

# Nuggets of New York Commercial Mortgage Law and Practice (A to Z)

By Joshua Stein

Any attorney who closes commercial mortgage finance transactions in New York State must consider a series of issues unique to New York law and practice. Many are major and fundamental, such as the mortgage recording tax, the Lien Law, qualification for the new nonjudicial foreclosure process, and occasional usury problems. These and a few other issues often require overall documentation structures that are unique to New York.

Another dozen or so issues are less substantial. A commercial mortgage finance lawyer must keep even these minor issues in mind when structuring and documenting mortgage loan transactions, but most do not make New York loan documents look fundamentally different from those used in any other state.

This article summarizes many of those minor issues in alphabetical order, with a brief discussion of each one. In a few cases, New York's treatment of an issue is contrasted against general American common law and the recently published Restatement of the Law of Mortgages (the "Restatement").<sup>1</sup>

This discussion limits itself to state-specific issues and concerns, disregarding all generic issues, even fundamentally important ones. Issues, restrictions, and requirements unique to residential mortgage lending are also disregarded.

This article is excerpted, with changes, from a summary of New York mortgage law and practice recently completed by the author, which will soon be published in book form. That summary will address not only the minor issues covered in this article, but also all other state-specific issues that arise in New York mortgage loan transac-

tions, including many of the issues mentioned in, but substantively excluded from, the scope of this article. The author's complete summary of New York mortgage law will include sample language where appropriate.

Because the following discussion will be revised before it is published in book format, comments and suggestions would be much appreciated and should be directed to the author.

## (a) Appraisals

If a lender requires an applicant for a loan to pay for an appraisal, New York's Real Property Law (RPL) says the borrower can obtain a free copy of the appraisal upon written request.<sup>2</sup>

Although this statute originally applied only to residential mortgages, it was amended in 1996 to apply to all mortgage borrowers.<sup>3</sup>

Commercial borrowers typically do not realize they have the statutory right to obtain a copy of any appraisal for which they have paid, a right that may be quite helpful with a lender that hesitates to provide a copy of the appraisal.

This statute means a borrower can raise one less issue (or easily "trade away" one fake issue) when negotiating a commitment letter.

If a lender doesn't want to show the borrower the appraisal, the lender might not require the borrower to pay for the appraisal and might instead collect some kind of processing fee. The lender would then pay for the appraisal itself.<sup>4</sup> Because no case at all has ever interpreted this statute, it is not clear whether the courts would regard the proposed substitution of a "processing fee" as being overly creative.

## (b) Assignments of Mortgages

When a mortgagee assigns a note, as a general proposition the mortgage follows automatically<sup>5</sup> under both generic American common law and New York common law.

A New York mortgage assignee will, however, often insist upon recording an assignment of the mortgage, precisely because of the occasional case that says possession of the note is not enough and a mortgage assignment is not effective against third parties until recorded.<sup>6</sup>

An assignment of a mortgage constitutes a conveyance within the meaning of New York's recording statute.<sup>7</sup>

A mortgage borrower is not deemed to be on notice of an assignment of the loan, hence may validly continue to pay the assignor, until the borrower has received actual notice of the assignment.<sup>8</sup> Absent such notice, the pledgee bears the risk that the pledgor might accept a prepayment of the entire loan without telling the pledgee, thus destroying the pledgee's collateral without the pledgee's knowledge.

These requirements can create practical problems for any lender that accepts a pledge of multiple mortgage loans as collateral for some other obligation. Such a pledgee may not consider it feasible (or "market-standard") to record assignment documents or notify all underlying obligors when their loans have been collaterally assigned to the pledgee. Some mechanisms have been developed to mitigate this risk,<sup>9</sup> but they are beyond the scope of this discussion.

To record a mortgage assignment in New York, the parties need to sign and deliver to the recording officer an affidavit confirming certain matters intended to help the State enforce its mortgage recording tax,<sup>10</sup> another topic outside the scope of this discussion.

### **(c) Assignments of Rents**

For income-producing property, New York mortgagees typically obtain a separate assignment of rents and leases, a purportedly absolute assignment of the rents from the borrower to the mortgagee. In most cases, consistent with practice elsewhere in the country, the mortgagee then grants the borrower a license back to collect the rents pending a default.

This legal fiction is no more and no less enforceable and reliable in New York than anywhere else. The use of a separate assignment should help perfect the mortgagee's interest in the rents. It should also give the mortgagee a fall-back security measure (a separate property interest and contract right against the borrower) if the mortgage somehow fails. Rather than rely on any assignment of rents, though, a New York mortgagee will typically have a receiver appointed as soon as the mortgagee starts foreclosure proceedings.

New York law creates only a few special issues regarding the form of an assignment of rents and leases. This document will often refer to New York Real Property Law § 291-f.<sup>11</sup> It will often also provide for the appointment of a receiver without notice, particularly if the mortgage does not already cover that issue.

Recording an assignment of rents and leases requires two executed originals of an affidavit stating that the instrument is delivered in connection with a mortgage between the parties. These affidavits are required under New York's mortgage recording tax, a topic otherwise outside the scope of this summary.<sup>12</sup>

### **(d) Doing Business**

Any out-of-state lender should consider New York's "doing business" laws, which say that out-of-state entities "doing business" in New York must "qualify" in New York in order to take certain actions within New York. This may include the commencement of a foreclosure action.

As in most other states, merely holding a mortgage in New York probably does not constitute "doing business." Any failure to qualify when required to do so can ordinarily be cured after the fact without much trouble, other than some delay.<sup>13</sup> Counsel to any out-of-state lender that is considering making its first New York loan should carefully consider these "doing business" statutes, which vary slightly among entity types.<sup>14</sup>

### **(e) Dagnet Clauses**

New York courts will enforce a "dagnet" clause in a mortgage, i.e., a provision by which the mortgage secures not only a specified indebtedness but also any future indebtedness of the same borrower to the same lender.<sup>15</sup>

### **(f) Due-on Clauses**

Due-on-sale clauses are enforceable in New York,<sup>16</sup> as are clauses that accelerate a loan upon the death of a guarantor.<sup>17</sup>

### **(g) Future Advances**

A mortgage can secure future advances (made within 20 years after the mortgage is recorded) provided that the mortgage: (1) says it secures such advances; and (2) specifies the maximum aggregate amount of indebtedness it secures. Priority dates back to the date of recording. The mortgagee should still obtain appropriate title insurance coverage at the time of any future advance, typically in the form of a datedown under a "pending disbursements" endorsement issued at closing. The statutory protection for future

advances does not extend to "building loans," a topic otherwise outside the scope of this summary.<sup>18</sup>

### **(h) Guaranties**

When any lender accepts a guaranty of a loan, New York law imposes few state-specific burdens or special concerns on the lender.

New York law does try to protect guarantors in a manner consistent with generic principles of suretyship law in other states.

New York courts seem to apply these suretyship principles in a practical way. Courts applying New York law have been willing to enforce broad and general waivers of suretyship defenses. Thus, a New York guaranty may work perfectly well without including a long tedious laundry list of every possible suretyship defense (or theory for disclaimer of liability), along with a separate "knowing" waiver of each.<sup>19</sup> A short, tedious laundry list may do the job if the waivers listed are broad enough.

In New York, this area is nowhere nearly as complex and troublesome as it is in, for example, California.<sup>20</sup> The same is true of New York's one form of action rules, which apply to guaranties, but are outside the scope of this discussion. Based on those rules, if a New York loan is covered by any form of guaranty, particularly a partial one, the lender may want to structure it as multiple separate loans to maximize the lender's leverage if the loan defaults.

In preparing guaranty documentation, counsel to a New York lender should also try to assure that the guaranty will qualify for certain expedited enforcement procedures available under New York's Civil Practice Law and Rules (CPLR). CPLR 3213 says a creditor can move for summary judgment as part of the complaint if the creditor holds an "instrument for the payment of money only,"<sup>21</sup> which can include a

guaranty. By proceeding this way, a lender may save some time in the litigation process.

A garden-variety guaranty of payment should unquestionably qualify for favorable treatment under CPLR 3213, but it never hurts to have the guarantor expressly acknowledge that the guaranty is "an instrument for the payment of money only." This is particularly true if the guaranty has some non-monetary elements as well. Courts have been known to treat an acknowledgment of the type suggested as being, in effect, a guarantor's waiver of any objections to proceeding via CPLR 3213, even if the guaranty does include some non-monetary elements. Of course, there is no assurance that every court will take the same view.

Therefore, if a lender obtains a guaranty of both monetary and non-monetary obligations, the lender might be well advised to break that document into two: a pure guaranty of payment, unquestionably eligible for favorable treatment under CPLR 3213, and a guaranty of performance whose qualification may be less assured.

This approach might prevent the borrower from trying to challenge the lender's eligibility for CPLR 3213 when the lender tries to enforce the pure monetary guaranty. The lender may avoid months of procedural wrangling.<sup>22</sup>

### **(i) Lien Priority for Unpaid Interest**

If the principal balance of a mortgage increases because unpaid interest is added to principal, the mortgage will secure the interest component with the same priority as the original mortgage, provided that the mortgage describes the terms of repayment.<sup>23</sup> If, however, the parties expressly "capitalize" interest by adding it to principal, this transaction may then incur a mortgage recording tax. It should not be undertaken lightly.

### **(j) Mortgages vs. Deeds of Trust**

New York is a "lien theory" state rather than a "title theory" state,<sup>24</sup> hence favors mortgages over deeds of trust. New York lenders universally use mortgages.

### **(k) Options Held by Mortgagees**

If a mortgagee obtains an option to purchase an interest in the collateral or an equity interest in the borrower, in connection with any loan of \$2.5 million or more, then a New York statute expressly says the mortgagee may enforce such an option, provided it is not triggered by the borrower's default.<sup>25</sup> For any loan below \$2.5 million, though, an option to purchase held by the mortgagee may still create issues regarding "clogging of the equity of redemption," an issue outside the scope of this summary.

### **(l) Powers of Attorney**

New York law provides for a statutory short form of power of attorney, but its use is not mandatory.<sup>26</sup> To grant affirmative authority to an attorney-in-fact under the statutory short form, the principal must not only sign and acknowledge the power of attorney, but also remember to initial certain paragraphs within that document. If the principal merely signs and acknowledges the document without initialing the particular paragraphs, the document may fail to achieve its intended purpose.<sup>27</sup>

A power of attorney may be recorded against the real property it affects, or recorded once and then used repeatedly for multiple properties. Either way, it should be recorded before the mortgage and must be acknowledged in the same manner as a deed.<sup>28</sup>

An attorney-in-fact cannot convey or mortgage an interest in land, other than entering into a lease for a year or less, unless the instrument of

appointment expressly grants such authority.<sup>29</sup>

New York statutes expressly contemplate that a corporation may act through a power of attorney, the same as any other legal entity.<sup>30</sup> Caution is advised, however, when planning a closing where a corporation will act through a power of attorney. New York real estate lawyers and title insurance companies often frown on the idea of having a corporation act through a power of attorney. If one plans to do it, one should first make sure no one else will be able to successfully object.

At least one New York case holds that an attorney-in-fact cannot sign an affidavit on behalf of its principal.<sup>31</sup> This type of limitation is of particular (and peculiar) relevance given the number of affidavits required for New York real estate closings. (New York closing affidavits go far beyond the two mentioned in this summary.) Title insurance companies may refuse to accept an affidavit signed by an attorney-in-fact. To solve such a problem, one can often have the affidavit signed by anyone else who knows about the underlying facts and is willing to sign the affidavit. Typically, counsel for either party will have the knowledge but may lack the willingness.

When an attorney-in-fact signs a document to be recorded, New York's newly enacted statute on acknowledgments expressly states that the acknowledgment of the attorney-in-fact's signature, like an acknowledgment of any other signature, "must conform substantially with" the new statutory form.<sup>32</sup> The statute prescribes no special treatment whatsoever for attorneys-in-fact.

The author has been advised that, despite the unequivocal statutory language, when an instrument signed by an attorney-in-fact is submitted for recording, some recording offices have begun to require that the acknowledgment be customized to describe the power of attorney under

which the attorney-in-fact was authorized to sign.<sup>33</sup> This represents an unfortunate and unnecessary reintroduction of complexity and pitfalls<sup>34</sup> into an area where, in a rare blow for simplicity in New York real estate closings, the Legislature has already decided the issue. The recording offices should simply do what the Legislature says. Until they decide to do so, practitioners should beware of these possible special requirements.

### (m) Prepayment

Unless a loan expressly says it is prepayable, the lender can reject a prepayment, and the borrower has no general legal right to prepay.<sup>35</sup>

Consistent with the general enforceability of prepayment restrictions in New York, prepayment premiums are enforceable in New York.<sup>36</sup> The loan documents should (and most already do) say that the borrower will owe a prepayment premium not only for a voluntary prepayment, but also for an involuntary one triggered by acceleration.<sup>37</sup>

### (n) Security Deposits

New York law requires a property owner to turn over security deposits to the transferee upon any conveyance of the property, including foreclosure. Failure to do so is a misdemeanor. When the transferee receives the security deposits, the transferee becomes legally responsible for them.<sup>38</sup>

If the mortgaged property is a rental apartment building, the mortgagee will usually be responsible for the tenants' security deposits after foreclosure, regardless of whether the mortgagee actually received them.<sup>39</sup>

This collection of statutory provisions suggests that, for nonresidential property, a mortgagee should, as a matter of law, have no liability after foreclosure for security deposits it did not receive. No available case actually confirms this result. If a mortgagee of nonresidential proper-

ty can effectively disclaim liability for security deposits it did not receive, and if that mortgagee were concerned about legal exposure only (as opposed to practicalities), then that mortgagee might not worry about what happens to the security deposits after foreclosure. If the mortgagee agreed to "nondisturb" the tenant, though, the issue would probably come back onto the radar screen and lead the mortgagee to add exculpatory language to the nondisturbance agreement.<sup>40</sup>

Practically speaking, for loans on New York apartment buildings, or even for nonresidential collateral, a prudent mortgagee will usually care very much about security deposits. A mortgagee will often seek assurances that the borrower will not misapply security deposits, so that they will be available to the new owner of the building after any foreclosure. A mortgagee might, for example, want to control the security deposits itself or address the issue through personal guaranties from the borrower's principals.

### (o) Separate Notes?

For a multistate multiproperty loan, New York mortgage loan attorneys typically do not believe that anything about New York mortgage law or practice dictates the use of a separate promissory note for the New York properties, or for each New York property separately.

The parties may, however, want to use separate notes for other reasons. In a multistate loan, for example, some states, like California and Colorado, have procedural traps that may favor breaking one large loan into multiple separate notes. Even for a purely intrastate loan, if a mortgagee obtains partial or complete guaranties of the indebtedness, the mortgagee may want to use multiple notes to try to maximize leverage after a default.<sup>41</sup> Nothing in New York mortgage law or practice substantively disfavors the use of multiple notes, although they create an extra layer of complexity<sup>42</sup> in an area

already more complex than it needs to be.<sup>43</sup>

### (p) Tax Escrow Fees

A mortgagee cannot charge a fee for administering a tax escrow.<sup>44</sup>

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The small collection of issues discussed in this article represents only the tip of the iceberg of state-specific issues that arise in New York mortgage loan closings. The minor issues discussed here do arise from time to time in any commercial mortgage loan practice, and this article is intended to assist the practitioner by providing a convenient set of answers. The author's upcoming summary of the law in this area, as described above, will address a broader range of issues.

### Endnotes

1. Restatement (Third) of Property: Mortgages (1996). See also Dale A. Whitman, *Mortgage Drafting: Lessons from the Restatement of Mortgages*, 33 A.B.A. Real Prop. Prob. & Tr. J. 415 (Fall 1998).
2. N.Y. Real Prop. Law § 254-c(1) (McKinney 1999).
3. New York L. 1996, ch. 80, § 1 (May 1996).
4. The sequence demonstrates in a tiny way the unexpected consequences that often follow whenever the Legislature decides to rewrite private contractual relationships, and how any such legislative efforts often end up requiring further legislative and regulatory efforts, often without end, to respond to private sector ingenuity. See, e.g., 9 N.Y.C.R.R. §§ 2050.1-2530.1 (about 300 pages of regulations governing apartment rents, but only the tip of the iceberg).
5. See *Flyer v. Sullivan*, 134 N.Y.S.2d 521, 522-523 (App. Div. 1954). The proposition that "the mortgage follows the note" tracks the traditional majority view under American common law, subject however to random cases, even in New York, holding just the opposite. As an example, see the *Parmann Mortgage Associates* case described in the next endnote. But see Restatement (Third) of Property § 5.4 (1996). The Restatement would change the traditional common law approach. The Restatement says that, unless the parties agree otherwise, if either the note or (except where the UCC requires otherwise) the mortgage is transferred, then the other automatically follows. While this approach sounds fair

- and reasonable, it may create uncertainty if a fraudulent assignor were to assign note and mortgage to two separate assignees simultaneously. Of course, that merely underscores the benefits of taking an assignment of the note and also searching title and recording an assignment of the mortgage, hence avoiding the issue entirely.
6. See *Parmann Mortgage Associates v. Patterson*, N.Y.L.J., Dec. 15, 1999, at 25. Here, the holder of the mortgage sold it twice. The first purchaser obtained only a recordable assignment of the mortgage, but didn't bother to require delivery of the original promissory note. The second purchaser obtained only the original promissory note, but didn't bother to perform a title search or record an assignment. The first purchaser recorded the assignment and won, even without holding the original promissory note. Dictum suggests the possibility of a different result if the second assignment had been collateral, rather than absolute—i.e., the first assignee's rights would depend not entirely on the nature or implementation of the first assignment itself but instead on what happened later—much the same as the Restatement's reference to the UCC as described in the preceding endnote. This case should not be regarded as a statement of New York "black-letter law," which normally says "the mortgage follows the note," as is typical under American common law. Instead, this case demonstrates the occasional randomness of results in this area. It shows why an assignee would want to obtain possession of the note and also record a notice of the assignment. For good measure, the assignee would also be well advised to notify the borrower of the assignment. Just how far to go with all this would depend largely on the assignee's view of the credit and reliability of the assignor.
  7. See *Weideman v. Pech*, 92 N.Y.S. 493, 495 (App. Div. 1905); see generally 92 N.Y. Jur. 2d § 70 (1998) (discussing the meaning of conveyance in the recording act). Assignments of mortgages, whether absolute or collateral, are not taxed in the state.
  8. See N.Y. Real Prop. Law § 324 (McKinney 1999). The borrower/obligor is deemed to have notice of the assignment if it was recorded before the deed to the borrower/obligor, i.e., if the obligor took the property "subject to" an existing mortgage that had been assigned before the borrower/obligor took title. This proposition is consistent with expecting any purchaser to perform a full search of title.
  9. For more on the practicalities and common law of loan assignments, both in and out of the state, with an emphasis on the risks of collateral assignments, see James I. Hisiger and Joshua Stein, *Acquisition Loans Pose Added Risks for Lenders*, Nat'l L.J., Sept. 29, 1997, at B11; Joshua Stein, *Mortgage Loan Assignments: A Primer in Two Parts*, Prac. Real Estate Law., July-Sept., 1997. See also N.Y. U.C.C. § 9-502(a) (McKinney 1999) ("on default the secured party is entitled to notify an account debtor or the obligor on an instrument to make payment to [the secured party] . . . and also to take control of any proceeds to which [the secured party] is entitled under § 9-306").
  10. See N.Y. Real Tax Law § 275 (McKinney 1999).
  11. See N.Y. Real Prop. Law § 291-f (McKinney 1999). This statute gives a mortgagee the right to notify certain commercial tenants that the mortgage restricts the landlord's right to modify, amend, or cancel leases, or accept prepayments of rent. The mortgagee must satisfy some technical conditions, including a requirement that the mortgage mention the statute. If those conditions are satisfied and the mortgagee gives the necessary notice, then the tenants are bound by the restrictions in the mortgage.
  12. See N.Y. Tax Law § 255 (McKinney 1999). Without this affidavit, an assignment of rents and leases may be taxed as a mortgage.
  13. Delay can, of course, be deadly (and embarrassing to counsel) once the loan goes into default.
  14. See N.Y. Bus. Corp. Law §§ 1301, 1312 (McKinney 1999); N.Y. Limited Liability Corp. Law §§ 803, 808 (McKinney 1999); N.Y. Partnership Law §§ 121-902, 121-907 (McKinney 1999).
  15. See *State Bank of Albany v. Fioravanti*, 51 N.Y.2d 638 (1980). As in so many other mortgage-related issues that would be routine in most states, the mortgage loan practitioner must again beware of the mortgage recording tax.
  16. *First Federal Savings & Loan Ass'n v. Jenkins*, 441 N.Y.S.2d 373 (Sup. Ct. 1981) (stating that, although decided on federal law, New York law would produce the same result). If a mortgagee has agreed not to withhold unreasonably its consent to a transfer of the property subject to the mortgage, then the mortgagee cannot use its consent right to require the new owner of the property to pay a higher interest rate, assuming the purchaser is otherwise not reasonably objectionable. See *Silver v. Rochester Savings Bank*, 424 N.Y.S.2d 945, 946 (App. Div. 1980) (requiring mortgagee to consent to the sale, without increasing the interest rate, where mortgagee's consent to a transfer was not to be unreasonably withheld and mortgagee had admitted the purchaser's credit was "impeccable and better than" the original mortgagor's). No available New York case addresses the validity of due-on-encumbrance clauses in the state. These "due-on" issues have produced astonishingly few reported cases here, particularly when compared against California, where the issue has spawned one of many vast bodies of state-specific mortgage-related jurisprudence.
  17. See *Bank of New York v. Spring Glen Associates*, 635 N.Y.S.2d 781 (App. Div. 1995).
  18. See N.Y. Real Prop. Law § 281 (McKinney 1999). As with so much else in the world of New York mortgages, counsel must also consider the mortgage recording tax. That tax will be due when the parties record the mortgage. The tax will apply based on the stated maximum principal amount of the mortgage, whether or not advanced, even if the parties add language to the mortgage to try to limit the secured indebtedness to some lower amount on an interim basis. If the parties think the borrower will repay the loan and then be able to re-borrow (a routine "revolver"), then they may face serious new problems under the mortgage recording tax. See Robert A. Simins, *Avoiding Mortgage Tax on Revolving Credit Loans*, N.Y.L.J., at 53; Joshua Stein, *New York Mortgage Recording Tax on Revolving Loans: The Problem and a New Solution for Multistate Transactions*, 22 NYSBA Real Property Law Section Newsletter, Winter 1994.
  19. See *Compagnie Financiere de CIC et de L'Union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 188 F.3d 31, 35 (2d Cir. 1999) ("the waiver set forth in the Guarantee Agreement was broad enough").
  20. Over many decades and many decisions, the California courts have seized on various theories to excuse guarantors from performing under their guaranties. Each new theory has led to a new paragraph of standard boilerplate waiver language in all future guaranties, with the result that a well-drafted California guaranty is a remarkable document indeed, in which a nugget of substance is completely buried, even overwhelmed, by paragraph after paragraph of waivers, disclosures, caveats, and recitations of every possible circumstance that might ever arise in the future life of a loan. New York law on guaranties is not as highly developed, and hence neither are New York guaranties. For an overview of the California rules, see Dennis B. Arnold, *Anti-Deficiency Protection in Multi-State Transactions*, 441 PLI/Real 973, May-June 1999; Peter J. Gregora, *Guarantees, Letters of Credit and Comfort Letters in Mortgage Financing*, 441 PLI/Real 1121, May-June 1999.
  21. N.Y. C.P.L.R. § 3213 (McKinney 1999). The guarantor will then defend the motion for summary judgment and the



- lender's enforcement activities may return to the slow track. The lender will, however, have saved the time that normally would have elapsed between filing a complaint and moving for summary judgment.
22. In a multistate transaction, the lender should not become so swept up by the speediness of N.Y. C.P.L.R. 3213 that the lender loses sight of the risks of obtaining a judgment on a note if any collateral is located in a single-action state such as California.
  23. See N.Y. Real Prop. Law § 291 (McKinney 1999). Does this mean the mortgagee should attach a copy of the note to the mortgage? Such a practice is not typical in New York.
  24. See Grant S. Nelson & Dale A. Whitman, 1 Real Estate Fin. Law § 4.2 (3rd ed. 1994) (describing New York as a leader in the development of the lien theory in United States mortgage law because of New York statutes that circumscribed the mortgagee's interest in the real estate before foreclosure). See also Restatement (Third) of Property § 4.1, note on mortgage theories followed by American jurisdictions (1996) (in New York, "[a] mortgage gives the mortgagee only a lien" and the title theory has been "abolished," citing *Ganbaum v. Rockwood*, 308 N.Y.S.2d 436 (App. Div. 1970)).
  25. See N.Y. Gen. Oblig. Law § 5-334 (McKinney 1999). In applying the monetary threshold, multiple advances are aggregated, as are advances to be made by multiple lenders.
  26. See N.Y. Gen. Oblig. Law § 5-1501(1) (McKinney 1999).
  27. This "negative option" was enacted by New York L. 1996, ch. 499, § 1 (January 1997). It was thought to be an improvement over the previous mechanism, where the attorney-in-fact's authority automatically extended to every category listed unless the principal expressly provided otherwise. In practice, the new requirement may create yet another counterintuitive pitfall in New York real estate practice, familiar to anyone who has ever forgotten to return the "negative option" form sent out every month by any book or CD club.
  28. See N.Y. Real Prop. Law § 294(1) (McKinney 1999).
  29. See N.Y. Gen. Oblig. Law § 5-703 (McKinney 1999); *Ochoa v. Estate of Sarria*, 468 N.Y.S.2d 44, 45 (App. Div. 1983) (holding that, without written authorization from lessee empowering attorney to exercise purchase option clause in lease, attorney's exercise of such clause for lessee was ineffective); *Raoul v. Olde Village Hall, Inc.*, 430 N.Y.S.2d 214, 217 (App. Div. 1980) (requiring a showing that attorney was authorized in writing to act as agent for vendor and, when attorney sent purchasers a realty sales contract not signed by vendor, vendor could have asserted attorney's lack of authorization as defense in purchasers' action for specific performance); *Singer v. Klebanow*, 168 N.Y.S.2d 487, 489 (Sup. Ct. 1957) (letter from defendant's attorney did not satisfy statute of frauds, absent showing of written authority for defendant's attorney to act as defendant's agent in signing contract).
  30. See N.Y. Real Prop. Law §§ 292-a, 309(1). The statute contains no comparable provisions validating powers of attorney issued by limited liability companies. But see N.Y. Limited Liability Corp. Law § 202(h) (empowering limited liability companies to "appoint . . . agents").
  31. *Reboul, MacMurray, Hewitt, Maynard & Kristol v. Quasha*, 455 N.Y.S.2d 86, 87 (App. Div. 1982). This case involved an affidavit on a contested issue in a litigation where the court seemed generally very unsympathetic to the party whose affidavit was being ignored. Perhaps the case is limited to its own facts or simply does not apply to real estate closings.
  32. N.Y. Real Prop. Law § 309-a(1) (McKinney 1999).
  33. These recording offices are believed to include the City Register of New York County.
  34. The recording offices that impose these new requirements can surely rationalize them, as they can any other contemplated new requirements. The concern may relate to proper indexing and cross-indexing of documents, but there are probably easier ways to address this particular concern. If all other rationalizations fail, these new requirements may be said to prevent fraud, which is a great fallback argument for almost everything. But that argument fails too, because anyone who creates a fraudulent document will be perfectly happy to continue to commit fraud when they sign and acknowledge their fraudulent document.
  35. *Arthur v. Burkich*, 520 N.Y.S.2d 638 (App. Div. 1987) (observing that "it has been settled law since the early 19th century that a mortgagor has no right to pay off his obligation prior to its stated maturity date in the absence of a prepayment clause in the mortgage or contrary statutory authority." *Id.* at 639. The court recognized that "prepayment can impose daunting economic sacrifices upon a mortgagee, not the least of which include the loss of the bargained-for rate of return, an increased tax burden, unanticipated costs occasioned by the need to reinvest the principal, and for those creditors anxious to ensure regular payments not unlike an annuity, it undoes the mortgagee's purpose in making the loan." Today those anxious creditors would include every fixed-rate securitization trust. The *Arthur v. Burkich* court declined to apply the Pennsylvania rule, in which silence regarding prepayment implies a right to prepay. The court emphasized the commercial nature of the transaction and concluded, "in any event, reform of the radical and adventuresome extent petitioners conceive is for the Legislature, not the courts, to bring to pass." *Id.* at 640. But see Restatement (Third) of Property § 6.1 (1996) (rejecting the established majority rule, the same rule as New York's, and providing, instead, "in the absence of an agreement restricting or prohibiting payment of the mortgage obligation prior to maturity, the mortgagor has a right to make such payment in whole or in part"). The net effect of the Restatement's change in the law will be to make it all the more important for lender's counsel to remember to include a paragraph to ban prepayment except as expressly negotiated in the documents.
  36. See, e.g., *Poughkeepsie Galleria Co. v. Aetna Life Insurance Co.*, 680 N.Y.S.2d 420 (Sup. Ct. 1998). This litigation involved a sophisticated borrower, a loan of \$112 million and a prepayment formula that had been so heavily negotiated that some last-minute changes in the clause were interlined by hand. As the court explained, the borrower "essentially argues that the portion of the prepayment clause which requires it to pay a prepayment premium, though negotiated by [borrower] and its counsel and agreed to by [borrower], is void and enforceable. However, prepayment premiums in nonresidential commercial mortgages are both valid and enforceable." *Id.* at 421. Faced with some other set of facts and a less sophisticated borrower, a New York court might conceivably stretch to invalidate a prepayment premium, but it seems unlikely. A bankruptcy court may have a different view.
  37. See, e.g., *George H. Nutman, Inc. v. Aetna Business Credit, Inc.*, 453 N.Y.S.2d 586, 587 (Sup. Ct. 1982) ("The election by the mortgagee herein to accelerate the mortgage and to treat the mortgage debt as due was not a voluntary act by the mortgagor sufficient to bring the prepayment penalty into operation."); *3C Associates v. I.C. & L.P. Realty Co.*, 524 N.Y.S.2d 701, 702 (App. Div. 1988) ("Given that the accelerated payment here is the result of plaintiffs-mortgagees having elected to bring this foreclosure action, they may not exact a prepayment penalty."). But see Bruce J. Bergman, *Bergman on New York Mortgage Foreclosures*, Vol. 1, 1-30, (Matthew Bender 1999 & Supp. 2000) ("The traditional view that a prepayment penalty is waived upon acceleration or default may be waning").
  38. N.Y. Gen. Oblig. Law § 7-105 (McKinney 1999).
  39. N.Y. Gen. Oblig. Law §§ 7-107, 7-108 (McKinney 1999).

40. For more on nondisturbance agreements, see Joshua Stein (subcomm. chair), *Report on Nondisturbance Agreements, with Model Agreement*, 22 NYSBA *Real Property Law Section Newsletter*, Spring 1994.
41. See Michael J. Feinman and William Zeena Jr., *Election of Remedies Statute's Effect on Holders of Mortgage Loan Guarantees*, N.Y.L.J., March 11, 1992, at 1.
42. The concept of multiple notes for a single financing is hardly unusual in New York real estate finance. Any construction loan will typically require at least two notes. Routine refinancings often require the lender to accept an assignment of a pile of old notes, which are then usually consolidated into one, but do not necessarily need to be.
43. Because mortgagees often lose original promissory notes, they may start to move away from notes and instead make "noteless loans." And if a mortgagee chooses to use multiple notes to evidence a loan that will refinance an

existing loan, the parties may need to "sever" the existing mortgage—break it into pieces—to avoid mortgage recording tax. This creates additional paper, expense, and utterly gratuitous complexity, but should create no substantive problems if done right.

44. N.Y. Real Prop. Law § 254-d (McKinney 1999). This prohibition applies to residential and commercial mortgage loans.

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**basis for a book to be published in 2001 by American Law Institute / American Bar Association, tentatively entitled "Practical Guide to Real Estate Practice." Mr. Stein acknowledges with thanks the helpful comments received on this article from numerous New York practitioners—too many to list here—who will all be identified and acknowledged when the author's complete summary of New York mortgage law and practice (described in the text of this article) is published. Any opinions or errors in this article are solely those of the author, not any organization with which the author is affiliated.**

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The Committee's definition of attorney professionalism is "... a dedication to service to clients and a commitment to promoting respect for the legal system in pursuit of justice and the public good, characterized by exemplary ethical conduct, competence, good judgment, integrity and civility."

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- Civility: behaving to all with courtesy, consideration and respect.

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