See id.* ("Circumstantial (sometimes called 'indirect') evidence is direct evidence of a collateral fact, that is, of a fact other than a fact in issue, from which, either alone or with other collateral facts, the fact in issue may be inferred.").
10. *See id.*
11. *Id.* An example of direct evidence is the testimony of a witness who saw drops of water falling from the sky toward earth. An example of indirect evidence is the testimony of a witness who saw people walking around with umbrellas and saw puddles on the ground. A proponent of either form of evidence will argue in summation that it was raining.
12. *See* SEYMOUR H. MOSKOWITZ ET AL., NEW YORK TRIAL GUIDE § 20.20(1) (Mathew Bender 1990) ("Marking the document for identification places it in the control of the court and provides a definite and convenient method of identifying and referring to it.").
13. *See id.* § 20.20(2).
14. *See id.*
15. *See* BARKER & ALEXANDER, *supra* note 3, § 6:74.
16. *See generally* BARKER & ALEXANDER, *supra* note 3, § 6:74.
17. *See id.* ("Such voir dire may be requested when the opponent wishes to challenge the foundation for the introduction (or exclusion) of evidence.").
18. *See* FARRELL, *supra* note 7, § 6–403 (explaining that on cross-examination "[t]he credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation…" (quoting FED. R. EVID. 608(a))).
19. EPSTEIN & WEISSENBERGER, *supra* note 6, ch.6-11.
20. *Id.* ch. 6-11, § 1.
21. MARGARET CAMMER, HOW TO PREPARE FOR A LANDLORD-TENANT TRIAL 2 (2006), *available at* http://www.courts.state.ny.us/publications/L&TPamphlet.pdf.
22. *See Spigel v. Gonzalez*, 6 Misc. 3d 564, 566, 789 N.Y.S.2d 840, 842 (N.Y. Civ. Ct. Kings County 2004). Only Richmond County has a combined trial and resolution part: Part Y. All other counties distinguish between resolution and trial parts.
23. *Id.*
24. *Id.*
25. *See id.*
26. FARRELL, *supra* note 7, § 1-201.
27. BLACK'S LAW DICTIONARY 1038-1039 (8th ed. 2004).
28. *Id.* at 1039.
29. *See* N.Y.C.R.R. tit. 22, ch. II, § 208.43 (2009) (LEXIS, NY Library, NYADMIN File) (explaining that the Housing Part can be presided over by a judge of the Civil Court or, in the discretion of the administrative judge, by a housing judge and that the decision of a judge or housing judge shall set forth conclusions of fact).
30. EPSTEIN & WEISSENBERGER, *supra* note 6, ch. 4-1.
31. *Id.* ch. 4-1, § 1.
32. *See id.*
33. *Id.*
34. BLACK'S LAW DICTIONARY 598 (8th ed. 2004).
35. BARKER & ALEXANDER, *supra* note 3, § 3:5, 3:18; MICHAEL M. MARTIN ET AL., NEW YORK EVIDENCE HANDBOOK § 8.3.3.8 (2d ed. 2003 & Supp. 2009); *see Powers v. Powers*, 86 N.Y.2d 63, 69, 653 N.E.2d 1154, 1158, 629 N.Y.S.2d 984, 988 (1995) (holding that respondent failed to meet his burden of going forward to rebut his ex-wife's prima facie case).
36. Warren A. Estis & William J. Robbins, *Evidentiary Issues in Landlord-Tenant Proceedings* 9 (2005) (unpublished outline for Summer Jud. Sem., on file with the N.Y. St. Jud. Inst.).
37. FREEDMAN, *supra* note 2, § 9:20 ("Demonstrative evidence is a visual aid for use in the courtroom.").
38. *Id.*
39. *See id. But see* FARRELL, *supra* note 7, § 4-201 ("Real evidence has also been called demonstrative evidence and evidence by perception or autoptic evidence.").
40. *See* FREEDMAN, *supra* note 2, § 9:20 ("Charts, diagrams, maps, models, videotapes, and exhibitions of an actual physical condition are examples of demonstrative evidence. Photographs can also be considered demonstrative evidence.").
41. *See id.* § 13:20.
42. *See generally* FERN A. FISHER, A LANDLORD'S GUIDE TO THE NEW YORK CITY HOUSING COURT 3–15 (2003), *available at* http://www.nycourts.gov/courts/nyc/housing/pdfs/Landlordbooklet.pdf (outlining the types of cases brought by tenants).
43. *See* 57 N.Y. JUR.2D *Evidence & Witnesses* § 163 (2009) (explaining that the plaintiff usually has the burden of proof, and they must prove a prima facie case).
44. *See* BLACK'S LAW DICTIONARY 1228 (8th ed. 2004) (defining prima facie case).
45. PAUL F. ROTHSTEIN ET AL., EVIDENCE IN A NUTSHELL: STATE AND FEDERAL RULES 47 (3d ed. West Publishing Co. 1997).
46. *See People v. Whipple*, 97 N.Y.2d 1, 8, 760 N.E.2d 337, 341, 734 N.Y.S.2d 549, 553 (2001) (holding that the trial court did not err in allowing the prosecution to reopen its case because of a missing element that was simple to prove and not seriously contested, and because the defendant was not unduly prejudiced by the reopening of the case).
47. ROTHSTEIN ET AL., *supra* note 45, at 619.
48. *See* FARRELL, *supra* note 7, § 3-211 ("Generally, if the defendant raises an affirmative defense,… the burden rests on the defendant to prove the defense.").
49. *See id.* § 6-504 ("[T]he rebuttal case encompasses…evidence tending to disprove some fact sought to be proved by the adversary….").
50. *See Whitlatch v. Fid. & Cas. Co. of N.Y.*, 149 N.Y. 45, 50, 43 N.E. 405, 406 (1896)

(explaining that the fact that a defendant has alleged an affirmative defense does not in any way relieve the plaintiff from the burden of proof and a prima facia case; "the burden of proof as to any fact, in its proper sense, arises and rests upon the party upon whom it was at the outset, and is not shifted by the course of the trial").

51. EPSTEIN & WEISSENBERGER, *supra* note 6, ch.1-2.

52. *See People v. Santos*, 86 N.Y.2d 869, 870-71, 658 N.E.2d 1041, 1042 635 N.Y.S.2d 168, 169 (1995) (explaining that "a specific objection is required to preserve sufficiency of the evidence claims for appellate review" in both jury and non-jury trials.).

53. EPSTEIN & WEISSENBERGER, *supra* note 6, ch.1-2.

54. *See* FARRELL, *supra* note 7, § 1-202.

55. *See* EDITH L. FISCH, FISCH ON NEW YORK EVIDENCE § 90 (2d ed. 1977) (1959).

56. *See* CAMMER, *supra* note 21, at 2; FISCH, *supra* note 55, § 108.

57. *See* CPLR 4518(c) (McKinney Supp. 2009); FISCH, *supra* note 55, § 109.

58. *See* FARRELL, *supra* note 6, § 8-1101 (explaining that the "authentication of certain public records may be accomplished by certification as provided in CPLR 4518(c)" but that "[w]here a public officer is required or authorized, by special provision of law, to make a certificate or an affidavit to a fact ascertained, or an act performed, by him in the course of his official duty, and to file or deposit it in a public office of the state, the certificate or affidavit so filed or deposited is prima facie evidence of the facts stated." (quoting CPLR 4518(c))).

59. ROTHSTEIN ET AL., *supra* note 45, at 619.

60. Estis & Robbins, *supra* note 36, at 7.

61. CPLR 4518(c), 4538 (McKinney 2007) ("Certification of the acknowledgement or proof of a writing, except a will, in the manner prescribed by law for taking and certifying the acknowledgement or proof of a conveyance of real property within the state is prima facie evidence that it was executed by the person who purported to do so."), *see Barcher v. Radovich*, 183 A.D.2d 689, 690-91, 583 N.Y.S.2d 276, 278 (2d Dep't 1992) (finding that Department of Housing Preservation and Development certified records are admissible as business records in tenant's suit for breach of warranty of habitability and that no separate authenticating witness is necessary to prove that documents are business records kept in the regular course of business); *see also Story v. Brady*, 114 A.D.2d 1026, 1026, 495 N.Y.S.2d 464, 465 (2d Dep't 1985) (finding that copy of separation agreement is admissible to prove terms of agreement, when husband acknowledged he executed separation agreement, the original of which was on file with the county clerk's office).

62. CAMMER, *supra* note 21, at 2; *see also Brown v. SMR Gateway 1, LLC*, 22 Misc. 3d 1139(A), 2009 WL 806792, at *3, 2009 N.Y. Slip Op. 50516(U) (Sup. Ct. Kings County 2009) (stating that "[a]uthentication of certain public records may be accomplished by certification as provided in CPLR § 4518(c).").

63. FREEDMAN, *supra* 2, § 11:30.

64. *Id.* (citing CPLR 2306, 2307, 4520, 4520).

65. GERALD LEBOVITS, HP PROCEEDINGS: A PRIMER, LEGAL UPDATE FOR JUDGES & COURT ATTORNEYS 69 (2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1299746 (last visited Oct. 10, 2009). For some Housing Court cases that allowed Internet resources into evidence, see *Schanzer v. Vendome*, No. 6065, 11 Misc. 3d 1061(A), 2006 WL 617978, at *3, Slip Op. 50339(U). (N.Y. Civ. Ct. New York County 2006) (Gerald Lebovits, J.) (stating that under MDL § 328 (3), the court has authority to access DOB's BIS website to find violations); *Goldman v. Rosen*, No. 083490, Misc. 3d 1020(A), 2005 WL 1796479, at *5, 2005 N.Y. Slip Op. 51206(U) (N.Y. Civ. Ct. N.Y. Co. 2005) (Gerald Lebovits, J.) (stating that the court can take judicial notice of DOB violations it can access by computer); *Glorius v. Siegel*, No. 76535, 5 Misc. 3d 1015(A), 2004 WL 2609413, at *4, Slip Op. 51378(U) (N.Y. Civ. Ct. New York County 2004) (Gerald Lebovits, J.) (explaining that the housing court can take judicial notice taken from public records).

66. *See* NYC Department of Buildings: Building Information Search, http://a810-bisweb.nyc.gov/bisweb/bispi00.jsp (last visited Oct. 10, 2009); Department of Housing, Preservation, and Development, Complaints, Violations and Registration Information, http://www.nyc.gov/html/hpd/html/home/home.shtml (last visited Oct. 10, 2009).

67. LEBOVITS, *supra* note 44, at 69-70; *see, e.g.*, *Hoya Saxa Inc. v. Gowan*, 149 Misc. 2d 191, 192, 571 N.Y.S.2d 179, 180 (1st Dep't 1991) (citing MDL § 328(3)) (holding that trial court erroneously refused to accept the computerized list of violations tenant proffered).

68. *See* CPLR 4522 (McKinney 2007).

69. *See id.*

70. New York City Housing Court, New York City Civil Courts Housing Part, http://nycourts.gov/courts/nyc/housing/subpoenas.shtml (last visited Oct. 10, 2009) (defining subpoena). *Compare* MARTIN ET AL., *supra* note 35, § 8.3.3.6 (noting that business records produced pursuant a subpoena under CPLR 3120 shall be accompanied by a certification).

71. *Id.*

72. BLACK'S LAW DICTIONARY 739 (8th ed. 2004).

73. Fisch, *supra* note 55, § 757 (predicating the prohibition against statements of an "extra judicial declarant, including those of the witness, when offered to prove the truth or falsity of the facts asserted." (citing *People v. Colascione*, 22 N.Y.2d 65, 238 N.E.2d 669, 291 N.Y.S. 2d 412 (1942))).

74. *See id.*

75. *See generally* MARTIN ET AL., *supra* note 35, § 8.3.

76. BLACK'S LAW DICTIONARY 212 (8th ed. 2004) (defining the business-records exception); *see* Fed. R. Evid. 803(6) (2009); *see also People v. Kennedy*, 68 N.Y.2d 569, 579, 503 N.E.2d 501, 507–08, 510 N.Y.S.2d 853, 859–60 (1986) (noting the requirements of a business record according to CPLR 4818).

77. MARTIN ET AL., *supra* note 35, § 8.3.3.6.

78. *See 1328 Broadway LLC v. E. Express Group, Inc.*, No. 112183 L & T 2002, 2003 WL 22250199, at *1 (N.Y. Civ. Ct. N.Y. County 2003) (explaining that business records, alone, are accepted as accurate upon good faith without the requirement that it needs to be authenticated by the person who actually enters it).

79. N.Y.S. Tech. L. § 302, *available at* http://www.oft.state.ny.us/policy/OFTEnablingLeg.htm ("'Electronic record' shall mean information, evidencing any act, transaction, occurrence, event, or other activity, produced or stored by electronic means and capable of being accurately reproduced in forms perceptible by human sensory capabilities."); *see* CPLR 4518(a) (McKinney Supp. 2009).

80. CPLR 4518(a). The tangible version of an electronic record offered into evidence can have been specifically produced for litigation purposes if the original data was at least in part for a purpose other than to prepare for litigation. Estis & Robbins, *supra* note 36, at 5-6 (citing MARTIN ET AL., *supra* note 35, § 8.3.3.6).

81. CPLR 4518(a).

82. Examples of cases in which rent breakdowns were accepted into evidence or requested by the court: *A & E Tiebout Realty, LLC v. Johnson*, No. L & T 53356, 23 Misc. 3d 1112(A), 2009 WL 1037741, at *1 (Civ. Ct. Bronx County April 17, 2009); *Classon Vill. LP v. Bethune*, No. 2006-805 K C, 15 Misc. 3d 139(A), 841 N.Y.S.2d 819, 2007 WL 1438731, *1 (Sup. Ct. App. T. 2d Dep't 2007*); Art Omi, Inc. v. Vallejos*, 15 Misc. 3d 870, 881, 832 N.Y.S.2d 915, 918 (Civ. Ct., N.Y. Co. 2007), *aff'd*, 21 Misc. 3d 129(A), 873 N.Y.S.2d 231 (Sup. Ct. App. T. 1st Dep't 2008).

83. CPLR 4518(a) (stating that "a true and accurate representation of such electronic record" is admissible).

84. *See People v. Kennedy*, 68 N.Y.2d 569, 579, 503 N.E.2d 501, 507, 510 N.Y.S.2d 853, 859 (1986) ("the business records exception grew out of considerations of necessity and trustworthiness . . . and the unusual degree of trustworthiness and reliability of such records.").

85. *See id.*

86. *See id.* at 579–80, 503 N.E.2d 501, 507–08, 510 N.Y.S.2d 853, 859–60.

87. *See* Lucy Billings, *Frequent Evidentiary Issues in Landlord-Tenant Proceedings* 2 (2005) (unpublished outline for Summer Jud. Sem., on file with the N.Y. St. Jud. Inst.). Cases in which a foundation for a business record was laid and the evidence was admissible because it also was authenticated: *Fanelli v. Lorenzo*, 187 A.D.2d 1004, 1005, 591 N.Y.S.2d 658, 660 (4th Dep't 1992) (stating that a letter written by a doctor was admitted because it was in the course of treating his patient); *Freeman v. Kirkland*, 184 A.D.2d 331, 332, 584 N.Y.S.2d 828, 830 (1st Dep't 1992) (allowing the complete medical file of a physician into evidence, where physician's testimony established that it related to the medical treatment). Cases in which a foundation for a business record was laid and the evidence was inadmissible because it was not authenticated: *People v. Michallow*, 201 A.D.2d 915, 916-17, 607 N.Y.S.2d 781, 783 (4th Dep't 1994) (holding that an insurance letter for car repairs was not sufficient evidence because it was not authenticated); *Wilson v. Bodian*, 130 A.D.2d 221, 233, 519 N.Y.S.2d 126, 134 (2d Dep't 1987) (holding that a portion of a business record should have been excluded because it was not a well known notation, and the appellants lacked the opportunity to test the fact of the statement).

88. Fed. R. Evid. 901(b).

89. Fed. R. Evid. 803(6), (7).

90. Ralph Yachnin, *The Business Record Rule—CPLR 4518(a) Worth Learning and Never Forgetting*, N.Y. L.J. May 30, 1995, at 1, col. 1.

91. Fed. R. Evid. 803(6); *see Carter v. Rivera*, 24 Misc. 3d 920, 925, 880 N.Y.S.2d 462, 467(N.Y. Sup. Ct. Kings County 2009) (indicating that material created specifically for litigation is not considered "systematic, routine, [or] day-by-day type of records" as required for the business record exception.); *cf Green v. DeMarco*, 11 Misc. 3d 451, 462, 812 N.Y.S.2d 772, 780, (N.Y. Sup. Ct. Monroe County 2005) ("'Only records prepared *solely* for the purpose of litigation' fall outside the scope of the hearsay exception" (citing *People v. Foster*, 27 N.Y.2d 47. 52, 3131 N.Y.S.2d 384, 261 N.E.2d 389 (1970))).

92. Martin et al., *supra* note 35, at § 8.3.3.6.

93. *Id.*; *Lodata v. Greyhawk N. Am LLC*, 39 A.D.3d 494, 834 N.Y.S.2d 239 (2d Dep't 2007) (holding that filing and retaining papers received from another business entity is insufficient to qualify as the receiving entity's business records).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*; Yachnin, *supra* note 90.

98. *E.g.*, *Johnson v. Lutz*, 253 N.Y.124, 127–28, 170 N.E. 517, 518 (1930) (holding that the purpose of the business record exception was not intended to apply to a police report of a bystander's account, because the officer who made the report was not present at the time of the accident, and the report was made from third person statements); *People v. Bayard*, 63 A.D.3d 482–83, 881 N.Y.S.2d 58, 60 (1st Dep't 2009) (holding that a police report based entirely on information provided by an unidentified officer was not reliable because it was unclear which witness or witnesses provided the underlying information or whether the report contained information received from two or three witnesses); *Noakes v. Rosa*, 54 A.D.3d 317, 862 N.Y.S.2d 573 (2d Dep't 2008) (finding that the police report should not have been admitted into evidence as a business-record exception to the hearsay rule because the statement in the report that the defendant "rear-ended" the plaintiff was from an unknown source); *Behrman v. Geratowski*, No. 109553, 2009 WL 158719, at *7, Slip Op. 51110(U) (Sup. Ct., N.Y. Co. May 11, 2009) (holding that uncertified police reports are inadmissible to indicate a party's liability if the police officer who prepared the report was not an eyewitness to the accident).

99. *See* Estis & Robbins, *supra* note 36; *see, e.g.*, *Tuscan Realty Corp. v. O'Neill*, 189 Misc. 2d 349, 350, 731 N.Y.S.2d 830 (Sup. Ct. App. T. 2d Dep't 2001).

100. *See, e.g.*, Billings, *supra* note 65, at 1.

101. *Id.* (citing *People v. Clark*, 95 N.Y.2d 773, 775, 731 N.E.2d 1105, 1105–06, 710 N.Y.S.2d 297, 297–98 (2000); *People v. Davis*, 58 N.Y.2d 1102, 1103, 449 N.E.2d 710, 462 N.Y.S.2d 816, 817 (1983); *People v. Cook*, 115 A.D.2d 240, 241, 496 N.Y.S.2d 175, 176 (4th Dep't 1985)).

102. FISCH, *supra* note 55, § 101.

103. *See* Fed. R. Evid. 901(b)(1).

104. *See* Fed. R. Evid. 901(b)(2).

105. *See* Fed. R. Evid. 901(b)(3).

106. *See* Fed. R. Evid. 901(b)(4).

107. *See* BILLINGS, *supra* note 87, at 4 (internal citations omitted).

108. *See* Fed. R. Evid. 901(b)(2).

109. *See* Fed. R. Evid. 901(b)(2), (3).

110. *See* Fed. R. Evid. 901(b)(8); FARRELL, *supra* note 7, § 3-124; *accord* FISCH, *supra* note 55, § 105.

111. FREEDMAN, *supra* note 2, § 12:10.

112. New York City Civil Court Housing Part, Tips for Your Day in Court, http://www.courts.state.ny.us/courts/nyc/housing/tips.shtml (last visited Oct. 10, 2009).

113. "To a large extent the determination of what constitutes the original of a telegram depends on the parties to the action." FISCH, *supra* note 55, § 86. The definition of "original" is broader in New York than in federal court. In New York, a duplicate made in the regular course of business is considered an original because it is sufficiently trustworthy. BAER, *supra* note 4, at 42 (citing CPLR 4539).

114. FREEDMAN, *supra* note 2, § 11:20; FISCH, *supra* note 55, § 81. New York courts have been reluctant "to indulge in technicalism in connection with proof of the contents of writings that are not genuinely disputed." *Id.* at § 97. As a consequence, the best-evidence rule is today more of a shaping principle. *Id.*

115. FREEDMAN, *supra* note 2, at § 11:20.

116. *See* Fed. R. Evid. 1003–08; *see generally* MARTIN ET AL., *supra* note 35, § 10.2; BARKER & ALEXANDER, *supra* note 3, § 10:3–:17.

117. CPLR 4539 (McKinney 2007); *see* MARTIN ET AL., *supra* note 35, § 10.2.1.

118. *See* FARRELL, *supra* note 7, §§ 10-202, 205 (noting that the sufficiency of the proof of loss is a question of fact); MARTIN ET AL., *supra* note 35, §§ 10.3.1, 10.3.3. *But see* Fed. R. Evid. 1003 (stating that the burden falls on the adversary to challenge the duplicate on the grounds that: (1) the it lacks authenticity, or (2) it would be unfair to admit the it into evidence).

119. *See id.* at § 10-202 to -203.

120. *See id.* at § 10-204 (stating that the degree of diligence is in proportion to the importance and value of the writing); MARTIN ET AL., *supra* note 35, § 10.3; Freedman, *supra* note 2, at § 11:20 (citing *Schozer v. William Penn Life Ins. Co. of N.Y.*, 84, N.Y.2d 639, 644 N.E.2d 1353, 620 N.Y.S.2d 797).

121. *See* CPLR 4539(a)–(b); *see also Schozer* at 644–46, 644 N.E.2d at1356, 620 N.Y.S.2d at 797−800; *Bell Atlantic Yellow Pages v. Havana Rio Enters.*, 184 Misc. 2d 863, 867, 710 N.Y.S.2d 751, 755 (New York Civ. Ct., N.Y. Co. 2000); *People v. Roach*, 226 A.D.2d 55, 60, 649 N.Y.S.2d 607, 610 (4th Dep't 1996) (allowing copies, rather than the original documentation of a breathalyzer's accuracy, into evidence because the copies were made in the regular course of business).

122. *See* CPLR 4539(a)–(b).

123. CPLR 4539(b).

124. *See Toho Bussan Kaisha, Ltd. v. Am. President Lines Ltd.*, 265 F.2d 418, 423 (2d Cir. 1959) (holding that it was photostats made especially for litigation were not within the statutory meaning of

"business records."); *Green v. DeMarco*, 11 Misc.3d 451, 462, 812 N.Y.S.2d 772, 780, (N.Y. Sup. Ct. Monroe County 2005).

125. *See* CPLR 4539(a).

126. FISCH, *supra* note 55, § 94 (citing *Hass v. Storner*, 21 Misc 661, 47 N.Y.S. 1100 (1897)).

127. *See* FERN A. FISHER, A TENANT'S GUIDE TO THE NEW YORK CITY HOUSING COURT 8–9, (Feb. 2006), *available at* http://www.nycourts.gov/courts/nyc/housing/pdfs/tenantsguide.pdf.

128. *See id.*

129. *See generally* FREEDMAN, *supra* note 2, at § 11:20 (citing N.Y. C.P.LR. 4539).

130. *Id.*

131. Estis & Robbins, *supra* note 36, at 6 (citing MARTIN ET AL., *supra* note 35, at § 8.3.3.6).

132. Adam Leitman Bailey & Colin E. Kaufman, *Harnessing the Internet: Must-know, Useful Web Sites for Real Estate Lawyers*, N.Y. L.J. Mar. 12, 2007, at 9, col. 2.

> The theory of admissibility rests on Multiple Dwelling Law § 328(3), CPLR 4518(a) and on New York State Technology Law §§ 305(3) and 306, which provide for the admissibility of authenticated electronic records and printouts in New York courts. The Federal Rules of Evidence § 1001(1) also indicates that a 'writing' includes electronic data.

Id. Cases in which Internet printouts and printed e-mails have been allowed into evidence: *Marro v. Nicholson*, No. 06-CV-6644, 2008 WL 699506 (E.D.N.Y. 2008); *United States. v. Reiner*, 468 F. Supp. 2d 393 (E.D.N.Y. 2006); *Varnelo v. Eastwind Transp. Ltd.*, No. 02-CV-2084, 2006 WL 1317026 (S.D.N.Y. 2006).

133. Randolph N. Jonakait et al., New York Evidentiary Foundations, 1-4 § L, M (2d ed. Lexis Law 1998).

134. *Id.*

135. *See e.g., Ochoa v. Walton Mgmt. LLC*, 19 No. 14191, Misc. 3d 1131(A), 2008 WL 1991486, N.Y. Slip Op. 50960(U) (Sup. Ct. Bronx County May 7, 2008) (allowing plaintiff to submit a photocopy of the defendant's photograph).

136. *See* CPLR 4539(a)–(b) (McKinney 2007).

137. *See* Martin et al., *supra* note 35, § 8.3.3.6 (citing *People v. Cratsley*, 86 N.Y.2d 81, 89, 629 N.Y.S.2d 992, 996 (1995).

138. *See* 23 C.J.S. Criminal Law § 1408 (2009); *see also People v. Clarke*, 286 A.D.2d 208, 209, 729 N.Y.S.2d 88, 89 (1st Dep't 2001) (suppressing photograph for lack of foundation because proponent offered no proof that co-defendant had ever seen it before the homicide. *See generally* FREEDMAN, *supra* note 5, § 10:10.

139. 23 C.J.S. *Criminal Law* § 1408.

140. *Id.*; *see* FREEDMAN, *supra* note 5, at § 10:10 (citing *Taylor v. N.Y.C. Transit Auth.*, 48 N.Y.2d 903, 424 N.Y.S.2d 888 (1979); *People v. Byrnes*, 33 N.Y.2d 343, 352 N.Y.S.2d 913 (1979)); *see also Kleveland v. United States*, 345 F.2d 134, 137 (2d Cir. 1965).

141. *See* FREEDMAN, *supra* note 5, at § 10:10.

142. *See* BARKER & ALEXANDER, *supra* note 3, § 11:9.

143. *See* 23 C.J.S. *Criminal Law* § 1408: BARKER & ALEXANDER, *supra* note 3, § 11:9.

144. *See* FREEDMAN, *supra* note 2, at § 13:30.

145. *See id.*

146. *See* BARKER & ALEXANDER, *supra* note 3, § 11:9; BLACK'S LAW DICTIONARY 1416 (8th ed. 2004) (defining silent–witness theory).

147. FARRELL, *supra* note 7, § 4-214 (citing *People v. Patterson*, 93 N.Y.2d 80, 84−85, 710 N.E.2d 665, 668, 688 N.Y.S.2d 101, 104 (1999)).

148. JONAKAIT ET AL., *supra* note 133, § I(4).

149. *See* BARKER & ALEXANDER, *supra* note 3, § 11:2; FARRELL, *supra* note 7, § 4-203.

150. *See* 23 C.J.S. *Criminal Law* § 1408; *see* FARRELL, *supra* note 7, § 4-203.

151. 23 C.J.S. *Criminal Law* § 1408.

152. James M. Campbell, Evidentiary Requirements for the Admission of Enhanced Digital Photographs, 74 DEF. COUNS. J. 12, 13 (Jan. 2007).

153. *Id.* at 13–14.

154. *Id*. at 21.

155. *See id.* at 21 (suggesting that as a "preliminary matter the proponent must be prepared to offer a witness capable of explaining in detail the process used to create the digital enhancement" pursuant to Fed. R. Evid. 901(b)(9) "Process or System." *State v. Swinton*, 847 A.2d 921, 939 (Conn. 2004)).

156. *Id*. at 17; accord FED. R. EVID. 901.

157. *See id.* at 18−20.

158. Estis & Robbins, *supra* note 36, at 1.

159. *Id.* at 3 (citing *City of N.Y. v. Prophete*, 144 Misc. 2d 391, 544 N.Y.S.2d 441 (N.Y. Civ. Ct., N.Y. Co. 1989)).

160. FARRELL, *supra* note 7, at § 4-214, at 86 (rev. 11th ed. Supp. 2008); JONAKAIT ET AL., *supra* note 133, § (I)(2), (4).

161. Estis & Robbins, *supra* note 36, at 1.

162. *Id.* at 1.

163. *See id.* at 2 (citing *People v. Jiminez*, N.Y. L.J., June 13, 2005, at 20, col. 1 (Sup. Ct., Bronx Co. 2005) ("[T]he best evidence rule precludes a witness from testifying to an altercation he observed on a surveillance videotape in the absence of the tape" because due to the nature of videotape footage the witness's testimony "would be no more than a summary of his interpretation of what he had seen on the tape and not a reliable and accurate portrayal of the original.").

164. *Id.* at 2.

165. CAMMER, *supra* note 21, at 2.

166. *Id.*

167. FREEDMAN, *supra* note 2, at 14-2; *see also* Baer, *supra* note 5, at 15.

168. FREEDMAN, *supra* note 2, at 14-2.

169. *Id.* at 16-5.

170. BAER, *supra* note 4, at § 702.

171. FREEDMAN, *supra* note 2, at 16-6; *see, e.g.*, *A-Tech Concrete v. Tilcon N.Y., Inc.*, 60 A.D.3d 603, 874 N.Y.S.2d 565 (2d Dep't 2009) (holding that the witness must demonstrate some personal knowledge of the scientific tests used in order to qualify for the professional-reliability exception to the hearsay rule); *Fraser v. 301-52 Townhouse Corp.*, 57 A.D.3d 416, 870 N.Y.S.2d 266 (1st Dep't 2008) (disallowing expert testimony because none of the medical literature in the record supported the expert's opinion).

172. *O'Brien v. Mbugua*, 49 A.D.3d 937, 938, 853 N.Y.S.2d 392, 394 (3d Dep't 2008).

173. FREEDMAN, *supra* note 2, at 16-2.

174. David M. Epstein & Glen Weissenberger, New York Evidence: 2001 Courtroom Manual, ch. 7-3, (2001); *See also* Epstein & Weissenberger, *supra* note 6, ch. 7-2, § 1.

175. *See generally* Freedman, *supra* note 2, at 16-2 (explaining the judicial discretion related to expert witness testimony).

176. *Id.* at 15-7 (citing CPLR 4514 and *Rodriguez v. N.Y.C. Housing Auth.*, 215 A.D.2d 362, 626 N.Y.S.2d 240 (2d Dep't 1995).

177. Epstein & Weissenberger, *supra* note 6, ch. 6-13, § 1 (quoting 1 McCormick on Evidence § 34).

178. *See* Epstein & Weissenberger, *supra* note 6, ch. 6-13, § 1; *See also* Epstein & Weissenberger, New York Evidence: 2001 Courtroom Manual, ch. 6-7, 152 (2001).

179. Freedman, *supra* note 2, at 15-7.

180. *Id.*

181. *See e.g., Letendre v. Hartford Acc. & Indem. Co.*, 21 N.Y.2d 518, 289 N.Y.S.2d 183, 236 N.E.2d 467 (1968) (holding that an extrajudicial declaration made by an employee should be admissible as affirmative evidence against the surety if the declaration is in writing and the declarant is available for cross-examination).

182. *See e.g., id.* at 524, 289 N.Y.S.2d at 188, 236 N.E.2d 470.

183. FARRELL, *supra* note 7, at 361.

184. *Id.* at 364−65.

185. *See id.* at 365.

186. *Id.* at 361.

187. FREEDMAN, *supra* note 2, at 15-9.

188. *Id.*

189. *Id.*

190. FARRELL, *supra* note 7, at 372.

191. FREEDMAN, *supra* note 2, at 15-10.

192. *Id.* at 15-9 to -10.

193. *See Mengoni v. Lorelli*, No. 570632/07, 2009 WL 1117483, 2009 N.Y. Slip Op. 50791(U) (Sup. Ct. App. T. 1st Dep't 2009) (per curium) (reversing trial judge who sustained tenant's objections on leading grounds because, in part, the landlord's leading questions "tend[ed] to carry the witness quickly to matters material to the issue").

194. *See* FREEDMAN, *supra* note 2, at 15-27.

195. *Id.*

196. *Id.* at 15-28.

197. *Id.*

198. *Id.*

199. *Id.*

200. The Dead Man's Statute is codified at CPLR 4519.

201. FISCH, *supra* note 55, at § 264.

202. *Id.*; Farrell, *supra* note 7, at § 6-121, at 235.

203. FISCH, *supra* note 55, at § 264. (Supp. 2008).

204. FARRELL, *supra* note 7, at § 5-101.

205. CPLR 4503 (McKinney 2007).

206. *Id.* § 4504.

207. *Id.* § 4508.

208. *Id.* § 4505.

209. *Id.* § 4502.

210. FARRELL, *supra* note 7, § 5-101.

211. *Id.* § 5-101 (Supp. 2008).

212. *In re Subpoena of Jane Doe*, 99 N.Y.2d 434, 442 n.3, 787 N.E.2d 618, 618 n.3, 757 N.Y.S.2d 507, 507 n.3 (2003).

213. EPSTEIN & WEISSENBERGER, *supra* note 6, ch. 3-1.

214. *See e.g.*, *300 W. 106th St. Corp. v. Rosenthal*, 9 Misc. 3d 1101(A), *5, 806 N.Y.S.2d 449, 2004 WL 3507103, *5 (N.Y. Civ. Ct. N.Y. County 2004), *aff'd*, 10 Misc. 3d 137(A), 814 N.Y.S.2d 565, 2005 WL 3555717 (Sup. Ct. App. T. 1st Dep't 2005).

215. FARRELL, *supra* note 7, § 5-102.

216. *See e.g.*, *Allen v. Rosenblatt*, 5 Misc. 3d 1032(A), *5, 799 N.Y.S.2d 158, 2004 WL 2963907, *5 (N.Y. Civ. Ct. N.Y. County 2004) (Lebovits, J.) (applying strong adverse inference against respondents who did not testify at trial for civil and criminal contempt for violating court order requiring them to effect repairs).

217. *Id.*

218. *See e.g.*, *855-79 L.L.C., v. Salas*, 40 A.D.3d 553, 556, 837 N.Y.S.2d 631, 634 (1st Dep't 2007) (reversing Appellate Term, which held that a negative inference was required when a tenant failed to testify at trial in drug-holdover case).

219. *See* EPSTEIN & WEISSENBERGER, *supra* note 6, ch. 4-4, § 1.

220. *See id.*

221. *See id.*

222. *Id.*

223. BAER, *supra* note 4, at § 702.

224. CPLR 3117 (McKinney 2005) (One exception arises if a witness is unavailable due to death or infirmity.).

225. *See* CPLR 2301 (McKinney Supp. 2009).

226. *Id.*

227. *Id.*

228. Ann B. Lesk, *Best Practices for Judges in the Settlement and Trial of Cases Involving Unrepresented Litigants in Housing Court*, N.Y. County Lawyer's Ass'n, (2008), www.nycla.org/siteFiles/Publications/Publications1166_1.pdf.

229. Paris Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating their Cases in New York City Housing Court*, 3 CARDOZO PUB. L. POLICY & ETHICS J. 659, 661 (2006).

230. John Sheldon & Peter Murray, *Rethinking the Rules of Evidentiary Admissibility in Non-jury Trials*, 86 JUDICATURE 227, 229 (2003), The New York State Unified Court System's Office of the Deputy Chief Administrative Judge for Justice Initiatives surveyed 3,303 pro se litigants appearing in the New York City Family Court and New York City Housing Court in 2003. The survey revealed that the majority of self-represented litigants have low incomes, feel that they cannot afford a lawyer for their case, do not consult with a lawyer, and have relatively low levels of formal education. *See* Office of the Deputy Chief Administrative Judge for Justice Initiatives, *Self-Represented Litigants: Characteristics, Needs, Services* (2005), http://www.courts.state.ny.us/reports/AJJI_SelfRep06.pdf.

231. Rebecca A. Albrecht et al., *Judicial Techniques for Cases Involving Self-Represented Litigants*, 42 JUDGES' JOURNAL 16, 16 (2003) (emphasis in the original).

232. *See generally* Baldacci, *supra* note 229, at 697–98; *see generally Best Practices*, *supra* note 228, at 1–2. Many scholars and practitioners advocate in the interest of justice that Housing Court judges adopt practices to relax the evidentiary restraints for pro se litigants while still maintaining impartiality in the courtroom. Baldacci, *supra* note 229, at 678. For examples of common accommodations regarding evidentiary rules, see, Office of the Deputy Chief Administrative Judge for Justice Initiatives, *Handling Cases Involving Self-Represented Litigants: A Bench Guide for New York Judges*, chs. 4-6 (2008) (on file with authors).

233. Baldacci, *supra* note 229, at 672 (explaining the rule is necessary because evidentiary rules often have the effect of silencing pro se litigants).

234. Lesk, *supra* note 228, at 9–10.

235. *Id.*

236. *Id.* at 5.

237. Baldacci, *supra* note 229, at 683; Paris R. Baldacci, *A Full and Fair Hearing: The Role of the ALJ in Assisting the Pro Se Litigant*, 27 J. NAT'L ASS'N OF ADMIN. L. JUDICIARY 448, 475–79 (2007).

238. *See Houghtaling v. Superior Ct.*, 17 Cal. App. 4th 1128, 1137, 21 Cal. Rptr. 2d 855, 860 (Cal. Dist. Ct. App. 4th 1993) ("In the case of inexperienced pro se litigants, it is better to err on the side of admitting an ore-heap of evidence in the belief that nuggets of truth may be found amidst the dross, rather than to confine the parties to presenting assayed and refined matter which qualifies as pure gold under the rules of evidence.").

239. Baldacci, *supra* note 229, at 681.

240. Lesk, *supra* note 228, at 10.

241. *Id.* at 11.

242. Albrecht et al., *supra* note 231, at 44.

243. CPLR 4518(c) (McKinney Supp. 2009) (A party who fails to object to the introduction of a document waives the authentication requirement).

244. Yachnin, *supra* note 90, at 12.

245. Sheldon & Murray, *supra* note 230, at 230 (quoting Fed. R. Evid. 103(a)).

Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, and an adjunct professor at St. John's University School of Law.

Julia Marter is a second-year student at Fordham University School of Law. The authors wrote this article for a New York State Judicial Institute seminar Judge Lebovits co-presented for Housing Court judges in July and August, 2009.

New York State Court of Appeals Defines Mutual Benefit Term in Commercial Lease and Extends Coverage for Additional Insureds

By L. Micha Ordway

On June 25, 2009, the New York State Court of Appeals decided *Kassis v. Ohio Casualty Insurance Co.*,[1] which clarified the definition of the term "mutual benefit" when used in the context of the insurance procurement provisions of a commercial lease ("Lease").[2] The court reversed a split decision of the New York State Appellate Division for the Fourth Department, which itself reversed the grant of summary judgment in favor of Kassis.[3]

Ostensibly, the *Kassis* decision represents a victory for landlords and / or tenants as similar "mutual benefit" language is commonly found in the insurance procurement provisions in commercial leases. Certainly, it is a significant victory for the Appellant, who was facing liability personally as a defendant in personal injury case. However, others should not derive too much comfort from Kassis' victory as the decision seemly depended largely on a particular peculiarity in the Ohio Casualty policy which is discussed below.[4]

The Facts

Joseph Kassis ("Kassis") and Kassis Superior Sign ("Superior Sign") commenced an action against the Ohio Casualty Insurance Company ("Ohio Casualty") seeking a judgment to declare that Ohio Casualty was obligated to defend and to indemnify them in relation to a personal injury action brought against Kassis, individually.[5] Superior Sign was the named insured to the policy with Ohio Casualty.[6] The issue before the court was, *inter alia*, whether Kassis was an additional insured pursuant to certain mutual benefit language contained in the Lease.[7]

Kassis had been sued by an employee of Superior Sign, who claimed that he slipped and fell on real property owned by Kassis and occupied by Superior Sign.[8] Kassis was the sole officer, director, and shareholder of Superior Sign, and had leased the property to Superior Sign pursuant to a written lease agreement ("Lease").

> *"Fortunately, two justices dissented, which allowed Kassis to appeal to the Court of Appeals as a right."*

Ohio Casualty initially disclaimed coverage, claiming that Holden was an employee of Superior Sign on the date of his alleged accident and that the Policy excluded coverage for employees.[9] After being informed that the employee exclusion was not a proper basis to disclaim coverage, Ohio Casualty disclaimed coverage on the basis that the alleged slip and fall occurred on a property not covered by the Policy. It continued to disclaim coverage on this basis even after Kassis demonstrated unequivocally that the accident occurred on the covered property.

Ohio Casualty subsequently disclaimed coverage on yet another basis claiming that the indemnification provisions in the Lease were limited to liability arising from the acts of Superior Sign and that the plaintiff had not alleged that Superior Sign was negligent.[10] Presumably, the plaintiff made no claim against Superior Sign because of the New York State Workers' Compensation Law.

Ohio Casualty's denials of coverage compelled Kassis and Superior Sign to commence a declaratory judgment action.[11] The Supreme Court subsequently granted Kassis' motion for summary judgment declaring that Ohio Casualty was obligated to defend Kassis.[12] Ohio Casualty appealed and the Fourth Department reversed in a split decision.[13] It found, incorrectly, that Kassis was not entitled to coverage as an additional insured under the policy.[14] Fortunately, two justices dissented, which allowed Kassis to appeal to the Court of Appeals as a right.[15]

The Decision

On appeal to the Court of Appeals, Kassis contended, as he had before the lower courts, that he was an additional insured pursuant to the Lease.[16] Specifically, the Lease required Superior Sign to procure general liability insurance in specific amounts for the "mutual benefit" of both Kassis as the landlord and Superior Sign as the tenant.[17] Kassis also argued that the "mutual benefit" language in the Lease satisfied the blanket additional insured provisions in the policy which required the insurer to extend coverage to any person or organization that the named insured (Superior Sign) was required to name as an additional insured pursuant who to a written agreement.[18] In essence, Kassis argued that the Lease's "mutual benefit" language required Superior Sign to name Kassis as an additional insured under the policy.[19]

In reversing the Fourth Department, the Court of Appeals agreed with Kassis and held that Kassis was an additional insured under the policy.[20] Specifically, the Court of Appeals determined that, under the Lease, "Superior Sign was obligated

to obtain coverage at specified monetary levels in the aggregate and per occurrence against 'claims for bodily injury, personal injury and property damage' 'at its sole cost and expense and for the mutual benefit of [Kassis] and [Superior Sign].'"[21] It further determined that "[t]he natural and intended meaning of the term 'mutual benefit' as used in this provision is that Kassis and Superior Sign are intended to enjoy the same level of coverage."[22] Since the Lease contemplated that Kassis and Superior Sign were to have the same coverage and since an additional insured is defined as one entitled to the same coverage as the named insured, the court held that the Lease's "mutual benefit" language required Superior Sign to name Kassis as an additional insured.[23]

"Since the Lease contemplated that Kassis and Superior Sign were to have the same coverage and since an additional insured is defined as one entitled to the same coverage as the named insured, the court held that the Lease's 'mutual benefit' language required Superior Sign to name Kassis as an additional insured."

Significant to the court's determination, and ostensibly to its interpretation of the term "mutual benefit," the Lease contained other insurance procurement provisions that recognized and accounted for circumstances when the interests of the parties were different.[24] The court noted that "where a disparity in coverage as between insureds was contemplated—i.e., where the insurance to be procured was not for the insureds' "mutual benefit"—it was expressly noted."[25]

Based upon the foregoing, the Court of Appeals held that Kassis was an additional insurer of the policy and was entitled to the same protection as the named insured.[26] As such, Ohio Casualty was obligated to defend Kassis and, if appropriate, to indemnify him in the underlying personal injury action.[27]

Important Lessons

Again, the *Kassis* decision is a victory for landlords and / or tenants. However, this decision depends largely on the certain terms of the Ohio Casualty policy that are not commonly found in other general liability policies. Unlike in most policies, the blanket additional insured provisions in the Ohio Casualty policy did not condition additional insured coverage on notice to the insurer or on issuance of a certificate of additional insurance. The absence of such requirements appears to have been significant in this case. The court specifically stated that:

> Notably, the insurance policy does not require Superior Sign to provide Ohio Casualty with notice of those persons or organizations Superior Sign is contractually required to name as an additional insured on the policy. Superior Sign is not required to complete and return to Ohio Casualty any notification forms listing those persons or organizations that it intended to name as additional insureds under the policy, nor does the policy require the submission of any additional insured certificates or the like.[28]

The unusual nature of this policy was also discussed at length during oral argument before the Court. Obviously, the fact that the policy allowed Superior Sign to unilaterally expand the scope of coverage to additional insureds without notice and without requiring a certificate of additional insurance was a significant factor in the outcome of this appeal. For these reasons, while this decision certainly clarifies the meaning of the term "mutual benefit" when used in the context of an insurance procurement clause, this decision may not provide salvation in every circumstance. The lesson to be learned from the *Kassis* case is that the insurance procurement provisions in commercial leases should substitute "mutual benefit" language for terminology that specifically requires a tenant to name the landlord as an additional insured. Further, to be absolutely assured of coverage, the additional insured must obtain a certificate of additional insurance. The safest approach is for parties to commercial leases to avoid having to rely upon the *Kassis* decision to obtain insurance coverage.

Endnotes

1. 12 N.Y.3d 595, 885 N.Y.S.2d 241, 913 N.E.2d 933, (2009).
2. *See id.* at 600, 885 N.Y.S.2d at 243 (defining "mutual benefit" to mean the same level of coverage enjoyed by both Kassis and Superior Sign).
3. *See id.* at 599, 885 N.Y.S.2d at 242 (providing that the supreme court held that Ohio Casualty was required to provide a defense, while the appellate division "found no obligation to defend or indemnify.").
4. *See id.* at 600, 885 N.Y.S.2d at 243 (defining "mutual benefit" in relation to the provision under the Lease).
5. *See id.* at 598, 885 N.Y.S.2d at 242.
6. *See id.* at 599–600, 885 N.Y.S.2d at 242 (explaining that lease created a general liability policy upon Superior Sign "at its sole cost and expense and for the mutual benefit of Landlord and Tenant").
7. *See Kassis v. Ohio Cas. Ins. Co.*, 12 N.Y.3d 595, 598, 600, 885 N.Y.S.2d 241, 243 (2009) (asserting that court only needed to decide "whether, under the lease, Superior Sign was required to ensure that Kassis received general liability insurance coverage equivalent to the coverage Superior Sign enjoyed").
8. *See Kassis v. Ohio Cas. Ins. Co.*, No. 2006–0025, 2007 WL 6774375 (Sup. Ct., Onondaga Co. 2007) (Trial Order).
9. *See id.* (explaining that initially "defendant disclaimed coverage based upon the employer's liability exclusion").
10. *See id.* (holding that "[d]efendant's duty to defend Kassis…[did] not depend upon proof of Superior Sign's negligence").

11. *See Kassis*, 12 N.Y.3d at 598, 885 N.Y.S.2d at 242.
12. *See id.* at 598–99, 885 N.Y.S.2d at 242.
13. *See Kassis v. Ohio Cas. Ins. Co.*, 51 A.D.3d 1366, 1368, 856 N.Y.S.2d 797, 799, 2008 WL 1914956 (4th Dep't 2008) (stating that Justice Smith and Justice Centra both dissented together).
14. *See Kassis*, 12 N.Y.3d at 601, 885 N.Y.S.2d at 243 (holding that Kassis was an additional insured).
15. *See Kassis*, 51 A.D.3d at 1368, 856 N.Y.S.2d at 799 (4th Dep't 2008) (indicating that the two justices that dissented include Justice Smith and Justice Centra).
16. *See Kassis*, 12 N.Y.3d at 599 n.1, 885 N.Y.S.2d at 242 n.1 (stating that "Kassis has standing to bring this action because a person claiming to be an insured under an insurance policy may bring a declaratory judgment action against an insurer").
17. *See id.* at 599, 885 N.Y.S.2d at 242 ("The lease further provide[d] that Superior Sign, 'at its sole cost and expense and for the mutual benefit of Landlord and Tenant, shall maintain a general liability policy…providing coverage against claims for bodily injury, personal injury and property damage' with specified aggregate and per occurrence coverage amounts.").
18. *See Kassis v. Ohio Cas. Ins. Co.*, 12 N.Y.3d 595, 599, 885 N.Y.S.2d 241, 242 (2009).
19. *See id.* at 598, 885 N.Y.S.2d at 241 (asking the court "to determine whether a landlord is an additional insured under an insurance policy obtained by his tenant such that the insurer is obligated to defend and indemnify the landlord in an underlying personal injury lawsuit").
20. *See id.* at 601, 885 N.Y.S.2d at 243.
21. *Id.* at 600, 885 N.Y.S.2d at 243.
22. *Id.* at 600, 885 N.Y.S.2d at 243.
23. *See id.* at 600–01, 885 N.Y.S.2d at 243 (resulting in Ohio Casualty's obligation "to defend . . . [Kassis] in the underlying personal injury action and, if appropriate, indemnify him as an additional insured in accordance with the policy").
24. *See Kassis v. Ohio Cas. Ins. Co.*, 12 N.Y.3d 595, 600, 885 N.Y.S.2d 241, 243 (2009) ("The intent and meaning of the term "mutual benefit" in the provision becomes clear when juxtaposed with the language of the other insurance provisions of the lease.").
25. *Id.* at 601, 885 N.Y.S.2d at 243.
26. *See id.* at 601, 885 N.Y.S.2d at 243.
27. *See id.* at 601, 885 N.Y.S.2d at 243.
28. *Id.* at 600, 885 N.Y.S.2d at 242–43.

L. Micha Ordway is a member of Green & Seifter, Attorneys, P.L.L.C. and of its recently formed Appellate Practice Group, and the lead appellate attorney of this case. He can be reached at (315) 701-6441 or lordway@gslaw.com.

New York State Bar Association
One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

RPLS REPORT #1 August 17, 2009
New York State Insurance Department
Proposed Draft Title Insurance Regulation

REAL PROPERTY LAW SECTION
Report on
New York State Insurance Department Title Insurance Regulation

The NYS Department of Insurance (NYSID) issued for comment a draft Title Insurance Regulation dated 05/26/09. The Real Property Law Section (RPLS) of the New York State Bar Association (NYSBA) generally supports regulation of the title insurance industry, including title insurance issuers and title insurance agents, but has the comments set forth below with respect to the draft Regulation.

The Section also is very much in favor of the concept of the licensing of title insurance agents, including non-attorney and attorney title insurance agents. It has issued a Memorandum on A.7127 / S.3550 NYSID Departmental Bill #98 so stating, but opposing the bill unless it is amended to: **(1)** exempt attorney title agents from the requirements of the proposed new sec. 2137 (sole source of business); **(2)** redefine the definition of "title insurance agent" (to eliminate closing or settling title); and **(3)** amend proposed revised sec. 6409 to clarify that an attorney title agent may reduce its legal fees to the consumer without such a reduction to be deemed an illegal rebate of a premium.

General Comments on the Draft Regulation:

1. Controlled Business. This Regulation contains a "controlled business" provision in section x.5 which is virtually identical to the provision in the NYSID's Title Agent Licensing Bill. In the context of attorneys, many attorney agents provide title insurance only to their own clients (or to their firm's own clients). This Regulation would prohibit this common practice because the attorney does not have "significant and multiple sources of business." Thus, this Regulation eliminates the ability of attorneys to "write title" for their clients. Such a result is detrimental to consumers because it eliminates the consumers ability to choose a way for obtaining title insurance which provides an efficient economy of scale. When an attorney represents a party to the transaction and provides the title insurance, some duplication of work in handling a real estate transaction is often eliminated. This practice, which is beneficial to consumers of title insurance, should not be eliminated. In this regard, it should be noted that the Real Estate Settlement Procedures Act (RESPA) specifically recognizes the common practice of

attorneys providing title insurance to their clients as an adjunct to their practice of law. 12 USC 2607(c).

Moreover, this Regulation will effectively remove people who are in the best position to provide title insurance: licensed New York State attorneys who have, among other things, graduated from law school, passed the bar exam, found to be of good moral character and fitness and are subject to regulation by the Appellate Division. Title insurance is not like casualty insurance, which insures against future risks. Title insurance is unique in that it insures the state of the title to real estate at a given moment in time and therefore its primary focus is on risk elimination. This risk elimination (which is entirely consistent with an attorney's duty in representing a buyer or mortgage lender) is accomplished by examining the records to real estate, producing a title report, clearing title exceptions and making judgments about the state of the title. This work is legal in nature - reviewing covenants, restrictions, easements, etc; determining the effect of death, heirship and intestacy on the devolution of title; examining foreclosure or bankruptcy proceedings to determine whether a referee, Trustee or Debtor in Possession can convey title free and clear of liens; reviewing surveys to determine whether an owner may be subject to a claim of adverse possession. By eliminating those most qualified to produce and issue title insurance, the NYSID's draft Regulation would be harmful to consumers of title insurance. For these reasons, the RPLS recommends the changes in section x.5 and x.1c shown on the attached mark-up. To better make the distinction between attorney title agents and non-attorney title agents, we have proposed a separate definition of "Attorney/title agent."

2. Closing or Settling Titles: Unauthorized Practice of Law. This draft Regulation in sections x.1(l)(3)(ii) and x.7 provides that a title insurance agent is in effect authorized to "close or settle titles." Thus, the NYSID is improperly trying to impose by regulation an exemption to the Judiciary Law, which allows only licensed attorneys to practice law. The Regulation is contrary to cases such as In re Garas 881 NYS 2d 744 (4th Dept 2009) and In re LaMattina, 51 A.D.3d 371, 858 N.Y.S.2d 148 (2d Dept. 2008) (attorney who aided non-attorneys to engage in unauthorized practice of law though corporation bearing his name that represented lending institutions at real estate closings was disbarred), which unambiguously confirm that only attorneys can represent parties in a real estate closings.

New York State Judiciary Law Section 484 plainly states (with some limited exceptions not applicable here) that only licensed attorneys are authorized to practice law in this state. Non-lawyers are explicitly prohibited in Section 484 from "preparing deeds, mortgages, assignments, discharges, leases or any other instruments affecting real estate." Since the New York State Legislature has clearly recognized that such conduct constitutes the practice of law, any suggestion that non-lawyers may conduct closings should be completely removed from the Regulation. Clearly, allowing a group of unregulated non-lawyers to conduct closings not only violates the Judiciary Law and applicable cases such as Garas and LaMattina, it is also something that is not in the public interest. See RPLS comments on section x.7 and x.1(l)(3)(ii) in the mark-up.

3. Effect on the Interest on Lawyer Account (IOLA) Fund. If this Regulation is promulgated, the controlled business provision will preclude the vast majority of attorney agents from continuing to provide title insurance to their clients. Attorney title agents who provide title insurance deposit significant sums of money into their attorney IOLA trust accounts. Typically attorney title agents collect all of the premiums, recording charges, mortgage tax, transfer taxes and any other items on the title bill and deposit them into their IOLA accounts. In addition, other types of escrows are held by attorney title agents in IOLA accounts for purposes of clearing exceptions post-closing. By eliminating the vast majority of attorney agents, the Regulation would result in significant sums of money no longer being held in IOLA accounts. This will have a detrimental effect on the ability of the IOLA Fund to provide legal services to the poor, which are significantly funded by the earnings on IOLA accounts. In 2008, the IOLA Fund provided almost $25,000,000 in legal assistance to non-profit civil legal aid organizations in New York, without any cost to the taxpayers or the State.

Furthermore, if title agents are authorized to act as settlement companies, loan proceeds (which are now typically wired to bank attorneys' IOLA accounts) will be taken out of the IOLA system. This would be a further substantial drain on the IOLA revenue if loan proceeds were no longer making their way to IOLA accounts.

4. Title Insurance Corporations Should Not be Required to Ensure That Attorney/Title Agents comply with NYSBA Opinions.

NYSBA opinions are issued by its Committee on Professional Ethics. They are advisory in nature and do not have the force of law or regulation. They are issued only to attorneys concerning their own proposed conduct. Disciplining of attorneys is done by the Grievance Committees and the Appellate Divisions of the various Judicial Departments which treat NYSBA opinions as advisory but give them deference. It is entirely inappropriate to require title insurance corporations to enforce NYSBA opinions. The provision in section x.0(d) should be deleted.

This provision in the Regulation appears to be a repetition of an argument by some non-attorney title agents that attorney title agents are violating their own ethics opinions by acting as title agents for their own clients. That argument is clearly false. NYSBA Opinion 576 states that an attorney can, after disclosure to the client of the potential conflict of interest and consent by the client, act as a title agent, examining counsel, attorney closer or approved attorney for a title insurance corporation.[1] See Wechsler, *The Real Estate Lawyer and the Title Insurance Policy Ethics Status Report*, 36 N.Y. Real Property Law Journal 13 (Summer 2008). We view that argument as merely an attempt to indirectly eliminate attorney title agents as competition for non-attorney title agents.

[1] This report does not address issues in circumstances where the attorney representing the purchasers has an ownership interest in the title abstract company (which is a separate and distinct legal entity) writing the insurance policy.

Attorneys have traditionally searched titles and given title opinions to their clients. With the coming of title insurance, many have generally shifted their role to acting as attorney title agents under the guidance given by Opinion 576. It is not in the public interest of consumers to prevent attorneys, directly or indirectly, from continuing to have a role in searching titles for their clients.

5. Audits by Title Insurance Corporations. Title insurance corporations are not equipped or licensed to conduct "audits" of financial records of title insurance agents, as proposed in section x.2(c)(1). This violates Education Law Sections 7401 et seq., which require one to have a CPA license to issue an opinion on the financial condition of another.

6. Premium Rates. We have deleted the last sentence in section x.8 because we do not believe that the proposed limit on losses to not less than 50% of the premium is appropriate. The proposal seems to misunderstand the expenses that are covered by the premium. Most expenses go for searching title, reviewing title exceptions and clearing up exceptions. Because that work is ordinarily done so well, losses on title insurance are relatively small. That is what distinguishes title insurance from other kinds of insurance. Any reduction in the premiums would impair the ability to search and resolve title questions. We leave it to the underwriters to fully explain this objection.

7. Lack of Statutory Authority of NYSID to Issue This Regulation.

NYSID's statutory authority to promulgate regulations is limited in scope. As a result, NYSID has crafted this Regulation as requirements for the underwriters to impose on the agents. In the absence of an agency licensing bill, we do not believe that NYSID has the statutory authority to regulate agents. Thus, this Regulation exceeds the scope of NYSID's rulemaking authority and is therefore void. This is especially true with respect to trying to create a mechanism to regulate the ethics of attorneys, for which NYSID clearly has no authority.

The primary authority to prescribe regulations is given to the Superintendent of Insurance by §301 of the Insurance Law which provides as follows:

> "§301. Regulations by superintendent
>
> The superintendent shall have the power to prescribe and from time to time withdraw or amend, in writing, regulations, not inconsistent with the provisions of the chapter:
>
> (a) governing the duties assigned to the members of the staff of the department;
>
> (b) effectuating any power, given to him under the provisions of this chapter to prescribe forms or otherwise make regulations;
>
> (c) interpreting the provisions of this chapter; and

(d) governing the procedures to be followed in the practice of the department."

The proposed Regulation clearly does not fall within the ambit of subsections (a) and (d). Inasmuch as there is no statutory authority for the licensing of title agents, they could not fall under subsection (c). There is also no power given to the Superintendent to regulate in this area and therefore (b) cannot be applicable either.

Notwithstanding the foregoing concerns, the RPLS has prepared a line-by-line mark up of the Regulation that accompanies this report to address specific issues in the Regulation. This markup is, nevertheless, subject to the overarching objection that NYSID lacks legal authority to promulgate the Regulation.

Based on the foregoing report, the Real Property Law Section of the New York State Bar Association opposes the promulgation of the proposed regulation unless it is amended to address the concerns outlined herein.

Report prepared by the RPLS Task Force on NYSID Title Insurance Regulations on August 7, 2009:

Karl B. Holtzschue, Chair
Gerald G. Antetomaso
Thomas J. Hall
Joshua Stein
Benjamin Weinstock
Robert M. Zinman

The Task Force acknowledges with thanks receiving comments on the Regulation from: Thomas Hall, Joshua Stein, Benjamin Weinstock, Peter Coffey, Samuel Tilton, Karl Holtzschue, George Haggerty, Vincent Gallo, Marvin Bagwell, Robert Zinman William P. Johnson, Melvin Mitzner, Gerald Antetomaso and Harry Meyer.

Revisions proposed by NYSBA RPLS 08/07/09
Please also refer to accompanying RPLS Report

DRAFT 05/26/09

INSURANCE DEPARTMENT OF THE STATE OF NEW YORK
PROPOSED REGULATION NO. _____
11 NYCRR

TITLE INSURANCE REGULATION

I, Eric R. Dinallo, Superintendent of Insurance of the State of New York, pursuant to the authority granted by Sections 201, 301, 308, 309, 2303, 2306, 2313, 2314, 2316, 2324, 2402, 2403, 2405, 2406, 2502, 6401, 6402, 6403, 6404, 6405, 6406, 6407, 6408, 6409, 6410 and 6411 of the Insurance Law, do hereby promulgate Part ____of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Regulation #____), to take effect 90 days after publication in the State Register, to read as follows:

§ x.0 Preamble and Purpose

(a) Title insurance protects property owners and other persons lawfully interested in real property and chattels real against potential losses that could result from a claim or dispute regarding title in such property. It is illegal for title insurance corporations to deviate from their filed and approved rates. It is also illegal for title insurance corporations, or ay person or entity acting for or on behalf of title insurance corporations, including title insurance agents, to give, among other things, illegal rebates or inducements.

(b) As a result of numerous complaints and inquiries, the New York Attorney General and the Superintendent of Insurance conducted a joint investigation of the title insurance industry in New York. The investigation confirmed that there are industry-wide abuses and illegal practices involving rebates, inducements, gifts and the charging of illegal fees, by various title insurance corporations and title insurance agents. These illegal practices and abuses have disadvantaged New York real estate consumers by, among other things, driving up insurance costs and perpetuating conflicts of interest.

(c) In order to protect the general public and to address and prevent the aforementioned abuses and illegal practices in the title insurance industry, especially those that involve title insurance agents, who do not have to be licensed to act as agents in New York, the rules and standards in this Part are hereby adopted.

(d) The purpose of this Part is to provide the State of New York with robust and effective regulation and supervision of the title insurance industry, including title insurance corporations authorized to write title insurance in this State, and title insurance agents appointed to perform title insurance business on behalf of those title insurance corporations. In addition to the applicable sections of the Insurance Law, and this Part, title insurance corporations must comply with the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. **§** 2607, as amended and Regulation X, 24 C.F.R. **§** 3500 et seq., and all other governing laws, and must ensure that their appointed title insurance agents also comply with those provisions~~. Further, the title insurance corporation shall ensure that its appointed title insurance agents who are also New York licensed attorneys, comply with the ethical rules and requirements as set forth in applicable New York State Bar Association opinions.~~ .

§ x.1 Definitions

For purposes of this Part, the following definitions shall apply:

a ~~a.~~ "Abstract of title" or "abstract" means a written history, synopsis or summary of the recorded instruments and filings affecting the title to real property.

aa. "Attorney / title agent" means an attorney licensed to practice law in New York who acts as a title insurance agent or examining counsel.

b. "Control," including the terms "controlling", "controlled by", and "under common control with", means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract (except a commercial contract for goods or non-management services) or otherwise; but no person shall be deemed to control another person solely reason of his being an

officer or director of such other person. Control shall be presumed to exist if any person directly or indirectly owns, controls or holds with the power to vote ~~ten percent or~~ more than 50% of the voting securities of any other person.

c. "Controlled business" or "Affiliated business" means any portion of a title insurance corporation's or title insurance agent's business written in this State that is referred to it by a referrer of title insurance business or by an associate of the referrer, where the referrer or associate or both, have a financial or other beneficial interest in the title insurance agent; provided, however, that controlled business shall not include the issuance of any title insurance by an attorney / title agent who provides title insurance to his or her own clients or to clients of his or her own law firm.

d. "Discretionary fees" means fees for services that are both (a) not mandatory for the issuance of a title insurance policy, and ~~which are~~(b) passed on to applicants for insurance by title insurance corporations and title insurance agents.

e. "Escrow" means written instruments, money, or other items deposited by one party with a depository or escrow agent, for delivery to another party upon the performance of a specified condition or the happening of a certain event.

f. "Escrow, settlement or closing fee" means the consideration for supervising or handling the actual execution, delivery or recording of transfer and lien documents and for disbursing funds, and any related closing and escrow services (whether before or after the closing).

g. "Financial interest" means a direct or indirect interest, legal or beneficial, where the holder of such interest is or will be entitled to any portion of the profits of the entity in which the interest is held.

~~h.~~ h. "Security" or "security deposit" means funds or other property received by the title insurance agent or title insurance corporation as collateral to secure an indemnitor's obligation under an indemnity agreement pursuant to which a title insurance corporation is granted a perfected security interest in the collateral in exchange for agreeing to provide coverage in a title insurance report, or title insurance policy.

i. "Significant and multiple sources of business" means title insurance ~~business~~ premiums that flows into a title insurance agency from two or more non-affiliate, non-controlled or non-owner business sources that constitute at least 70% of the total amount of title insurance business transacted in the preceding calendar year of the title insurance agency. An attorney / title agent who provides title insurance to his or her own clients or his or her own law firm shall be deemed to have significant and multiple sources of business.

j. "Person" means an individual, partnership, limited liability company, firm, association, cooperative, corporation, joint-stock company, trust, any similar entity or any combination of the foregoing acting in concert.

~~k.~~ "Referral" ~~or "Referrer"~~ means the directing or exercising of any power or influence over the placement of title insurance business by a person, whether or not the consent or approval of any other person is sought or obtained with respect to the referral.

l. "Referrer" means a person that makes a referral.

m. ~~l.~~ "Title insurance agent" or "title insurance agency' means any authorized or acknowledged agent of a title insurance corporation, ~~and any sub-agent or other representative of such an agent, who:~~ who:

~~(1)~~ acts as an agent in the solicitation, negotiation for, or sale of, a title insurance policy, excluding such persons acting only in the capacity of sales personnel;

(2) issues commitments to insure or reports of title based upon a search or an examination of title; or

(3) determines insurability in accordance with underwriting rules and standards prescribed by the title insurance corporation and who, in substantial part, on behalf of the title insurance corporation;

(i) collects premiums and other funds on behalf of a title insurance corporation in connection with the issuance of a title insurance policy;

(ii) ~~closes or settles title, including the clearance of~~ clears title exceptions in connection with the issuance of a title insurance policy; or

(iii) marks up a title insurance ~~commitment~~ report to bind a title insurance corporation or prepares and issues a title insurance policy on behalf of a title insurance corporation.

(4) Such term shall not include any regular salaried officer or employee of an authorized title insurance corporation or of a title insurance agent, who does not receive a commission or other compensation for services, which commission or other compensation is directly dependent upon the amount of title insurance business done.

m. ~~m.~~ "Title insurance business" means activities described in section 6403 of the Insurance Law.

n. ~~n.~~ "Title insurance policy" has the meaning specified in section 6401(b) of the Insurance Law.

o. ~~o.~~ "Title insurance report" means a preliminary report, ~~commitment or binder~~ issued prior to the issuance of a title insurance policy ~~containing the terms, conditions, exceptions and any other matters incorporated by reference under which the title insurer is willing to issue its~~ setting forth those liens, encumbrances and other matters that the title insurance company will except from coverage under the title insurance policy and identifying such additional information, documents and undertakings that the title insurance company requires as a condition to the issuance of a title insurance policy.

p. ~~p.~~ "Title insurance corporation" has the meaning specified in section 6401(a) of the Insurance Law.

q. ~~q.~~ "Underwrite" means the authority to accept or reject risk on behalf of the title insurance corporation.

§ x.2 Duties of Title Insurance Corporations Utilizing the Services of Title Insurance Agents

(a) No title insurance corporation shall accept business from a title insurance agent except pursuant to a written contract in accordance with section x.3 of this Part, between the title insurance corporation and the title insurance agent that sets forth the responsibilities of each party and, where both parties share responsibility for a particular function, specifies the division of responsibilities.

(b) For each title insurance agent under contract with the title insurance corporation, a title insurance corporation shall have on file ~~an annual independent financial statement, in a form acceptable to the Superintendent, showing a true and accurate representation of the condition of each~~ a written authorization to obtain a credit report for such title insurance agent~~.~~
not less frequently than once per annum.

(c) (1) The title insurance corporation shall, at least annually, conduct an on-site review of the underwriting and escrow practices of the title insurance agent which shall include a review of the agent's policy blank inventory and processing operations, ~~audits~~ and an inspection of the operating, checking. payroll and escrow accounts of its title insurance agent ~~in order to compare the list of persons ordering title insurance to the list of persons who received payments or gifts from the title insurance agent, and~~ to ensure that all payments made are in accordance with the provisions of the Insurance Law and this Part; but nothing contained herein shall require an attorney / title agent to turn over any such information that would constitute a breach of confidentiality with respect to any clients (other than clients who obtained title insurance) of the attorney or his or her law firm. Attorney / title agents must procure as part of their retainer letters the clients' written consent for the title insurance corporation to conduct such an on-site review of the records.

(2) Every title insurance corporation shall notify the Superintendent of any suspected fraudulent activity in accordance with Article 4 of the Insurance Law, and any improper or illegal payments, material discrepancies or any other violations of law found during or as a result of such on-site review, and shall take steps to investigate such fraudulent activities, improper or illegal payments, material discrepancies or other violations of law and, where appropriate, take immediate steps to terminate the title insurance agent's contract subject to the approval of the Superintendent. In the case of attorney / title agents, notification shall also be given to the Grievance Committee of the Judicial Department in which the attorney / title agent maintains its principal office.

(d) A title insurance corporation that appoints a title insurance agent to act for or on behalf of it in this State~~, either directly, or through sub-agents of the title insurance agent~~ shall, within 30 days of the appointment of a title insurance agent, complete and file written notification of such appointment with the Superintendent on a form prescribed by the Superintendent. An amended form shall be filed within 30 days alter any change, including termination of appointment. A title insurance corporation shall at all times maintain on its public website a list of all currently appointed title insurance agents, effective beginning six months after this Regulation becomes effective. The title insurance corporation shall fully update that list at least once each calendar month, except that if the title insurance corporation revokes a title insurance agent's authority to act for the title insurance corporation, the title insurance corporation shall remove such agent's name from the list within one business day.

(e) The title insurance corporation may suspend the title insurance agent's underwriting duties during the pendency of any dispute regarding the cause of termination, but shall discontinue the title insurance agent's underwriting duties upon

termination of the title insurance agent's appointment. Nothing in this subsection is intended to relieve the title insurance agent or title insurance corporation of any other contractual obligation. A title insurance corporation shall immediately notify the Superintendent of the termination of a title insurance agent and the reasons therefor. , and shall remove the name of such terminated title insurance agent from the title insurance corporation's website list of appointed title insurance agents. Any such termination and removal shall not limit any liability of the title insurance corporation that accrued before the date of such termination and removal.

(f) The title insurance corporation shall maintain an inventory of all policies issued through each title insurance agent.

(g) The title insurance corporation shall establish, and incorporate into the contract with its title insurance agents, its underwriting guidelines and its prohibition on a title insurance agent's authority to settle claims.

(h) No title insurance corporation shall appoint to more than 20% of its board of directors, any of its title insurance agents or any officer, director, employee, controlling shareholder, or any partner, member or manager of any such title insurance agents. This subdivision shall not apply to relationships governed by articles 15 or 16 of the Insurance Law.

§ x.3 Required Provisions for Contract between Title Insurance Corporation and Title Insurance Agent

Every contract, as provided for in section x.2 of this Part, shall provide at a minimum that:

(a) the title insurance agent will render accounts to the title insurance corporation detailing all transactions and shall remit all funds due under the contract to the title insurance corporation on a regular basis as requited by the title insurance corporation, but no less frequently than 60 days after receipt of funds.

(b) if the title insurance corporation does not receive remittance of all funds due premiums due the title insurance corporation under the contract, except for amounts in dispute, within the timeframe specified in subsection (a) of this section, the title insurance corporation must promptly advise the title insurance agent of such failure to remit, and if the title insurance agent fails to take immediate steps to remit the funds, the title insurance corporation shall promptly notify the Superintendent of such failure to remit and the title insurance agent must be immediately terminated.

(c) all funds collected for the account of a title insurance corporation by a title insurance agent shall be held in a fiduciary capacity in the same manner as provided for in section 20.3 of this Title (Regulation 29) with respect to insurance agents. This fiduciary account shall be used for all funds received by the title insurance agent in such capacity. An attorney / title agent shall be in compliance with this section x.3 by depositing such funds in an attorney IOLA or other attorney trust account or accounts for this purpose.

(d) (1) separate records of business written remittance and escrows by the title insurance agent shall be maintained for each title insurance corporation with which the title insurance agent has a contract;

(2) the title insurance corporation shall have access to and a right to copy all accounts and records (including machine-readable data) related to its business in a firm usable to the title insurance corporation;

(3) the Superintendent shall have access to all books, bank accounts and records (including machine-readable data) of the title insurance corporation and the title insurance agent in a form usable to the Superintendent. With respect to attorney / title agents, such access shall be limited to clients purchasing title insurance. Attorney / title agents shall procure as part of their retainer letters the clients' written consent for the Superintendent to obtain such access. The Superintendent shall not have access to any records affecting the clients of an attorney / title agent who have not so consented; and

(4) such records shall be retained in accordance with Part 243 of this Title (Regulation 152) and this Part.

(e) the contract may not be assigned in whole or in part by the title insurance agent without the expressed written consent of the title insurance corporation.

(f) the title insurance agent will follow appropriate insurer underwriting guidelines, relating to:

(1) the basis of the rates to be charged;

(2) commission or fee schedules;

(3) the types of risks that may be written;

(4) maximum limits of liability;

(5) territorial limitations;

(6) title searches and examinations; and

(7) applicable exclusions.

(g) the title insurance agent shall not:

(1) bind reinsurance or retrocessions on behalf of the title insurance corporation;

(2) permit any director, officer, controlling shareholder, employee, partner, member or manager of the title insurance agent to serve on the title insurance corporation's board of directors in violation of section x.2(h) of this Regulation. This subdivision shall not apply to relationships governed by articles 15 or 16 of the Insurance Law;

(3) jointly employ an individual who is employed with the title insurance corporation unless the title insurance corporation and the title insurance agent are under common control as defined herein;

(4) collect any payment from a reinsurer or commit the title insurance corporation to any claim settlement with a reinsurer without prior approval of the title insurance corporation. If prior approval is given, a report must be promptly forwarded to the title insurance corporation; or

(5) settle title insurance claims on behalf of the title insurance corporation.

(h) the specific terms of the title insurance agent's compensation shall be clearly set forth in the contract.

(i) every title insurance agent is required~~, at the time of the closing~~ to sign a certification attesting that: [Note, title insurance agents do not normally attend the closing, the title closers attend the closing]

(1) the insured has paid the title insurance agent only the premium for the title policy in accordance with the insurer's filed rates, and charges for services performed in connection with the issuance of the title insurance policy, in accordance with the title insurance ~~corporations~~ corporation's established guidelines and fee schedule;

(2) the insured has not paid any additional charges of any kind to the title insurance agent, including but not limited to the payment of a cash tip~~s at the closing~~ except as permitted in this Regulation and in the Title Insurance Rate Service Association, Inc. Rate Manual approved by the Superintendent;

(3) where the title insurance agent performs additional services required by the lender or other party, which are not necessary services performed in connection with the issuance of the title insurance policy, in advance of the closing date the title insurance agent has provided clear written notice to the insured, that such additional services are not performed in connection with the issuance of the title insurance policy~~; and~~, separately stating any municipal fees and service charges;

(4) the title insurance agent has provided clear written notice to the insured to the insured's attorney in advance of the closing date that issuance of the title insurance policy is not dependent upon the title insurance agent performing such additional services; and

(5) the title insurance agent, if not licensed to practice law, has not performed any services which would constitute the practice of law.

(j) every title insurance agent must maintain an inventory of all policies issued through the title insurance agent on behalf of the title insurance corporation.

(k) the title insurance agent shall maintain at all times an insurance policy, in an amount to be agreed upon between the title insurance company and the title insurance agent, designed to make the title insurance corporation whole in the event of professional negligence or omission on the part of such title insurance agent or, in the case of intentional fraud by the title insurance agent, a surety bond or other acceptable evidence of financial responsibility. The Lawyers' Fund for Client Protection of the State of New York shall be deemed acceptable financial responsibility for attorney/title insurance agents. The insurance policy shall provide for a deductible ~~of no less than $10,000.00,~~ in an amount to be agreed upon between the title insurance company and the title insurance agent, applicable per occurrence for claims resulting from the title insurance agent's negligent acts or omissions. The title insurance corporation shall not reimburse or otherwise offset any amount of the deductible, nor shall the title insurance corporation indemnify the title insurance agent for any expenditures resulting from the title insurance agent's ~~negligent or fraudulent acts or omissions.~~ fraudulent acts. [Title insurance corporations should be permitted to assume the liability for the negligent acts and omissions of their title insurance agents, but not for their fraudulent conduct.]

(l) the title insurance corporation may terminate the contract upon written notice to the title insurance agent under the following circumstances:

(1) fraud, material misrepresentation, insolvency, appointment of a receiver or conservator or bankruptcy;

(2) material breach of any provision of the contract or any provision of this Part or of the Insurance Law; or

(3) notice of termination has been provided in accordance with contract termination requirements**.**

(m) once the title insurance corporation serves a notice of termination upon the title insurance agent, the title insurance corporation will immediately notify the Superintendent of such termination and the reasons therefor, and remove such title insurance agent from the list of title insurance agents on the title insurance corporation's website.

(n) the title insurance corporation may suspend the title insurance agent's underwriting duties during the pendency of any dispute regarding the cause of termination, but shall discontinue the title insurance agent's underwriting duties upon termination of the title insurance agent's appointment, and that nothing in this subsection is intended to relieve the title insurance agent or title insurance corporation of any other contractual obligation.

§ x.4 Disclosures to Policyholders

(a) When ~~making an offer to issue~~ issuing a title insurance report for the purposes of issuing an owner's title insurance policy covering the initial sale or resale of residential property, the title insurance corporation or its appointed title insurance agent shall furnish a title insurance report to the purchaser ~~and~~or the purchaser's ~~representative~~ attorney (including an attorney / title agent) at least five days prior to the scheduled date of closing. If the title insurance report cannot be delivered at least five days prior to closing, the title insurance corporation shall document or require documentation of the reasons for the delay~~. The~~, unless such requirement is waived in writing by the lender and / or purchaser, or the attorney for lender and / or purchaser. The title insurance report furnished to the purchaser ~~and~~or its ~~representative~~ attorney shall conspicuously display the following statement, or a statement containing substantially similar language, on the first page in bold type:

PLEASE READ THE EXCEPTIONS AND THE TERMS SHOWN OR REFERRED TO HEREIN CAREFULLY. THE EXCEPTIONS ARE MEANT TO PROVIDE YOU WITH NOTICE OF MATTERS, WHICH MAY NOT BE COVERED UNDER THE TERMS OF THE TITLE INSURANCE POLICY, AND SHOULD BE CAREFULLY CONSIDERED.

THIS TITLE INSURANCE REPORT IS NOT A TITLE INSURANCE POLICY ~~AND MAY NOT LIST ALL LIENS, DEFECTS, AND ENCUMBRANCES AFFECTING TITLE TO THE PROPERTY.~~UNTIL DULY ENDORSED AT CLOSING.

(b) Where a lender's title insurance policy is issued and no owner's title insurance policy has been requested, a title insurance corporation shall be responsible for ensuring that its appointed title insurance agent provides a written notice on a form ~~acceptable to~~ prepared by the Superintendent, to the purchaser at the time the ~~commitment~~ title insurance report is prepared, which shall explain:

(1) that a lender's title insurance policy protects the mortgage-lender, and that the title insurance policy does not provide title insurance protection to the purchaser as the owner of the property being purchased;

(2) what a title policy insures against and what possible exposures exist for the purchaser that could be insured against through the purchase of an owner's title insurance policy; and

(3) that the purchaser may obtain an owner's title insurance policy protecting the property owner at a specified cost, or the approximate cost if the proposed coverages or amount of insurance is not then known.

(c) Every title insurance corporation shall require that a copy of such notice, signed by the purchaser, is retained in the relevant title insurance agent's underwriting file in accordance with the requirements in Part 243 of this Title (Regulation 152) and this Part.

§ x.5 Affiliated/Controlled Business Arrangements

(a) A title insurance corporation shall ensure that its authorized title insurance agents provide to the title insurance corporation a record and report of: the title insurance agent's owners; the title insurance agent's ownership interests in other persons or businesses; and material transactions between the parties.

(b) A title insurance corporation shall require, initially and whenever there is a change, that its appointed title insurance agents file reports with the title insurance corporation setting forth the names and addresses of those persons, if any, who have a direct or indirect financial or other beneficial interest in the title insurance agent, and who the title insurance agent

knows or has reason to believe:

(1) engages in the business of buying or selling any interest in real property; and

(2) acts as a broker, agent, mortgage lender, mortgage banker, mortgage broker, or an agent, representative or attorney of a person who leases, buys or sells any interest in real property, or who lends or borrows money secured by an interest in real property.

(c) The title insurance corporation shall ensure that any person who holds any direct or indirect financial or other beneficial interest in, or is under common control with, or under control by, such title insurance corporation or the title insurance agent shall not make a referral of title insurance business to such title insurance corporation or title insurance agent unless it discloses to the party being referred, in clear, concise and conspicuous language:

(1) that the person has a financial or other beneficial interest in the title insurance agent or title insurance corporation;

(2) an estimate of the cost of the services of the title insurance corporation or title insurance agent, including, without limitation, the title insurance premiums, fees and other charges (separately stating filing fees and service charges) and a statement that these costs are typically set by statute or regulation and do not materially vary among different vendors;

(3) that the party being referred is not required to use the title insurance corporation or title insurance agent to which the party is being referred;

(4) that the person is not the sole source of business for the title insurance corporation or title insurance agent, and the title insurance corporation or title insurance agent has significant and multiple sources of business, provided however that this section x.5 shall not be applicable to an attorney at law or law firm that is acting as an attorney / title agent for his, her or its own client(s);

(5) that any money or other thing of value paid by the title insurance agent or title insurance corporation to the person is based on the person's financial or other beneficial interest in, or common control with, the title insurance corporation or title insurance agent and is not related to the amount of title insurance business the person refers to the title insurance corporation or title insurance agent; and that the payment of such money or other thing of value does not violate section two thousand three hundred twenty-four or six thousand four hundred nine of the Insurance Law; and

(6) that the person is not required to produce a specified amount of title business.

§ x.6 Rebates, Inducements and Fees

(a) Every title insurance corporation shall establish policies and procedures that will ensure that its appointed title insurance agents are in full compliance with the provisions of the Insurance Law addressing rebates and inducements, including articles 23 and 64 of Insurance Law, and this Part.

(b) Every title insurance corporation shall ensure that all fees, including discretionary fees, when charged in connection with the issuance of a title insurance policy, shall be reasonably based on the actual cost for the services provided or cost incurred. All title insurance fees charged shall be listed on the closing statement or title bill along with any other separately identifiable service charge, in accordance with the title insurance corporation's fee schedule. The title insurance corporation shall ensure that fees charged by its appointed title insurance agent shall ~~not be greater than the fees charged for the same services by the title insurance corporation~~ be reasonable.

(c) Every title insurance corporation shall, on its website, make its premium rates publicly available and accessible in a manner that permits a policyholder or applicant to independently determine the applicable premium by providing specified information and receiving an automatically generated premium quote by providing specified pieces of information and receiving an automatically generated premium quote, immediately displayed online and available to be forwarded by email if desired, all at no charge and with no requirement for the viewer to register, identify itself, or provide a password.

(d) The title insurance corporation shall require that every title insurance agent sign a certification as provided for in section x.3(i).

(e) The title insurance corporation shall ensure that all entertainment-related events, including but not limited to parties, trips, gifts and charitable contributions that are hosted or disbursed by title insurance corporations or its appointed title insurance agents, and the expenses therefrom: (1) comply with applicable provisions of the federal Internal Revenue Code and Regulations; and (2) do not violate the rebating and inducement provisions, or any other provisions of the Insurance Law and this title. All such expenses by the title insurance corporation must be included as applicable expenses in the title

insurance corporation's annual statement as required in Part 105 of this Title (Regulation 30). Every title insurance corporation shall be responsible for retaining a complete list of attendees at all entertainment-related events hosted by the title insurance corporation and by its appointed title insurance agents, and a record of the amount of expenses incurred, in accordance with the requirements in Part 243 of this Title (Regulation 152) and this Part.

§ x.7 Conditions for ~~Providing Escrow, Closing, or Settlement Services, and~~ Maintaining Escrow and Security Deposit Accounts

~~Every title insurance corporation may operate as an escrow, security, settlement or closing agent and shall be responsible for ensuring that its title insurance agents that operate as an escrow, security, settlement or closing agent, comply with applicable sections of the New York Banking Law and the following requirements:~~

(a) All funds deposited with the title insurance agent in connection with an escrow~~, settlement, closing~~ or security deposit shall be submitted for collection to or deposited in a separate fiduciary trust account or accounts, or in the case of any attorney / title agent to a separate attorney IOLA or other attorney trust account or accounts in compliance with Rule 1.15 of the New York Rules of Professional Conduct, (22 NYCRR Part 1200) in a qualified financial institution ~~no later than the close of the next business day~~ promptly after receipt of such funds provided that:

(1) the funds shall be the property of the person or persons entitled to them under the provisions of the escrow, ~~settlement,~~ security deposit ~~or closing~~ agreement and shall be segregated for each depository by escrow~~, settlement,~~ or security deposit ~~or closing~~ in the records of the title insurance agent in a manner that permits the funds to be identified on an individual basis: and

(2) the funds shall be applied only in accordance with the terms of the individual instructions or agreements under which the funds were accepted and the title insurance corporation shall be responsible to ensure such application.

(b) Every title insurance corporation shall ensure that funds held in an escrow account are disbursed only pursuant to a written instruction or agreement specifying how and to whom such funds may be disbursed.

(c) Every title insurance corporation shall ensure that funds held in a security deposit account be disbursed only pursuant to a written agreement specifying:

(1) what actions shall be taken to satisfy obligations under the agreement; and

(2) the duties of the title insurance agent with respect to disposition of the funds held, including a requirement to maintain evidence of the disposition of the title exception before any balance may be paid over to the depositing party or his or her designee.

(d) Every title insurance corporation shall ensure that any interest received on funds deposited in connection with any escrow~~, settlement,~~ or security deposit ~~or closing~~ are paid, net of administrative costs, to the depositing party, unless the instructions for the funds or a governing statute (including any IOLA statute or regulations that apply pursuant to Rule 1.15 of the New York Rules of Professional Conduct (22 NYCRR Part 1200)) provides otherwise.

(e) Every title insurance corporation shall be responsible for ensuring that disbursements from an escrow~~, settlement or closing~~ account are only made if deposits in amounts at least equal to the disbursement have first been made directly relating to the transaction disbursed against and if the deposits are in one of the following forms:

(1) cash;

(2) wire transfers such that the funds are unconditionally received by the title insurance agent or the agent's depository;

(3) checks, drafts, negotiable orders of withdrawal, money orders and any other item that has been finally paid before any disbursements;

(4) a depository check. Including a certified check ~~governed~~ the proceeds of which are required to be made available by the provisions of the Federal Expedited Funds Availablity Act. 12 U.S.C. § 4001, et seq. (i.e., if any required hold period has expired); or

(5) credit transfers through the Automated Clearing House (ACH), which have been deemed available by the by the depository institution receiving the credits. The credits must conform the operating rules set forth by the National Automated Clearing House Association (NACHA).

(f) If the title insurance agent is appointed by two or more title insurance corporations and maintains fiduciary trust accounts in connection with ~~providing escrow, closing or settlement services~~holding escrows or security deposits, every title insurance corporation shall ensure that it has direct online access to the accounts of its title insurance agent (with no need for cooperation by such title insurance agent) and any or all of the supporting account information, in order to ascertain the safety and security of the funds held by the title insurance agent. With respect to attorney/title agents, such access shall be limited to clients purchasing title insurance. The title insurance corporation shall be responsible for ensuring that its title insurance agent return all excess or unused escrow funds, or escheats such funds to the State in accordance with New York Abandoned Property Law, or, if the agent is an attorney/title agent, provides for the disposition of the funds in accordance with rules applicable to attorney IOLA or attorney trust accounts.

(g) An attorney/title agent shall be in compliance with this section x.7 by depositing such funds in an attorney IOLA or other attorney trust account or accounts pursuant to Rule 1.15 of the New York Rules of Professional Conduct (22 NYCRR Part 1200) for this purpose.

(h) Upon request, a title insurance corporation may issue a letter to a prospective insured or its attorney, confirming and acknowledging such corporation's responsibilities regarding its title insurance agent under this section x.7.

§ x.8 Premium Rates

Pursuant to articles 23 and 64 of the Insurance Law, every title insurance corporation or rate service organization filing rates for title insurance shall include in its rate filing with the Superintendent the appropriate rate formula upon which its rates are based, including provisions for expenses, losses and profit. ~~In connection with rate filings and commissions, every title insurance corporation shall ensure that the provision for losses included in such rate formula shall not be less than 50% of the premium.~~

LEGISLATIVE UPDATE:
Expanded Regulation of Mortgage Loan Originators: Updating Article 12-E

By Andrew Braid

Article 12-E, a new regulatory scheme for Mortgage Loan Originators (MLOs) effective January 1, 2008, was the New York Legislature's attempt at intervention once the flaws in the mortgage market became apparent. Other states responded in similar fashion to New York, enacting their own versions of mortgage-regulation legislation. Meanwhile, there was increasing recognition that the system of mortgage lending and securitization was of national concern. This brought a push for national legislation, resulting in the "S.A.F.E. Mortgage Licensing Act" (SAFE).[1] S.A.F.E. imposed a minimum nation-wide standard for states' regulation of MLOs and authorized the Department of Housing and Urban Development to impose its own system on any state that did not meet the requirements of S.A.F.E.[2] S.A.F.E.'s design, encouraging states to adopt their own regulation as opposed to imposing a national system, reflects the general consensus that the financial system is better off having "multiple oversight agencies rather than one monolith."[3]

This past summer, on July 11, 2009, the Legislature repealed the 2008 version of Article 12-E and enacted a new version of the legislation to comply with S.A.F.E.'s requirements. The standards for MLO "registration"[4] under the new statute are materially different in four major respects. The new legislation (1) expands the role of the newly created Nationwide Mortgage Licensing System and Registry (NMLSR),[5] (2) requires more stringent background checks for MLO applicants,[6] (3) imposes more stringent standards for pre-licensing[7] and continuing education[8] and a new pre-licensing testing requirement,[9] and (4) requires each MLO to post a surety bond corresponding to the dollar amount of loans it originated.[10] Borrowing much of its language directly from S.A.F.E., the new Article 12-E improves the clarity of defined terms[11] and eliminates some cross-referencing. Other provisions remain substantially similar but now appear in different sections of the statute.

NMLSR Plays a Large Role in State Regulation, from Registration to Education

Created by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators, NMLSR was launched in the beginning of 2008 to meet states' demands for a national system of tracking MLOs. Under the 2008 legislation, New York began to use the NMLSR as the initial step in gathering information about applicants during the authorization process.[12] Expanding upon this role, the new statute expressly establishes the NMLSR as the organization in charge of approving and reviewing education courses[13] and the agent for distributing criminal and non-criminal background information on applicants.[14] The new Article 12-E also requires that each licensee register and maintain a unique NMLSR identification number with the.[15] MLOs are required to display this identifier on "all residential mortgage loan application forms, solicitations [and] advertisements, including business cards and websites."[16]

Background Checks

Because of the fear that mortgage officers that had been disbarred or disciplined in one state could simply move across state lines, background checks were stressed as a major element in S.A.F.E.[17] New York had already incorporated several of these elements into the 2008 version of Article 12-E.[18] The new legislation, corresponding almost verbatim to S.A.F.E., greatly simplifies the wording of these statutes and elevates standards. While under the prior version of Article 12-E, a finding of felonious conduct or prior revocation of a license gave the superintendent *discretion* to withhold authorization,[19] the new version of Article 12-E *requires* that the superintendent withhold a license from such an applicant. The new legislation requires that the superintendent withhold a license if he finds any felonious conduct within the last seven years, or any felonious conduct, regardless of when it occurred, if that conduct "involved an act of fraud, dishonesty, or a breach of trust, or money laundering."[20]

Education Requirements Are Modified and Expanded

In order to comply with S.A.F.E., the pre-licensing and continuing education requirements have been substantially modified by the new version of Article 12-E. The prior version of Article 12-E required that MLOs complete eighteen hours of education courses within the five years prior to, or one year subsequent to, approval of an application for authorization.[21] It also required eighteen hours of continuing education courses every two years for the next eight years, and, thereafter, scaled back the education requirement to eight hours of education every four years.[22] The old legislation specified neither a method of approval for courses nor any particular curriculum.[23] In addition to specifying a curriculum,[24] the new statute increases the hours requirements for both pre-licensing and continuing education, requires that all courses be

approved by NMLSR,[25] and requires that MLO applicants pass a test based upon the pre-licensing curriculum.

Requirements for pre-license education and testing requirements are specified in sections 599-f and 599-g, respectively. Unlike the old law, which allowed the MLO to complete education requirements after receiving his license, the new law requires the MLO applicant to complete twenty hours of education and pass a pre-licensing exam *prior* to receiving a license. The new law includes minimum hours requirements for courses in ethics, lending standards, and federal and New York State banking law and regulations. The statute provides that the written licensing exam will cover these areas[26] and also specifies that the applicant attain the minimum competency by answering seventy-five percent of the test questions correctly.[27]

The continuing education requirements for MLO license holders are enumerated in section 599-j. They are much more stringent than the previous requirements, as they now require eleven hours annually of education courses beginning the year after licensing,[28] and, unlike the prior legislation, do not scale back with increasing experience of the MLO licensee.

Surety Bond Requirement

An entirely new section, requiring a surety bond, appears in Section 599-k. The rules proposed by the Banking Department specify a scale for the amount of the bond that increases as the dollar amount of the loans originated by the MLO increase.[29] They also grant the superintendent discretion to require that a bond of a greater amount be posted "in the reasonable judgment of the Superintended" if the nature of the MLO's business requires "additional protection for consumers."[30]

The Big Picture

Overall the new Article 12-E exhibits a much more comprehensive approach to regulating the mortgage industry. Many of the changes could not have occurred without the national movement for reform, which brought about the creating of the NMLSR and a national standard for minimum regulation requirements. For instance, the NMLSR's national system for background checking solves one of the major concerns that brought about the crisis, namely that mortgage lenders, having been barred on account of fraudulent or criminal practices in one state, could move to a different state.[31]

While fraudulent conduct certainly did not help the situation, MLOs engaged in many types of non-fraudulent conduct that also substantially contributed to the mortgage crisis. MLOs sold loans with non-amortizing "teaser" rates, balloon payments, and zero-down financing and without appropriate documentation of borrowers' assets or income and with teaser rates to entice. The New York statute still does not address any of these individual commercial practices of MLOs, now recognized as fundamentally de-stabilizing the mortgage system. However, the Governor's Subprime Law of 2008 did significantly increase a mortgage broker's responsibilities to his or her clients. That law requires a mortgage broker to act in the borrower's interest, act in good faith, disclose any compensation that inures to the broker, and to work diligently to present borrowers with a range of loan products appropriate to the borrower.[32] With Section 590-b in effect, Article 12-E requires that that the applicant initially demonstrate fitness in order to obtain a license[33] and grants the superintendent expanded power to regulate MLOs. Evidencing this expanded power, the superintendent's proposed regulations prohibit an MLO from "[e]ngag[ing] in any transaction, practice or course of business that is not in good faith or does not constitute fair dealing,"[34] and allow the superintendent to take disciplinary action whenever an MLO fails "to perform his or her duties in an honest, fair and reasonable manner."[35]

In order to smooth the switch to the heightened requirements, the Banking Department has proposed a transition period for MLOs who are already registered or currently undergoing the registration process. This plan is outlined in the proposed update to Part 420 of the Superintendent's Regulations.[36]

Endnotes

1. Pub. L. 110-289, Div. A, Tit. V, §§ 5101–5116, 12 U.S.C. §§ 5101-5116 (2008).
2. *Id.*, § 5107.
3. Statement from New York Superintendent of Banks and Oversight Panel Member Richard H. Neiman, Sept. 10, 2009 (*available at* http://www.banking.state.ny.us/pr090910.htm).
4. The prior version of Article 12-E called this process "authorization." N.Y. Banking Law § 599-c (McKinney 2008) (emphasis added) ("No person shall…. engage in mortgage loan originating without first being *authorized* by the superintendent….").
5. L. 2009 ch. 123, § 599-d (McKinney); *see generally* NMLSR Registry website, http://www.stateregulatoryregistry.org/NMLS.
6. L. 2009 ch. 123, § 599-e(1)(a)–(c).
7. *Id.*, §§ 599-e(1)(d), 599-f.
8. *Id.*, § 599-j.
9. *Id.*, §§ 599-e(1)(e), 599-g.
10. *Id.*, §§ 599-e(1)(f), 599-k.
11. *Compare* N.Y. Banking Law § 599-b(1) (McKinney 2008) *with* L. 2009 ch. 123, § 599-b(7) (McKinney) (definition of Mortgage Loan Originator).
12. *See* "New Law Requiring Mortgage Loan Originators to be Authorized by New York State Banking Department Takes Effect on Jan. 1, 2008," Dec. 19, 2007 (*available at* http://www.banking.state.ny.us/pr071219.htm).
13. L. 2009 ch. 123, §§ 599-f(2) (pre-licensing education), 599-j(2) (continuing education for licensees) (McKinney).
14. *Id.*, § 599-d(7), (8).
15. *Id.*, § 599-c(1).
16. *Id.*, § 599-p.
17. Pub. L. 110-289, Div. A, Tit. V, §§ 5104(a), (b), 12 U.S.C. § 5104 (2008).
18. *See* N.Y. Banking Law § 599-c(2), (3) (McKinney 2008).
19. *Id.*, § 599-c(3)(a).
20. L. 2009 ch. 123, § 599-e(1)(b) (McKinney).
21. N.Y. Banking Law, § 599-d(1) (McKinney 2008).
22. *Id.*, § 599-d(3), (4).

23. Though absent from the statute, there was a requirement under the Banking Department Rules, Part 420, that providers of education courses and the courses themselves be approved by the superintendent. *See* Superintendent's Regulations, Ch. III.B. § 420.12(b), (d) (updated April 16, 2008) (*available at* http://www.banking.state.ny.us/legal/rgmb420a.htm).

24. L. 2009 ch. 123, §§ 599-f(1) (pre-licensing education), 599-j(1) (continuing education) (McKinney).

25. *Id.*, §§ 599-f(2) (pre-licensing education), 599-j(2) (continuing education). One benefit to the national NMLSR approval of education courses is reciprocity of granting education credits. *See id.*, §§ 599-j(7).

26. L. 2009 ch. 123, § 599-g(2).

27. *Id.*, § 599-g(4).

28. *Id.*, § 599-g(1); *see also* § 599-g(5).

29. *Superintendent's Regulations (Proposed)*, Ch. III.B. § 420.15(b) (updated August 27, 2009) (*available at* http://www.banking.state.ny.us/legal/rgmb420.htm). The adoption of the revised Part 420 is suspended while the Banking Department seeks comments on the draft amendments.

30. *Id.*, § 420.15(d).

31. See Richard B. Schmitt, "FBI Saw Threat of Mortgage Crisis," LOS ANGELES TIMES, Aug. 25, 2008 (*available at* http://articles.latimes.com/2008/aug/25/business/fi-mortgagefraud25).

32. N.Y. Banking Law 590-b(1) (McKinney 2008).

33. L. 2009 ch. 123, § 599-c(1)(e) (McKinney) ("[T]he applicant [must] demonstrate[] financial responsibility, character, and general fitness such as to command the confidence of the community and to warrant a determination that the MLO will operate honestly, fairly and efficiently within the purposes of this article.").

34. *Regulations*, *supra* note 29, § 420.20(a)(6) (stating one of nine specific patterns of conduct prohibited under § 420.20(a)).

35. *Regulations*, *supra* note 29, § 420.21(h)(6).

36. *Regulations*, *supra* note 29, § 420.04(c).

Andrew Braid is a third year law student at St. John's University School of Law. He is the Associate Managing Editor of the Student Editorial Board of the *N.Y. Real Property Law Journal*. He is a J.D. candidate for June 2010.

BERGMAN ON MORTGAGE FORECLOSURES:
Statute of Limitations Sinks Lender—Again

By Bruce J. Bergman

There is this scary glitch in New York law in the realm of statute of limitations which presents substantial peril to mortgagees. A recent cases emphasizes yet again how true this is. [*Secured Equities Investments v. McFarland,* 300 A.D.2d 1137, 753 N.Y.S.2d 264 (4th Dept. 2002)].

Because the underlying concept may be counterintuitive for some, we begin with a quick basic review of the statute of limitations formula. This is also necessary because mortgagees would typically be incredulous that the applicable six year statute of limitations would ever play a role in a foreclosure because mortgage holders are not in the habit of doing nothing for six years while the clock ticks away. That is why it is so surprising.

In any event, here's how to understand the point. Suppose a mortgage originates today and the first payment is due in a month. No installments are ever paid. The lender or servicer does absolutely nothing (bizarre though that is) except to awaken six years and one day after that first payment was due. At that moment it begins a foreclosure. Although by then that very first overdue installment could not be collected in any lawsuit or in a foreclosure, the remainder of all sums due—all being within six years—*are* collectible. Hence, in such a scenario the statute of limitations presents virtually no problem.

What happens if after the first month's default the mortgagee accelerates the balance? (Put aside the typical need to first send a 30-day cure letter and the fact that it would be so unusual to accelerate after a mere month.) If after acceleration the mortgagee did nothing for six years and a day, then the *entire* balance

of the mortgage would be barred by the statute of limitations and therefore uncollectible. Because it would be highly unlikely that any mortgage holder would accelerate and then do nothing for six years, this hardly seems to be a perilous situation.

"Mortgage holders would like to believe that if the foreclosure action goes away, so too does the acceleration—but that is precisely what courts have repeatedly said is not the case—all to the obvious and repeated detriment of foreclosing plaintiffs."

But now let's turn to the usual case where after a certain number of months after default, the lender accelerates and promptly initiates a mortgage foreclosure action. Starting that action *stops* the statute of limitations from running and if the case proceeds to a conclusion, the statute of limitations never becomes an issue. The problem, though, occurs if after some lengthy time, the foreclosure is dismissed. If by then more than six years have passed since acceleration, the statute of limitations just rendered enforcement of that mortgage void.

Our dedicated readers may recall that this has occurred a number of times and here it has happened yet again with these mundane but scary facts. Mortgage is delivered in 1986. The mortgage is then assigned and in the face of a later default, in March of 1988, the assignee commences a mortgage foreclosure action on July 11, 1989. The foreclosure proceeds to judgment of foreclosure and sale but that judgment is vacated—and the complaint dismissed—because the assignee / foreclosing plaintiff had not sought the default judgment in a timely fashion. (This impediment is a creature of the CPLR which needn't be reviewed here.)

Even though the foreclosure had been dismissed, the mortgage itself was later again assigned and, understandably, the new assignee began a foreclosure in 1998. The borrower defendant moved to dismiss the case arguing it was barred by the statute of limitations. The court agreed, ruling that acceleration occurred when the complaint was filed in the earlier foreclosure on July 11, 1989. So, six years thereafter—on July 11, 1995—the statute of limitations had expired. This new action, having been brought in 1998, was simply too late.

The critical proposition underlying all this is that even though the earlier foreclosure action was dismissed, the acceleration upon which a statute of limitations could run survived.

Mortgage holders would like to believe that if the foreclosure action goes away, so too does the acceleration—but that is precisely what courts have repeatedly said is not the case—all to the obvious and repeated detriment of foreclosing plaintiffs. And this particular case adds yet another wrinkle. The lender, aware of its jeopardy, attempted to argue that its initial acceleration back in

1989 was a nullity so that the statute of limitations could never have run on the mortgage balance (presumably only on installments older than six years). Aside from a finding that the mortgage holder was unable to submit evidence to support the claim that its acceleration was meaningless, the court also invoked the doctrine of judicial estoppel. That is a philosophy which precludes a party from presenting a pleading in a manner inconsistent with a position taken in an earlier judicial proceeding. The point of this is to observe that there appears to be no alternative argument that lenders can use to avoid this particular statute of limitations problem.

Sadly, there is no lesson that emerges from this case and the earlier decisions on the same point because their essence is that foreclosure cases need to be done correctly to avoid being dismissed and engendering the statute of limitations dilemma. Mindful that mortgage lenders, servicers and their counsel always intend to do these things right, it is not a matter of volitionally failing to take care of these things, but rather a matter of dedication, skill and sometimes luck.

Mr. Bergman is the author of the three-volume treatise, *Bergman on New York Mortgage Foreclosures*, LexisNexis Matthew Bender & Co., Inc. (rev. 2009) and is a member of Berkman, Henoch, Peterson & Peddy, P.C., Garden City, New York. He is also a member of the USFN and the American College of Real Estate Lawyers, and a Fellow of the American College of Mortgage Attorneys.

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crussell@harrisbeach.com

Awards
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dLeistman@taxcert.com

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300 South State Street
Syracuse, NY 13202
kcorpus@hiscockbarclay.com

Condominiums & Cooperatives
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Seyfarth Shaw
620 Eighth Avenue
New York, NY 10018
dgreenstein@seyfarth.com

Ira S. Goldenberg
Goldenberg & Selker, LLP
399 Knollwood Road, Ste. 112
White Plains, NY 10603
igoldenberg@goldenbergselkerlaw.com

Continuing Legal Education
Joseph M. Walsh
Walsh & Walsh, LLP
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Saratoga Springs, NY 12866
joewalsh@spalaw2.com

Lawrence J. Wolk
Holland & Knight LLP
195 Broadway
New York, NY 10007
Lawrence.Wolk@hklaw.com

Land Use and Environmental Law
Matthew F. Fuller
FitzGerald Morris Baker Firth, PC
3019 State Route 4
Hudson Falls, NY 12839
mff@fmbf-law.com

John C. Armentano
Farrell Fritz PC
1320 RXR Plaza
Uniondale, NY 11556
jcarmentano@farrellfritz.com

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New York, NY 10007
filemyr@verizon.net

Hon. Gerald Lebovits
New York City Civil Court
111 Centre Street
New York, NY 10013
glebovits@aol.com

Legislation
Karl B. Holtzschue
Law Office of Karl B. Holtzschue
122 East 82nd Street
New York, NY 10028
kbholt@gmail.com

Kathleen A. Lynch
Western New York Law Center
237 Main Street, Ste. 1130
Buffalo, NY 14203
klynch@wnylc.com

Low Income and Affordable Housing
Richard C. Singer
Hirschen Singer & Epstein LLP
902 Broadway, 13th Fl.
New York, NY 10010
rsinger90@aol.com

Steven J. Weiss
Cannon Heyman & Weiss, LLP
726 Exchange Street, Ste. 516
Buffalo, NY 14210
sweiss@chwattys.com

Membership
David L. Berkey
Gallet Dreyer & Berkey LLP
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dlb@gdblaw.com

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lmonte@hodgsonruss.com

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The Granite Bldg.
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lsawyko@harrisbeach.com

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Schoeman Updike & Kaufman LLP
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mstern@schoeman.com

Professionalism
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Rye, NY 10580
atartagl@courts.state.ny.us

Public Interest
Lewis G. Creekmore
Legal Services of the Hudson Valley
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Newburgh, NY 12550
lcreekmore@lshv.org

Rebecca Case Grammatico
Empire Justice Center
One West Main Street, Ste. 200
Rochester, NY 14614
rcase@empirejustice.org

Publications
William A. Colavito
One Robin Hood Road
Bedford Hills, NY 10507
wcolavito@yahoo.com

Vincent Di Lorenzo
St. John's University School of Law
8000 Utopia Parkway
Belson Hall, Room 4-46
Jamaica, NY 11439
dilorenv@stjohns.edu

William P. Johnson
Nesper, Ferber & DiGiacomo, LLP
501 John James Audubon Pkwy
One Towne Centre, Ste. 300
Amherst, NY 14228
wjohnson@nfdlaw.com

Marvin N. Bagwell
Bagwell & Associates Title Agency LLC
380 Rector Place
New York, NY 10280
mnbagwell@bagwelltitle.com

Real Estate Construction
Susanna S. Fodor
Jones Day
222 East 41st Street
New York, NY 10017-6702
ssfodor@jonesday.com

David Pieterse
Nixon Peabody LLP
1100 Clinton Square
Rochester, NY 14604
dpieterse@nixonpeabody.com

Real Estate Financing
Steven M. Alden
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022
smalden@debevoise.com

Real Estate Workouts and Bankruptcy
Garry M. Graber
Hodgson Russ LLP
The Guaranty Building
140 Pearl Street, Ste. 100
Buffalo, NY 14202
ggraber@hodgsonruss.com

Richard S. Fries
Bingham McCutchen LLP
399 Park Avenue, 26th Fl.
New York, NY 10022
richard.fries@bingham.com

Robert M. Zinman
St. Johns University School of Law
8000 Utopia Parkway
Queens, NY 11439
robertzinman@yahoo.com

Title and Transfer
Gerard G. Antetomaso
Gerard G. Antetomaso, PC
1674 Empire Boulevard, Ste. 200
Webster, NY 14580
jerry@ggalaw.com

Thomas J. Hall
The Law Firm of Hall & Hall, LLP
57 Beach Street
Staten Island, NY 10304
hallt@hallandhalllaw.com

Joseph D. DeSalvo
First American Title Insurance Company
of New York
633 Third Avenue, 17th Fl.
New York, NY 10017
jdesalvo@firstam.com

Unlawful Practice of Law
Robert W. Hoffman
Hoffman & Naviasky, PLLC
1802 Eastern Parkway
Schenectady, NY 12309
bob@hoffnavlaw.com

George J. Haggerty
George Haggerty & Assoc., PC
500 North Broadway, No. 128
Ste. 580
Jericho, NY 11753
george@gjhlaw.com

Nancy M. Langer
Law Offices of Nancy Langer
115 Woodbridge Avenue
Buffalo, NY 14214
NMLanger@aol.com

Green Real Estate Committee
Nicholas M. Ward-Willis
Keane & Beane, PC
445 Hamilton Avenue, Ste. 1500
White Plains, NY 10601
nward-willis@kblaw.com

Sujata Yalamanchili
Hodgson Russ LLP
The Guaranty Building
140 Pearl Street Ste. 100
Buffalo, NY 14202
syalaman@hodgsonruss.com

Task Force on Alternative Legislation for Low Income, Worker & Affordable Housing
Stacy L. Wallach
105 Stevens Lake Way
Great Barrington, MA 01230
slw1234@hughes.net

Task Force on Fraudulent Practices
Peter J. Battaglia
Ticor Title Insurance Company
424 Main Street, Ste. 200
Buffalo, NY 14202
battagliap@ticortitle.com

Harold A. Lubell
Bryan Cave LLP
1290 Avenue of the Americas
New York, NY 10104
halubell@bryancave.com

Elizabeth A. Wade
Gateway Title Agency LLC
250 Osborne Road
Albany, NY 12205
eawtitle@hotmail.com

Task Force on Hydrofracking/Wind Power
Elizabeth A. Holden
Hodgson Russ LLP
The Guaranty Building
140 Pearl Street Ste. 100
Buffalo, NY 14202
eholden@hodgsonruss.com

John E. Jones
Hinman Howard & Kattell, LLP
700 Security Mutual
80 Exchange Street
Binghamton, NY 13901
jonesje@hhk.com

Task Force on Increasing Participation of Section Members in Committee Meetings
Ira S. Goldenberg
Goldenberg & Selker, LLP
399 Knollwood Road, Ste. 112
White Plains, NY 10603
igoldenberg@goldenbergselkerlaw.com

Task Force on NYSI D TI Regs
Karl B. Holtzschue
Law Office of Karl B. Holtzschue
122 East 82nd Street, Apt. 3c
New York, NY 10028
kbholt@gmail.com

Task Force on Taxation of Recorded Documents
Peter V. Coffey
Englert, Coffey, McHugh & Fantauzzi, LLP
224 State Street
P.O. Box 1092
Schenectady, NY 12305
pcoffey@ecmlaw.com

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