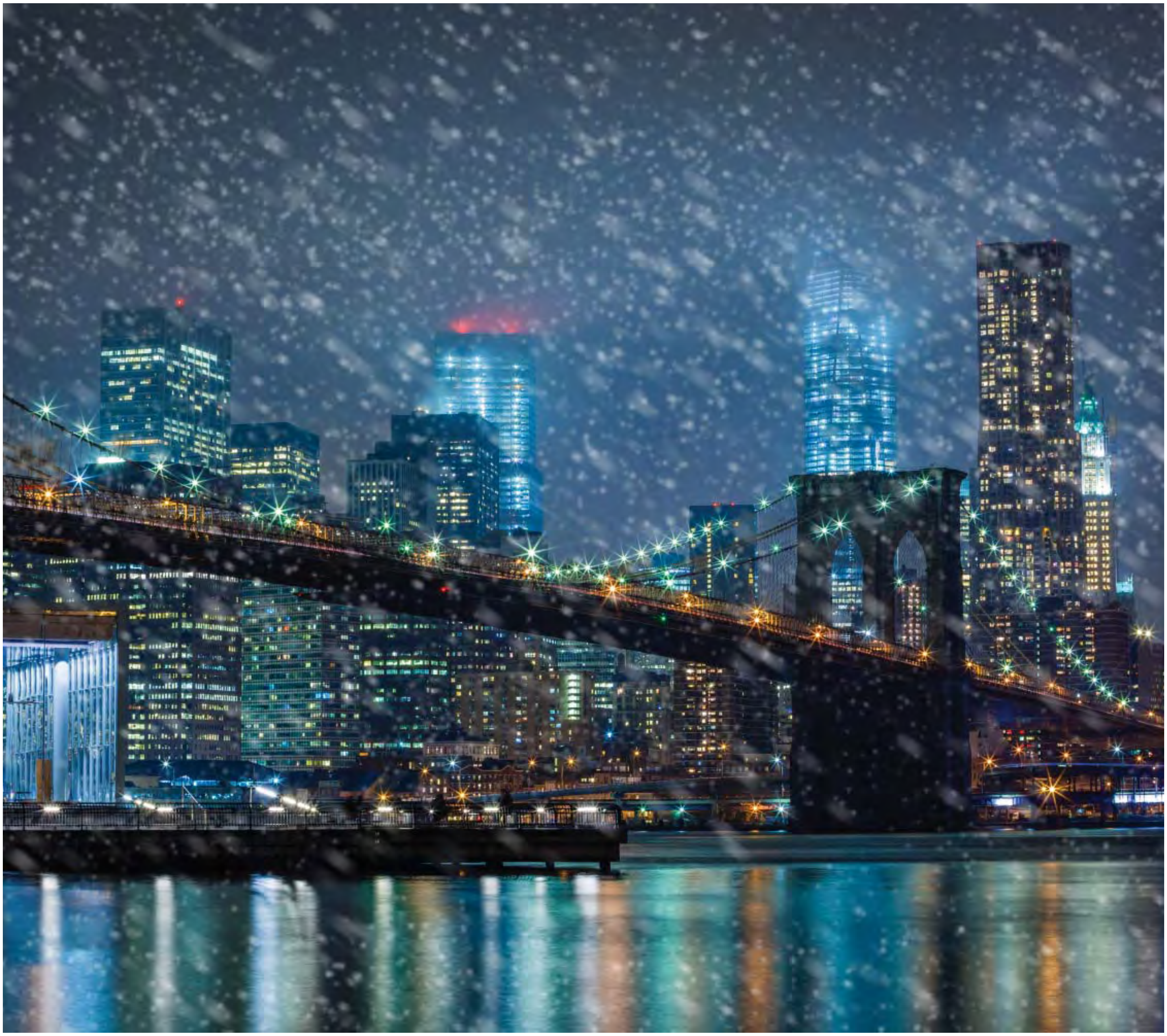
NYSBA WINTER 2019 | VOL. 46 | NO. 4

N.Y. Real Property Law Journal

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



Message from the Chair


Thomas J. Hall

One of the great benefits of being a member of the Real Property Law Section is this *Journal*, which you are reading right now. This quarterly publication consistently produces high quality articles on topics which are both timely and relevant to a broad spectrum of real estate practitioners. This edition of our *Journal* is, of course, no exception. I hope that you enjoy reading it and get as much out of it as I do. Many thanks to the members of our Publications Committee, Professor Vincent Di Lorenzo, Marvin N. Bagwell, William P. Johnson, and Matthew J. Leeds. I would also be remiss if I did not thank the entire Editorial Board and Staff, who under the able guidance of Professor Di Lorenzo consistently produce a top-notch publication.

By now you should be aware that Real Property Law Section Meeting at the NYSBA Annual Meeting will be held at the New York Hilton Midtown the week of January 14th. The Real Property Law Section General CLE program will be on January 17, 2019. In addition to the great CLE programs and committee meetings, I would encourage you to attend our Section lunch on Thursday January 17, 2019 immediately following the General CLE Program on Thursday. While we all know that you can get CLE credit sitting at your desk in front of a computer screen, it is the personal interaction with other Section members that is perhaps the greatest value of being a Section member. I have always found the live CLE presentations, with the ability to ask questions of the expert speakers directly—oftentimes on a one to one basis during a coffee break or after the speaker has finished his or her presentation—to be a tremendous benefit. Socializing with your colleagues and many of the speakers at the Section lunch is also a great benefit.

Another great thing that the Real Property Law Section does at the Annual Meeting is to award two scholarships to deserving law students. The Real Property Law Section Melvyn Mitzner Scholarship is awarded to a full- or part-time student enrolled in a New York State law school. The scholarship was created to honor the memory of Melvyn Mitzner, a legend in the New York real estate legal community. Mel was a former chair of the Real Property Law Section, and was an active and valued member of the Section for many years.

The Real Property Law Section Lorraine Power Tharp Scholarship is awarded to a second- or third-year law school student who best exemplifies the core values important to Lorraine: academic excellence, a demonstrated interest in public service, high integrity and, if possible, an interest in real property law. The scholarship was created to honor the memory of Lorraine Power Tharp, who served as President of the NYSBA and Chair of the Real Property Law Section. Many thanks to our Scholarship Committee Chairs, Joel Sachs and Mindy Stern, for their tireless efforts for everything they do to make sure the generous donations to these scholarship funds find their way to deserving law students.

I hope to see you all at the Annual Meeting in January!

Thomas J. Hall

Table of Contents

NEW YORK STATE BAR ASSOCIATION

☐ I am a Section member — please consider me for appointment to committees marked.

Name ______________________________

Address ______________________________

____

City ____________ State ____ Zip ____________

The above address is my ☐ Home ☐ Office ☐ Both

Please supply us with an additional address.

Name ______________________________

Address ______________________________

City ____________ State ____ Zip ____________

Office phone (______) ____________________

Home phone (______) ____________________

Fax number (______) ____________________

E-mail address ____________________

Date of birth ______ /______ /______

Law school ____________________

Graduation date ____________

States and dates of admission to Bar: ____________

Please return this application to:

MEMBER RESOURCE CENTER,

New York State Bar Association, One Elk Street, Albany NY 12207

Phone 800.582.2452/518.463.3200 • FAX 518.463.5993

E-mail mrc@nysba.org • www.nysba.org

JOIN A COMMITTEE

Committee Involvement

The Real Property Law Section offers both experienced and novice practitioners excellent opportunities to enhance their professional skills and knowledge through committees.

With numerous areas to choose from, committee involvement is rewarding for active Section members.

Real Property Law Section Committees

Please designate in order of choice (1, 2, 3) from the list below, a maximum of three committees in which you are interested.

___ Attorney Opinion Letters (REAL1100)
___ Awards (REAL3400)
___ Commercial Leasing (REAL1200)
___ Condemnation, Certiorari, & Real Estate Taxation (REAL1300)
___ Condominiums & Cooperatives (REAL1400)
___ Continuing Legal Education (REAL1020)
___ Diversity (REAL5200)
___ Green Real Estate (REAL4700)
___ Landlord & Tenant Proceedings (REAL2100)
___ Land Use & Environmental Law (REAL1500)
___ Legislation (REAL1030)
___ Low Income & Affordable Housing (REAL2600)
___ Membership (REAL1040)
___ Not-for-profit Entities & Concerns (REAL3200)
___ Professionalism (REAL3100)
___ Publications (REAL1800)
___ Public Interest (REAL4000)
___ Real Estate Construction (REAL4400)
___ Real Estate Financing (REAL1900)
___ Real Estate Workouts & Bankruptcy (REAL3600)
___ Sponsorship (REAL5900)
___ Student Affairs (REAL5500)
___ Task Force on Attorney Escrow (REAL3700)
___ Task Force on Bylaws (REAL5600)
___ Task Force on NYSID TI Regs (REAL4800)
___ Task Force on Zombie House (REAL5700)
___ Title & Transfer (REAL2200)
___ Website & Electronic Communications (REAL5400)

NYSBA

Expert Analysis: A Breakdown of Title Insurance for Mezzanine Financing

By Spencer Compton and David Wanetik

Spencer Compton

David Wanetik

Mezzanine financing is commonly used in commercial real estate transactions because it offers borrowers a mechanism to increase loan proceeds available to finance their acquisition or development of real property while providing lenders with a relative streamlined process if they need to foreclose on the loan. Because mezzanine financing is secured by a pledge of the borrower's equity in the entity owning the real property, rather than an interest in the real property itself, traditional title insurance is not available for these loans. This article explains basic mezzanine debt structure and discusses the title insurance options available to mezzanine lenders, including a rundown of the requirements and necessary documentation for insuring a mezzanine loan and a discussion of issues related to the refinancing of mezzanine loans.

What Is Mezzanine Financing?

Mezzanine financing fills the gap between first mortgage financing, which usually has a loan-to-value ratio of 40 percent to 75 percent, and the equity participation of the borrower's principals, which is usually no more than 10 percent of the cost of the project. Typically, the mezzanine lender extends credit to the members or other equity holders of the borrower (the current equity owners) and takes a pledge of 100 percent of such parties' equity interests (including the right to distributions of income) in the entity that holds title to the subject real property (the titleholding entity). Additionally, the mezzanine lender enters into an intercreditor agreement with the mortgage lender.

The increased securitization of real estate, the packaging of loan pools for sale into the secondary market and the resistance of first mortgage lenders to subordinate mortgages on secured properties has popularized mezzanine financing in recent years. Mezzanine financing is attractive to both borrowers and lenders:

- *Borrower's benefits*. For borrowers, it is a simple way to add to the capital stack. As most loan to values are about 70 percent of the purchase price, mezzanine financing can increase that stack to 80 percent or even 90 percent. Mezzanine loans are also appealing because they are easier to assign or sell than mortgage loans. Finally, where applicable, mezzanine loans do not require the payment of mortgage recording tax, which can be prohibitive in states like New York and Florida.
- *Lender's benefits*. For lenders, the mezzanine loan foreclosure process is faster and less complicated than a real property loan foreclosure. If a real property borrower defaults under its mortgage, a real property lender may bring a foreclosure action under the laws of the jurisdiction where the real property is located. It is usually a complex and lengthy process. If a mezzanine borrower defaults under its security agreement, the mezzanine lender may bring a foreclosure action under Article 9 of the UCC, a relatively quick and straightforward process which begins with notice by publication and ends with a public auction of the pledged collateral. Upon foreclosure, the mezzanine lender has the right to succeed to the ownership and control of the borrower's equity interest. This enables the mezzanine lender to (at least theoretically) prevent a bankruptcy filing by the borrower and enables it to immediately collect and possess the cash flow without having to foreclose on the real property.

Collateral—Creation, Attachment, Perfection and Priority of the Mezzanine Lender's Security Interest

The collateral for a real property loan is comprised of the real estate together with any improvements thereon. It is secured by a mortgage recorded in the real property records where the real estate is located. Sometimes the mortgage will include an assignment of leases and rents.

In contrast, the collateral for a mezzanine loan is the equity in the titleholding entity, which is personal property. The lien on the personal property collateral is created by a pledge and security agreement between the mezzanine lender and the current equity owners. The mezzanine lender generally requires that the security interest be perfected (known as opting in) under Article 8 of the Uniform Commercial Code, and that the mezzanine borrower's ownership interest in the fee owner be certificated. Opting in under Article 8 and certificating the ownership interest permit the mezzanine lender to take physical possession of the membership certificates (for a limited liability company) and protect against potential bona fide purchaser claims.

Moody's Opinion and Rating—2007

The importance of these protections is seen in Moody's approach to rating mezzanine financing. In 2007, Moody's issued a release entitled "Moody's Approach to Rating Commercial Real Estate Mezzanine Loans," stating that, in its review process:

> Moody's expects that the overall substance of a mezzanine loan agreement will be comparable to that of a CRE mortgage loan agreement. It will have most of the same terms, conditions precedent, affirmative and negative covenants, events of default and representations and warranties—altered, of course, to reflect the nature of collateral—to those obtained by mortgage lenders.[1]

The basic requirements Moody's is looking for in a mezzanine transaction are:

- Pledge of 100 percent of the equity
- Opt in to Article 8
- Certificate the equity
- Filing of a financing statement
- Controlling the ability to out-out—hardwire or proxy
- UCC insurance

Opting in to UCC Article 8 gives the mezzanine lender protected purchaser status by perfecting under Article 8 by control rather than under Article 9 by merely filing. Article 8 perfection will prime any filing made under Article 9. The rationale was explained as follows: The mezzanine lender then can obtain priority and perfection of its security interest merely by taking control or physical delivery of the LLC or partnership certificates and can take advantage of so-called protected purchaser status. Thus, Moody's expects that mezzanine loan borrowers will irrevocably opt in to Article 8 of the UCC and will certificate the partnership or LLC membership interests that will be pledged to the mezzanine lender.

Title Insurance Products for Mezzanine Lender vs. Insurance Products for Real Property Lender

Mezzanine lenders typically have two title insurance options. Each is explained below.

Owner's Title Insurance Policy With Mezzanine Loan Endorsement

The American Land Title Association 16-06 Mezzanine Financing endorsement is ideally used with a new owner's policy involving a mezzanine lender.[2] (Although it is possible in certain jurisdictions to obtain a mezzanine financing endorsement to an existing prior dated title insurance policy issued by the same title insurer, such an endorsement will only cover the period prior and up to the date of that existing policy. There will be a gap in coverage from the policy date going forward.) The mezzanine financing endorsement provides a partial waiver of exclusions 3(a), 3(b) and 3(e) for loss or damage that would be otherwise excluded as the result of the action, inaction or knowledge of the current equity owners in connection with the insured titleholding entity. This endorsement is intended for situations where the mezzanine lender takes as security a pledge of 100 percent of the equity interest in the insured titleholding entity. The insured titleholding entity also assigns its rights to receive any amounts payable under the policy for any loss compensable under the policy to the mezzanine lender up to the amount of the outstanding debt under the mezzanine loan. In sum, the mezzanine financing endorsement provides the mezzanine lender with nonimputation coverage and direct access to proceeds of a claim.

Eagle 9 or Similar Uniform Commercial Code Insurance Policy/UCC Mezzanine Endorsement

All the major land-title insurance companies offer UCC insurance policies; however, there is no standard form of UCC insurance policy as there are standard ALTA forms of land title insurance. So, while all the forms of the UCC lender policies are similar, they are not exactly the same.

A basic UCC lender's insurance policy insures the creation, attachment, perfection and priority of the mezzanine lender's security interest in personal property collateral. In addition to basic lien priority coverage, UCC insurance covers many of the risks associated with the perfection of a security interest through the central state filing system such as the authorized execution of the lien-granting document by the debtor borrower, misindexed filings, unauthorized termination statements filed against the record, the correctness of the debtor's name, filing in the appropriate jurisdictions and similar matters. Additionally, the coverage insures the gap between the search report and the date of filing.

Additional risks covered by UCC insurance include:

- Federal and state tax liens;
- Matching the description of the covered collateral in the financing statement against the description of the collateral in the lien-granting document, such as the security agreement;
- Whether the security agreement is sufficient to create the security interest.

As noted, there is no single, uniform form of UCC lender's policy. A commonly used form is the EAGLE 9 UCC insurance policy, or Eagle 9 policy, offered by First

American Title Insurance Company.[3] First American and other insurers have also promulgated a specialized endorsement for use in connection with mezzanine loans. Where the governing documents of an LLC provide that the membership interests are securities and the lender has taken the proper steps to achieve protected purchaser status (as described above), the Eagle 9 policy when coupled with this endorsement insures not only perfection by possession or control, but also that the pledgor effectively owns the interests being pledged as collateral and that the lender has protected purchaser status under Article 8. Note that though this endorsement is referred to as the mezzanine endorsement, it is not the same as the identically named mezzanine endorsement to a new owner's policy that is discussed above and serves a different purpose.

Requirements for a UCC Lender's Policy and the UCC Mezzanine Endorsement

To begin processing a new order for a UCC lender's policy and UCC mezzanine endorsement, the insurer will need the following information:

- Name and address of the proposed insured (secured party);
- Name, address and jurisdiction of the debtor(s);
- Draft pledge/security agreement(s);
- Collateral description, along with method of perfection (filing, possession, and/or control); and
- Contact information for all parties.

To issue the final policy, the insurer's requirements will include:

- Evidence of payment in full of the loan proceeds;
- Copies of the executed loan documents, for example:
- Pledge/security agreement;
- Appropriate control agreement(s) for uncertificated securities or deposit accounts;
- Copies of certificated securities and related endorsements executed in blank (certificates are to include a legend which states that the interest in the issuer is a security governed by Article 8 of the UCC);
- Sufficient evidence that the proposed insured is in possession of the original certificated securities and endorsements executed in blank;
- Irrevocable proxy (Article 8 matters);
- Loan agreement;
- UCC-1 financing statement;
- Copies of executed formation documents;
- Organizational chart;
- Articles of incorporation, organization or limited partnership for all debtors and issuers, with any amendments thereto;
- By laws, operating agreement or partnership agreement for all debtors and issuers, with any and all amendments thereto (for securities, all issuers must sufficiently opt in to Article 8 of the UCC);
- Document tracing the ownership of the issuer's equity interest back to the date of formation;
- Contribution and/or assignment agreement;
- Appropriate consents or resolutions authorizing this transaction between the debtor and proposed insured;
- Appropriate consents in the event there is a restriction on encumbrance of the issuer's equity;
- Copies of all membership certificates, which have ever been signed or executed, representing the collateral (i.e., replacement certificates, duplicate originals, etc.) marked as cancelled, or a confirmation satisfactory to the company that the only executed originals are those which have been delivered to the proposed insured (note that similar to promissory notes, membership certificates should be signed only one time).

Every transaction is different, and the requirements vary based on the structure of each transaction.

Refinancing of Mezzanine Loans

A significant increase in the refinancing of existing mezzanine loans began in 2017. In many of these transactions, the amount of the outstanding loan was increased. The explanation for this wave of refinancing appears to be a rush to refinance before anticipated interest rate increases in 2018. In addition, borrowers are taking into consideration the increased value of the properties since originally financed.

If a UCC lender's policy was issued at the time of the original transaction and that loan amount is increased, that policy can easily be amended to increase the amount of insurance with little additional documentation. Unlike a mortgage, the perfection under the UCC remains in place. If the same lender is involved with the refinancing, it remains the holder of the certificate representing the pledged equity. If a new lender is involved in the refinancing, that certificate must be transferred to the new lender. (Refinancing of a mezzanine loan by a new lender requires a new UCC lender's policy.) Locating that original certificate is important and can be of considerable concern if it cannot be located.

Lost or Misplaced Certificates

In 2006 and 2007 when mezzanine financing was at its height, over 90 percent of the transactions included opting in to Article 8 of the UCC and having the pledged equity certificated. Those certificates were taken at closing by the lender's representative perfecting the lien. Possession satisfied the statute's control requirement. The certificates were endorsed in blank and then held by the lender throughout the life of the loan.

The certificates with endorsements in blank are easily transferrable, similar to negotiable instruments. As these loans have matured, been assigned, sold and in some cases defaulted, the equities represented by those certificates need to be located and passed to any new secured party. Unfortunately, new lenders and their insurance companies are finding more and more situations in which the certificates cannot be located. Because the certificates are negotiable, it creates a potential liability should those certificates be obtained by a third party without knowing that they had been lost or even stolen. In the UCC, Article 8 specifically addresses what the original secured party needs to do in this situation to protect any new secured party who will accept a replacement certificate. Section 8-405[4], entitled "Replacement of Lost, Destroyed, or Wrongfully Taken Security Certificate," sets forth the requirements:

> If an owner of a certificated security, whether in registered or bearer form, claims that the certificate has been lost, destroyed or wrongfully taken, the issuer shall issue a new certificate if the owner:
>
> - so requests before the issuer has notice that the certificate has been acquired by a protected purchaser;
> - files with the issuer a sufficient indemnity bond; and
> - satisfies other reasonable requirements imposed by the issuer.

To overcome the potential liability of a lost or stolen certificate surfacing after a new loan is in place, expensive options are available to the original lender/secured party. The original lender can obtain a bond in the amount of the original loan, but such a bond is a very expensive product that any lender would be reluctant to pursue. Normally, the bond requires payment of upwards of 10 percent of the amount in question, meaning that on a $100 million loan, $10 million would be required to obtain the bond. The alternative is to offer an indemnity should the original certificate surface. Any new lender or any insurance company issuin g a UCC policy insuring the transaction would require financial information from the proposed indemnitor to determine if it has sufficient financial assets should a claim arise. Considering the size of most mezzanine deals, considerable assets would be needed to meet this requirement.

Generally speaking, certificates are rarely, if ever, lost. They are usually misplaced. They are taken at the real estate closing and placed in a box and stored along with the other closing documents. The real estate closer may not realize a certificate is negotiable. Situations have occurred where after extensive searches, certificates have turned up on the closing date, thus avoiding the pricey requirements dictated by the UCC.

When handling the closing of a mezzanine financing transaction, it is essential to be aware of the negotiable status of the certificates and carefully maintain them so that they are readily available in the future. If the certificates—which are valuable collateral at the time of the original closing—are put away in a file without documenting their location, it becomes a very costly mistake when they cannot be located later.

Outlook for Mezzanine Financing

Despite pessimism after the recession that mezzanine financing would disappear, its appeal to both lenders and borrowers endures, and mezzanine financing continues to be a part of almost every significant commercial real estate transaction's financing. As business and legislative requirements keep loan to values on average below 70 percent, mezzanine financing will continue to fill the gap required by buyers. And with so much mezzanine financing reaching maturity in the coming years, it appears that it will be around for quite some time.

Endnotes

1. Daniel Rubock, *US CMBS and CRE CDO: Moody's Approach to Rating Commercial Real Estate Mezzanine Loans*, Moody's Investor Serv. (March 29, 2007), http://dirt.umkc.edu/attachments/mdymezz%20loans.pdf.
2. *See* American Land Title Association, Endorsement 16-06 (Mezzanine Financing) Adopted 6-17-06, *available at* https://www.thomastitle.com/wp-content/uploads/2016/03/ALTA_Endorsement_16-06_Mezzanine_Financing_6-17-061.pdf.
3. *First American Is The UCC Insurance Company*, First American, https://www.firstam.com/title/ucc/.
4. U.C.C. § 8-405 (Am. Law Inst. & Unif. Law Comm'n 1977).

S.H. Spencer Compton is a vice president and special counsel and David L. Wanetik is the chief operating officer of the UCC Division at the First American Title Insurance Company.

The Year of Many New Landlord-Tenant Laws

By Adam Leitman Bailey and Dov Treiman

Adam Leitman Bailey

Dov Treiman

On August 9, 2017 and in the ensuing months, becoming effective at scattered times over the ensuing year, the (New York) City Council enacted numerous provisions falling into three areas: general landlord/tenant relations, harassment, and construction and sales of properties. This article focuses on the numerous enactments related to harassment, bedbugs, and smoking, the first two of which expand tenants' rights and the final one intended to constrict them.

Expanded Definitions of Harassment

Local Laws 162, 163, and 164 all expand the definition of harassment as found in New York City Administrative Code § 27-2004(48) and all took effect on December 28, 2017. Local Law 184 of 2017, effective February 5, 2018, Local Law 24 of 2018, effective April 30, 2018, and Local Law 48 of 2018, effective May 11, 2018 also expanded the definition.

"Since the complaining tenant is not a party to the prior action, there is no collateral estoppel effect and the complaining tenant can therefore choose to relitigate the propriety of somebody else's lawsuit afresh, even if the previous case was settled in the landlord's favor."

Under the new laws, there is now a rebuttable presumption that the landlord's acts were intended to get the tenant to move out or otherwise waive rights[1] except with relation to private dwellings.[2] Acts of harassment now include lying to a tenant in some manner related to the occupancy of the unit,[3] lying about rent regulation or construction,[4] interrupting services once where there have been repeated interruptions elsewhere in the building,[5] repeatedly failing to cure violations,[6] repeatedly falsely certifying the correction of violations,[7] repeatedly engaging in construction that requires a permit without actually having such a permit,[8] bringing one frivolous action against a tenant where there have been repeated other frivolous actions against other tenants in the building,[9] or trying to buy out a tenant under circumstances we will discuss immediately below.[10]

Under the new laws, it is considered harassing a tenant when one repeatedly contacts or visits the tenant at any time other than when would expect the tenant to be away at work. The tenant is not to be contacted Saturdays, Sundays, holidays, or outside of business hours. Thus, the only tenants who can be contacted are those who either work unusual hours or are out of work. However, if the tenant initiates the contact *in writing*, the landlord may respond, but again not during usual working hours unless the tenant's contact says so. Thus, if the tenant, not knowing the fine points of the law, writes, "Contact me about a buyout," the landlord is at peril if responding with the word "when?" unless that response from the landlord is made during normal business hours.[11] Further, while case law for the service of process takes into account commuting time,[12] this ordinance does not. Under these new additions, buyout negotiations become highly hazardous for landlords, but to the consternation of tenants as well who, now having to take the initiative, weaken their hands.

Also regarded as harassment is threatening any person based on categories newly including, "such person's actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, uniformed service,[13] sexual orientation, alienage or citizenship status, status as a victim of domestic violence, status as a victim of sex offenses or stalking, lawful source of income or because children are, may be or would be residing in such dwelling unit."[14]

This expanded definition of harassment includes "threatening" people "based on age, race, creed, etc." But it does not say threatening *with what*. For example, if a landlord honestly believes that younger persons require greater vigilance on the landlord's part in collecting rent due to youth-induced forgetfulness, are such collection efforts "harassment"? Since another subdivision already says that implied threats "of force" are harassment, this means that the protected class threats are threats of some nature *other* than force, without specifying what.

Also included as harassment is "requesting identifying documentation for any person lawfully entitled to occupancy of such dwelling unit that would disclose the citizenship status of such person, when such person has provided the owner with a current form of government-issued personal identification."[15]

Presumption of Intent

While under previous law, it had been the burden of the complainant to prove that the forbidden actions taken, were for the purpose of getting tenants to vacate their apartments or give up residential rights, now, the complainant need only prove the acts themselves, being entitled to a rebuttable presumption of the forbidden intent.

Gift to Tenant Organizers

Two provisions of these enactments immediately stand out as providing distinct advantages to organizations that organize the entire tenancy of a particular building—advantages over firms that only do occasional tenant representation.

> *"Effective December 1, 2017, the penalties for a judicial finding of harassment are increased for repeated commencement of baseless or frivolous lawsuits against one particular tenant from one to two thousand dollars minimum for initial violations and four thousand dollars for repeatedly doing so with a ceiling of ten thousand dollars."*

§ 27-2004(48)(b-1)(ii) enables a tenant to claim harassment for a one-shot loss of essential service if the interruption has taken place in a building where there are other interruptions of essential services, regardless of whether those other interruptions affect the complaining tenant. Obviously, someone organizing the building, is more aware of the building's overall history than are the individual tenants. Nothing in this provision requires that the interrupted service be building-wide in nature.

§ 27-2004(48)(d-1) enables a tenant to claim harassment for *one* "baseless or frivolous" court proceeding, if there have been other "baseless or frivolous" proceedings in the building, specifically ones that have *not* affected the complaining tenant. Tenant-organizing firms are clearly better positioned to know of such lawsuits than individual tenants are. The law has no requirement for a previous adjudication that the previous lawsuit was "baseless or frivolous." Since the complaining tenant is not a party to the prior action, there is no collateral estoppel effect and the complaining tenant can therefore choose to relitigate the propriety of somebody else's lawsuit afresh, even if the previous case was settled in the landlord's favor. Under the law of unintended consequences, owners are, by this provision, strongly disincentivized to settle a run-of-the-mill nonpayment or holdover case on any terms that do not include a clear statement that the case had some merit to it.

Penalties for Harassment

Effective December 1, 2017, the penalties for a judicial finding of harassment are increased for repeated commencement of baseless or frivolous lawsuits against one particular tenant from one to two thousand dollars minimum for initial violations and four thousand dollars for repeatedly doing so with a ceiling of ten thousand dollars. Such relief would not preclude an award of sanctions under the existing New York Court Rule § 130-1, and even disciplinary action under Rule 3.1 of the Rules of Professional Conduct.

Bedbugs

Effective as of November 6, 2017, is Local Law 69, amending NYC Administrative Code § 27-2018.1 and adding § 27-2018.2, dealing with bedbugs. This law applies to buildings that are three or more units, thus adding significantly to the regulatory burden of outer boroughs.

The law requires owners to provide tenants with their leases and lease renewals reports of histories of bedbugs in the building, along with posting such reports "prominently" in the building, adding to the already large assortment of lobby postings. Additionally, the law calls for electronically filing with the City an annual report with the same, thus requiring owners of buildings large and small to own and use computers.

The law does not directly set forth penalties for non-compliance. It does require that the electronic filing shall be publicly available and presumably anyone doing electronic research will find all previous reports. Therefore, anyone purchasing a multiple dwelling should, during the due diligence period, be researching these postings.

> *"The law specifies that the history shall, at a minimum, include the building's address, the number of units, the number of units with bedbug infestations during the previous year..."*

One peculiar provision of the new law is Administrative Code § 27-2018.2(d), providing "Owners of multiple dwellings shall attempt to obtain the bedbug infestation history for the previous year for each dwelling unit from the tenant or owner, including whether eradication measures were employed during the previous year for a bedbug infestation."

We believe that this provision shall be interpreted to read, "Owners of multiple dwellings shall *reasonably* attempt to obtain the bedbug infestation histories." Since during the course of a year since the last report, the building may be sold, "shall reasonably attempt" places a burden of obtaining that history on the purchaser, as a condition to closing. However, since the enactment requires that HPD post the electronic reports, it may be that doing the electronic research is enough to "reasonably attempt."

The law specifies that the history shall, at a minimum, include the building's address, the number of units, the number of units with bedbug infestations during the previous year, the number of units in which eradication measures were employed, and the number of units with continued infestations after eradication measures were employed.

Smoking

The new smoking enactment may be regarded either as expanding the rights of nonsmokers or constricting the rights of smokers.

Effective August 28, 2018 is Local Law 147, dealing with smoking policies, amending NYC Administrative Code § 17-502 and § 17-508, and adding § 17-506.1. The law has one of the broadest possible definitions of an "owner" and of a building to which the law applies—finding applications to all classes of ownership, including privately owned buildings as well as cooperatives and condominiums. Without dictating the policy, it requires all affected buildings—all Class A multiple dwellings—to adopt smoking policies. While requiring that it be incorporated in leases, it exempts from incorporation any rent regulated or publicly rented units, their tenants, and their successors. The policy affects both leases and subleases and therefore applies to both owners of a large building and to individual occupants who rent out their apartments.

"With stiff fines for failure to abide by these provisions, owners should be careful not to post a summary of the smoking policy, but the actual verbatim policy itself."

In spite of the fact that a board of directors of a cooperative or a board of managers of a condominium is free to govern buildings with general wide latitude, this law requires them to vote for a smoking policy, without specifying what the smoking policy is and does not specify whether occupants of a building that has adopted such a policy shall have third party beneficiary status to compel the building's ownership to enforce the policy it adopts.

Under the law, it is perfectly legal for a building to adopt a policy that smoking is completely allowed except where prohibited by law.

While the law requires that the landlord specify exact locations where smoking is prohibited and permitted in and around the building, for the very reason that the law does not specify third party enforcement, the safest policy, from a legal if not marketing point of view, is one that simply allows smoking.

To the extent that the law requires enforcement of the policy, it merely requires that "the owner … shall incorporate the building's smoking policy into any agreement to rent or lease a dwelling unit…" or "shall incorporate the building's smoking policy into any agreement to rent or purchase the dwelling unit." However, it also sets penalties of $100 for each instance of failing to adopt or disclose the smoking policy and specifies that those shall be the only penalties for violation.

The law does not specify whether it is sufficient that the lease now state, "it is the policy of this building that there shall be no smoking in the apartments" or that a lease must rather state, "there shall be no smoking in the apartment."

Under one possible reading of this new ordinance, it is enough for a lease to state what the building's policy is without requiring that the occupant actually obey the policy. However, another possible reading of the law is that the lease must state *both* what the building's policy is *and* that it will be enforced, presumably with threat of eviction.

Unlike the bedbug history, this law does not *require* posting of the policy in a prominent place in the building, but allows posting as an alternative to distributing copies of it to all the occupants and maintaining records of such distribution. With stiff fines for failure to abide by these provisions, owners should be careful *not* to post a summary of the smoking policy, but the actual verbatim policy itself. For this reason, the policy should be written with as few words as possible and posted in as large print as possible.[16]

Conclusion

Late 2017 and early 2018 proved to be one of the most prolific periods in New York City history for promulgating local laws regarding landlord-tenant relations. From at least some point of view, all of these laws were intended to expand tenant protections. However, the actual effect of such laws may well force landlords to be more strident in their actual enforcement of their rights when their rights are clear. Thus, the net benefit to tenants by these enactments is not assured.

Endnotes:

1. 2017 N.Y.C. Local Law No. 162.
2. 2017 N.Y.C. Local Law No. 184.
3. 2018 N.Y.C. Local Law No. 24.
4. *Id.*
5. 2017 N.Y.C. Local Law No. 164.
6. 2018 N.Y.C. Local Law No. 24.
7. *Id.*
8. *Id.*
9. 2017 N.Y.C. Local Law No. 164.
10. *See* 2017 N.Y.C. Local Law No. 163.
11. *Id.*
12. *See Bass v. Blumenthal*, 27 HCR 681A, 681A. *See* Ingrassia, J.P; Pallea and Levitt, JJ, *Bass res. v. Blumenthal*, New York Law Journal, Dec. 2, 1999 at 35, col. 5. *See Bass v. Blumenthal*, N.Y. Misc. LEXIS 737, *1 (Sup. Ct. App. T. 2d Dep't 1999).
13. While we assume that this means police, firefighters, and military, it could mean restaurant servers and doorpersons.
14. 2018 N.Y.C. Local Law No. 48.
15. *Id.*
16. These authors have written and published forms both of simple texts of possible new policies and law-compliant posters stating the policy.

Actively at the helm of the law firm he built from scratch, Adam Leitman Bailey, Esq. practices residential and commercial real estate law. Among New York's most successful and prominent real estate attorneys, Mr. Bailey is one of two attorneys from a law firm with less than 30 attorneys that has been ranked in Chambers & Partners, honored with a Martindale-Hubbell "AV" Preeminent rating, a Best Lawyer ranking for himself and his law firm and selected as one of New York's Top 100 attorneys by Super Lawyers which included only five real estate law firm's attorneys.

Dov Treiman chairs Adam Leitman Bailey, P.C.'s Landlord-Tenant Civil Litigation Practice and is a partner at the firm. As one of the leading authorities in the landlord-tenant bar, Mr. Treiman's drafting of appellate briefs, legal documents and motions has increased the ability of Adam Leitman Bailey, P.C. to garner better results for its clients. Mr. Treiman was involved in private practice for fifteen years before devoting his principal time to the collecting, editing, writing, and publishing of scholarly research materials in landlord-tenant law. His writings include several articles in the *New York Law Journal* and numerous articles in the *Landlord-Tenant Practice Reporter*.

N.Y. REAL PROPERTY LAW JOURNAL
2018-2019

NEW YORK STATE BAR ASSOCIATION

NYSBA 2019 Membership Application

Please check the appropriate box: ☐ **I wish to join the New York State Bar Association** ☐ **I wish to reactivate my membership**
☐ **I wish to join the Sections checked below *(NYSBA membership required)***

Enrollment Information

Name ______________________
Address ______________________
____
City ____________ State ______ Zip ______
The above address is my ☐ Home ☐ Office ☐ Both
E-mail address ______________________

Office phone (____) ______________________
Home phone (____) ______________________
Date of birth ______ /______ /______
Law school ______________________ Graduation date ____
States and dates of admission to Bar: ______________________

Annual Membership Dues *(check One)*

Class based on first year of admission to bar of any state.

ACTIVE/ASSOCIATE IN-STATE ATTORNEY MEMBERSHIP

☐ Attorneys admitted 2011 and prior	$275
☐ Attorneys admitted 2012-2013	185
☐ Attorneys admitted 2014-2015	125
☐ Attorneys admitted 2016 - 3.31.2018	60

ACTIVE/ASSOCIATE OUT-OF-STATE ATTORNEY MEMBERSHIP

☐ Attorneys admitted 2011 and prior	$180
☐ Attorneys admitted 2012-2013	150
☐ Attorneys admitted 2014-2015	120
☐ Attorneys admitted 2016 - 3.31.2018	60

OTHER

☐ Sustaining Member	$400
☐ Affiliate Member	185
☐ Newly Admitted Member*	FREE
☐ Law Student Member	FREE

DEFINITIONS

Active In-State = Attorneys admitted in NYS, who work and/or reside in NYS

Associate In-State = Attorneys not admitted in NYS, who work and/or reside in NYS

Active Out-of-State = Attorneys admitted in NYS, who neither work nor reside in NYS

Associate Out-of-State = Attorneys not admitted in NYS, who neither work nor reside in NYS

Sustaining = Attorney members who voluntarily provide additional funds to further support the work of the Association

Affiliate = Person(s) holding a JD, not admitted to practice, who work for a law school or bar association

*Newly admitted = Attorneys admitted on or after April 1, 2018

Law Students = Person(s) enrolled in an ABA accredited law school (includes law graduate students, within 2 years of graduation only, awaiting admission)

Sections — I wish to join the following Section(s):

☐ Antitrust*	$30.
☐ Business Law**	25.
☐ Commercial & Federal Litigation*	40.
☐ Corporate Counsel*	30.
☐ Criminal Justice+	35.
☐ Dispute Resolution***	35.
☐ Elder Law & Special Needs*	30.
☐ Entertainment, Arts & Sports Law*	35.
☐ Environmental & Energy Law*	35.
☐ Family Law*	35.
☐ Food, Drug & Cosmetic Law*	25.
☐ General Practice**	25.
☐ Health Law**	35.
☐ Intellectual Property Law*	30.
☐ International†	35.
☐ Judicial	25.
☐ Labor & Employment Law**	35.
☐ Local & State Government Law*	30.
☐ Real Property Law+ *(Attorneys admitted 5 years or less are $10)*	40.
☐ Senior Lawyers *(Focus on Attorneys age 55 and over)*	20.
☐ Tax*	25.
☐ Torts, Insurance, & Compensation Law**	40.
☐ Trial Lawyers****	40.
☐ Trusts & Estates Law**	40.
☐ Women in Law***	30.
☐ Young Lawyers *(Law Students, and attorneys admitted less than 10 years)*	20.

Section Dues Total $ ________

*Law Student Rate: half price **Law Student Rate: $5 ***Law Student Rate: $10 ****Law Student Rate: $15 †Law Student Rate: $12.50 +Law Student Rate: FREE

Dues Payment

Association Membership Dues	
Section Dues *(Optional)*	$
TOTAL ENCLOSED :	$

METHOD OF PAYMENT: ☐ Check (payable in U.S. dollars)
☐ MasterCard ☐ Visa ☐ American Express ☐ Discover

Account Number ______________________________

Expiration Date ____________________ Date ____________

Signature ______________________________

New members: Please include proof of your admission to the practice of law.

A New, Simpler Way to Pay Your Dues: Auto-Renew

When you enroll in the Auto-Renew program, your credit card will be charged either annually or monthly based on your billing preference. This way your membership will always be current, so you'll receive your benefits uninterrupted. **We'll even renew your NYSBA membership each year without you needing to take action.**

Enrollment Instructions

Two payment options are available to members, annually and monthly. Go to www.nysba.org/autorenew to set up either of the options. Or, use the check box below and provide your signature to authorize payment.

☐ **Monthly | Installment Plan – Make your first payment today and spread the rest out over the remaining months in the term.**

☐ **Annually – You will pay the full dues bill now and will automatically be renewed on an annual basis.**

By joining the Auto-Renew Program we will automatically process your membership dues annually, and you understand that your credit card will be charged at the beginning of your month of expiration for your next year of membership at the then-current rate. If you have chosen the monthly payment option, your credit card will be charged at the beginning of each month without interruption. The program will continue until you cancel your participation. If you decide to cancel your membership prior to paying your dues in full for the entire year, then you will have to cover the remaining balance before renewing your membership again. If you wish to leave the program at any time, you can simply call 800.582.2452 in advance of your month of expiration.

METHOD OF PAYMENT:
☐ MasterCard ☐ Visa ☐ American Express ☐ Discover

Account Number ______________________________

Expiration Date ____________________ Date ____________

Signature ______________________________

CLE Online All Access Pass $66.25 per month for a total of $795 annually

Access hundreds of programs online and satisfy your MCLE requirement for one low price. Over 1,700 programs currently available online. New programs will be added each month to the online library. (Includes unlimited access to all NYSBA CLE online programs including videos and course materials through December 31, 2019.)

Learn more at www.nysba.org/AllAccess.

Billed monthly $66.25 per month.*
☐ Yes, I want to enroll in CLE online all access pass

*Non-member price $1,995 Billed monthly at $166.25 per month.
NYSBA members save $100 a month.

METHOD OF PAYMENT:
☐ MasterCard ☐ Visa ☐ American Express ☐ Discover

Account Number ______________________________

Expiration Date ____________________ Date ____________

Signature ______________________________

Join online at www.nysbajoin.org

Please return this application to: **MEMBER RESOURCE CENTER**
New York State Bar Association, One Elk Street, Albany NY 12207
Phone 800.582.2452/518.463.3200 • Fax 518.463.5993 • E-mail mrc@nysba.org • www.nysba.org

NEW YORK STATE BAR ASSOCIATION

CONNECT | INSPIRE | LEARN

ANNUAL MEETING 2019

JANUARY 14–18

NEW YORK CITY | NEW YORK HILTON MIDTOWN

REGISTRATION FORM — WWW.NYSBA.ORG/AM2019

REGISTRANT INFORMATION

NAME:____

ORGANIZATION: ________________________________

ADDRESS: ____________________________________

____

CITY:______________________STATE:______ ZIP:____________

MEMBER ID: ☐☐☐☐☐☐

EMAIL:_______________________________________

TELEPHONE: __________________________

FAX:_________________________________

In case of Emergency, please contact:

____

at __________________________________

Register Online | www.nysba.org/am2019
or fax or mail this form to:
NYSBA Member Resource Center
One Elk Street, Albany, New York, 12207
Telephone: 800-582-2452 Fax: 518-463-5993

Register Early and Save!
Registrations received after December 28, 2018 carry a $100 late fee.

MONDAY – JANUARY 14				
Career Development Conference	❑ Program $0			Total _____
Celebrate Diversity in the Bar Reception			❑ Reception $0	Total _____
Sections:				
International	❑ Program $90	❑ Lunch $115		Total _____
TUESDAY – JANUARY 15				
Sections:				
Elder Law and Special Needs Law	❑ Program $90		❑ Off-site Reception $35	Total _____
Entertainment, Arts & Sports Law	❑ Program $90	❑ EASL Members Off-site Reception $55	❑ EASL Student Members $30	Total _____
		❑ Non-EASL Members Off-site Reception $105	❑ Non-EASL Student Members $45	Total _____
General Practice & Professional Discipline	❑ Program $90			Total _____
Intellectual Property Law	❑ Program $130	❑ Lunch $100	❑ Off-site Reception $0	Total _____
Tax	❑ Program $130	❑ Lunch $115		Total _____
Women in Law	❑ Program $130	❑ Lunch $65	❑ Reception $15	Total _____
Committees:				
Cannabis Law	❑ Program $90			Total _____
WEDNESDAY – JANUARY 16				
Sections:				
Business Law	❑ Program $90	❑ Lunch $60		Total _____
Commercial & Federal Litigation	❑ Program $90	❑ Lunch $180		Total _____
Criminal Justice	❑ Program $90	❑ Lunch $115		Total _____
Health Law	❑ Program $130	❑ Lunch $115		Total _____
TICL and Trial Lawyers		❑ Off-site Dinner $180		Total _____
Trusts and Estates Law	❑ Program $90	❑ Lunch $115	____ Off-site Reception $0	Total _____
Young Lawyers	❑ Program $90			Total _____
Committees:				
Animals and the Law	❑ Program $90			Total _____
Law, Youth and Citizenship	❑ Program $90			Total _____
Leadership Development (Non-CLE)	❑ Program $0			Total _____
Legal Education & Admission to the Bar	❑ Program $0			Total _____
PRESIDENTIAL SUMMIT MCLE (2:00 p.m.–5:30 p.m.)	❑ Program $0 (General Registration Required)			Total _____
THURSDAY – JANUARY 17				
Sections:				
Antitrust Law	❑ Program $130	❑ Member Off-site Dinner $130	❑ Reception $0	Total _____
		❑ Non-Members Off-site Dinner $500		Total _____
Dispute Resolution & Corporate Counsel	❑ Program $90	❑ Off-site Lunch $40	❑ Off-site Reception $0	Total _____
Environmental & Energy Law Section Reception			❑ Reception $0	Total _____
Family Law	❑ Program $90	❑ Lunch $75	❑ Off-site Reception $0	Total _____
Food, Drug & Cosmetic Law	❑ Program $90		❑ Off-site Reception $20	Total _____
Local and State Government Law	❑ Program $130			Total _____
Real Property Law	❑ Program $90	❑ Off-site Lunch $65		Total _____
Senior Lawyers (Non-CLE)	❑ Program $0			Total _____
TICL and Trial Lawyers	❑ Program $130			Total _____
Young Lawyers Bridging the Gap Day One	❑ Program $130			Total _____
Committees:				
Civil Rights & Immigration Representation	❑ Program $90			Total _____
Condominiums & Cooperatives *(Real Property Law)*	❑ Program $90			Total _____
Justice for All Luncheon		❑ Lunch $40	❑ Non-NYSBA Members $90	Total _____
"LPM" Day: CLE Program	❑ Program $130 (includes lunch)			Total _____
Cyber Café Networking Reception			❑ Reception $0	Total _____
FRIDAY – JANUARY 18				
Sections:				
Environmental & Energy Law	❑ Program $90	❑ Off-Site Lunch $65		Total _____
Judicial Section/Council of Judicial Associations		❑ Members of the NYSBA Judicial Section Lunch $75		Total _____
		❑ Judiciary members not in the Judicial Section $115		Total _____
Labor and Employment Law	❑ Program $90	❑ Lunch $115		Total _____
	***Please choose one workshop:** (Visit nysba.org/AM2019 for details)	**Workshop "A"** ❑ **Workshop "C"** ❑	**Workshop "B"** ❑ **Workshop "D"** ❑	
Young Lawyers Bridging the Gap Day Two	❑ Program $130			Total _____
Committees:				
Children and the Law	❑ Program $90			Total _____
Not-for-Profit *(Real Property Law Section)*	❑ Program $90			Total _____

General Registration (required for all programs) **$95**

General registration fee is NOT required for those attending only a meal function (lunch, reception, dinner)

Special General Registration Fee for Attorneys Admitted Three Years or Less (admitted after January 1, 2016) **$55**

After **December 28, 2018** — Add $100 to General Registration Fee _________

Surcharge for ALL Non-NYSBA members — $200 _________

GRAND TOTAL _________

PAYMENT INFORMATION

❑ Check or money order enclosed in the amount of $ _________ (Payable to the New York State Bar Association)

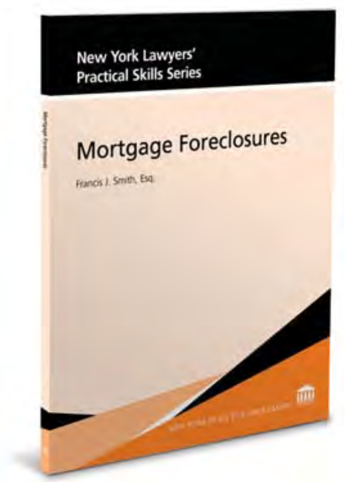
❑ Charge $ _______ to ❑ American Express ❑ Discover ❑ MasterCard ❑ Visa Card Exp. ____________

Card number ______________________________ Signature ______________________________

No refunds or cancellations will be processed after January 4, 2019.

From the NYSBA Book Store

Mortgage Foreclosures



PRODUCT INFO AND PRICES

2018-2019 / 98 pp., softbound
PN: 41409 (Book w/Forms)
PN: 41409E (Downloadable PDF)

NYSBA Members	**$125**
Non-members	$165

Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total.

Author

Francis J. Smith, Esq.
McNamee, Lochner, Albany, NY

Covering the basics of a mortgage foreclosure proceeding, this practice guide also addresses service on tenants, the attorney affirmation of compliance in residential foreclosure actions, and consumer protection legislation and its application to a mortgage foreclosure proceeding.

Mortgage Foreclosures guides the practitioner through the basics of a mortgage foreclosure proceeding. With its helpful practice guides and many useful forms, this is an invaluable resource.

The 2018-2019 release is current through the 2018 New York State legislative session and is even more valuable with the inclusion of **Downloadable Forms**.

Get the Information Edge

NEW YORK STATE BAR ASSOCIATION
1.800.582.2452 www.nysba.org/pubs
Mention Code: PUB9136N

NYSBA

Title Insurance: Co-Insurance v. Re-Insurance, What Is the Difference?

By Marvin Bagwell

The New York City skyline is being filled in. Everywhere that one looks, from every vantage point, a new skyscraper is going up. It used to be that when the words "New York City" and "skyscraper" appeared in the same sentence, the writer meant "Manhattan," but not now. Drive along the FDR, look to your right, you can new skyscrapers going up among older ones in Queens. Drive further south, cross into Brooklyn over the Manhattan or Brooklyn Bridge, and try to navigate to downtown Brooklyn. The entire area is one big construction site of mega buildings, which is why you will swear to yourself never to leave Manhattan again. Plainly, one will be seeing cranes erecting skyscrapers in every borough, with the Bronx coming on line next and Staten Island following with its on-again off-again Ferris wheel. *The New York Times* has reported that there are 20 fixed-place (not mobile cranes attached to trucks) in use in New York City for residential and mixed-use construction at this time.[1]

Marvin Bagwell

This number does not include cranes used in building commercial skyscrapers which, if counted would push the number higher. In fact, according to New York's building department, there were 7,423 major construction underway in New York City as of Tuesday, August 21.[2]

It is axiomatic (translated, I could not find a study that I could footnote) that the taller the structure, the higher the cost. The billion-dollar mark has been shattered several, if not many times over. Even existing buildings with a checkered past are priced by the marketplace at a billion dollars or more. According to *The New Times*, the Canadian property investment company, Brookfield Asset Management, paid $1.2 billion to acquire a 49.5 percent interest in the Kushner family-owned 666 Fifth Avenue, which at 41 stories is a mere pipsqueak among giants.[3] You can bet that title underwriters insured the transaction through the issuance of the fee or owner's policy insuring the purchaser and a loan or mortgage policy insuring the lenders.

According to Demotec, the insurance rating company, there are only four national title underwriters that have the capital and surplus required to insure a billion-dollar transaction: the Fidelity Family (Fidelity, Chicago, Commonwealth and Lawyers), First American, Stewart, and Old Republic (commonly known in the industry as the "Big Four"). None of the Big Four would want to risk their entire capital structure through the issuance of a single title policy, nor would their regulators allow any of them to do so. So, the question of the day is, how do title underwriters insure billion-dollar transactions?

At this point, I am reminded of Benjamin Franklin's often quoted remark after signing the Declaration of Independence, "We must, indeed, all hang together or most assuredly, we shall all hang separately."

Let us consider how the title insurance companies are able to insure billion-dollar transactions through co-insurance and reinsurance.

Co-Insurance

Co-insurance occurs when two or more underwriters (or underwriters acting through title agents) share in insuring a single risk through the issuance of a single policy in which the policy liability is assumed by the underwriters in proportionate amounts. The "lead" underwriter will issue the title policy in its name, and the other co-insurers will share in a proportional share of the total liability. The co-insurers will also share proportionally in the policy premium and in establishing claim reserves in accordance with State laws and regulations. Although in New York, it is permissible for each co-insurer to issue a separate policy, almost always, the co-insurers join in issuing the co-insurance endorsement to the lead underwriter's policy. The endorsement sets forth the names of each co-insurer, its policy number and the proportional amount of the liability it assumes.[4]

The co-insurance proportion and amounts are usually established by the lead co-insurer through a flurry of e-mails and phone call solicitations before the closing occurs. This is so that the co-insurance endorsement will be available at the closing table. The solicitations usually begin with a frantic "We are insuring the new skyscraper being developed by ____________ (whose identity has been appearing online in *The Real Deal* and in the *Wall Street Journal* for weeks if not months before the closing and therefore is no big secret); followed by "how much you can take" setting off intramural jockeying among the parties establishing guidelines determined by G-d who knows what. In the end, once things are sorted out, the lenders' guidelines based upon their perceived net worth of the co-insurers ultimately determine how much of the transaction each co-insurer will receive (although each co-insurer still has the ability to decide how much of the risk it will assume). Once the lender sets those numbers, it is off to the races. As a leading commentator has written, "Coinsurance also enables a customer to 'share the wealth' in terms of giving work to multiple title companies. The customer may wish to 'favor' a title insurer with which it has a prior business or underwriting relationship or pricing arrangements."[5] It has not been unheard of for the participants in a co-insurance to throw sharp elbows to obtain a portion of a particularly lucrative co-insurance transaction.

At some point after the initial phone call or e-mail, the co-insuring underwriters must decide whether to conduct their own examination of title or to rely upon the one already commissioned by the lead underwriter. Depending upon the co-insurer, that decision usually is made by senior counsel at corporate headquarters, (which by the way, for almost all underwriters, is no longer in New York), the complexity of the title, the professional reputation of the lead, and by whether the financing structure that is meant to reduce the mortgage recording tax as much as possible, passes the underwriters' risk tolerance or stomach test.

Retreating to solvency, for the lender and for counsels to the lender and the borrower (who is the fee insured), it is most important to keep in mind that if one of the co-insurers become insolvent, and that co-insurer cannot pay its proportionate share of a claim, the other insurers have no obligation to pick up the insolvent co-insurer's share. In fact, the author has seen the following exception raised in smaller co-insurance transaction where two or more co-insurers issue their own title policies:

> This Policy will be issued contemporaneously with Policy Number _____________ issued by ________________. At the time liability for any loss shall have been fixed pursuant to the conditions of the policy, the Company shall not be liable to the Insured for a greater portion of the loss than the amount that this Policy bears to the whole amount of insurance held by Insured as aforesaid.

As for the fee and mortgage insureds, caveat emptor. If a co-insurer becomes insolvent or is otherwise unable to pay its claim, then the insurance buyer has no means to obtain full coverage of its loss. The remining co-insurers have no obligation to cover the insolvent co-insurer's inability to pay its share of the claim.

This semi pro tanto, in staying with Latin, provision means that claims resolution may have to be negotiated with each co-insuring underwriter separately if all the underwriters are not in agreement. New York has resolved this problem by providing that the insureds may purchase a joint and several liability endorsement to the policy that makes each co-insurer jointly and severally liable for the payment of a claim. This endorsement is available for the price of $1.00 per thousand dollars of the insurance amount. For our typical $1 billion transaction that translates to an additional premium of $1 million, if the author's high school math is still relevant.

Re-Insurance

Whereas co-insurance is akin to horse trading in the Wild, Wild West, re-insurance is more like having tea and crumpets at Downton Abbey. During a co-insurance transaction, all of the parties involved in the transaction, and more significantly, some who are not directly involved, all try to "get a share of the transaction" in order to obtain "a piece of the action" for themselves or for others. The re-insurance world is much more limited, involving only title underwriters and occasionally outside underwriters such as Lloyd's of London, if the transaction is really huge.

In a re-insurance transaction, a title underwriter will actually go into the title marketplace to buy insurance against a risk from another title underwriter or groups of underwriters. The company purchasing the insurance is called the "ceder' because, in effect, the insurance purchasing underwriter is ceding a part of the risk and the insurance to a second underwriter or group of underwriters, for a price, of course. The ceder, in effect, is purchasing insurance from a re-insuring underwriter to protect itself (the ceder) from having to assume all of the risk and liability that it took when it issued the policy. Note that the ceder issues the policy, while in the instance of co-insurance all of the co-insurers essentially issue their own policies through the issuance of their co-insurance endorsements that are attached to the lead underwriter's policy.

Since the lead insurer or ceder issues a single policy covering the entire risk, the relationship among the re-insurers, reinsurance is governed by the terms and conditions of the American Land Title Association (ALTA) Facultative Reinsurance Agreement (hereinafter, the "Agreement").[6] Among other things, under the Agreement the ceder warrants that it has disclosed all extra-hazardous risks to the reinsurer; the reinsurer assumes its "coordinate and proportionate" share of loss suffered by the ceder. In the event that the insured makes a claim under the ceder's title policy, the ceder has the responsibility to monitor and administer the claim. However, if the ceder does not honor the claim, then the insured has direct access to each co-insurer for the administration of, and more importantly, payment of, the claim. There is an important factor for the parties involved in a re-insurance transaction. For the title agent who brings the billion-dollar transaction to its underwriter, it is important to remember that the underwriter has to pay a premium to the other underwriter for reinsurance. It is certainly not unheard of for the underwriter to pass on some of the cost of the premium to the agent who brought the transaction to the underwriter. In other words, re-insurance is not a freebie for the title agent.

In re-insurance, there can be several levels of an insurer accepting liability. There can be a primary, a secondary, tertiary and possibly a quaternary level. In our $1 billion transaction, the primary insurer may take the first or primary liability for the first $500 million, another underwriter may take a secondary position for the next $300 million and so on down the line.

While it is not uncommon for re-insurance to take place before or while a transaction is closing, quite often re-insurance is not settled until after the transaction closes. Re-insurance involves only underwriters located in the re-insurers' home offices; re-insurance administrators comprise much smaller and familiar universe. Therefore, quite often the re-insurance world often lacks the drama of the co-insurance world. Re-insurers will have to deal with each other on the next huge transaction. Hence their world is more Downton Abbey than the Wild, Wild West.

Why Should You as the Insured Care Whether Your Transaction Is Co-Insured or Re-insured?

In a co-insurance transaction, it is helpful to recall that each co-insurer issues it own policy. Therefore, if one co-insurer becomes insolvent, its policy most likely will die with the co-insurer. The other co-insurers have neither the responsibility nor incentive to assume the insolvent co-insurer's liability under the co-insurer's policy. Therefore, for a fee or mortgagee insured, a co-insurance position may be riskier than re-insurance depending upon the solvency of the co-insurers. This is why the borrower and lender have a keen interest in how the lead underwriter places co-insurance.

In re-insurance, the ceding underwriter issues its own, single policy and no matter how much the claim, normally the ceder is responsible for the payment of the claim. Even if a re-insurer goes insolvent, the ceder's policy remains intact and must cover the claim, unless, of course, the ceder has gone insolvent. Then, the Falcultative Agreement becomes important because it gives the borrower and the lender the ability to pursue a claim directly with the re-insuring underwriters.

The title insurance world is not without its risks, but as the one-time premium indicates, in the general sphere of life it is inexpensive in comparison to property and casualty, auto and life insurance, all of which require the payment of annual premiums. Because in title insurance most of the risks are identified and eliminated (or excepted in the policy) before the closing, there is less of a probability of a future claim. But for the title underwriters either through co-insurance or re-insurance, Benjamin Franklin's adage rings true. All persons participating in a real estate transaction, whether the transaction involves a billion-dollar skyscraper that is filling in an empty space in the skyline, or a $250,000 starter home on an eighth of an acre of land (if there is such a creature remaining in downstate New York), should be cognizant of what underlies and supports the title insurance policy that they are purchasing. The world is an uncertain place and unlike Disneyland, not all of its risks can be wished away. But having a title policy certainly helps.

Endnotes

1. Michael Kolomatsky, *Looking Up for Home Construction*, N.Y. Times, August 19, 2018, at RE 2.
2. Winnie Hu, *Tracking the Building Frenzy Transforming the City*, N.Y. Times, August 22, 2018, at A17.
3. Charles Bagli and Kate Kelly, *Kushners Get Relief with Lease Deal on Troubled Office Tower*, N.Y. Times, August 4, 2018, at A16.
4. The official definition of a co-insurance transaction in New York is set forward in the Title Insurance Rate Service Association (TIRSA) as "a transaction in which each coinsurer assumes a designated portion of the Total Amount of Insurance from the first dollar and is liable for only such portion of any loss. Each coinsurer shall issue a Policy or the Coinsurance Endorsement setting forth the amount of liability it assumes," Tirsa, Title Insurance Rate Manual for New York State 10 (6th ed. 2018).
5. Gerald J. Castro, Coinsurance/Reinsurance: Different Means to a Similar End, 10 Title Issues 1, 3 (2012). The author recommends Mr. Castro's article to anyone who would like a deeper and more academically inclined treatment to co- and re-insurance. Mr. Castro's article may also be found at www.ntiweb.com/forms/v10n.htm. Note, however, that "pricing arrangements" refers to the per thousand dollar premium that the re-insuring underwriter will charge the ceder for the re-insurer's policy.
6. *See* Stewart Title Guaranty Company, American Land Title Association (ALTA) Tertiary Facultative Reinsurance Agreement—Type I (06/17/06), https://www.virtualunderwriter.com/en/forms/2008-6/FM115626448800000007.html

***See also* James L. Gosdin, Title Insurance: A Comprehensive Overview (3rd ed. 2007).**

Marvin N. Bagwell is the Vice-President and Chief New York State Counsel for Old Republic National Title Insurance Company and is based in Westbury, New York. Prior to joining Old Republic, he was the President of Bagwell & Associates Title Agency LLC based in New York City and in White Plains. He previously served as Vice-President and Eastern Divisional Counsel for United General Title Insurance Company and as Vice-President and Senior Underwriting Counsel at such other underwriters as Title USA, TRW Title, Nations Title and Fidelity Title. Mr. Bagwell has also served as the President of the New York State Land Title Association (NYSLTA) and as President of the Title Insurance Rate Service Association (TIRSA).

Bergman on Mortgage Foreclosures: A Series on Procedural Defenses

By Bruce J. Bergman

Bruce J. Bergman

The Thorny Problem of Proving the Home Loan 90-Day Notice Was Sent

Where it is a home loan[1] in default, it is widely recognized that a 90-day notice will be required as a condition of acceleration and foreclosure.

Two recent cases confirm that sending the 90-day notice is a condition precedent to initiate a home loan mortgage foreclosure action and that failure to do so will defeat summary judgment and effectively defeat the case. [See *Citibank, N.A. v. Wood*, 150 A.D.3d 813, 55 N.Y.S.3d 109 (2d Dep't 2017); *Wells Fargo Bank, N.A. v. Trupia*, 150 A.D.3d 1049, 55 N.Y.S.3d 134 (2d Dep't 2017)].

While this is hardly welcome for lenders, it is not new. What is perhaps portentous is the more obscure issue of how to *prove* that the 90-day notice was sent. Each lender failed on that point in the cited cases, and yet another case as well.[2]

In the *Citibank* case the court held that the plaintiff had failed to submit an affidavit of service or any other proof of mailing by the post office showing that it properly served the borrower according to the statute.[3] Rather, the affidavit of an officer referenced supposed tracking numbers stamped on the notice, which was held insufficient to show that the notice was sent in the manner required by the statute because the loan servicer did not provide proof of a standard office mailing procedure and offered no independent proof of the actual mailing.[4]

In the *Wells Fargo* case, the plaintiff submitted an affidavit of an officer stating that she had reviewed the 90-day notice sent to the borrower on a certain date to the last known address by first class mail and certified mail. Annexed to that affidavit was a copy of that notice along with a copy of the certified mail receipt and the certified mail number, but the receipt contained no language indicating that it was issued by the United States Postal Service. The court held that although mailing may be proved by documents meeting the requirements of the business records exception to the rule against hearsay, here the officer did not claim that she was familiar with the plaintiff's mailing practices and procedures and consequently did not establish proof of standard office practice and procedure designed to ensure that items are properly addressed and mailed.[5] In the end, the plaintiff was simply unable to support the officer's assertion that the notice was mailed to the borrower by first class mail.

In yet another case,[6] an officer averred that he had reviewed the business records maintained in plaintiff's regular course of business relating to the loan and based thereupon he concluded that the 90-day notice was sent in accordance with statute. But this was held unsubstantiated and conclusory, insufficient to establish that the RPAPL § 1304 notice was mailed to the borrower by registered or certified mail and also by first class mail.[7]

All of this readily suggests that foreclosing plaintiff's will need to have procedures in place to ensure that actual proof of a mailing according to the statute can be presented to a court when a borrower claims that the 90-day notice was not sent.

Endnotes

1. Defined in RPAPL § 1304(6).
2. *Central Mortgage Company v. Abraham*, 150 A.D.3d 961, 55 N.Y.S.3d 336 (2d Dept. 2017).
3. Citing *Aurora Loan Serv., LLC v. Weisblum*, 85 A.D.3d 95, 106, 923 N.Y.S.2d 609.
4. Citing *Citimortgage, Inc. v. Pappas*, 147 A.D.3d 900, 47 N.Y.S.3d 415; *JPMorgan Chase Bank, N.A. v. Kutch*, 142 A.D.3d 536, 537, 36 N.Y.S.3d 235; cf. *Flagstar Bank FSB v. Mendoza*, 139 A.D.3d 898, 900, 32 N.Y.S.2d 278.
5. *Citimortgage Inc. v. Pappas*, 147 A.D.3d 900, 901, 47 N.Y.S.3d 415.
6. *Central Mortgage Company v. Abraham*, *supra*, at note 2.
7. *Central Mortgage Company v. Abraham*, *supra*, at note 2, citing RPAPL § 1304(2); *JPMorgan Chase Bank, N.A. v. Kutch*, 142 A.D.3d 536, 537, 36 N.Y.S.3d 285; *Cenlar, FSB v. Weisz*, 136 A.D.3d 855, 856, 25 N.Y.S.3d 308; *Citimortgage, Inc. v. Espinal*, 134 A.D.3d 876, 878-879, 23 N.Y.S.3d 251; *HSBC Mtge. Corp. (USA) v. Gerber*, 100 A.D.3d 966, 967, 955, N.Y.S.2d 131; *Aurora Loan Servs., LLC v. Weisblum*, 85 A.D.3d 95, 106, 923 N.Y.S.2d 609.

Failure of Preforeclosure Notice—Again—and What a Mess This All Is

Whether one believes that foreclosing lenders have some particular advantage in the foreclosure case, or whether legislation of recent years has especially empowered borrowers, or whether it is truly a level playing field, there can be no doubt that the path through a New York foreclosure (especially the residential case) is longer and more burdensome than it once was. In short, foreclosing lenders in home loan cases in New York are faced with more than a few roadblocks in the foreclosure process. Prominent among them is the obligation to send a certain 90-day notice (RPAPL § 1304) before acceleration can be declared or a mortgage foreclosure action can be initiated. No matter how egregious and obvious the borrower's default may be, there is no remedy until this notice is sent. Even then, once the commonplace defense of proper notice not having been received is interposed, the burden is then upon the plaintiff to make a showing of prima facie compliance.

> *"The court conceded that the mailing of the notice could be proven by documents meeting the requirements of the business exception to the hearsay rule, but the person swearing would have to demonstrate familiarity with the plaintiff's mailing practices and procedures."*

A recent case tells us yet again how difficult it apparently is for the mortgage holder to meet this test. [*Bank of America, N.A.* v. *Wheatley*, 158 A.D.3d 736, 73 N.Y.S.3d 88 (2d Dep't 2018)].

First as to the comment about it all being such a mess (for foreclosing plaintiffs that is), in this case, as in so many, the omnipresent standing defense was raised—and the motion court found it to be a good defense. The plaintiff *did* have standing, however, and so this was reversed on appeal. But the lender had to suffer the time and expense of the initial defeat and the need to even appeal the case. Principles enunciated in the decision elucidating standing are meaningful, but the subject is a much larger one and strays from the main focus here.

Turning to the point actually under discussion, a foreclosing party can demonstrate service of the 1304 predicate notice rather simply by having an affidavit of service for each one. Seeing this reported with regularity, though, it becomes apparent that is not convenient or economical to do. There is an alternative, however, and that is testimony by someone with knowledge of the plaintiff's or servicer's procedures as to how such notices are mailed. Unfortunately, lenders and servicers often run afoul of glitches in presenting this proof. Such is precisely what happened in this case.

Here, having confirmed that service of a 1304 notice is a prerequisite to any foreclosure, and that the burden shifts to the plaintiff to prove the mailing once the borrower submits the defense, the court observed that the plaintiff failed to make the requisite showing. Plaintiff submitted an affidavit of an officer of its servicer together with two copies of the 90-day notice addressed to borrower defendant (as well as proof of filing of the financial statement with the New York State Banking Department—another issue). The court conceded that the mailing of the notice could be proven by documents meeting the requirements of the business exception to the hearsay rule, but the person swearing would have to demonstrate familiarity with the plaintiff's mailing practices and procedures. Having not shown that, the affidavit did not establish proof of standard practice and procedure designed to ensure that items were properly addressed and mailed. In addition, the plaintiff was unable to demonstrate that the notices included a list of five housing counseling agencies as required by the notice provision. Although the servicer's affidavit stated that such a list was included, the copies of the notices submitted merely contained information about contacting a hotline that would provide advice from counseling agencies—but not the list.

Reported cases readily confirm the consistent jousting on this issue: whether the foreclosing plaintiff can avail itself of the business records exception to hearsay. A number of further nuanced decisions can be found at 1 *Bergman on New York Mortgage Foreclosures* § 5.22, LexisNexis Matthew Bender, and if readers encounter the problem, reference there may be helpful.

In sum, the plaintiff somehow managed not to offer proof which meets the standards. The result was that the court found that the required notice was not proven; therefore, the denial of summary judgment by the trial court was affirmed.

At this point the hapless lender will either need to proceed to a trial to prove the mailing, or discontinue the action, serve the notice anew, being certain that its mailing can be proven, to then start the action all over again. To be sure, such a laborious, time-consuming path is most unwelcome to lenders.

Condo Gets Bank Interest Reduced for Delay

A new case (New York County Supreme Court) relating to delay of a foreclosure action confirms two meaningful principles from the respective viewpoints of a foreclosing lender and a condominium holding a junior common charge lien. [*Citimortgage, Inc. v. Gueye*, 2016 Misc. LEXIS 2316].

Foreclosing parties always need to be aware that undue delay of a foreclosure action on the part of a plaintiff can result in a court reducing or eliminating the accrual of interest commensurate with the delay. This is an equitable judgment call on the part of a court and it typically does not arise unless delay has been considerable and the borrower pursues the issue. Conceptually, though, it is a matter of statute (CPLR 5001) and a substantial amount of case law that in an equity action (a foreclosure is such an action) the court has the authority to reduce or eliminate interest if the foreclosing party has been the source of delay.[1] It is worth emphasizing for the sake of clarity that if the court holds papers for long durations, or it is the borrower who employs dilatory tactics, such is not chargeable to the foreclosing party.

On the other side of this concept is the condominium holding a condominium common charge lien. The (incorrect) prevailing wisdom on the part of many condos is that because their liens are junior to foreclosing *first* mortgage holders, there is no point in prosecuting the condo lien; the bank will take care of it with their own foreclosure. But home loan foreclosure dictates impose considerable delays in the process, which means that a diligent condominium should be able to arrive at a foreclosure sale much faster than a foreclosing first mortgage—hence the suggestion that condos are well advised to indeed prosecute their condominium common charge liens. Further explanation as to why that is so need not be restated here, although those who could benefit from the discussion are invited to consult 4 *Bergman on New York Mortgage Foreclosures* § 36.11 [a], LexisNexis Matthew Bender (rev. 2016).

Whether or not the junior condominium is foreclosing, should the foreclosing bank be consuming undue time in the foreclosure, the condo is obviously suffering thereby. The form of damage is continuously accruing interest which creates a greater debt to the condominium and more money due to the foreclosing lender, which in turn consumes the equity. This leaves less, or no, surplus for the condominium. Accordingly, there is an incentive for the condominium to assault a foreclosing lender to seek reduction of interest where that foreclosing party caused the delay.

That is precisely what happened in the new case. Remarkably, the foreclosing plaintiff consumed *seven years* in prosecuting an unopposed mortgage foreclosure action. As part of that, the mortgage holder waited *three years* to even file an RJI. Faced with this undue protraction, and a cross motion by the condo to eliminate interest for the delay periods, the court did just what the condo asked. It examined each aspect of delay and attributed extinguishment of interest for the appropriate periods. From the foreclosing party's point of view this is unfortunate and unwelcome, although it has to be conceded that the lender brought the consequences upon itself.

From the position of the condominium, it buttresses the weapon that if they choose to allow the bank to bear the burden of foreclosing, but there is delay incurred, interest on that senior obligation can be subject to reduction or elimination.

Endnote

1. *See* case law and discussion at 1 *Bergman on New York Mortgage Foreclosures* § 2.20[3], LexisNexis Matthew Bender (rev. 2016).

Release in Loan Mod Saves Lender—a Salutary Reminder

Here is a not uncommon scenario known to lenders. A once defaulting borrower (or one still in default) sues the lender for violation of the General Business Law Sections 349 and 350 alleging, as the court recited it, that the lender "employed relaxed underwriting standards, reduced documentation requirements, false appraisals, and forgery of borrower income levels for the purpose of consummating unaffordable or high-cost home loans that were destined to fail."

So while the money was indeed loaned to the borrower, the assertion was that the borrower should be entitled to keep the money because the lender never should have made the loan. The borrower lost this one, however, because the lender was sage enough to include in certain documentation a loan repayment agreement and a loan mod—and an effective release—and such is the lesson of this report. [The new case is *Warmhold v. Zagarino*, 2016 N.Y. App Div. LEXIS 7070].

Obviously, loan repayment plan agreements and loan modifications (there were both in this case) are oft-used avenues allowing borrowers to become current and pay off defaulted mortgages. Every lender and attorney has their own forms and there are any number of provisions they contain. But this case reminds that a release from the borrower of any claims against the lender is both essential and enforceable.

The court confirmed that a release is a contract and its construction is governed by contract law. When there is such a release—again here from the borrower to the lender—this shifts the burden of going forward to the party making a claim to show that there has been fraud, duress or some other fact sufficient to void the release.

In this case, the loan repayment plan agreement and a loan modification agreement, both of which were executed by the borrower, contained releases which by their terms unambiguously barred the very action which this borrower brought. Unable to raise any issue as to invalidly of the releases, those releases controlled and the borrower's claim was dismissed. Chalk one up for a careful lender.

Short Sale Not a Defense to Foreclosure

Certainly since the financial crisis, short sales have become commonplace, although perhaps a bit less intense of late. Where the property is apparently worth less than the sum due on the mortgage, the borrower might hope to sell for that diminished market value and the lender might be agreeable. But *must* a lender accept a short sale when tendered? Would a borrower even try to assert such a tender as a defense? The respective answers are, not surprisingly, "no" and "yes," as a recent case illustrates. [*U.S. Bank, N.A.* v. *Nava*, 2018 N.Y. Misc. LEXIS 155]. Speeding immediately to the conclusion, the court ruled that the borrowers' desire to proceed with a short sale is not a defense to a foreclosure action and the court cannot force an agreement upon a plaintiff.

This conclusion is not unexpected, although certainly helpful to have had a ruling like this since it is reasonable to expect that borrowers will raise such a defense from time to time. But then, the facts of the case were somewhat unusual and are worthy of recitation, particularly because they add other helpful elements.

Here, the judgment of foreclosure and sale had been obtained on January 30, 2017 but a bankruptcy filing by the borrower made it impossible to conduct the sale within 90 days of the judgment [as required by RPAPL § 1351(1)]. Nonetheless, the foreclosure sale was conducted, albeit beyond the 90 days, and thereafter the plaintiff sought the blessing of the court after the fact by way of an extension for the sale date. The borrowers opposed that motion and claimed that they wanted to complete a short sale. Prior to the foreclosure sale the borrowers had made an offer and a proof of funds but the plaintiff declined to consider it. The borrowers argued that the foreclosure sale was improper because it was late and further that the short sale application would have been considered if the improper sale had not been scheduled.

The court observed, however, that the borrower defendants had been in default in the action, had failed to vacate their default and therefore were not even qualified to seek affirmative relief in the case. As to the late sale, the court pointed out that a court is authorized to extend any time fixed by statute as may be just and upon good cause shown whether such an application for such an extension is made before or after expiration of the time fixed. Finding that the plaintiff had good cause for its delay in setting the sale (after all, the borrowers had filed bankruptcy) and that the borrowers did not demonstrate any prejudice as a result of the delay (indeed the defendants waited a year after entry of judgment of foreclosure and sale to proceed with a short sale) there was just no basis to upset the foreclosure sale.

While the circumstances of this case provided yet other support for the court to deny the short sale proposal as a defense, the basic concept should still apply: that a borrower's hopes to proceed with a short sale is not a defense to a foreclosure.

Relationship Between Mandatory Conference and the One-Year Default Trap

This sounds too obscure, but hang in there. Have we mentioned before in these columns that nuance and minutiae in the New York foreclosure edits (especially for home loan cases) are a field of mines exploding in the path of foreclosing lenders? Of course we have, but it all continues to surprise nonetheless, although the case reported on here actually solves a problem in exposing one of the perilous areas. [*HSBC Bank, USA, N.A.* v. *Seidner*, 159 A.D.3d 1035, 74 N.Y.S.3d 282 (2d Dep't 2018)].

The issue arises out of the conflict between two major foreclosure mandates: One, to move for a default within one year [CPLR 3215(c)], the other to participate in the settlement process (CPLR 3048). If one dwells upon the clash between these imperatives, both might not be able to be accommodated.

As to the one-year default obligation, after all defendants have been served in the foreclosure, and if any of them is in default, should a plaintiff fail to take proceedings for entry of a judgment within one year of default a judgment will not be entered. Rather the complaint shall be dismissed as abandoned. This dismissal is mandatory (although there is an exception if the failure to timely seek a default is supported by sufficient cause for the inaction), meaning in actuality both a reasonable excuse for delay and demonstration of meritorious cause of action.

Attorneys for mortgage lenders and servicers will immediately recognize the difficulty of moving for a judgment within one year, the settlement process aside. First there must be an application for an order of reference, then the computation, and only then the motion for judgment. The rescue here is that because application for appointment of a referee is a requirement in a foreclosure and is a prerequisite to a judgment, that is the same as having applied for a judgment so that is not an issue. This does not mean it is not litigated—it is—but lenders win on the point. Case law on this aspect can be worthy of consultation—see *2 Bergman on New York Mortgage Foreclosures* § 20.02[c], LexisNexis Mathew Bender (rev. 2018).

We turn now, though, to the other mandate, which is that a settlement conference be conducted after process service is complete. This depends upon when the court schedules the conference. Even if that is done with dispatch, there can be reasons for the conferences to be postponed (such as the borrower not having counsel or not having appropriate papers) and lenders can request adjournments as well for various reasons. But then, that a conference is held does not mean repeated meetings will not be needed or directed by the court.

It is readily discernable that the conference process can consume many months, sometimes more than a year. So if the matter is released from the conference part after a year, but a default has not been pursued, the action may be subject to mandatory dismissal for want of a default judgment having been entered. Here is where new case law confirms that this really is not a problem. The ruling was that if a request for judicial intervention in a matter subject to mandatory settlement conference is filed within the one-year deadline needed for the default, the time thereafter to move for the default judgment is *tolled* while settlement conferences are pending.

If it didn't work this way, foreclosing plaintiffs would face an insurmountable imposition, so it probably had to be decided in any event. Happily it was, in a reasonable fashion and wisely taking realities into account.

Mr. Bergman, author of the four-volume treatise, *Bergman on New York Mortgage Foreclosures*, LexisNexis Matthew Bender, is a member of Berkman, Henoch, Peterson, Peddy & Fenchel, P.C. in Garden City. He is a fellow of the American College of Mortgage Attorneys and a member of the American College of Real Estate Lawyers and the USFN. His biography appears in *Who's Who in American Law* and he is listed in *Best Lawyers in America* and *New York Super Lawyers*.

The Real Property Law Section Welcomes New Members *(September 2018 - November 2018)*

First District
Jing An
Hon. Nancy M. Bannon
Warren J. Bennia
Lee Brett Bergstein
Erica F. Buckley
Steven Cheng
Kathryn Alexis Christoforatos
Myron Cohen
Dejon C. Delpino
Florian Scott Ellison
Ari Chaim Glatt
Matthew Eric Guber
Janice Mac Avoy
Ellen M. Massey
Ramsay Thompson Randall
B. Cameron Schladenhauffen
Randall T. Sims
Walter John Thompson
Michael Andrew Wasil
Michael J. Werner

Second District
Kelly Victoria Decker
Alana M. Hans
David H. Perlman

Third District
Michael Joseph Andreani
Anne Bair
Deanna Cucharale
Alexandra Noel Falanga
Brian P. Murphy
George R. Slingerland
Gregory J. Teresi

Fourth District
Jacqueline M. Caswell

Fourth District *(continued)*
Paula Nadeau Berube

Fifth District
David S. Kimpel

Sixth District
Corrie Ann Damulis
Kurt D. Schulte

Seventh District
Anthony Joseph Adiutori
Molly Chapman
Michael J. Gionta
Jeffrey M. Jayson
William N. LaForte
Neil Patrick McLaughlin
Elizabeth Kathleen Ogden
Ashley Elizabeth Ragan
Thomas Somare Tarnow
Sean Williams

Eighth District
Daneal Barnaby
Jordan Sarah Joseph
Matthew A. Kielich
James A. McAuley, IV
Todd James Potter, Jr.
Franklin R. Pratcher
Kelsey Ruszkowski
David C. Schubel
Katharine Bowen Smith

Ninth District
Joanna Maria Caccavo
Denise J. D'Ambrosio
Michael A. Disanto
Richard Angelo Fiore, II
Kristine Holden

Ninth District *(continued)*
Jessica M. Mahoney
Omar A. Nimri
Cassia R. Schaeffer
Lino Sciarretta
Marc E. Sharff
Rikki Alyse Solowey
Karen S. Sonn
David Whittaker Stever

Tenth District
Andres Emile Baena
Laurie Bakhchi
Jennifer Elizabeth Bentivegna
Michael J. Ciaravino
Kevin M. Clyne
Charles John Collins
Albert A. D'Agostino
Jeanelle Dawes
Kayla Rae Dimatos
Kenji J. Fukuda
Joel M. Furman
Ira Lawrence Goldberg
Christine M. Hogan
Judith Ann Lanahan
Allison L. Luskoff
Michael A. Markowitz
William D. McCabe
Michael A. Messi
Janice M. Morelli
Anthony Armando Nozzolillo
Mark J. Piccirillo
Julia Rachiele
Kevin Drew Rosenberg
Aidan B. Slevin
Ellen A. Victor
Jeffrey M. Zalkin
Peter N. Zogas

Eleventh District
Patrick Archer
Kevin K. Diffley
Julian Nievis Fairweather
Benjamin L. Federici
Ned Kassman
Changhui Li
Sateesh K. Nori
Anamil Parkash
Loris Philmore Primus
Chris Psomopoulos
Harry Tiwari

Twelfth Distric
Samantha Ann Fix
Matthew Marchese

Thirteenth District
Frank J. Lamonica

Out of State/Country
John M. Barbarula
Nelson Kenneth Bauersfeld
Emily Kay Declercq
James Walter Doyle
Scottland Paul Glenn
Timothy Willis Grooms
Kenneth M. Gruder
Ann Marie Henderson
Ashley Nicole Higginson
Christopher Messina
Agatha Christina Mingos
Francesco Carmelo Mioli
John Sercan Onal
Stuart I. Seiden
Marina Semenenko
Philip W. Shapiro
Theodore A. Topouzis
Simone Tsigounis

Section Committees and 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.

Attorney Opinion Letters
Gregory P. Pressman
Schulte Roth & Zabel LLP
919 Third Avenue
New York, NYNY 10022-4728
gregory.pressman@srz.com

Charles W. Russell
Harris Beach PLLC
99 Garnsey Road
Pittsford, NY 14534
crussell@harrisbeach.com

Awards
Peter V. Coffey
Englert, Coffey, McHugh
& Fantauzzi, LLP
224 State Street
P.O. Box 1092
Schenectady, NY 12305
pcoffey@ecmlaw.com

Commercial Leasing
Deborah Leigh Goldman
Joshua Stein PLLC
501 Madison Avenue, Room 402
New York, NY 10022-5635
success1968@hotmail.com

Robert J. Shansky
Scarola Zubatov Schaffzin PLLC
1700 Broadway, 41st Floor
New York, NY 10019
rjshansky@szslaw.com

Sujata Yalamanchili
Hodgson Russ LLP
The Guaranty Building
140 Pearl Street Suite 100
Buffalo, NY 14202-4040
syalaman@hodgsonruss.com

Condemnation, Certiorari and Real Estate Taxation
Karla M. Corpus
National Grid
300 Erie Boulevard West
Syracuse, NY 13202
kmcorpus@gmail.com

Steven Wimpfheimer
Steven Wimpfheimer, Esq.
166-25 Powells Cove Blvd.
Whitestone, NY 11357
wimpf1@gmail.com

Condominiums & Cooperatives
Dale J. Degenshein
Stroock & Stroock & Lavan LLP
180 Maiden Lane, Suite 3961
New York, NY10038
ddegenshein@stroock.com

Condominiums & Cooperatives (continued)
Steven D. Sladkus
Schwartz Sladkus Reich Greenberg
& Atlas LLP
270 Madison Avenue
9th Floor
New York, NY 10016
ssladkus@ssrga.com

Continuing Legal Education
Scott A. Sydelnik
Davidson Fink LLP
28 E. Main Street, Suite 1700
Rochester, NY 14614
ssydelnik@davidsonfink.com

David J. Zinberg
Ingram Yuzek Gainen Carroll &
Bertolotti, LLP
250 Park Avenue, 6th Floor
New York, NY 10177
dzinberg@ingramllp.com

Diversity
Antar P. Jones
The Law Office of Antar P. Jones, PLLC
538 East 24th Street
Brooklyn, NY 11210
antar@antarlaw.com

Harry G. Meyer
Rockledge, FL 32955
hgmeyer96@gmail.com

Green Real Estate
Joel I. Binstok
York Consulting
570 Lexington Avenue, Suite 2900
New York, NY 10022
JBinstok@yorkleaseaudit.com

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

Land Use and Environmental Law
Alan J. Knauf
Knauf Shaw LLP
2 State Street, 1400 Crossroads Building
Rochester, NY 14614-1314
aknauf@nyenvlaw.com

Linda U. Margolin
Margolin Besunder, LLP
1050 Old Nichols Road
Suite 200
Islandia, NY 11749
lmargolin@margolinbesunder.com

Landlord and Tenant Proceedings
Paul N. Gruber
Borah, Goldstein, Altschuler,
Nahins & Goidel, P.C.
377 Broadway
New York, NY10013
pgruber@borahgoldstein.com

Peter A. Kolodny
Kolodny PC
15 Maiden Lane
Suite 2000
New York, NY10038
pk@kolodnylaw.com

Legislation
Richard A. Nardi
Loeb & Loeb LLP
345 Park Avenue
21st Floor
New York, NY10154
rnardi@loeb.com

Samuel O. Tilton
Woods Oviatt Gilman LLP
700 Crossroads Building
2 State Street
Rochester, NY 14614-1308
stilton@woodsoviatt.com

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

Membership
Jaime Lathrop
Law Offices of Jaime Lathrop, PC
641 President Street
Suite 202
Brooklyn, NY 11215-1186
jlathrop@lathroplawpc.com

Harry G. Meyer
Rockledge, FL 32955
hgmeyer96@gmail.com

Not-for-Profit Entities and Concerns
Susan E. Golden
Venable LLP
1270 Avenue of the Americas
New York, NY 10020-1700
SGolden@Venable.com

Anne Reynolds Copps
Copps DiPaola, PLLC
126 State Street, 6th Floor
Albany, NY 12207
arcopps@coppsdipaola.com

Professionalism
Patricia E. Watkins
Bartlett, Pontiff, Stewart & Rhodes PC
One Washington Street
P.O. Box 2168
Glens Falls, NY 12801-2168
pew@bpsrlaw.com

Nancy A. Connery
Schoeman, Updike & Kaufman
551 Fifth Avenue
New York, NY 10176
nconnery@schoeman.com

Public Interest
Maria Theresa DeGennaro
Empire Justice Center
Touro Law Center PAC
225 Eastview Drive
Central Islip, NY 11722
mdegennaro@empirejustice.org

Daniel Farwagi Webster
Webster & Dubs, P.C.
37 Franklin Street, Suite 1000
Buffalo, NY 14202

Publications
Marvin N. Bagwell
Old Republic National Title Insurance Co.
400 Post Avenue
Suite 310
Westbury, NY 11590
MBagwell1@OldRepublicTitle.com

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

William P. Johnson
Nesper, Ferber, DiGiacomo,
Johnson & Grimm, LLP
200 John James Audubon Parkway
Suite 302
Amherst, NY 14228
wjohnson@nfdlaw.com

Matthew J. Leeds
Ganfer Shore Leeds & Zauderer, LLP
360 Lexington Avenue
New York, NY 10017
mleeds@ganfershore.com

Real Estate Construction
Gavin M. Lankford
Harris Beach PLLC
99 Garnsey Rd
Pittsford, NY 14534-4532
glankford@harrisbeach.com

Brian G. Lustbader
Schiff Hardin LLP
666 5th Avenue
Suite 1700
New York, NY 10103
BLustbader@schiffhardin.com

Real Estate Financing
Richard S. Fries
Sidley Austin LLP
787 Seventh Avenue
New York, NY 10019
richard.fries@sidley.com

Heather C.M. Rogers
Davidson Fink LLP
28 East Main Street, Suite 1700
Rochester, NY 14614
hrogers@davidsonfink.com

Real Estate Workouts and Bankruptcy
Garry M. Graber
Hodgson Russ LLP
The Guaranty Building
140 Pearl Street, Suite 100
Buffalo, NY 14202-4040
ggraber@hodgsonruss.com

Daniel N. Zinman
Kriss & Feuerstein, LLP
360 Lexington Avenue
Suite 1200
New York, NY 10017
danzinmanesq@gmail.com

Sponsorship Committee
Ira S. Goldenberg
Goldenberg & Selker, LLP
399 Knollwood Rd.
Suite 112
White Plains, NY 10603-1937
igoldenberg@goldenbergselkerlaw.com

Student Affairs Committee
Shelby D. Green
Pace University School of Law
78 North Broadway
White Plains, NY 10603-3796
sgreen@law.pace.edu

Ariel Weinstock
Katsky Korins LLP
605 3rd Avenue
16th Floor
New York, NY 10158-0180
aweinstock@katskykorins.com

Title and Transfer
Gerard G. Antetomaso
Evans Fox LLP
100 Meridian Centre Blvd.
Suite 300
Rochester, NY 14618
jerry@evansfox.com

Toni Ann Christine Barone
Law Firm of Barone & Barone,LLP
43 New Dorp Plaza
Staten Island, NY 10306
tabarone@verizon.net

Gilbert M. Hoffman
Vanguard Research & Title Services, Inc.
499 South Warren Street
Suite 210
Syracuse, New York 13202
Gilbert.Hoffman@vgrti.com

Website and Electronic Communications
Susan M. Scharbach
D'Agostino, Levine, Landesman
& Lederman, LLP
345 Seventh Avenue
23rd Floor
New York, NY 10001
sscharbach@dagll.com

Michael P. Stevens
4-74 48th Avenue
Apt. 5G
Long Island City, NY 11109
michaelpstevens@gmail.com

Task Force on Attorney Escrow
Gilbert M. Hoffman
Vanguard Research & Title Services, Inc.
499 South Warren Street
Suite 210
Syracuse, New York 13202
Gilbert.Hoffman@vgrti.com

Benjamin Weinstock
Ruskin Moscou Faltischek, P.C.
1425 RXR Plaza
East Tower
15th Floor
Uniondale, NY 11556-1425
bweinstock@rmfpc.com

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

Task Force on Draft Department of Financial Services Title Insurance Regulations
Gerard G. Antetomaso
Evans Fox LLP
100 Meridian Centre Blvd.
Suite 300
Rochester, NY 14618
jerry@evansfox.com

Thomas J. Hall
The Law Firm of Hall & Hall, LLP
57 Beach Street
Staten Island, NY 10304-0002
hallt@hallandhalllaw.com

Task Force on Zombie Houses
Joel H. Sachs
Keane & Beane PC
445 Hamilton Ave
White Plains, NY 10601
jsachs@kblaw.com

Leon T. Sawyko
Harris Beach PLLC
99 Garnsey Road
Pittsford, NY 14534
lsawyko@harrisbeach.com

Section District Representatives

First District
Joel I. Binstok
The York Group LLC
5557 Fifth Avenue
14th Floor
New York, NY 10017
JBinstok@yorkleaseaudit.com

Second District
Lawrence F. DiGiovanna
Abrams Fensterman
1 MetroTech Centre
Suite 1701
Brooklyn, NY 11201
LDiGiovanna@abramslaw.com

Third District
Christina Watson Meier
Meier Law Firm, PLLC
10 Utica Avenue
Latham, NY 12110
christina@meierlawpllc.com

Fourth District
Alice M. Breding
Law Office of Alice M Breding, Esq., PLLC
632 Plank Road
Suite 201
Clifton Park , NY 12065-6588
alice@bredinglaw.com

Fifth District
Ann Marie McGrath
Law Office of Ann McGrath
8196 Oswego Rd.
Liverpool, NY 13090
annmcgrathesq@msn.com

Sixth District
John E. Jones
Hinman Howard & Kattell, LLP
700 Security Mutual
80 Exchange Street
Binghamton, NY 13901-3400
jonesje@hhk.com

Eighth District
David C. Mineo
Erie County Water Authority
295 Main Street
Buffalo, NY 14203
dmineo@ecwa.org

Ninth District
Lisa M. Stenson Desamours
1400 Half Moon Bay Drive
Croton On Hudson, NY 10520
lmstenson1@gmail.com

Tenth District
Daniel J. Baker
Certilman Balin Adler & Hyman, LLP
90 Merrick Avenue
9th Floor
East Meadow, NY 11554
dbaker@certilmanbalin.com

Sanford A. Pomerantz
Schroder & Strom LLP
7 Jodi Court
Glen Cove, NY 11542
sandyslaw@optonline.net

Eleventh District
Steven Wimpfheimer
166-25 Powells Cove Blvd.
Whitestone, NY 11357-1522
wimpf1@gmail.com

Twelfth District
Vacant

Thirteenth District
Toni Ann Christine Barone
Law Firm of Barone & Barone, LLP
43 New Dorp Plaza
Staten Island, NY 10306
tabarone@verizon.net

Section Officers

Chair
Thomas J. Hall
The Law Firm of Hall & Hall, LLP
57 Beach Street
Staten Island, NY 10304-0002
hallt@hallandhalllaw.com

First Vice-Chair
Gerard G. Antetomaso
Evans Fox LLP
100 Meridian Centre Blvd.
Suite 300
Rochester, NY 14618
jerry@evansfox.com

Second Vice-Chair
Ira S. Goldenberg
Goldenberg & Selker, LLP
399 Knollwood Road
Suite 112
White Plains, NY 10603-1937
igoldenberg@goldenbergselkerlaw.com

Secretary
Michelle H. Wildgrube
Cioffi Slezak Wildgrube P.C.
1473 Erie Boulevard
1st Floor
Schenectady, NY 12305
mwildgrube@cswlawfirm.com

Budget Officer
S.H. Spencer Compton
First American Title
666 Third Avenue, 5th Floor
New York, NY 10017
SHCompton@firstam.com

N.Y. Real Property Law Journal

Submission Guidelines

The *Journal* welcomes the submission of articles of timely interest to members of the Section in addition to comments and suggestions for future issues. Articles should be submitted to any one of the Co-Editors whose names and addresses appear on this page.

For ease of publication, articles should be submitted via e-mail to any one of the Co-Editors, or if e-mail is not available, on a CD, preferably in Microsoft Word or WordPerfect (pdfs are NOT acceptable). Accepted articles fall generally in the range of 7-18 typewritten, double-spaced pages. Please use endnotes in lieu of footnotes. The Co-Editors request that all submissions for consideration to be published in this *Journal* use gender-neutral terms where appropriate or, alternatively, the masculine and feminine forms may both be used. Please contact the Co-Editors regarding further requirements for the submission of articles.

Unless stated to the contrary, all published articles represent the viewpoint of the author and should not be regarded as representing the views of the Co-Editors, Board of Editors or the Section or substantive approval of the contents therein.

Accommodations for Persons with Disabilities:

NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at (518) 463-3200.

N.Y. Real Property Law Journal

Co-Editors

William P. Johnson
Nesper, Ferber, DiGiacomo, Johnson & Grimm, LLP
200 John James Audubon Parkway
Suite 302
Amherst, NY 14228
wjohnson@nfdlaw.com

Marvin N. Bagwell
Old Republic National Title Insurance Co.
400 Post Avenue, Suite 310
Westbury, NY 11590
mbagwell1@oldrepublictitle.com

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

Matthew J. Leeds
Ganfer Shore Leeds & Zauderer, LLP
360 Lexington Avenue
New York, NY 10017
mleeds@ganfershore.com

This *Journal* is published for members of the Real Property Law Section of the New York State Bar Association.

ISSN 1530-3919 (print) ISSN 1933-8465 (online)

Cite as: ***N.Y. Real Prop. L.J.***

NEW YORK STATE BAR ASSOCIATION
REAL PROPERTY LAW SECTION
One Elk Street, Albany, New York 12207-1002

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155