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photo by Marian Wait

See pages 169-172 for more photos of the Section's Summer Meeting

Inside

A Message from the Section Chair

A Wish List for New York Real Estate Law

Our Section's Committee on Legislation has started to play an active role in the legislative process as it affects real property law. This effort represents an important development for us. Over time, our involvement should help produce better real property statutes in New York.

So far, we have only responded to legislation proposed by others, as we have started to understand the legislative process and define our role in it. Looking forward, we intend to propose legislation within our expertise, starting with a "technical corrections act" in which we will try to identify and fix some obvious drafting errors in statutes on real property.

Spencer Compton's Legislative Committee Report starting on page 194 of this issue describes our approach to legislation, what we have achieved so far, and where we see ourselves going.

Looking further ahead, at some point I hope we will start to identify and correct some serious (and less serious) flaws, gaps, and glitches in New York real property law. By doing so, we will clarify and improve the law and make it easier to transact real estate business in the state. Ultimately that is one of the goals of our legislative initiative, proves its value, and gives you a very good reason to get involved in our work.

To begin to lay the foundation for possible legislative initiatives in coming years, I've collected here my "wish list" of some changes I would like to see in New York statutes. I've tried to emphasize changes that would simplify and streamline the law and practice of real estate in the state, without substantively benefiting or hurting any particular group.

I've stayed away from suggesting reductions in taxes on real estate transactions, as these are obvious suggestions and not particularly creative. Although it goes against my personal views on these issues, I also note that New York's high taxes do not seem to have prevented New York real estate from doing quite well for quite a long time.

If I were appointed tomorrow as the grand czar of New York real estate law, here are the first statutory changes I would make, ranked in order of importance:

1. ***Yellowstone Injunctions.*** New York commercial lease disputes often become high-intensity full-blown litigations as a result of glitches in the Real Property Actions and Proceedings Law that artificially increase the stakes in the early stages of any landlord-tenant litigation. The tenant will often seek a so-called "Yellowstone" injunction to prevent the landlord from terminating the lease for a non-monetary default or a default in certain monetary obligations. This process often takes place on an emergency basis, late some Friday afternoon. The Legislature could readily eliminate all the excitement by saying that if a court decides a tenant was in fact in default under its lease, then after such determination the tenant will have a "last clear chance" to cure the default to prevent termination, regardless of what the lease says. Any such rule would need to be accompanied by an absolute requirement for the tenant to continue paying fixed rent (and perform any undisputed obligations) while the court decided the dispute.
2. ***Single-Purpose Entities.*** The rating agencies and the securitization industry have found a reason why New York "single member" limited liability companies are not as reliable as Delaware entities of the same type. This alleged problem has moved a significant volume of entity formation business to Delaware and created the need to involve Delaware counsel in many major transactions. Whatever problem the rating agencies and the securitization industry have identified could presumably be fixed by New York legislation. And it should be, along with anything else that makes New York less hospitable than Delaware for forming routine entities for real property transactions.
3. ***Mortgage Consolidations.*** Every New York commercial refinancing forces the parties to perpetrate a complex series of assignment, consolidation, and amendment documents, to say nothing of occasional splitters, spreaders, and "lost note" documents—all in an effort to mitigate mortgage recording tax. This massive accumulation of complexity could and should be replaced by a simple affidavit that discloses the "tax-paid" amount of debt already on the property, and the amount of any increase in that "tax-paid" debt resulting from the current transaction. Lenders would have the same incentives that they already do to assure payment of the tax. With this change, though, we could instantly eliminate mortgage

chains, most lost note affidavits, and the tedious task of drafting documents whose sole purpose is the preservation and manipulation of old mortgages.

4. ***Revolving Loans.*** New York imposes its mortgage recording tax on every readvance of a substantial commercial revolving loan—a position that simply prevents New York real property from securing such loans. The Legislature should solve this problem, as well as some other similar problems that the mortgage recording tax creates for substantial modern multi-state transactions.

5. ***Lien Law.*** The law governing mechanics' liens and construction loans is absolutely incomprehensible and unnecessarily complex. It creates a regime in which a famous lawyer for mechanic's lien claimants once bragged that for any construction loan he could always find a way that the lender had violated the lien law. This statute should be rewritten, clarified, and simplified—translated into English without changing its major substantive concepts and requirements.

6. ***Simpler Mortgage Documents.*** The New York Real Property Law on its face seems to create two great tools to simplify New York mortgage documents. First, anyone can incorporate by reference a "statutory form of mortgage" defined in the Real Property Law, thus creating a one-page mortgage. Second, anyone has the statutory right to record a "master mortgage," which can then be incorporated by reference in all future mortgages, again creating one-page mortgages. No one uses either tool. The first tool deserves not to be used because the statutory mortgage is woefully deficient and does not even satisfy the elementary requirements of New York law. The second tool makes a lot of sense and is widely used in, for example, California. The Legislature should update the statutory form of mortgage to reflect current law, and should consider taking steps to encourage the use of "master mortgages." On the other hand, because longer mortgages create more recording fees, neither of these changes seems likely to happen any time soon.

7. ***Conditional Limitations.*** If a lease expires ten days after a landlord gives notice of termination, the landlord qualifies to bring a summary proceeding. On the other hand, if the lease expires automatically when the landlord gives notice of termination, the landlord doesn't qualify to bring a summary proceeding. New York's common law calls the former a "conditional limitation" (summary proceeding allowed) and the latter a "condition subsequent" (no summary proceeding allowed). The distinction makes no sense and should be eliminated by legislation to allow summary proceedings in both cases and prevent a "glitch" in lease drafting.

8. ***Opaque Disclosure Law.*** Whatever may be the merits or wisdom of the state's recently enacted Property Condition Disclosure Act, the text of the Act is hardly a model of transparency and clear disclosure. The Act would probably flunk New York's "Plain English" law, which imposes a $50 penalty for using an incomprehensible contract in a consumer-related transaction. This and similar statutes should be written in plain English, to help serve the Legislature's goal of achieving broad and effective communication of useful information.

9. ***Separate Assignments of Rents.*** Why must a mortgagee obtain a separate assignment of rents, beyond the assignment already in the mortgage? The answer: archaic principles of real property law that should play no role in modern transactions. The Legislature should clarify by statute that no such separate document is required, and a mortgagee can enforce an assignment of rents built into a mortgage as soon as a foreclosure begins. The National Conference of Commissioners of Uniform State Laws is in the process of proposing similar changes via a model act, which New York should adopt as soon as it becomes available.

10. ***Leasehold Condominiums.*** New York law says a condominium cannot be created on a leasehold—unless the site is located in a handful of selected development areas within the city and a quasi-public agency is involved. Although this law presumably tries to protect consumers, it in fact hurts consumers by encouraging the use of cooperatives (a truly wretched form of ownership) rather than condominiums. New York should figure out a way to allow leasehold condominiums in a way that adequately protects consumers. Other states seem to do it without much trouble.

11. ***Mortgage Foreclosures on Apartment Buildings.*** New York's non-judicial foreclosure statute generally applies to commercial real property, but carves out any building where residential renters occupy more than about two-thirds of the units. If a mortgagee were seeking to foreclose out the interest of those renters, it might make sense to prohibit the use of non-judicial foreclosure. But if the mortgagee has no interest

in terminating residential leases, it is hard to see why investors in apartment buildings should be any more immune from non-judicial foreclosure than investors in office buildings or shopping centers. Therefore, the Legislature should remove this distinction, at least as long as the lender does not want to terminate any residential leases by foreclosure.

12. ***No Waiver of Landlord's Liability for Negligence.*** The New York General Obligations Law says a tenant can't release a landlord from liability for negligence. Some New York leasing practitioners argue that if a tenant promises to pay any "deductible" amount under a liability insurance policy that otherwise benefits the landlord, any such agreement by the tenant violates the General Obligations Law and hence is invalid. This argument then implies that the tenant should maintain the lowest possible deductible amounts, regardless of the tenant's risk management program company-wide. Any such requirement for low deductibles seems inappropriate, at least in a commercial transaction where the choice of a deductible amount simply represents a business decision in the tenant's risk management program. The Legislature should remove this possible issue, at least for substantial commercial leases.

Each of the "wish list" items above would remove complexity and unnecessary issues, excitement, or risks from New York real estate law. None of these items would seem likely to hurt any recognizable group of players in the real estate industry. Of course, one can hardly guarantee a lack of controversy. Almost any change may somehow hurt or at least offend someone. If that is the case, or if I have missed some compelling reason that existing law is terrific and requires no change, I apologize in advance. I also encourage the offended or otherwise objecting party to speak up, as the beginning of a discussion of where we should and should not suggest legislative improvements. (Don't worry, none of these possible changes will be moving forward on an emergency basis!)

Finally, I should emphasize that my "wish list" reflects my own opinions, or perhaps fantasies, and only at the moment of writing. This does not reflect the opinions of the Section or the Association. And my "wish list" is in no way tempered by any considerations of reality or political feasibility.

Turning to a more immediate legislative agenda, New York legislators have joined those in many other states in proposing legislation to respond to *Kelo v. New London*, the recent U.S. Supreme Court case on the use of eminent domain to facilitate private development projects as part of governmental programs to eliminate "blight." The Section intends to participate actively in the Association's responses to, and comments on, these proposals. Section members who would like to participate in that process should be in touch with any of the co-chairs of our Legislation Committee, as identified on page 198 of this *Journal*.

The *Kelo* case will be one of several areas of emphasis at the Section's continuing legal education program during the upcoming winter meeting of the Association, which will take place January 23 through 28, 2006, at the Marriott Marquis in Manhattan. Under the leadership of First Vice Chair Harry Meyer, our CLE program will also focus on several other areas of current concern to New York real property practitioners. Tentative additional topics include:

- Workouts of securitized loans;
- Indian land claims that affect wide swathes of the state;
- Recent disputes under a federal law that tries to protect places of worship in residential neighborhoods;
- How developments in appraisal technology affect real estate lending;
- Possible changes in the Property Condition Disclosure Act (though not of the nature suggested above);
- Ethical issues in real estate closings, with a continuation of Anne Copps's case study; and
- The growing use of non-attorney "closers" in residential real estate transactions.

We hope you will attend the winter meeting and get involved in our legislative activities or other Section committees. You can find contact information for all the committee co-chairs on pages 197-198 of this *Journal.*

Joshua Stein

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Military Law in New York Landlord-Tenant Actions and Proceedings

By Gerald Lebovits

I. Introduction

As of March 31, 2005, the United States military had 1,398,833 active duty volunteer servicemembers worldwide.[1] Of those, approximately 221,500 members—including reservists and National Guard members called to active duty—are deployed around the globe for Operation Enduring Freedom and Operation Iraqi Freedom.[2] Reservists and National Guard members are men and women with jobs, homes, and families they must leave to fulfill their obligations when called to active duty. Sometimes called "weekend warriors" because they serve one weekend a month and two weeks a year in peace time, reservists and National Guard members currently make up 30 percent of the United States active military force in Iraq.[3] Many reservists and National Guard members suffer significant pay cuts while on active military duty.[4] They and their dependants often cannot meet the financial obligations they entered into before being called to active duty.

The same is true for full-time servicemembers called abroad. They and their dependants accumulate debt and sometimes face eviction actions and proceedings or foreclosure actions.

Members on active duty, whether full time or reserve, are frequently unable to appear in court to defend themselves. Their inability to appear exposes them to the threat of default judgments, even nonmeritorious defaults, while they risk their lives defending our nation.

The United States, New York State, and other states recognize that servicemembers on active duty are vulnerable to lawsuits. Therefore, the United States—through the Servicemembers' Civil Relief Act (SCRA)[5]—and New York—through the New York Soldiers' and Sailors' Civil Relief Act (NYSSCRA)[6]—protect members from rupture and ruin, not to mention distraction and dislocation, while they attend to matters of import and immediacy.

Import and immediacy have added significance since the attacks of September 11, 2001, and the call to arms in Afghanistan and Iraq. Reacting to that call to arms, the New York City Civil Court's Housing Part has taken significant steps to protect servicemembers' vulnerability to landlord-tenant lawsuits. If a respondent alleges or a petitioner's nonmilitary affidavit states that a respondent is on active military duty or dependent on someone on active duty, the case will be assigned to Part M, for "Military Part," a Civil Court part in Bronx, Kings, New York, and Queens Counties.[7] When a respondent appears to answer a petition, the clerk must inquire whether the respondent is on active military duty or whether the respondent depends on someone on active duty.[8] If the respondent is on active duty or depends on someone who is, the case will be assigned to Part M. The case will also be transferred to Part M if facts at any stage of the litigation reveal that a litigant is or has become an active duty member or a dependent.

New York City's Part M is a microcosm of the nation's response to 9-11. In 2003, Congress enacted the SCRA, which significantly amended the Soldiers' and Sailors' Civil Relief Act (SSCRA) of 1940.[9] Congress revised the SSCRA

> to make the Act easier to read and understand by clarifying its language and putting it in modern legislative drafting form, to incorporate into the Act many years of judicial interpretation, and to update the Act to take into account generally accepted practice under its provisions and new developments in American life not envisioned by the original drafters.[10]

The SCRA was widely supported. The United States House of Representatives Committee on Veterans' Affairs issued a report supporting the SCRA stating that, "[w]ith hundreds of thousands of servicemembers fighting in the war on terrorism and the war in Iraq, many of them mobilized from the reserve components, the [SSCRA] should be restated and strengthened to ensure that its protections meet their needs in the 21st century."[11]

This article analyzes the SCRA and NYSSCRA and discusses what practitioners, litigants, and judges need to know when servicemembers or their dependents are involved in landlord-tenant disputes.

II. History and Purpose of the Federal and New York Acts

During the Civil War, Congress enacted a moratorium on civil actions brought against Union soldiers and sailors.[12] During World War I, Congress passed the SSCRA of 1918 to protect members of the armed forces.[13] Although not an absolute moratorium on civil actions against servicemembers, the 1918 SSCRA suspended the enforcement of all civil liabilities against military personnel if active duty materially affected their ability to defend civil lawsuits.[14] The 1918 SSCRA had a

sunset provision. It expired shortly after World War I ended.

In 1940, because of World War II, Congress re-enacted the SSCRA of 1918, this time without an expiry date. The 1940 SSCRA was designed "to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of national defense. . . ."[15] Congress intended the SSCRA to delay, in certain cases, enforcing civil liabilities so that servicemembers could focus their energy on the nation's defense needs. Since 1940, members have received uninterrupted coverage.

Servicemembers' coverage was strengthened in 2003. On December 19, 2003, President George W. Bush signed into law Public Law No. 108-189, 117 Stat. 2835—the SCRA—a major revision of the SSCRA. Before the SCRA went into force, the 1940 SSCRA had been amended 15 times. The SCRA continues to protect servicemembers and the nation from harm that will result from a member's inability to defend against lawsuits because of active military service.[16]

New York State legislation shares the ideals of the federal legislation. In 1951, the New York State Legislature enacted the NYSSCRA, New York's version of the Federal SSCRA.[17] It closely follows the 1940 SSCRA's substantive and procedural provisions but is less detailed than either the SSCRA or the SCRA.[18] For example, the SCRA defines the term "dependents" whereas the NYSSCRA does not. In 1941, New York enacted legislation similar to the NYSSCRA,[19] which by its terms expired during times of peace.[20] The 1951 NYSSCRA, enacted in response to the Korean War, has no expiry date. New York enacted it to give servicemembers continued protection in times of peace and in times of war. In enacting the NYSSCRA, the Legislature stated that to promote national security, "it is essential to provide in certain cases for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in the military service."[21] Further protecting servicemembers, Governor George E. Pataki signed Executive Order 125 on March 24, 2003.[22] The order makes discrimination based on military status unlawful and classifies that discrimination as a violation of a member's civil rights.[23]

Where possible, the NYSSCRA and the SCRA must be read together.[24] When the NYSSCRA does not address a point the SCRA addresses, the SCRA controls.[25] If the SCRA is silent and the NYSSCRA provides protection, the NYSSCRA applies.[26] In New York eviction actions and proceedings, a court will not evict a member unless the landlord satisfies both the SCRA and the NYSSCRA.

Satisfying the Federal and New York Acts means understanding their goals. The Federal Act's goal, as Supreme Court Justice Hugo M. Black explained, regarding the SSCRA, is

> to prevent soldiers and sailors from being harassed by civil litigation "in order to enable such persons to devote their entire energy to the defense needs of the Nation." He is required to devote himself to serious business, and should not be asked either to attempt to convince his superior officers of the importance of his private affairs or to spend his time hunting for lawyers.[27]

The Act gives servicemembers a measure of comfort so that they do not have to worry about defending civil proceedings while serving on active duty. As one Civil Court judge put it during World War II, the Act is intended, "to give members of the armed forces a degree of mental repose and to protect their rights and their remedies and to free them from hardships which might be imposed upon them solely because of the performance of their patriotic duties."[28]

To achieve the SCRA's and the NYSSCRA's goals, courts must construe the Acts liberally.[29] The NYSSCRA explicitly provides that "[a]ll the provisions of this article shall be liberally construed. . . ."[30] No one said it better than Justice Robert H. Jackson, who explained that a law that aids military members in defending civil cases "is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation."[31]

III. Overview of the Federal and State Acts

Although the NYSSCRA and SCRA give servicemembers broad protection against civil defaults, neither Act applies to all members or in all circumstances, and neither Act enables a member to escape from civil liability altogether. Even when a court stays an action or proceeding, the stay is not indefinite. At some point the member must return to the jurisdiction to defend the case. The overview below discusses whom the Acts apply to and the circumstances in which they apply.

A. Where Applicable

The NYSSCRA applies to all civil proceedings in all New York state courts of record or not.[32] Under the NYSSCRA, New York courts, administrative and licensing agencies, and public authorities are vested with the power to stay proceedings on their own motion.[33] Although the SSCRA had applied only to cases heard in a court,[34] the SCRA extended the SSCRA's scope to protect servicemembers in civil matters before "any judicial or administrative proceedings commenced in any court or agency" in all federal, state, and ter-

ritorial courts.[35] For example, the protective provisions of the SCRA and NYSSCRA apply if a landlord seeks administrative relief before the New York State Department of Housing and Community Renewal (DHCR) or if a proceeding over public housing is heard by a New York City Housing Authority (NYCHA) administrative law judge. Thus, the SCRA and the NYSSCRA apply to actions and proceedings, whether judicial or administrative.

The SCRA does not, however, give the federal courts the collateral power "to review, vacate, or impede state decisions" applying the SCRA.[36] Wrote one federal court: "[J]udgments made in violation of the Act are subject to attack only in the courts which rendered the judgment."[37]

B. Servicemembers Covered by the SCRA

The SCRA protects those in military duty. The SCRA defines "military duty" as a servicemember's being in "active duty."[38] The SCRA defines "active duty" as "full-time duty in the active military service of the United States."[39] The 2003 SCRA protects the same servicemembers as the 1940 SSCRA: members of the United States Army, Navy, Marine Corps, Air Force, Coast Guard.[40] The SCRA also extends coverage to those the SSCRA did not: reserve forces called to active duty and National Guard members called to active duty for over 30 consecutive days who answer national emergencies declared by the president and supported by federal funds.[41] In New York, members of the National Guard include members of the New York National Guard, the New York Naval Militia, and the New York Guard.[42] The SCRA further covers commissioned officers in the National Oceanic and Atmospheric Administration and Public Health Service in active service.[43] Reserve Officer Training Corps (ROTC) cadets are not included in the SCRA's definition of "servicemember" or in the definition of "active service"[44] unless they are undergoing "training or education under the supervision of the United States preliminary to induction into the military service,"[45] such as in an ROTC summer training camp.[46]

C. Dependents Covered by the SCRA and NYSSCRA

The SCRA protects more than just servicemembers. It also protects members' dependents. The SCRA defines a dependent as "(A) the servicemember's spouse, (B) the servicemember's child, [or] (C) an individual for whom the servicemember provided more than one-half of the individual's support for 180 days immediately preceding an application for relief under this Act."[47] A dependent may invoke the SCRA if the member's active military service materially "affects the dependent's ability to comply with a lease, contract, bailment, or other obligation."[48] Thus, the SCRA protects dependents in eviction proceedings, with some qualifications, as explained below.

The NYSSCRA affords much broader protection to dependents than the SCRA. The NYSSCRA extends all its protections to dependents.[49]

D. When the SCRA Covers Servicemembers

Unlike the SSCRA, which protected servicemembers during active military duty only, the SCRA protects members absent from active duty because of "sickness, wounds, leave, or other lawful cause."[50] This reflects Congress' realization that members who are hurt or who depend on injured members have important obligations to tend to and only a limited time to tend to them.[51] Members' health or family problems can hinder their ability to defend lawsuits. Unlike a court proceeding, a member's health or family concerns cannot be stayed.

To take advantage of the SCRA, active duty must prevent a member from appearing. Granting a member protection under the Federal and State Acts is inappropriate if the court is shown only that the member is in the military and outside the court's jurisdiction.[52] The member must also prove an inability because of military obligations to return to the jurisdiction.[53]

IV. Affidavits of Nonmilitary Service

The SCRA prohibits entering a default judgment against any person in a civil plenary action or summary proceeding if the plaintiff/petitioner seeking the default judgment does not first file an affidavit stating that (1) the defendant/respondent is not in military service or (2) that the plaintiff/petitioner is unable to determine whether the defendant/respondent is in military service.[54] Unlike the SCRA, the NYSSCRA extends to dependents all its benefits, including the nonmilitary affidavit's protection and the ability to stay an action.[55] Under the NYSSCRA, therefore, the affidavit must also state whether (1) the defendant/respondent depends on a servicemember or (2) the plaintiff/petitioner is unable to determine whether the respondent depends on a member.[56]

The nonmilitary affidavit requirement is the cornerstone of both the Federal and New York Acts. It protects servicemembers against default judgments while they serve their country. A court may, however, dispense with the affidavit requirement if it is satisfied that the defendant/respondent is not an active member.[57]

Nonmilitary affidavits are required in both holdover and nonpayment proceedings.[58] Except as the NYSSCRA concerns stays, an issue discussed below, neither the SCRA nor the NYSSCRA distinguishes between holdovers and nonpayments. Rather, the SCRA—and the

NYSSCRA through the SCRA—applies to "any judicial or administrative proceeding,"[59] and therefore to holdover and nonpayment cases. As two commentators have explained, "a petitioner must submit an affidavit or testimony of non-military status prior to the entry of a default judgment whether the case is a non-payment or holdover."[60] In a nonpayment proceeding, a court awards a judgment on default after reviewing the papers. In a holdover proceeding, however, a court must hold an inquest before it awards a judgment of possession on default.[61] A court may, accordingly, inquire into the defendant/respondent's military status during the holdover inquest and, if offered sufficient evidence to conclude that the defendant/respondent is not an active servicemember, may forgo a nonmilitary affidavit.[62]

A defendant/respondent's appearance, even by counsel, eliminates the need for a nonmilitary affidavit. The SCRA and the NYSSCRA protect members from default judgments entered without their knowledge.[63] A member's appearance means that the member had notice of the action or proceeding.[64]

A. Investigating for Affidavits of Nonmilitary Service

Plaintiffs/petitioners must complete a military service investigation before they may execute a nonmilitary affidavit. The SCRA does not provide when the military service investigation must occur, although case law interpreting the SCRA and its predecessor SCCRA, imposed a "contemporaneous" standard.[65] Under the NYSSCRA, the investigation must occur after the default but before the default judgment is entered.[66] That was the rule in New York City Civil Court actions and proceedings before September 11, 2001.[67] The Civil Court's rule changed after September 11, 2001.[68] According to a post 9-11 Civil Court directive, investigations in all civil actions and proceedings, (including nonpayment and holdover proceedings), must now take place not more than 30 days before application for default judgment.[69] The 30-day requirement ensures that the information gathered during the investigation is current when a court enters a default judgment.

To ascertain a defendant/respondent's military status, the investigator must speak to the defendant/respondent personally, to the defendant/respondent's neighbors, or to any individuals, such as the defendant/respondent's employers or fellow employees, who know the defendant/respondent personally.[70] An investigator's reviewing the occupant's file is sufficient for the court to conclude that the occupant is not in the military, so long as the file is identified to the court and is current and so long as the facts in the file show that the occupant is not in the military.[71]

After investigating, a plaintiff/petitioner who concludes incorrectly that a defendant/respondent is not in the military risks incurring the court's wrath. In *Secretary of Housing & Urban Development v. McClenan*, a 2004 New York City Housing Part proceeding, the respondent, called to duty after the 9-11 attacks, sought to be restored to her home after she was evicted.[72] She was evicted in accordance with a stipulation awarding final judgment to the petitioner, subject to negotiations between her and the petitioner to buy the premises, although she had been paying use and occupancy and had been negotiating with the petitioner. Before she signed the stipulation, she returned to New York from active military duty but was ill and stayed with her mother to convalesce. After the marshal executed the warrant and she moved to be restored, the petitioner's attorney, aware of the respondent's condition, argued that she was not on active duty and thus not entitled to SCRA protection. The court held under SCRA § 511 that she was protected from eviction while she was absent from active duty "because of sickness."[73] The court reprimanded the petitioner's attorney for allowing an eviction in the face of evidence that she was in active military duty and therefore protected under the SCRA.[74]

Another case, *Heritage East-West, LLC v. Chung*, provides an example of how courts punish for filing false nonmilitary affidavits.[75] In *Heritage*, an attorney who authorized a false nonmilitary affidavit was fined $6,000.[76] The investigator had attested that she conducted six investigations simultaneously.[77] The court—the same judge who decided *McClenan*—found that the petitioner's attorney, who submitted the affidavits to the court, had actual or imputed knowledge that the affidavits were false and therefore had engaged in fraud for filing false nonmilitary affidavits in the six cases he was prosecuting. The court fined the attorney under the SCRA $1,000 in each case.[78]

Process servers and marshals can also be punished for assisting in falsifying affidavits of nonmilitary service. In *In re Jacobs*, the court accepted a marshal's resignation for, among other things, filing false nonmilitary affidavits.[79]

These cases are just examples. If anyone falsifies an affidavit of nonmilitary service, courts may impose many forms of punishment, including criminal penalties.[80] Courts may also hold perjurers in contempt,[81] impose sanctions,[82] award costs,[83] grant attorney fees,[84] and censure attorneys for fraud.[85]

B. The Affidavit's Requirements

A nonmilitary affidavit can be signed only by certain persons and must contain certain facts about the investigator, the defendant/respondent, and the investigation.

According to a New York City Civil Court directive, the investigation underlying the affidavit must be performed and sworn to by: "a) The

Plaintiff/Petitioner or his/her attorney; b) Anyone requested to do so by the Plaintiff/Petitioner or his/her attorney; c) Anyone hired for that purpose by the Plaintiff/Petitioner or his/her attorney; [or] d) An employee of the Plaintiff/Petitioner or his/her attorney."[86]

Under the SCRA and the NYSSCRA, the affidavit must state the investigator's name and the place, date, and approximate time the investigation took place. The plaintiff/petitioner must also include in the affidavit the name of the person with whom the affiant spoke as well as that person's relationship with the defendant/respondent. The plaintiff/petitioner must file an affidavit for every person against whom the default judgment is sought based on that person's failure to answer a summons and complaint or a petition and notice of petition. In a landlord-tenant action or proceeding, all the premises' occupants may be included in one nonmilitary affidavit, so long as each occupant—under-tenants included—is identified and so long as the plaintiff/petitioner explains the basis for contending that the occupants are not servicemembers or dependents.[87]

Under the SSCRA, a plaintiff/petitioner was required to use a nonmilitary affidavit only for tenants named in the lease, regardless of whether anyone else lived in the premises. Under the revised SCRA, an affidavit is required for all occupants, regardless of whether the landlord knows who all the occupants are. In the past, most landlords used fictitious names like "John Doe or Jane Doe" when suing to evict unknown occupants. Required now is an affidavit of nonmilitary service, not only for the lease's primary tenant, but for all the rental unit's occupants.[88] If a "John Doe" or "Jane Doe" is included in the caption, it will be impossible to evict the occupant because it is impossible to determine whether an unknown occupant is in the military.[89] To evict all the occupants, a landlord must find out the names of all the occupants in the rental premises and name them in the court papers. It is an affirmative obligation of each landlord to know whether any occupants, other than the principal tenant, live in the rental home.[90]

The SCRA does not require that a nonmilitary affidavit be notarized. The SCRA permits a written but unsworn "statement, declaration, verification, or certificate, in writing, subscribed and certified or declared to be true under penalty of perjury"[91] to take the place of a notarized affidavit. The SCRA has no need for a notarization requirement; it contains criminal penalties up to one-year imprisonment and a fine for knowingly violating the SCRA's nonmilitary-affidavit provisions.[92] The NYSSCRA is silent about whether nonmilitary affidavits must be notarized, but the custom is to notarize nonmilitary affidavits submitted to the New York City Civil Court.

C. The Investigation's Sufficiency

An extensive investigation must usually be completed to determine the defendant/respondent's military or dependency status. The affidavit must include facts supporting the plaintiff/petitioner's beliefs that show to the court's satisfaction that a respondent/defendant is not in active military service or, in New York, dependent on someone serving actively.

Case law prescribes the factors to determine whether the information in a nonmilitary affidavit is sufficient. Calling the occupant's apartment, asking whether the person on the telephone is the occupant, and finding out whether that person is in the military or dependent on someone in the military is sufficient to determine the defendant/respondent's military status.[93] It is also sufficient to determine nonmilitary status if the occupant told someone like an identified neighbor, relative, or superintendent that the occupant is not in the military or dependent on anyone in the military.[94]

Also sufficient are allegations that the affiant knows, or that an identifiable person stated, that the occupant is elderly (if people of the occupant's age are beyond military age to serve in the military), physically incapacitated (if the incapacity is such that the defendant/respondent would not be allowed to serve in the military), or receiving public assistance.[95] Although alleging that an occupant is physically incapacitated or receiving public assistance raises the problem that the occupant's status might have changed or that the occupant might have lied, these statements are reliable because they can be verified.

An affidavit cannot, however, be based on conclusions, or statements without underlying factual support.[96] A statement that to the affiant's "best information and belief" the occupant is not in the military may not, without providing the foundation for that belief, support a default judgment.[97]

Some facts are insufficient as a matter of law, such as statements that the investigator went to the occupant's apartment five times and never saw the occupant,[98] that the person to whom the investigator spoke was not in military uniform,[99] or that the occupant is between the ages of 40 and 50.[100]

D. If Military Status Cannot Be Determined

When the occupant's military status cannot be determined from a nonmilitary affidavit, the court may require, as a condition before entering a default judgment, that the plaintiff/petitioner file a bond to indemnify the defaulting party from damages. The SCRA and NYSSCRA give courts the discretion to require a bond to protect an occupant if the plaintiff/petitioner turns out to be

wrong about the occupant's military status and if the default judgment will harm the occupant.[101] The bond remains in effect until the occupant-defendant/respondent's time to appeal expires.[102]

If an occupant's military status cannot be determined after an investigation, a plaintiff/petitioner can ask the court to dispense with the nonmilitary-affidavit requirement.[103] Courts have the discretion to waive nonmilitary affidavits if presented with satisfactory proof that an occupant is not an active servicemember.

A plaintiff/petitioner unable to determine whether an occupant is in the military can contact the military. The U.S. government created the Defense Manpower Data Center (DMDC) to collect and maintain the Department of Defense's records about individuals' military status. An investigator can write to the DMDC and, with an occupant's name, social security number, and date of birth, get a letter that reveals the occupant's military status.[104] The DMDC will not include whether anyone is dependent on someone in the military. But if an occupant depends on a servicemember, the dependent—unlike a member who may not leave a military post—can appear and inform the court of that status. The DMDC is a reliable source of information of an occupant's military status and may be sufficient by itself to constitute a proper investigation to dispense with a nonmilitary affidavit.[105] A landlord can also research a defendant/respondent's military status on the DMDC Web site at https://www.dmdc.osd.mil/scra/owa/home. In addition to a DMDC search, a plaintiff/petitioner can contact each individual branch of the armed services to inquire about an occupant's military status.[106]

Tivoli Associates v. Foskey provides one unsuccessful example of a plaintiff/petitioner's request to waive a nonmilitary affidavit. In *Tivoli*, a petitioner-landlord sought a default judgment in a summary nonpayment proceeding against the respondent-tenant and requested that the court waive the military investigation and the Federal and New York Acts' nonmilitary-affidavit requirements.[107] The petitioner-landlord asked the court to accept the process server's affidavit in lieu of a nonmilitary affidavit. The process server's affidavit stated only that he attempted to serve the respondent twice in person and that the respondent was not at home on either occasion. The process server's affidavit did not note any additional inquiry into the respondent's military status. The court held that this investigation was insufficient to determine whether the respondent was in the military. Thus, the court could not justify waiving the nonmilitary affidavit and denied the petitioner's request for a default judgment.

V. Court-Appointed Attorney

If the defendant/respondent's military status is unknown, the court, under both the SCRA and the NYSSCRA, may appoint an attorney for the member.[108] Neither Act provides the amount of compensation to which a court-appointed attorney is entitled. Resort is made to the case law, none of which is from New York. In *Dorsey v. McClain*, a Maryland divorce proceeding, the court used a family law statute to determine the amount of attorney fees.[109] In *In re Ehlke's Estate*, a 1947 Wisconsin case, the court held that $75 paid out of the member's share of his sister's estate was "reasonable compensation" for the work the appointed attorney performed.[110]

If the court fails to appoint an attorney for the member, then the default judgment or decree the court enters against the member is voidable. If the member is in the United States and is available to appear but intentionally defaults, the court will not appoint an attorney for the member. If a member intentionally defaults, neither the SCRA nor the NYSSCRA applies.[111] Nor will a court appoint an attorney for a member's dependents. Nothing prevents a dependent from appearing in court.

The SCRA prohibits entering a default judgment against a defendant/respondent whose military status is unknown until after the court appoints an attorney to protect the litigant's interests.[112] The court-appointed attorney's job is to protect the member's rights.[113] If the attorney cannot locate the member, the attorney may assert any rights the member has under the SCRA but may not waive the members' defenses or bind the member in any way.[114]

The role of the court-appointed attorney includes first finding out—if possible—where the defendant/respondent is and the defendant/respondent's status; second, contacting the defendant/respondent to advise the defendant/respondent that a default judgment might be entered; and third, if necessary, asking the court to stay the proceeding.[115]

VI. Court-Ordered Stays

The SCRA and NYSSCRA are intended to protect servicemembers' civil rights while they serve on active duty. To do so, both the SCRA and NYSSCRA allow, and sometimes mandate, courts to stay—that is, adjourn or postpone—actions or proceedings in which the member is a litigant. If the defendant/respondent is not a necessary party to the action, the court may proceed against any co-defendant/respondent in the action or proceeding without the member's presence.[116] Moreover, a stay is meant to last only until the members can return to protect their interest adequately.

A court will not stay in every instance. For example, a court will not stay an action or proceeding if the member-defendant/respondent has no defense in a nonpayment case and the nonpayment occurred before the member entered active duty.[117]

Nor will the court stay a case if the member could have obtained leave but chose not to do so. The Act is intended to protect servicemembers, not grant them immunity from civil suit.[118]

The SCRA and the NYSSCRA each has two stay provisions. One stay provision applies to all actions and proceedings except eviction proceedings; the other applies to eviction actions and proceedings only. The following explores when courts can grant stays under the SCRA and the NYSSCRA and considers their stay provisions generally and for eviction cases.

A. Requesting SCRA and NYSSCRA Stays

The NYSSCRA does not contain a provision detailing the procedure to request a stay. The SCRA's procedure therefore governs. Before the SCRA was promulgated, a split of authority existed about which side—plaintiffs/petitioners or defendants/respondents—had the burden of proof to show whether military service materially affected the member's ability to appear.[119] The SCRA resolves that split. It places the burden of proof on the member and explains what showing a member must make.

Under the SCRA, a servicemember's request for a stay will be granted if: (1) the member explains why current military duty materially affects an ability to appear; (2) the member gives the court a date by which the member can appear; and (3) the member's commanding officer states that the member's duties preclude appearing and that the member is not authorized for leave at the time of the hearing.[120] No specified format exists to inform the court of the requirements, but letters to the court from both the member and the member's commanding officer will suffice.

The SCRA requires the court to determine whether the member and the member's commanding officer provide sufficient factual information to ascertain whether the member's military status materially affects an ability to appear.[121] The best guidance about whether the facts underlying a defendant/respondent's application for a stay are sufficient is case law, which holds that the SCRA must be liberally construed to protect a member in active duty and an active duty member's dependents.[122]

The court in *Turchiano v. Jay Dee Transportation* made it clear that servicemembers may not abuse the NYSSCRA's generous stay provisions.[123] In *Turchiano*, a member was a defendant in an automobile accident case. The trial court granted a stay under the NYSSCRA after finding that the member's military service materially affected his ability to appear. The plaintiff moved to restore the action to the calendar almost six years after the stay was granted, but the trial judge denied the motion. The Appellate Division reversed, finding that the defendant-member produced insufficient evidence to show that his military service continued to affect his ability to appear. The Appellate Division found that the NYSSCRA does not give members blanket immunity from suit. The Appellate Division restored the action to the trial calendar pending more recent affidavits[124] from the member and his commanding officer that his military service materially affected his ability to appear.

B. Stays Under the SCRA

1. General SCRA Stays

Under the SCRA, courts must stay an action or proceeding if the servicemember-defendant/respondent's ability to defend is "materially affected" by active military service.[125] To grant a stay, the court must find that (1) the member is on active duty or has been relieved of active duty within 90 days of the requested stay, (2) the military service materially affects the member's ability to defend the action, and (3) the member had notice of the pending action or proceeding.[126] Courts consider several factors to determine whether a member's military service materially affects an ability to appear. They include the member's accrued leave, the means of communication available between the member and the court, and member's efforts to obtain leave.[127] If a member intentionally defaults, then the military duty did not materially affect any ability to appear, and the court will deny a stay.[128]

The court has the discretion to decide how long the stay should last. Once a court finds that the servicemember is entitled to a stay, the stay may not be less than 90 days.[129] If a stay is appropriate, the court will typically stay the action or proceeding until the member can appear—that is, when the member ceases to be unable to appear because of active military duty.

Under the SSCRA and the SCRA, courts have the discretion to deny a servicemember's request to stay the action or proceeding. The court should ascertain whether the evidence shows that the defendant/respondent's military service substantially affects an ability to appear.[130] When a member's application was denied under the SSCRA, some courts considered the application an appearance and therefore a waiver of some SSCRA protections.[131] Under the SCRA, a member's request for a stay is not an appearance or a waiver of any rights or defenses.[132]

2. SCRA Eviction Stays

The SCRA offers special protection for servicemembers and their dependents threatened by an action or proceeding for not paying rent. The SCRA's eviction provision applies to all premises used primarily as a residence for which the monthly rent is $2,400 or less.[133] But the 2003 SCRA revisions mirror the rise in housing costs in this country in the last 60 years. Starting in 2004,

and continuing annually, the rent amount will increase each year to reflect inflation.[134] To determine the rent increase amount the SCRA eviction-stay provision covers, the SCRA is indexed to the Consumer Price Index (CPI). Each year, the base rent increases by the percentage change by which the CPI for November of the preceding calendar year exceeds the November 1984 CPI.[135] Once the November CPI is published, the amount of the new increase must be calculated and published within 60 days.[136] In 2004, the SCRA covered servicemembers and their dependents whose monthly rent for their residence was $2,465 or less.[137] The 2006 rent increase will be based on the difference between the November 2005 CPI and the November 1984 CPI.

If a member's rent is less than the current $2,465 base and the member cannot pay the agreed upon rent because of active military service, the court may either (1) stay the proceeding for 90 days, or shorter or longer in the interests of justice, or (2) adjust lease obligations to preserve the litigants' interests.[138] Of critical importance, the SCRA eviction-stay provision empowers a court to adjust a residential lease—such as by lowering the rent amount or by creating a payment plan for the member or the member's dependent—in addition to staying the proceeding. Thus, a court may ignore RPAPL rent deposit laws and grant a motion to stay the execution of a warrant of eviction to benefit a member or dependent who defaults in a stipulation or trial judgment that gave a landlord a final judgment. A court may even modify a lease at the warrant phase. In exercising its discretion, a court may garnish the member's military salary to pay some percentage of the member's salary directly to the landlord.[139]

The SCRA offers no specialized protection in summary holdover proceedings or plenary ejectment actions. But the SCRA's broad language—it applies to "any judicial or administrative proceeding commenced in any court or agency in any jurisdiction subject to this Act"[140]—encompasses holdover proceedings and ejectment actions.

C. Stays Under the NYSSCRA

1. General NYSSCRA Stays

The NYSSCRA, like the SCRA, contains a general stay provision. Courts may grant a stay when a servicemember is a party to an action or proceeding and is either in active military service or has been out of active military service for 60 days or less.[141] A stay can be granted only when a member's active duty service materially affects an ability to appear and prosecute or defend the case.[142] Under the NYSSCRA, as under the SCRA, courts have the discretion to determine how long the action or proceeding should be stayed. According to the NYSSCRA, courts may stay the action or proceeding "for the period of military service and three months thereafter or any part of such period."[143]

The language of the NYSSCRA's stay provision is similar to that of the SSCRA, the former Federal Act, but servicemembers are given more generous stay protections under the SCRA than under the SSCRA or the NYSSCRA.[144] The NYSSCRA allows a member to request a stay while on active duty or 60 days after the member leaves active duty; the SCRA allows a member to request a stay while on active duty or 90 days after leaving active duty.[145] Additionally, judges have the discretion under the NYSSCRA to stay an action or proceeding for up to three months after a member's military service is supposed to conclude.[146] The SCRA, on the other hand, leaves the duration of the stay to the judge's discretion, so long as the stay lasts at least 90 days.[147]

2. NYSSCRA Eviction Stays

Like the SCRA, the NYSSCRA contains a provision that applies only to nonpayment proceedings. The nonpayment stay provision applies to "any premises occupied chiefly for dwelling purposes" by either the servicemember or the member's dependents[148] but only when a member's military service materially affects an ability to pay rent.[149] This provision is especially pertinent for reserve and National Guard members, who must leave their private sector jobs and perhaps take a pay cut when called to active duty. If the court finds that active military service materially affects the member's ability to pay rent, the court may stay the proceeding for up to three months from the time the judge grants the stay.[150]

The NYSSCRA's specialized section for nonpayment actions and proceedings does not apply to holdover proceedings or ejectment actions.[151] The question is whether the NYSSCRA's general stay provision, discussed above, protects servicemembers in holdovers and ejectments.

Although one opinion assumes without deciding that the Acts cover holdovers,[152] the only on-point published New York case law, *London v. O'Connell* and *Bronson v. Chamberlain*, holds that the NYSSCRA does not apply to holdovers.[153] But neither *London* nor *Bronson* has precedential value.

First, both *London* and *Bronson* are decades-old Municipal Court cases that discussed the issue in dictum. The dictum in *London* was the court's statement that even though neither the SSCRA nor the NYSSCRA covers holdovers, the tenant would lose even if the Acts applied to holdovers. The dictum in *Bronson* was that the court mentioned the NYSSCRA's inapplicability to holdovers as but one ground among many in ruling for the landlord.

Second, both *Bronson* and *London* ignore relevant portions of the SSCRA (now the SCRA) and the NYSSCRA. *Bronson* and *London* correctly held that NYSSCRA § 309 applies to nonpayment proceedings

only. Relying on *Bronson* and *London*, other leading authorities also state correctly that NYSSCRA § 309 applies only to nonpayment proceedings.[154] *Bronson* and *London* erred, however, in not applying NYSSCRA § 304—NYSSCRA's general stay provision—to holdover proceedings.

Third, both *Bronson* and *London* predate the passage of the SCRA, which applies "to any judicial or administrative proceeding commenced . . . in any jurisdiction subject to this Act."[155]

Thus, the NYSSCRA by its own terms, or through the SCRA's eviction stay provision, applies to nonpayment actions and proceedings and to holdover proceedings and ejectment actions.

Other commentators agree that the NYSSCRA applies to holdovers. For example, one commentator—this author's predecessor in New York County's Military Part—has opined that "provisions in the New York Act apply to holdover proceedings permitting the judge in his or her discretion to stay the proceeding, if it appears that the respondent's ability to defend the action is materially affected as a result of his or her military service."[156]

Additionally, a member may invoke CPLR 2201 in moving to stay both nonpayments and holdovers or ejectments. CPLR 2201 allows a court to stay an action or proceeding "upon such terms as may be just." In *Mirisoloff v. Monroe*, a servicemember moved for a stay under both CPLR 2201 and the SCRA.[157] Although the Appellate Division denied the motion because the member had not provided facts to support his stay application, the court considered CPLR 2201 with the SCRA.[158]

D. Additional SCRA and NYSSCRA Stays

1. Additional SCRA Stays

If the court's initial stay is insufficient, the servicemember may apply for an additional stay if military duties continue to affect materially any ability to appear.[159] The member must give the court updated information of the kind the member was required to provide to obtain the initial stay: a letter from the member and the member's commanding officer stating how the military duty materially affects the ability to appear and a date by which the member can appear.[160] If the court finds that the member's military duty no longer materially affects an ability to appear, the court will deny the additional stay. If the court denies the additional stay, the court must appoint counsel for the member.[161]

2. Additional NYSSCRA Stays

The NYSSCRA specifies no procedure to apply for an additional stay. By implication, therefore, the NYSSCRA defers to the SCRA's provisions when an additional stay is requested. An action or proceeding stayed under the NYSSCRA is taken off the trial calendar and placed on the military suspense calendar until the member can appear.[162] The plaintiff/petitioner may thereafter apply to move the case from the military suspense calendar to the trial calendar.[163] At that point, the member must once again meet the SCRA's requirements to show continued unavailability by reason of military service. That is, the member and the member's commanding officer must explain in a letter or other communication why military duty prevents the member from appearing and provide a date by which the member will appear.[164] If the court is satisfied that military service still materially affects the member's ability to appear, then the court may grant an additional NYSSCRA stay.[165]

VII. Added Protections for Servicemembers

Under the SCRA, servicemembers or members' dependents may unilaterally terminate a lease signed before the member entered active duty.[166] The SCRA's lease termination provision covers residential, professional, business, and agricultural leases, as well as leases for "similar purpose[s]."[167] The SCRA also allows members and their dependents to terminate without financial repercussions leases entered into while on active duty if the member later receives orders for a permanent change of station or deployment for 90 days or more.[168] The lease termination provision allows members and their dependents to terminate leases that become untenable because of active duty service.

The SCRA requires that servicemembers give a landlord notice before breaking a lease.[169] For a month-to-month tenancy, once the member gives the landlord notice the lease will terminate 30 days after the date of the next payment is owed.[170] For other lease agreements, the lease will terminate on the last day of the month following the month notice is given.[171] The member must give the landlord a copy of the transfer or deployment order along with a termination notice.[172] Only members may terminate leases. Dependents are protected from financial repercussions if a member terminates a lease, but they have no authority unilaterally to terminate a lease.[173]

The SCRA applies not only to actions and proceedings about rental housing but also to mortgage payments, if the foreclosure action was filed within the member's period of active military or within 90 days after.[174] When servicemembers default on their mortgage payments because of financial hardship, a court may grant them a stay or modify their obligations if they can show that military service materially affects their ability to make mortgage payments.[175] Courts have complete discretion to determine the length of the stay and to adjust the member's mortgage payment obligations to preserve all the parties' interests.[176]

The SCRA also helps indebted servicemembers. The SCRA reduces the interest on any debt a member has to six percent for the member's entire active military service.[177] This provision applies to any debt, including credit card and mortgage debts.[178] The SCRA forgives any interest over six percent.[179] To take advantage of this protection, a member must give the creditor written notice and a copy of the military orders at any time during the member's military service but not later than 180 days after release from service.[180]

VIII. When Defaults Are Wrongly Entered Against Servicemembers

The 2003 SCRA defines the term "judgment" as "any judgment, decree, order, or ruling, final or temporary."[181] Servicemembers can set aside judgments in more circumstances than under the 1940 SSCRA, which did not define "judgment."[182]

If a servicemember did not receive notice of an action or proceeding and a default judgment is entered while the member is on active duty, the member may seek to open the default judgment to defend on the merits. The motion must be made when the member completes active military service or within 60 days after.[183] In addition to proving that the default judgment was entered while the member was on active duty, the member must prove that the member was unable to defend because of active military service and that the member has a meritorious defense to the claim or "some part of it."[184]

If one servicemember-defendant/respondent can prove the factors required to open a default judgment, the court must then open the default against all the member-defendants/respondents in the case.[185]

Opening a default judgment will not impair a bona fide purchaser's right or title acquired under that judgment.[186] Instead, the court might try to compensate the member who lost land because of a wrongly entered default judgment. The court can order the seller of the land to indemnify the defendant for the amount the defendant would have received for the land.

IX. Tolling Statutes of Limitation

The SCRA tolls the statute of limitations during military service for both service member-plaintiffs/petitioners and defendants/respondents.[187] The SCRA does not, however, affect time periods within a suit, such as the time period to dismiss for failure to prosecute.[188] Nor need plaintiffs/petitioners wait until the member's last day of active service to bring an action or proceeding if they can effect proper service before the member is released from military service.[189]

Once active military service is proven, tolling is automatic for the duration of service, and members need not show that their active military service prejudiced their ability to prosecute or defend an action or proceeding.[190] Thus, the United States Supreme Court held in *Conroy v. Aniskoff* that "[a] member of the Armed Services [need not] show that his military service prejudiced his ability to redeem title to property before he can qualify for the statutory suspension of time."[191]

X. Waiver

Servicemembers may waive their rights under both the Federal and New York Acts.[192] The waiver must be in writing and executed after the member began a tour of active duty.[193] The waiver can occur any time after the member enters active duty, even after the member defaults. If the plaintiff/petitioner submits a written statement in which a member waived SCRA protection, a court may enter a default judgment.[194]

The SCRA provides that any waiver of rights be in a separate document and in 12-point type.[195] A member who wishes to waive the right to break a residential lease must therefore sign a waiver form separate from the lease itself. A waiver of one SCRA provision does not, moreover, waive the member's rights to all SCRA protections.[196] Congress sought to reduce the possibility that members might waive SCRA rights unknowingly.[197]

XI. Conclusion

Those who protect us all need protection themselves. Enshrining that doctrine, Congress enacted the SCRA and the New York Legislature enacted the NYSSCRA to defend servicemembers and their dependents from civil liability while they serve our country. Taken together, the SCRA and the NYSSCRA give due process to members on active duty in the United States and around the globe. If both Acts are applied properly, members will not return from service to find unexpectedly that a landlord has secured an eviction, that a bank has foreclosed on property, or that a creditor has won a money judgment. Cherished must be the principle that members of the United States armed forces will not come home to find themselves or their loved ones homeless.

Endnotes

1. Department of Defense Active Duty Military Personnel Strengths by Regional Area and by Country, *available at* http://www.dior.whs.mil/mmid/military/history/hst0305.pdf (last visited Aug. 22, 2005).
2. *Id*.
3. *The National Guard and Reserves: Once was Enough*, The Economist, July 9, 2005, at 77 (noting that early in 2005, reservists made up as many as 50% of U.S. military force in Iraq).
4. Sandra Block, *Reservists Pay Steep Price for Service*, USA Today, June 9, 2003, at A1 ("More than a third of military reservists and National Guard members suffer a cut in pay when they're called to active duty.").
5. 50 U.S.C. app. §§ 501 *et seq.*

6. N.Y. Military Law §§ 300 *et seq*.
7. In Richmond County, all Housing Part cases, including military cases, go to Part Y, an all-purpose resolution and trial part.
8. *See generally* Larry S. Schachner & Susan Avery, Outside Counsel, *Housing Court Part M, The Military and Their Dependents*, N.Y.L.J., May 14, 2003, p.4, col. 4.
9. *See* 50 U.S.C. app. §§ 501 *et seq.* (1940).
10. John T. Meixell, *Servicemembers Civil Relief Act Replaces Soldiers' and Sailors' Civil Relief Act*, Army Law. 38, 38 (Dec. 2003).
11. H.R. Rep. No.108-81, at 32 (2003).
12. *See* An Act in Relation to the Limitation of Actions in Certain Cases, 13 Stat. 123 (1864).
13. *See* 50 U.S.C. app. §§ 101 *et seq*. (1918).
14. *The Sylph*, 42 F. Supp. 354, 356 (E.D.N.Y. 1941).
15. 50 U.S.C. app. § 510 (1940).
16. *See* 50 U.S.C. app. § 502(1) & (2).
17. *See* N.Y. Military Law §§ 300 *et seq*.
18. *Kelley v. Kelley*, 38 N.Y.S.2d 344, 347 (Sup. Ct., Oneida Co. 1942).
19. *See* New York Soldiers' and Sailors' Civil Relief Act, N.Y. Military Law §§ 300 *et seq*. (1941).
20. *Id.* § 322.
21. N.Y. Military Law § 300.
22. *See* N.Y. Exec. (Human Rights) Law §§ 296 *et seq.* (N.Y. St. Patriot Act) (eff. Aug. 29, 2005); Maria I. Doti, *Military Families and Civil Court/Pro Bono Needs*, 3 (unpublished N.Y. County Lawyers' Ass'n Civ. Ct. Prac. Sect. memorandum dated June 9, 2005).
23. *See* N.Y. Exec. (Human Rights) Law §§ 296 *et seq.*
24. *Heritage East-West, LLC. v. Chung*, 6 Misc. 3d 523, 528, 785 N.Y.S.2d 317, 321-22 (Hous. Part Civ. Ct., Queens Co. 2004) (reading SSCRA and NYSSCRA together); *Cornell Leasing Corp. v. Hemmingway*, 147 Misc. 2d 83, 85, 553 N.Y.S.2d 285, 286 (Hous. Part Civ. Ct., N.Y. Co. 1990); *Kelley*, 38 N.Y.S.2d at 347.
25. *Kelley*, 38 N.Y.S.2d at 347.
26. *Id.*
27. *Boone v. Lightner*, 319 U.S. 561, 578 (1943) (Black, J., dissenting) (quoting 50 U.S.C. app. § 510 (1940)).
28. *Meyers v. Schmidt*, 181 Misc. 589, 591, 46 N.Y.S.2d 420, 422 (Columbia County Ct.,1944); *accord Jaworski v. McCloskey*, 47 N.Y.S.2d 26, 27 (Sup. Ct., N.Y. Co. 1944); Larry S. Schachner, *Affidavits of Military Status As Required by the United States Soldiers' and Sailors' Civil Relief Act of 1940 and the New York State Soldiers' and Sailors' Civil Relief Act of 1951*, at 3 (2002) (unpublished paper for N.Y. County Lawyers' Ass'n Jack Newton Lerner CLE Lecture Series, Apr. & May 2002).
29. *Arkless v. Kilstein*, 61 F. Supp. 886, 887 (E.D. Pa. 1944); *Lesher v. Louiseville Gas & Electric Co.*, 49 F. Supp. 88, 90 (W.D. Ky. 1943); *Balconi v. Dvascas*, 133 Misc. 2d 685, 688, 507 N.Y.S.2d 788, 790 (Monroe County Ct., 1986); Bernice Siegal & Christina Caturano, *Non-Military Affidavits: Providing Civil Relief at Home*, 4 Landlord-Tenant Prac. Rep. 1, 8 (Mar. 2003).
30. N.Y. Military Law § 300.
31. *Boone*, 319 U.S. at 575.
32. N.Y. Military Law § 301(3).
33. *Id.* § 304.
34. *See* 50 U.S.C. app. § 512(1) (1940) ("The provisions of [§ 512] shall apply to the United States, the several States and Territories, the District of Columbia, and all territory subject to the jurisdiction of the United States and to proceedings commenced in any court therein.").
35. *Id.* § 512(b); s*ee also* Meixell, *supra* note 10, at 38.
36. Major Hostetter, *Using the Soldiers' and Sailors' Relief Act to Your Clients' Advantage*, Army Law. 34, 36 (Dec. 1993) (citing *Shatswell v. Shatswell*, 758 F. Supp. 662, 663 (D. Kan. 1991) (holding that federal court may not supercede state determination not to stay proceedings)).
37. *Longmire v. Longmire*, 2000 WL 796435, at *2, 2000 U.S. Dist. LEXIS 8506, at *6 (N.D. Miss. 2000) (referencing SSCRA).
38. 50 U.S.C. app. § 511(2).
39. *Id.* (citing 10 U.S.C. § 101(d)(1) (defining "active duty")).
40. *Id.* § 511(2)(A).
41. *Id.* § 511(2)(A)(i) & (ii).
42. Schachner, *supra* note 28, at 3.
43. 50 U.S.C. app. § 511(2)(B) (citing 10 U.S.C. § 101(a)(5) (defining "uniformed services")).
44. *Id.* § 511(2) (citing 10 U.S.C. § 101(d)(1) (defining "active duty")).
45. *Id.* § 511(2)(A)(i) (citing 10 U.S.C. § 101(d)(1)).
46. Mark S. Cohen, *Entitlement to a Stay or Default Judgment Relief Under the Soldiers' and Sailors' Relief Act*, 56 Am. Jur. Proof of Facts 3d § 5(2) (last updated June 2005).
47. 50 U.S.C. app. § 511(4).
48. *Id.* § 538.
49. N.Y. Military Law § 301-b; *Jusino v. N.Y.C. Hous. Auth.*, 255 A.D.2d 41, 46, 691 N.Y.S.2d 12, 17 (1st Dep't 1999) (extending stay to servicemember's dependent).
50. 50 U.S.C. app. § 511(2)(C).
51. Mark E. Sullivan, *Judge's Guide to the Servicemembers Civil Relief Act* 1-2 (Mar. 16, 2004), *available at* http://www.abanet.org/family/military/scrajudgesguidecklist.pdf. (last visited Aug. 9, 2005) (updated from 41 Judges' J. 28 (2002)).
52. *Branch v. Stukes*, 2001 WL 1550903, at *1, 2001 U.S. Dist. LEXIS 20640, at *1 (S.D.N.Y 2001) (holding that merely showing that defendant is in military does not render stay mandatory unless defendant's ability to defend is materially affected); *Hackman v. Postel*, 675 F. Supp. 1132, 1133 (N.D. Ill. 1988) (refusing to grant stay when defendant made no showing of unavailability or that service materially affected his ability to appear); *Deacon v. Witham*, 131 Misc. 2d 217, 219, 499 N.Y.S.2d 317, 319 (Hudson City Ct., 1985); *Mayfair Sales, Inc. v. Sams*, 169 So. 2d 150, 152 (La. Ct. App. 1964) (holding that defendant not entitled to stay because defendant was servicemember only).
53. *See* 50 U.S.C. app. § 522(b)(2); *Theresa G. v. Eric L.*, 133 Misc. 2d 414, 419, 506 N.Y.S.2d 948, 951 (Fam. Ct., Kings Co. 1986) (holding that because respondent was available to return, military duty did not materially affect ability to appear); *Underhill v. Barnes*, 288 S.E.2d 905, 907 (Ga. Ct. App. 1982) (affirming decision that servicemember did not provide sufficient evidence that military service materially affected his ability to appear).
54. 50 U.S.C. app. § 521(b)(1)(A) & (B).
55. N.Y. Military Law § 301-b(1).
56. *Citibank, N.A. v. McGarvey*, 196 Misc. 2d 292, 297-298, 765 N.Y.S.2d 163, 167 (Civ. Ct., Richmond Co. 2003).
57. *L&F Realty Co. v. Kazama*, N.Y.L.J., Nov. 26, 1997, p. 31, col. 1 (Hous. Part Civ. Ct., N.Y. Co.) (holding that nonmilitary-affidavit requirement may be waived if petitioner is unable to file affidavit but that court must be satisfied with adequacy of landlord's investigation of respondent's military status); *Rosenblum v. Ruiz*, N.Y.L.J., Mar. 6, 1991, p. 24, col. 2 (Hous. Part Civ. Ct., Kings Co.) (stating SSCRA allows court to dispense with nonmilitary affidavit, but declining to do so); *Tivoli Assocs. v. Foskey*, 144 Misc. 2d 723, 724, 545 N.Y.S.2d 259, 260 (Hous. Part Civ. Ct., Kings Co. 1989) ("Federal statute mandates and requires that a nonmilitary investigation be conducted, absent the formal filing of an affidavit of military service."); Schachner & Avery, *supra* note 8, p. 7, col. 5 (stating that courts can dispense with nonmilitary affidavit if petitioner in Housing Part proceeding is unable to determine respondent's military status).
58. *See* Schachner & Avery, *supra* note 8, p. 7, col. 6.

59. 50 U.S.C. app. § 512(b).

60. Schachner & Avery, *supra* note 8, p. 7, col. 6.

61. *In re Brusco v. Braun*, 84 N.Y.2d 674, 681, 645 N.E.2d 724, 726, 621 N.Y.S.2d 291, 293-94 (1994).

62. Schachner & Avery, *supra* note 8, p. 7, col. 6 (stating that a petitioner must submit affidavits or testimony about military status); N.Y.C. Civ. Ct., Non-Military Affidavits, Legal/Statutory Memorandum, Class LSM-152, at 2 (Apr. 30, 2003) ("[w]here a case is set for inquest, the presiding judge should inquire as to the military status of the defendant or respondent and note it in the decision.") (hereinafter "Legal/Statutory Memorandum 2003").

63. Siegal & Caturano, *supra* note 29, at 11.

64. *Id.*

65. *See, e.g.*, *Citibank*, 196 Misc. 2d at 299, 765 N.Y.S.2d at 168.

66. *Nat'l Bank of Far Rockaway v. Van Tassel*, 178 Misc. 776, 777-78, 36 N.Y.S.2d 478, 480 (Sup. Ct., Queens Co. 1942).

67. *Id.*, 36 N.Y.S.2d at 480.

68. *See* Legal/Statutory Memorandum 2003, *supra* note 62, at 2. That directive replaced a directive promulgated immediately after September 11, 2001. *See* N.Y.C. Civ. Ct., Non-Military Affidavits, Legal/Statutory Memorandum, Class LSM-109c, at 2 (Sept. 27, 2001).

69. Legal/Statutory Memorandum 2003, *supra* note 62, at 3.

70. *Id.*; *21948, LLC v. Riaz*, 191 Misc. 2d 730, 731, 745 N.Y.S.2d 389, 390 (Civ. Ct., N.Y. Co. 2002) (requiring investigator to speak with someone who has actual knowledge of defaulting respondent's military service) (citing *Benabi Realty Mgmt. Co., L.L.C. v. Van Doorne*, 190 Misc. 2d 37, 38, 738 N.Y.S.2d 167 (Hous. Part Civ. Ct., N.Y. Co. 2001); *N.Y. Mill Rock Plz. Assocs. v. Lively*, 153 Misc. 2d 254, 256-58, 580 N.Y.S.2d 815, 817-18 (Hous. Part Civ. Ct., N.Y. Co. 1990)).

71. *N.Y.C. Hous. Auth. v. Smithson*, 119 Misc. 2d 721, 723, 464 N.Y.S.2d 672, 673 (Hous. Part Civ. Ct., N.Y. Co. 1983) (rejecting nonmilitary affidavit in part because affidavit was based on tenant's file in which age and contents of file not identified); Legal/Statutory Memorandum 2003, *supra* note 62, at 3.

72. *See* 4 Misc. 3d 1027(A), 2004 Slip Op. 51085(U), at *1, 2004 WL 2187568, at *1, 2004 N.Y. Misc. LEXIS 1540, at *2 (Hous. Part Civ. Ct., Queens Co. 2004).

73. *Id.*, 2004 Slip Op. 51085(U), at *4, 2004 WL 2187568, at *4, 2004 N.Y. Misc. LEXIS 1540, at *8 (quoting 50 U.S.C. app. § 511).

74. *See id.* at *5, 2004 Slip Op. 51085(U), at *5, 2004 WL 2187568, at *5, 2004 N.Y. Misc. LEXIS 1540, at *11-12.

75. 6 Misc. 3d 523, 785 N.Y.S.2d 317 (Civil Ct., Queens Co. 2004).

76. *Id.* at 532, 785 N.Y.S.2d at 325.

77. *See id.*, 785 N.Y.S.2d at 325.

78. *Id.*, 785 N.Y.S.2d at 325.

79. 43 A.D.2d 8, 9, 349 N.Y.S.2d 935, 936 (1st and 2d Dep'ts 1973) (*per curiam*).

80. *See infra* note 92 and accompanying text.

81. Siegal & Caturano, *supra* note 29, at 11 n.56 (citing *Smithson*, 119 Misc. 2d at 724, 464 N.Y.S.2d at 674 (threatening to refer possible contempt to prosecutor)).

82. *Id.* at 11 n.57 (citing *Brantley v. Riley*, N.Y.L.J., Jan. 19, 1998, p. 32, col. 5 (Hous. Part Civ. Ct., Kings Co.); *De Camp v. Dawson*, N.Y.L.J., Mar. 12, 1997, p. 30, col. 4 (Hous. Part Civ. Ct., Kings Co.)).

83. *Id.*

84. *Id.*

85. Siegal & Caturano, *supra* note 29, at 11 n.58 (citing *In re Siegel*, 47 A.D.2d 461, 463, 367 N.Y.S.2d 294, 295 (1st Dep't 1975) (*per curiam*); *In re Shenghit*, 44 A.D.2d 440, 441-42, 355 N.Y.S.2d 599, 600 (1st Dep't 1974) (*per curiam*)).

86. Legal/Statutory Memorandum 2003, *supra* note 62, at 3.

87. *Id.*; *N.Y. Mill Rock Plz. Assocs.*, 153 Misc. 2d at 256-58, 580 N.Y.S.2d at 816-18.

88. *Avoid Using Fictitious 'John and Jane Doe' Names in Nonpayment Court Papers*, N.Y. Apt. L. Insider, Aug. 2004, at 14.

89. *Id.*

90. *Id.* at 14-15.

91. 50 U.S.C. app. § 521(b)(4).

92. *Id.* § 521(c) ("A person [who falsifies affidavit] shall be fined as provided in title 18, United States Code, or imprisoned for not more than one year, or both.").

93. *In re Jacreg Realty Corp. v. Kornreich*, N.Y.L.J., Apr. 28, 1999, p. 27, col. 4 (Sup. Ct., N.Y. Co.).

94. Larry S. Schachner & Susan Weissman, *Using Affidavits of Military Service in Housing Court Proceedings*, N.Y.L.J., June 6, 2002, p. 8, col. 5.

95. *Oliver v. Oliver*, 12 So. 2d 852, 853-54 (Ala. 1943) (allowing plaintiff to proceed because affidavit alleged that defendant was exempt from military service by reason of physical incapacity); Legal/Statutory Memoranda 2003, *supra* note 62, at 3.

96. *See, e.g.*, *Benabi Realty Mgmt.*, 190 Misc. 2d at 38, 738 N.Y.S.2d at 167 (requiring investigator to ascertain how individual spoken to knows respondent's military status); *N.Y. Mill Rock Plz. Assocs.*, 153 Misc. 2d at 257, 580 N.Y.S.2d at 817 (requiring clarity in giving basis of knowledge for nonmilitary affidavit).

97. *United States v. Simmons*, 508 F. Supp. 552, 552 (D.C. Tenn. 1980); Schachner & Weissman, *supra* note 94, p. 8, col. 5-6.

98. *L&F Realty*, N.Y.L.J., Nov. 26, 1997, p. 31, col. 1.

99. *Nat'l Bank of Far Rockaway*, 178 Misc. at 778, 36 N.Y.S.2d at 481.

100. *See* 10 U.S.C. § 1251(a) (providing, with exceptions, that Army, Navy, Air Force, and Marine Corps regular commissioned officers must retire at 62 years old); *One Sickles St. Co. LP v. Vasquez*, N.Y.L.J., Mar. 19, 1997, p. 26, col. 3 (Hous. Part Civ. Ct., N.Y. Co.) (alleging that respondent's age is between 40 and 50 is insufficient to prove that defendant is not in military because some servicemembers may serve past age 62).

101. *See* 50 U.S.C. app. § 521(b)(3); N.Y. Military Law § 303(1); *In re Realty Assocs. Sec. Corp.*, 53 F. Supp. 1015, 1016 (E.D.N.Y. 1944) (holding that if no evidence of defendant's military service exists, court may require bond before entering default judgment); *Syracuse Sav. Bank v. Brown*, 181 Misc. 999, 1002, 42 N.Y.S.2d 156, 159 (Sup Ct., Onondaga Co. 1943) (stating that court may require plaintiff to indemnify defendant against any loss defendant may suffer from judgment later set aside); *One Sickles St.*, N.Y.L.J., Mar. 19, 1997, p. 26, col. 3.

102. 50 U.S.C. app. § 521(b)(3).

103. *See Tivoli Assocs.*, 144 Misc. 2d at 724, 545 N.Y.S.2d at 260.

104. *Avoid Eviction Delays by Getting Information About Tenant's Military Service*, N.Y. Apt. L. Insider, Jan. 2003, at 2-3. The DMDC's address is 1600 Wilson Blvd., Ste. 400, Arlington, VA 22209-2593.

105. Sullivan, *supra* note 51, at 2-3.

106. Siegal & Caturano, *supra* note 29, at 10 (giving contact names, addresses, and fees for each armed forces branch).

107. *See* 144 Misc. 2d at 724, 545 N.Y.S.2d at 259.

108. *See* 50 U.S.C. app. § 521(b)(2); N.Y. Military Law § 303(1); *Realty Assocs. Sec.*, 53 F. Supp. at 1016 (noting that appointing counsel to represent servicemember is discretionary); *444 W. 54th St. Tenants Ass'n v. Costello*, 138 Misc. 2d 5, 16-17, 523 N.Y.S.2d 374, 381 (Civ. Ct., N.Y. Co. 1987).

109. *See* 562 A.2d 1302, 1305 (Md. App. 1989).

110. *See* 27 N.W.2d 754, 757 (Wisc. 1947).

111. *E.g.*, *Cornell Leasing*, 147 Misc. 2d at 87, 553 N.Y.S.2d at 287 (refusing to grant stay where servicemember intentionally defaulted despite availability to appear).

112. 50 U.S.C. app. § 521(b)(2) (providing that court "may not enter a [default] judgment until after the court appoints an attorney to represent the defendant"); *see Simkowitz v. Botelho*, N.Y.L.J., Oct. 30,

2002, p. 19, col. 3 (Hous. Part Civ. Ct., N.Y. Co.) (refusing to enter default judgment and, instead, appointing attorney).

113. *United States v. Henagan*, 552 F. Supp. 350, 351 (D.C. Ala. 1982); *Citibank*, 196 Misc. 2d at 301, 765 N.Y.S.2d at 170.

114. 50 U.S.C. app. § 521(b)(2).

115. *See generally State ex rel. Burden v. Smith*, 1994 WL 714505, at *2, 1994 Ohio App. LEXIS 5881, at *6 (Ct. App. 10th Dist. 1994).

116. 50 U.S.C. app. § 525(b).

117. *See DeMetre v. Hall*, 269 A.D. 802, 802, 55 N.Y.S.2d 111, 112 (3d Dep't 1945) (*per curiam*) (refusing to stay case because appellant had no defense); *Franklin Soc. for Home-Building & Sav. v. Flavin*, 265 A.D. 720, 721, 40 N.Y.S.2d 582, 583 (1st Dep't 1943) (*per curiam*); Schachner & Avery, *supra* note 8, p. 4, col. 5 (stating that court will not issue stay if respondent/defendant has no defense and if payment default preceded military service).

118. *See Jamaica Sav. Bank v. Bryan*, 176 Misc. 215, 216, 25 N.Y.S.2d 641, 642 (Sup. Ct., Queens Co. 1941) (refusing to grant stay because court found that servicemember could appear); *Theresa G.*, 133 Misc. 2d at 419, 506 N.Y.S.2d at 951; *Recovery Partners, L.P. v. Murphy*, N.Y.L.J., Sept. 10, 2001, p. 32, col. 3 (Dist. Ct., Nassau Co.) (denying stay because member was fully informed of action and had time to appear and defend); Schachner & Avery, *supra* note 8, p. 4, col. 5 (stating that courts will not grant stay unless military service materially affects member's ability to appear).

119. Schachner & Avery, *supra* note 8, p. 4, col. 5 (citing *Boone*, 319 U.S. at 570 (holding that court must use discretion to determine burden of proof); *Thompson v. Anderson*, 37 S.E.2d 581, 589 (Sup. Ct., So. Carolina 1946) (placing burden of proof on servicemember)).

120. *See* 50 U.S.C. app. 522(b)(2)(A) & (B); Meixell, *supra* note 10, at 39.

121. *Id.* § 522(b)(1) & (2) (directing court to stay action or proceeding if conditions in subsection 2 are met).

122. *See*, *e.g.*, *Royster v. Lederle*, 128 F.2d 197, 200 (6th Cir. 1942) (finding that Act should be construed liberally to carry out its intended purposes: to protect servicemembers unavailable for reasons of military service); *Arkless* at 61 F. Supp. at 887; *Lesher*, 49 F. Supp. at 90 ; *In re Burrell*, 230 B.R. 309, 312 (Bankr. E.D. Tex. 1999); *Balconi v. Dvascas*, 133 Misc. 2d 685, 688, 507 N.Y.S.2d 788, 790 (Rochester City Ct. 1986).

123. *See* 109 A.D.2d 790, 791, 486 N.Y.S.2d, 301, 302 (2d Dep't 1985); *see also Franklin Soc. for Home-Building & Sav.*, 265 A.D. at 721, 40 N.Y.S.2d at 583; *Nassau Sav. & Loan Ass'n v. Ormund*, 179 Misc. 447, 449, 39 N.Y.S.2d 92, 94 (Sup. Ct., Queens Co. 1942).

124. Note, however, that 50 U.S.C. app. § 522(b)(2) requires "[a] letter or other communication," not an affidavit.

125. *See* 50 U.S.C. app. § 522(b)(2)(A).

126. *Id.* § 522(a) & (b).

127. Sullivan, *supra* note 51, at 5-6.

128. *In re Title Guarantee Co. v. Duffy*, 267 A.D. 444, 446-47, 46 N.Y.S.2d 441, 443 (1st Dep't 1944); *Burgess v. Burgess*, 234 N.Y.S.2d 87, 89 (Sup. Ct., Westchester Co. 1962); *King v. King*, 193 Misc. 750, 753, 85 N.Y.S.2d 563, 567 (Sup. Ct., N.Y. Co. 1948).

129. 50 U.S.C. app. § 522(b)(1).

130. *Id.* § 522(b)(1) & (2).

131. *E.g.*, *Skates v. Stockton*, 683 P.2d 304, 305-06 (Ariz. Ct. App. 1984); *Vara v. Vara*, 171 N.E.2d 384, 392 (Ohio Ct. Com. Pl., Highland Co. 1961).

132. 50 U.S.C. app. § 522(c).

133. *Id.* § 531(a)(1)(A)(ii); *Servicemembers Given Added Protection from Eviction, Expanded Rights to End Lease*, N.Y. Apt. L. Insider, Apr. 2004, at 13 (hereinafter "Servicemembers Given Added Protection"); George C. Thompson, *The Servicemembers' Civil Relief Act*, Res Gestae 13, 17 (Sept. 2003).

134. 50 U.S.C. app. § 531(a)(2)(A).

135. *Id.* § 531(a)(2)(B)(i)(I) & (II).

136. *Id.* § 531(a)(3).

137. Publication of Housing Price Inflation Adjustment Under Public Law 108-109 § 301, 69 Fed. Reg. § 1281; Stanley Kwieciak, III, *Protecting the Protectors*, 77 N.Y. St. B.J. 42, 43 (Feb. 2005).

138. *Id.* § 531(b)(1)(A) & (B).

139. *Id.* § 531(d).

140. *Id.* § 512(b).

141. N.Y. Military Law § 304.

142. *Id.*

143. *Id.* § 307.

144. *Compare* 50 U.S.C. app. § 522(a)(1) *with* 50 U.S.C. app. § 521 (1940) *and with* N.Y. Military Law § 304.

145. *See* U.S.C. app. § 522(a)(1); N.Y. Military Law § 304.

146. *See* N.Y. Military Law § 307.

147. *See* U.S.C. app. § 522(b)(1).

148. N.Y. Military Law § 309(1); Siegal & Caturano, *supra* note 29, at 8 (citing *Riaz*, 191 Misc. 2d at 730-31, 745 N.Y.S.2d at 390).

149. N.Y. Military Law § 309(2).

150. *Id.*; *70 Linden Realty Co. v. Williams*, N.Y.L.J., Apr. 17, 1991, p. 25, col. 1 (Hous. Part Civ. Ct., Kings Co. 1991) (vacating judgment and staying for three months or until respondent returned from active duty).

151. *Id.* (mentioning only payment of "rent").

152. *See 444 W. 54th St. Tenants Ass'n*, 138 Misc.2d at 6, 523 N.Y.S.2d at 375.

153. *See London v. O'Connell*, 20 Misc. 2d 168, 168, 192 N.Y.S.2d 594, 595 (Mun. Ct., N.Y. Co. 1959); *Bronson v. Chamberlain*, 53 N.Y.S.2d 172, 174 (Syracuse Mun. Ct. 1945).

154. 3 Rasch's Landlord & Tenant, Including Summary Proceedings § 47:4, at 222 (Robert F. Dolan, 4th ed. 1998); 77 Herbert B. Chermside, Jr., N.Y. Jur. 2d Military and Civil Defense § 97, at 240–41 (2d ed. 1989); Elizabeth K. Ormond et al., 90 N.Y. Jur. 2d Real Prop. § 263, at 130-31 (1991).

155. 50 U.S.C. app. § 512(b).

156. Schachner, *supra* note 28, at 13 (citing N.Y. Military Law §§ 304, 306 & 309; *Adiaco v. Decker*, Index # 51267/01 (Hous. Part Civ. Ct., Richmond Co. 2001) (Bedford, J.)) (footnotes omitted).

157. *See* 16 A.D.3d 1161, 791 N.Y.S.2d 255 (4th Dep't 2005) (mem.).

158. *Id.* at 1161, 791 N.Y.S.2d at 256.

159. 50 U.S.C. app. § 522(d)(1).

160. *Id.*

161. *Id.* § 522(d)(2).

162. *Turchiano*, 109 A.D.2d at 790, 486 N.Y.S.2d at 301.

163. *Id.*, 486 N.Y.S.2d at 301.

164. *Id.*, 486 N.Y.S.2d at 301.

165. *Id.* at 790-91, 486 N.Y.S.2d at 301.

166. 50 U.S.C. app. § 535(b)(1)(A).

167. *See id.* § 535(b)(1).

168. *See id.* § 535(b)(1)(B); *accord* Charlton Meginley, *The Servicemembers' Civil Relief Act: Protecting Those Who Protect America*, 52 La. B.J. 94, 96 (2004); Meixell, *supra* note 10, at 40.

169. *See* 50 U.S.C. app. § 535(c).

170. *Id.* § 535(d)(1).

171. *Id.*

172. *Id.* § 535(c)(1)(A); *see also Servicemembers Given Added Protection*, *supra* note 133, at 14.

173. *Id.* § 535(b)(1)(A) & (B).

174. *Id.* § 533(b).

175. *Id.*

176. *Id.* § 533(b)(2).

177. *See id.* § 527(a)(1).

178. *Id.*; Charles W. Dobra, *Military, Employment and Business Law—New Developments that Employers, Employees Who are Military Reservists or Guardsmen, and the*

Lawyers Who Represent Them, Should Be Aware Of, 17 DuPage County Bar Ass'n Brief 12, 14 (2004).

179. *See* 50 U.S.C. app. § 527(a)(2).
180. *Id.* § 527(b)(1).
181. *Id.* § 511(9); *see also Congress Changes Service Members' Housing Rights*, N.Y. Apt. L. Insider, Apr. 2005, at 11 (hereinafter "Housing Rights").
182. *Housing Rights*, *supra* note 181, at 11.
183. 50 U.S.C. app. § 521(g)(1).
184. *Id.* § 521(g)(1)(A) & (B); *see also Dep't of Hous. Preserv. & Dev. of City of N.Y. v. W. 129th St. Realty Corp. & Green*, 2005 Slip Op. 25323, at *1, 2005 WL 1862717, at *1 (App. Term 1st Dep't 2005) (*per curiam*) (declining to open default in HP proceeding because co-respondent Green did not allege he was member or member's dependent); *Citibank, N.A. v. McGarvey*, 196 Misc. 2d 292, 297-298, 765 N.Y.S.2d 163, 167 (Civ. Ct., Richmond Co. 2003) (refusing to open default judgment because although defendant presented meritorious defense, he did not show he was in active military service).
185. *Id.* § 521(g)(1) (providing that upon servicemember's meeting burden, court "shall" vacate default).
186. *Id.* § 521(h).
187. *See id.* § 526(a).
188. *Zitomer v. Holdsworth*, 449 F.2d 724, 726 (3d Cir. 1971) (*per curiam*).
189. *Richard v. Birch*, 529 F.2d 214, 217 (4th Cir. 1975).
190. Sullivan, *supra* note 51, at 10.
191. *See Conroy v. Aniskoff*, 507 U.S. 511, 517-18 (1993) (holding that army officer on active duty whose property was bought by town in tax sale and later resold need not show that military service prejudiced ability to redeem title to property before receiving benefit of Federal Act's statute of limitation's tolling provision).
192. 50 U.S.C. app. § 517; N.Y. Military Law § 302.
193. 50 U.S.C. app. § 517(a); N.Y. Military Law § 302(3).
194. Schachner, *supra* note 28, at 10.
195. 50 U.S.C. app. § 517(c).
196. *Harris v. Stem*, 30 So. 2d 889, 892 (La. Ct. App. 1947).
197. *Housing Rights*, *supra* note 181, at 11.

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Determining the Proper Amount of Coverage in an Owner's Leasehold Title Insurance Policy

By John E. Blyth

1. The Problem

Assume a ground lease where (1) the value of the land is $1,600,000, (2) the insured will build a building worth $3,000,000, and (3) the amount of the rent over the primary twenty (20) year-term (at $100,000 per year) is $2,000,000. Further assume the lease provides that the tenant will own all of the improvements built on the land during the term of the lease and the ownership of the improvements will go to the landlord at the termination of the lease.[1] What is the proper amount of leasehold title insurance[2] for the tenant?[3]

For a purchaser of real estate, the appropriate insurance amount is the market value of the property which, generally, is the same as the purchase price. For a lender, the appropriate amount is the loan amount. In the leasehold situation, title insurers and proposed insureds have a much more difficult time determining the coverage amount.[4]

2. The Answers

The possible answers include: (1) $1,600,000 (land value), (2) $2,000,000 (rental value), (3) $4,600,000 (land plus value of the improvements), or (4) $5,000,000 (rent plus value of the improvements). Is the proper amount of insurance the sum of all four of the foregoing factors or $6,600,000? Should the tenant purchase two policies, a leasehold policy based upon rental value and a fee policy for the value of the improvements?

Some states specifically provide rules for determining the minimum amount of leasehold insurance. In California, the amount of insurance is determined by mandatory rules which require that the minimum amount of insurance shall be either the full value of the land and existing improvements, or a lesser amount relating to the remaining term of the lease, calculated according to a table.[5] In New York, the amount of insurance is selected by the insured under rules set forth in Section 7 of the TIRSA[6] Rate Manual according to one of four methods.[7]

The result is that the amount of the leasehold title insurance coverage (but not the premium rate) is almost always negotiated between the insurer and the insured. John C. Murray advises that in the small number of states which have regulations requiring that title insurance for leasehold estates be purchased at some multiple of the aggregate annual rental, the title underwriter should be consulted.[8] Obviously, and depending upon the lease context, "annual rental" may include base rent, percentage rent, additional rent (taxes, insurance, utilities), charges and fees, the obligation to maintain and repair, the obligation to replace, or various combinations thereof.

The 1975 Policies were designed with a simple operating lease in mind. If the holder of the leased space were dispossessed as a result of a defect in either the landlord's title or in the lease itself, the title policy would indemnify the holder for the increased cost of leasing an alternate space and give some "Miscellaneous Items of Loss" as well. The Policies missed the developing markets in real estate leasing[9] and were never popular.[10]

On October 13, 2001, the ALTA adopted the new ALTA 13 Leasehold Owner's Endorsement and ALTA 13.1 Leasehold Loan Endorsement (the "2001 Leasehold Endorsements") and withdrew the old 1975 Owner's and Lender's Leasehold Policies.[11] The new endorsements provide significantly expanded coverage as well as much needed clarification of essential terms.[12]

Since the 2001 Leasehold Endorsements only insure the possessory right of the insured, payment for a loss under the Policy is made only after the insured has been evicted or an eviction has taken place. Under Section 1 a. of the Owner's Endorsement, "Evicted" or "Eviction" means (1) the lawful deprivation, in whole or in part, of the right of possession insured by the Policy, contrary to the terms of the Lease or (2) the lawful prevention of the use of the land or the Tenant Leasehold Improvements for the purposes permitted by the Lease, in either case, as a result of a matter covered by the Policy.

Typical of any ALTA title insurance policy, the 2001 Leasehold Endorsements are constructed upon defined terms. In order to determine the calculation of value, these terms include the definitions of "Lease Term" and "Tenant Leasehold Improvements" as well as the definition of "Valuation of Estate or Interest Insured."[13]

a. "Lease Term" under Section 1 d. of the Owner's Endorsement refers to "the duration of the Leasehold estate, including any renewal or extended term, if a valid option to renew or extend is contained in the Lease." Gone is the 1975 language that made coverage subject to lease provisions that limited a tenant's right of possession.

b. "Tenant Leasehold Improvements" under Section 1 g. of the Owner's Endorsement are "improvements, including landscaping, required or permitted to be built on the land by the Lease that have been built at the insured's expense or in which the insured has an interest greater than the right to possession during the Lease Term."

This language is intended to make it clear that the tenant's interest in the improvements will only be covered if the tenant has paid for the improvements or has more than a possessory right therein. Otherwise, the tenant's rights in the property would be adequately covered under the definition of "Leasehold Estate."

c. "Valuation of Estate or Interest Insured" means "the value of the Remaining Lease Term of the Leasehold Estate and any Tenant Leasehold Improvements existing on the date of the Eviction. The insured claimant shall have the right to have the Leasehold Estate and the Tenant Leasehold Improvements valued either as a whole or separately.[14] In either event, this determination of value shall take into account rent no longer required to be paid for the Remaining Lease Term." According to Robert Bozarth, the valuation provision of the ALTA 13 Endorsement is the most significant change in the ALTA leasehold coverages.[15]

While there is no method specified for valuing either the Leasehold Estate or the Tenant Leasehold Improvements, there is recognition of the fact that the Leasehold Estate and the Tenant Leasehold Improvements may be valued independently.[16] That is where the negotiations of the amount of coverage between the insured and insurer take upon great importance. Determining the value of tenant leasehold improvements five years into a ten-year lease may present significant challenges. Similarly, difficulties may arise in valuing leases and determining whether they are, in fact, below market.[17]

It is possible to incorporate all of these concepts into one Owner's Leasehold Insurance Policy. It is no longer thought proper for the tenant to purchase a leasehold policy insuring its interest based upon annual rent and another fee policy insuring its interest based upon the value of the tenant's improvements.

3. Avoiding the Coinsurance Trap

Under Section 7(b) of the Owner's and Lender's ALTA Conditions and Stipulations, if the insured does not purchase a minimally required amount of title insurance, i.e., if it fails the 80% or 120% test, the insured becomes a co-insurer with the title insurance company and shares in any loss along with the title insurance company under a complicated formula. This trap is avoided by Section 2 of the 2001 Leasehold Owner's Endorsement which states that "subsection (b) of Section 7 of the Conditions and Stipulations shall not apply to any Leasehold Estate covered by this policy."[18]

The coinsurance requirement, it should be noted, applies only to the valuation of the Leasehold Estate and does not apply to the valuation of the Tenant Leasehold Improvements. In the latter case, a construction budget is usually prepared which shows the cost of constructing the improvements.[19]

For Tenant Leasehold Improvements that are not completed at the time of the loss, Section 4 g. of the 2001 Leasehold Endorsements provides that the insurer will pay the actual costs incurred for such improvements by the insured up to that date (less salvage value), i.e., both the "hard" and "soft" costs, such as "costs incurred to obtain land use, zoning, building and occupancy permits, architectural and engineering fees, construction management fees, costs of environmental test and reviews, landscaping costs and fees, costs and interest on loans for the acquisition and construction."

Robert Bozarth points out that there are still some issues for the leasehold loan coverages. If a tenant places a mortgage on its leasehold to secure repayment of a loan, and later modifies or terminates its lease with the landlord but without the consent of the insured lender, the ALTA 13.1 does not insure that the lender can foreclose on the leasehold interest as it existed before the modification or termination. The modification or termination are post-policy events and presumably are not covered by the policy which speaks from the date of issuance.[20]

4. The Short Answer

Because there is no coinsurance trap in an Owner's Leasehold Title Insurance Policy, the insurer and the insured are free to negotiate the proper amount of coverage. The insurer, however, will almost always insist on an amount sufficient to generate a premium which will at least cover its anticipated costs of defense under the policy, should that dreaded day arrive.

Endnotes

1. Taken from posts on the First American "Landsakes" internal listserv for April 19, 2004, between Lillian E. Eyrich at ketrucg@steeglaw.com and Cliff Morgan at cmorgan@firstam.com.
2. A leasehold title insurance policy is the same as an owner's or lender's policy except that Schedule "A" recites the leasehold, as described in the lease, as the insured premises. The Leasehold Endorsements are added without additional premium charge. Bulletin, Stewart Title Guaranty Company, January 2, 2002, http://www.vuwriter.com.
3. The amount of insurance in a Lender's Leasehold Title Insurance Policy is usually based upon the amount of the loan and therefore does not generate the same number of concerns as those generated by an Owner's Leasehold Title Insurance Policy. Serious questions do arise, however, where the amount of insurance must be allocated among several properties, as in a multi-state transaction, or where the face amount of the mortgage is deliberately kept low in order to avoid paying mortgage recording tax or its equivalent.
4. Harvey L. Temkin, *The Value in Protecting the Tenant's Interest: Leasehold Title Insurance*, Probate and Property, May/June 2002 at 35.
5. The California Rate Manual, Section F, Leasehold Policies, provides:

Remaining Term	Minimum Amount of Insurance
Less than 10 yrs.	remaining term in yrs. times annual rental
10 yrs. or more, but less than 25 yrs.	10 times annual rental
25 yrs. or more, but less than 50 yrs.	20 times annual rental
50 yrs. or more	full value of the land and existing improvements

6. Title Insurance Rating Services Agency.

7. (A)(1) for leases having a term of six (6) years or less, an amount equal to the aggregate of the total rents payable under the lease; or (2) for leases having a term of more than six (6) years, an amount not less than the aggregate of the total rentals for the six (6) years immediately following the closing of the lease transaction (on percentage leases, a statement of estimated rent may be used); or (3) not less than the fair market value of the land and improvements at the time of closing of the leasehold transaction; or (4) not less than the appraised value of the land and improvements at the time of the closing of the leasehold transaction. Section 7(B) provides, in the case of proposed construction, that the projected cost of improvements may, at the option of the insured, be added to the amount specified in (A)(1) through (4) above.

8. John C. Murray, *Benefits of the New Leasehold Endorsements for Owner's and Loan Policies* (2005), http://www.firstam.com/faf/html/cust/jm-articles. *See also*, Robert Bozarth, *The New ALTA Leasehold Endorsements: Where are we now, and how did we get here?* (2002), http://www.nextra.landam.com/extranet/SingleSource/content/Articles/LeaseholdEndorsements.htm.

9. For example, leveraged leasing of build-to-suit projects, ground leases with tenant build-to-suit projects, sale-leaseback transactions, and synthetic leases. Robert Bozarth, *The New ALTA Leasehold Endorsements: Where are we now, and how did we get here?* (2002), http://www.nextra.landam.com/extranet/SingleSource/content/Articles/LeaseholdEndorsements.htm; Bulletin, Stewart Title Guaranty Company (2002), http://www.vuwriter.com.

10. Robert Bozarth, *The New ALTA Leasehold Endorsements: Where are we now, and how did we get here?* (2002), http://www.nextra.landam.com/extranet/SingleSource/content/Articles/Leasehold Endorsements.htm.

11. *See generally*, John C. Murray, *Benefits of the New Leasehold Endorsements for Owner's and Loan Policies* (2005), http://www.firstam.com/faf/html/cust/jm-articles. Jack points out that the 1975 Policies may still be available to those who wish to use them until they get comfortable with the new endorsements. Robert Bozarth points out that the Policies were amended five (5) times between 1975 and 2001 but only the 2001 amendments made significant changes. Robert Bozarth, *The New ALTA Leasehold Endorsements: Where are we now, and how did we get here?* (2002), http://www.nextra.landam.com/extranet/SingleSource/content/Articles/LeaseholdEndorsements.htm.

12. *Id.* In his article, Jack Murray explains how the 2001 Leasehold Endorsements improve upon the ALTA 1975 Owner's and Lender's Leasehold Policies. The 1975 Policies were designed to provide basic protection primarily for a tenant leasing space in an office building where the cost of tenant improvements is insignificant and the tenant's business does not depend upon being in a specific location. They did not protect major tenants who have invested large sums of money in tenant improvements, the purchaser of a business who considers the unique location of such property and the goodwill generated thereby as important items of valuation, or purchasers of ground leasehold estates where the tenant anticipates constructing and financing significant leasehold improvements.

13. A definition for "personal property" was not added to the definitions in Section 1 of the Conditions and Stipulations but appears in Section 15(a) because the concept of personal property only applied to the "Miscellaneous Items of Loss." Robert Bozarth, *The New ALTA Leasehold Endorsements: Where are we now, and how did we get here?* (2002), http://www.nextra.landam.com/extranet/SingleSource/content/Articles/LeaseholdEndorsements.htm.

14. This new provision allows for a negotiated basis for valuation of both the Leasehold Estate and the Tenant Leasehold Improvements if they are to be valued separately. If a subsequent loss occurs, the "value" of the leasehold interest for the Remaining Lease Term may be determined by appraisal, which could consist, at the option of the insured, either of a calculation of the value of both the Leasehold Estate and the Tenant Leasehold Improvements, or a separate calculation of the value of each of these components. The insured will be able to offer as proof of loss whatever damages it claims it has incurred by virtue of its loss of possession and will not be limited by the language in the 1975 Leasehold Policies that restricted coverage to the difference between the fair market rental value of the leased premises for the remainder of the lease term and the value of the rent required to be paid under the lease for the same period. With respect to leasehold improvements, the Leasehold Endorsements do not provide a specific method of valuation. John C. Murray, *Benefits of the New Leasehold Endorsements for Owner's and Loan Policies* (2005), http://www.firstam.com/faf/html/cust/jm-articles.

15. Robert Bozarth, *The New ALTA Leasehold Endorsements: Where are we now, and how did we get here?* (2002), http://www.nextra.landam.com/extranet/SingleSource/content/Articles/Leasehold Endorsements.htm.

16. *Id.* The Leasehold Endorsements limit the insured's recovery to the values, less any "salvage value" and excluding rent "no longer required to be paid for the Remaining Lease Term."

17. Harvey L. Temkin, *The Value in Protecting the Tenant's Interest: Leasehold Title Insurance*, Probate & Property, May/June 2002 at 39.

18. The coinsurance provisions were added to the ALTA Policies in the 1987 comprehensive revision of all ALTA policy forms but the Forms Committee did not identify the difficulty that application of a coinsurance provision would have on determining the value of a leasehold estate. It is the most persistent problem in insuring leasehold estates and nobody has found a policy solution to resolve it. The coinsurance provision was made inapplicable to Leasehold Estates in 1987. Robert Bozarth, *The New ALTA Leasehold Endorsements: Where are we now, and how did we get here?* (2002), http://www.nextra.landam.com/extranet/SingleSource/content/Articles/LeaseholdEndorsements.htm.

19. John C. Murray, *Benefits of the New Leasehold Endorsements for Owner's and Loan Policies* (2005), http://www.firstam.com/faf/html/cust/jm-articles.

20. Robert Bozarth, *The New ALTA Leasehold Endorsements: Where are we now, and how did we get here?* (2002), http://www.nextra.landam.com/extranet/SingleSource/content/Articles/Leasehold Endorsements.htm.

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A Call to Conscience: Remedy for Harsh Result in Oppressive New York Tax Enforcement Procedures Overdue

By Elaine A. Turley

Article 11 of the N.Y. Real Prop. Tax Law (hereinafter "Article 11"), known as "The Uniform Delinquent Tax Enforcement Act," provides a uniform code for property tax enforcement in New York State.[1] Certain local tax districts, by the terms of Article 11, may adopt the statute to enforce property tax collection or may enact local laws to do so.[2] Article 11 provides, in major part, for an in rem foreclosure proceeding by which absolute title to properties not redeemed from delinquent tax liens is transferred to the tax district and surplus proceeds of the subsequent sale are retained by the district.[3] The Article 11 in rem foreclosure proceeding is analogous to a strict foreclosure of a mortgage proceeding in methodology[4] and effect—a proceeding disfavored and, consequently, rarely used, in American law.[5] Local laws enacted by some tax districts that have opted not to adopt Article 11 provide for a similar foreclosure proceeding which precludes the former property owner from applying for a distribution of the proceeds of the foreclosure sale.[6]

Suffolk County, until recently, implemented a foreclosure proceeding similar to that provided in Article 11. The county realized a windfall profit of $4,469,198.11 in June 2004, when it sold twenty-one single-family homes for $4,825,000.00 to enforce collection of $355,801.39 owed in taxes and penalties.[7] Title to the properties had previously been transferred to the county to enforce collection of delinquent tax liens that amounted to a fraction of the value of the parcels. When the properties were sold at public auction, surplus proceeds were retained by the county since there was no provision in county law[8] to allow former property owners to apply for a distribution of proceeds. After months of heated debate, the Suffolk County Legislature amended local tax enforcement legislation to provide relief to property owners from the harsh result of the tax enforcement procedures. The amendment allows former owners of owner-occupied residential properties foreclosed for non-payment of property taxes to apply for the surplus proceeds of the sale of such properties.[9]

Tax foreclosure proceedings tend to affect our most vulnerable citizens, as is evidenced by the stories behind some recent tax foreclosure sales. One of the properties sold in the 2004 Suffolk County auction was owned for almost 40 years by Sarah Jones, a 68-year-old woman who had suffered two strokes and been relying on Social Security to support herself since 1988.[10] Title to Ms. Jones's property was transferred to Suffolk County in 1997.[11] Taxpayer Charles Weber, whose home was sold in the auction, fell behind in his tax payments after his wife was diagnosed with the cancer that eventually took her life and his business began failing.[12] A Chemung County public auction in June 2004 included the family farm of George Kent, Jr., a man who says he fell behind in his taxes after he and his girlfriend lost their jobs in the upstate community and had difficulty finding new employment.[13] Evidently, tax districts that retain the surplus equity or proceeds in the sale of homes foreclosed for non-payment of taxes are often making a profit off those who have suffered misfortunes such as ill health or job loss.

Legislation similar to that enacted by the Suffolk County Legislature is needed on the state level to alleviate the harsh and oppressive results of New York State tax foreclosure policy.

"Tax foreclosure proceedings tend to affect our most vulnerable citizens . . ."

This article reviews the authority of the New York Legislature to enact legislation to protect property owners from oppressive tax lien foreclosure proceedings, existing New York statutes providing for tax enforcement, and case law examining the constitutionality of the statutory framework. The rights of property owners in tax foreclosure actions are contrasted with their rights in mortgage foreclosure proceedings. The article concludes with an appeal to the New York Legislature to amend tax enforcement legislation to provide long overdue relief to New York State taxpayers.

Power of the Legislature to Protect Property Owners in Tax Foreclosure Actions

In *Gautier v. Ditmar,* the New York Court of Appeals held all power to impose and collect taxes vested in the New York Legislature and found that power to be limited only by the federal constitution.[14] The legislature has the authority to determine the procedures by which taxes are collected and enforced and by whom.[15] The N.Y. State Constitution gives local governments the authority to enact local legislation to

levy and collect local taxes authorized by the New York Legislature in a manner consistent with the constitution and general laws of the state.[16] The Home Rule Amendment to the State Constitution[17] and related state statute[18] vests control over the "property, affairs and government" of localities in local governments but do not limit the state's power to legislate on matters of state concern.[19] The New York Court of Appeals has held that the state is empowered to enact special laws that affect the property, affairs and government of local governments without a home rule message when the special law bears a "reasonable relationship to a substantial state concern."[20] When the New York Legislature delegates its power to impose and collect taxes to municipalities, local laws must be consistent with state law even where the state does not mandate uniformity with state law.[21] Thus, where a taxpayer challenged the in rem foreclosure procedure enacted and followed by the City of New York, claiming that the local law must fail due to inconsistency with the state uniform in rem tax foreclosure procedure, the court found that the law was not invalid as inconsistent with state law merely because the state and local laws lacked uniformity.[22]

Since the exclusive power of taxation is vested in the New York State Legislature and is not subject to municipal home rule provisions of the State Constitution or state statutes, the Legislature has the power to require that municipalities return to property owners the surplus proceeds in tax foreclosure sales and excess value of property acquired by local governments in foreclosure actions. Prohibiting local governments from collecting windfall profits at the expense of the state's property owners is a state concern giving the Legislature unqualified power to enact legislation to accomplish this equitable result. Enacting a general state law to correct this inequity on the state level will not preclude local governments from following local tax collection enforcement procedures otherwise consistent with state legislation.

Article 11—The Uniform Delinquent Tax Act

Title two of Article 11, which governs the redemption of real property subject to delinquent tax liens, provides that such property must be redeemed within two years of the date on which the tax becomes a lien.[23] Local districts are authorized to increase the redemption period for residential and/or farm property as defined by the title.[24] Tax liens against property subject to more than one lien will be redeemed in reverse chronological order. Partial payment of delinquent taxes, therefore, will be applied to the tax lien entered last, allowing the foreclosure of the earlier tax liens to proceed while the taxpayer is making payments.[25]

Tax liens not redeemed within the expiration period are to be foreclosed by the in rem foreclosure procedure set forth in title three of Article 11.[26] Three months prior to the expiration of the redemption period the enforcing officer of the tax district must prepare, execute, and file in the county clerk's office a petition of foreclosure[27] and notice of the action must be given as provided in Article 11.[28] Notice of the commencement of the foreclosure proceeding must inform interested parties of their right to interpose an answer in the action or to redeem the property prior to the expiration of the redemption period.[29]

If the property is not redeemed or an answer interposed prior to the expiration of the redemption period, a default judgment in favor of the tax district is entered.[30] Once a default judgment is entered all interest, right and equity of redemption of the property owner is foreclosed and fee absolute title is conveyed to the tax district.[31] It is irrelevant to what extent the value of the property transferred to the tax district exceeds the amount of the delinquent tax liens; the tax district is entitled to retain all surplus equity in the property.[32]

When an answer to the foreclosure proceeding has been interposed, the court is to conduct a summary proceeding to determine the issues raised in the petition and answer. When an answer interposed by any party other than a tax district is meritorious, the petition of foreclosure is to be dismissed.[33] When the court determines that the answer lacks merit, the court is to make a final judgment awarding possession of the parcel to the tax district and directing the enforcing officer to execute and have recorded a deed conveying fee simple absolute title to the district. All rights and interests of the property owner are extinguished and the tax district is entitled to retain all surplus equity.[34]

An amendment to Article 11 enacted by the New York Legislature in 1995 seems to have eliminated the possibility that a property owner who interposes an unmeritorious answer will retain any right or claim to the surplus value of the property or surplus proceeds in the sale of the property when it is acquired or sold by the tax district. The amendment deleted the language that gave the court full power "when an answer has been interposed, to direct a sale of the real property which is the subject of the proceeding and the distribution or other disposition of the proceeds of the sale."[35] Also eliminated by the amendment was the language of section 1136(2)(a) that provided when an answer had been interposed and the court had "determine[d] that such party ha[d] any right, title, interest, claim, lien or equity of redemption in such parcel, the court shall make a final judgment directing the sale of such parcel."[36] Added in place of the deleted

language of subsection (2)(a) is an instruction "if the court determines the answer is not meritorious, [to] make a final judgment awarding to such tax district the possession of the affected parcel or parcels in the same manner as provided by subdivision three of this section."[37] Subdivision three directs the court to make a final judgment awarding possession of the affected property to the tax district and directing the enforcing officer to execute and have recorded a deed conveying fee simple absolute title to the district.[38] Rather than the court having the power to determine the rights, interests, or equity of redemption of the property owner or other interested parties, and the power to direct the distribution of proceeds in a sale, the court is empowered only to enter judgment directing the conveyance of title to the tax district once it has determined the answer lacks merit.

While there is no case law interpreting the language of section 1136 as amended by the 1995 legislative enactment, prior case law upheld the power of the court to direct that surplus proceeds of a tax foreclosure sale be awarded to the delinquent taxpayer. In *Binghamton v. Ritter*, the court held that a taxpayer who interposed an answer was not foreclosed of his interest in the real property subject to the delinquent tax liens and the tax district was not entitled to fee absolute title to the property.[39] Although the court found the taxpayer's answer to lack merit, based on its interpretation of Article 11 section 1136(2), as it then existed, it ordered the case be remitted to county court "for a determination of respondent's interest in the parcel or parcels and that an appropriate sale be directed and surplus moneys, if any, be awarded to respondent."[40]

Article 11's in rem foreclosure proceeding is analogous to a strict foreclosure action in that fee simple absolute title to the property is transferred to the enforcing tax district to satisfy its lien and the property owner's right to the surplus value of the property is forfeited. Where the value of the property acquired by the in rem tax foreclosure action far exceeds the amount of the foreclosed lien, a resale of the property will generally yield a windfall profit for the foreclosing tax district.

Title five of Article 11, which provides for the foreclosure of a tax lien as in an action to foreclose a mortgage, has been used infrequently.[41] Title 5 allows tax districts to enter a contract to sell delinquent tax liens to the New York Municipal Bond Bank or entities created by the bond bank. Tax districts not subject to Article 11 pursuant to section 1104 may elect to adopt title 5 or may enact a local law to provide for the sale of delinquent tax liens.[42] The holder of a delinquent tax lien purchased pursuant to Title 5 may foreclose the tax lien after the expiration of the specified redemption period as in an action to foreclose a mortgage: proceedings are to be in accordance with N.Y. Prop. Acts. Article 13, with certain exceptions.[43]

The title 5 tax lien foreclosure process seems to preserve the right of the property owner to claim an interest in the surplus proceeds of the sale of the real property as provided in the Article 13 mortgage foreclosure process. In a sale of property made pursuant to a judgment in a mortgage foreclosure proceeding the proceeds are to be applied to satisfy obligations and costs to the foreclosing mortgagee and certain other liens against the property.[44] Surplus proceeds are paid into court and the former property owner may make application to the court for the surplus proceeds.[45] In a conveyance made pursuant to a title 5 proceeding "right, title, interest, claim, lien and equity of redemption in and against the real property sold" vests in the purchaser of the property at the tax sale,[46] but there is no provision in the title denying the property owner the right to apply for the surplus equity as granted in Article 13 section 1361.[47]

The Constitutionality of Tax Foreclosure Proceedings

The U.S. Supreme Court has consistently held that retention of surplus property value or proceeds of a tax sale by the government in a tax foreclosure proceeding is not an unconstitutional taking of property without just compensation or a forfeiture of property without due process of law. The Supreme Court has shown great deference to legislatures in enacting laws necessary and proper to enforce collection of delinquent taxes where statutes provide adequate notice to the property owner of the action, an adequate opportunity for the owner to defend her interest and an adequate opportunity to redeem her interest in the property. In some cases, the courts have acknowledged the harsh effect of tax enforcement statutes, but have found it is within the authority of the legislatures and not the courts to provide relief.[48]

In *Nelson v. City of New York* the Court found that retention by the tax district of the surplus value of property foreclosed did not violate the Fourteenth Amendment due process guarantee, but noted the harsh result of the forfeiture and that it was the responsibility of the Legislature and not the courts to provide relief.[49] *Nelson* involved two parcels of land; one of which was sold to a private party at auction for $7000.00 after title was transferred to the City of New York in collection of water arrears of $72.50, and another in which title to a parcel assessed at $46,000.00 was transferred to the City of New York for outstanding water charges of $814.50.[50] Prior to the U.S. Supreme Court hearing the case, the New York Court of Appeals found the tax

foreclosure proceedings did not violate the U.S. Constitution—in a decision which the court began by noting this was a "hard case"[51] and closed by stating, "Unfortunately, the power to afford relief here is not confided to the courts. The result suggests the need for legislation liberalizing the right of redemption, or giving to city officials the power to ameliorate such extreme hardships in appropriate cases."[52] When the property owner appealed, the Supreme Court noted evidence that the owner or his agents received adequate notice of the arrears and the foreclosure action.[53] The Court concluded that since the city provided proper notice, the statute as applied did not deprive the appellants of due process of law.[54]

Regarding the appellant's argument that the retention of one parcel and the retention of the surplus proceeds of the sale of the other parcel constituted a taking without just compensation or a deprivation of the owner's property without due process of law, the Court held that nothing in the federal Constitution prevents the government from retaining such surplus providing adequate steps are taken to notify the property owner of the arrears and the foreclosure proceeding.[55] The Court agreed with the New York Court of Appeals that the statute was a harsh one but that "relief from the hardship imposed by a state statute is the responsibility of the state legislature and not of the courts, unless some constitutional guarantee is infringed."[56]

New York State's Article 11 tax foreclosure statute, though it yields a harsh and oppressive result for delinquent taxpayers whose property rights are forfeited to the tax district, is not unconstitutional. Rather than the state responding to the Court's call for a fairer and more equitable result for the state's taxpayers, the Legislature amended Article 11 as late as 1995 to make it more difficult for property owners to obtain any portion of the equity they have invested in their property in a tax foreclosure proceeding. Since state legislation provides a concededly adequate opportunity for property owners to redeem their property, the result, although harsh and oppressive, does not deprive property owners of their constitutional right to due process of law.

Contrast Between Mortgage Foreclosure and Tax Foreclosure Proceedings

Most states do not allow the strict foreclosure of mortgages.[57] The result of a strict foreclosure proceeding is considered "harsh, oppressive and unfair" since a mortgagee might receive title to property with a value that far exceeds the debt owed.[58] New York State law does not allow strict foreclosure of mortgage obligations but instead provides for mortgage foreclosure through judicially supervised foreclosure sale[59] and by non-judicial power of sale foreclosure proceedings under certain circumstances.[60]

New York statute provides for the transfer to the mortgagor of any surplus proceeds in a mortgage foreclosure proceeding after certain obligations have been satisfied.[61] After the obligation owed the foreclosing mortgagee is satisfied, remaining proceeds must be applied to certain other liens on the property and surplus proceeds are to be paid into court.[62] The property owner or any other person who appeared as a party to the action or has a recorded lien against the property may file a claim for the surplus proceeds.[63] Surplus proceeds will be distributed to the parties claiming an interest in the funds by order of the court.[64]

Case Law Related to Mortgage Foreclosure Proceedings

The Supreme Court has shown deference to state mortgage foreclosure proceedings and regulations, as is evidenced by the Court's decision in *BFP v. Resolution Trust Corp.*[65] BFP petitioned for bankruptcy under Chapter 11 of the Bankruptcy Code[66] after its property was sold in a mortgage foreclosure action, and then challenged the sale of its property as a fraudulent transfer, seeking to set aside the sale under section 548 of the federal code.[67] The Court found that fraudulent transfer regulations incorporated into federal bankruptcy laws and state foreclosure regulations have been interpreted as setting consistent rather than conflicting standards for foreclosure actions[68] and held that a transfer that satisfies state foreclosure regulations does not constitute a fraudulent transfer under the federal bankruptcy code.[69]

Noteworthy in the *BFP* decision is the Court's reference to the "draconian consequences" of strict foreclosure proceedings in which the entire interest of the borrower is forfeited upon default of his mortgage obligation and to the trend in 19th-century America towards foreclosure by sale with the surplus proceeds of the sale being transferred to the mortgagor.[70]

The Supreme Court, in deciding the constitutionality of Depression-era statutes that limited a mortgagee's right to a deficiency judgment following a mortgage foreclosure, made it clear that a mortgagee is entitled to no more than the obligation secured by the mortgage.[71] In *Honeyman v. Jacobs,* a mortgagee sought a deficiency judgment after purchasing the foreclosed property, which had a market value greater than the obligation due the lender.[72] Legislation passed by the

New York Legislature after the mortgage that was the subject of the foreclosure action was executed, but prior to the commencement of the action, required that the right to a deficiency judgment be determined in the foreclosure action and that the amount of the deficiency be based on the market value of the premises rather than the sale price at the foreclosure sale.[73] When the court denied the lender a deficiency judgment based on the market value of the premises being greater than the amount owed the mortgagee, the lender brought an action challenging the legislation as a violation of the Contracts Clause of the U.S. Constitution,[74] claiming that his contract right under the mortgage was impaired by the legislation.[75] The Court found that the obligation to the lender under the contract was the amount of principal and interest provided for in the mortgage bond and that the lender's remedy under the mortgage was limited to the ability of the lender to "make himself whole, . . . but not that he should be enriched at the expense of the debtor or realize more than what would repay the debt with the costs and expenses of the suit."[76]

In a similar case that soon followed, the Court again made clear that a mortgagee has no right to collect more than the obligation due,[77] noting that ". . . for about two centuries there has been a rather continuous effort . . . to prevent the machinery of judicial sales from becoming an instrument of oppression. And so far as mortgage foreclosures are concerned numerous devices have been employed to safeguard mortgagors from sales which will or may result in mortgagees collecting more than their due."[78]

Current New York State law providing for a mortgagee's action for a deficiency judgment is similar to the legislation that was challenged in the cases noted.[79] The Court's analysis, therefore, cannot be said to have been guided by the economic necessities of the Depression era.

Public Policy Objectives That Shape Tax Foreclosure Legislation Can Be Achieved Without Forfeiture of a Property Owner's Interest in a Tax Foreclosure Sale

In *City of Auburn v. Mandarelli*[80] the court noted, when it denied the appeal of a defendant in a tax foreclosure action, that private property is owned subject to the sovereign's right to impose and collect taxes and taxation is essential to the existence of government.[81] The government is responsible for the health, safety and welfare of the public, and since the government cannot exist without the revenue generated by the imposition and collection of taxes, the preservation of the health, safety and welfare of the public is dependent on effective tax collection.[82] The state has a right to expect all taxpayers will exercise their duty as citizens to pay their taxes when due. There are no constitutional constraints on government mandating the forfeiture of real property for nonpayment of taxes or the retention of surplus proceeds in the sale of such premises. It is only the intention of the legislature and the statutes it enacts that must be considered when determining the rights of the parties to excess value or proceeds.[83]

The New York State Senate enunciated the public policy expressed by the court in *City of Auburn* when it noted in a Legislative Memorandum in support of amending Article 11 and the Public Authorities Law that efficient property tax collection by local governments was necessary to facilitate the effective delivery of government services.[84]

Balancing the needs, interests and rights of government and the citizens it serves in developing tax collection enforcement procedures will not undermine these policy objectives. High rates of interest and steep penalties imposed for nonpayment of taxes provide a strong incentive for property owners to pay taxes imposed in a timely manner. When a property is subject to multiple tax liens, Article 11 and local laws mandate that partial payments of overdue taxes be applied in reverse chronological order. Earlier tax liens subject the property to foreclosure proceedings even while the taxpayer is paying amounts past due. If property tax liens remain unredeemed for the statutory period, title to the property is transferred to the tax district and the tax district is authorized to sell the property at public auction. In the alternative, the tax liens are sold by the tax district to a private investor who is authorized to foreclose the tax liens and sell the property at public auction. Provisions such as these provide a strong incentive for taxpayers to pay the tax imposed on their property in a timely manner unless they are truly unable to do so. When a taxpayer is unable to meet the obligations of property ownership, the government has an efficient and expeditious means of collecting revenue by transferring title away from the property owner and into the municipality. Retaining the surplus value of the owner's property or the proceeds of a tax sale imposes an overly harsh penalty on the property owner and is not necessary to promote efficient tax collection. Windfall profits to municipalities may help government balance budgets, but generating profits at the expense of our most vulnerable citizens is not good or acceptable policy.

Proposal for Reform

Article 11 must be amended to allow property owners and others with an interest in the property to make application for the surplus proceeds of the public auction of premises sold in tax foreclosure actions. Although few instances will

arise where the tax district will take and retain title to property for non-payment of taxes, if the municipality opts to retain the parcel for its own use, provisions must mandate that the owner be compensated for the surplus value of the property over the amounts due.

The New York Legislature is called upon herein to study current property tax enforcement provisions and determine the most effective means by which the interests of all parties are balanced. The New York State Legislature must now examine its collective conscience and amend existing legislation to remove the unfair and punitive result it imposes on New York State property owners. The Legislature can do so and still achieve the important policy objective of facilitating revenue generation for government operations. This article calls upon the Legislature to do so now.

Endnotes

1. N.Y. Real Prop. Tax Law, Ch. 50-a, art. 11 (RPTL) (McKinney 2000).
2. *Id*. at § 1104 (A county, city or town that enforced the collection of delinquent taxes according to a county charter, city charter, administrative code or a special law as of January 1993, and enacted legislation providing for the continued enforcement according to said charter, code or law by a certain date, is not subject to Article 11.) (The counties that have opted out of Article 11 are Erie, Monroe, Nassau, Niagara, Onondaga, Oneida, and Suffolk. The cities that have opted out are Auburn, Canandaigua, Cortland, Geneva, Glen Cove, Johnstown, Long Beach, Middletown, Mount Vernon, New York, Norwich, North Tonawanda, Ogdensburg, Oneida, Port Jervis, Poughkeepsie, Rochester, Rome, Salamanca, Sherrill, Syracuse, Utica, Watertown, and Yonkers. (Office of Counsel, Office of Real Prop. Services, Section 1104, Municipalities which opted out of Article 11 (May 2004))).
3. *Id*. at §§ 1131, 1136(2)(d), (3).
4. *See,* N.Y. Real Prop. Acts. § 1352 (RPAPL) (McKinney 1979); Black's Law Dictionary 658 (7th ed. 1999).
5. *See,* Black's Law Dictionary 658 (7th ed. 1999); Steven Wechsler, *Through the Looking Glass: Foreclosure by Sale as De Facto Strict Foreclosure—An Empirical Study of Mortgage Foreclosure and Subsequent Resale,* 70 Cornell L. Rev. 850, 857, 858 (1985).
6. *See*, *e.g.,* N.Y.C. Admin. Code § 11-428 (after applying proceeds of sale of property acquired through tax foreclosure proceedings to unpaid real estate taxes including interest and costs, unpaid local assessments without interest and penalties, unpaid sewer rents including interest and penalties, and brokerage fees and other costs associated with such sale of premises, balance of proceeds to be paid into the general fund. This section applies only to the foreclosure of tax liens owned by the City of New York.) (Note that N.Y.C. Admin. Code §§ 11-319, 11-335 provides for the sale of tax liens to private investors and foreclosure of tax liens as in an action to foreclose a mortgage. Section 11-341 provides that in a sale of property pursuant to a judgment of foreclosure, say a tax lien sold by the City of New York, the foreclosed property owner may apply for surplus proceeds of the foreclosure sale.).
7. Christian Murray, *A step to return lost equity,* Newsday, Sept. 29, 2004, at A20.
8. Suffolk Co. Tax Act, ch. 982, art. 2; Suffolk Co. Admin. Code § 14(30).
9. Res. 1838 (Suffolk Co. 2004) enacted on Oct. 27, 2004, amended the Suffolk Co. Admin. Code, art. XIV, § 14-30 by adding a provision that allows the former owner of an auction parcel improved by an owner-occupied residence occupied by the owner for a certain period to apply for a distribution of the proceeds of the sale.
10. Christian Murray, *Small sum, big loss, Delinquent property taxpayers lose their homes while Suffolk profits from equity,* Newsday, Aug. 9, 2004, at A7.
11. *Id.*
12. *Id.*
13. Brooke J. Sherman, *Tax 'mistake' may cause Veteran man to lose family farm,* Star Gazette (Elmira, N.Y.), June 12, 2004, at 1A.
14. *Gautier v. Ditmar*, 204 N.Y. 20, 26; 97 N.E.464, 467 (N.Y. 1912).
15. *Id.* at 26; 467.
16. N.Y. Const., art. IX, §§ 2(c)(i), 2(c)(ii)(8).
17. *Id. at* § 2 (originally enacted as art. 9, § 11).
18. N.Y. Stat. Loc. Gov. § 11(4).
19. *Manes v. Goldin*, 400 F. Supp. 23, 28 (E.D.N.Y. 1975), *aff'd*, 423 U.S. 1068.
20. *P.B.A. v. City of N.Y.*, 97 N.Y.2d 378, 386; 767 N.E.2d 116, 120 (N.Y. 2001).
21. *Sonmax, Inc. v. City of N.Y.*, 43 N.Y.2d 253, 257-58; 372 N.E.2d 9, 11-12 (N.Y. 1977).
22. *Id.* at 258; 12.
23. RPTL § 1110.
24. *Id.* at § 1111.
25. *Id.* at § 1112.
26. *Id.* at § 1120(1).
27. *Id.* at § 1123(1)(2).
28. *Id.* at §§ 1124(1)(2)(4), 1125.
29. *Id.* at § 1125(2).
30. *Id.* at § 1131.
31. *Id.* at §§ 1131, 1136(3).
32. *See Anderson v. Pease*, 284 A.D.2d 871, 727 N.Y.S.2d 717 (3d Dep't App. Div. 2001); *First National Bank of Downsville v. Atkin*, 279 A.D.2d 779, 718 N.Y.S.2d 499 (3d Dep't App. Div. 2001); *Ellis v. City of Rochester*, 227 A.D.2d 904, 643 N.Y.S.2d 279 (4th Dep't App. Div. 1996); *Estate of Scott v. City of Rochester*, 116 A.D.2d 1020, 498 N.Y.S.2d 634 (4th Dep't App. Div. 1986).
33. RPTL § 1136(2).
34. *Id.* at § 1136(3).
35. 995 N.Y. Law 579 § 13 (amending § 1136(1)).
36. *Id.* (amending § 1136(2)(a)).
37. *Id.*
38. RPTL § 1136(3).
39. *In re Binghamton*, 128 A.D.2d 266, 268; 515 N.Y.S.2d 660, 661 (3d. Dep't App. Div. (1987).
40. *Id.* at 268-69; 661-62.
41. S. 226-149, Reg. Sess. (N.Y. 2003) (N.Y. Senate Memorandum in Support of Senate bill S5071A, a bill to amend article 11 title 5 provisions and other state laws. The New York State Senate noted in the 2003 memorandum that the first transaction conducted pursuant to Title 5 was scheduled in close in early 2003.
42. RPTL § 1190(1)(a) (McKinney 2000).
43. *Id.* at § 1194(1).
44. RPAPL § 1354(1)(2)(3).
45. *Id.* at §§ 1354(4), 1361(3).
46. RPTL § 1194(10).
47. *Id.* at §§ 1190, 1192, 1194 (These sections do not indicate that § 1354(4), which provides for surplus proceeds to be paid into court, or § 1361, which provides that a former owner of the equity of redemption may make application for a distribution of the surplus proceeds, are excepted from the Article 13 provisions applicable to Article 11, title 5 proceedings.).
48. *See Chapman v. Zobelein*, 237 U.S. 135 (1915); *Nelson v. City of N.Y.*, 352 U.S. 103 (1956), *aff'g* 309 N.Y. 94, 127 N.E.2d 827 (N.Y. 1955); *Balthazar v. Mari, Ltd.*, 396 U.S. 114 (1969).

49. *Nelson*, 352 U.S. 103, *aff'g* 309 N.Y. 94, 127 N.E.2d 827 (N.Y. 1955).
50. *Id.* at 96-97; 828.
51. *Id.*
52. *Id.*
53. *Nelson,* 352 U.S. at 105-06.
54. *Id.* at 108-09.
55. *Id.* at 110.
56. *Id.* at 111.
57. *Wechsler*, *supra* note 5, at 862.
58. *Id.* at 859.
59. RPAPL § 1351.
60. *Id.* at § 1401.
61. *Id.* at § 1354.
62. *Id.* at § 1354(1)(2)(4).
63. *Id.* at § 1361(1)(3).
64. *Id.* at § 1362(1).
65. *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994).
66. 11 U.S.C. §§ 1101-1174.
67. 11 U.S.C. § 548.
68. *BFP*, 511 U.S. at 542.
69. *Id.* at 544.
70. *Id.* at 541.
71. *See Honeyman v. Jacobs*, 306 U.S. 539 (1939); *Gelfert v. Nat'l City Bank of N.Y.*, 313 U.S. 221 (1941).
72. *Honeyman*, 306 U.S. at 541.
73. 1933 N.Y. Laws 794 (codified at N.Y. Civ. Prac. Act § 1083-a, *repealed*.). (The act titled the "Limitation Upon Deficiency Judgments During Emergency Period," provided that a motion for leave to enter a deficiency judgment had to be entered simultaneously with the entry of a motion for an order confirming the foreclosure sale of mortgaged property. A deficiency judgment would be entered for an amount equal to the liability of the mortgagor as determined by the court less the "fair and reasonable market value" of the premises. Where the mortgagee acquired premises at the foreclosure sale with a market value exceeding the amount due on the mortgage debt and the amount of all other liens and costs to be satisfied by the proceeds of the sale, the mortgagee was not entitled to a deficiency judgment.)
74. U.S. Const. art. 1, § 10, cl. 1.
75. *Honeyman,* 306 U.S. at 542.
76. *Id.* at 542-43.
77. *Gelfert*, 313 U.S. 221.
78. *Id.* at 232-33.
79. RPAPL § 1371(2).
80. *City of Auburn v. Mandarelli*, 320 A.2d 22 (Me. 1974).
81. *Id.* at 27.
82. *Id.* at 27-28.
83. *Id.* at 30, 31, 32.
84. S. 223-203, Reg. Sess. (N.Y. 2000) (The New York Legislative Memorandum of the Senate was in support of amending Article 11 and N.Y. Pub. Auth., art. 8, title 18 to allow municipalities to securitize delinquent tax liens.).

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Our Clients Told Us to "Take a Hike!"






Photos above by Marian Wait • Photos below by Robert W. Hoffman

Real Property Law Section

Summer Meeting

Hike Director: Bob Hoffman







July 14-17, 2005 • Lake Placid, New York

Real Property Law Section Summer Meetin

















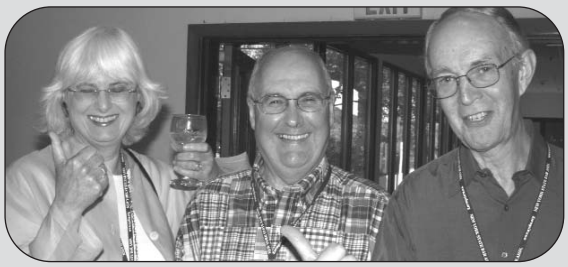

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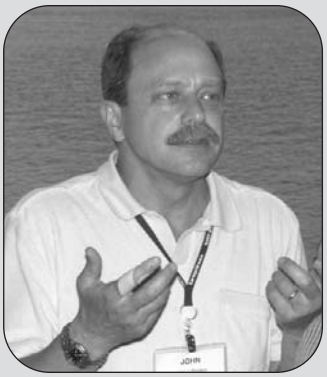




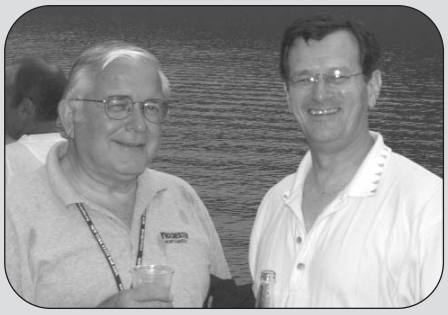






Harry Meyer

The Pushy Paparazzi

By Bob Zinman

The following question was put to a group of celebrities attending the Summer Meeting of the Real Property Law Section:*

"What did you like most about the Summer Meeting?"

Those who did not call the police, who did not punch out the photographer, and whose pictures developed properly, answered as follows:

Lorraine Power Tharp:
"The collegiality—the pristine beauty."

Gerald Goldstein:
"The hike."

Joe Walsh:
"Great company! Great venue!"

Joel Sachs:
"The environment!"*

Penny Domow:
"The hikes were fantastic!"

John Jones:
"Excellent CLE Program. Bobsled ride was a close second."

Jeffrey Chancar:
"Great event; well done program."

Peter Battaglia:
"Very calming location, which promoted friendships."

Lori Nicoll:
"I love the Adirondacks. The hills and scenery bring peace to me."

Ron Sernau:
"I liked the opportunity to meet with the world's smartest lawyers."

Lila Goldenberg:
"How the newsletter describing the events said 'casual' and 'very casual.'"

Adam Berkey:
I really enjoyed the setting. Very scenic and very beautiful. It allowed each participant to have a fun activity, i.e. hiking, tennis or golf.

Joshua Stein:
"I liked hanging out at the magnificient house on the lake with dozens of my terrific colleagues."

Steve Baum:
"I enjoyed the company of fellow attorneys and the hike with Bob Hoffman—who deceived us into thinking hiking was easy."

Patrick Medlock-Turek:
"What I really liked about this conference were the sporting events."

Ed and Donna Baer:
"Loved the Adirondacks. Scenery is beautiful. The people are interesting and fun."

Karen, Spencer, Liam and Nell Compton:
"Terrific CLE programs; spending time with friends and family."

Ben and Fran Mahler:
"All the parties were lovely and the people so friendly."

***If you would like your picture, please contact Bob Zinman at zinmanr@stjohns.edu**

****Editorial liberties taken here.**

New Bankruptcy Law Affects Real Estate Investments

By Robert M. Zinman

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (hereinafter, the "Reform Act") became generally effective on October 17, 2005, and makes major changes throughout the Bankruptcy Code. Several of its provisions affect real estate investments, the most notable of which are discussed below.

I. Time to Assume or Reject Leases of Non-Residential Real Property

The Reform Act extends the time to assume or reject leases under Bankruptcy Code § 365(d)(4) from 60 to 120 days, but limits the court's ability to extend the time to a maximum of an additional 90 days (making the total time no more than 210 days). At the end of the 210 days, the court may extend the period only with the *landlord's* consent!

This change was the result of a perception that courts too frequently extend the tenant-debtor's time to assume or reject leases and do so for too long a period of time, to the substantial detriment of landlords. While there is some truth to this perception, the draconian nature of the remedy may cause severe difficulties for debtors with extensive operations throughout the country, who may have to make a decision on assuming or rejecting a lease before the plan of reorganization has been completed, and when the debtor may not be aware of where and what operations will be continued.[1]

Practice Comment: *If one is representing a tenant and the decision to assume or reject cannot be made within the specified time period, one may be tempted to recommend assumption of the lease within the period and rejection later, perhaps in the plan of reorganization, if necessary. Bankruptcy Code § 365(g) recognizes the possibility that a previously assumed lease may be rejected (it doesn't work the other way around). However, bear in mind that when a lease is assumed, the rental payments may become administrative expenses, which will be paid ahead of general claims and may not be subject to the cap on landlord's claim of 15% of the remaining term with a floor of one year and a ceiling of three years' rent.[2] The Reform Act, however, as discussed in part II below, limits the administrative expense claim to two years.*

II. Administrative Expense for Assumed but Later Rejected Leases

Where the tenant's trustee[3] rejects a lease, the landlord's claim is generally limited under section 502(b)(6) to rent for 15% of the remaining term with a floor of one year and a ceiling of three years. If the tenant's trustee assumes the lease, the landlord would be entitled to full priority payment of the rent as an administrative expense during the period of assumption, even if the lease is later rejected (see *Practice Comment* in part I above). However, under the Reform Act, Bankruptcy Code § 503(b)(7), if a lease is assumed and later rejected the landlord's administrative expense priority is limited to two years following the rejection date. The landlord would seem also to be able to obtain the section 502(b)(6) limited claim after the rejection date, although the language is not completely free of ambiguity.[4]

III. Removal of the $4 million Cap on Definition of Single Asset Real Estate

In 1994, Congress answered Scott Carlisle's plea for reform in the single asset area[5] with section 362(d)(3) of the Bankruptcy Code, which purported to speed up the resolution of single asset[6] bankruptcy cases. It provided that if the debtor did not propose a plan with a reasonable possibility of confirmation within 90 days (subject to extension by the court) after the commencement of bankruptcy, the court could either lift the stay and allow the mortgagee to foreclose, or order the payment of lost opportunity costs,[7] something akin to post-petition interest (no post-petition interest will normally accrue in bankruptcy except to the extent that the creditor is over-secured). The 90-day period represented a shortening of the 120-day period (the courts had the right to, and routinely did extend this time) during which the debtor normally has the exclusive right to propose a plan of reorganization.[8] The reason for this limitation was the perception that single asset debtors, in control of the property and recovering management fees off the top of the income being produced, were needlessly delaying the submission of a plan, to the great detriment of the mortgagee.

Unfortunately, shortly before the 1994 enactment, a modification had been made to the definition of single asset real estate, which limited the application of the new section 362(d)(3) to debtors whose secured debt did not exceed $4 million, thus making the provision unavailable in many, if not most, single asset Chapter 11 proceedings.[9] What followed was 10 years of struggle to have the "cap" removed from the definition of single asset real estate culminating in the adoption of the Reform Act, which did just that.[10]

Practice Comment: *The key to speeding up single asset cases still remains with the court. There is no limitation on the court's ability to extend the period for submission of the plan without lifting of the stay or requiring lost opportunity cost payments. Thus, the debtor should gather evidence of the*

complexity of the case that makes submission of a plan having a reasonable possibility of confirmation within 90 days impossible. On the other hand, the mortgagee should show that the business of the debtor is only the operation of a single real estate property or project, without the complex issues involved in determining the future of other businesses. Because of the deference given to the court, this author does not believe the elimination of the cap will make major differences in the length of single asset cases. However, the risks involved will probably discourage filing simply for the purpose of stalling the inevitable, and might even provide mortgagees with a form of post-petition interest where the court concludes that the debtor is stalling.

IV. Section 365(f)(1) Does Not Override Restrictions on Assumption of Shopping Center Leases in Section 365(b)(3)

Section 365(b)(3)(C) and (D) of the Bankruptcy Code provides, *inter alia*, that assumption or assignment of a lease in a shopping center is subject to all the provision of the lease including, without limitation, radius, location, use and exclusivity, and that it will not breach provisions in other leases and agreements. Section 365(f)(1) makes the general statement that the lease may be assigned notwithstanding provisions prohibiting, restricting or conditioning assignments. Some courts concluded that the general provision of section 365(f)(1) somehow superceded the specific requirements of section 365(b)(3), thus permitting assignment free and clear of restrictive covenants and use clauses in leases.[11]

The Reform Act corrected this obvious manipulation of the language of the Bankruptcy Code by amending section 365(f)(1) to make it subject to the provisions of section 365(b). As a result, investors in shopping centers can feel confident that the provisions of leases designed to preserve the integrity of shopping centers will not be abrogated on the tenant's bankruptcy.

V. Assumption of a Lease Requires Curing of Non-Monetary Defaults, but Not Incurable Non-Monetary Defaults.

The Reform Act resolves a dual controversy that arose over the interpretation of section 363(b)'s requirement that if a lease the tenant-debtor wishes to assume (assumption is a prerequisite to assignment) is in default, the tenant must first cure the default. The first question was whether non-monetary defaults had to be cured. The question arose because an exception to the curing requirement for certain penalty provisions was interpreted to also cover non-monetary defaults.[12] The Reform Act makes it clear that defaults that must be cured involve both monetary *and* non-monetary defaults.[13]

The second, and related question, was whether a tenant-debtor could assume a lease where there was a non-monetary default that was *incapable* of being cured. A good example is where the tenant in the past had failed to remain open during the hours prescribed in the lease. The tenant is able to avoid such defaults in the future, but had no way of curing the past default. In its amendment to section 365(b)(1)(A) (which also clarified the "penalty" issue discussed in the above paragraph), the Reform Act adds an exception to the cure requirement for non-monetary obligations under a lease of real property[14] "if it is impossible for the trustee to cure such default by performing non-monetary acts at or after the time of assumption" and further adds that if the non-monetary default is related to the failure to operate, the default will be cured by performance at or after the time of assumption and the landlord must be compensated for any pecuniary losses resulting from the default.

VI. Automatic Stay

A. Eviction

The Reform Act adds subsections (22) and (23) to section 362(b) as exceptions to the automatic stay. Subsection (22) makes the stay inapplicable where before the filing of a petition by a debtor-tenant of residential real estate, the landlord had obtained a judgment for possession in an eviction, unlawful detainer or similar action. Thus the landlord may continue the proceeding to its conclusion notwithstanding the tenant filing.

Subsection (23) excepts from the automatic stay an eviction proceeding against a tenant based on the tenant's "endangerment" of the property or use of controlled substances on the premises if the landlord files a certification under penalty of perjury with the court and serves the debtor, subject to circumstances required by that subsection. Under a new subsection (m) to section 362, subsection (23) applies 15 days after the service of the certification. Section 362(m) also contains specific requirements dealing with service of objection to the certification by the debtor.

B. Fraudulent Filing as a Ground for Relief from the Stay

The Reform Act adds a new section 362(d)(4) that provides relief from the stay to a mortgagee where the court finds that the debtor-tenant's petition in bankruptcy was part of a scheme to delay, hinder and defraud creditors involving either transfer of ownership in whole or in part or multiple bankruptcy filings affecting the real property. Any such order will be binding in any other case in bankruptcy affecting the same real property if the court order is recorded in state public records as prescribed by the subsection.

VII. Homestead Exemption

Because some states permit an unlimited exemption, and wealthy potential debtors have been able to

relocate from less generous jurisdictions and purchase an expensive home in anticipation of insolvency, the Reform Act limits the ability of a debtor to use a particular state's exemption in bankruptcy. Section 522(b) now provides that a debtor may not use a state's exemption unless the debtor has resided in the state for at least 730 days (up from the present 180 days). Even if the residency requirement is met, however, the exemption will be limited to $125,000 unless the homestead was acquired within 1,215 days *before* the filing. There are some detailed provisions concerning the application of the state exemption specified in section 522.

A New York domiciliary foreseeing economic distress should probably plan the move to states such as Florida or Texas as soon as possible because a person claiming New York exemptions will be entitled to a homestead exemption of only $50,000, or $100,000 for joint debtors. This is a recent increase in New York from the previous $10,000/$20,000 homestead exemption.[15]

* * *

The Reform Act amendments to the Bankruptcy Code are largely beneficial to real estate transactions and represent a continued receptive climate in Congress to the needs of persons with interests in real estate.

Endnotes

1. Professor James Angell McLachlan, who authored the 60-day limitation for assumption or rejection when it first appeared in the Chandler Act of 1938, said: "I do remember that . . . there was criticism . . . of trying to apply anything like the sixty-day period [in reorganizations]. . . . As Al Houston, of White and Case, said, "it takes the receiver 60 days to find out where the toilet is." John J. Creedon and Robert M. Zinman, *Landlord's Bankruptcy: Laissez Les Lessees*, 26 Bus. Law 1391, 1440 (1971).
2. 11 U.S.C. § 502(b)(6). *See Nostas Associates v. Costich* (*In re Klein Sleep Products, Inc.*) 78 F.3d 18 (2d Cir. 1996) and Thomas McIntyre Devaney, Note, *The Klein Sleep Decision: Section 502(b)(6) Lease Damages Cap as the Rule, Not the Exception*, 4 Am. Bankr. Inst. L. Rev. 557 (1996).
3. As used herein, the term "trustee" refers to a trustee or debtor-in-possession.
4. 11 U.S.C. § 502(b)(6), which limits the landlord's claim, is an *exception* to the general allowance of claims provided for in section 502(b). Section 502(b) says, in effect, that a court shall allow a "claim" *except* to the extent that it exceeds the cap in (6). The Reform Act amendment states in section 507(b)(7) that the two-year administrative expense claim "shall be a claim" under subsection (b)(6). Thus it may be possible, however incorrectly, for a court to interpret the language to include the two-year administrative expense claim within the claim that is limited in section 502(b)(6).
5. Scott Carlisle, *Single Asset Real Estate in Chapter 11: Secured Creditors' Perspective and the Need for Reform*, 1 Am. Bankr. Inst. L. Rev. 133 (1993).
6. Single asset real estate is defined in 11 U.S.C. § 101 (51B) to mean "property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto. . . ."
7. This constituted monthly payments of interest at a current *fair market rate* on the *value of the collateral*. This differed from post-petition interest in that the post-petition interest would be interest at the *contract rate* on the remaining *principal balance*. The Reform Act changes this somewhat by prescribing interest at the non-default *contract rate* on the *value of the collateral*. It also permits the payments to be made from rents.
8. In the Reform Act, a limitation has been placed on extensions of the debtor's normal exclusivity period to a date that is 18 months after the order for relief, and on the period for soliciting acceptances to the plan to 20 months beyond such order. 11 U.S.C. § 1121(d)(2).
9. The 1994 amendment added "having aggregate noncontingent, liquidated secured debts in an amount no more than $4,000,000" to the definition found in note 6, *supra*. The Reform Act simply removed the quoted clause from the definition in 11 U.S.C. § 101(51B).
10. The emotion and bitterness surrounding this change is difficult to understand given the flexibility afforded to the court and the limited shortening of the exclusivity period. Opponents to elimination of the cap resorted to arguments that the amendment was anti-labor (the mortgagee might not be as friendly to unions as the developer, a colossal non sequitur) and anti-tenant (if the mortgagee foreclosed it could cut off junior leases without non-disturbance protection).
11. *Compare In re Rickel Home Centers*, 240 B.R. 826 (D. Del. 1999) *with In re Trak Auto Corp (Trak Auto Corp v. West Town Center, LLC)* 367 F.3d 237 (4th Cir. 2004).
12. The exception was contained in 11 U.S.C. § 365(b)(2)(D), which provided that the cure requirement did not apply to defaults relating to "the satisfaction of any penalty rate or provision" with respect to non-monetary defaults. Some courts read "penalty" as modifying only "rate" but not "provision." *See, e.g., Eagle Ins. Co. v. Bankvest Capital Corp.* (*In re Bankvest Capital Corp.*), 360 F.3d 291 (1st Cir. 2004).
13. It does this simply by repeating the word "penalty" before "provision." *See id.*
14. For an excellent discussion of the development of these amendments and the consequences for executory contracts other than leases of real property, especially equipment leasing, see Paul H. Deutch, *The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Important Implications for the Equipment Leasing Industry,* 24 LJN's Equipment Leasing Newsletter 1 (No. 5, 2005).
15. Laws of 2005, Ch. 623, amending CPLR 5206.

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Kelo v. City of New London—The Fallout Continues

By Joel H. Sachs

The fallout from the June 23, 2005 decision by of the United States Supreme Court in *Kelo v. City of New London*[1] continues. Within days after the decision, the House of Representatives voted 365 to 33 in support of a resolution expressing "grave disapproval" of the Court's decision. A Congressman from Iowa introduced an amendment to an appropriation bill seeking to strip $1.5 million from the Supreme Court's budget as a symbolic protest against "the injustice done to property owners in this case." Several bills have been introduced in Congress to withhold federal financing from projects in which municipalities propose to take private property for economic redevelopment. Some bills would also prohibit the federal government from exercising its right of eminent domain to condemn private property for economic redevelopment.

"'If the promise of more jobs and more revenue is enough to take someone's property, then nobody is safe in their home.'"

Residents throughout the United States have severely criticized the Supreme Court's 5 to 4 decision. For instance, in recent Letters to the Editor in the *New York Post*, a Los Angeles resident decried: "But now, any private developer can go up to your local tax hungry, bribe, influence susceptible, government officials and get them to steal your property, usually at fire sale prices on its behalf." A resident of Chicago lamented: "If the promise of more jobs and more revenue is enough to take someone's property, then nobody is safe in their home. Practically, any home in the United States would generate more tax dollars as a warehouse club."

A recent headline in *The New York Times* was entitled, "Ruling on Property Seizures Rallies Christian Groups." The article indicated that many religious groups were more concerned about the Court's ruling in the *Kelo* case than they were about the Supreme Court decisions on the Ten Commandments which came down days after the *Kelo* decision. Such religious organizations are concerned that the tax exempt status of churches makes them an easy target for condemnation proceedings.

The *Kelo* case stems from a clause in the United States Constitution, as well as in every state constitution, which in essence states that a governmental agency can condemn private property, but only for a "public use" and only if the property owner receives "just compensation." In *Kelo*[2] several owners of single-family homes objected when the City of New London determined that their houses were within the geographic area proposed to be acquired by a municipal redevelopment agency. Plaintiffs' properties, once acquired, would be resold to developers for new office, commercial and residential development that would allegedly bring increased taxes and new jobs to the city. New London sought to utilize its condemnation power even though the homes of the litigants were not falling down and were not in a blighted neighborhood. Susette Kelo and her neighbors did not want "just compensation" from the city. Rather, they wanted to keep their homes.

From the founding of our country, it has been a hallmark principle that the government cannot take a parcel of land from one private party merely to benefit another private party. However, the Constitution does recognize the condemning of private property for public ownership or public use. Traditionally, there have been two types of condemnations which have satisfied the so-called "public use" requirement. First, there is the situation where the government agency acquires private property, which then devolves into public ownership for the construction of public improvements, such as roads, schools, parks or sewerage

"[I]n Kelo, *the Court was faced foursquare with a request by the City of New London to condemn private property, not for public ownership or public use, but rather for economic redevelopment purposes."*

treatment plants. The second type of condemnation which has not been subject to serious legal challenge involves the government condemning private property for a private entity, which entity will be utilizing the property for the benefit of the public. Included in this category are the obtaining of railroad rights of way, public utility franchises, sports stadiums and the like. However, in *Kelo*, the Court was faced foursquare with a request by the City of New London to condemn private property, not for public ownership or public use, but rather for economic redevelopment purposes.

Before discussing *Kelo*, two prior Supreme Court decisions which were cited both by the majority and the minority in *Kelo* are important to mention. In *Berman v. Parker*,[3] the Supreme Court, in the unanimous opinion, permitted a public agency to condemn properties within one of the most badly blighted areas in

Washington D.C., and convey the parcels to a private entity for redevelopment. The plaintiff argued that the condemnation violated the Fifth Amendment because his property would be resold to another private entity. The Supreme Court disagreed and authorized the use of the eminent domain power to transfer the property from one private party to another for the purpose of blight eradication. Even though the plaintiff's property itself was not blighted, the Supreme Court declined to second-guess the condemning authority's finding that the condemnation was necessary to eliminate blight, explaining that "the role of the judiciary in determining whether (eminent domain) powers being exercised for a public purposes is extremely narrow."[4]

In *Hawaii Housing Authority v. Midkiff*,[5] landowners challenged state legislation which utilized the eminent domain power to redistribute land from lessors to lessees, the purpose of which was to alleviate a skewed residential land market in which ownership of a majority of private property in the state was concentrated in relatively few owners. The landowners claimed that this legislative purpose failed to satisfy the public use requirement of the Fifth Amendment. However, the Supreme Court declined to "substitute its judgment for a legislature's judgment as to what constitutes a public use."[6] Citing *Berman v. Parker*, Justice Sandra Day O'Connor emphasized for a unanimous Court that the scope of judicial review in such matters was extremely narrow, such that a legislature's judgment as to what constitutes a public use should not be disturbed "unless the use be palpably without reasonable foundation" or "shown to involve an impossibility."[7]

Three state court cases also are worthy of mention. In *Poletown Neighborhood Council v. Detroit*,[8] a former landmark case (now overruled), a sharply divided Michigan Supreme Court deferred to legislative and redevelopment agency findings of public use and upheld, under the state constitution, the taking of private homes for the construction of a General Motors assembly plant. The condemnation was not premised upon finding a blight, but rather upon the prospect of increased employment and tax revenues that might be generated by the new plant. Notably, the redevelopment did not generate the anticipated number of jobs or significant additional tax revenues. In *County of Wayne v. Hathcock*,[9] the Michigan Supreme Court overruled *Poletown* and determined that an economic redevelopment proposal did not satisfy the public use requirement of the Michigan Constitution.

In *Casino Reinvestment Development Authority v. Banin*,[10] the plaintiffs successfully argued that the development project for which their property was being condemned did not serve a public purpose. Donald Trump owned or controlled an assemblage of properties upon which he intended to build a casino and hotel. He asked the Casino Reinvestment Development Authority (CRDA), which had eminent domain power, to help him acquire three properties he had been unable to purchase outright, ostensibly to build a parking lot and park. However, the court upheld the property owners' challenge, finding that CRDA's proposed condemnation of the properties was impermissible because there was no definite plan as to the prospective use of the land. As the court explained, "[w]hat has occurred here is analogous to giving Trump a blank check with respect to future development on the property for casino hotel purposes."[11] Accordingly, the court found the primary interest served was "a private rather than a public one" and dismissed the condemnation proceedings.[12]

In *West 41st Street Realty LLC v. New York State Urban Development Corp.*,[13] six property owners challenged the condemnation of their properties to make way for a high-rise office tower. The tower was to be leased to the New York Times Company for a new corporate headquarters, and would provide 700,000 square feet of space for other office tenants. The tower would also include condominiums, a new subway entrance, ground-floor public amenities, a 350-seat auditorium, a gallery and retail space.

Relying upon testimony introduced at its public hearing, the UDC argued that the project would keep the New York Times headquartered in Times Square, add needed office space, create employment, increase retail revenue, attract further economic improvement to the larger area, and address a critical shortage of commercial space.[14] The UDC also claimed that the proposal would provide a needed spur to Eighth Avenue development by linking the renovated Penn Plaza in the 30s with the Worldwide Plaza located in the 50s. Witnesses at the public hearing also had testified that much of the original blighted condition on the particular site remained unchanged during the past two decades: businesses at the site allegedly included five adult entertainment centers and low-end retail and food establishments. An active street drug trade also was said to persist.

On the other hand, the property owners and project opponents argued that urban blight had been virtually eliminated in the project area. To the extent that blight remained, opponents claimed that private development had been effectively stifled due to the ever-present threat of condemnation which had hung over the redevelopment district for twenty years.

The Appellate Division, First Department, sided with the UDC. In

affirming the use of the eminent domain power, the court held that the "public purpose is dominant, warranting confirmation of the challenged determination, even though a private entity will benefit substantially from its involvement in the project."[15] The court emphasized that '[t]he scope of our review is necessarily narrow since this exercise of the eminent domain power is a legislative function," such that the condemnees could only prevail if they demonstrated the proposed taking "is not rationally related to a conceivable public purpose."[16] Thus, the court validated the exercise of eminent domain as being rationally related to the conceivable public purpose of reducing blight in the area, despite the significant benefits to private parties that it would confer. The foregoing cases and growing debate over the use of the eminent domain power helped set the stages for *Kelo* wherein the Supreme Court had before it a situation where the City of New London was economically depressed. As a result, the city had created redevelopment authority with power to condemn private property for economic development. When Pfizer Pharmaceutical Company proposed a research and development facility for the Fort Trumbell area of the city, the redevelopment authority believed that condemning substantial parcels in the Fort Trumbell neighborhood would spur redevelopment plans for offices, hotels, and residential developments. The owners of ten single-family homes in the Fort Trumbell area, which homes were concededly not blighted or in poor condition, challenged the condemnation. Represented by a national organization headquartered in Washington—the Institute for Justice—the homeowners argued before the Courts of Connecticut that economic redevelopment did not satisfy the public use requirement of the United States Constitution. The plaintiffs were unsuccessful in the Connecticut Superior Court and in a closely divided (4–3) Connecticut Supreme Court granted certiorari.

On June 23, 2005, the Supreme Court, by a slim 5 to 4 margin, upheld the authority of the City of New London and its redevelopment agency to condemn the plaintiffs' properties. In the majority decision by Justice Stevens, the Court indicated that the city's redevelopment plan served a public purpose and was part of a carefully considered scheme to revitalize the city. The majority indicated that the fact the plaintiffs' properties were not blighted or in poor condition was irrelevant. Further, that the properties would not be put to public use or even open to the general public once it was redeveloped was not persuasive to the majority. Rather, Justice Stevens indicated that economic redevelopment is a proper and longstanding function of government. Citing *Berman v. Parker* and *Midkiff v. Hawaiian Housing Authority*, the majority indicated that it would defer to state legislatures in determining what constitutes a public use.

"'Nothing is to prevent the State from replacing any Motel 6 with a Ritz Carlton, any home with a shopping mall, or any farm with a factory.'"
—Justice Sandra Day O'Connor

In a strongly worded dissent, Justice O'Connor indicated that the Court's holding made it entirely appropriate for a municipality to utilize its condemnation power to take land away from A and thereafter convey the land to B as long as B upgrades the property. In a particularly memorable quote, Justice O'Connor declared, "Nothing is to prevent the State from replacing any Motel 6 with a Ritz Carlton, any home with a shopping mall, or any farm with a factory."

The dissent indicated that possible public benefits such as increased taxes and jobs did not convert the proposed condemnation into a public use. Justice O'Connor distinguished *Berman* and *Midkiff* by indicating that those decisions addressed legitimate evils, i.e., blighted conditions and land use oligopolies. Justice O'Connor also indicated that it was an abrogation of the Court's responsibility to defer to the state legislature. Rather, she indicated that it was the Court's responsibility on a case-by-case basis to determine whether or not the proposed taking was for a "public use."

In a separate dissent, Justice Clarence Thomas indicated that the beneficiaries of the Court's decision were large corporations, developers and lenders who would utilize the decision to persuade municipalities to gobble up lands for redevelopment. As a result, Justice Thomas indicated that the victims of the *Kelo* decision would be the low-income and minority residents of municipalities who would be displaced from their homes and businesses at an ever-increasing pace due to the Court's decision.

What will be the short-term and the long-term fallout from the *Kelo* decision? In the short-term, there is no doubt that the decision is a victory for municipalities, developers, lenders and the entire real estate development community. We would expect to see more condemnations taking place in the name of economic redevelopment.

However, at the same time, this situation will doubtless lead to abuses of the eminent domain power by certain governmental entities and real estate developers. Even the United States Supreme Court majority was cognizant of this situation in

that Justice Stevens warned that municipal condemnations would face heightened judicial scrutiny so as to prevent abusive use of the condemnation power.

"[A]fter the initial political frenzy dies down, a number of states will doubtless enact new legislation restricting the utilization of the condemnation power to instances which do not involve economic redevelopment."

In the long run and after the initial political frenzy dies down, a number of states will doubtless enact new legislation restricting the utilization of the condemnation power to instances which do not involve economic redevelopment. Approximately ten (10) states already have this limitation on the condemnation power, either in their state constitution or in state legislation. Interestingly, the *Kelo* decision really does not involve a significant change in the substantive law of eminent domain. However, the Supreme Court majority and minority opinions have now blurred the distinction between "public use," "public purpose," and "public benefit." This should lead to a significant amount of litigation in the future as the courts wrestle to further define these terms and impose reasonable limits on the power of condemnation.

Endnotes

1. 162 L. Ed. 2d 439, 125 S. Ct. 2655, 2005 U.S. LEXIS 501 (U.S. 2005).
2. 162 L. Ed. 2d at 447, 125 S. Ct. at 2658, 2005 U.S. LEXIS 5011.
3. 348 U.S. 26, 75 S. Ct. 98 (1954).
4. *Berman*, 348 U.S. at 32, 75 S. Ct. at 102.
5. 467 U.S. 229, 104 S. Ct. 2321 (1984).
6. *Midkiff*, 467 U.S. at 241, 104 S. Ct. at 2329.
7. *Id.*, at 240-41, 104 S. Ct. at 2329 (quoting *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 680, 16 S. Ct. 427, 429 (1896), and *Old Dominion Co. v. United States*, 269 U.S. 55, 66, 46 S. Ct. 39, 40 (1925)).
8. 410 Mich. 616, 304 N.W.2d 455 (Mich. 1981).
9. 471 Mich. 445, 684 N.W.2d 765 (Mich. 2004).
10. 320 N.J. Super. 342, 727 A.2d 102 (N.J. Super. L. 1998).
11. *Banin*, 320 N.J. Super. at 358, 727 A.2d 111.
12. *Id.*
13. 298 A.D.2d 1, 744 N.Y.S.2d 121 (1st Dep't. 2002), *appeal dismissed*, 98 N.Y.2d 727, 749 N.Y.S.2d 476 (2002), *cert. denied*, 537 U.S. 1191, 123 S. Ct. 1271 (2003).
14. *See West 41st Street Realty LLC*, 298 A.D.2d 1, 744 N.Y.S.2d at 124.
15. *Id.* at 126.
16. *Id.*

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Use of an Apostille in a United States Real Estate Transaction

By John E. Blyth

For a deed to be recorded in New York State, it is commonly understood that an acknowledgment or proof of the real property conveyance within this state must be made before any one of a number of public officials, commonly a notary public.[1] If a deed is executed outside of the United States, the acknowledgment or proof of the real property conveyance is commonly made before a United States Embassy or Consular official before it may be recorded in New York.[2] The process of acknowledgment or proof in a foreign country is frequently referred to as "legalization." Finding a U.S. Embassy or Consulate official in a foreign country is not always an easy or inexpensive process.

"Finding a U.S. Embassy or Consulate official in a foreign country is not always an easy or inexpensive process."

A simpler process for acknowledging or proving a real property conveyance is available in New York. Since October 15, 1981, the United States has been a part of the 1961 Hague Convention abolishing the requirement of legalization for foreign public documents. The Convention provides for the simplified certification of public (including notarized) documents to be used in countries that have joined the Convention—in short, use of an apostille.[3] This entitles the document to recognition in the country of intended use without going through the legalization process.[4]

Before 1981, if a document executed in New York X County were to be used in a German proceeding, it first had to be executed before a notary public in X County (or before a non-X County notary whose "official character" from the notary's county of residence had been filed in X County). Then it was sent to the German Consulate in New York City, accompanied by the appropriate fee, which the Consulate would then send to the intended recipient in Germany. For a document executed in Germany to be used in the United States, the reverse legalization process was employed. This method of legalization has been considered too costly and time consuming.[5]

The use of an apostille ensures that public documents issued in one signatory country will be recognized as valid in another signatory country. The sole function of the apostille is to certify the authenticity of the signature on the document, the capacity in which the person signing the document acted, and the identity of any stamp or seal affixed to the document.[6]

Use of an apostille is not limited to deeds: it may also be used in connection with birth and death records, marriage records, and education documents (transcripts, diplomas, or certificates)[7] as well as in probate proceedings[8] and in adoption proceedings.[9]

Although some 94 nations are parties to the Convention, Canada is not. Therefore, between the United States and Canada, the legalization process must be used.[10] Canada requires, and is required to provide, a certificate of authentication when validation is needed for official public documents of foreign origin or for foreign use.[11]

Authentication of a document by use of an apostille is considerably simpler than by the legalization process. For instance, because both the United States and Germany are signatories to the Hague Convention, if a deed is executed in Hof/Saale[12] and is intended to be recorded in New York X County, the grantor need only appear before a notary[13] in Hof, have the notary affix an apostille to the document, and send it off. The apostille must be in the form of a square with sides at least 9 centimeters long. Because the notary's apostille serves the same function as an acknowledgment taken in New York State, the document may be recorded in New York.[14]

"The use of an apostille ensures that public documents issued in one signatory country will be recognized as valid in another signatory country.

The X County Clerk may not, however, readily believe that the document may be recorded in X County since the Real Property Law is silent on the use of an apostille. It may therefore be necessary to provide a legal memorandum to the Clerk reciting the existence of the Convention, that the Convention is a treaty to which the United States is a party, ratified by the United States Senate, and that it therefore supercedes the Real Property Law.

Since the apostille is executed in a foreign country, it is usually written in the language of that country and must therefore be translated into English before it may be recorded. Moreover, the translator must attach a certificate of the accuracy of the translation to the English form of the apostille.

Apostille

(Convention de La Haye[15] du 5 octobre 1961)

1. Country _____United States of America_____

   This public document

2. Has been signed by _____

3. acting in the capacity of _____

4. bears the seal/stamp of _____

Certified

5. at _____ 6. the _____

7. by _____

8. N _____

9. Seal/Stamp: _____ 10. Signature _____

Certificate of Accuracy

State of New York)
County of X)

Translation of Documents
from German to English

On this day of ____ October, 2005, personally appeared before me Freiherr[16] Otto von Bismarck who, after being duly sworn, deposes and says:

That he is a translator of the German and English languages and that he is fully conversant with these languages.

That he has carefully made the attached translation from the original documents written in the German language.

That the attached translation is a true and correct English version of such original to the best of his knowledge and belief.

Freiherr Otto von Bismarck

Subscribed and sworn to before me
this ____ day of October, 2005.

_____
Notary Public

Endnotes

1. Real Property Law § 298. If the acknowledgment or proof is made without the state but within the United States, see Real Property Law § 299.
2. Acknowledgment or proof before other foreign officials is also permitted. Real Property Law § 301.
3. http://www.state.gov/m/a/auth/c1267. The text of the Convention may be found in T.I.A.S. 10072; 33 U.S. Treaty Series (UST) 883; 527 U.N. Treaty Series (UNTS) 189, and Martindale-Hubble International Law Digest. Apostille is a French word meaning "notation." http://www.michigan.gov/sos/0,1607,7-127-27035–F,00.html.
4. *Id.*
5. Keith Sherry, *Old Treaties Never Die, They Just Lose Their Teeth: Authentication Needs of a Global Community Demand Retirement of the Hague Public Documents Convention*, 31 J. Marshall L. Rev. 1045 (1998).
6. http://www.dos.state.ny.us/corp/msrfaq.html.
7. *Id.*
8. *Estate of Kate McDermott*, 112 Misc.2d 308, 447 N.Y.S.2d 107 (Surrogate's Court, Bronx County 1982) (English distributees submitted documents to the Surrogate's Court in order to be considered to be the legitimate heirs of the deceased).
9. *Matter of Adoption of Dafina T.G.*, 161 Misc.2d 106, 613 N.Y.S.2d 329 (Surrogate's Court, Nassau County 1994).
10. http://www.gov.on/ca/MBS/english/mbs/ods/apostille.
11. *Id.*
12. Hof is located on the Saale River and is technically in Bavaria but no self-respecting Hofer would acknowledge that fact. Rather, he or she would advise that Hof is located in Upper Franconia which has its own, almost incomprehensible dialect. The city is proud of its excellent water and nine (9) breweries.
13. A notary in a foreign country is not the equivalent of a notary public in the United States. A notary (Notar-Germany, notaire-France, notario-Italy) receives the same education as a lawyer admitted to practice in that country. Typically, the notary scores extremely highly on the various state examinations which are given in the foreign country. The notary may be equated with an office lawyer in the United States (preparation of deeds, mortgages, wills, business documents, etc.) and with a solicitor in the United Kingdom. As such, the notary is not a partisan (advocate of one side or the other) but rather represents the transaction and sees to it that it is done correctly and that both sides understand it. Real Property Law § 313 provides that a "notary public" includes any person appointed to perform notarial functions. Pursuant to the Israeli Notaries Law 5736-1976, the authentication of a signature, copy, power of attorney, public document and life certificate may be carried out at the nearest Israeli mission. http://www.mfa.gov.il/MFA/About%20the%20Ministry/Consular%20affairs/NOTARIAL%20FUNCTIONS.
14. Letter to Bernard M. Rifkin, First Vice President & Chief Counsel, Title-Guaranty-New York, dated February 1, 1982, from George J. Faeth, City Register of the Borough of Manhattan.
15. Even though The Hague is in The Netherlands, the Convention is frequently referred to in French. Hence, The Hague becomes La Haye.
16. Baron. If he were Austrian, his title would likely be Durchlaucht (Serene Highness).

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Report on Surveys About PCDA

To: **Real Property Law Section Executive Committee**
From: **Sam Tilton, Joel Sachs and Karl Holtzschue**
Date: **November 23, 2004**

I. Survey of Bar Associations

In January of 2004, a letter was sent out to approximately 80 bar associations throughout the state by Joel Sachs and Sam Tilton requesting feedback and comments on the PCDA, including utilization of the PCDS, experiences of practitioners, problems encountered and whether the PCDA should be repealed. Fifteen responses were received.

Several bar associations throughout the state, namely Dutchess, Oswego, Steuben, Westchester and Allegany Counties, seem to be strongly in favor of repeal of the statute. Suffolk County originally was pressing for repeal, but now is concerned that any repeal effort would fail in the legislature and the backlash would result in increasing the $500.00 fine along with other modifications in the law which would be of concern to practitioners.

Two upstate bar associations, Ontario and Genesee Counties, believe the law is working satisfactorily, but thought that some of the PCD form questions require revisions. The remainder of the responses from bar associations including Rockland, Nassau, Sullivan and Montgomery Counties indicated that they were neither supporting nor opposing the law, but felt that major changes needed to be made in the text of the law. Some bar associations did not want to take any position at this time believing that there is not enough experience for them to make any intelligent recommendations. These included both New York and Erie Counties.

Several bar associations indicated that in their respective counties almost every seller is giving the $500.00 credit to the buyer. Others indicated that sellers mark "unknown" in their answers to most questions on the form.

In conclusion, the reactions of the various bar associations to the law were decidedly mixed.

II. Survey of Real Property Law Section Members

A ten question survey on the Property Condition Disclosure Act by Joel Sachs and Sam Tilton was sent by e-mail to over 3,500 members of the Real Property Law Section on June 17, 2004. Responses were received from 77 members, by e-mail and by fax; 59 from downstate; 16 from upstate; and 2 unlocated. The New York State Bar Association (NYSBA) informed us that that was a reasonable response rate for this type of survey.

The responses from downstate and upstate differed significantly. The Executive Committee previously established that upstate was north of Sullivan, Ulster and Dutchess Counties and parts of Greene and Columbia Counties.

Among the principal results of the survey are the following:

1. Downstate, attorneys nearly always prepare the contract of sale; upstate, brokers nearly always do so.

2. Consequently, downstate, attorneys explain the PCDS; upstate, the brokers do so. Some respondents noted that some brokers refused to explain the PCDS, based on instructions from NYSAR that brokers are not supposed to give advice. This is ironic, as the brokers were the prime movers of the PCDA and insisted on the lengthy and broadly-worded questions.

3. Downstate, the PCDS is rarely provided; upstate it is generally provided.

4. Potential liability was the reason most often given for failure to give the PCDS.

5. Among the problems reported downstate were: confusion over the effect of the $500 credit on the price; timing for delivery of the PCDS and increased attorney workload without the ability to charge for it. Upstate, problems were: confusion over some questions; inconsistent assistance from brokers; timing; and increased attorney workload. Surprisingly few respondents mentioned any benefits.

6. Respondents downstate and upstate overwhelmingly opposed increasing the penalty (49 of 59).

7. Respondents downstate and upstate overwhelmingly opposed adding questions (36 of 44), though some suggested asking about toxic mold and recent repair work. No one mentioned asking about a swimming pool, though that was the subject of the first reported case on the PCDA.

8. Respondents downstate and upstate overwhelmingly opposed deleting questions (24 of 35, but 43 did not answer); 9 said delete all or most of the questions.

9. The few respondents who answered mostly did not think the questions should be amended (16 of 28); 12 suggested amendments; 50 did not answer. Six suggested amending the

environmental questions and 2 asked for a definition of "material defect."

Below is a copy of the Real Property Law Section Member survey and a summary of each of the answers.

III. NYSAR Request for Meeting

The New York State Association of Realtors (NYSAR) wrote a letter to Joel Sachs and Sam Tilton in July of 2004 noting that the Real Property Law Section was reviewing the purpose and content of the PCDA, stating that NYSAR was doing the same, and asking that we discuss with them working together. They said they would be asking their members many of the same types of questions we asked. They stated that, "a penalty increase may be none, part or all of the solution."

IV. Recommendations

1. We recommend that the Section's Task Force on Disclosure be reconstituted (Holtzschue, Coffey, DeSalvo, Tilton and Sachs) and asked to reconsider the wording of the questions.
2. We recommend that the Section's Task Force on Disclosure be authorized to meet with NYSAR to find out what they plan to do and see if there is any common ground, particularly on the rewording of questions in light of our survey results.

Summary of Answers to RPLS Member Survey About PCDS

Question 1:
In your area, who prepares the Contract of Sale—the broker/sales agent or the attorney?

The respondent's answers reflected the different practices in the upstate and downstate areas. Of the 59 downstate responses, 57 were the attorney, while 1 was the broker, and 1 both. Upstate, the broker had 13 and the attorney 2, while 1 elected both.

Question 2:
Who explains to the Seller the significance of the PCDS and how to fill it out—the broker or the attorney? (NYSAR takes the position that Realtors are not allowed to advise the Seller on this.)

Again, the answers reflected the downstate/upstate division.

Downstate, only 3 selected the broker as compared to 41 for the attorney, with 10 responding both. Upstate 13 selected the broker as compared to only 1 for the attorney, and 2 responding both.

Question 3:
How often does the Seller deliver a PCDS prior to the Buyer executing the Contract, as required by the PCDA?

Since the downstate practice discourages use of the PCDS, it is not surprising that 37 downstate responses stated the PCDS is rarely or never delivered; 6 were less than 50% of the time; 6 about 50%; and 5 more than 50%.

Upstate, where the PCDS is generally provided, 14 responded more than 50% or always, while 2 said 50%.

Question 4:
If the Seller does not deliver a PCDS, why not?

Downstate responses overwhelmingly pointed to potential liability as the reason for not delivering the PCDS; 11 responded counsel so advised; while 1 mentioned preference for the $500.00 credit.

Upstate, 7 mentioned liability or advice of counsel; 3 said the Seller did not understand the PCDS; one preferred the $500.00 credit, and the rest said that some questions were unclear or had no definitive response.

Question 5:
Does the Seller answer unknown to some/most/nearly all of the questions? Is that done in whole or in part because the Seller does not understand that the test for response is actual knowledge at the time of response?

Downstate, even though few respondents encourage use of the PCDS, 22 answered that Sellers would or do answer unknown, mostly because of ignorance or confusion about the questions.

Upstate, 15 responded that some or all of the Sellers answer unknown to the questions, with 7 attributing that to ignorance or confusion.

Question 6:
What specific problems have occurred in your practice regarding the PCDA? Are there benefits, such as ascertaining knowledge about the property that is not in the Contract, (e.g., a common driveway)?

Downstate, 10 mentioned problems including confusion over the effect of the $500.00 credit on the purchase price; the timing for delivery of the PCDS; and increased attorney workload. Only 8 saw limited benefit in learning more about the property prior to preparing the contract.

Upstate, 6 respondents mentioned such problems as confusion over the questions (e.g., what is a "landfill?"); inconsistent assistance/advice from brokers; timing of delivery; additional attorney work; and failure to address the mold issue. Surprisingly while the PCDS is generally utilized, only 4 mentioned any benefit, that being limited to the buyer learning more about the property.

If the legislature refuses to repeal the PCDA:

Question 7:
Should the penalty be increased (and if so, to what amount)?

The respondents overwhelmingly opposed increasing the penalty, by 49 out of 59 (83%). Downstate opposed 42 out of 49 (86%); upstate opposed 7 out of 10 (70%). Of the 10 favoring an increase, 5 suggested $1,000; 2 suggested $1,500; 2 suggested $2,500; and 1 suggested .5% of the price.

Question 8:
Should any questions be added (if so, which ones)?

The respondents overwhelmingly opposed adding questions by 36 out of 44 (82%). Of the 8 suggestions, 4 suggested adding toxic mold; 4 suggested asking about improvements, repairs or work done in the last 2 years. Other suggestions included alarm systems, cesspools below ground, and title issues such as common driveways.

Question 9:
Should any questions be deleted (if so, which ones)?

The respondents who answered overwhelmingly opposed deleting questions, by 24 out of 35 (69%), but 43 did not answer. Nine of the 11 who said yes, said all or most of the questions should be deleted; 2 said certain environmental questions should be deleted; and 1 from Buffalo suggested deleting questions 5-7, which are title related, 3, 4, 8-12, 26-29, 32-48 that could be covered in the contract (see e.g., the Greater Buffalo contract form) and 20-25 (allow inspection).

Question 10:
Should some of the questions be amended or clarified (if so, which ones)?

The few respondents who answered were mostly negative by 16 of 28 (57%); 12 suggested amendments; 50 did not answer. Six suggested amending environmental questions: all environmental questions, Q10, Q11, Q14, or Q19 (specific problems were raised about aboveground storage of oil, USTs, flood plains, wetlands, and agricultural districts, particularly if public records were available). Two asked for a definition of "material defect"; 2 suggested awarding attorney's fees to the successful party in a litigation.

Survey Regarding Property Condition Disclosure Act

Background

The New York State Association of Realtors ("NYSAR") has indicated that it plans to seek, at some point, legislation to increase the penalty for non-delivery of the disclosure required by the Property Condition Disclosure Act ("PCDA"), and to reword some of the questions in the Property Condition Disclosure Statement ("PCDS"). The Suffolk County Bar Association had requested the support of the NYSBA in its effort to have the PCDA repealed, but after considerable discussion and reevaluation withdrew that request this Spring. The Real Property Law Section of the NYSBA had recommended that the State Bar Association not support the effort of the Suffolk County Bar, believing that there was not sufficient experience with the PCDA to make a judgment as to what amendments would be appropriate and/or whether repeal was justified.

In order to make an informed judgment, the Real Property Law Section has undertaken to assemble the experiences of real estate practitioners throughout the State. Recently, a letter was sent out to about 85 local Bar Associations requesting input, and a number of helpful responses were received. The second step is to send out this survey to members of the Real Property Law Section to obtain their observations, actual experiences and recommendations. Your candid response will be greatly appreciated as the Real Property Law Section prepares, if requested, to take a position on amendment or appeal of the PCDA.

Please send your response by e-mail (or regular mail if e-mail is not possible) to:

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Survey Questions

1. In your area, who prepares the Contract of Sale—the broker/sales agent or the attorney?
2. Who explains to the Seller the significance of the PCDS and how to fill it out—the broker or the attorney? (NYSAR takes the position that Realtors are not allowed to advise the Seller on this.)
3. How often does the Seller deliver a PCDS prior to the Buyer executing the Contract, as required by the PCDA?
4. If the Seller does not deliver a PCDS, why not?
5. Does the Seller answer unknown to some/most/nearly all of the questions? Is that done in whole or in part because the Seller does not understand that the test for response is actual knowledge at the time of response?
6. What specific problems have occurred in your practice regarding the PCDA? Are there benefits, such as ascertaining knowledge about the property that is not in the Contract, (e.g., a common driveway)?

If the legislature refuses to repeal the PCDA:

7. Should the penalty be increased (and if so, to what amount)?
8. Should any questions be added (if so, which ones)?
9. Should any questions be deleted (if so, which ones)?
10. Should some of the questions be amended or clarified (if so, which ones)?

BERGMAN ON MORTGAGE FORECLOSURES:
Mortgage Filing Error—And Why Title Insurance Is Vital

By Bruce J. Bergman

Here is a tale to be told primarily because this is the world in which mortgage foreclosure attorneys (and other real estate lawyers) reside. There may be no lesson in the end (other than explaining why title insurance really is necessary), only enlightenment. [The case making the point is from May 2, 2003: *Coco v. Ranalletta*, 305 A.D.2d 1082, 759 N.Y.S.2d 274 (4th Dep't 2003)].

First to the principle, then some salutary thoughts. If a mortgage misspells the borrower's name—and is thereby incorrectly filed in the county clerk's office—subsequent encumbrancers, such as later mortgagees, are *not* charged with constructive knowledge of the earlier mortgage. In other words, the earlier mortgage (dated first and earlier filed) is nonetheless junior and inferior to the mortgage which came later. So what should have been a first mortgage became a second mortgage (a likely disaster depending upon the equity) and a second mortgage became a first mortgage. Of course, from the viewpoint of a possibly second mortgagee, such a situation is a bonanza.

Turning now to how this happens—at the mortgage closing the mortgage documents are executed and typically delivered to a title company to record. Although it is obvious that care needs to be exercised by all participants in assuring that the mortgagors' names are correctly spelled, errors can be made from time to time, as was so in this case. Where county clerks use names as the indexing method, a misspelling will cause the mortgage to be misfiled in a different place in the index so that if one searches for an existing mortgage at the correct spot it will not be found. Here, the index could have been searched phonetically and that would have revealed this earlier mortgage. But the court said that the availability of searching phonetically does not dispose of the issue. The mortgage had to be correctly filed to give notice to the world and it was not so filed.

Once a defaulted mortgage requires foreclosure, this reversal of priorities will be revealed by the foreclosure search. Then the mortgage holder would turn to the title company which insured the mortgage and ask them to either correct the situation or respond in damages. Whether the lender actually suffers a loss because its first mortgage became a second depends upon the equity in the property, but assuming there was a loss, this is part of what a title insurance policy is for. The title company representative at the closing should have assured that the mortgagor's name was correctly spelled so that it could be correctly indexed. That miscue created the problem which could lead to liability. While the case did not mention a title company or who might pay for the loss, as a practical matter, that is what would be pursued and what would occur. In New York, of course, it is the owner/mortgagor who has a fee title policy while the lender obtains a mortgage policy.

And if the lender here did not have title insurance? Then, whatever loss might be incurred by virtue of the misfiling is not reimbursed by any insurer and must be borne by the lender—a serious situation indeed.

Mr. Bergman, author of the three-volume treatise, *Bergman on New York Mortgage Foreclosures* (Matthew Bender & Co., Inc., rev. 2004), is a partner with Berkman, Henoch, Peterson & Peddy, P.C., Garden City, NY; an Adjunct Associate Professor of Real Estate with New York University's Real Estate Institute, where he teaches the mortgage foreclosure course; and a special lecturer on law at Hofstra Law School. He is also a member of the USFN and the American College of Real Estate Lawyers.

In Memoriam

Edith I. Spivack, Esq.

(August 2005)

It is with real sadness that I relate these recollections of a truly unusual and remarkable woman.

I had heard about Edith Spivack long before I first met her through her husband, Bernard H. Goldstein, Esq., then a partner at the Tenzer Greenblatt firm. One of her former associates in the New York City corporation counsel's office, Meyer "Mike" Schepse, came to work for me at the Title Guarantee office in Mineola, New York, after he had left city employment, having worked with Edith in developing the In Rem Tax Foreclosure procedure for the City of New York. The transition from the then-method of tax lien foreclosure after the Great Depression was both radical and monumental, but they convinced the courts of its constitutionality and made it work. It generated millions of dollars for a cash-starved city. "Mike" recounted numerous stories of the brilliance of this unusual lady.

I also worked with her husband, "Bernie," on a number of educational projects and he would also tell me how they both made an early train daily out of Port Washington, Long Island, so that he could take at least a two mile circuitous walk to the Chrysler Building where his office was located.

Edith entered Columbia Law School several years before I started at New York University Law School in 1935. I do not know how many other women were in her class then but there were only two women in my class at New York University. The law was not yet deemed appropriate work for a lady, with the possible exception of real estate or surrogate court work.

It is difficult even for an "ancient" like my self to remember the various ill-conceived prejudices against even the thought of a female lawyer handling criminal law matters, especially anything of a sexual nature. There was also the practical concern that a client would not want to have a female lawyer. They were not considered to be sufficiently aggressive. Edith proved them all wrong by sheer persistence, ability and hard work.

It boggles the mind to reflect on how she was able to cope with a long succession of corporation counsels and mayors of different political parties for well over a half-century, and at the same time raise a fine family.

On a few occasions, I had the opportunity to discuss with her certain title matters that involved the City of New York. I learned quickly that she considered herself a guardian of the city's interests, and the fact that I was a personal friend mattered not at all to what she considered to be the interest of the city.

However, to know her personally was always a delight. She was intelligent, articulate and charming. She could discuss the issues of the day of the law; she always had an opinion.

Perhaps it is a shame that she was so good at what she did at the corporation counsel's office. She was probably at least a full generation, or more, ahead of her time. A woman with her ability could certainly reach a much more important position today, and if inclined towards political activity, could achieve high office. She certainly had the talent, ability and intelligence to compare with the very best.

—James M. Pedowitz

Recent Cases on Professional Practice

By Anne Reynolds Copps, Alfred C. Tartaglia and Michael P. Petro

This article addresses recent cases which impact real estate practice. Some of the cases raise purely ethical questions, while others concern disqualification or sound in legal malpractice. We have made no attempts to parse the meaning of "professional practice" in this article, choosing instead to focus on significant cases for the real estate practitioner, however they may be characterized.

Avoiding Conflicts of Interest

"Personal interest" conflicts of interest arise when an attorney's personal, financial, or business interests conflict with those of the client. DR 5-101(A) provides that personal conflicts of interest may be waived in certain situations. The standard is one of objective reasonableness; in order for a waiver to be valid, a disinterested attorney would have to conclude that the conflict was not so pronounced as to rule out consent. In cases in which attorneys actually enter into business relationships with clients, DR 5-104(A) requires that the client's consent be obtained and reduced to a writing. No other waiver section of the Disciplinary Rules requires that the consent be reduced to writing.

DR 5-104(A)[1] states, in part, that, "[a] lawyer shall not enter into a business transaction with a client if they have differing interests therein . . . unless the client has consented after full disclosure." In view of the foregoing, it is probably not a surprise to report that business ventures between attorneys and clients are not advisable. These agreements may be rescinded by the client, even absent evidence of fraud or undue influence, unless the attorney can demonstrate that the client was fully aware of the consequences of the agreement, and that there was no exploitation of the client's confidence in the attorney.[2]

In *O'Keefe v. Hibner*,[3] the plaintiffs were parties to a Family Court proceeding. While the Family Court proceeding was pending, the plaintiffs transferred their home (apparently in arrears in mortgage payments) to the attorney who represented them in Family Court, ostensibly to avoid foreclosure. The reported decision does not reflect what consideration was paid by the attorney, if any; presumably there was none. The attorney allegedly expended over $200,000 to redeem the property, although the former owners claimed that the value of the property exceeded $400,000. Evidently, according to the attorney, it was agreed that the plaintiffs would transfer the property to the attorney; that the attorney would satisfy the mortgage; and that the plaintiffs would remain on as tenants at a reduced rent. The plaintiffs failed to rent as allegedly agreed. In the plaintiffs' action to set aside the deed, the court enjoined the eviction of the plaintiffs, finding that the plaintiffs had established a likelihood of success on the merits. The court reasoned that serious issues existed with respect to the legality of the real estate transaction, and the propriety of the attorney's role in becoming the plaintiffs' landlord and in commencing an eviction proceeding against them while he served as their counsel.

It is not always clear at the outset that engaging in a business arrangement involves ethical concerns. The attorney may believe that he or she is acting solely as an individual, whereas the business associate (and the court) may believe that an attorney-client relationship exists, imposing a fiduciary obligation on the attorney. The claim itself may take its toll in time and expense on the attorney's part. Illustrating these concerns is *Weadick v. Herlihy*,[4] in which an attorney and her fellow loft tenants formed a venture to purchase the building in which their lofts were located. The attorney, at the last moment, withdrew from the venture and purchased a one-half interest in the building individually. Her joint venturers eventually purchased the other half, and then brought an action to impose a constructive trust on the attorney's one-half interest, contending that she was both their attorney and co-venturer. In affirming the denial of her motion for summary judgment, the Court held:

> Contrary to defendants' contention, it is immaterial whether plaintiffs imparted any confidences to the attorney co-venturer or whether they relied on her as a result of their lesser business sophistication, since these jural fiduciary relationships, unlike informal confidential ones, do not depend on dominance and related factors. While the client's subjective belief as to the existence of an attorney-client relationship is not dispositive. . . . Here, questions exist, including whether the attorney diverted the opportunity to herself and was unjustly enriched as a result. Facts supporting the imposition of a constructive trust were sufficiently set forth. The motion court aptly recognized the flexibility of the equitable doctrine, and that the creation of interests in real property falls within the purview of "a transfer in reliance" on a promise. (Internal citations omitted).

The issue as to whether an attorney-client relationship exists is a factual one, and in *Weadick*, the court took pains to distinguish *Fleissler v. Bayroff*,[5] a case in which no attorney-client relationship was established between parties to a real estate venture. *Fleissler* was resolved in favor of the attorney after a non-jury trial, which merely serves to illustrate the point that it is probably best to avoid engaging in business ventures with anyone who may claim later to be a client.

An extreme case of "personal interest" conflict of interest was *In re Fredric J. Roth*,[6] a disciplinary proceeding in which the respondent attorney admitted that he entered into several real estate partnerships with a client of his firm. Respondent's firm acted as counsel to the partnerships, but respondent failed to: (1) inform his client that his firm would not be protecting the client's interests separately from the interests of the partnerships; and (2) advise the client to seek the advice of independent counsel. In addition, when the real estate deals soured, respondent attorney helped draft an agreement which required the client to fund a disproportionate share of responsibility for the debt. Respondent also borrowed money from the client without informing the client to seek the advice of independent counsel, and then improperly attempted to convey ownership of his home in order to shield it from his client's efforts to collect on the debt. These acts collectively impelled counsel to tender his resignation from the bar, and his name was accordingly stricken from the roll of attorneys and counselors-at-law.

Conflict of Interest Arising Out of Prior Representation

In *Hempstead Video v. Incorporated Village of Valley Stream*,[7] the Second Circuit disagreed with a NYSBA ethics opinion and held that an "of counsel" relationship with a law firm will not necessarily result in imputation of the "of counsel's" conflicts of interest to the law firm. The case involved a zoning dispute by the Village of Valley Stream against Hempstead Video, Inc., a corporation owned by James Alessandria. Hempstead Video operated an adult video store. The zoning dispute was settled in an agreement in which, among other things, the Village agreed not to prosecute the store under its zoning ordinance, and Hempstead Video agreed not to install enclosed viewing rooms. Two years later, Hempstead Video installed viewing booths which, it argued, did not violate the settlement agreement, as there was an 18-inch gap between the top of the partitions and the ceiling. The Village, represented by Jaspan Schlesinger, sought leave to prosecute the store under its adult use ordinance, alleging that the store had breached the prior agreement. The federal magistrate conducted an evidentiary hearing on August 21, 2003, at which Elena Winter, the former president and manager of Hempstead Video testified for the Village.

William Englander, who had become "of counsel" to the Jaspan firm in July 2003, had represented Hempstead Video with respect to labor matters for the past 20 years, including defending Hempstead Video in a suit brought by Elena Winter, the former store manager, in which she alleged that Hempstead Video had illegally terminated her employment based on her pregnancy. Prior to July 2003, Englander had been a solo practitioner who rented office space from the Jaspan firm. In 2003, he decided to semi-retire, turning over the representation of several of his clients, not including Hempstead Video, to Jaspan. Englander retained other clients, including Alessandria and Hempstead Video, whom Englander continued to represent in his individual capacity. Jaspan had no access to Alessandria's or Hempstead Video's files, and in fact, neither the Village's counsel nor Englander was aware of the other's involvement with either the Village or Hempstead Video.

While a determination on the issue of the breach of the settlement agreement was pending, Englander wrote a letter to his co-counsel representing Hempstead Video in the labor case, mistakenly using Jaspan stationery. Hempstead Video then moved to disqualify the Village's counsel and Jaspan Schlesinger based on Englander's conflict of interest.

The Second Circuit had little difficulty in determining that Hempstead Video had breached the settlement agreement, leaving the Village free to pursue enforcement of its local laws. With respect to the motion to disqualify, the court noted that Disciplinary Rule 5-105 generally provides that an attorney's conflict of interest is imputed to his or her firm based on the presumption that associated attorneys share client confidences. The issue presented was whether Englander's potential conflict should be attributed to Jaspan by reason of his "of counsel" relationship with Jaspan. The court noted but declined to follow a rule adopted by the New York State Bar Association in 2004 which would require disqualification of the firm if an "of counsel" attorney associated with the firm had a conflict of interest.[8] The court reasoned that such an approach exalted form over substance, and failed to achieve an appropriate balance between an individual's right to representation of his or her choice, and the public's interest in the integrity of the profession.

The Second Circuit instead adopted the rule that the imputation of an "of counsel" attorney's conflict to his or her firm requires consideration of the substance of the relationship under review and the procedures in place to safeguard against sharing of client confidences. The court held that imputation was not warranted under the particular facts because: (1) Englander became "of counsel" to Jaspan for the limited purpose of providing transitional services to those clients turned over to Jaspan; (2) Englander represented Hempstead Video, Alessandria, and other clients in his independent

capacity; (3) Jaspan had no access to the confidences of Englander's private clients, whose files were separately maintained by Englander; (4) Alessandria never discussed the present case with Englander, and Englander never discussed the details of either the present case or the labor case involving Winter with anyone at Jaspan; and (5) when Jaspan learned of the potential conflict, it instructed Englander not to discuss the Winter case with anyone at the firm and to continue maintaining a separate file.[9]

In *Schertz v. Jenkins*,[10] a case involving an eviction proceeding, the landlord moved during trial to disqualify the tenant's counsel on the ground that he had previously represented the landlord in an eviction of another tenant in the same building. Reading between the lines of the reported decision, the building appeared to be an illegal or "de facto" multiple dwelling, i.e., a two-family home to which a third, illegal apartment had been added. The illegality of an apartment was a defense in the present eviction proceeding, and presumably would have presented a viable defense to the prior eviction proceeding—but eviction in the prior proceeding had been granted on the tenant's default. The court noted that under *Jamaica Public Service Co., Ltd. v. AIU Ins. Co.*,[11] a motion to disqualify opposing counsel requires a tripartate showing that: (1) there was a prior attorney-client relationship; (2) the matters in the two actions are substantially related; and, (3) the interest of the present and former client are materially adverse. The court concluded that DR 5-108 did not require disqualification on the ground that the attorney's prior representation of the landlord was not "substantially related" to the subsequent eviction proceeding—despite the fact that both proceedings involved the same landlord and building. Judge Battaglia concluded that the present and former actions were not related because the tenants were in occupancy during different time periods, and because the defense of illegality was not raised in the prior proceeding due to the tenants' default. In addition, the court noted that there was no showing that client confidences were imparted in the prior representation.

In *Richard L. v. Flora L.*,[12] the court held that an attorney who represented a married couple in the purchase of a home was disqualified from representing the husband in a divorce proceeding where the husband claimed that the residence was his separate property. As the attorney would be required to testify as to the circumstances surrounding the purchase of the dwelling in the upcoming trial on the issue of equitable distribution, the lawyer would be cast in the role of an advocate-witness in violation of DR 5-102(A). The court noted that if the marital residence was conceded to be marital property, disqualification would likely have been found to be unnecessary, as the issues regarding the purchase would probably not have constituted significant issues at trial.

Title Closings and Temporary Certificate of Occupancy; The Yeti Wore a Met's Hat

Observing that it "is more likely that you will see a Yeti crossing the West Shore Expressway wearing a Mets Hat than a final certificate of occupancy at a closing [in Staten Island]," Justice Stranieri of the New York City Civil Court, Richmond County, acknowledged the practical difficulties in obtaining a certificate of occupancy, either temporary or final, for newly constructed residential properties on Staten Island in New York. The Court recognized that the local practice, when no final certificate of occupancy had been issued, had been to hold $2,500 in escrow pending issuance of the certificate of occupancy; by local custom, the amount of the escrow, the Court observed, was unrelated to the actual cost of completing "open" items, and was "almost never" negotiated by the purchaser or lender. Nevertheless, the court held that the purchaser's law firm committed legal malpractice when the firm allowed the plaintiff to close title without any certificate of occupancy.[13] It is not this holding, but the judge's scathing condemnation of the issuance and use of temporary certificates of occupancy, that has caused consternation. The court went on to suggest that:

- an attorney who permits a client to purchase a home on which only a temporary certificate of occupancy has been issued is subject to ethical sanctions based on a failure to properly advise the client; and,
- lenders issuing mortgage loans in New York have a legal obligation not to close the loan unless a final certificate of occupancy has been issued, or, if a temporary certificate of occupancy is in effect, unless sufficient funds are held in escrow so that the outstanding work can be completed and paid for within the time set forth in the temporary certificate of occupancy.

Members of the bar have questioned the court's conclusions. It remains to be seen whether other courts will similarly condemn the use of certificates of occupancy.

Professional Conduct; Use of Subpoenas and Execution of Nonmilitary Affidavits

An attorney at a prominent firm was suspended for three months for abusing subpoenas in New York City Housing Court.[14] In Housing Court summary proceedings, discovery is generally available only with leave of the court; in addition, the subpoenaed documents must be delivered directly to the court, and be made available for inspection by counsel only with the court's express approval. The Housing Court denied landlord's request for discovery of certain documents. Nevertheless, the landlord's attorney issued subpoenas

to third parties seeking the financial and medical records of a tenant without obtaining the court's permission, suggested that the subpoenaed documents be sent directly to his office—thereby improperly attempting to circumvent the court's oversight.

In *Heritage East-West, LLC v. Chung & Choi*,[15] an attorney filed non-military affidavits in six separate eviction proceedings. The Civil Court reviewed the affidavits in which the investigator alleged that she conducted the requisite investigations and discovered that the affidavits, if truthful, would have required the same non-attorney investigator to be in separate places at the same time. Finding that a lawyer is responsible for the conduct of non-lawyer employees, and making reference to DR 102A(4) relating to conduct involving fraud and dishonesty, the court imposed a sanction of $6,000 for frivolous conduct, and referred the matter to the Disciplinary Committee.

Improper Referrals

In *In re Jordan*,[16] counsel represented five purchasers of real estate. In each purchase, the seller was First Home Properties, Inc., or a related entity, and the broker was First Home Brokerage Corp., or a related entity. In each of the five sales, the attorney's fees were paid by the broker. The attorney was referred an additional 380 clients by the same broker. Finding that the attorney failed to disclose to his clients the potential conflict of interest, and that he allowed his independent professional judgment on behalf of his clients to be adversely affected by his relationship with First Home Brokerage, First Home Properties, or one of their affiliates, the court determined that the appropriate sanction was disbarment.

Escrow Accounts

An attorney, as escrow agent in two transactions for the sale of Manhattan cooperative apartments, placed down payments of $1.45 million and $1.28 million in a New York branch of a Connecticut bank. The accounts were not FDIC insured; the bank failed. While the lower court held that the attorney breached an obligation as escrowee to place the funds in an insured account, the Appellate Division, First Department, concluded that there was no legal malpractice, as the attorney had no notice of the bank's financial condition, and there is no obligation to place escrowed funds in an FDIC-insured account.[17] Although it seems laughable to suggest that an attorney would knowingly deposit funds in a bank which he or she has knowledge is in danger of failing, the case does not explore those circumstances in which an attorney may be put on notice of a bank's precarious financial condition.

Escrow account violations are minuscule in comparison to the number of transactions which require that funds be placed in escrow. We feel constrained, however, to take note of a case which imposed the penalty of disbarment for escrow account violations, even though there was no "actual" harm to the clients (i.e., no money was lost), and even though the attorney had no venal intent. In *In re White*,[18] the court imposed the maximum sanction with the statement, "The respondent's ignorance and/or disregard of the rules regarding maintenance of an escrow account render him a danger to the public."

Endnotes

1. That section provides that "[a] lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client; (2) the lawyer advises the client to seek the advice of independent counsel in the transaction; and (3) the client consents in writing, after full disclosure, to the terms of the transaction and to the lawyer's inherent conflict of interest in the transaction."
2. *Schlanger v. Flaton*, 218 A.D.2d 597, 631 N.Y.S.2d 293 (1st Dep't 1995), *appeal denied*, 87 N.Y.2d 812, 644 N.Y.S.2d 145, 666 N.E.2d 1059 (1996) ("The present matter is not one of a lawyer simply undertaking a business relationship with a client, but rather of a lawyer, in effect, exploiting his own client through a lack of disclosure and also pursuing affirmative steps to benefit himself at the expense of that client.").
3. N.Y.L.J., Oct. 2, 2003, p. 20, col. 1 (Sup. Ct., Nassau Co., Skelos, J.).
4. 16 A.D.3d 223, 792 N.Y.S.2d 25 (1st Dep't 2005).
5. 266 A.D.2d 34, 698 N.Y.S.2d 19 (1st Dep't 1999).
6. 786 N.Y.S.2d 172, 2004 N.Y. App. Div. LEXIS 15374 (1st Dep't 2004).
7. 2005 U.S. App. LEXIS 9910 (2d Cir. 2005).
8. New York State Bar Association Commission on Professional Ethics, Op. 773 (2004) ("If a lawyer acting alone would be disqualified from a particular representation based on any of the rules enumerated in DR 5-105(D), then that disqualification is imputed to a law firm with which that lawyer has an 'of counsel' relationship.").
9. The Court also concluded that, even if the rebuttable presumption of a conflict were imputed in the case, the presumption was rebutted.
10. N.Y.L.J., June 2, 2004, at 19, col. 1 (Civil Court of the City of New York, Kings Co., Battaglia, J.).
11. 92 N.Y.2d 631 (1998).
12. N.Y.L.J., January 25, 2005, at 19, col. 1 (Sup. Ct., Suffolk Co., Pines, J.).
13. *Howard v. Berkman, Henoch, Peterson & Peddy, P.C.*, 2004 NY Slip Op 51470U, 5 Misc. 3d 1020A, 2004 N.Y. Misc. LEXIS 2364.
14. *In re Burden*, 5 A.D.3d 1, 772 N.Y.S.2d 26 (1st Dep't 2004).
15. N.Y.L.J., Nov. 29, 2004, at 19, col 1 (Civil Court of the City of New York, Queens Co. (Brown, J.)).
16. 299 A.D.2d 34, 747 N.Y.S.2d 249 (2d Dep't 2002).
17. *Bazinet v. Kluge*, 14 A.D.3d 324, 788 N.Y.S.2d 77 (1st Dep't 2005).
18. 779 N.Y.S.2d 92 (2d Dep't 2004).

The assistance of Dorothy H. Ferguson, Esq., former Section Chair, in the preparation of this article, is gratefully acknowledged.

CASE NOTE

Eastside Exhibition Corp. v. 210 East 86th Street Corp., 2005 N.Y. Slip Op. 06735; 2005 WL 2233306 (N.Y.A.D. 1 Dep't)

Defendant-landlord, 210 East 86th Street Corp., sought review of a judgment from the Supreme Court, New York County, in favor of plaintiff-tenant, Eastside Exhibition Corp. The issue before the appellate division was whether or not the plaintiff was entitled to an abatement of its entire rental obligation because the defendant took possession of a minimal and non-essential portion of its demised premises. The appellate division held that the plaintiff suffered a partial actual eviction and compensated the plaintiff with a partial rent abatement for the injury it has suffered and will continue to suffer.

The plaintiff held a lease on a two-story space configured as a four-theater movie house. The lease permitted the defendant to have access to the demised premises at reasonable times in order to make repairs and improvements without (i) the abatement of rent while the work was in progress; (ii) damages for loss or interruption of business; (iii) diminution of rental value; or (iv) liability on the landlord's behalf. In December 2002, without notice to or consent of the plaintiff, the defendant entered the leased premises and installed floor-to-ceiling steel cross-bracing between two existing support columns in preparation for additional construction to the building. The cross-bracing occupies space between the two theaters and the concession stand on the first floor, thus narrowing the main passageway. On the second floor, the cross-bracing displaces a portion of an informal seating area for patrons waiting to enter the upstairs theaters. As a result of the defendant's actions, the plaintiff stopped paying rent as a remedy for partial actual eviction and immediately commenced action in Supreme Court, New York County. The plaintiff sought a permanent injunction barring the defendant from doing any further work in the theater and directing the defendant to remove what was already done, a full abatement of rent, compensatory damages exceeding $1 million, and punitive damages of $3 million.

The trial court determined that the plaintiff was deprived of approximately 12 square feet of space from an area measuring over 15,000 square feet, in an area non-essential to the operation of the plaintiff's business, and that the percentage of total area lost was *de minimis*. The general rule in this situation is that a partial actual eviction warrants an abatement of the total rent; however, the trial court held that the taking of a non-essential minute area of space constitutes an exception to the rule. Accordingly, the trial court held that defendant could leave the subject alteration in the demised premises in place without forgoing the agreed rent. The trial court also held that the plaintiff was not in default and dismissed the defendant's claims for ejectment and attorney's fees. The defendant sought review and the plaintiff cross-appealed.

Upon review, the appellate division declared that the trial court correctly found that the lease permitted the defendant to enter the plaintiff's premises at reasonable times, but did not authorize the defendant to permanently deprive the plaintiff of the use of any portion of the demised premises. The appellate division agreed that such a deprivation would constitute a partial actual eviction. However, the appellate division declared that the factual underpinnings of the cases relied upon by the trial court did not support its conclusion of an exception to the general rule.

The appellate division, quoting Justice Cardozo in *Fifth Ave. Bldg. Co. v. Kernochan*,[1] explained that a partial actual eviction "suspends the entire rent because the landlord is not permitted to apportion his own wrong" since no landlord may be encouraged to injure or disturb his tenant. While acknowledging that it was constrained by precedent, the appellate division admitted that it was also sympathetic to the trial court's conclusion that total rent abatement was an unpalatable remedy under the facts of the case. The appellate division cited three cases that it believes stand for the proposition that a partially evicted plaintiff is entitled to money damages proportionate to the eviction.[2] The appellate division held that the appropriate remedy in the case at bar was a partial rent abatement for the injury that the plaintiff has suffered and will continue to suffer.

Accordingly, the judgment of the Supreme Court, New York County, was modified to reflect that the plaintiff should be compensated in the form of partial rent abatement proportional to the injury. The remainder of the judgment was affirmed.

Nicholas Malito, '06

Endnotes

1. 221 N.Y. 370, 373 (1917).
2. *Eastside Exhibition Corp. v. 210 East 86th Street Corp.*, 2005 N.Y. Slip Op. 06735, 4, (*citing Paine & Chriscott v. Blair House Assocs.*, 70 A.D.2d 571, 572 (1979) ("To the extent that the pipes and conduits might constitute a partial eviction, this can easily be compensated by money damages."); *cf. Appliance Giant, Inc. v. Columbia 90 Assocs.*, 8 A.D.3d 932, 933 (2004) (a partially evicted tenant is entitled to recover that part of paid rent attributable to that portion of the premises from which it was evicted); *81 Franklin Co. v. Ginaccini*, 160 A.D.2d 558, 559 (1990).

Real Estate Transactions— Commercial Property*

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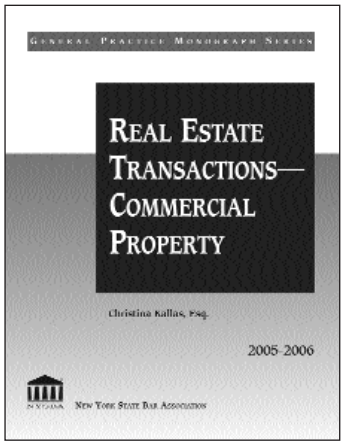

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Section News

Legislative Committee Report

Perhaps the most privileged and vital function of any bar association consists of participating in the making of laws. This is a function that the Real Property Law Section has recently identified as crucial to the real estate bar, and perhaps the number one focus of the Section's activities going forward. As part of that initiative, in January 2005, Gary Litke, Ralph Habib and I became co-chairs of the NYSBA Real Property Law Section Legislative Committee. Our major undertaking to date has been an effort to reinvigorate the Section's influence on pending legislation in New York State.

As a former real estate practitioner, my experience has been entirely with transactional law. The legislature was for the litigators. My ignorance of the mechanics of lawmaking reminds me of 19th-century German politician Otto von Bismarck's saying: "Laws are like sausages. It's better not to see them being made." In this article, I will share with you my steep learning curve and report on our progress to date. I will also invite you to get involved in this very important enterprise, and give you the information you will need.

First, some background.

New York State Senators and Assembly members are elected to two-year terms. Accordingly, each legislative session in Albany runs for two years with the legislature sitting in session from January 1st to June 30th each year. During each of these six-month periods, the legislators typically introduce thousands of bills, only a small percentage of which are ultimately signed into law by the governor. As of September 2005, over 15,000 bills have been introduced. When a bill is introduced, there is no way of determining whether it has sufficient political support to be passed or whether it is dead on arrival. Certain bills are reintroduced year after year in the New York State Senate without finding the backing to be introduced in the Assembly, and vice versa. From time to time, one of these perennially languishing bills develops powerful support, sometimes catching its opponents by surprise, and gets passed (or doesn't due to frantic last minute oppositional maneuvering).

Under New York legislative practice, during a legislative session, the governor does not have a "pocket veto." If a bill is "delivered" to the governor and the governor does nothing for ten days, then the bill is enacted into law. Informally, the governor and the legislators agree that bills are sent to the governor in "batches" of ten to twenty bills so that the governor's staff is not overwhelmed by the ten-day rule. Sometimes both houses of the legislature pass bills but do not "deliver" them to the governor for many months.

The Real Property Law Section Legislative Committee's mission is to monitor the flow of proposed legislation in both the State Assembly and the Senate affecting any aspect of real property and consider each bill to decide whether the RPLS supports, opposes, or is neutral with respect to that bill. The Committee strives to identify and oppose those bills which, in the opinion of the Committee, threaten to impose unjust and/or unintended consequences to or otherwise impede real estate commerce. The Committee's goal is to improve the law by simplifying, clarifying or streamlining it, not by changing it substantively. If the legislature wants to change the substance of the law, they are the experts on that, not us. We try to limit our role to making sure that what the legislature enacts will work, and not create new problems or unreasonable burdens, taking into account what really happens in real estate practice around the state.

The individuals in the legislative Committee who review a particular bill may (and frequently do) consult with the chair of the relevant substantive committee. When a bill is proposed in the Senate or the Assembly and a section of the NYSBA comments on it, that is called a "legislative report." It must be approved by the executive committee (or, under time pressure, just the officers) of the applicable section and must be consistent with existing NYSBA policy. For new legislation to be initiated by the Real Property Law Section, bills are typically drafted by the interested substantive committee within the Section, blessed by the Section's Executive Committee, and then submitted to the Association for consideration by the NYSBA Executive Committee and/or the House of Delegates.

Our first objective in revamping the Legislative Committee has been to increase our ability to monitor pending bills and react to them where appropriate. With the assistance of the NYSBA Department of Governmental Relations, we launched the RPLS legislation tracking website, which may be accessed on the RPLS section of the NYSBA website. (The direct web address is: http://www.nysba.org/statewatch/SBA_RPLS.HTM.) This only scratches the surface of the broad range of useful information available on the NYSBA's website. You will find the website to be particularly useful if you set up a username and password, which you can easily do at the following web address: http://www.nysba.org/pwhelp.

Working with the RPLS Executive Committee and with the Legislative Committee, Governmental Relations Director Glenn Lefebvre and Associate Director Ron Kennedy identify bills that affect real estate and post them on the website. They also work with legislative staff whenever the Legislative Committee writes a legislative report on a pending bill. Committee members are kept informed of Committee activities through periodic conference calls. Karl Holtzschue, a Section officer and our Committee member extraordinaire, maintains the Committee's legislation tracking status chart, which keeps track of those bills the Committee is reporting on or considering reporting on and the responsible substantive committee.

As an example of how the process works, a group of "public interest" attorneys recently proposed a bill entitled "The Home Equity Theft Prevention Act," intended to protect financially distressed homeowners from con artists who promise to solve their problems but, in fact, only worsen them. Versions of the bill were introduced in both the Assembly and the Senate. A NYSBA member, whose primary clients were foreclosing lenders, became aware of the bill and pressed the Legislative Committee to write a legislative report in opposition because of burdens that the proposed legislation would place on foreclosing lenders. (Among other things, the proposed statute would require lenders to deliver an additional notice to defaulting borrowers printed on colored paper and in the native language of the borrower—a requirement that may sound innocuous but would, in the view of some Section members, significantly complicate and delay every foreclosure in the state and impose a burden not justified or necessary given the problem the legislation was intended to solve.)

The more "liberal" members of the Section's Executive Committee supported the bill; the more "conservative" members opposed it. Because the Legislative Committee's mission is an impartial one, our legislative report praised the goals of the bill, but cited a few provisions (like those mentioned above) that seemed to impose unjustified burdens, costs, and risks of litigation. The Section ultimately opposed the proposal but the Legislative Committee offered to meet with the bill's sponsors to discuss a handful of changes that might lead to a revised bill that we could support or at least not oppose. The legislature adjourned for the summer before this offer could be accepted, but the legislation remains on our radar screen.

Another concern in redesigning the Legislative Committee is increasing the depth and breadth of our surveillance of pending bills. Often, as evidenced in the last couple of paragraphs, only when a Section member's "ox is gored" does sufficient momentum develop to inspire the writing of a legislative report. As a result, we have thus far participated only sporadically in the legislative process because of the logistical difficulties of reading every relevant bill and taking its measure. To address this, we are implementing a system whereby volunteer Legislative Committee members systematically review an assigned range of bills and select bills that may merit further review and perhaps a report. Substantive committees will then be asked to review the bill in question and, where appropriate, work with the Legislative Committee to draft a legislative report for sign-off by the Section's Executive Committee.

Finally, and perhaps most important, once we have established the RPLS as a consistent and reliable voice of the real estate legal community in the legislative process, we intend to become proactive and propose bills—not just react to them. Typically, a bill would be proposed by one of our substantive committees, and would likely be based on either a problem in the law or a bad court decision. Our first "baby step" into the legislative waters will, however, consist of an "omnibus technical corrections act," designed to correct the numerous typos and similar mistakes currently on the books in various real property law statutes. Section members are encouraged to submit such errors to the attention of the Legislative Committee co-chairs for inclusion in our proposed bill. This is an intentionally non-controversial effort, designed primarily to acclimate the legislature (and us) to our legislative efforts. Hopefully, more substantive law-making will follow. To further expand our influence, Gary will be organizing meetings with crucial Assembly and Senate members and their staffs in Albany.

Ralph, Gary and I encourage all RPLS members to participate in the Legislative Committee. This participation can take any or all of the following forms: (a) help us develop our "omnibus technical corrections act"; (b) participate in our quarterly conference calls; (c) help us review and monitor pending legislation; and (d) help us write/edit legislative reports. Helping the Section participate in the legislative process in New York State is a big job. We welcome all the help we can get. If you are interested in getting involved, please contact any of the co-chairs, at the following telephone numbers and e-mail addresses:

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—S.H. Spencer Compton

* * *

New Member Mentoring Program

In the forthcoming issue of the *N.Y. Real Property Law Journal* there will be an article regarding a Real Property Law Section mentoring program. Your participation is greatly appreciated.

(1) What is it? An effort by the NYSBA and the Executive Committee of the Real Property Section to encourage participation by new and recent members of the Association and Section to participate in Committee and attend Committee and Section meetings as well as other NYSBA activities.

(2) What must I do? Contact new and recent members of the Section from your locality to make them aware of upcoming meetings and programs. If you are attending, seek them out to greet them or try to find another member who can. The objective is to foster continuing interest in the NYSBA and the Section.

(3) What this is NOT—this is not a program to give legal mentoring and advice to young lawyers. There is another program for that.

Gerald Goldstein
Mentoring Coordinator
Real Property Section

* * *

Correction

A statement in memoriam of the late Thomas P. Moonan, Esq., written by James A. Pedowitz Esq., appeared in the last edition of the *N.Y. Real Property Law Journal*. Reference was made to the so-called "Indian Covenant" drafted by Tom and Monroe Title Insurance Corporation for purposes of addressing their title insurance policies' land claims of Native Americans. The correct version of that covenant is as follows:

> This policy is written upon the express covenant that any contract to sell or application to mortgage all or any portion of the insured premises shall provide for acceptance by the vendee or mortgagee as the sole title evidence, a title insurance policy, issued by any title company licensed to do business with New York State which policy shall contain the same covenant and be issued without exception as to any alleged right of any Indian or Tribe of Indians and be issued at the then applicable rate. This corporation agrees upon application to reissue its policy with the same covenant included therein.

Section Committees & Chairs

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

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