NYSBA WINTER 2017 | VOL. 45 | NO. 1

N.Y. Real Property Law Journal

A publication of the Real Property Law Section
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Save the Dates!

Real Property Law Section Meets During NYSBA 2017 Annual Meeting
Thursday, January 26, 2017 | 8:00 a.m. – 12:00 p.m.
"Zombie Housing, Cyber Security, § 1031 Like-Kind Exchanges"

Thursday January 26, 2017 | 2:30 p.m. – 5:30 p.m.
"Coops and Condos: Current Trends and Issues"

Real Property Executive Committee Meeting
Friday, April 21, 2017 | 10:00 a.m. – 12:00 p.m. | The Harvard Club | NYC

Real Property Law Section Summer Meeting
July 27 – 29, 2017 | High Peaks Resort | Lake Placid, NY

For registration and more information on the above events, please visit www.nysba.org/Real

Message from the Chair

"No one has ever become poor by giving." Simple, eloquent words to live by from Anne Frank.

The Real Property Law Section includes some of the most generous professional colleagues it has been my privilege to know. The evidence is abundant. Following are just a few examples.

District Representatives recruit and welcome new members to the Section, and organize events designed to promote local culture and charitable causes while networking. They suggest great ideas intended to help Section members advance their careers and be better attorneys, such as our Section brochure and a local practice guide for residential real estate closings—and then volunteer the time needed to implement them.

Past chairs are among the Section's most loyal and effective ambassadors. They passionately share ideas about the Section's mission and how to better serve its members. We recently held our first Past Chair summit, which I hope will become an annual event.

Current Committee and Task Force Co-Chairs organize and present CLE programs and meetings to educate and share with members the latest dish on dirt, monitor and either champion or object to legislation affecting our real estate clients' investments and activities, and work on projects such as checklists, sample contracts, leases, construction agreements and other forms to inform us and make us more effective counselors.

Our Section sponsors two scholarships through the New York Bar Foundation, in memory of Lorraine Power Tharp and Melvyn Mitzner, two titans of the real estate bar who served their colleagues and their community with an unmatched selfless spirit that continues to inspire us long after their passing.

And let's not forget the many ways we reach out to law students and young attorneys, our next generation of dirt lawyers and leaders, through "road shows," opportunities to help write and edit Section *Journal* articles, and work with us as interns in our firms and on Section Committee projects.

What do active Section members receive in return? If you subscribe to the notion of "giver's gain" as I do, you already know the answer. They network and collaborate with fellow dirt lawyers at all stages of their careers, ranging from the most experienced and accomplished members of our profession to those just beginning the journey. They influence what legislation is enacted and how it is written. They help freshen up forms you now use, or draft new ones you would like to use in your practice.

Whatever we contribute comes back to us in spades. So again I ask, what are you waiting for? Do yourself a favor and join us. As Pablo Picasso once said, "The meaning of life is to find your gift. The purpose of life is to give it away."

Mindy H. Stern

Model Opinion of Counsel

By Joshua Stein

Whenever any commercial real estate borrower obtains a loan, the lender typically asks the borrower to have its counsel deliver one or more legal opinions, depending on the deal structure and the lender's appetite. The "basic" opinions relate to two areas: (1) "corporate" (really limited liability company or sometimes partnership) matters; and (2) "enforceability" of the loan documents. From that starting point, lenders can ask for more, sometimes much more. For a CMBS loan, the rating agencies seem to regard legal opinions as a general panacea for every possible problem or risk, some quite arcane. So opinions multiply.

This Model Document offers a reasonable template for a variety of common opinions of counsel for commercial real estate loan closings. It covers the basic matters listed above—excluding opinions specific to CMBS transactions—plus usury and choice of law (really part of the enforceability opinion), noncontravention and some security interests. It has options for New York, including issuance of a New York local real estate counsel opinion and a New York law enforceability opinion with real property out of state.

"This model opinion also does not try to describe the conditions that a transaction must meet so counsel can give each opinion conclusion."

Given how many great minds have devoted tremendous effort to legal opinions in the last few decades, it may be presumptuous to offer a model legal opinion prepared without extensive deliberation by a bar association committee or multiple committees of multiple bar associations. Nonetheless, that is exactly what follows. It reflects the author's experience and lessons learned through extensive work on legal opinions for several decades, including a decade as a member of the finance opinions committee of a global law firm.

This model opinion incorporates ideas from bar association opinion reports. It also reflects the author's efforts to simplify and improve the wording of opinions consistent with industry standards and expectations. The result: a virtually comment-proof model opinion that also does not expose any reasonably careful opinion giver to risk. Although endnotes address a few opinion issues, the substantive discussion of those issues is minimal. Anyone desiring to learn more about them can look at any of the dozens of opinion reports issued by dozens of bar associations, plus books on the topic.

As a practical matter, the value of an opinion derives primarily from the process of thinking through exactly what the opinion should say and how the opinion giver can get comfortable with those conclusions, and not so much from the precise words on the page.

In all the excitement about opinion verbiage (particularly assumptions, exceptions, exclusions, limitations, qualifications, etc.), any opinion giver should not overlook a not-so-minor detail: the need to read and think about the documents the opinion covers. Counsel should look for issues on enforceability or anything else and otherwise confirm the "standard" process conclusions. That process represents a separate discussion outside the scope of this model document. Exactly what does counsel need to see to conclude that loan documents are "enforceable"? What would make a document "unenforceable" or prevent counsel from issuing an enforceability opinion? Those are great questions, but they are not answered here.

This model opinion also does not try to describe the conditions that a transaction must meet so counsel can give each opinion conclusion. Those conditions are certainly important—they add up to much of the law that applies to everything the opinion covers—but they lie outside the scope of this document. It is assumed that counsel using this model opinion already knows the law without restating or summarizing it here. The goal here simply consists of providing a reasonable template for "ordinary" opinions of counsel. The template does include a few substantive legal comments, mostly tied to the opinion preparation process, but they do not amount to exhaustive commentary of the type often found in opinion reports.

Though not often requested from local counsel, and generally disfavored in any case, this opinion template offers conclusions and qualifications on "pending litigation" and compliance with "material agreements." These conclusions should come, if at all, from Borrower's internal counsel and not any form of outside counsel, except maybe Borrower's outside general counsel. To issue these conclusions, local counsel will generally need to rely entirely on certificates from Borrower. If local counsel with no other connection to Borrower relies on unverified certificates from Borrower, those conclusions are worthless. Counsel would perform no useful function.

The bulk of most opinions consists of a mishmash of assumptions, exceptions, limitations, qualifications and restrictions (the "caveats")—every caveat the opinions committee can think of or has ever seen in any opinions report or the absence of which has led any opinion giver to incur liability or a whiff of possible liability under a

legal opinion. This model opinion seeks to impose some order on that accumulation to help opinion givers and recipients think through what might and might not make sense in a particular case. As a first step, this model opinion collects each category of caveats separately. The user will need to exercise judgment to decide which caveats to keep or delete. Endnotes offer a bit of guidance.

Opinions often tie particular caveats to particular conclusions, particularly the enforceability conclusions. That practice may feel very precise and careful. But it creates a risk that the opinion giver might fail to tie a particular caveat to a particular conclusion to which it should have been tied. For example, suppose paragraph 2 consists of an enforceability conclusion on Borrower. The caveats can refer to paragraph 2. Later, though, the parties might add paragraph 3 with a separate enforceability conclusion on Guarantor. The opinion giver might forget to tie the caveats to the newly added conclusion.[1] Hence this model opinion refrains from tying caveats to conclusions. All caveats apply to all conclusions. That varies from the typical expectation that the caveats will tie only to the enforceability conclusion. But why shouldn't they apply to all conclusions? If an opinion recipient wants to see more tying, the opinion giver can add some rope. It adds no value while creating risk. But some people like rope.

This opinion seeks to apply principles of Plain English writing: short and direct sentences, verbs, ordinary words, active voice, not too many parentheses, basic principles expressed before their exceptions and presentation of concepts in an orderly and logical way. Sometimes the result doesn't sound like "the usual wording." Lawyers often don't like that. They feel more comfortable doing everything exactly as it has always been done, whether or not some other way might be better. The author favors improvement over time, accomplished carefully and thoughtfully.

When counsel other than the borrower's main closing counsel (typically loan counsel) issues an opinion, that can require some coordination. In the worst case, local counsel will refuse to allow its opinion to be released until it has seen complete, final and fully executed documents. In other cases, local counsel may establish elaborate escrow mechanisms for release of the signed opinion, as if it has extraordinary value and must be guarded like the Crown Jewels. The author prefers not to stand on ceremony about any of this.

Instead, counsel should deliver the signed opinion with the same level of formality, if any, that would apply to delivering any other signed closing document to trusted counsel for another party. If one does not have confidence in that counsel to handle these matters professionally, then why would one expect that counsel not to substitute pages without authorization, or otherwise misbehave? And if one has any such doubts, one should probably decline the assignment entirely.

Along similar lines, the Marc Dreier drama[2] demonstrated the risks of acting "just" as an opinion giver, especially on due authorization and execution, in a transaction where one has no other involvement. An opinion giver may want to decline that role, or at least ask questions before proceeding.[3]

"Any law firm should keep an organized record of opinions issued with details on who did the background work to assure each opinion was correct."

To accommodate the typical chaos of a transaction—"just this one time we're really in a hurry" —counsel will usually need to send out a draft opinion without having fully reviewed the documents, with the idea that if any issues appear the parties will deal with them. As a practical matter, if the documents raise issues, they will more likely lead to changes to the documents than changes to the opinion, so the practice of sending out the opinion before reading the documents makes sense. The opinion giver just needs to remember to pay attention to the documents, identify and raise any concerns and make sure they get addressed.

This model opinion arose out of many transactions where the author and his colleagues at Joshua Stein PLLC acted as New York counsel or borrower's closing counsel with documents governed by New York law. Use in other states will require significant adjustment and checking.

Instructions and comments to the user appear in the endnotes.

This model opinion has no internal section cross-references. They just cause mischief.

The template opinion has a table of contents and an index of defined terms, originally just for pedagogical reasons but ultimately for reader convenience, after the signature page. The template opinion uses a coordinated section numbering system, to better highlight building blocks and structure. Both measures described in this paragraph are "off market" but helpful.

If the user keeps the index of defined terms, then any changes or additions to defined terms should be suitably marked for that index.

Any law firm should keep an organized record of opinions issued with details on who did the background work to assure each opinion was correct. This can include preparing a backup memo to support the opinion conclusions.

MODEL OPINION OF COUNSEL

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[LETTERHEAD OF COUNSEL]

_____, 201_ (the "Closing Date")

_____, as Administrative Agent for the Lenders (in that capacity, "Administrative Agent")[4]
_____
_____
_____

Loan of $_____ (the "Loan") Referring to Premises (the "Premises") Located at _____ in State of _____ (the "Real Property Jurisdiction"[5]) – File No. ___

Ladies and Gentlemen:

1. CONTEXT

We have acted as special[6] counsel in the State of New York (the "State") to these parties ("Borrower Parties"):

1.1. _____, a _____ ("Borrower");

1.2. _____, a _____, Borrower's sole member;

1.3. _____, an individual ("Guarantor"); and

1.4. _____, a _____ _____ ("Manager").[7]

Borrower Parties asked us to give you this opinion to meet [the condition in Loan Agreement § ___] [your Loan requirements]. In this opinion: (a) definitions in the Loan Agreement apply except where this opinion defines a term[8]; (b) we may use a term before defining it; and (c) "Loan Activities" means execution and delivery of the Loan Documents and Borrower's borrowing and repaying the Loan. An index of defined terms follows the signature page.[9]

2. ITEMS CONSIDERED

We considered matters of fact and questions of law as appropriate to support this opinion. We reviewed, among other things:

2.1. Loan Documents. These documents (the "Loan Documents"), all dated as of the Closing Date and entered into between Borrower and (or from Borrower to) Administrative Agent except as stated:[10]

2.1.1. Loan Agreement ("Loan Agreement");

2.1.2. Promissory Note ("Note");

2.1.3. Security Agreement ("Security Agreement");

2.1.4. Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Financing Statement ("Mortgage"), which we have been advised will be submitted for

recording in the real property records of _____[11] (the "Real Property Records"), in the Real Property Jurisdiction, describing certain real and personal property (the "Mortgaged Property"[12]);

2.1.5. Assignment of Leases and Rents, to be submitted for recording in the Real Property Records (with the Mortgage [and the Fixture Filing], the "Real Property Documents"[13]);

2.1.6. Cash Management Agreement among Borrower, Administrative Agent and Manager;

2.1.7. Deposit Account Control Agreement (the "DACA") among Borrower, Administrative Agent, Manager and _____ ("Cash Bank");

2.1.8. Environmental Indemnity Agreement made by Borrower and Guarantor to Administrative Agent as Indemnitee;

2.1.9. Guaranty of Recourse Obligations from Guarantor to Administrative Agent; and

2.1.10. _____.

2.2. Organizational Documents. These documents for Borrower [, certain of Borrower's direct and indirect constituents,] and _____ (the "Organizational Documents"):[14]

2.2.1. Borrower's filed certificate of formation dated _____ as amended _____ and _____;

2.2.2. Borrower's operating agreement dated _____ as amended _____ and _____;

2.2.3. Borrower's certificate of limited partnership dated _____ as amended ____ and _____;

2.2.4. Borrower's agreement of limited partnership dated _____ as amended _____ and _____;

2.2.5. Borrower's good standing certificate dated _____;[15]

2.2.6. Officer's Certificate dated _____; and

2.2.7. Consent dated _____, signed by _____.

2.3. Material Agreements. Only those agreements and instruments that evidence or secure each Borrower Party's indebtedness for borrowed money (or that are otherwise material to a Borrower Party) as listed in the Officer's Certificate (the "Material Agreements").[16]

2.4. Financing Statements. Photocopy(ies) of these UCC-1 financing statement(s) naming Borrower as debtor and Administrative Agent as secured party ("Secured Party"), with all schedules and exhibits, copies of which are attached as Exhibit __,[17] each intended to be filed in the office indicated below (the "Central Filing Office"[18]) for the state indicated (collectively, the "Financing Statements"):

2.4.1. Financing Statement to be filed with Secretary of State ("SOS") of the State; and

2.4.2. Financing statement to be filed with SOS of _____.

2.5. Fixture Filing. Photocopy of a UCC-1 financing statement naming Borrower as debtor and Secured Party as secured party, with all schedules and exhibits, referring to goods that are or may become fixtures under State UCC § 9-102(a)(41) ("Fixtures"), a copy of which is attached as Exhibit _, intended to be filed in the Real Property Records (the "Fixture Filing").[19]

2.6. _____.[20]

3. RELIANCE BY COUNSEL AND SCOPE OF REVIEW

With your consent, we relied on all the foregoing and, for some factual matters: (1) representations and warranties in the Loan Documents;[21] (2) statements in the Organizational Documents; and (3) certificates of Borrower Parties' officer(s) and of government officials, as of recent date. We have not independently verified those factual matters. We have no reason to believe any of these documents are inaccurate.[22] We have not obtained datedowns of any Organizational Documents filed with any SOS beyond the certificates recited above.[23]

Where we make a statement "to our knowledge," or with a similar qualification, we mean that the attorneys in this law practice who reviewed the Loan Documents and prepared this opinion have no current actual knowledge of any inaccuracy. Except where we state otherwise, we have not independently investigated the accuracy of any such statement.

We are admitted to practice law only in the State. We opine on only these laws (the "Included Laws"): (1) United States federal law[24]; (2) internal law of the State [excluding any law on choice of law[25]]; (3) recording requirements for the Real Property Records (the "Recording Requirements"); (4) only for our Borrower Status Conclusion and our Execution and Delivery Conclusion, the Delaware Limited Liability Company Act, Delaware Code Title 6 Chapter 18 ("DLLCA") and Delaware Revised Uniform Limited Partnership Act, Delaware Code Title 6, Chapter 17 ("DRULPA") (DLLCA and DRUPLA, together, "Delaware Corporate Law")[26]; and (5) only for our Perfection by Filing Conclusion, the Delaware Uniform Commercial Code, Delaware Code Title 6 Article 9 (the "Delaware UCC").[27]

To the extent we opine on the Delaware UCC or Delaware Corporate Law, we do so based only on that statute as published on or about the Closing Date on the State of Delaware website (http://delcode.delaware.gov), without regard to regulations or judicial interpretations.[28] We are not licensed in Delaware.

In this opinion, "UCC" means: (1) if preceded by a state's name, the Uniform Commercial Code in that state[29]; and (2) otherwise, whatever Uniform Commercial Code applies.

4. CONCLUSIONS

Subject to the foregoing and the further matters in this opinion, we opine that, as of the Closing Date:

4.1. Borrower Status. Borrower is a validly existing [limited liability company/limited partnership] under the _____ law of _____ with company power and authority to

conduct the Loan Activities. Based solely on certificates from public officials, Borrower is in good standing under the laws of _____ and qualified to do business in _____. (We refer to this paragraph as our "Borrower Status Conclusion.")

4.2. Execution and Delivery. Each Borrower Party's execution, delivery and performance of the Loan Documents to which it is a party are within that Borrower Party's company powers and have been duly authorized by all necessary action of that Borrower Party. (We refer to this paragraph as our "Execution and Delivery Conclusion.")

4.3. Enforceability. To the extent New York law governs, each Loan Document is a valid and binding obligation of each Borrower Party that is a party to that Loan Document, enforceable against that Borrower Party in accordance with its terms (our "Enforceability Conclusion").[30]

4.4. Usury. Without limiting our Enforceability Conclusion, the Loan Documents violate no law on usury, interest rates or compound interest.[31]

4.5. Choice of New York Law. Without limiting our Enforceability Conclusion, a New York state court, or a federal court applying New York law, should[32] enforce any contractual choice of New York law or venue in the Loan Documents.[33]

4.6. Noncontravention. The Loan Activities of the Borrower Parties do not do any of the following (collectively, our "Noncontravention Conclusion"):

4.6.1. Organizational Documents. Violate any Organizational Document (our "No-Violation-of-Org-Docs Conclusion");

4.6.2. Violation of Law. Violate any Included Law that applies to any Borrower Party (our "No-Violation-of-Law Conclusion");

4.6.3. Government Approvals. Require any Borrower Party to obtain any consent, approval or authorization from or make any registration, declaration or filing with any Government Authority (a "Government Approval"), on or before the Closing Date, except any Government Approval: (1) necessary to perfect or protect Administrative Agent's security interests; or (2) already obtained or accomplished (our "No-Government-Approval Conclusion")[34]; or

4.6.4. Material Agreements. Result in a breach or default under any Material Agreement (our "Material Agreements Conclusion").[35]

4.7. Qualification of Borrower. Borrower is qualified to do business [and in good standing] [as a foreign entity] in the State.

4.8. Mortgage UCC Attachment Conclusion. The Mortgage creates, in favor of Administrative Agent as secured party, a security interest in Borrower's rights in that part of the Mortgaged Property described in Mortgage § __ in which Borrower has rights and a security interest may be created under State UCC Article 9, including Fixtures (the "Mortgage UCC Collateral"). That security interest secures the Obligations.[36] (We refer to this paragraph as our "Mortgage UCC Attachment Conclusion.")

4.9. Account Collateral Attachment.[37] The Security Agreement creates a UCC security interest in favor of Administrative Agent in Borrower's rights in the Account Collateral

under the Security Agreement. The Cash Management Agreement creates in favor of Administrative Agent a security interest in Borrower's rights in the Cash Management Account under the Cash Management Agreement, account number _____ maintained by Cash Bank and its subaccounts. That security interest secures the Obligations. (We refer to this paragraph as our "Account Collateral Attachment Conclusion.")

4.10. Perfection by Filing Conclusion. The Financing Statement is in appropriate form to file in the State's Central Filing Office. Upon proper filing of the Financing Statement there, Secured Party's security interest in Borrower's rights in the Mortgage UCC Collateral described in the Financing Statement[38] will be perfected to the extent a security interest in that collateral can be perfected under the State UCC by filing a financing statement in that Central Filing Office. (We refer to this paragraph as our "Perfection by Filing Conclusion.")

4.11. Fixtures Perfection Conclusion. Upon proper recording and indexing of the Mortgage against the Real Property in the Real Property Records, Administrative Agent's security interest in Borrower's rights in the Fixtures that are, or are to become, affixed to any Real Property constituting Mortgaged Property (the "Pledged Fixtures") will be perfected to the extent a security interest in the Pledged Fixtures can be perfected under the State UCC by recording a mortgage in the Real Property Records.[39] (We refer to this paragraph as our "Fixtures Perfection Conclusion.")

[The previous Conclusion and the next Conclusion are alternative paragraphs. See commentary in endnotes.]

4.12. Fixtures Perfection Conclusion. The Fixture Filing is in appropriate form to file (or record) in the Real Property Records. Upon proper filing (or recording) and indexing of the Fixture Filing in the Real Property Records, Secured Party's security interest in Borrower's rights in that part of the Mortgaged Property consisting of Fixtures located on the real property described in Exhibit __ to the Fixture Filing will be perfected to the extent a security interest in those Fixtures can be perfected under the State UCC by filing (or recording) a financing statement for Fixtures in the Real Property Records.[40] (We refer to this paragraph as our "Fixtures Perfection Conclusion.")

4.13. Account Perfection Conclusion. To the extent the Collateral consists of one or more "deposit accounts" under UCC § 9-102(a)(29)[41] (each a "Deposit Account"), the DACA perfects Administrative Agent's security interest in Borrower's rights in those Deposit Accounts, when they hold funds. (We refer to this paragraph as our "Account Perfection Conclusion.")

4.14. Proper Form to Record. The Real Property Documents are in proper form to record in the Real Property Records,[42] if accompanied by all required affidavits, tax returns, cover pages and other deliveries, all in proper form and executed and acknowledged as required and accompanied by proper payment of mortgage recording tax, on which we do not opine.

4.15. Mortgage Form Conclusion.[43] The form of the Mortgage is sufficient to create a valid lien[44] on Borrower's right, title and interest in any Mortgaged Property that constitutes real property [except Fixtures][45] (the "Real Property"). The recording and proper indexing of the Mortgage in the Real Property Records[46] constitutes the only filing or recording necessary to give later purchasers and mortgagees of the Real Property constructive notice of any lien the Mortgage creates on the Real Property. No other recording, filing, re-recording or refiling is necessary to maintain any such lien on the Real Property. (We refer to this paragraph as our "Mortgage Form Conclusion.")[47]

4.16. Mortgage Tax Conclusion. The Real Property Jurisdiction imposes no documentary, filing, intangible, mortgage, note, privilege, recording or stamp tax (or other tax or fee) on delivery, execution, filing or recording of any Real Property Document, except these, on which we express no opinion: (i) nominal recording fees; (ii) any tax or fee imposed by local ordinance; (iii) transfer taxes on any transfer of title, including by foreclosure or deed in lieu and (iv) New York mortgage recording tax. We express no opinion on any business license, franchise, income, sales, withholding or other tax that may result from the Loan Activities, Loan Document enforcement or any other matter arising from the Loan Documents. (We refer to this paragraph as our "Mortgage Tax Conclusion.")[48]

4.17. Pending Litigation. Except as the Officer's Certificate discloses, we have no actual knowledge of any outstanding judgment or pending or threatened claim or litigation against any Borrower Party, which judgment, claim or litigation would materially adversely affect or impair the Loan Documents or the Loan Activities. (We refer to this paragraph as our "Pending Litigation Conclusion.")[49]

Our preceding conclusions are subject to these further assumptions, exclusions, qualifications and restrictions:[50]

5. ASSUMPTIONS

5.1. Entity Matters. We assume each party to the Loan Documents, including[51] each Borrower Party and Cash Bank: (1) is a legally recognized entity, duly formed and validly existing under the laws of a state of the United States, with power and authority to undertake its Loan Activities; and (2) has duly authorized, executed and delivered the Loan Documents to which it is a party.

5.2. Enforceability Against Others. We assume the Loan Documents constitute legally valid and binding obligations of all parties, except Borrower Parties, enforceable against each in accordance with their terms.

5.3. Noncontravention. [Except as we state in our Noncontravention Conclusion,[52]] we assume the Loan Activities of all parties, including Borrower Parties, do not violate any: (1) Excluded Law; (2) organizational documents; (3) agreement or instrument by which a party is bound; (4) court or governmental order; or (5) requirement, under any Excluded Law, to make or obtain any Government Approval.

5.4. Administrative Agent and Lenders. We assume Administrative Agent and each Lender: (1) has qualified to do business in New York, the United States and the Real Property Jurisdiction; and (2) is legally authorized and empowered to make the Loan and receive, hold and enforce the Loan Documents.

5.5. Guarantor. We assume Guarantor is legally competent to become obligated under, execute, deliver and perform its obligations under the Loan Documents to which it is a party.[53]

5.6. Loan Document Matters. We assume all: (1) conditions precedent in the Loan Documents except delivery of this opinion have been satisfied or waived; and (2) rights and remedies in the Loan Documents were granted without fraud or duress[54] or intent to hinder, delay or defeat any rights of any creditor of any Borrower Party.

5.7. Other Opinion(s). We understand you are receiving the opinion of ____ on _____ law and the opinion of _____ on _____. We express no opinion on any matter those opinions address. To the extent any such matter is necessary to our conclusions, we assume it.[55]

5.8. Real Property. We assume: (1) the Real Property is located in the geographic areas the Real Property Records cover; (2) the Loan Documents adequately, accurately and completely describe the Real Property; and (3) Borrower has or will have a record interest in the Real Property when the Real Property Documents are recorded.[56]

5.9. Accuracy/Completeness. We assume each document or certificate, including those from public officials, submitted to us for review or reliance is: (1) accurate, complete and correct; (2) an authentic original if it looks like an original; and (3) an authentic copy if it looks like a copy. We assume all signatures are genuine. We assume all documents were executed and delivered in substantially the same form we last received.[57]

5.10. Amendment of Original Documents.[58] Some Loan Documents amend, restate or modify documents previously signed (the "Original Documents"). We did not represent any parties to the Original Documents (collectively, "Original Parties") for the Original Documents. We assume: (a) all assumptions and conclusions we state in this opinion on the Loan Documents are accurate as they relate to the Original Documents; (b) the Original Documents remain in full force and effect; (c) no act or omission of any Original Party has impaired or waived any term of any Original Document or its enforceability; and (d) Administrative Agent and the Lenders hold the Original Documents.

5.11. Bankruptcy Approvals. We assume all necessary bankruptcy court approvals for Borrower's acquisition of the Mortgaged Property have been obtained, are valid, in full force and effect and not subject to appeal and fully authorize this transaction. We did not review them.[59]

6. EXCLUSIONS

6.1. Certain Clauses. We express no opinion on enforceability of any: (i) consent to, or restriction on, judicial relief, jurisdiction or venue, except any express submission to New York law and jurisdiction[60]; (ii) advance waiver of claims, defenses, rights granted by law or notice, opportunity for hearing, evidentiary requirements, statutes of limitation, trial by jury or at law or other procedural rights; (iii) provision for exclusivity, election or cumulation of rights or remedies; (iv) restriction on non-written modifications and waivers; (v) provision authorizing or validating conclusive or discretionary determinations; (vi) grant of setoff rights; (vii) provision that a guarantor is liable as a primary obligor and not as a surety; (viii) provision for payment of attorneys' fees if it violates law or public policy; (ix) proxy, power or trust, including any power of attorney or appointment of an attorney in fact; (x) provision prohibiting, restricting or requiring consent to assignment or transfer of any right or property; (xi) provision for liquidated damages, default interest, late charges, monetary penalties, prepayment or make-whole premiums or other economic remedies; (xii) power of sale remedy in the Mortgage; (xiii) provisions stating that contingent obligations survive repayment of the Loan or exercise of remedies after default; or (xiv) provision that makes a Guarantor personally liable if a Borrower Party defends against Loan enforcement, absent an exception for good faith defenses.

6.2. Excluded Laws. We express no opinion on these laws (the "Excluded Laws"): (1) any Delaware law except Delaware Corporate Law [and the Delaware UCC]; (2) the law of any jurisdiction we do not mention in the definition of Included Laws; (3) zoning, land use or environmental law; (4) laws, ordinances, codes and other requirements of any municipality, agency or other political subdivision of any state or commonwealth, including the State, except

Recording Requirements; (5) securities law, bank or other lender regulatory law, tax law, antitrust or trade regulation law, insolvency or fraudulent transfer law, bankruptcy law, margin regulations, NASD or NYSE rules, pension or employee benefit law (including ERISA), compliance with fiduciary duty requirements and other laws not customarily recognized as applying to general business organizations engaged in transactions like the Loan; or (6) any law or regulation that applies because of anyone's legal or regulatory status.[61]

6.3. Security Interests. [Except to the extent of (1) any Conclusion the defined term for which includes the word "Attachment" or the word "Perfection"; and (2) our Mortgage Form Conclusion, to the extent it addresses attachment of any UCC security interest ("(1)" and "(2)," each, a "Security Interest Conclusion"),[62]] we express no opinion on attachment, creation, existence, perfection, priority or validity of any security interest.

6.4. Property Matters. We express no opinion on: (1) ownership of, title to or any rights or interests in the Mortgaged Property (or any exceptions to ownership or title) or anything else the Real Property Records might disclose; or (2) accuracy, adequacy or completeness of any categorization, classification or description of property.

6.5. Liens; Licenses; Certain Clauses. We express no opinion on (1) whether any Real Property Document actually creates any lien, security interest or other interest in or affecting any Real Property [except Pledged Fixtures][63]; (2) any business license, franchise, income, sales, transfer, withholding or other tax, or reassessment for real estate taxes, that may result from any Loan Activities or Loan Document enforcement; or (3) enforceability against third parties of any "after-acquired property" or "dragnet" clause in any Loan Document.

6.6. Cash Bank. We are not counsel to and we have no relationship with Cash Bank.[64]

6.7. Out of State Real Property. For any real property security outside the State, we express no opinion on: (a) whether a court in the State would or could entertain any action: (i) to enforce any real property remedy, including any preliminary remedy such as appointment of a receiver or any other remedy arising from, relating to or governed by real property law; (ii) to affect title to or possession or occupancy; or (iii) otherwise of a nature requiring jurisdiction over real property; or (b) which provisions of the Real Property Documents the law of the Real Property Jurisdiction would govern.

7. QUALIFICATIONS (GENERAL)

7.1. Generic Limitations. We note the effect of the following (the "Generic Limitations"): (1) bankruptcy, fraudulent transfer, insolvency, moratorium, preference, reorganization, and other similar laws relating to or affecting creditors' rights or remedies; (2) general principles of equity, whether considered in a proceeding in equity or at law, including possible unavailability of specific performance or injunctive relief and possible limitations on enforcement of full recourse "carveout guaranties" triggered by immaterial defaults or other immaterial matters; (3) concepts of fair dealing, good faith, materiality and reasonableness; (4) the discretion of the court before which a proceeding is brought; and (5) unenforceability under certain circumstances of provisions for indemnification, exculpation, or contribution.[65]

7.2. Practical Realization. The Generic Limitations do not make the Loan Documents inadequate for practical realization of the benefits intended to be provided by the Loan Documents under Included Law. By that we mean only that the Generic Limitations, as applied to and taking into account the terms of the Loan Documents and Included Law, should not, either alone or in combination, make the Loan Documents entirely invalid or entirely preclude: (i)

acceleration of Borrower's obligation to repay principal and interest on the Loan if Borrower fails to pay or perform a substantial obligation under the Loan Documents, continuing beyond cure periods; or (ii) judicial enforcement, subject to the restrictions and requirements of Included Law, of Borrower's obligations to pay principal and interest.[66]

7.3. Law Considered. Our conclusions in this opinion reflect our consideration of only statutes, rules and regulations that a commercial real estate finance lawyer in the State, with an ordinary degree of professional competence in the area, would recognize normally apply to borrowers and guarantors in secured commercial loans.

7.4. Assignment Restrictions. We note the effect of UCC §§ 9-406, 9-407, 9-408 and 9-409 on any Loan Document provision that purports to prohibit, restrict, require consent for or otherwise condition or limit any assignment.[67]

7.5. Material Agreements and Pending Litigation Conclusions. Our Material Agreements Conclusion and Pending Litigation Conclusion: (a) rely solely on the Officer's Certificate, which we have not verified; and (b) reflect no investigation or searches on our part. We have no knowledge on these matters beyond the Officer's Certificate.[68]

8. QUALIFICATIONS (NEW YORK)

8.1. UCC Limitations. New York UCC § 1-301 imposes mandatory choice of law provisions, which may not be varied by contract.[69]

8.2. Out of State Real Property. To the extent our Enforceability Conclusion relates to any contractual choice of New York law or forum in the Loan Documents but New York is not the Real Property Jurisdiction, we have relied exclusively upon, and assume federal constitutionality of, New York General Obligations Law § 5-1401. At least one federal district court has questioned that constitutionality if New York has no connection to the parties or the transaction and use of New York law would violate an important public policy of a more interested jurisdiction.[70] We express no opinion on whether a jurisdiction outside New York would enforce a contractual choice of New York law or a judgment resulting from that choice of law.[71]

8.3. RPAPL Limitations. Our opinions are subject to New York Real Property Actions and Proceedings Law ("RPAPL") §§ 1301 and 1371. These statutes set procedural and substantive standards, and sequencing requirements, that limit a mortgagee's ability to enforce, or obtain a deficiency or other personal judgment on, a loan secured by New York real property or a related guaranty (the "New York Limitations").[72] It is a traditional rule of New York law that the New York Limitations do not apply if a mortgagee seeks a personal judgment against a mortgagor or guarantor in New York after foreclosing on real property outside New York ("Out-of-State Collateral").[73] Recent cases both in and out of New York suggest, however, that courts may apply the New York Limitations even for Out-of-State Collateral, notwithstanding the traditional rule that they do not apply there.[74] Thus a New York court could apply the New York Limitations even to Out-of-State Collateral, so Administrative Agent would need to consider them before commencing enforcement.[75]

8.4. CPLR Enforcement Limitation. We note Civil Practice Law and Rules § 5236(b), which states a mortgage lender cannot enforce a personal judgment against the mortgaged property.[76] We have not considered whether or how that restriction would apply to out-of-state real property under loan documents partly governed by New York law.

8.5. Lien Law. We express no opinion on any compliance with the New York Lien Law (the "Lien Law"), including: (1) proper characterization of any "costs of improvement"; (2) compliance with filing requirements for any building loan agreement or any other filing the Lien Law may contemplate; (3) compliance with Lien Law provisions on statutory trusts (Article 3-A); and (4) accuracy of the § 22 Lien Law Affidavit attached to the Building Loan Agreement. The Lien Law states that the Building Loan may be used only to pay "costs of improvement." To the extent it funds other items, the Building Loan Mortgage may be subordinated. We have tried to help Borrower and Administrative Agent characterize costs to be funded from the Loan as "costs of improvement" or otherwise. The governing case law is inconsistent and uncertain. We do not guarantee those characterizations. We recommend: (a) erring on the side of caution; (b) categorizing any unclear future disbursement of Loan proceeds as not covering "costs of improvement"; and (c) hence funding those unclear future disbursements from the Project Loan, not the Building Loan. Also, it has become common for construction lenders to file a Notice of Lending to seek to mitigate exposure under Lien Law Article 3-A, although some commentators question the need for that.[77]

9. QUALIFICATIONS (SECURITY INTERESTS)

Our Security Interest Conclusions are subject to these qualifications:[78]

9.1. Attachment. We assume Administrative Agent's security interest in the Mortgage UCC Collateral has attached.[79]

9.2. Non-Mortgage UCC Collateral. We express no opinion on any: (1) collateral outside the scope of UCC Articles 8 and 9; (2) priority of any security interest or lien; (3) agricultural lien; (4) property subject to a statute, regulation or treaty that preempts the UCC; or (5) collateral that consists of letter-of-credit rights, commercial tort claims, goods covered by a certificate of title, claims against any government or government agency, consumer goods, crops grown or to be grown, uncut timber or goods that are or are to become Fixtures, as-extracted collateral or cooperative interests.

9.3. Sufficiency. We assume the Loan Document collateral descriptions sufficiently describe the intended collateral. We express no opinion on whether general phrases such as "all personal property" or "all assets," used in a security agreement, would create a valid security interest in anything described that way.

9.4. Rights; Value. We assume Borrower has (or for after-acquired property will have) rights or the power to transfer rights in the Collateral.[80] We express no opinion on Borrower's rights in any Collateral. Administrative Agent's security interest in any after-acquired property will not attach until Borrower acquires it.

9.5. Deposit Accounts. To the extent the Collateral consists of one or more Deposit Accounts, we assume no one except Administrative Agent or Borrower has "control" of that Collateral under UCC § 9-104.[81]

9.6. Bankruptcy Code. If a debtor acquires property while subject to any proceeding under the United States Bankruptcy Code (the "Bankruptcy Code"), then Bankruptcy Code § 552 limits the effect of any previous security agreement.[82]

9.7. Assignment Prohibitions. We express no opinion on any security interest in any collateral subject to an agreement that prohibits, restricts or conditions its assignment, except to the extent that the UCC overrides that agreement or Borrower has complied with it.

9.8. Security Interest Limitations. UCC § 9-315 limits perfection of a security interest in "proceeds" (under the UCC) of collateral.[83] UCC § 9-335 or 9-336 limits any security interest in any goods that are accessions to, or commingled or processed with, other goods.[84] UCC § 9-515 limits the Fixture Filing's duration.[85]

9.9. UCC Restrictions. We also note: (i) unenforceability of contractual provisions waiving or varying the rules in UCC § 9-602;[86] (ii) unenforceability in certain cases of contractual provisions on self-help or summary remedies without notice or opportunity for hearing or correction; and (iii) UCC provisions that require a secured party to act in good faith and in a commercially reasonable manner.

9.10. Transmitting Utilities. We assume Borrower is not a "transmitting utility" under UCC § 9-102(a)(80).[87]

10. RESTRICTIONS

This opinion speaks only as of the Closing Date. We disclaim any duty to advise you of anything occurring after the Closing Date that might affect any of our conclusions.

We furnish this opinion only to you and only for your benefit for the Loan. You may not rely on it for any other purpose.[88] You may not furnish or quote from this opinion to anyone else for any other purpose. No one else may rely on this opinion. This paragraph is subject to the remaining paragraphs (below) of this opinion.

We consent to reliance on this opinion by: (a) Administrative Agent and each Lender; (b) the successors, assigns or any replacement of any addressee of this opinion and (c) any trustee or servicer for any securitization that includes the Loan. Notwithstanding the previous sentence, this opinion may not be relied upon by any: (x) person acquiring its interest in the Loan in violation of the Loan Documents; (y) title insurer, even if it acquires an interest in the Loan by subrogation or any other means; or (z) successor or assign of either.

You may share this opinion, for review but not reliance, with any (a) accountant, attorney, auditor or other professional adviser; (b) participant or assignee; (c) rating agency that rates any notes or certificates issued in a securitization that includes the Loan; (d) non-hired nationally recognized statistical rating organization so long as it obtains access only through a password-protected website and complies with Rule 17g-5 under the Securities Exchange Act of 1934 or other law that applies, but we do not admit such review needs our consent; (e) government agency with regulatory authority over holder(s) of the Loan; or (f) designated persons by order of government authority.

No Further Text on This Page.

Any reliance on or review of this opinion shall be on the conditions and understandings that: (i) it must be actual and reasonable under the circumstances at the time; and (ii) any person that relies upon or reviews this opinion shall keep it confidential, except for disclosures necessary and appropriate given the review or reliance otherwise allowed above.

Very truly yours,[89]

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Endnotes

1. See In re SonicBLUE Inc., No. 03-51775, WL 926871, at *3 (Bankr. N.D. Cal. Mar. 26, 2007) ("In what may have been a scrivener's error, the bankruptcy limitation in paragraph 9 referenced only paragraph 2 and not paragraph 3 of the opinion letter."). Counsel or its insurance carrier settled the resulting claims, plus some others, for about $10 million.
2. Marc Dreier, once a prominent New York transactional lawyer, used left-over extra signature pages from closings to create new "loan documents" out of whole cloth. He engaged major law firms to issue opinions on those documents. When Dreier's victims sued everyone in sight, the opinion issuers became defendants, though they generally prevailed. For details, visit http://tinyurl.com/zs7kfgj and www.bop.gov (inmates; find an inmate).
3. Every time something goes wrong with a legal opinion, new caveats are born, much like the development of insurance policies. In this case, one might add something like this: Communications with Lead Counsel. We have communicated entirely with Borrower Parties' lead closing counsel, _____ ("Lead Counsel"), not with any Borrower Party, about the Loan Documents, this engagement, our engagement letter and issuance of this opinion. We have no relationship with any Borrower Party beyond that engagement by Lead Counsel. We assume Lead Counsel acts (and is fully authorized to act) for all Borrower Parties regarding this engagement. We disclaim any responsibility to confirm Lead Counsel's authority to engage us or to act for Borrower Parties. If any issue may exist regarding that authority, we encourage you to take such actions as may be necessary or appropriate to confirm Lead Counsel's authority and bona fides. If one has enough doubts to consider adding a paragraph like this one, that's also a good reason to take a pass.
4. This template assumes "Administrative Agent" holds the Mortgage acting for a Lender group. The Real Property Documents should identify Administrative Agent accordingly. Because all Loan Documents run to Administrative Agent for the Lenders, so should the opinion.
5. For a transaction entirely in New York, replace "Real Property Jurisdiction" with "State" throughout and define "State" just once.
6. If the opinion giver had only a limited role or engagement, say so, e.g., "special," "local" or "New York" counsel. Even if a firm does most or all of a client's legal work, it will rarely identify itself as "general counsel."
7. If Manager is unrelated, remove it from Borrower Parties and add it later to the parties on whom counsel makes assumptions (due formation, execution, etc.).
8. Though convenient, incorporation by reference might cause errors. One should try to define in the opinion, precisely, any terms it uses. To the extent an opinion uses terms defined in the Loan Documents, confirm: (1) the Loan Documents do in fact define them; and (2) the opinion uses each correctly. As an example of "2," the Loan Agreement probably defines "Loan Documents" to include every document in any way ever connected to the Loan. Counsel should not opine on those "Loan Documents," but instead only on specific "Loan Documents" defined in the opinion.
9. Most opinions do not have an index of defined terms. Given the extensive use of defined terms in this model, partly to avoid cross-references, an index of defined terms makes sense. One can certainly delete it.
10. Adjust as appropriate to capture all "significant" documents. To the extent those documents require new or different conclusions, adjust the opinion caveats accordingly.
11. Fill in the location of the Real Property Records, typically "County of _____."
12. When opining on real property security document(s), identify them here. If the documents do not define Mortgaged Property, edit appropriately.
13. If the transaction involves Real Property Documents in only one state, the Real Property Jurisdiction, this defined term will work. One can globally replace it and the definite article that precedes it with the actual jurisdiction, e.g., "New York" or the "State." If the transaction involves Real Property Documents in multiple states, edit accordingly.
14. Edit for entity type. These options cover only limited liability companies and limited partnerships. Corporations rarely appear in real estate transactions and opinions. Trusts sometimes appear, typically requiring involvement by the trust's counsel. When a transaction starts, clarify who will obtain entity searches and filings—typically Borrower's main closing counsel or Lender's counsel, not local counsel. Among other things, an entity's charter documents represent the best and only authoritative evidence of the entity's name.
15. Only for domestic entities or foreign entities registered in New York.
16. Include only in the unusual case where the opinion refers to Material Agreements.
17. Lender's counsel should distribute draft UCC financing statements, including exhibits and riders, early in the process. If they appear at the last minute, then this opinion will become a last-minute emergency. Prevention of that common problem requires help from Lender's counsel. Pre-filing has some appeal.
18. Particularly for filings in only one state, replace this defined term with the exact name of the office.
19. If the Mortgage acts as a fixture filing, delete this paragraph. Most states allow a Mortgage to act as a fixture filing if it satisfies UCC § 9-502(c). That eliminates a separate Fixture Filing as well as issues on expiration, continuation and future changes of the debtor's name or status. In New York, this approach has one possible downside to a secured party. Any New York Mortgage must limit its principal amount. If the Mortgage for any reason secures less than the entire Loan, one might prefer that the "principal amount" limitation not burden the fixture filing. One could use a separate fixture filing in addition to, or instead of, the fixture filing in the Mortgage. One can also try to assure that the "principal amount" limitation does not limit the granting language for the security interest in Fixtures. Although these New York concerns are technically valid, they may not justify incremental legal fees.
20. List other matters here as appropriate.
21. If the addressee rejects reliance on Borrower's representations and warranties, delete the concept. Counsel would then need to beef up the officers' certificates to deliver equivalent comfort, thus incurring legal fees to produce no value.
22. The preceding sentence may not be necessary. It just states the only basis on which opinion giver could proceed. It might raise opinion giver's standard of care. But it is reasonable for Lender to request. It is also reasonable for opinion giver to omit.
23. If the preceding sentence causes concern, consider adding this nonstandard statement: "Instead, with your consent, we have relied on SOS website(s), confirming the 'Active' or equivalent status of each Borrower Party as of shortly before the Closing Date, as a substitute for a further datedown."
24. Although federal law is customary, local real estate counsel has no reason to opine on it. One hopes that someone with a more central role has considered the existence and effect of federal law.
25. In New York, typically delete the bracketed language because counsel can issue a choice of law opinion based on a favorable statute, as appears in the text of this opinion template. Other states often require a "reasoned opinion" not worth the trouble.
26. Include this clause only if counsel opines on these matters for Delaware entities. Clearly identify any conclusions on Delaware law. Non-Delaware counsel will often opine on "routine" matters of Delaware corporate or UCC law, but not "enforceability" of, e.g., the terms of an operating agreement. In "non-routine" cases, use Delaware counsel.
27. Include this clause when opining on UCC filings against Delaware entities.
28. The preceding sentence often appears in "routine" Delaware corporate opinions issued by non-Delaware lawyers. One could say Lender should reject it, insisting instead on either (a) an opinion from Delaware counsel; or (b) more diligence by non-Delaware counsel. As a practical matter, the formulation in text accurately describes industry standards and expectations for

simple Delaware entities the opinion giver formed. One would engage Delaware counsel for complex entities, entities with issues or history or (maybe) entities not formed by the opinion giver.

29. When opining on more than one jurisdiction's UCC (e.g., where different states' UCC's govern validity and perfection), say which state's UCC governs which conclusion.

30. Sometimes one sees the word "legal" before the word "valid" or "binding." This may imply an opinion on legality, better addressed elsewhere in terms of noncontravention.

31. In New York, counsel can almost always readily issue a usury opinion for any substantial transaction with minimal due diligence. Rather than wait for such a request, this model opinion includes suitable language. This helps prevent sloppiness if counsel puts together a usury conclusion at the last minute in opinion negotiations.

32. Lender will often ask counsel to replace "should" with "will" or "shall."

33. Like usury, this conclusion will usually raise no concerns for a transaction whose documents choose New York law, and appears here to prevent last-minute sloppiness. New York law expressly validates New York choice of law clauses. See Ministers & Missionaries Benefit Bd. v. Snow, 26 N.Y.3d 466, 470, 45 N.E.3d 917, 919, 25 N.Y.S.3d 21, 23 (2015). But see below for caveats.

34. Counsel often raises an exception here for any Government Approval "any securities law may require for sale of any collateral." That seems unnecessary. The opinion refers only to Government Approvals required at the Closing Date.

35. This conclusion is disfavored for outside counsel, especially local counsel. It should come, if at all, from Borrower's general or in-house counsel.

36. Confirm that whatever document creates the security interest states it secures all Obligations under the Loan Documents.

37. Edit this paragraph based on circumstances and which document does what.

38. This language limits the perfection conclusion to only any collateral described in both the Mortgage and the Financing Statement. Absent Borrower consent, the description in the Financing Statement should not exceed that in the Mortgage. Borrower may, for example, consent to "all assets" in the Financing Statement even though the Mortgage or some other security agreement actually covers less.

39. Include this paragraph or the next, but not both. This way, the opinion will define "Pledged Fixtures" only once. For the reasons stated in the endnote accompanying the definition of Fixture Filing, usually the Mortgage should act as a fixture filing under UCC § 9-502(c). This eliminates the next opinion paragraph. Conceivably Lender might perfect both within the Mortgage and with a separate fixture filing, in which case keep both paragraphs but adjust the definition of Fixtures Perfection Conclusion. Counsel typically does not opine on perfection of a security interest in Fixtures unless the same counsel opines on its attachment.

40. Use this paragraph when opining on New York Fixture Filings.

41. N.Y. U.C.C. § 9-102(a)(29) (2016). Administrative Agent might instead ask opinion giver to determine and confirm that the Deposit Accounts are in fact deposit accounts. Counsel might want to go a step further and add an assumption that Cash Bank's jurisdiction (determined under UCC § 9-304) consists of a certain state. Counsel should be able to resolve that issue without making an assumption.

42. This opinion conclusion may sound "routine," but it is not. If Lender will obtain title insurance, delete it. If counsel must include it, consider county recording requirements. Think of all the ways the recording office might "bounce" the document, e.g., inadequate acknowledgment or notary stamp, missing legal description or other identifying information, inconsistent or incomplete names of parties or signers, missing block and lot number, inadequate space to file-stamp the document, prohibition of blue ink, requirement for blue ink, other technical details. We didn't go to law school to master these technical details, but getting them wrong can inflict worse damage than getting some sophisticated legal concept wrong. Counsel must consider everything about the "form" of the document when opining on recordable form.

43. Lender sometimes ask counsel to confirm that the documents contain the usual State-specific "magic language." This should be resisted, as it is not a typical opinion conclusion. It is best covered in a memo, an email or a conversation after due regard to conflict waivers. If counsel is completely confident on the documents and its allegiances, counsel might say:

> State Law Provisions. The Loan Documents contain all material State-specific provisions on Lender's rights and remedies that typically appear in secured commercial loan documents governed by State law.

44. Counsel does not opine that a mortgage creates or will create a lien on real property. That is the province of title insurance. Use the language suggested here. Don't refer to "perfection" of a mortgage lien on real property.

45. If the Mortgage covers fixtures and satisfies UCC Section 9-502(c), delete bracketed text.

46. If asked, counsel can identify the proper office in which to record the Mortgage.

47. In this opinion paragraph, don't use broad terms like "Mortgaged Property." These include all kinds of collateral for which this opinion paragraph would not apply.

48. If Administrative Agent's counsel seeks comfort that Administrative Agent and any Lender need not qualify in New York to make a Loan secured by New York real property, then consider this language:

> No Qualification. Administrative Agent and the Lenders need not qualify to do business in New York solely to make the Loan; acquire their rights and security under the Loan Documents; or collect or enforce the Loan or its security. We express no opinion on any requirement that could apply if any person took title to any collateral in New York or made multiple loans secured by New York real property.

This conclusion was once common but is now rare. Administrative Agent and the Lenders should know whether they are or need to be qualified, without help from local counsel. Any request for this conclusion from local counsel by a major financial institution is rather silly. If counsel provides this conclusion, then counsel should satisfy itself that the Loan is a commercial loan and not a residential loan.

49. This conclusion is disfavored. It should come just from Borrower or from Borrower's inside counsel. If counsel provides this conclusion, then the Officer's Certificate should state appropriate facts. Consider whether reliance on an Officer's Certificate creates a duty to rely justifiably, especially for pending litigation, a matter of public record. Obtain such a certificate from each party the Pending Litigation Conclusion covers. If the Pending Litigation Conclusion is removed, then search for that phrase and adjust as appropriate.

50. In addition to the listed generic caveats, counsel should raise a specific qualification if counsel knows the parties attach particular importance to specific provisions of their agreement and such provisions are of dubious enforceability. Consider whether other deal-specific conclusions in the opinion require any special exceptions.

51. If counsel opines on some of these matters, edit accordingly. Nevertheless raise an assumption for any of these matters under any Excluded Law and for all matters outside the opinion, such as Cash Bank and (if not a Credit Party) Manager.

52. If counsel opines on any of these matters for Borrower Parties, then Lender may worry about the assumptions in this paragraph, even with the introductory exception. Counsel can resolve that concern by making clear that counsel is not assuming its own conclusions, and adjusting the assumptions accordingly.

53. Omit this paragraph if Guarantor is an entity covered by the opinion conclusions.

54. Counsel sometimes also assumes rights and remedies in the Loan Documents were granted in exchange for "good, valuable and adequate consideration" and "will be exercised in good faith." Counsel ought to get comfortable on consideration without raising an assumption. And future good faith should have no effect on enforceability on the Closing Date.

55. Refer to other opinions when they cover issues that are predicates for this one. Assume the predicates, not the correctness of the other opinion, which may be subject to numerous caveats. Reliance on other opinions might create some duty to rely only justifiably, and consider the other firm's competence and the substance and scope of its opinion.

56. Add bracketed language if opinion covers a security interest in Fixtures located on the Real Property.

57. The preceding sentence is nonstandard. Lender may object to it. It seeks to recognize the timing constraints of modern emergency closings.

58. Add this exception for amendments to documents prepared by other counsel.

59. Include this paragraph only if Mortgaged Property is subject to a bankruptcy proceeding.

60. New York law makes this exception-to-an-exception easy. That's not always true elsewhere.

61. If there is any possibility of an issue, counsel may want to add to the excluded laws: "any law or regulation that applies only to any personal, family, residential or other noncommercial transaction (for example, "truth in lending," "fair credit reporting" and any other disclosure or consumer protection law) ("Consumer Law")." Counsel would also want to add a statement like: "We express no opinion on whether any Consumer Law would, to any degree, apply to this transaction." Although this sounds like a good idea, a better idea would be to determine with certainty whether the transaction is actually subject to Consumer Law and, if it is, figure out what that entails. That's more work than assuming the problem away, but it comports better with why one endures the legal opinion process.

62. If the opinion includes no Security Interest Conclusions, then delete everything in this paragraph before this endnote. Keep the language after the endnote.

63. Add bracketed language if opinion covers creation of a security interest in Pledged Fixtures.

64. If Manager is not a Credit Party, add a reference to Manager in this exclusion.

65. Omit this exception if the Loan Documents contain no such provisions.

66. If asked, opinion giver can include this conclusion, or one of many possible variations, but would often try to omit it from the first draft. It effectively forces opinion giver to characterize and describe in a paragraph the effect of all law that might possibly affect the Loan Documents. Lender and its counsel should have considered those issues, without help from the opinion giver, when Lender prepared its Loan Documents at Borrower's expense. Consider this alternative: "To the extent the Generic Limitations impair enforceability of the Loan Documents, that impairment falls within the ordinary range of impairment suffered by any typical set of institutional loan documents." In other words, these loan documents are no worse than average, which is really the point.

67. All remaining Qualifications apply only in particular circumstances and would ordinarily not apply.

68. Both conclusions mentioned here are disfavored. Delete this paragraph to the extent the disfavored conclusions are also deleted. These conclusions, subject to the qualifications in this paragraph, give Administrative Agent no benefit. If Material Agreements do exist, counsel will need to review and consider them. If they raise any issues at all, counsel should highlight them and raise appropriate exceptions. If Excluded Law governs Material Agreements, counsel might add this qualification:
To the extent our Material Agreements Conclusion requires us to interpret the Material Agreements, we: (i) assume any court would enforce them in accordance with their plain meaning; (ii) applied New York law, even if some other state's law governs; and (iii) express no opinion on any Borrower Party's action or inaction that may violate any Loan Document or Material Agreement, or anything that requires a calculation or financial or accounting determination.

69. See N.Y. U.C.C. § 1-301 (McKinney 2016).

70. See Lehman Bros. Commercial Corp. v. Minmetals Int'l Non-ferrous Metals Trading Co., 179 F. Supp. 2d 118, 137 (S.D.N.Y. 2000) (it remains to be seen if a state with no connection to either party or the transaction can apply its own law when it would conflict with the public policy of a more-interested state).

71. This qualification applies only where New York law governs non-New-York real property.

72. N.Y. Real Prop. Acts. Law §§ 1301, 1371 (McKinney 2016). For New York real property, keep the text before this endnote and delete the text that follows. For real property outside New York with documents governed by New York law, keep the whole paragraph. Adjust defined terms accordingly.

73. See Fielding v. Drew, 94 A.D.2d 687, 463 N.Y.S.2d 15, 16 (1st Dep't 1983).

74. See Wells Fargo Bank, N.A. v. Pena, 51 Misc. 3d 241, 248-49, 24 N.Y.S.3d 865, 871 (Sup Ct. Kings County 2016); see also Credit Suisse v. Boespflug, 2009 WL 800214, 4 (D. Idaho 2009).

75. Counsel should check for any new cases on the New York Limitations.

76. N.Y. C.P.L.R. § 5236(b) (McKinney 2016).

77. Even for a building loan, this paragraph may be unnecessary. Counsel may, however, prefer to be safe not sorry. The author is tempted to include this statement at the end of the paragraph, but it would not be opinion-like: "Unfortunately, ordinary legal research and analysis will usually not answer questions under the Lien Law."

78. Remove security interest qualifications if counsel does not opine on security interests.

79. Include only if counsel opines on perfection but not attachment of a security interest.

80. Counsel might assume: "and that value has been given." But counsel should be able to determine that without assuming it, just like confirming "consideration" or thinking about most other legal issues that arise in a transaction.

81. See generally N.Y. U.C.C. § 9-104 (McKinney 2016).

82. 11 U.S.C.A. § 552 (West 2016).

83. N.Y. U.C.C. § 9-315 (McKinney 2016).

84. N.Y. U.C.C. § 9-335, 9-336 (2016).

85. N.Y. U.C.C. § 9-515 (2016). Use this sentence only for a Fixture Filing outside the Mortgage.

86. N.Y. U.C.C. § 9-602 (2016).

87. Usually counsel can delete this assumption rather easily.

88. What possible "other purpose" causes concern?

89. After "Very truly yours," a partner (or sole principal) should sign the firm's name by hand. One does not typically type out the firm name or identify individual(s).

The author, Joshua Stein, chaired the Real Property Law Section for the year ending in May 2006. For more information on the author, visit www.joshuastein.com.
The author thanks these reviewers for their helpful comments and criticism: Christopher Delson of Morrison & Foerster LLP; Charles McCreary of Bricker & Eckler LLP; Gregory P. Pressman of Schulte Roth & Zabel LLP; Chris Smith of Shearman & Sterling LLP; Alfredo R. Lagamon, Jr., of Ernst & Young LLP; and James Patalano, the author's associate. Blame only the author for any error or omission.

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Property Contamination and Leasing: The Federal Law

By Larry Schnapf

Prior to the enactment of modern environmental laws, liability for contamination in leasing transactions was governed solely by contract and tort principles. In the absence of an express agreement or misrepresentation, the tenant was expected to make its own careful examination of the conditions of the property and the vendor or landlord would not be liable for any existing harm or defects.[1] Tenants were traditionally liable for harm caused to persons or property and for dangerous conditions or nuisances created without the landlord's knowledge or acquiescence.[2]

The general rule was that the lessor would not be liable to the lessee or others for harm for dangerous conditions existing at the time of the transfer[3] or created after the lessee took possession of the property.[4] Over time, the courts crafted a number of exceptions to this principle. One exception was that a landlord could be subject to liability if it knew, or had reason to know, of a condition that posed an unreasonable risk of physical harm to persons, the lessor had reason to believe that the lessee would not discover the dangerous condition, and the lessor concealed or failed to disclose this condition to a lessee or sublessee.[5]

Another exception was that a lessor may be held liable for tenant activities that constitute a nuisance, such as environmental contamination, if the lessor consented to such action or knew that the tenant's operations would likely release contaminants and the landlord failed to take precautions to prevent such damage.[6]

Modern formulations link liability of lessors and lessees to a failure to exercise reasonable care and incorporate concepts of comparative negligence. A lessor has a duty to exercise reasonable care for any risks that are created by the lessor and a duty to disclose any latent dangerous condition that the landlord knows, or should know, is unknown to the lessee.[7] This includes disclosure of dangerous latent conditions that were not created by the lessor.[8] The obligation hinges on whether the lessee appreciates the danger posed by the condition and not simply if the dangerous condition is open or obvious. The lessor's duty is not cut off by a lessee's failure to exercise reasonable care to discover dangerous conditions.[9]

In New York, landlords and tenants have been held liable for contamination under common-law principles such as strict liability, nuisance, trespass and negligence. Owners who have failed to abate contamination caused by their tenants have been found liable for creating or maintaining a nuisance.[10] While some states allow transferees to bring a nuisance action against its transferor on the grounds that "the creator of a nuisance remains liable even after alienating his property," New York courts have held that a nuisance action can only be maintained between adjoining landowners and is not a proper claim in a suit between successive landowners, or operators of the same property.[11]

New York has a three-year statute of limitations for claims for personal injury and damage claims relating to exposure to hazardous substances. The clock starts on the date the injuries are discovered or should have been discovered by a reasonably diligent party.[12]

The Federal Law

Numerous federal environmental laws can impose liability on owners or operators of contaminated property. One of the principal laws of concern is the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[13]

CERCLA liability is probably the most significant environmental law for commercial leasing transactions. It applies to the release of hazardous substances.[14] The federal Environmental Protection Agency (EPA) is authorized to perform cleanups in cases of release of hazardous substances[15] and seek reimbursement of its costs from four categories of potentially responsible parties (PRPs) who may be strictly, jointly and retroactively liable for cleanup costs.[16] Private parties who incur cleanup costs may also seek reimbursement from PRPs.[17] Indeed, because the New York State Superfund law does not expressly authorize the New York State Department of Environmental Conservation (NYSDEC) to recover its cleanup costs, NYSDEC customarily uses CERCLA to seek cost recovery.

Liability for Property Owners and Tenants Under CERCLA

The types of CERCLA PRPs that may be liable include current and past owners and operators of contaminated property. The liability for past owners or operators under CERCLA is not necessarily congruent with the liability of current owners or operators. Parties that currently hold title or possession of contaminated property may be liable for historic contamination that occurred prior to the time the owner acquired title or the operator came into possession of the property.[18] However, past owners or operators are only liable if they owned or occupied the property "at the time of disposal" of the hazardous substances.[19]

Current landlords may be considered CERCLA owners based on their ownership of property, even if the owner did not place the hazardous waste on the site or cause the release.[20] Furthermore, a current passive landlord or sublessor does not have to exercise any control over the disposal activity to be liable as a CERCLA owner.[21]

Tenants may be liable as an owner if they had sufficient indicia of ownership, or as an operator, based on their

control of a property. When deciding if a tenant should be considered a "*de facto* owner," courts will examine rights and obligations of the tenant under a lease to see if effective control of the property had been handed over to the tenant. Some factors courts have considered include:

- If there is a long-term lease, where the lessor cannot direct how the property is used;
- If the lessee can sublet without permission of the owner;
- Whether the lessee is responsible for paying all costs, including taxes, assessments and operation and maintenance costs; and
- Whether the lessee is responsible for making any and all structural changes and other repairs.

The leading case in New York for determining liability of tenants and subtenants is *Commander Oil v. Barlo Equipment Corp.*,[22] where the plaintiff initially leased one parcel to the defendant, Barlo Equipment Corp. (Barlo), in 1964, and a second parcel to Pasley Solvents & Chemicals, Inc. (Pasley), in 1969. Barlo used its parcel for office and warehouse space, while Pasley operated a solvent repackaging and reclamation business on its leasehold. In 1972, the plaintiff consolidated the leases so that Barlo was the lessee for both parcels and was sublessor for the Pasley lot. Under the new lease, Barlo was responsible for basic maintenance and payment of taxes on both lots.

In 1981, contamination was discovered on the Pasley parcel. Eventually, the plaintiff entered into a consent order with the EPA to implement a cleanup and sought contribution from Barlo for the costs incurred at the former Pasley lot on the theory that Barlo was a CERCLA owner. The plaintiff did not proceed against Barlo under an "operator" theory because Barlo never conducted operations at the Pasley parcel. The district court granted summary judgment to the plaintiff, ruling that Barlo was a CERCLA owner by virtue of its "authority and control" over the Pasley lot.[23] After a bench trial, the district court ruled that although Pasley was responsible for all of the response costs associated with its lot, the costs had to be allocated between the plaintiff and Barlo since Pasley was "financially irresponsible."

On appeal, Barlo argued that CERCLA owner liability was restricted to owners of record, while Commander Oil urged a more expansive definition that relied primarily on the right to control property, whether the right is possessory or is a recorded property interest. The Second Circuit acknowledged that most district courts have held that site control is a sufficient indicator to find lessees or sublessors liable as CERCLA owners. However, the appeals court also noted that the circuit precedent provided that CERCLA "owner" and "operator" liability should be treated separately, and suggested that relying solely on a site control analysis could essentially make all operators into owners and thereby render most operator language superfluous.

The court recognized that while the typical lessee should not be held liable as an owner, there might be circumstances when liability would be appropriate.[24] However, the court emphasized that in reaching such a conclusion, the critical analysis was the relationship between the owner and the tenant/sublessor, and not the lessee/sublessor's relationship with its sublessee.

Turning to the lease, the court concluded that Barlo did not possess sufficient attributes of ownership over the Pasley lot based on, in part, on the following:

- Barlo was limited to using its parcel and only "for that business presently conducted by tenant on a portion of the same premises leased hereunder";
- Barlo was required to obtain written consent from Commander Oil before making "any additions, alterations or improvements" on the land, which alterations would become Commander Oil's property in any event;
- The lease required Barlo to obtain written approval from Commander Oil to sublet the property, and prohibited subletting to any entity that had "any connection with the fuel, fuel oil or oil business";
- Barlo was prohibited from doing anything that would "in any way increase the rate of fire insurance" on the property, and from bringing or keeping upon the premises "any inflammable, combustible or explosive fluid, chemical or substance."

The court acknowledged that Barlo possessed some attributes of ownership with respect to the Pasley lot; however, when viewed in totality, the Second Circuit held that Barlo lacked most of the rights that come with ownership and reversed the district court ruling.

In *Scarlett & Associates, Inc. v. Briarcliff Center Partners, LLC*,[25] a federal district court found there was a genuine dispute of material facts as to whether a managing agent of a shopping center was a CERCLA operator of a tenant dry cleaning business. The agent did not maintain an office or have personnel at the site, nor did it have keys to any leased space or have the power to evict tenants. The managing agent said its principal responsibilities were to attempt to rent space to tenants approved by the owner, collect rent, maintain the common areas of the center, pay bills in a timely manner, and send excess revenues to the owner.

The owner pointed to language in the management services agreement that the agent was to obtain all necessary government approvals and perform such acts necessary to ensure that the owner was in compliance with all laws. The court noted that the managing agent sent the dry cleaner a certified letter advising of certain environmental reporting requirements and requested copies of the documentation that the dry cleaner was required to provide to the EPA or an explanation as to why the dry cleaner was exempt from providing such documentation.

The court said that this correspondence, combined with the other evidence of record indicating that the managing agent generally was responsible for managing and maintaining the shopping center and performing all acts necessary to effect compliance with laws, rules, ordinances, statutes, and regulations, was sufficient to create a genuine issue as to whether the agent managed the operations of the dry cleaner specifically related to pollution, and it therefore met the definition of a former "operator."

Defenses

Third-Party Defense

CERCLA originally contained three affirmative defenses to liability: act of God, act of war, and the third-party defense. From a practical standpoint, the third-party defense was the only viable defense available to property owners or operators. To establish that defense, the owner or operator would have to show that the disposal or release was:

- *solely* caused by a party;
- with whom it had no direct or indirect *contractual relationship*;
- the defendant exercised *due care* with respect to the hazardous substances; and
- took *precautions* against foreseeable actions or omissions of third parties.[26]

Most courts broadly construed the phrase "*in connection with a contractual relationship, existing directly or indirectly*" to encompass virtually all forms of real estate conveyances. As a result, lessors of property that was contaminated by a current or former a tenant could not successfully assert the third-party defense on the grounds that a lease constituted a "contractual relationship" with the responsible party (i.e., lessee).

The concept that the mere existence of a lease can preclude an owner from asserting a third-party defense when the contamination is solely caused by a tenant is rather harsh especially in the case of truly absentee landlords with so-called "triple-net leases" or long-term ground leases.

The good news is that the Second Circuit has adopted an expansive view of the third-party defense so that it is a viable defense for owners or operators in New York. The federal courts in New York generally take a narrow view of the phrase "contractual relationship" and have held that the existence of a "contractual relationship" does not bar an owner or operator from invoking the defense.[27] Instead, a party will be precluded from asserting the defense only if there is some relationship between the disposal or release that caused the contamination and the contract, or a relationship which allows the landlord to exert some form of control over such activities.[28]

Perhaps the seminal case on third-party defense is *New York v. Lashins Arcade*,[29] where a current owner of a shopping center was able to successfully invoke the third-party defense because it did not have a contractual relationship with a former dry cleaner tenant who had discharged hazardous substances into the ground 15 years prior to acquisition.

Assuming that a prospective purchaser or tenant could overcome the "contractual relationship" hurdle, it would still have to establish that it satisfied the third prong of the test to exercise due care in dealing with the hazardous substances, and the fourth prong, which requires taking precautions against the foreseeable actions of omissions of third parties. The property owner in *Lashins Arcade* established that it had exercised due care such as maintaining water filters, sampling drinking water, instructing tenants to avoid discharging into the septic, inserting use restrictions into leases, and it performed periodic inspections to assure compliance with this obligation. In contrast, a bank that had subleased its space to a dry cleaner was unable to assert the third-party defense because it had failed to assess environmental threats after discovery of disposal would be part of due care analysis.[30]

Innocent Landowner Defense

Because the third-party defense was largely unavailable to purchasers or tenants of contaminated property, Congress enacted the innocent purchaser defense in 1986. Under this defense, a purchaser (or tenant) who "did not know or had no reason to know" of contamination would not be liable as a CERCLA owner or operator.[31] To establish that it had no reason to know of the contamination, a defendant must demonstrate that it took "all appropriate inquiries…into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices."[32]

Since it relies on an affirmative defense, the innocent purchaser has the burden of establishing that it satisfied the elements of the defense. Not surprisingly, most courts narrowly construed the innocent purchaser defense. If a purchaser did not discover contamination before taking title, but contamination was subsequently discovered, courts generally concluded that the purchaser did not conduct an adequate inquiry and, therefore, could not avail itself of the defense.

Further complicating matters, CERCLA did not establish specific requirements for what constituted an appropriate inquiry. As part of the 2002 amendments, the EPA was required to promulgate an All Appropriate Inquiries (AAI) rule. The AAI rule became effective on November 1, 2006.[33]

Bona Fide Prospective Purchaser (BFPP) Defense

The principal drawback of the innocent purchaser defense is that a purchaser or tenant cannot know, or have reason to know, that the property was contaminated. To incentivize redevelopment of contaminated properties, Congress added the BFPP to CERCLA as part of the 2002

amendments.[34] This defense allows a landowner or tenant to knowingly acquire or lease contaminated property after January 11, 2002 without incurring liability for remediation, if it can establish the following pre-acquisition requirements:

- All disposal of hazardous substances occurred before the purchaser acquired the facility;[35]
- The purchaser is not a potentially responsible party or affiliated with any other PRP for the property through any direct or indirect familial relationship, any contractual or corporate relationship, or as a result of a reorganization of a business entity that was a PRP;[36]
- The purchaser conducted "all appropriate inquiries" into the past use and ownership of the site.[37]

After taking title, a purchaser also must comply with a number of "continuing obligations" to maintain its BFPP status.

Contiguous Property Owner (CPO) Defense

Congress also added the CPO[38] defense in 2002. This defense provides liability protection to a person owning or leasing property that has been contaminated by a contiguous or adjacent property.

A person seeking to qualify for the CPO must comply with the same pre-and post-acquisition obligations as a BFPP. However, while the BFPP can knowingly acquire contaminated property, a CPO must not know or have reason to know of the contamination after it has completed its pre-acquisition AAI investigation. If an owner cannot qualify for the CPO defense, it may still be able to qualify for the BFPP defense.

Innocent Seller's Defense

An innocent purchaser who then becomes a seller can assert this defense if it discloses the existence of hazardous substances that may have occurred after taking title and if it complied with the "due care" and "precautionary" prongs of the third-party defense.[39]

CERCLA Secured Creditor Exemption

Lenders who without participating in the management of a facility hold indicia of ownership to protect a security interest in the facility are also exempt from liability.[40] However, banks that have foreclosed on property or have been overly involved in the management of a borrower's operation have been held liable as owners or operators of the property.

Contractual and Equitable Defenses

While the statutory defenses are the only ones available to defendants in government cost recovery actions, traditional equitable defenses are available to defendants in private party cost recovery actions or contribution actions such as laches, release, waiver, or unclean hands to reduce liability in private cost recovery actions. Defendants may also raise procedural defenses to government cost recovery actions such as response costs were not consistent with the National Contingency Plan[41] and the remedy was not cost-effective.

CERCLA Liens

CERCLA provides the EPA with two types of statutory liens. The EPA may impose a non-priority lien on property where it has performed response actions. The lien becomes effective when the EPA incurs response costs or notifies the owner of the property of its potential liability, whichever is later. The lien is subject to the rights of holders of previously perfected security interests.[42]

The EPA may also file a windfall lien when it has performed a response action at a site owned or operated by a BFPP and the response actions have increased the fair market value of the property above the fair market value that existed before the response action was initiated.[43] The windfall lien is to be measured by the increase in fair market value of the property attributable to the response action at the time of a sale or other disposition of the property. The lien will arise at the time the EPA incurs its costs and shall continue until the lien is satisfied by sale or other means, or the EPA recovers all of its response costs incurred at the property. In lieu of the EPA imposing a windfall lien on the property, the BFPP may agree to grant the EPA a lien on any other property that the BFPP owns or provide some other assurance of payment in the amount of the unrecovered response costs that is satisfactory to the EPA.

Resource Conservation and Recovery Act (RCRA)[44]

Under this law owners or operators of facilities that treat, store or dispose of hazardous waste must comply with certain operating standards and may also be required to undertake corrective action to clean up contamination caused by hazardous or solid wastes. The federal government may also issue a corrective action order to an owner or operator of a Treatment, Storage and Disposal Facility or generators of hazardous waste subject to RCRA.[45] The government may also issue orders for injunctive relief to address hazardous waste posing an "imminent and substantial endangerment" to public health and the environment.[46]

RCRA also imposes a full range of regulatory requirements on owners and operators of Underground Storage Tanks that are used to store petroleum or hazardous substances.[47] Some parts of the UST program are administered by the NYSDEC in lieu of EPA enforcement.[48]

Unlike with CERCLA, private parties are not entitled to recover their cleanup costs under RCRA. Instead, private parties may seek injunctive relief ordering persons who contributed to the past or present handling, storage, treatment, transportation, or disposal of hazardous waste to remediate hazardous waste contamination that is

posing an "imminent and substantial endangerment" to public health and the environment.[49] Indeed, this provision is becoming a powerful litigation tool particularly for sites contaminated by gas stations[50] and the dry cleaners.

Endnotes

1. This concept has sometimes been referred to as "caveat lessee."
2. *State of N.Y. v. Monarch Chems.*, 90 A.D.2d 907, 456 N.Y.S.2d 867 (3d Dep't 1982).
3. Restatement of the Law, Second, Torts, § 356.
4. Restatement of the Law, Second, Torts, § 355.
5. Restatement of the Law, Second, Torts, § 358.
6. *Monarch Chems.*, 90 A.D.2d 907.
7. Restatement of the Law, Third, Torts: Liability for Physical and Emotional Harm, § 53.
8. *Id*. comment (e).
9. Consistent with modern notions of comparative responsibility, such failure would constitute negligence and either reduce the recovery of a lessee or subject the lessee to liability to third parties who are harmed by the dangerous condition. *Id*.
10. *Copart Indus., Inc. v. Consolidated Edison Co.*, 41 N.Y.2d 564 (1977); *Monarch Chems.*, 90 A.D.2d 907; *State of N.Y. v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985).
11. *Nashua Corp. v. Norton Co.*, 1997 U.S. Dist. LEXIS 5173 (N.D.N.Y. Apr. 15, 1997).
12. CPLR 214-c; *Jensen v. General Elec. Co.*, 82 N.Y.2d 77 (1993); *Aiken v. General Elec. Co*, 57 A.D.3d 1070, 869 N.Y.S.2d 263 (3d Dep't 2008); *Atkins v. Exxon Mobil Corp.*, 9 A.D.3d 758, 780 N.Y.S.2d 666 (3d Dep't 2004).
13. 42 U.S.C. §§ 9601 *et seq*.
14. Petroleum is excluded from the definition of hazardous substances. 42 U.S.C. § 9601(14). Because of the so-called petroleum exclusion, neither EPA nor private parties may seek reimbursement of costs incurred to remediate contamination from leaking gasoline underground storage tanks (USTs). *White Plains Hous. Auth. v. Getty Props. Corp.*, 2014 U.S. Dist. LEXIS 174308 (S.D.N.Y. Dec. 16, 2014). However, the petroleum exclusion does not apply to contaminants added to petroleum during normal use, such as waste oil. *City of N.Y. v. Exxon Corp.*, 766 F. Supp. 177, 186 (S.D.N.Y. 1991).
15. 42 U.S.C. § 9604.
16. 42 U.S.C. § 9607(a).
17. Innocent parties may seek 100% recovery of their costs (known as cost recovery actions) under 42 U.S.C. § 9607(a)(4)(B) while PRPs may file contribution actions under 42 U.S.C. § 9613(f)(1) if they incur costs that exceed their allocated share of the liability.
18. 42 U.S.C. § 9607(a)(1).
19. 42 U.S.C. § 9607(a)(2).
20. *Shore Realty Corp.*, 759 F.2d 1032.
21. *Bedford Affiliates v. Manheimer*, 1997 U.S. Dist. LEXIS 23903 (E.D.N.Y. Aug. 6, 1997); *United States v. A & N Cleaners & Launderers,* 788 F. Supp. 1317 (S.D.N.Y. 1992).
22. 215 F.3d 321 (2d Cir. 2000).
23. For support of its holding that Barlo was a CERCLA owner, the district court relied on *Delaney v. Town of Carmel*, 55 F. Supp. 2d 237 (S.D.N.Y. 1999) and *A & N Cleaners & Launderers, Inc.*, 788 F. Supp. 1317. These cases interpreted the term "owner" to extend beyond the fee or record owner to anyone possessing the requisite degree of control over the property.
24. The court provided three rare instances where the lessee did not have a typical lease but instead may have obtained a priority of ownership rights: (i) sale-leaseback arrangements…if the lessee actually retains most rights of ownership with respect to the new record owner; (ii) extremely long-term leases where, according to the terms of the lease, the lessee retains so many of the indicia of ownership that he is the de facto owner; and (iii) where a lessee/sublessor has impermissibly exploited more rights than originally leased.
25. 2009 U.S. Dist. LEXIS 90483 (N.D. Ga. Oct. 30, 2009).
26. 42 U.S.C. § 9607(b)(3) (emphasis added).
27. *But see U.S. v. Occidental Chemical Corp.*, 965 F. Supp. 408 (W.D.N.Y. 1997) (a deed can serve as an indirect contractual relationship that can prevent a property owner from asserting the third party defense).
28. *Westwood Pharms., Inc. v. Nat'l Fuel Gas Distrib. Corp.*, 964 F.2d 85 (2d Cir. 1992). *But see A & N Cleaners & Launderers, Inc.*, where a bank that was sublessor who maintained complete control and responsibility for property where a release occurred was deemed to be an owner for CERCLA purposes.
29. 91 F.3d. 353 (2d Cir. 1996). Compare *Lashins* conduct to the purchaser/owner in *Idylwoods Assoc. v. Mader Capital Inc.*, 956 F. Supp. 410 (W.D.N.Y. 1997).
30. *United States v. A&N Cleaners & Launderers, Inc.*, 854 F. Supp. 229 (S.D.N.Y. 1994).
31. 42 U.S.C. § 9601(35)(A).
32. 42 U.S.C. § 9601(35)(B)(i)(I).
33. 40 C.F.R. § 312.
34. 42 U.S.C. § 9607(r).
35. 42 U.S.C. § 9601(40)(A).
36. 42 U.S.C. § 9601(40)(H).
37. 42 U.S.C. § 9601(40)(B). EPA promulgated its AAI rule at 40 C.F.R. § 312.
38. 42 U.S.C. § 9607(q).
39. *Westwood Pharms. v. Nat'l Fuel Gas Distrib.*, 964 F.2d 85 (2d Cir. 1992).
40. 42 U.S.C. § 9601(20)(A).
41. 40 C.F.R. § 300.
42. 42 U.S.C. § 9607(l).
43. 42 U.S.C. § 9607(r).
44. 40 C.F.R. pts. 239–282.
45. 42 U.S.C. § 6928(h).
46. 42 U.S.C. § 6973.
47. 42 U.S.C. §§ 6991–6991m.
48. A discussion of New York state law is beyond the scope of this article.
49. 42 U.S.C. § 6972(a)(1)(B).
50. Because petroleum is excluded from the CERCLA definition of hazardous substances, RCRA § 7002 is often the only federal remedy available to owners or operators of property contaminated with petroleum.

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This article originally appeared in the 2016 Spring/Summer edition of the New York Environmental Lawyer.

Bergman on Mortgage Foreclosures

Accepting Mortgage Payments or Condominium Fees When Legal Expenses are Unpaid

By Bruce J. Bergman

It does indeed happen from time to time. A defaulting mortgage borrower receives a reinstatement letter and responds by submitting all sums except the legal fees. Not surprisingly, this occurs too in the condominium common charge lien foreclosure: the unit owner pays everything—but neglects the attorney fee sum.

From the perspective of the mortgagor or the condo unit owner is this likely to be a winning technique? It is cute, but as reviewed below, not a winner.

"But mortgages typically provide for such recompense, as do condo bylaws, so most often the only issue is the reasonableness of those legal fees."

If the lender, or the condo board (as the case may be) takes the money, that is, the lesser sum, are legal fees in jeopardy? A recent case confirms that they are not. [Board of Managers of One Strivers Row Condominium v. Giaw, 134 A.D. 3d 514, 22 N.Y.S.3d 176 (1st Dept. 2015)]

Because that decision addressed a condo common charge default, the perspective will focus upon condos, but the concept is the same for a mortgage holder pursuing a mortgage foreclosure action.

So the question can be asked: What should a board do if during a period of default by a unit owner—or during a condo lien foreclosure action—the unit owner pays everything *except* the legal fees?

It is no revelation that the borrowers (in the case of mortgages) and unit owners (in the instance of condo common charge liens) are displeased with the obligation to pay the other side's legal expenses. But mortgages typically provide for such recompense, as do condo bylaws, so most often the only issue is the reasonableness of those legal fees.

"The next path is to keep the partial payment. From a cash flow basis, especially mindful that income shortages must be funded by other unit owners, this has its appeal."

What is less common in the arena of both the mortgage foreclosure condominium common charge lien foreclosure is remittance of the mortgage sums or the condo fees, as the case may be, but without the legal fee component. In the mortgage realm, accepting post acceleration payments portends the possibility of waiver of acceleration of the debt. While it ought not to be so (a different subject), it creates unease. In turn, this timorousness carries over into the condo domain.

So, if a unit owner remits all sums due—except legal fees—should the board accept the money? Can it safely do so?

Because pursuit of a condo lien does not invoke acceleration, there is simply nothing to waive. What is due pursuant to the lien (a continuing lien) is a determinable sum and it does not dissipate. Nonetheless, accepting condo fees, leaving a presumably lesser or modest amount attributable to legal fees (with costs and disbursements likely as well) means that the condo lien foreclosure must now be pursued *solely* for the legal portion—psychologically not an ideal scenario. (This psychological disadvantage would prevail as well in the mortgage foreclosure case).

"So there are indeed ways to handle what could otherwise be a thorny situation—and it may tell a creative unit owner or borrower that such a sleight of hand will not succeed."

There are two choices for the lienor board to consider. One, it can reject the check, returning it with the pointed advise that anything less than full payment is unacceptable. This will encourage some, perhaps many, unit owners to realize they must pay all. For those situations, though, where the unit owner is intractable, the foreclosure can proceed for the likely more palatable full panoply of its items due.

The next path is to keep the partial payment. From a cash flow basis, especially mindful that income shortages must be funded by other unit owners, this has its appeal. As noted, though, it necessitates continuing the foreclosure exclusively for the legal fee aspect of the debt. While queasiness in that regard cannot be entirely banished, at least case law very affirmatively supports it viability.

"So there are indeed ways to handle what could otherwise be a thorny situation—and it may tell a creative unit owner or borrower that such a sleight of hand will not succeed."

That was precisely an issue in the mentioned case where the unit owner paid all of the outstanding common charges just before the court ruled on the plaintiff board's summary judgement motion—but neglected to include legal fees.

The First Department ruled that plaintiff (the condo) was still authorized to seek reasonable attorneys fees (and its late charges) in prosecuting the action. Interestingly, the court also held that the owner's payment in full of the open common charges while summary judgment was pending served in essence as an admission that the amounts sought were owed.

So there are indeed ways to handle what could otherwise be a thorny situation—and it may tell a creative unit owner or borrower that such a sleight of hand will not succeed.

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Zombies No More: New York Abandoned Properties Find a Home with New Legislation

By Bill Alesi and Ian King II

The largest single investment most people will make in their lifetimes is the purchase of a home.[1] The ability to purchase a home has always been regarded as an enduring pillar of the American Dream because it represents upward economic mobility and the accumulation of equity.[2] In 2007, that pillar was shaken to its core by a seismic shift in the collective economic confidence, caused by the subprime mortgage crisis, also known as the Great Recession.[3] Our economy had not felt an economic shift of that magnitude since World War II.[4] During the height of the recession, from 2006 until 2009, the average price of residential real estate in the United States fell roughly 30 percent.[5]

Prior to the housing market crisis, some borrowers who had difficulty applying for traditional 30-year mortgages qualified instead for balloon mortgages, which were short term, non-amortizing loans with very low monthly payments. Unfortunately, these borrowers were unable to pay the remaining principal balance when their balloon mortgage became due.[6] This forced the homeowners to refinance, sell their homes or convert their existing mortgage to a traditional mortgage.[7] The mortgagees also had the option to assert their right to foreclose on the property and recover as much of their losses as possible.[8]

"The entire purpose of the Neighborhood Relief Act is to both help communities recover from the Great Recession and stave off further zombie properties from springing up in the locales across New York State."

Oftentimes the sale of the homeowner's property at fair market value was not enough to settle their mortgage debt.[9] This meant that their property was "underwater," which made it much more difficult for homeowners to refinance, sell their property and pay off their mortgages, and led to a cascading effect of foreclosures that in turn reduced property value.[10]

Once homeowners realized their financial plight, there was no incentive for them to continue making payments on a mortgage that they had no hope of repaying.[11] Homes fell into disrepair because neither the homeowner nor the mortgagee was paying the maintenance costs associated with the property.[12] Some homeowners simply abandoned the property altogether before the bank could properly deliver a notice of foreclosure and sale, and as a result, "zombie" properties were born.[13]

Legislative Background

As of the first quarter of 2015, New York had 16,777 zombie properties in foreclosure, which was up 54 percent from the same period the previous year and constituted the third highest state total for zombie foreclosures, after Florida and New Jersey, respectively.[14] Furthermore, in 2015, the New York-Newark-Jersey City, NY-NJ-PA Metropolitan Statistical Area had 19,777 zombie foreclosures which accounted for more than 17 percent of all property foreclosures in any metropolitan statistical area during the same year.[15] In response to this crisis, Governor Andrew Cuomo signed the New York State Abandoned Property Neighborhood Relief Act of 2016 (the Act) into law on June 23, 2016.[16] Before the Act was signed into law, Real Property and Proceedings Law Section 1307 governed this area.

Under the old law, Section 1307, mortgagees and their loan-servicing agents were under no obligation to maintain property secured by a delinquent mortgage until after a judgment of foreclosure had been entered.[17] However, the plaintiff-mortgagee would simply get around the impositions of the old law by abandoning the foreclosure proceeding altogether or seeking to vacate the default judgment of foreclosure.[18]

Both actions effectively relieved the plaintiff-mortgagee from its obligation to maintain the property because it did not want to be responsible for its upkeep.[19] Plaintiff-mortgagees do not find successful foreclosure proceedings to be in their best interest because they are often unable to recoup the full sum of the deficiency on the property being sold.[20] Section 2 of the Neighborhood Relief Act amends RPAPL Section 1307 by defining "vacant and abandoned" residential property, thereby expanding the existing duty of a mortgagee and its loan-servicing agents to maintain the abandoned property even before commencement of foreclosure and sale proceedings.[21]

The Neighborhood Relief Act

The entire purpose of the Neighborhood Relief Act is to both help communities recover from the Great Recession and stave off further zombie properties from springing up in the locales across New York State. The Act has several sections that delineate several requirements.[22]

Section 2 of the Act amends Section 1307 of the Real Property Actions and Proceedings Law. Specifically, this provision creates a definition of "vacant and abandoned" residential property.[23] Moreover, it creates and expands the existing duty of mortgagees to maintain any abandoned and vacant property, even if a foreclosure action has not yet been filed.[24] Even in the case where a

judgment of foreclosure has been issued by a court against a certain property, and the mortgagor has abandoned the property even though a lawful tenant still remains in possession of the foreclosed property, the mortgagee or its loan servicing agent has the duty to maintain the property until such time as "ownership has been transferred through the closing of title in foreclosure, or other disposition...".[25]

Vacant and abandoned residential properties securing delinquent mortgages fall into disrepair and harm neighboring properties and the surrounding community.[26] Previously, municipalities were often forced to expend taxpayer funds to prevent a vacant and abandoned property from becoming a public hazard.[27] If a municipality were to take care of a significant number of these vacant and abandoned properties, its budget may have been in danger of being quickly depleted.[28] These properties often become boarded up, inhabited by squatters, or used for criminal purposes.[29] Furthermore, when a vacant and abandoned property is not maintained for an extended period of time, there is a corresponding decline in the community's real estate market and the state's property tax base.[30]

"Any income that is earned from monies already within the Relief Fund will be added to the Fund itself."

This Section of the Act specifically imputes the duty to maintain these properties on the mortgagee's loan servicing agent, which seeks to prevent the degeneration of these homes and the dangers that come from it.[31] Section 2 also includes an "inspection requirement" for mortgagees and their servicing agents to discover whether "residential real property subject to a delinquent mortgage is currently occupied."[32] The Act also forbids any of these same mortgagees or servicers from entering these occupied homes with intent to force, intimidate, harass, or coerce the lawful occupant into leaving the property.[33]

Section 3 of the Act creates a new Section 1307(a) to the Real Property Actions and Proceedings Law.[34] It requires the Attorney General to create and maintain the Vacant and Abandoned Property Registry such that all local government officials may access and contribute to it.[35] Mortgagees and loan servicers are now required to promptly enter into the Registry any information about abandoned or vacant property.[36] When a mortgagor is three monthly payments past due, the mortgagee or its agents must provide "prompt written notice to mortgagors" informing them of their legal right to remain on the property until ordered to leave by a court.[37] The Act requires the Attorney General to establish a toll-free hotline through which concerned citizens may report such abandoned and vacant properties in their neighborhood.[38]

Moreover, the Act authorizes the Attorney General or the affected locale to "seek injunctive relief and/or civil penalties against mortgagees and/or their agents for violations of RPAPL Sections 1307 and 1307-a."[39] The civil penalties collected by the Attorney General are used to fund the Abandoned Property Neighborhood Relief Fund, which is described in detail in Section 6 of this Act. Should the banks fail to comply, the law allows the Department of Financial Services to "take court action, issue violations and fines." Under this law, banks have a duty to maintain and secure these properties, and, if they violate the law, banks will face fines of up to $500 "per property, per day for failing to do so."[40]

Sections 4 through 7 each impose a single requirement. Section 4 of the Act states in its entirety, "A part of the supreme court shall be devoted to foreclosure actions involving property alleged to be vacant and abandoned."[41] If a plaintiff wishes to expedite foreclosure on a vacant and abandoned property, it may do so under this law. However, this expedition of the foreclosure process only applies to bona fide vacant and abandoned properties the homeowners "no longer want."[42] To expedite the foreclosure, the plaintiff must make an application for an order to show cause "upon notice seeking entry of judgment of foreclosure and sale on the grounds that the property is vacant and abandoned."[43] Further, the foreclosing party now has a time limit on when it can move to auction the property. The foreclosing party must go to auction within ninety days of obtaining the judgment of foreclosure.[44] It is now incumbent on the foreclosing party to ensure the property is reoccupied and no longer vacant, all within 180 days of taking title to the property.[45]

Section 5 of the Act establishes a special foreclosure proceeding for these types of properties by amending RPAPL Section 1308.[46] Once the application has been submitted, the court will examine the "evidence supporting the facts…at an evidentiary hearing under oath… and shall make a written finding whether the property to be foreclosed upon…meets the definition of vacant and abandoned."[47]

Section 6 creates the Abandoned Property Neighborhood Relief Fund under Section 91-g of the State Finance Law.[48] The purpose of this fund is to use civil penalties collected by the Attorney General for mortgagee violations of Section1307-a, to ensure that the abandoned and vacant properties in question are maintained "…in accordance with all ordinances, codes, regulations and statutes…until such time as title to the property has been transferred through a foreclosure sale or otherwise."[49] This fund is replenished by money collected in enforcement actions from violations of the Act under RPAPL Section 1307-A.[50] Any income that is earned from monies already within the Relief Fund will be added to the Fund itself.[51] Section 91-g also enumerates the procedure through which localities may receive Enforcement Assistance Grants from the Relief Fund.[52]

According to Section 91-g (4), the chief elected official of a locality within New York State may apply for an

"abandoned property enforcement assistance grant" by submitting a written application to the Attorney General. The official (or his agent) must include in the application: (a) the amount of money desired; (b) a detailed description of the impact of the vacant property on the locality; (c) a detailed description of the enforcement purpose or, more generally, how the funding will be applied; and (d) the date and result of any prior applications for these grants.[53]

The Attorney General will take into consideration several factors when considering an application.[54] First, the Attorney General will consider the impact the property has had on the locale. Second, the Attorney General will consider what, if any, impact the disbursement of the funds will have on the enforcement of the law within the locale. Third, the Attorney General will consider whether there are enough funds available to pay "some or all of the enforcement costs for which the requesting locality seeks funding." Lastly, the Attorney General must consider whether any previous grants made to this same locality were used in accordance with the law.[55]

"Independent of the Registry, yet supplemental to it, is a toll-free hotline that provides open communication between local officials and the community."

If the Attorney General has decided the locality will receive a grant from the Relief Fund, the Attorney General may disburse any amount of money up to the amount the official requested.[56] The funds disbursed may only be used in connection with the purpose of their application for the monies, specifically, towards the enforcement of this law. The Attorney General has the right to create provisions for periodic review and evaluation of the enforcement assistance program.[57] Of course, the State Comptroller has the ability to audit the finances of any locality awarded a grant in order to determine the use of the funds disbursed.[58] The Attorney General and State Comptroller must report to the Governor and Legislature every year concerning the success of the grant program.[59] Finally, Section 7 of the Act states that the Act will take effect ninety days after it becomes law, which was on September 21, 2016.

Benefits of This Act

This Act promotes a three-pronged partnership among the State, the lender, and the homeowner. The first, and arguably the primary, benefit of the Act is to make the mortgagees, its loan servicers and its agents responsible for the abandoned and vacant property even if the property is not yet in foreclosure. As noted in the *New York Law Journal*, "In the event a lender or servicing agent fails to secure and maintain an abandoned property upon which it holds a lien, there are significant fines . . . and injunctive relief available to the municipality and the Attorney General."[60]

It is an important objective of the legislature to hold mortgagees and their agents responsible for these properties. Abandoned and vacant property adversely affects communities by lowering the surrounding properties' property values. As New York State Senator Jeffrey D. Klein (D-Bronx/Westchester) said, "The introduction of the Abandoned Property Neighborhood Relief Act brings New York State a step closer to curing the blight these properties bring to neighborhoods."[61] Perhaps the most pressing blight is the use of abandoned houses as distribution sites for such illegal narcotics as heroin, which is currently ravaging the country at large.[62]

The need for this Act also arises out of ignorance on the part of mortgagors in danger of foreclosure. Most people in this position are not aware of when they need to vacate their homes, and do so earlier than necessary.[63] When this happens, the vacant property is in legal limbo: the defendant-mortgagor homeowner is no longer providing necessary maintenance and care for the property, and neither is the plaintiff-mortgagee lender.

Therefore, another benefit of this Act is the early notification to homeowners that they have a legal right to remain within their property unless and until a court orders them to leave.[64] Moreover, because the Act requires mortgagees and any pertinent loan servicers to "identify, secure and maintain vacant and abandoned properties much earlier in the mortgage delinquency timeline,"[65] this Act will directly lead to fewer properties being neglected. The creation of the Vacant and Abandoned Property Registry directly promotes cooperation with New York State in the reporting and management of any properties left unmaintained and currently vacant.[66]

Independent of the Registry, yet supplemental to it, is a toll-free hotline that provides open communication between local officials and the community. This is an easier method to give notice to local government officials about any given zombie property.[67] Finally, the establishment of the new Abandoned Property Neighborhood Relief Fund, supplied by money collected from violations of the Act, will directly contribute to aiding various localities in the "enforcement of the Act."[68]

It is in everyone's best interest—the property owner, the lender or its servicer, and the municipality—that the record titleholder occupy the property for as long as possible.[69] This is important not only for individual maintenance purposes, but also for sustaining an appearance of upkeep throughout the neighborhood that upholds property values and stabilizes municipalities struggling with the zombie problem.[70] While no law is perfect, the New York State Abandoned Property Neighborhood Relief Act of 2016 is a solid step in the right direction. In the wake of the Great Recession, thousands of New Yorkers found themselves in danger of foreclosure. With the passage of

this Act, people in the same situation are given more help to improve their financial situation, preserve their legal rights, and keep their homes.

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The Real Property Law Section is now accepting applications for its two law student scholarships in the amount of $5,000 each. The scholarships will be awarded in 2018.

REAL PROPERTY LAW SECTION
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Through a gift from the Real Property Law Section, The New York Bar Foundation established the Real Property Law Section Lorraine Power Tharp Scholarship in 2008. The $5,000 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.

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Efforts will be made to honor Lorraine's commitment to gender equity and diversity in the profession. To ensure geographic diversity, the Foundation will strive to select students attending New York State law schools in different counties each year, so that over time students from all areas of the state will be able to benefit from the scholarship. A preference will be given to students who demonstrate financial need.

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Application Deadline: November 30, 2017.

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2014 – no scholarship awarded
2015 – no scholarship awarded
2016 – David Ullman—Columbia Law School

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Through a gift from the Real Property Law Section and Rosalyn Mitzner, The New York Bar Foundation established the Real Property Law Section Melvyn Mitzner Scholarship in 2013. The $5,000 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. Mitzner, a former chair of the Real Property Law Section, was an active and valued member of the Section for many years.

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Plotch v. Citibank, N.A.: Court of Appeals Decides Consolidated Mortgage Filed Prior to Common Charges Lien Qualifies as First Mortgage of Record Under the Condominium Act

By Nora Boujida

New York Real Property Law § 339-z provides that a condominium board's lien on units for unpaid common charges has priority over all other liens.[1] The statute contains three exceptions that are not subject to subordinated priority, including "all sums unpaid on a first mortgage of record."[2] When dealing with a consolidated mortgage, New York courts have historically been inconsistent in determining what constitutes the "first mortgage of record."[3] On May 10, 2016, the Court of Appeals provided guidance and addressed this issue in *Plotch v. Citibank, N.A.*

In July 2000, defendant Citibank, N.A. (Citibank) extended a $54,000 mortgage to a condominium unit owner, which was recorded.[4] The following year, Citibank extended a second mortgage for $38,000 to the owner, and the parties entered into a consolidation agreement in which the two mortgages were consolidated into a single mortgage lien for $92,000. The second mortgage and the consolidation agreement were both recorded on the same day. About seven years later, the condominium board filed a lien against the unit for unpaid common charges.[5]

"The Court reasoned that treating consolidation agreements as the first mortgage allows condominium unit owners greater flexibility in obtaining a larger mortgage or refinancing, and thus advances the goals of the Condominium Act."

In 2010, plaintiff purchased the unit in a foreclosure action subject to the first mortgage of record against the premises.[6] Subsequently, plaintiff commenced a lawsuit seeking, *inter alia*, a declaration that the second mortgage for $38,000 was subordinate to the common charges lien under Real Property Law § 339-z and was therefore extinguished by the condominium board's foreclosure action. The Supreme Court denied plaintiff's motion for summary judgment and instead granted defendant's motion seeking a declaration that the consolidation agreement, not the initial $54,000 mortgage, was the first mortgage of record. The Appellate Division affirmed.[7]

The Court of Appeals granted plaintiff leave to appeal in *Plotch v. Citibank, N.A.*[8] In its opinion, the Court noted that plaintiff relied heavily on *Societe Generale v. Charles & Co. Acquisition*,[9] where the Supreme Court held that only the original first mortgage had priority over a common charges lien, even though a second mortgage and consolidation agreement were recorded prior to the common charges lien. However, the Court went on to discuss four lower court decisions decided after *Societe Generale* holding the opposite—that a consolidated mortgage recorded prior to a common charges lien qualifies as the first mortgage of record. The Court also noted there was no intervening lien at the time the two mortgages were consolidated, and therefore the consolidation agreement did not interfere with any rights of the condominium board.[10]

"The Court of Appeals correctly resolved a decades-long conflict on this issue in the lower courts."

Furthermore, the Court discussed the negative implications of giving priority to a common charges lien recorded years after the filing of a consolidation agreement, stating that such a result may adversely affect the ability of a homeowner to refinance.[11] In addition, the Court opined that if it were to find the consolidation agreement did not qualify as the first mortgage of record, banks and condominium owners would simply take additional steps to satisfy the original mortgage, take out a new mortgage, and pay the additional fees required to achieve essentially the same result.[12]

Lastly, the Court justified its ruling based on the policy behind the relevant portion of the Condominium Act, which was enacted "to stimulate greater building activity throughout the State and to allow private enterprise to supply additional housing units, particularly in the middle income rental range."[13] The Court reasoned that treating consolidation agreements as the first mortgage allows condominium unit owners greater flexibility in obtaining a larger mortgage or refinancing, and thus advances the goals of the Condominium Act. Based on the foregoing, the Court held that the consolidated mortgage qualifies as the first mortgage of record and affirmed the decision of the Appellate Division.[14]

The Court of Appeals correctly resolved a decades-long conflict on this issue in the lower courts. This decision is important because it clarifies lien priority when dealing with a consolidated mortgage. The holding

confirms that condominium boards can now confidently proceed with a common charges lien without worrying about whether the consolidation of a later recorded mortgage will take priority.

This case protects the interests of condominium owners by providing them with greater flexibility in obtaining a larger mortgage or refinancing, which advances the Condominium Act's legislative intent of stimulating greater building activity throughout the State. The Court prevented a scenario where lenders would be less willing to consolidate loans for condominium owners in fear of their lien becoming subordinate to a common charges lien arising after. However, the Court also kept the interests of condominium boards in mind by stating that a consolidation agreement would not be considered the first mortgage of record if the common charges lien intervened between the time a first mortgage was made and the time a second mortgage was made and consolidated.[15]

The opinion noted that the legislature has the opportunity to amend Real Property Law § 339-z, as it has done in the past on numerous occasions.[16] In the future, the legislature may end up deciding to amend the statute. Until then, this case will control similar cases to follow.

Endnotes

1. N.Y. Real Prop. Law § 339-z (McKinney 2016).
2. *Id*.
3. Eva Talel & Richard Siegler, *Priority of Liens—Evolving Rules For Condominiums and Lenders*, N.Y.L.J., Sept. 7, 2016, *available at* http://www.stroock.com/siteFiles/Publications/070091616Stroock.pdf.
4. *Plotch v. Citibank, N.A.*, 27 N.Y.3d 477, 481, 54 N.E.3d 66, 67, 34 N.Y.S.3d 394, 395 (2016).
5. *Id*.
6. *Id*.
7. *Id*. at 481-82, 54 N.E.3d at 67, 34 N.Y.S.3d at 395.
8. *Id*.
9. 157 Misc.2d 643, 597 N.Y.S.2d 1004 (1993).
10. *Plotch v. Citibank, N.A.*, at 483, 54 N.E.3d at 68, 34 N.Y.S.3d at 396.
11. *Id*. at 482-83, 54 N.E.3d at 68, 34 N.Y.S.3d at 396.
12. *Id*.
13. *Id*. at 484, 54 N.E.3d at 69, 34 N.Y.S.3d at 397.
14. *Id*.
15. *Id*. at 483, 54 N.E.3d at 68, 34 N.Y.S.3d at 396.
16. *Id*. at 484, 54 N.E.3d at 69, 34 N.Y.S.3d at 397.

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N.Y. Real Property Law Journal

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N.Y. Real Property Law Journal

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

ISSN 1530-3918 (print) ISSN 1933-8465 (online)

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

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Biography: I am interested in practicing law in the real estate, corporate, and securities industries. I have had extensive legal experience working at different law firms that focus on these areas, as well as experience working at an in-house legal department at a midsize company. My passion and eager attitude towards these areas of law have helped me stay on top of relevant changes and advancements in these industries.

Name: Antonio G. Vozza
Year: Third-Year Law Student at St. John's University School of Law
Position on Journal: Senior Staff Member of the *N.Y. Real Property Law Journal*
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Biography: I have worked in the real estate world for a number of years. I used to assist my father with his closings when he was in private practice and now I work for First American Title Company. I have worked for First American for the past three years, delving into all aspects of the title and real estate world.

Name: Vernée C. Pelage
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Biography: I am interested in all aspects of transactional law. I hope to draft contracts on varying subject matters, including intellectual property and commercial real estate. I have also gained insight into intellectual property matters during my time at Ween & Kozek, PLLC. In addition to private sector work, I have demonstrated my commitment to the public interest through my roles at Queens Law Associates and New York Legal Assistance Group: Economic Justice Clinic. I am currently a paralegal at Meenan & Associates, LLC, a boutique firm in Manhattan.

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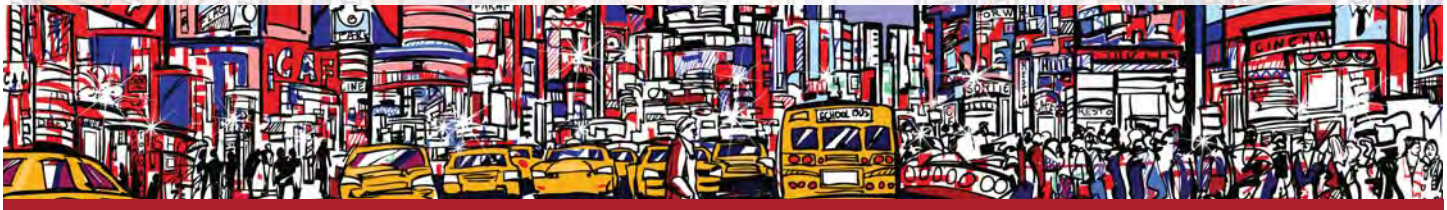

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