

# TABLE OF CONTENTS

## CHAPTER 1

### How to Use This Book

§ 1.01	How to Use This Book to Save Time, Lower Stress and Increase Efficiency. . . . .	1-1
	[1] Improvements to Traditional Document Preparation and Negotiation. . . . .	1-1
	[2] Key Features of This Book . . . . .	1-2
	[a] Deal-Specific Checklists . . . . .	1-2
	[b] Annotated Forms . . . . .	1-4
	[c] Data Input Sheet. . . . .	1-6
	[d] Quick-Access Integrated Commentary. . . . .	1-6
	[3] Document Assembly Software Compatibility . . . . .	1-7
§ 1.02	Scope of the Book . . . . .	1-9

## CHAPTER 2

### Overview of Standard Mortgage Financing; Pre-Closing Matters

§ 2.01	Chapter Scope . . . . .	2-8
§ 2.02	Mortgage Loan Stages . . . . .	2-8.1
	[1] Advertisements, Solicitations and Brokers. . .	2-8.1
	[2] Application . . . . .	2-8.1
	[3] Underwriting Review . . . . .	2-8.1
	[4] Commitment . . . . .	2-8.2
	[5] Appraisals . . . . .	2-8.2
	[6] Due Diligence . . . . .	2-8.2
	[7] Closing. . . . .	2-8.2
	[8] Administration. . . . .	2-8.2
§ 2.03	Sources of Financing Available to Borrowers. . . . .	2-8.3
	[1] Lenders Generally. . . . .	2-8.3
	[a] Institutional Lenders. . . . .	2-8.3
	[b] Nonbank Lenders (a/k/a Shadow Banks) . . . . .	2-8.3

**REAL ESTATE FINANCING**

	[2]	Government-Assisted Loans . . . . .	2-8.4
	[3]	Tax-Exempt Financing . . . . .	2-8.5
	[4]	Purchase Money Financing . . . . .	2-8.5
	[5]	Component Financing . . . . .	2-8.5
	[6]	Sale-Leaseback . . . . .	2-8.5
	[7]	Equity Financing . . . . .	2-8.5
	[8]	Tenant Financing or Equity Participation . . . . .	2-8.6
	[9]	Loans by IRAs . . . . .	2-9
	[a]	Self-Directed IRAs . . . . .	2-9
	[b]	Permitted Investments for Self-Directed IRAs . . . . .	2-9
	[c]	Prohibited Transactions . . . . .	2-9
	[d]	UBIT Tax Applies to Profits from Leveraged Real Estate . . . . .	2-9
	[e]	Need to Maintain Sufficient Liquidity to Make Distributions and Pay Property Expenses . . . . .	2-10
	[f]	IRA Distributions Without Penalty: College Expenses, High Medical Expenses, Disability Expenses, First-Time Home Purchase . . . . .	2-10
	[10]	Loans by Pension Plans . . . . .	2-10
	[a]	Loans by Retirement Plans to Beneficiaries . . . . .	2-10
§ 2.04		Requirements for Lenders Regarding Out-of-State Loans . . . . .	2-11
	[1]	Qualification to Do Business . . . . .	2-11
	[2]	Licensing and Regulatory Requirements . . . . .	2-12
	[3]	Franchise and Other Taxes . . . . .	2-12
	[4]	Filing Requirements . . . . .	2-12
§ 2.05		Lender's Tax Planning for Lending Transactions . . . . .	2-13
	[1]	Interest Rate Less Than "Applicable Federal Rate" . . . . .	2-13
	[2]	Avoiding "Original Issue Discount" Rules . . . . .	2-13
	[3]	Recharacterization of Loans If Conditional or Not <i>Bona Fide</i> . . . . .	2-16
	[4]	How Foreign Lenders Can Reduce United States Income Tax . . . . .	2-17
	[5]	Risks of "Conduit" Financing . . . . .	2-18
	[6]	Shift Origination Expenses to Borrower Since Lender Might Have to Amortize Them . . . . .	2-19
	[7]	Cancellation of Note on Lender's Death . . . . .	2-20
	[8]	Structuring a Transaction as an Equity Investment or Loan . . . . .	2-20

**TABLE OF CONTENTS**

xi

	[a]	In General . . . . .	2-20
	[b]	Payment to a Partner May Be a Deductible Distribution . . . . .	2-20
[9]		Tax Concerns of REIT Lenders . . . . .	2-20
	[a]	Basic Prerequisites for REITS . . . . .	2-21
	[b]	Powers of REITs To Hold Mortgages on “Interests in Real Property” and Debt Issued by Public REITs . . . . .	2-21
	[c]	Increase in FIRPTA Exemption (from 5% to 10% of Stock in Public REITs) May Increase Foreign Investment in REITs . . . . .	2-22
	[d]	Exemptions from FIRPTA tax on REIT Shares held by Foreign Qualified Collective Investment Vehicles . . . . .	2-22
	[e]	Risk of Loss of REIT Status if REIT Receives Certain Contingent Interest . . . . .	2-22
	[f]	Tax Issues of REITs in Loan Workouts . . . . .	2-23
[10]		State and Local Taxes Payable by “Foreign” Lenders . . . . .	2-23
	[a]	Examples of State and Local Taxes Assessed Against “Foreign” Lenders . . . . .	2-23
	[b]	U.S. Federal Limits on State and Local Taxes Assessed Against “Foreign” Lenders . . . . .	2-23
	[c]	U.S. Federal Limits on State and Local Taxes Assessed Against Federally Chartered Financial Institutions . . . . .	2-24
[11]		Information Returns Required to Be Filed by U.S. Lenders . . . . .	2-24
§ 2.06		Borrower’s Tax Planning for Lending Transactions . . . . .	2-25
	[1]	Incentives and Disincentives to Maximize Financing . . . . .	2-25
	[2]	Ownership of Mortgaged Property . . . . .	2-27
	[a]	C Corporations . . . . .	2-27
		[i] Double Taxation . . . . .	2-27
		[ii] Incentives for Foreigners to Use Corporations . . . . .	2-28
	[b]	S Corporations . . . . .	2-29
	[c]	Limited Partnerships . . . . .	2-30

## REAL ESTATE FINANCING

	<ul style="list-style-type: none"> <li>[i] Disadvantages of Partnerships for Foreign Investors . . . . .</li> </ul>	2-32.1
[d]	Limited Liability Companies . . . . .	2-32.2
[e]	Nominee Corporations . . . . .	2-32.3
[f]	Other Entities . . . . .	2-33
[g]	Additional Rules for Noncorporate Borrowers and Their Equity Owners . . . . .	2-33
[h]	Structuring Ownership to Maximize Benefits of Future Tax-Deferred Exchange per 26 USC § 1031 . . . . .	2-34
[3]	Minimizing Impact of “At Risk” Rules . . . . .	2-35
[4]	Qualified Nonrecourse Financing . . . . .	2-36
[5]	Acceleration of Interest Deductions by Refinancing . . . . .	2-36.1
[6]	Reducing Loan Fees and Increasing Deductible Interest . . . . .	2-36.2
[7]	Payment of Interest by Borrower from Its Own Funds . . . . .	2-36.2
[8]	Only Borrower Can Deduct Payment of Interest . . . . .	2-36.3
[9]	Related Party Loans . . . . .	2-36.3
[a]	Interest Paid to Related Cash-Basis Lender . . . . .	2-36.3
[b]	Offsetting of Interest Income and Expense . . . . .	2-36.3
[c]	Loans Between Family Members . . . . .	2-36.4
[10]	Insuring Deductibility of Interest by Proper Use of Loan Proceeds . . . . .	2-36.4
[11]	Insuring Deductibility of Interest on “ <i>Bona Fide</i> ” Debt . . . . .	2-36.5
[12]	Nonrecourse “Loan” Proceeds Are Income to Borrower if It Controls Repayment . . . . .	2-36.6
[13]	Borrower’s Obligations for (a) Withholding Taxes on Payments to “Foreign” Lender, and (b) Information Returns and Statements . . . . .	2-36.7
[a]	Withholding Taxes . . . . .	2-36.7
[b]	Information Returns and Statements . . . . .	2-36.8
[14]	Adverse Tax Impact of Transferee’s Assumption of Mortgage Loan . . . . .	2-36.8
[15]	Adverse Impact of Pledge of IRA . . . . .	2-36.9
[16]	Tax Concerns of Tax-Exempt Borrowers and Investors . . . . .	2-36.9
[a]	Unrelated Business Taxable Income . . . . .	2-36.9
[b]	New Exemption from FIRPTA Tax For Investments by Foreign Pension Funds in U.S. Real Estate . . . . .	2-36.10

**TABLE OF CONTENTS**

	[17] Tax Concerns of REIT Borrowers and Investors . . . . .	2-36.10
	[a] Risks when Taxable REIT Subsidiary Provides Collateral. . . . .	2-36.10
	[b] Risk of Restrictions on Distributions by a REIT to Its Shareholders . . . .	2-36.11
	[18] An Owner Will Realize a Capital Loss on Property Held for Investment and an Ordinary Loss on Property Held for Sale. . .	2-36.11
§ 2.07	Lender’s Unique Legal, Organizational and Contractual Requirements . . . . .	2-36.12
	[1] Governmental Licensing and Regulatory Requirements . . . . .	2-36.12
	[a] Risk Management. . . . .	2-36.14
	[i] Interest Rate Risk Management . . . . .	2-36.14
	[ii] Risk Management for Large Banks. . . . .	2-36.14
	[iii] Regulated Lenders Must Supervise Third-Party Vendors and Relationships with Other Banks . . . . .	2-36.15
	[iv] Cybersecurity Requirements Applicable to Lenders and Third-Party Service Providers Such as Lawyers. . . .	2-36.16
	[b] Foreign Banks and Their Branches and Agencies. . . . .	2-36.17
	[c] Licensing Generally . . . . .	2-36.17
	[d] Tax-Exempt and Non-Profit Entities. . .	2-36.18
	[e] Accounting Requirements . . . . .	2-36.19
	[f] Specialized Lenders . . . . .	2-36.19
	[2] Offering Materials; Organizational Requirements . . . . .	2-36.19
	[3] Contractual Requirements. . . . .	2-36.20
§ 2.08	Lender’s Due Diligence to Determine Potential Defenses . . . . .	2-36.21
	[1] Grounds for Borrower to Avoid Its Obligations; Illegality. . . . .	2-36.21
	[a] Infancy . . . . .	2-36.21
	[b] Competency . . . . .	2-36.21
	[c] Unconscionability and Duress . . . . .	2-36.21
	[d] Sovereign Immunity. . . . .	2-36.22
	[e] Lack of Power and Authority . . . . .	2-37
	[f] Lack of Existence. . . . .	2-37
	[g] Client/Borrower and Lawyer/Lender. . .	2-37
	[h] Officer or Director as Borrower and Public Company as Lender. . . . .	2-38

## REAL ESTATE FINANCING

	[2]	Obstacles to Recovery from Collateral . . . . .	2-38
		[a] Homestead Laws and Asset Protection Methods . . . . .	2-38
		[i] Homestead Laws . . . . .	2-38
		[ii] Asset Protection Methods . . . . .	2-38
		[iii] Lender's Due Diligence and Documents . . . . .	2-39
		[b] "One-Action" and "Anti-Deficiency" States . . . . .	2-39
§ 2.09		Lender's Requirements for Loan Commitments . . . . .	2-40
	[1]	Form of Commitment . . . . .	2-40
		[a] Letter of Intent . . . . .	2-40
		[i] Letter of Intent is generally not binding on Lender . . . . .	2-40
		[ii] Covenant by Borrower and its Principals to Indemnify Lender . . . . .	2-40
		[iii] Representations and Covenants by Borrower and Obligors . . . . .	2-41
		[iv] Confidentiality and Exclusivity . . . . .	2-41
		[v] Indemnity . . . . .	2-41
		[b] Combined Form of Application and Commitment . . . . .	2-41
	[2]	Conditional Obligation to Lend . . . . .	2-41
	[3]	Clarifying Implied Limits on Lender's Satisfaction . . . . .	2-42
	[4]	Requiring Strict Compliance by Borrower . . . . .	2-42
	[5]	Borrower's Obligation to Borrow . . . . .	2-42
	[6]	Commitment Fee . . . . .	2-42.1
		[a] Refundable Commitment Fee . . . . .	2-42.1
		[b] Nonrefundable Commitment Fee . . . . .	2-43
		[c] Recoupment of Other Expenses . . . . .	2-43
	[7]	Appraisal . . . . .	2-43
		[a] Legal Requirements for Appraisers . . . . .	2-44
		[b] Legal Requirements for Appraisals . . . . .	2-45
		[i] Risks of "Total Net Value" Appraisal Method . . . . .	2-46
		[c] Required Contents of an Appraisal . . . . .	2-47
		[i] An Appraisal Should Describe the Relevant Market and How It Is Functioning . . . . .	2-47
		[ii] Valuation Methods Based on Comparable Sales, Income, and Cost . . . . .	2-47
		[iii] Highest and Best Use of the Property . . . . .	2-47

**TABLE OF CONTENTS**

[iv] Appraisals Should Not Predict the Future Value of a Property . . . . . 2-47

[v] Appraisals in Declining Markets . . . . . 2-48

[d] Limits, Innovations & Variables Relating to Appraisals . . . . . 2-48

[i] Different Appraisers May Give Conflicting Appraised Values For the Same Property . . . . . 2-48

[ii] Automated Valuation Models (“AVMs”) May Improve Appraisals . . . . . 2-48

[iii] Variables Affecting Appraisals . . . . . 2-49

[e] Appraiser Independence, and Legal Review of Appraisals . . . . . 2-50

[f] Proof of Compliance with Loan-to-Value Requirement . . . . . 2-50

[g] Lender’s Real Estate Appraisal and Evaluation Program . . . . . 2-50

[h] Evaluations . . . . . 2-50.1

[8] Financial Disclosures . . . . . 2-50.1

[a] Financial Statements . . . . . 2-50.1

[b] Credit Report . . . . . 2-50.2

[c] Credit Scoring Models . . . . . 2-50.3

[d] Verification of Personal Data . . . . . 2-50.3

[9] Compliance with Regulatory Requirements . . . . . 2-50.3

[a] Loan-to-Value (“LTV”) Guidelines . . . . . 2-50.4

[b] Loan to One Borrower Limits . . . . . 2-50.4

[c] Capital Requirements . . . . . 2-50.5

[d] Loans to Insiders . . . . . 2-50.7

[e] Qualified Thrift Lender Requirement for FSAs . . . . . 2-50.7

[10] Specifying All Material Terms and Avoiding Vagueness . . . . . 2-50.8

[11] Enforceability Against Entities to Be Formed . . . . . 2-50.8

[12] Limitations on Borrower’s Remedies . . . . . 2-50.8

[13] Right of Cancellation Upon Any Material Change . . . . . 2-50.10

[14] Notification of Adverse Action . . . . . 2-50.10

[15] Brokerage Agreement . . . . . 2-50.11

[16] Consent to Pre-Closing UCC-1 Filings . . . . . 2-50.11

[17] Restrictions on Requiring Spouse to Be Guarantor or Co-Borrower . . . . . 2-50.11

§ 2.10	Borrower's Requirements for Loan Commitments . . .	2-50.12
	[1] Specify Borrower's Terms . . . . .	2-50.12
	[2] Lender Should Be Obligated and Able to Fund, Subject Only to Reasonable Conditions . . . . .	2-50.12
	[3] Reasonable and Objective Limits on Lender's Discretion . . . . .	2-50.14
	[4] Limit Right to Cancel Based on Material Changes . . . . .	2-50.14
	[5] Limit Maximum Amount of Fees . . . . .	2-50.14
	[6] Interest on Refundable Commitment Fee . . .	2-50.14
	[7] Limit Forfeiture of Borrower's Fees . . . . .	2-50.15
	[8] Limit Borrower's Ultimate Liability . . . . .	2-51
	[9] Reconciling Loan Documents with Borrower's Other Agreements . . . . .	2-51
	[10] Negotiations Among Members of the "Borrower Group" . . . . .	2-51
	[11] Other Changes . . . . .	2-51
	[12] Specific Performance of Commitment . . . . .	2-51
§ 2.11	Electronic Loan Documents . . . . .	2-53
	[1] Electronic Documents Are Enforceable . . . . .	2-53
	[a] Electronic National Mortgage Registry . . . . .	2-53
	[b] Fannie Mae and Freddie Mac Requirements . . . . .	2-54
	[c] Slow Acceptance of eMortgage Loans . . . . .	2-57
	[d] Special Rule for Individual Consumers . . . . .	2-58
	[e] Exception for Records That Cannot Be Retained and Accurately Reproduced . . . . .	2-58
	[f] Remote Electronic Notarization . . . . .	2-59
	[g] Electronic Apostille . . . . .	2-62
	[2] Take Special Precautions in Electronic Transactions . . . . .	2-62
	[a] Avoid Inadvertent Agreement to Use Electronic Documents . . . . .	2-63
	[b] Avoid Unauthorized Use of Computer or Fax . . . . .	2-64
	[c] Final Step: Get Confirmation from the Other Party That It Can Act Electronically . . . . .	2-64
	[d] Requirements for Electronic Signatures . . . . .	2-66
	[e] Burden of Compliance on Lender . . . . .	2-67
	[f] Lender's Need to Maintain Control of e-Note . . . . .	2-67



**TABLE OF CONTENTS**

§ 2.12

- [g] Secure Methods of Remote Electronic Signatures . . . . . 2-67
- [3] Impact of Federal Electronic Signatures Act on State Law . . . . . 2-68
- [4] Methods of Making eSignatures . . . . . 2-68
- [5] Cryptocurrencies & Other Digital Assets . . . . . 2-68.1
- Types of “Lender Liability” Claims; Procedures to Minimize Such Claims . . . . . 2-69
- [1] Types of Liability . . . . . 2-69
  - [a] Defenses by Borrower and Guarantors . . . . . 2-69
  - [b] Summary of Grounds for Suits Against Lenders . . . . . 2-69
    - [i] Contract Claims . . . . . 2-69
    - [ii] Tort Claims . . . . . 2-70
    - [iii] Economic Duress Claims . . . . . 2-70.1
    - [iv] Claims of Tortious Interference with Contract . . . . . 2-70.1
    - [v] Negligence Claims . . . . . 2-70.1
    - [vi] Examples of Other Claims Against Lenders . . . . . 2-70.2
  - [c] Grounds for Suits by Governmental Units Against Lenders . . . . . 2-70.5
  - [d] Future Grounds for Lender Liability . . . . . 2-70.6
  - [e] Lender Defenses . . . . . 2-70.6
    - [i] In Pari Delicto . . . . . 2-70.6
    - [ii] Preemption of State Law Claims . . . . . 2-70.6
    - [iii] “Lender Liability” Statutes of Frauds . . . . . 2-70.8
- [2] Ways of Avoiding Lender Liability . . . . . 2-70.8
  - [a] Prevent Unauthorized, Informal, or Unanticipated Agreements and Use Disclaimers . . . . . 2-70.8
  - [b] Lender Should Not Only Comply with Literal Terms of Loan Documents, But Also Be Reasonable . . . . . 2-70.11
  - [c] Lender Should Not Get Involved in Management of Borrower . . . . . 2-70.12
    - [i] Consider Independent Managing Agent . . . . . 2-70.12
    - [ii] Lender Should Threaten to Foreclose Rather Than Appoint Officers . . . . . 2-70.12
    - [iii] Lender Should Avoid Exercising Rights of Equity Owner . . . . . 2-70.12

## REAL ESTATE FINANCING

	[d]	Comply with All Post-Closing Obligations . . . . .	2-70.13
	[e]	Don't Declare Defaults Based on Vague Standards. . . . .	2-70.13
	[f]	Consider Risks if Other Creditors Are Not Paid . . . . .	2-70.14
	[g]	Don't Bluff or Lie . . . . .	2-70.14
	[h]	Avoid Selective Disclosure of Material Documents; Use Disclosure When Forwarding Third Party Documents . . . . .	2-70.15
	[i]	Lender Should Give Notice of Default and Opportunity to Cure. . .	2-70.15
	[j]	Treat Carefully Those Who Confide in, or Rely on, the Lender. . . . .	2-70.17
	[k]	Do Not Cause Others to Do Wrong. . .	2-70.18
	[l]	Before Any Enforcement Action Against Borrower, Get All Approvals, and Verify No Representative of the Lender Made Conflicting Promises. . . . .	2-70.18
	[3]	Ways of Protecting Lender Representatives. . .	2-70.19
	[a]	Exculpation . . . . .	2-70.19
	[b]	Indemnification and Advancement of Legal Fees . . . . .	2-70.19
	[c]	Insurance. . . . .	2-70.20
§ 2.13		Methods for Borrower and Its Principals to Limit Personal Liability to Lender . . . . .	2-71
	[1]	Maintain Separate Identity of Borrower to Avoid Personal Liability of Members, Partners, and Shareholders. . . . .	2-71
	[2]	Comply with Duties to Creditors. . . . .	2-72
	[3]	Avoid Waste to Mortgaged Property. . . . .	2-72
	[4]	Asset Protection Planning. . . . .	2-73
	[a]	Owning Property as Tenants by the Entirety. . . . .	2-73
	[b]	Transferring Assets from Spouse at Risk to Spouse with No Liabilities. . . . .	2-73
	[c]	Asset Protection Trusts and Dynasty Trusts . . . . .	2-74
	[d]	Transfer of Assets to Pension Plan. . .	2-74
	[e]	Use State Exemptions . . . . .	2-74
	[f]	"Equity Stripping" by Encumbering Assets with Debt. . . . .	2-75
	[5]	Ways of Protecting Borrower Representatives. . . . .	2-75
	[6]	Special Deposits . . . . .	2-75

## TABLE OF CONTENTS

xix

§ 2.14	Ethical and Legal Requirements Applicable to Attorneys . . . . .	2-76
[1]	Ethical Requirements for Counsel . . . . .	2-76
	[a] Conflicts of Interests . . . . .	2-76
	[b] Lawyer Has Affirmative Duty to Keep Client Informed, Not Just to Follow Orders . . . . .	2-76
	[c] Duty to be Competent . . . . .	2-77
	[d] Duty to Maintain Confidentiality of Client Information. . . . .	2-77
	[i] Internet Access to Client Confidences. . . . .	2-77
	[ii] Unencrypted Emails. . . . .	2-78
	[iii] Client Consent . . . . .	2-78
[2]	Lawyer's Duty to Decline or Terminate Representation. . . . .	2-79
[3]	Liability of Lawyer Acting as Counsel for Client. . . . .	2-80
[4]	Liability of Lawyer Acting as a Notary. . . . .	2-81
[5]	Liability of Lawyer Acting as a Title Agent. . . . .	2-81
[6]	Liability of Lawyer Acting as a Mortgage Loan Originator . . . . .	2-82
[7]	Liability of Law Firm for Cybersecurity Breach. . . . .	2-82
[8]	Liability of Lawyer as Debt Collector. . . . .	2-83
[9]	Liability of Lawyer for Consumer Fraud. . . . .	2-83

## CHAPTER 3

### Promissory Notes and Payment Terms Generally

§ 3.01	Chapter Scope . . . . .	3-6
§ 3.02	Lender's Requirements for Promissory Note. . . . .	3-7
[1]	Negotiability Provisions . . . . .	3-7
	[a] Signature . . . . .	3-7
	[b] Unconditional Promise to Pay a Sum Certain . . . . .	3-8
	[i] Nonrecourse Limitation. . . . .	3-9
	[ii] Sum Certain. . . . .	3-9
	[iii] No Other Promise . . . . .	3-10
	[c] Payable on Demand or at a Definite Time . . . . .	3-10
	[d] Payable to Order or to Bearer . . . . .	3-10
	[e] Waiver by Maker . . . . .	3-10
[2]	Interest . . . . .	3-11
	[a] Current Rates . . . . .	3-11
	[b] Types of Adjustable Rates. . . . .	3-11

## REAL ESTATE FINANCING

	[i]	Prime Rate . . . . .	3-11
	[ii]	LIBOR & SOFR . . . . .	3-11
	[iii]	Other Rates . . . . .	3-21
	[c]	Adjustable Interest Rate Based on Index. . . . .	3-21
	[d]	Impact of Increases in Adjustable Rate . . . . .	3-22
	[e]	Interest After Maturity . . . . .	3-22
	[f]	Interest on Unpaid Balance . . . . .	3-22
[3]		Usury Savings Clause . . . . .	3-22
[4]		Methods of Payment . . . . .	3-23
	[a]	Check . . . . .	3-23
		[i] How to Minimize Your Risk of Loss from Check Fraud . . . . .	3-24
		[ii] How Closing to Minimize the Risk of Your Bank Your Checking Account. . . . .	3-24
	[b]	Maker's Right to Require Production of Note . . . . .	3-24
[5]		Limits on Prepayment or Early Termination. . . . .	3-24.1
	[a]	Types of Prepayment Restrictions. . . . .	3-24.1
		[i] Absolute Prohibition . . . . .	3-24.1
		[ii] Percentage Fee . . . . .	3-24.1
		[iii] Yield Maintenance. . . . .	3-25
		[iv] Collateral Defeasance . . . . .	3-25
		[v] "Make-Whole" Premium. . . . .	3-25
	[b]	Prepayment Right Favors Borrower. . . . .	3-26
	[c]	Prepayment Right Increases Lender's Credit Risk . . . . .	3-26
	[d]	Prepayment Fee Enforceable Unless Unconscionable or a Penalty. . . . .	3-26
	[e]	Specify Prepayment Fee Due Upon Default and Involuntary Payment. . . . .	3-28
	[f]	Application of Partial Prepayment in Inverse Order. . . . .	3-29
	[g]	Avoid Language Implying Prepayment Is Permitted. . . . .	3-29
	[h]	Fee for Early Termination of Credit Line. . . . .	3-29
	[i]	Payment of Swap Breakage Costs. . . . .	3-30
	[j]	Prepayments by Debtors in Bankruptcy Cases . . . . .	3-30
		[i] Prepayment Fee Must Be Reasonable. . . . .	3-30
		[ii] Prepayment Fee Triggered by Bankruptcy Filing . . . . .	3-30
[6]		Late Charges . . . . .	3-32

**TABLE OF CONTENTS**

xxi

	[7] Increased Interest Rate After Default . . . . .	3-34
	[8] Lender’s Limitations on Nonrecourse Provisions . . . . .	3-34.2
	[9] Choice of Law . . . . .	3-34.3
§ 3.03	Lender’s Drafting Concerns and Alternative Provisions . . . . .	3-34.4
	[1] Assumption of Note . . . . .	3-34.4
	[2] Mandatory Forum Selection Clause . . . . .	3-34.4
	[3] Extension Option . . . . .	3-34.4
	[4] Option to Reduce Interest Rate . . . . .	3-34.4
	[5] Enforceability . . . . .	3-34.5
	[6] Interest Rate Swaps, Caps and Collars . . . . .	3-34.5
	[a] Interest Rate Swap . . . . .	3-34.5
	[b] Interest Rate Cap . . . . .	3-34.5
	[c] Interest Rate Collar . . . . .	3-34.6
	[d] Mortgage Securing Interest Rate Agreement . . . . .	3-34.6
	[i] Title Insurance Endorsement . . . . .	3-34.6
	[ii] Additional Tax if Mortgage Secures Swap Breakage Costs . . . . .	3-34.7
	[e] Securities and Tort Liabilities . . . . .	3-34.7
	[f] ISDA Forms . . . . .	3-34.8
	[g] Counterparty Risks . . . . .	3-34.8
	[h] GMEI . . . . .	3-34.9
	[i] Lender’s Swap Breakage Costs . . . . .	3-34.9
	[j] Exemptions from Clearing & Execution Requirements for Swaps . . . . .	3-34.9
	[k] Guarantee by Non-ECP Cannot Cover Swap Obligations . . . . .	3-34.10
	[l] Regulatory Requirements . . . . .	3-34.11
	[m] ISDA Protocols . . . . .	3-34.12
	[i] ISDA 2020 IBOR Fallbacks Protocol . . . . .	3-34.13
	[ii] ISDA 2018 U.S. Resolution Stay Protocol . . . . .	3-34.13
	[iii] ISDA 2016 Variation Margin Protocol . . . . .	3-34.13
	[iv] ISDA 2015 Universal Resolution Stay Protocol . . . . .	3-34.13
	[v] ISDA March 2013 DF Protocol . . . . .	3-34.13
	[vi] ISDA August 2012 DF Protocol . . . . .	3-34.13
	[vii] Other ISDA Protocols . . . . .	3-34.14
	[n] Margin Requirements . . . . .	3-34.14
	[i] Uncleared Swaps . . . . .	3-34.14
[6A]	Structured, Synthetic, and Volatile Notes . . . . .	3-34.17

## REAL ESTATE FINANCING

	[a]	Structured Notes . . . . .	3-34.17
	[b]	Synthetic Notes. . . . .	3-34.17
	[c]	Notes with Volatile Returns. . . . .	3-34.17
[6B]		Inflation Adjustment to Principal. . . . .	3-34.18
[7]		Payments not in U.S. Currency . . . . .	3-34.19
	[a]	Foreign Currency . . . . .	3-34.19
	[b]	Cryptocurrency & Other Digital Assets. . . . .	3-34.20
	[i]	Current Laws Relating to Cryptocurrency & Other Digital Assets . . . . .	3-34.20
	[ii]	Current Procedures to Buy, Own & Sell Bitcoin, and to Make Loans Secured by Digital Assets . . . . .	3-34.20
	[iii]	Digital Assets under the 2022 UCC Amendments. . . . .	3-34.21
	[iv]	Regulatory & Other Legal Issues . . . . .	3-34.22
[8]		Electronic Notes . . . . .	3-34.23
	[a]	Holder in Due Course . . . . .	3-34.24
	[b]	Lender Must Get “Control” of a “Transferable Record” . . . . .	3-34.25
	[c]	Lenders’ Requirements for “Systems” Maintaining “Transferable Records”. . . . .	3-34.25
	[d]	Risk Resulting from Lack of Explicit Legal Procedure to Deal with “Lost” Electronic Records. . . . .	3-34.27
	[e]	Risk Resulting from Technical Inability of Computers to Retain “Single Authoritative Copy”. . . . .	3-34.27
	[f]	Need for Special Agreement Among Transferors and Transferees . . . . .	3-34.27
	[g]	Format for eNote . . . . .	3-34.27
	[h]	Payment Intangibles & Controllable Payment Intangibles. . . . .	3-34.28
[9]		Structuring Lender’s Advance as a Loan Rather Than Equity or Payment . . . . .	3-34.28
§ 3.04		Lender’s Requirements for Other Documents and Payments . . . . .	3-35
	[1]	Usury and Unconscionability Opinion. . . . .	3-35
	[a]	Usury. . . . .	3-35
	[b]	Unconscionability. . . . .	3-35
[2]		Usury Calculation Memorandum . . . . .	3-36
	[a]	General Formula for Usury “Interest” Rate . . . . .	3-36
	[b]	“Spreading” Interest Charges Over Term . . . . .	3-37

**TABLE OF CONTENTS**

xxiii

- [c] Variable Interest Rate. . . . . 3-37
- [d] “Escalator” Clauses . . . . . 3-38
- [e] Interest in Advance and Discounted  
Loans . . . . . 3-38
- [f] Usury Limits on Inflation  
Adjustment of Principal. . . . . 3-38
- [g] Acceleration of Interest Payments. . . . . 3-38
- [h] Prepayment, Collection and  
Late Charges . . . . . 3-39
- [i] Reasonable Fees . . . . . 3-40
- [j] Exemptions . . . . . 3-40
  - [i] Right of “Federal” Lenders to  
“Export” the Maximum Rate  
of Their “Home State” . . . . . 3-41
  - [ii] Apply Usury Laws of “Host”  
State (Where Lender’s  
Branch Is Located) if All  
“Executive” Acts Occur  
There . . . . . 3-41
  - [iii] Apply “Home” State or “Host”  
State Laws if at Least One  
Type of Executive Acts  
Occurs in “Home” State. . . . . 3-42
  - [iv] Need for Clause Fixing  
Applicable Law and  
Disclosure to Borrower. . . . . 3-42
  - [v] Lender Should Be Cautious  
and Try to Comply with  
Usury Limits of “Home”  
and “Host” States . . . . . 3-43
- [3] Advancing Loan Directly to  
Borrower/Owner . . . . . 3-43
  - [a] Loans Must Be Made “In Form” and  
“In Fact” to “Exempt” Borrower  
for Usury Purposes . . . . . 3-44
  - [b] Fraudulent Transfers and  
Conveyances . . . . . 3-44
    - [i] Avoidance of Interest Payments  
as Fraudulent Conveyance . . . . . 3-45
  - [c] Mortgage Payments Should Be  
Made by Entity Which Owns  
Mortgaged Property. . . . . 3-46
  - [d] Risk of Advancing Loan Proceeds to  
Borrower Who Applies for  
Purchase Money Loan and Then  
Cashes Out. . . . . 3-46
- [4] Payment of Lender’s Expenses . . . . . 3-46
- [5] Suspicious Activity Report. . . . . 3-47

## REAL ESTATE FINANCING

[6]	Documents Required for Customers and Accounts . . . . .	3-48
	[a] CIP . . . . .	3-49
	[b] Customer Identification . . . . .	3-49
	[c] Customer Verification . . . . .	3-50
	[i] Documentary Verification . . . . .	3-50
	[ii] Non-Documentary Verification . . . . .	3-52
	[d] Procedures When Customer's Identity Is Not Verified . . . . .	3-53
	[e] Records of Identification and Verification . . . . .	3-53
	[f] Checking Lists of Terrorists & Blocked Persons . . . . .	3-53
	[g] Notice to Customers . . . . .	3-54
	[h] When Reliance on Others Is Justified . . . . .	3-54
[7]	Documents Verifying Identification of Non-Customer Parties . . . . .	3-56
[8]	Authentication of Internet and Other Electronic Transactions . . . . .	3-60
[9]	Disbursing Proceeds by Joint Check to Lender and Borrower . . . . .	3-60.1
[10]	Proof That Payments to Lender Are Not Subject to Third-Party Rights . . . . .	3-61
[11]	Payments . . . . .	3-61
	[a] Checks . . . . .	3-61
	[i] "Available Funds" May Still Not Be "Good Funds" . . . . .	3-61
	[ii] Risk of Remote Deposit . . . . .	3-62
	[iii] Duty to Promptly Give Notice of Unauthorized Check Deposit . . . . .	3-62
	[b] Wire Transfers . . . . .	3-62
	[i] "Available Funds" May Still Not Be "Good Funds" . . . . .	3-62
	[ii] Notice to Borrower that Lender May Rely on Wire Transfer Instructions . . . . .	3-63
	[c] Other Types of Payments . . . . .	3-63
	[d] Issues Affecting Payments Generally . . . . .	3-63
	[i] Preferences . . . . .	3-63
	[ii] Fraudulent Transfers . . . . .	3-63
	[iii] Use Safe Security Procedures for Transfers from Bank Accounts . . . . .	3-64



**TABLE OF CONTENTS**

		[iv] Money Laundering and Transfers From Prohibited Persons . . . . .	3-64
		[v] Erroneous Payments . . . . .	3-64
§ 3.05		Borrower’s Concerns. . . . .	3-65
	[1]	Whether to Refinance and at What Interest Rate . . . . .	3-65
	[2]	Nonrecourse Provision . . . . .	3-65
		[a] Avoiding Personal Liability for Losses. . . . .	3-65
		[b] Allowing “Pass-Through” of Income Tax Deductions . . . . .	3-65
		[c] Applicability of Nonrecourse Provision to All Loan Documents. . . . .	3-66
		[d] Limiting Exceptions to Nonrecourse Provisions. . . . .	3-66
		[e] Avoiding Personal Liability on Existing Mortgages . . . . .	3-67
		[f] Special Tax Requirements of Foreign Investors. . . . .	3-68
		[g] Taxable Income to Borrower if It Controls Repayment. . . . .	3-68
	[3]	Right to Prepay at the Lowest Cost. . . . .	3-68
		[a] General . . . . .	3-68
		[b] Avoiding Interest Accruing After Prepayment. . . . .	3-69
		[c] No Prepayment Fee on Involuntary Prepayment. . . . .	3-69
		[d] <i>Pro Rata</i> Reduction in Payments After Partial Prepayment. . . . .	3-70
		[e] Avoiding “Rule of 78ths” . . . . .	3-70
		[f] Right to Defeasance . . . . .	3-70
	[4]	No Interest on Undisbursed Funds. . . . .	3-70
	[5]	Late Charge Should Not Apply to Entire Unpaid Balance . . . . .	3-71
	[6]	Eliminate Late Charges. . . . .	3-71
	[7]	Revolving Credit. . . . .	3-71
	[8]	No Representation as to Lender’s Compliance with Law . . . . .	3-71
	[9]	Securities Law Liability . . . . .	3-71
	[10]	Reducing Interest Rate Risk . . . . .	3-72
	[11]	Reducing Exchange Rate Risk . . . . .	3-73
	[12]	Below Market Interest Rate May Be Fraudulent Transfer . . . . .	3-73
	[13]	Risks of Electronic Notes. . . . .	3-73
	[14]	Other Changes. . . . .	3-74
		[a] Borrower Protections for Negotiable Notes . . . . .	3-74

**REAL ESTATE FINANCING**

[b]	Borrower Protections for DSCR	
	Default .....	3-74
[c]	Limit Scope of Borrower's	
	Assumption of Note .....	3-74
[d]	Limits on Lender Transfer of Loan. . .	3-75
[e]	Buyer's Reliance on Payments .....	3-75
[f]	365/360 Day Year .....	3-75
[g]	Foreign Lenders .....	3-76
[h]	Other Borrower Requirements .....	3-76

**CHAPTER 4****Contingent Interest**

§ 4.01	General. ....	4-2
	[1] Definitions .....	4-2
	[a] Contingent Interest .....	4-2
	[b] Equity Kicker or Participation .....	4-3
	[c] Shared Appreciation Mortgage .....	4-3
	[2] Chapter Scope .....	4-3
§ 4.02	Interest Based on Net Income .....	4-4
	[1] Lender's Requirements .....	4-4
	[a] Avoid Deduction of "Reimbursable" or "Unreasonable" Expenses .....	4-4
	[b] Due on Sale Clauses .....	4-4
	[c] Due on Assignment or Sublease Clauses .....	4-4
	[d] Audited Financial Statements .....	4-5
	[e] Restriction on Prepayment .....	4-5
	[f] Regulatory Requirements .....	4-5
	[g] Special Requirements of REITs .....	4-5
	[2] Borrower's Requirements .....	4-6
	[a] Broad Definition of Operating Expenses .....	4-6
	[b] Reserves .....	4-6
	[c] Option to Annualize Payments .....	4-6
	[d] Deduction of "Reimbursable" Expenses .....	4-6
	[e] Adverse Impact on Nonrecourse Financing .....	4-7
§ 4.03	Interest Based on Gross Income .....	4-8
	[1] Lender's Requirements .....	4-8
	[a] Advantages for Lender .....	4-8
	[b] Regulatory Requirements .....	4-8
	[2] Borrower's Requirements .....	4-8
	[a] Exclude "Capital" Proceeds .....	4-8
	[b] Cash Basis .....	4-8
	[c] Percentage of Income Exceeding Expenses .....	4-8

**TABLE OF CONTENTS**

xxvii

	[d] Cost of Living Increases . . . . .	4-9
	[e] Other Changes . . . . .	4-9
§ 4.04	Interest Based on Appreciation or Capital Events . . . . .	4-10
	[1] Lender’s Requirements . . . . .	4-10
	[a] Triggering Events . . . . .	4-10
	[b] Limits on Deductions for Capital Expenditures . . . . .	4-11
	[c] Right of First Refusal . . . . .	4-11
	[d] Requirements of REITs . . . . .	4-11
	[2] Borrower’s Requirements . . . . .	4-11
	[a] Value on a Net Basis . . . . .	4-11
	[b] Interim Payments . . . . .	4-12
§ 4.05	Lender’s Concerns and Additional Provisions . . . . .	4-13
	[1] Usury . . . . .	4-13
	[2] Recharacterization of Loan as Partnership Interest . . . . .	4-13
	[3] Portfolio Interest Exclusion Does Not Apply to Contingent Interest . . . . .	4-13
	[4] Contingent Interest May Be U.S. Real Property Interest . . . . .	4-14
	[5] Contingent Interest Might Not Be Prior to Other Liens . . . . .	4-14
	[6] Title Insurance Should Cover More Than Principal Amount . . . . .	4-15
	[7] Need for Agreement with Borrower as to Projected Payment Schedule . . . . .	4-15
	[8] Contingent Interest Over Long Period, or Requirement for Lender’s Consent, May Be Void . . . . .	4-16
	[9] Risk That Contingent Interest After Maturity Date May Be Unenforceable . . . . .	4-16
	[10] Tax-Exempt Lenders May Be Able to Escape UBTI by Making Loan with Contingent Interest Rather than Equity Investment . . . . .	4-16
	[11] Risk of Adding Interest to Principal . . . . .	4-16
	[12] Contingent Interest May Impair Negotiability . . . . .	4-17
	[13] Increased Risk of Lender Liability . . . . .	4-17
§ 4.06	Borrower’s Concerns and Additional Provisions . . . . .	4-18
	[1] Limits on Lender’s Remedies . . . . .	4-18
	[2] Determine Income on Cash Basis . . . . .	4-18

**CHAPTER 5**

**Mezzanine Loans, Convertible Mortgages,  
and Other Lender Rights to Equity Interests**

§ 5.01	General . . . . .	5-4
	[1] Definitions . . . . .	5-4

## REAL ESTATE FINANCING

	[a] Equity . . . . .	5-4
	[b] Convertible Mortgage . . . . .	5-4
	[c] Mezzanine Financing . . . . .	5-5
	[2] Chapter Scope . . . . .	5-5
§ 5.02	Lender's Requirements for Mezzanine Loans and Other Loans Secured by Equity Interests . . . . .	5-6
	[1] Security Agreement . . . . .	5-6
	[2] Control or Possession of Security . . . . .	5-7
	[a] Corporate Stock . . . . .	5-7
	[b] Converting Partnership and LLC Interests to Investment Property by Provisions in Organizational Documents . . . . .	5-7
	[c] Means of Obtaining Control Over Securities . . . . .	5-11
	[d] Control of Beneficial Interests in Land Trusts . . . . .	5-12
	[3] Organizational Documents of Entity . . . . .	5-13
	[a] Generally . . . . .	5-13
	[b] Mezzanine Loans . . . . .	5-14
	[4] Agreement with Stockholders or Members . . . . .	5-15
	[5] Stock Power . . . . .	5-15
	[6] Notice of Grant of Security Interest . . . . .	5-16
	[7] Proof of Registration of Security Interest . . . . .	5-16
	[8] Recognition Agreement . . . . .	5-16
	[9] UCC-1 Financing Statements . . . . .	5-16
	[a] Reasons for Filing UCC-1s; Alternative Means of Perfection . . . . .	5-16
	[b] Dividends, Distributions, and Other Proceeds . . . . .	5-17
	[10] UCC, Judgment, Tax Lien and Other Searches . . . . .	5-18
	[11] Title and Security Interest Insurance . . . . .	5-18
	[12] Due Diligence as to Entity and Its Assets and Liabilities . . . . .	5-20
	[13] Legal Opinion . . . . .	5-21
	[14] Other Documents . . . . .	5-21
	[a] Loan Agreement . . . . .	5-21
	[b] Nonconsolidation Opinions . . . . .	5-21
	[c] Guaranty of Nonrecourse Obligations . . . . .	5-22
	[d] Full Recourse Credit Guaranty . . . . .	5-22
	[e] Lockbox Agreement . . . . .	5-22
	[f] Deposit Account Control Agreement . . . . .	5-22
	[g] Promissory Note . . . . .	5-23
	[h] Intercreditor Agreement . . . . .	5-23
	[i] Forms . . . . .	5-23

**TABLE OF CONTENTS**

xxix

	[ii] Qualified Transferees . . . . .	5-23
	[iii] Mezzanine Lender’s Right of First Refusal . . . . .	5-24
	[iv] Mezzanine Lender’s Right to Enforce Its Remedies . . . . .	5-24
	[v] Interpretation . . . . .	5-25
	[i] Assignment of Interest Rate Protection Agreement . . . . .	5-26
	[j] Property Management Agreement . . . . .	5-26
	[k] Insurance Certificates . . . . .	5-26
	[l] Due Diligence Documents . . . . .	5-26
	[m] Statement as to U.S. Real Property Interest . . . . .	5-27
	[n] Tax Elections . . . . .	5-27
	[o] REIT Tax Option . . . . .	5-27
	[p] Miscellaneous . . . . .	5-27
[15]	Lender’s Drafting Concerns . . . . .	5-28
	[a] Control Over Borrower . . . . .	5-28
	[b] Equitable Subordination . . . . .	5-28
	[c] Breach of Fiduciary Duty . . . . .	5-28
	[d] Same Lender Holding Mortgage and Mezzanine Loan May Be Clog on Equity . . . . .	5-28.1
	[e] Mezzanine Lending May Be Adversely Affected By Future Laws . . . . .	5-28.1
	[i] Mezzanine Lenders Might be Required to Enforce Their Rights by Commencing Judicial Foreclosure Actions . . . . .	5-28.2
	[ii] Recording Taxes May Be Imposed on Mezzanine Loans . . . . .	5-28.2
§ 5.02A	Borrower’s Requirements for Security Interest in Ownership Interests . . . . .	5-28.3
	[1] Nonrecourse Financing . . . . .	5-28.3
	[2] Guaranty of Exceptions to Nonrecourse Limitation . . . . .	5-28.3
§ 5.03	Lender’s Requirements for Convertible Mortgage Loans . . . . .	5-29
	[1] Separate Option Agreement . . . . .	5-29
	[2] Title Insurance Endorsement . . . . .	5-30
	[3] Recognition Agreement . . . . .	5-31
	[a] Anti-Dilution Provisions . . . . .	5-31
	[b] Piggyback Registration Rights . . . . .	5-31
	[4] Agreement Among Holders of Equity Interests . . . . .	5-31

## REAL ESTATE FINANCING

	[a]	Limits on Actions Relating to Entity	
		Prior to Conversion . . . . .	5-32
	[b]	Rights of Lender After Conversion . . .	5-32
	[5]	Affidavit by Borrower . . . . .	5-33
	[6]	Appraisal . . . . .	5-33
§ 5.04		Lender's Drafting Concerns for Convertible	
		Mortgages . . . . .	5-34
	[1]	Income Tax Consequences of Convertible	
		Mortgages . . . . .	5-34
	[2]	Regulatory Requirements . . . . .	5-35
	[3]	Risk That Option May Be Deemed to Impair	
		Borrower's Right of Redemption . . . . .	5-35
	[4]	Usury . . . . .	5-35
	[5]	Securities Laws . . . . .	5-35
§ 5.05		Borrower's Concerns for Convertible Mortgages . . .	5-37
§ 5.06		Lender's Ownership of Stock or Equity Interests . . .	5-38
	[1]	Lender's Requirements . . . . .	5-38
	[a]	Organizational Documents . . . . .	5-38
		[i] Budget through Stabilization	
		Date . . . . .	5-38
		[ii] Distributions of Cash	
		Flow; Capital Calls . . . . .	5-38
	[b]	Waiver of Claims Against Lender . . .	5-38
	[c]	Date of Contribution of Lender's	
		Capital . . . . .	5-39
	[d]	No Contribution on Account of	
		Soft Costs or Cost Overruns . . . . .	5-39
	[e]	"Non-Imputation" Title Endorsement . . .	5-39
	[f]	Endorsement Confirming Continuation	
		of Insurance After Dissolution . . . . .	5-40
	[g]	Title Insurance Endorsement Where	
		Lender Holds Both an Equity	
		Interest and a Mortgage . . . . .	5-40
	[2]	Lender's Drafting Concerns . . . . .	5-41
	[a]	Control of Borrower . . . . .	5-41
	[b]	Equitable Subordination . . . . .	5-41
	[c]	Risk of Avoidance in Bankruptcy	
		of Mortgage Securing Loan . . . . .	5-42
	[d]	Other Bases for Subordination	
		of Lender's Claim . . . . .	5-42
	[e]	Acquisition of "Equity" Interest	
		by Subsidiary of Lender . . . . .	5-42
	[f]	Regulatory Restrictions . . . . .	5-42
	[g]	Usury . . . . .	5-43
	[h]	Tax Issues . . . . .	5-44
		[i] Generally . . . . .	5-44
		[ii] Income Tax Incentives for Tax-	
		Exempt and Foreign Lenders	
		to Avoid Direct Investment . . .	5-44

**TABLE OF CONTENTS**

- [i] Original Issue Discount Must Be Allocated to Options, Securities, or Other Property Transferred by Borrower to Lender . . . . . 5-44
- [j] Accounting Disclosures for Interests in Variable Interest Entities . . . . . 5-44
- [k] Securities Laws . . . . . 5-45
- [3] Borrower’s Requirements . . . . . 5-45
  - [a] Avoid Loan from Related Lender Since Not “At Risk” . . . . . 5-45
  - [b] Avoid Nonrecourse Loan from Lender-Partner . . . . . 5-46
  - [c] Avoiding Reduction of Investors’ Interests and Buy-Sells . . . . . 5-46
  - [d] “Pass-Through” Status . . . . . 5-46
  - [e] Tax-Exempt or Foreign Investors . . . . . 5-46
  - [f] Securities Claims . . . . . 5-47
  - [g] Interim Distributions . . . . . 5-47
- § 5.07 Lender’s Requirements for Direct Ownership of Property . . . . . 5-48
- § 5.08 Recharacterization of Loan as Equity or Income . . . . . 5-49
  - [1] Each Party Shares Profits . . . . . 5-50
  - [2] Each Party Shares Losses . . . . . 5-50
  - [3] Mutual Control . . . . . 5-50
  - [4] No Right to “Pay-Off” Party . . . . . 5-50
  - [5] Perceptions of Third Parties . . . . . 5-51
  - [6] High Nonrecourse Financing . . . . . 5-51
  - [7] Insider Loans . . . . . 5-51
  - [8] Other Terms . . . . . 5-52
  - [9] Accounting Requirements . . . . . 5-54
  - [10] Documentary Requirements to Reduce Risk of Recharacterization . . . . . 5-54
  - [11] Structuring Deals as Equity or Loans . . . . . 5-55
    - [a] When Payment Should Be Structured as a Loan . . . . . 5-55
    - [b] When Payment Should Be Structured as Equity . . . . . 5-55

**CHAPTER 6**

**Mortgages, Deeds of Trust and Other Loan Documents Generally**

- § 6.01 General . . . . . 6-12
  - [1] Definitions . . . . . 6-12
    - [a] Mortgage . . . . . 6-12
    - [b] Deed of Trust . . . . . 6-12
    - [c] Judicial Foreclosure . . . . . 6-12

## REAL ESTATE FINANCING

	[d]	Power of Sale Foreclosure . . . . .	6-12
	[e]	“Title Theory” States . . . . .	6-13
	[f]	“Lien Theory” States . . . . .	6-13
	[g]	“Intermediate Theory” States . . . . .	6-13
	[h]	Deficiency Judgment . . . . .	6-13
	[i]	“One Action” Rule . . . . .	6-13
	[2]	Chapter Scope . . . . .	6-13
	[3]	Closing Documents and Requirements . . . . .	6-14
	[a]	General . . . . .	6-14
	[b]	Timing . . . . .	6-14
§ 6.02		Lender’s Requirements for Mortgages, Deeds of Trust, Security Agreements, and Control Agreements . . . . .	6-14.1
	[1]	Broad Description of Collateral . . . . .	6-14.1
	[2]	Description of Debt . . . . .	6-14.3
	[3]	Covenant to Pay Debt . . . . .	6-15
	[4]	Mortgage to Secure Nonmonetary Obligation . . . . .	6-15
	[5]	Maturity Date . . . . .	6-16
	[6]	Identification of Parties . . . . .	6-16
	[a]	Identification of Borrower . . . . .	6-16
	[b]	Identification of Mortgage Holder . . . . .	6-16
	[7]	Assignment of Rents and Leases . . . . .	6-16
	[a]	Collateral Assignment . . . . .	6-17
	[b]	Absolute Assignment with Conditional License to Borrower . . . . .	6-17
	[i]	Assignment Immediate with No Subsequent Action Required (“Immediate States”) . . . . .	6-17
	[ii]	Subsequent Action Required to Collect Rents (“Subsequent Collection States”) . . . . .	6-18
	[iii]	Subsequent Action Required to “Perfect” Interest in Rents (“Subsequent Perfection States”) . . . . .	6-19
	[iv]	Lender’s Use of Cash Management Agreement . . . . .	6-20
	[c]	Absolute Assignment with No License to Borrower . . . . .	6-20
	[d]	Assignment of Income Other Than Rents . . . . .	6-20.1
	[e]	“One Action” Rule and Assignment of Rents . . . . .	6-22
	[f]	Post-Petition Leases . . . . .	6-23
	[g]	Assignment of Damages from Lease Rejection . . . . .	6-23



**TABLE OF CONTENTS**

xxxiii

	[h]	“Preference” Attack on Rents Received by Lender from Tenants . . . . .	6-23
	[i]	Assignment of Tenant’s Interest in Lease . . . . .	6-24
	[j]	Covenant to Hold Rents in Trust to Pay Loan . . . . .	6-24
[8]		Occupancy Leases . . . . .	6-24
[9]		Receiver to Collect Rents . . . . .	6-25
	[a]	Grounds for Appointment of Receiver . . . . .	6-25
	[b]	<i>Ex Parte</i> Appointment of Receiver . . . . .	6-26
	[c]	Payment by Borrower for Its Use of Property . . . . .	6-26
	[d]	Restrictions on Receivership for Business on Mortgaged Property . . . . .	6-26
	[e]	Restrictions on Receiverships for Indian Borrowers . . . . .	6-27
[10]		Future Advances . . . . .	6-27
	[a]	Exception for UCC Security Interests . . . . .	6-28
	[b]	Special Mortgage Provisions; Waiver of “Cut-Off” Notice . . . . .	6-28
[11]		Negative Amortization . . . . .	6-29
[12]		“Dragnet” Clauses Including Other Debts . . . . .	6-30
	[a]	Limitations on Enforcement of Dragnet Clauses . . . . .	6-30
	[i]	Only Future Obligations Are Secured . . . . .	6-30
	[ii]	Debts Must Be of Same Type . . . . .	6-30.1
	[iii]	Dragnet Clause Will Not Secure More Than Maximum Specified in Mortgage . . . . .	6-31
	[iv]	Other Limits on Dragnet Clauses . . . . .	6-31
	[b]	Clauses Enhancing Enforceability of Dragnet Clauses . . . . .	6-32
	[c]	Disadvantages to Lenders of Dragnet Clauses . . . . .	6-33
	[i]	Anti-Deficiency Laws . . . . .	6-33
	[ii]	Election of Remedies Laws . . . . .	6-33
	[iii]	Subordinate and Prior Lenders . . . . .	6-33
[13]		After-Acquired Property . . . . .	6-34
	[a]	General . . . . .	6-34

## REAL ESTATE FINANCING

	[b]	Limitations on Enforcement . . . . .	6-34
		[i] Title Search Will Not Disclose Risk . . . . .	6-34
		[ii] After-Acquired Property Must Have Functional Relationship to Mortgaged Property . . . . .	6-35
		[iii] Limited to Appurtenances to Mortgaged Property or Location Specified in Mortgage . . . . .	6-35
		[iv] Other Limitations . . . . .	6-35
[14]		Reserves for Taxes and Insurance Premiums . . . . .	6-36
	[a]	Negate Trust or Fiduciary Relationship . . . . .	6-36
	[b]	No Interest . . . . .	6-36
	[c]	Reserves Held by a Third-Party Bank or Agent . . . . .	6-37
	[d]	Calculating Tax Reserves; Restoration of Deferred or Abated Taxes . . . . .	6-37
	[e]	Required Reserves for Flood Insurance Premiums . . . . .	6-38
[15]		Covenant to Make Repairs . . . . .	6-38
[16]		Reserves for Repairs . . . . .	6-39
[17]		Property Insurance . . . . .	6-39
	[a]	“Standard” Mortgagee Endorsement . . . . .	6-40
	[b]	Use of Proceeds for Restoration . . . . .	6-40
	[c]	One Insurer . . . . .	6-40.1
[18]		Liability Insurance . . . . .	6-40.1
[19]		Condemnation . . . . .	6-40.1
[20]		Warranty of Title . . . . .	6-40.2
[21]		Restrictions on Releases . . . . .	6-40.2
	[a]	No Releases Following Default . . . . .	6-40.2
	[b]	Right to Release Fee . . . . .	6-40.3
	[c]	Release Payments More Than Pro Rata . . . . .	6-40.3
	[d]	No Release of Essential Collateral . . . . .	6-40.3
[22]		Due on Sale Clauses . . . . .	6-40.3
	[a]	Limits on Enforceability . . . . .	6-40.3
	[b]	Broaden Scope of Due on Sale Clause . . . . .	6-41
	[c]	Possible Unenforceability with Prepayment Restriction . . . . .	6-42
		[i] Prepayment Penalty . . . . .	6-42

**TABLE OF CONTENTS**

xxxv

[ii] Prepayment Prohibition . . . . . 6-42

[d] Limits on Forfeiture and Injunctive Relief . . . . . 6-42.1

[23] Due on Encumbrance Clauses; Negative Pledges . . . . . 6-42.1

[24] Default Clauses . . . . . 6-42.1

[a] Notice and Grace Periods . . . . . 6-42.1

[b] Bankruptcy and Other “Ipso Facto” Clauses, Cross-Defaults, and Setoffs . . . . . 6-44

[i] Bankruptcy and “Ipso Facto” Clauses . . . . . 6-44

[ii] Cross-Defaults; Setoffs . . . . . 6-47

[25] Remedies . . . . . 6-48

[a] Acceleration . . . . . 6-48

[b] Disposition of Surplus . . . . . 6-48

[c] Waiver of “One Action” Rule . . . . . 6-48

[d] Pre-Judgment Attachment . . . . . 6-48

[26] Waiver of Limits on Deficiencies . . . . . 6-49

[27] Bankruptcy Waivers . . . . . 6-49

[a] Consent to Relief from Automatic Stay . . . . . 6-49

[b] Agreement Not to File Bankruptcy Petition . . . . . 6-50

[c] Consent to Dismissal of Bankruptcy Case . . . . . 6-50

[d] Waiver of Right to File Reorganization Plan . . . . . 6-50

[28] Waiver of Rights of Redemption . . . . . 6-51

[29] Other Waivers by Borrower . . . . . 6-51

[a] Waiver of Constitutional Law Defenses . . . . . 6-51

[b] Borrower’s Waiver of Claims for Consequential or Punitive Damages . . . . . 6-52

[c] Merger Clause and Disclaimer of Reliance . . . . . 6-52

[d] Waivers by Tenants in Common . . . . . 6-53

[30] Security Agreement and Control Agreement . . . . . 6-53

[a] General Requirements for Security Agreement . . . . . 6-53

[b] Limitations on Security Interests . . . . . 6-53

[c] Drafting Options for Security Agreements . . . . . 6-54

[d] Amendments to Security Agreements Required by the Revisions to UCC Article 9 . . . . . 6-55

## REAL ESTATE FINANCING

	[i]	Definitions . . . . .	6-55
	[ii]	Additional Representations and Covenants . . . . .	6-56
[e]		“Control” Agreement . . . . .	6-56
[f]		Obtaining Control of Controllable Electronic Records (“C.E.R.’s”), and Controllable Payment Intangibles . . . . .	6-58.1
	[i]	Existing Practice Prior to 2022 UC Amendments . . . . .	6-58.1
	[ii]	Controllable Electronic Records (“C.E.R.’s”), & Controllable Payment Intangibles, Pursuant to 2022 UCC Amendments . . . . .	6-58.1
[31]		Purchase Options Granted to Borrower . . . . .	6-58.2
	[a]	Requirements for Perfection of Lender’s Interest . . . . .	6-58.3
	[b]	Rejection of Purchase Option by Owner’s Bankruptcy Trustee . . . . .	6-58.3
		[i] Option Holder in Possession . . . . .	6-58.3
		[ii] Protection of Lender . . . . .	6-58.4
		[iii] Personal Liability of Principals of Owner . . . . .	6-58.4
	[c]	Rejection of Purchase Option by Option Holder’s Bankruptcy Trustee . . . . .	6-58.4
	[d]	Rights of Intervening Claimants . . . . .	6-59
	[e]	Terms of Option . . . . .	6-59
[31A]		Options Granted by Borrower . . . . .	6-60
	[a]	Risks of Option Senior to Mortgage . . . . .	6-60
	[b]	Risks of Option Subject to Mortgage . . . . .	6-61
	[c]	Prepayment . . . . .	6-61
[32]		Lender’s Right to Cure Defaults . . . . .	6-61
[33]		Payment of Lender’s Expenses . . . . .	6-62
[34]		Financial Statements . . . . .	6-63
[35]		Covenants by Borrower to Maintain Its Credit Standing . . . . .	6-63
[36]		Mortgagor as Guarantor . . . . .	6-64
[37]		Miscellaneous Provisions . . . . .	6-64
	[a]	No Waiver by Acceptance of Late Payments . . . . .	6-64
	[b]	No Third-Party Beneficiaries . . . . .	6-64
	[c]	Time of the Essence . . . . .	6-64
	[d]	Consent to All Modifications . . . . .	6-64
	[e]	Disgorgement by Lender . . . . .	6-64.1

**TABLE OF CONTENTS**

xxxvii

	[f]	Invalidation of Mortgage if Not Properly Acknowledged or Witnessed . . . . .	6-64.1
	[g]	ERISA Representations . . . . .	6-64.3
	[h]	Choice of Law . . . . .	6-64.3
	[i]	Anti-Money Laundering Laws and Patriot Act. . . . .	6-64.5
	[j]	Consent of Non-Borrower Spouse in Community Property States . . . .	6-64.5
§ 6.03		Lender’s Requirements for Other Related Documents . . . . .	6-65
	[1]	Assignment of Rents . . . . .	6-65
	[2]	Lock-Box Agreement . . . . .	6-65
	[a]	Collect Rents but Avoid Control of Borrower . . . . .	6-65
	[b]	Account at Third-Party Bank. . . . .	6-66
	[c]	Impact of “One Action” Rule . . . . .	6-66
	[d]	No Commingled Funds . . . . .	6-66
	[e]	Waiver of Fiduciary Obligations of Depository Bank . . . . .	6-67
	[f]	Provide for Post-Maturity Retention of Funds . . . . .	6-67
	[3]	Independent Management Agreement . . . . .	6-67
	[4]	Notices to Tenants and Account Debtors . . .	6-67
	[a]	Notices to Tenants . . . . .	6-67
	[b]	Notices to Account Debtors. . . . .	6-68
	[5]	Occupancy Leases . . . . .	6-68
	[a]	Credit of Long-Term Tenants . . . . .	6-69
	[b]	No Onerous Obligations of Landlord. . . . .	6-69
	[c]	Covenants by Landlord Relating to Other Property . . . . .	6-69
	[d]	No Options to Purchase of Tenant . . .	6-69
	[e]	Notice of Default and Opportunity to Cure . . . . .	6-69
	[f]	Limit Termination Rights of Tenants. . . . .	6-70
	[i]	Fire and Casualty; Condemnation . . . . .	6-70
	[ii]	Breach of Cotenancy Clause. . .	6-70
	[iii]	Alternative Remedy of Injunctive Relief or Damages . . . . .	6-70
	[g]	Limit Rental Offsets by Tenants . . . . .	6-70
	[h]	Covenant to Pay Rent . . . . .	6-71
	[i]	Due Diligence Required For Legally Regulated Rents. . . .	6-71

## REAL ESTATE FINANCING

	[i]	Rent Must Cover Expenses . . . . .	6-71
	[j]	Credit Only for Funds Received . . . . .	6-71
	[k]	Survival of Tenant's Liability . . . . .	6-71
	[l]	Limits on Alterations . . . . .	6-72
	[m]	No Assignment or Subletting. . . . .	6-72
	[n]	Subordination and Attornment Provisions. . . . .	6-72
	[o]	Duty to Make Changes Required by Lenders . . . . .	6-73
	[p]	Guarantees and Security. . . . .	6-73
	[q]	General Requirements for Leases (Concerning Lender, Borrower and Tenant) . . . . .	6-74
		[i] Overlapping Exclusive Use Clauses . . . . .	6-74
		[ii] Organizational Documents . . . . .	6-74
[6]		Subordination, Attornment and Nondisturbance Agreements with Tenants . . . . .	6-74.1
	[a]	Covenant to Obey Lease Terms if No True Attornment . . . . .	6-74.1
	[b]	Other Protections for Lender . . . . .	6-74.1
[7]		Lease Estoppel Certificates and Rent Roll . . . . .	6-75
	[a]	Contents of Certificate . . . . .	6-75
	[b]	Detailed and Clear Waivers. . . . .	6-75
	[c]	Rent Roll. . . . .	6-76
[8]		Security Deposits Held by Borrower . . . . .	6-76
[9]		Loan Agreement . . . . .	6-76
	[a]	Commitment to Make Loan or Provide Financial Accommodations . . . . .	6-77
	[b]	Agreement Containing Covenants by Lender. . . . .	6-77
	[c]	Survival of Certain Lender Remedies After Payoff. . . . .	6-77
	[d]	Borrower Waivers and Acknowledgements . . . . .	6-78
[10]		Security Agreement and Control Agreement . . . . .	6-78
[11]		Assignments of Permits and Intangibles . . . . .	6-79
	[a]	Three-Party Agreement . . . . .	6-79
	[b]	Trademarks . . . . .	6-79
	[c]	Copyrights. . . . .	6-80
	[d]	Patents. . . . .	6-80.1
	[e]	Other Types of Intellectual Property . . . . .	6-80.1

**TABLE OF CONTENTS**

xxxix

- [i] Trade Secrets . . . . . 6-80.1
- [ii] Intellectual Property Licenses. . . 6-80.1
- [iii] Domain Names . . . . . 6-80.2
- [iv] Email addresses, telephone  
numbers, and fax  
numbers . . . . . 6-80.3
- [v] Social Media Rights . . . . . 6-80.3
- [12] Assignment of Borrower’s Rights  
Under Agreements . . . . . 6-80.3
  - [a] Management Agreement . . . . . 6-80.4
  - [b] Franchise Agreement . . . . . 6-80.4
  - [c] Notice of Assignment to  
Third-Party Obligor . . . . . 6-80.4
- [13] UCC-1 Financing Statements . . . . . 6-81
  - [a] Revisions to UCC-1s . . . . . 6-81
    - [i] Revisions Effective  
July 1, 2013 . . . . . 6-81
    - [ii] Revisions Effective  
July 1, 2023 . . . . . 6-81
  - [b] National UCC-1 Form . . . . . 6-81
  - [c] Description of Collateral . . . . . 6-82
  - [d] Debtor’s Name . . . . . 6-83
    - [i] Registered Organizations . . . . . 6-83
    - [ii] Individuals . . . . . 6-83
  - [e] Prohibition on Subordinate  
Liens and Sales . . . . . 6-85
  - [f] Place of Filing . . . . . 6-85
    - [i] Fixtures . . . . . 6-85
    - [ii] Location of Debtor . . . . . 6-85
    - [iii] When UCC-1 Filed in the  
Location of the Debtor  
May Not Protect Lender. . . . . 6-86
    - [iv] Filing in Jurisdictions Other  
Than Where Real Estate  
Is Located . . . . . 6-87
  - [g] Lenders Should File Whenever  
Possible . . . . . 6-87
- [14] Pre-Closing Filing of UCC-1 Financing  
Statements . . . . . 6-87
- [15] UCC, Judgment, Tax Lien and Other  
Searches . . . . . 6-88
  - [a] Searches May Omit Recent  
Filings . . . . . 6-88
  - [b] Most Searches Not Fully Insured . . . . . 6-89
  - [c] Search May Not Disclose Security  
Interests with Priority . . . . . 6-89

## REAL ESTATE FINANCING

	[d] Issues Related to Searches Against the Debtor's name . . . . .	6-89
	[e] Tax Lien Searches . . . . .	6-91
	[f] Other Traps for Searches Against Individuals . . . . .	6-92
	[g] Search Must Cover Debtor's Current and Prior Locations, and Predecessors and Transferors . . . . .	6-93
	[h] Searches for Litigation and Other State Action . . . . .	6-93
[16]	Security Interest Insurance . . . . .	6-93
[17]	Confession of Judgment . . . . .	6-94
[18]	Guarantees, Deposit Accounts, L/CS, Insurance, and Other Credit Enhancements . . . . .	6-96
	[a] Generally . . . . .	6-96
	[b] Insurance . . . . .	6-96.1
	[c] Letters of Credit . . . . .	6-97
	[i] Lender Should Obtain Control of Letter-of-Credit Rights. . . . .	6-97
	[ii] Lender Should Become a Transferee Beneficiary . . . . .	6-97
	[iii] Letters of Credit from Tenants and Other Third Parties . . . . .	6-98
	[iv] Structuring Terms of Letter of Credit . . . . .	6-98
[19]	Environmental Indemnity . . . . .	6-98
[20]	Legal Opinions . . . . .	6-99
[21]	Property Insurance Policies . . . . .	6-99
	[a] Insurance Certificates . . . . .	6-99
	[b] Coverages . . . . .	6-101
	[i] "All Risk"/"Special Perils" Forms . . . . .	6-101
	[ii] Rental Income/Business Interruption . . . . .	6-101
	[iii] Boiler and Machinery . . . . .	6-102
	[iv] Flood . . . . .	6-102
	[v] Prevention of Ingress and Egress and Act of Civil Authority . . . . .	6-104
	[vi] Terrorism . . . . .	6-104
	[vii] Other Coverages . . . . .	6-107
	[viii] Exclusions . . . . .	6-108
	[c] Endorsements . . . . .	6-109
	[i] Agreed Amount . . . . .	6-109
	[ii] Replacement Cost . . . . .	6-109
	[iii] Collateral Assignment of Beneficial Interest . . . . .	6-110



**TABLE OF CONTENTS**

[d] Rating of Insurer . . . . . 6-110

[e] Proof of Payment of Annual  
Premium . . . . . 6-110

[f] Waiver of Subrogation . . . . . 6-110

[g] Blanket Policies . . . . . 6-111

[h] Lender’s Due Diligence at Time  
Policy Is Issued . . . . . 6-111

[22] Copy of Application for Property  
Insurance . . . . . 6-111

[23] Liability Insurance . . . . . 6-111

[a] Coverages . . . . . 6-112

[i] Additional Interest and  
Additional Insureds . . . . . 6-112

[ii] Water Damage . . . . . 6-114

[iii] Auto . . . . . 6-114

[iv] Umbrella . . . . . 6-114

[v] Environmental . . . . . 6-114

[b] Endorsements . . . . . 6-115

[i] Liquor Liability . . . . . 6-115

[ii] “Knowledge of Occurrence”  
and Unintentional Failure  
to Disclose Endorsements . . . . . 6-115

[24] Notice to Borrower and Servicer Regarding  
Flood Insurance . . . . . 6-115

[25] Notice to Governmental Authority  
Regarding Real Estate Taxes . . . . . 6-116

[26] Title Insurance Policy . . . . . 6-116.1

[a] Proof of Payment of Premium . . . . . 6-116.1

[b] Title Insurance Commitment . . . . . 6-116.1

[c] Insured Closing Letter . . . . . 6-116.1

[d] Receipt for Documents . . . . . 6-116.1

[e] Permitted Exceptions . . . . . 6-116.1

[27] Escrow Agreement with Title Company  
or Attorney . . . . . 6-117

[a] Closing Escrows . . . . . 6-117

[b] Fiduciary Obligations Owed by  
Lenders to Depositors . . . . . 6-118

[c] Attorney Holding Escrow Funds  
Should Subordinate Its Lien . . . . . 6-118

[d] Escrow Holder Should Hold  
Escrowed Funds in a Segregated  
Account . . . . . 6-118

[28] Proof of Payment of Recording, Filing,  
and Other Taxes and Fees . . . . . 6-118

[29] Certified Survey . . . . . 6-119

[30] Appraisal . . . . . 6-120.1

[a] General Requirements . . . . . 6-120.1

## REAL ESTATE FINANCING

	[b] Letter from Appraiser Confirming Conditions Met .....	6-120.2
[31]	Financial Disclosures .....	6-120.2
[32]	Tax Returns .....	6-120.4
[33]	Engineering Report .....	6-120.5
[34]	Environmental Report & Hazardous Wastes. . .	6-120.6
[35]	Interest Reserve .....	6-120.14
[36]	Certificate of Occupancy; Proof of Subdivision; Tax Map .....	6-120.14
[37]	Letter from Utility .....	6-120.16
[38]	Proof of Recording of, and No Defaults Under, Easements and Related Documents .....	6-120.16
[39]	Proof of Dedication of Roads .....	6-120.16
[40]	Organizational Documents of Entities Obligated to Lender .....	6-120.16
	[a] Formation Documents .....	6-120.17
	[i] Benefit Corporations .....	6-120.17
	[b] Good Standing Documents .....	6-120.17
[41]	Entity Certificates .....	6-120.18
	[a] Secretary's Certificate of Resolutions .....	6-120.18
	[b] Incumbency Certificates .....	6-120.18
	[c] Consents of Partners or Shareholders .....	6-120.18
	[d] Other Consents and Approvals .....	6-120.18
	[i] Review by CFIUS of Covered Transactions .....	6-120.18
	[ii] Premerger Notice to FTC & DOJ .....	6-120.19
[42]	Borrower's Affidavit .....	6-120.20
[43]	Requirements of "Permanent" Lender .....	6-120.20
[44]	Memorandum of Counsel with Material Terms .....	6-120.20
[45]	Disclosure of Other Material Information .....	6-120.21
	[a] Internet Sites Providing Property Information .....	6-120.21
	[b] Lender's Duty to Disclose Information .....	6-120.21
	[c] Due Diligence May Trigger "Inquiry Notice" .....	6-120.22
[46]	Modification and Consolidation Agreements .....	6-120.22
[47]	Other Documents .....	6-120.23
§ 6.04	Lender's Alternative Provisions and Drafting Concerns .....	6-121
[1]	Control of Borrower .....	6-121

**TABLE OF CONTENTS**

xliii

	[a]	Warehousing of Land . . . . .	6-121
	[b]	Right of First Refusal to Make Loans . . . . .	6-121
	[c]	Ownership of Borrower’s Stock and Appointment of Officers or Directors . . . . .	6-121
	[d]	Management of Borrower’s Business . . . . .	6-121
	[e]	Capacity to Influence Borrower . . . . .	6-122
	[f]	Payments by Lender to Creditors . . . . .	6-122
	[2]	Avoiding Equitable Subordination . . . . .	6-123
	[3]	Agreement to Transfer Collateral to Lender . . . . .	6-123
	[4]	Advances for Improvements . . . . .	6-123
	[5]	Compliance with Anti-Tying Requirements . . . . .	6-123
	[6]	Financing of Multiple Properties . . . . .	6-124
	[7]	Electronic UCC-1s, Mortgages, and Other Filings . . . . .	6-126
	[8]	Payoff of Existing Mortgage . . . . .	6-127
	[9]	Preventing Fraudulent Transfers and Preferences . . . . .	6-128
	[10]	PACA and PSA “Agricultural” Super Liens . . . . .	6-130
§ 6.05		Lender’s Requirements for Post-Closing Loan Administration . . . . .	6-131
	[1]	Recorded Instruments . . . . .	6-131
	[2]	Title Insurance Policy . . . . .	6-132
	[3]	UCC-1 Financing Statements . . . . .	6-132
	[a]	UCC-3 Continuations . . . . .	6-132
	[b]	UCC-1s in Debtor’s New Location . . . . .	6-132
	[c]	UCC-1s or UCC-3s to Reflect Debtor’s New Name . . . . .	6-132.1
	[d]	UCC-1s or UCC-3s Required by Enactment of 2010 Version of Article 9 of UCC . . . . .	6-132.1
	[e]	UCC-3 Amendment to Reflect Secured Party’s New Name or Address . . . . .	6-133
	[f]	New UCC-1 Filings After Conversion of Any Collateral into Proceeds . . . . .	6-134
	[4]	Insurance Policies and Renewals and Payment of Premiums . . . . .	6-134
	[5]	Payment of Real Estate Taxes . . . . .	6-136
	[6]	Transfers of the Mortgaged Property . . . . .	6-136

**REAL ESTATE FINANCING**

	[7]	Avoid Blanket Release of All Lender Rights . . . . .	6-136
	[8]	Avoid Oral and Other Inadvertent Changes . . . . .	6-137
	[9]	Borrower's Military Service . . . . .	6-138
	[10]	Renewals of Letters of Credit, Permits, and Agreements; Substitution of Issuer/Guarantor; Additional Deposits . . . . .	6-139
	[11]	Timely Challenges to "Takings" and Other State Action . . . . .	6-139
	[12]	Confirm New Loan Is Covered by Existing Dragnet Clause . . . . .	6-139
	[13]	Loan Payments and Payoffs . . . . .	6-139
	[14]	Lender's Setoff Against Cash Collateral . . . . .	6-141
	[15]	Need to File Claim Promptly Against Estate . . . . .	6-141
	[16]	Inspections, Monitoring, Accounting and Reporting . . . . .	6-142
		[a] Generally . . . . .	6-142
		[b] Environmental Compliance . . . . .	6-142
		[c] Climate Change Laws . . . . .	6-142.1
		[d] Accounting and Reporting . . . . .	6-142.1
	[17]	Filing of Proof of Claim . . . . .	6-142.2
	[18]	Notice of Transfer of Proof of Claim . . . . .	6-142.2
	[19]	Acceptance of Loan Payments After Maturity . . . . .	6-142.2
	[20]	Negotiations for a Loan Modification . . . . .	6-142.2
	[21]	Compliance with Lender's "Construction" Requirements . . . . .	6-142.3
		[a] Builder's Risk and Liability Insurance Covering New Improvements . . . . .	6-142.3
		[b] Environmental Compliance . . . . .	6-142.3
	[22]	IRS 1098 to be Sent by Lenders to Individual Borrowers . . . . .	6-142.4
	[23]	Update of Customer Information . . . . .	6-142.4
§ 6.06		Borrower's Concerns . . . . .	6-143
	[1]	Nonrecourse Provision . . . . .	6-143
	[2]	Notice of Default and Opportunity to Cure . . . . .	6-143
	[3]	Releases . . . . .	6-143
		[a] Reduction in Amortization and Interest . . . . .	6-143
		[b] No Prepayment Fee . . . . .	6-143
		[c] Runs to Successors and Assigns . . . . .	6-144
		[d] Releases During Default . . . . .	6-144
		[e] Defeasance . . . . .	6-144
	[4]	Permitted Transfers . . . . .	6-144

## TABLE OF CONTENTS

xliv

[5]	Permitted Subordinate Mortgages . . . . .	6-145
[6]	Financing Land Separately . . . . .	6-145
[7]	Interest on Escrows and Reserves . . . . .	6-145
[8]	Minimizing Escrows and Reserves . . . . .	6-145
[9]	Use of Insurance Proceeds and Condemnation Awards for Restoration . . . . .	6-146
[10]	Coordination of Insurance Coverages . . . . .	6-146
[11]	No Side Letter . . . . .	6-146
[12]	Proof of Authority of Lender . . . . .	6-146.1
[13]	Protecting Confidential and Privileged Data . . . . .	6-147
[14]	Avoiding Conflicts with Borrower's Agreements . . . . .	6-147
[15]	Financings of Multiple Properties . . . . .	6-147
[16]	Other Changes by Borrowers to Closing Documents . . . . .	6-148
	[a] Carveouts from Lender's Security Interest . . . . .	6-148
	[b] Limiting Representations by Borrower and its Principals . . . . .	6-149
	[c] Miscellaneous Changes Requested by Borrowers . . . . .	6-150
[17]	Post-Closing Concerns of Borrowers . . . . .	6-152

## CHAPTER 7

### Title Insurance

§ 7.01	General . . . . .	7-2
	[1] Definitions . . . . .	7-2
	[a] ALTA . . . . .	7-2
	[b] CLTA . . . . .	7-2
	[c] Coinsurance . . . . .	7-2
	[d] Reinsurance . . . . .	7-2
	[2] Chapter Scope . . . . .	7-3
§ 7.02	Criteria for Selecting Title Insurer . . . . .	7-4
§ 7.03	Title Insurance Commitment & Exceptions . . . . .	7-5
§ 7.04	Standard Endorsements . . . . .	7-8
	[1] Variable Rate; Negative Amortization . . . . .	7-8
	[2] Contingent Interest . . . . .	7-9
	[3] Revolving Credit and Future Advances; Letters of Credit and Surety Bonds; Reverse Mortgages . . . . .	7-9
	[4] Environmental Protection . . . . .	7-10
	[5] Covenants, Restrictions, Encroachments and Minerals . . . . .	7-10
	[6] Survey . . . . .	7-11
	[7] Zoning . . . . .	7-11

**REAL ESTATE FINANCING**

	[8]	Truth in Lending . . . . .	7-12
	[9]	“Last Dollar” Endorsement. . . . .	7-12
	[10]	“First Loss” Endorsement. . . . .	7-13
	[11]	“Tie-In” Endorsement . . . . .	7-13
	[12]	Mobile Homes and Other Manufactured Housing. . . . .	7-13
	[13]	Street Assessments . . . . .	7-14
	[14]	Other Endorsements . . . . .	7-14
§ 7.05		Affirmative Insurance . . . . .	7-19
	[1]	Access . . . . .	7-19
	[2]	Contiguity . . . . .	7-19
	[3]	No Fraudulent Transfer. . . . .	7-19
§ 7.06		Coinurance and Reinsurance. . . . .	7-21
§ 7.07		Escrow Agreements. . . . .	7-22
§ 7.08		Insured Closing Letters. . . . .	7-23

**CHAPTER 8**

**Guarantees and Other Credit Enhancements**

§ 8.01		Lender’s Requirements for Guarantees . . . . .	8-4
	[1]	Types of Guarantees . . . . .	8-4
		[a] Continuing Guarantee. . . . .	8-4
		[b] Guarantee of Payment . . . . .	8-4
		[c] Guarantee of Collection . . . . .	8-4
		[d] Completion Guarantee . . . . .	8-4
		[e] Carry Guarantee . . . . .	8-5
		[f] Comfort Letter . . . . .	8-5
		[g] “Set Aside” Letters. . . . .	8-5
		[h] Credit Derivatives. . . . .	8-5
		[i] Financial Guaranty Insurance . . . . .	8-6
		[j] Surety Bonds . . . . .	8-6
		[k] Limited Recourse Guarantees . . . . .	8-6
	[1]	Sham Guarantees . . . . .	8-6.1
	[2]	Description of Guaranteed Obligations; Waiver of Defenses . . . . .	8-6.1
		[a] Description of Guaranteed Obligations. . . . .	8-6.1
		[b] Waiver of Defenses . . . . .	8-6.2
	[3]	Disclaimer of Reliance . . . . .	8-8
	[4]	Waiver of Right of Subrogation. . . . .	8-9
	[5]	Protections Relating to Guarantees by Insiders or Tenants. . . . .	8-10
	[6]	Guarantor’s Assets . . . . .	8-11
		[a] Lender’s Lien Against Guarantor’s Assets. . . . .	8-11
		[b] Guarantor’s Consent to Future Advances and Automatic Stay Relief. . . . .	8-11

**TABLE OF CONTENTS**

xlvii

	[c] Guarantor’s Disclosure Regarding Its Assets . . . . .	8-12
[7]	Bankruptcy Issues . . . . .	8-12
	[a] Weigh Risk of Guarantor’s Subsequent Bankruptcy . . . . .	8-12
	[b] Indemnity Against Bankruptcy Filing . . . . .	8-12
[8]	Protections Against Avoidance as Fraudulent Transfer . . . . .	8-13
	[a] “Upstream” Guarantee . . . . .	8-13
	[b] “Cross-Stream” and Unaffiliated Guarantees . . . . .	8-14
	[c] Proof of Solvency of Guarantor . . . . .	8-14
[9]	Guarantee of Exceptions to Nonrecourse Limitation . . . . .	8-14
[10]	Forbearance, Extension and Modification . . . . .	8-16
[11]	Restrictions on Spousal Guarantees . . . . .	8-16
	[a] Equal Credit Opportunity Act (“ECOA”) . . . . .	8-16
	[b] Property owned by guarantor spouse as tenant by the entirety . . . . .	8-17
	[c] Community Property . . . . .	8-17
[12]	Limits on Enforceability in “One Action” States . . . . .	8-18
[13]	Effect of Limits on Deficiency Claim . . . . .	8-18
[14]	Payment of Taxes . . . . .	8-19
[15]	Consideration to Guarantor . . . . .	8-19
[16]	Other Guarantee Provisions . . . . .	8-20
[17]	Special Swap Requirements for Guaranties . . . . .	8-23
	[a] Guaranty by Non-ECP Cannot Cover Swap Obligations . . . . .	8-23
	[b] Guaranty of Swap Obligations by U.S. Person . . . . .	8-23
§ 8.02	Borrower’s Requirements for Guarantees . . . . .	8-25
	[1] Income Tax Effect . . . . .	8-25
	[2] Adverse Effect of Guarantee by Foreigners . . . . .	8-25
	[3] Disclosure by Public Company . . . . .	8-25
§ 8.03	Guarantor’s Requirements for Guarantees . . . . .	8-26
	[1] Guarantee of Collection . . . . .	8-26
	[2] Notice and Grace Periods . . . . .	8-26
	[3] No Waiver of Right of Subrogation . . . . .	8-26
	[4] Fixed Limit on Liability . . . . .	8-28
	[5] Risk of Recharacterization of Guaranteed Loan as Equity . . . . .	8-28
	[6] Pledging Collateral with Tax Liabilities Triggered by Transfer . . . . .	8-28

**REAL ESTATE FINANCING**

	[7]	Make Guarantor’s Payments Deductible . . . .	8-29
	[8]	Guarantor’s Accounting Requirements. . . . .	8-29
	[9]	Contribution and Reimbursement . . . . .	8-31
		[a] Contribution Agreement Among All Guarantors . . . . .	8-31
		[b] Reimbursement Agreement . . . . .	8-32
	[10]	Regulatory Requirements . . . . .	8-32
		[a] Financial Institutions as Obligors . . . . .	8-32
		[b] Guaranty of Swap Obligations by U.S. Person . . . . .	8-32
	[11]	Asset Protection Planning. . . . .	8-33
	[12]	Effect of Guarantor’s Death . . . . .	8-33
	[13]	Guarantee of Exceptions to Nonrecourse Limitation . . . . .	8-33
	[14]	Guaranty or Pledge Relating to Affiliated Foreign Entity. . . . .	8-35
	[15]	Income Tax Issues of Guarantors. . . . .	8-36
		[a] Guarantor of Loan to S Corp. . . . .	8-36
		[b] Risks of Guaranty of Exceptions to Nonrecourse Limitations. . . . .	8-36
		[c] Guaranty May Be Deemed a Prohibited Transaction. . . . .	8-37
		[d] Impact of Guaranty on Allocation of Partnership Liabilities. . . . .	8-37
§ 8.04		Lender’s Requirements for Letters of Credit Issued to It . . . . .	8-38
	[1]	Limiting Risk of Injunction of Payment . . . .	8-43
	[2]	Limiting Risk of Avoidance as Preference. . .	8-44
	[3]	Application of Security Does Not Cure Default. . . . .	8-45
	[4]	Possession of Letter of Credit . . . . .	8-46
	[5]	Become Transferee Beneficiary of Letter of Credit. . . . .	8-46
	[6]	Regulatory Requirements . . . . .	8-46
	[7]	Legal Opinion as to Enforceability of Letter of Credit. . . . .	8-47
	[8]	Safe Procedure for Drawing on a Letter of Credit . . . . .	8-47
	[9]	Special Rules of Interpretation . . . . .	8-47
	[10]	Disclaimers in Favor of Issuers . . . . .	8-48
	[11]	Advising and Confirming Letters of Credit. . .	8-48
	[12]	Electronic Signatures to a Letter of Credit Are Permitted by the 2022 UCC Amendments . . . . .	8-49
§ 8.05		Requirements for Letter of Credit Issued by Lender . . . . .	8-50
	[1]	Lender’s Requirements . . . . .	8-50
	[2]	Borrower’s Requirements . . . . .	8-50.1



## TABLE OF CONTENTS

xlix

§ 8.06	Mortgage Insurance . . . . .	8-51
	[1] Types of Mortgage Insurance . . . . .	8-51
	[a] FHA and VA . . . . .	8-51
	[b] PMI . . . . .	8-51
	[2] Lender’s Requirements . . . . .	8-51
	[a] Verifying Representations Made to Insurer . . . . .	8-51
	[3] Borrower’s Requirements . . . . .	8-52
§ 8.07	Lender’s Requirements for Set-Aside Letters . . . . .	8-53

## CHAPTER 9

### Legal Opinions and Reports

§ 9.01	Lenders’ Requirements for Legal Opinions . . . . .	9-3
	[1] Specification of Loan Terms . . . . .	9-4
	[2] Usury . . . . .	9-5
	[3] Zoning and Environmental . . . . .	9-5
	[4] Title, Perfection, and Priority . . . . .	9-6
	[a] Tenancy in Common Interests . . . . .	9-7
	[b] Need Specificity for any Security Interest in Personal Property . . . . .	9-7
	[5] Errors and Omissions Insurance . . . . .	9-7
	[6] Overcoming “Privity” Defense of Opinion Giver . . . . .	9-7
	[7] Overcoming “Reliance” Defense of Opinion Giver . . . . .	9-8
	[8] “Securitizations” and Other Opinions . . . . .	9-9
	[a] Securitizations . . . . .	9-9
	[b] Securities Opinions . . . . .	9-9
	[9] Compliance with Legal Requirements . . . . .	9-9
	[10] Opinions Regarding Entities and Trusts . . . . .	9-10
§ 9.02	Requirements of Opinion Giver . . . . .	9-12
	[1] Due Diligence . . . . .	9-12
	[2] Need to Modify Standard Forms . . . . .	9-12
	[3] Caveats to Opinion . . . . .	9-12
	[a] General Caveats . . . . .	9-12
	[i] Avoiding Opinions as to Certain Factual Matters . . . . .	9-12
	[ii] Requests for Excessively General Opinions . . . . .	9-13
	[iii] Enforceability . . . . .	9-13
	[b] Exceptions for Inapplicable Laws . . . . .	9-15
	[c] Common Exceptions and Qualifications . . . . .	9-15
	[d] Other Specific Exceptions & Qualifications . . . . .	9-16
	[i] Foreign Parties . . . . .	9-16

## REAL ESTATE FINANCING

	[ii] Setoffs . . . . .	9-18
	[iii] Transfer Restrictions . . . . .	9-18
	[iv] Liquidated Damages and Financial Penalties . . . . .	9-19
	[v] Waiver of any Statute of Limitations . . . . .	9-19
	[vi] Indemnities for Negligence and Other Torts and Wrongs . . . . .	9-19
	[vii] Waiver of Sovereign Immunity . . . . .	9-20
	[viii] Enforceability of Limitations on Assignment of Payment Rights . . . . .	9-20
	[ix] Arbitration . . . . .	9-21
	[x] Covenants not to Compete . . . . .	9-21
	[xi] Currency Exception . . . . .	9-21
	[xii] Judgment Currency Exception . . . . .	9-22
	[xiii] Choice of Law . . . . .	9-22
	[xiv] Choice of Forum; Service of Process; Jurisdiction and Venue . . . . .	9-23
	[xv] Patriot Act . . . . .	9-24
	[xvi] Jury Trial Waivers . . . . .	9-24
	[xvii] Derivatives Exception . . . . .	9-25
	[xviii] Receiver Exception . . . . .	9-26
	[xix] Recharacterization Exception . . . . .	9-26
	[xx] Exception if Guarantee by Non-ECP Covers Swap Obligations . . . . .	9-26
	[xxi] Debt Restructurings (generally and pursuant to Section 316(b) of the Trust Indenture Act) . . . . .	9-27
	[xxii] EU “Bail-In” Provisions . . . . .	9-27
	[xxiii] Compliance with risk retention rules . . . . .	9-28
[4]	Disclosure and Waiver of Conflict of Interest . . . . .	9-28
[5]	Qualification for Knowledge of Opinion Giver; Litigation . . . . .	9-28
[6]	Exclusion of Real Property Matters . . . . .	9-28.1
[7]	Exclusion of Personal Property Matters . . . . .	9-28.2
[8]	Qualification of Borrower to Do Business . . . . .	9-28.5
[9]	Qualification of Lender to Do Business . . . . .	9-28.5
[10]	Borrower’s Licenses, Permits, and Compliance with Laws, Orders, and Contracts . . . . .	9-28.5

## TABLE OF CONTENTS

li

	[11] Land Use and Environmental Opinions . . . . .	9-28.6
	[12] When the Opinion Giver Practices in a Jurisdiction Other Than the Jurisdiction of the Applicable Law . . . . .	9-28.6
	[13] Assumption of Genuineness of Signatures . . . . .	9-28.7
	[14] Special Qualifications for Opinions Regarding LLCs & LPs . . . . .	9-29
	[a] LLCs . . . . .	9-29
	[b] LPs . . . . .	9-30
	[15] Rights of Subrogation Against Title Insurer . . . . .	9-30
	[16] Liability Caps and Waivers . . . . .	9-30
	[17] Local Counsel Opinions . . . . .	9-31
§ 9.03	Requirements for Reports and Other Statements by Lawyers . . . . .	9-33
	[1] Requirements of Lawyers Issuing Reports and Statements . . . . .	9-33

## CHAPTER 10

### Leasehold Mortgage Loans

§ 10.01	General . . . . .	10-6
	[1] Definition . . . . .	10-6
	[2] Purpose . . . . .	10-6
	[3] Component or “Split” Financing . . . . .	10-6
	[4] Chapter Scope . . . . .	10-6
	[5] Closing Documents and Requirement . . . . .	10-7
	[6] Reasons for Lease Rather Than Sale . . . . .	10-7
	[a] Income Tax and Other Benefits to Landlord . . . . .	10-7
	[b] Income Tax and Other Benefits to Tenant/Borrower . . . . .	10-8
	[c] “Rent-Leveling” (IRC § 467) . . . . .	10-8
	[d] “Obligation-Shifting” Transactions . . . . .	10-9
	[e] Availability Subject to Economic Conditions . . . . .	10-9
	[7] Reasons for Loan in Addition to Lease . . . . .	10-10
	[a] Sales Tax . . . . .	10-10
	[b] Transfer Tax . . . . .	10-10
	[c] Income Tax . . . . .	10-10
§ 10.02	Requirements for “Mortgageable” Lease . . . . .	10-11
	[1] Essential Features . . . . .	10-11
	[2] Mortgage Against Lease and Fee . . . . .	10-11
	[3] Leases Not Perfectly “Mortgageable” May Still Be Valuable Collateral . . . . .	10-11
	[4] Leasehold Mortgage Lender’s Prior Approval of Lease . . . . .	10-12

**REAL ESTATE FINANCING**

[5]	Parties Entitled to Rights of Leasehold Mortgage Lender .....	10-12
[6]	Tenant's Right to Mortgage Its Rights Under Lease .....	10-13
	[a] Leasehold Mortgage Encumbers Tenant's Interest Only .....	10-13
	[b] No Mortgaging of Right to Purchase Money Financing .....	10-13
[7]	Tenant's Right to Assign or Sublet .....	10-13
[8]	Tenant's Right to Use the Leased Property .....	10-13
[9]	Landlord's Right to Mortgage Landlord's Interest .....	10-14
	[a] Leasehold Mortgage Lender Rights .....	10-14
	[b] Nondisturbance Agreement from Prior Mortgage Lender .....	10-14
	[c] Subordination by Prior Mortgage Lender .....	10-14
	[d] Payments on Prior Mortgage Exceeding Rent .....	10-15
[10]	Right to Cure Mortgage and Tax Defaults .....	10-15
[11]	Right to Cure Lease Defaults .....	10-16
[12]	Lender's Liability Under Lease .....	10-17
[13]	No Costly Future Obligations of Tenant Except Rent .....	10-17
[14]	No Modification or Termination of Lease without Lender's Consent .....	10-17
	[a] Rejection of Lease in Tenant's Bankruptcy .....	10-17
	[b] Rejection of Lease in Landlord's Bankruptcy .....	10-18
[15]	Right to a New Lease .....	10-19
	[a] Rejection in Landlord's Bankruptcy of Right to a New Lease .....	10-20
	[b] Rule Against Perpetuities .....	10-20
	[c] Rights of Intervening Creditors or Purchasers .....	10-20
[16]	Necessity of Option to Purchase .....	10-20
[17]	Lease Expiration Date Must Follow Loan Maturity Date; No Termination Rights .....	10-20
[18]	Term Must Not Exceed Legal Limits .....	10-21
[19]	Exercise of Extensions and Renewals .....	10-21
[20]	Limit on Rent Acceleration .....	10-22
[21]	Limits on Rent Adjustments .....	10-22
[22]	Property Insurance .....	10-22

**TABLE OF CONTENTS**

	[23] Condemnation . . . . .	10-23
	[a] Total (or Near-Total) Condemnation . . . . .	10-23
	[b] Partial Taking and Restoration . . . . .	10-24
	[24] No Merger of Lease into Fee . . . . .	10-25
	[25] Duty to Give Estoppel Certificate . . . . .	10-25
	[26] General Requirements . . . . .	10-25
§ 10.03	Lender’s Requirements for Leasehold Mortgage . . . . .	10-26
	[1] Requirements for Lease . . . . .	10-26
	[2] Cross-Default Clause . . . . .	10-26
	[3] Right to Cure Defaults . . . . .	10-26
	[4] Protections Against Termination of Lease in Bankruptcy . . . . .	10-26
	[a] Tenant’s Bankruptcy . . . . .	10-26
	[b] Landlord’s Bankruptcy . . . . .	10-27
	[5] Options to Renew or Purchase . . . . .	10-28
	[6] Tenant’s Rights in Leased Property and Proceeds . . . . .	10-28
	[7] Subleases . . . . .	10-28.1
	[8] Restrictions on Junior Mortgages . . . . .	10-29
	[9] Waiver of Subrogation to Prior Liens . . . . .	10-29
	[10] Waiver of Marshalling . . . . .	10-29
	[11] Property Insurance . . . . .	10-30
	[12] Security for Tenant’s Performance Under Lease . . . . .	10-31
	[13] Assignment . . . . .	10-31
	[14] Trust Mortgage . . . . .	10-31
	[15] Other Requirements . . . . .	10-32
§ 10.04	Other Closing Documents and Requirements of Leasehold Mortgage Lender . . . . .	10-33
	[1] Recordation of Lease . . . . .	10-33
	[2] Title Insurance . . . . .	10-33
	[a] Amount of Insurance . . . . .	10-33
	[b] Metes and Bounds Description in Lease . . . . .	10-33
	[c] Affirmative Coverages . . . . .	10-34
	[d] Endorsement for Relocation of Special Use Property . . . . .	10-34
	[e] Collateral Assignment of Lease . . . . .	10-35
	[f] Laws Restricting Use of Public Property . . . . .	10-35
	[3] Security Agreement and UCC-1 Financing Statements . . . . .	10-36
	[4] Nondisturbance Agreement from Prior Mortgage Holder . . . . .	10-36
	[5] Subordination Agreement from Prior Mortgage Holder . . . . .	10-37
	[6] Nondisturbance Agreement from Fee Owner or Other Prior Party . . . . .	10-37

	[7]	Estoppel Certificate . . . . .	10-38
	[8]	Reserves for Tenant's Obligations . . . . .	10-38.1
	[9]	Power of Attorney . . . . .	10-39
	[10]	Enforceability Opinion Regarding Lease . . . . .	10-39
	[11]	Appraisal . . . . .	10-39
§ 10.05		Liens Against Fee or Other Prior Interests:	
		Requirements of Leasehold	
		Mortgage Lender . . . . .	10-40
	[1]	In General . . . . .	10-40
	[2]	Fee Mortgage . . . . .	10-41
	[3]	"Subordination" of Fee . . . . .	10-41
	[4]	Subordination of Lease . . . . .	10-41
	[5]	Assignment of Landlord's Interest in Lease and Subleases . . . . .	10-41
	[6]	Attornment by Subtenants . . . . .	10-42
	[7]	Other Requirements . . . . .	10-42
§ 10.06		Subordinating to Lease: Requirements of Fee	
		Mortgage Lender . . . . .	10-43
	[1]	No Modification or Cancellation of Lease . . . . .	10-43
	[2]	No Prepayments . . . . .	10-43
	[3]	Fixed Minimum Rent Paid Directly to Lender . . . . .	10-44
§ 10.07		Subjecting Ownership Rights to Leasehold	
		Mortgage: Requirements of the Owner . . . . .	10-45
	[1]	Specification of Mortgage Lender . . . . .	10-45
	[2]	Specification of Tenant's Mortgage Loan . . . . .	10-45
	[3]	Specification of Tenant's Equity . . . . .	10-45
	[4]	Specification of Use of Proceeds . . . . .	10-45
		[a] Soft Costs . . . . .	10-45
		[b] Certifications of Application of Each Advance . . . . .	10-46
	[5]	Notice of Default and Opportunity to Cure . . . . .	10-46
	[6]	"Cross-Default" Clause in Lease . . . . .	10-46
	[7]	Reimbursement of Owner . . . . .	10-46
	[8]	Assignment of Rents and Other Payments . . . . .	10-46
	[9]	Attornment by Subtenants . . . . .	10-46
	[10]	Insurance and Condemnation . . . . .	10-47
	[11]	Assignment of Construction, Development and Other Rights . . . . .	10-47
		[a] Construction Contracts . . . . .	10-47
		[b] Right to Use Plans . . . . .	10-47
		[c] Mortgage Loan Commitment . . . . .	10-47
	[12]	Additional Safeguards for Construction . . . . .	10-47
		[a] Approval of Plans . . . . .	10-47
		[b] Bonded Contractor . . . . .	10-48
		[c] Other Construction-Related Requirements . . . . .	10-48

**TABLE OF CONTENTS**

	[13] No Personal Liability of Owner . . . . .	10-48
	[14] Limits on Refinancings, Extensions and Modifications . . . . .	10-48
	[15] Subordination of Owner’s Mortgage Loan . . .	10-48
	[16] Subordination of Owner’s Right to Rents . . .	10-48
	[17] Owner’s Subordinate Leasehold Mortgage . . .	10-49
§ 10.08	Accounting for Leases by Tenant . . . . .	10-50
	[1] Operating Lease or Capital Lease . . . . .	10-50
	[2] Land Leases . . . . .	10-50
	[3] Lease of Land and Buildings . . . . .	10-51
	[a] Either Title Transferred to Tenant or Bargain Purchase Option . . . . .	10-51
	[b] Land Value Is Twenty-Five Percent of More . . . . .	10-51
	[c] Lease Term Is Seventy-Five Percent or More of Useful Life, or Present Value of Rent Is Ninety Percent or More of Value of Property . . . . .	10-51
	[4] Accounting For Fiscal Years Beginning After 12/15/18 . . . . .	10-51
§ 10.09	Recharacterization of Lease as Sale and/or Loan . . .	10-53
	[1] In General . . . . .	10-53
	[2] Factors Leading to Recharacterization . . . . .	10-54
	[a] Tenant Obligated to Buy the Property . . . . .	10-54
	[b] Tenant Option to Renew or Purchase for Little or No Consideration . . . . .	10-55
	[c] Rent and Term of Lease Tied to Debt Service and Term of Financing . . . . .	10-55
	[d] Substantial Prepaid Rent . . . . .	10-56
	[e] Rent Exceeds Fair Rental Value . . . . .	10-56
	[f] Tenant Required to Make Substantial Improvements . . . . .	10-57
	[g] Landlord Failed to Retain Normal Risks and Responsibilities of Ownership . . . . .	10-57
	[i] Tenant Obligated to Construct Leased Improvements . . . . .	10-58
	[ii] Tenant Right to Alter or Sell Its Improvements and to Create Easements . . . . .	10-58
	[h] Term of the Lease Is at Least the Economic Life of the Property . . . . .	10-58
	[i] Tax Avoidance Intent . . . . .	10-59
	[j] Landlord Has Substantial Investment in Property . . . . .	10-59

**REAL ESTATE FINANCING**

	[3]	Factors Preventing Recharacterization of Lease . . . . .	10-59
		[a] Non-Tax Business Intent . . . . .	10-59
		[b] Rent and Option Price at Market Rates . . . . .	10-59
		[c] Accounting Classification . . . . .	10-60
	[4]	Recharacterization of Sale-Leasebacks. . . . .	10-60
§ 10.10		Landlord Loans . . . . .	10-61
	[1]	Customary Costs Included in Loan . . . . .	10-61
	[2]	Advantages of Making Loan Instead of Including Landlord Costs in Rent . . . . .	10-61
		[a] Reduction of Rent for Property and Income Tax Purposes . . . . .	10-61
		[b] Avoidance of Limitation on Bankruptcy Claim . . . . .	10-61
		[c] Landlord Can Accelerate Loan and Recover Full Amount . . . . .	10-61
		[d] Loan Can Be Fully Secured. . . . .	10-62
		[e] Easier to Negotiate Guarantee of Loan Than of Entire Rent. . . . .	10-62
		[f] Landlord Can Recoup Investment Over Term of Loan Instead of Longer Depreciation Period . . . . .	10-62
	[3]	Disadvantages of Making Loan to Tenant. . . . .	10-62
		[a] Unsecured or Partially Secured Loan May Be Discharged in Tenant's Bankruptcy . . . . .	10-62
		[b] Landlord's Remedies May Be Faster Than Lender's . . . . .	10-63
		[c] Tenant Can Depreciate Leasehold Improvements. . . . .	10-63
		[d] No Landlord Lien for Loan. . . . .	10-63
		[e] Mortgage Taxes . . . . .	10-63

**CHAPTER 11****Subordinate Mortgage Financing**

§ 11.01		General. . . . .	11-6
	[1]	Definitions . . . . .	11-6
		[a] Subordinate Mortgage Financing. . . . .	11-6
		[b] Lien Subordination. . . . .	11-6
		[c] Debt Subordination. . . . .	11-6
		[d] Equitable Subordination. . . . .	11-7
		[e] Wraparound Mortgage . . . . .	11-7
		[f] Intercreditor Agreements . . . . .	11-8
	[2]	Chapter Scope . . . . .	11-8
	[3]	Closing Documents and Requirements . . . . .	11-8



**TABLE OF CONTENTS**

lvii

	[4] Reasons for Subordinate Financing . . . . .	11-9
	[a] Liquidity for Borrower. . . . .	11-9
	[b] Advantages for Borrower over Refinancing Existing Mortgage. . . . .	11-9
	[c] Subordination of Subordinate Debt Increases Credit Standing of Prior Debt . . . . .	11-9
	[d] Higher Return to Subordinate Lender Based on Higher Risk. . . . .	11-10
	[i] Economic Volatility Disproportionately Affects Subordinate Mortgage Loans. . . . .	11-10
	[ii] Risk of Acceleration of Prior Mortgage Can Be Reduced by Subordination Agreement. . . . .	11-11
	[5] Reasons for Priority . . . . .	11-11
	[6] Alternatives to Subordinate Mortgage Financing. . . . .	11-11
§ 11.02	Requirements of Prior Lender for Subordinate Mortgage. . . . .	11-12
	[1] Negotiation Considerations. . . . .	11-12
	[a] First Mortgage Lenders’ Objections to Subordinate Mortgages . . . . .	11-12
	[b] Strong Bargaining Power of Existing Prior Lenders. . . . .	11-12
	[2] Types of Subordination. . . . .	11-13
	[a] Subordination of Lien Only . . . . .	11-13
	[b] Subordination of Payments Effective Upon Default . . . . .	11-13
	[c] Immediate Subordination of Payments Until Prior Lender Paid in Full. . . . .	11-13
	[3] Consent of Third Parties. . . . .	11-14
	[4] Subordination Agreement . . . . .	11-14
	[a] Proof of Recording of Subordination Agreement . . . . .	11-14.1
	[b] Subordination Provision in Subordinate Mortgage. . . . .	11-14.1
	[c] Prior Mortgage Remains Prior Even if Unrecorded or Avoided. . . . .	11-15
	[d] “Prior” Lender Remains Prior Even with Notice of “Subordinate” Mortgage . . . . .	11-15
	[e] Specification of Terms of Prior Loan . . . . .	11-16
	[i] Full Disclosure Jurisdictions. . . . .	11-16

## REAL ESTATE FINANCING

	[ii] Limited Disclosure	
	Jurisdictions . . . . .	11-18
	[iii] Maximum Unpaid Balance . . . . .	11-18
	[iv] Loan-to-Value Ratio . . . . .	11-20
	[v] Collateral . . . . .	11-21
	[vi] Use of Proceeds . . . . .	11-22
	[vii] Other Terms . . . . .	11-22
[f]	Subordination to Refinancing and	
	Modification of Prior Lien . . . . .	11-23
[g]	“Continuing” Subordination . . . . .	11-24
[h]	Cross-Default Clause for Subordination	
	Agreement, Subordinate Loan and	
	Prior Loan . . . . .	11-24
[i]	Broad Description of Subordinate	
	Loan . . . . .	11-25
[j]	Representations Regarding	
	Subordinate Loan . . . . .	11-25
[k]	Prior Lender’s Right to Enforce	
	Subordinate Loan . . . . .	11-25
[l]	Subordinate Lender’s Agreement	
	Not to Assign or Modify	
	Subordinate Loan . . . . .	11-27
[m]	All Sales Proceeds Applied to	
	Prior Mortgage . . . . .	11-27
[n]	Consent by Subordinate Lender to	
	Use of Insurance Proceeds and	
	Condemnation Awards . . . . .	11-28
[o]	Deemed Consent by Subordinate	
	Lender to Actions by	
	Prior Lender . . . . .	11-28
[p]	Subordinate Lender Will Not	
	Acquire Any Prior Lien . . . . .	11-28
[q]	Waiver by Subordinate Lender	
	of Right to Collect Rents and	
	Other Proceeds of Collateral . . . . .	11-29
[r]	Subordination to Leases . . . . .	11-30
[s]	Waiver of Marshalling and Other	
	Legal Rights . . . . .	11-30
[t]	Disclaimer of Any Duty of Prior	
	Lender to Protect Subordinate	
	Lender . . . . .	11-30
[u]	Acknowledgment of Reliance	
	by Prior Lender . . . . .	11-31
[v]	Other Terms . . . . .	11-32
[5]	Resolutions and Consents . . . . .	11-34
[6]	Releases, Nondisturbance Agreements	
	and Consents . . . . .	11-34

**TABLE OF CONTENTS**

lix

	[7] Delivery of Original Subordinate Note and Mortgage . . . . .	11-35
	[8] Legending of Original Subordinate Note . . . . .	11-35
	[9] Security Agreement Pledging Subordinate Note and Mortgage . . . . .	11-35
	[10] UCC-1 Financing Statement . . . . .	11-36
	[11] UCC-3 Amendment Statement . . . . .	11-36
	[12] Financial Disclosures by Subordinate Lender . . . . .	11-36
	[13] Financial Disclosures of Borrower . . . . .	11-37
	[14] Title Insurance Endorsement . . . . .	11-37
	[15] Confirmation of Subordination . . . . .	11-37
	[16] Documents Complying with Laws Protecting Subordinate Lenders . . . . .	11-38
	[17] Prudent Post-Closing Loan Administration . . . . .	11-38
	[a] Disbursing Loan Funds as Provided in Loan Agreement . . . . .	11-38
	[b] Risks of Applying Borrower’s Payments to Unsecured Debt Owed to Prior Lender . . . . .	11-39
	[c] Avoiding “Equitable Subordination” . . . . .	11-40
	[d] Avoiding Control of Borrower . . . . .	11-41
§ 11.03	Requirements of Prior Lender for Subordination of Other Interests . . . . .	11-42
	[1] Tenants . . . . .	11-42
	[a] Subordination of Lease to Mortgage . . . . .	11-42
	[b] Subordination of Mortgage to Lease . . . . .	11-42
	[c] Attornment by Tenant . . . . .	11-43
	[d] Nondisturbance Agreement for Tenant . . . . .	11-44
	[2] Purchasers . . . . .	11-44
§ 11.04	Requirements of Subordinate Lender for Subordination Agreement . . . . .	11-45
	[1] Negotiating Considerations . . . . .	11-45
	[a] Weak Bargaining Power of Subordinate Lender . . . . .	11-45
	[b] Attorney’s Duty to Disclose Risks of Subordination . . . . .	11-45
	[c] Duty to Negotiate Protections for Subordinate Lender . . . . .	11-46
	[d] Enforceability of Prohibitions Against Subordinate Mortgages . . . . .	11-46
	[2] Specification of Terms of Prior Mortgage Loan . . . . .	11-46
	[a] Maximum Unpaid Balance . . . . .	11-47
	[b] Term of Prior Mortgage . . . . .	11-47
	[c] Use of Proceeds . . . . .	11-47
	[d] Identity of Lender . . . . .	11-48

## REAL ESTATE FINANCING

	[e]	Continuing Subordination . . . . .	11-48
	[f]	Other Terms of Prior Loan . . . . .	11-48
[3]		Specification of Owner's Equity . . . . .	11-49
[4]		Notice of Default and Opportunity to Cure . . . . .	11-49
[5]		Waivers by Prior Lender for Subordinate Lender . . . . .	11-49
	[a]	Review of Prior Mortgage . . . . .	11-49
	[b]	Waiver of "Due on Encumbrance" Clause . . . . .	11-49
	[c]	Waiver of "Due on Sale" Clause . . . . .	11-50
	[d]	Waiver of Other Defaults Under Prior Mortgage . . . . .	11-50
	[e]	Waiver of Right to Make Future Advances . . . . .	11-50
	[f]	Waiver of Dragnet Clause . . . . .	11-50
	[g]	Waiver of Onerous Covenants . . . . .	11-51
[6]		Limits on Refinancings, Extensions and Modifications of Prior Liens . . . . .	11-51
	[a]	Payment to Subordinate Lender of Excess Proceeds . . . . .	11-51
	[b]	No Changes of Material Terms of Prior Liens . . . . .	11-51
[7]		Right of Subordinate Lender to Commence Enforcement . . . . .	11-52
[8]		Application of Insurance Proceeds and Condemnation Awards to Restoration . . . . .	11-52
[9]		Limits on Consents by Subordinate Lender . . . . .	11-52
[10]		Agreement to Subordinate Not Effective Unless No Defaults . . . . .	11-52
[11]		Subordination Effective Only if Prior Lien Retains Its Priority . . . . .	11-53
[12]		Representation by Prior Lender of No Basis for Subordination or Avoidance . . . . .	11-53
	[a]	Prior Lender Not Related to Borrower . . . . .	11-54
	[b]	Prior Debt Includes No Claim for Rescission of Sale of Security . . . . .	11-54
[13]		Assignment to the Prior Lender Without Recourse . . . . .	11-54
[14]		Waiver of Defenses by Borrower and Guarantors . . . . .	11-54
[15]		Option to Buy Senior Loan . . . . .	11-54
[16]		Compliance With Laws Protecting Borrowers . . . . .	11-55
[17]		Exceptions to Subordination . . . . .	11-55
	[a]	Salary to Subordinate Lender or Its Principals . . . . .	11-55

**TABLE OF CONTENTS**

	[b] Rent and Other Operating Payments to Related Parties. . . . .	11-55
[18]	Documentary Preconditions to Subordination . . . . .	11-55
	[a] Title Insurance Endorsement . . . . .	11-55
	[b] Approval by Subordinate Lender of Plans and Construction Budget. . . . .	11-56
	[c] Commitment for “Permanent” Financing . . . . .	11-56
	[d] Notice of Limitation to Prior Lender . . . . .	11-56
	[e] Estoppels from Major Tenants. . . . .	11-56
	[f] Estoppel/Consent from Prior Lender . . . . .	11-57
	[g] Other Consents . . . . .	11-57
	[h] Attorney’s Letter Disclosing Risks . . . . .	11-57
	[i] Tax Opinion . . . . .	11-58
[19]	Accounting Disclosures for Interests in Variable Interest Entities . . . . .	11-58
[20]	Requirements of Multiple Subordinate Lenders . . . . .	11-59
	[a] Requirement That Payments Be Made on a <i>Pari Passu</i> Basis. . . . .	11-59
§ 11.05	Requirements of Subordinate Lender for Subordinate Mortgage . . . . .	11-60
	[1] Collection of Payments on Prior Mortgages, Taxes and Insurance. . . . .	11-60
	[2] Subordinate Lender’s Right of Subrogation Based on Payment of Prior Liens . . . . .	11-60
	[3] “Cross-Default” Clause in Subordinate Mortgage. . . . .	11-60
	[4] Reimbursement of Subordinate Lender . . . . .	11-60.1
	[5] Assignment to Subordinate Lender of Rents and Other Payments. . . . .	11-60.1
	[6] Construction Loan Requirements . . . . .	11-60.1
	[7] Covenants by Borrower Affecting Its Credit Rating . . . . .	11-60.2
	[8] Insurance Requirements of Subordinate Mortgage. . . . .	11-60.2
§ 11.06	Requirements of Borrower . . . . .	11-61
	[1] Enhancing Liquidity by Compliance with Lenders’ Requirements. . . . .	11-61
	[2] Tax Option. . . . .	11-61
	[3] Other Requirements. . . . .	11-61
§ 11.07	Wraparound Mortgages. . . . .	11-63
	[1] Requirements of Wraparound Lender for Mortgage. . . . .	11-63
	[a] Obligation to Pay Prior Mortgage Conditioned on Receipt of Payments and No Defaults . . . . .	11-63

## REAL ESTATE FINANCING

	[b]	Option to Apply Proceeds of Foreclosure Sale . . . . .	11-63
	[c]	No Shortfall Between Payments on Prior and Wrap Mortgages . . . . .	11-64
	[d]	No Prepayment of Underlying Mortgage . . . . .	11-64
	[e]	No Modification of Underlying Mortgage . . . . .	11-64
	[f]	Right to Refinance Underlying Mortgage . . . . .	11-65
	[g]	No Assumption of Nonmonetary Obligations . . . . .	11-65
	[h]	Preserving Installment Sale Reporting of Taxable Gain . . . . .	11-65
	[i]	Payment of Mortgage Taxes . . . . .	11-65
[2]		Requirements of Wraparound Lender for Other Closing Documents . . . . .	11-66
	[a]	Usury Endorsement . . . . .	11-66
	[b]	Usury Opinion . . . . .	11-66
	[c]	Title Insurance Endorsement and Subrogation Clause for Future Advances . . . . .	11-67
[3]		Requirements of Borrower . . . . .	11-67
	[a]	Wraparound Lender's Duty to Pay Prior Mortgage . . . . .	11-67
	[b]	Right of Offset . . . . .	11-67
	[c]	Notice and Opportunity to Cure Default Under Underlying Mortgage . . . . .	11-67
	[d]	Other Remedies for Wraparound Lender's Default . . . . .	11-68
		[i] Consequential Damages . . . . .	11-68
		[ii] Obligation to Satisfy Prior Mortgage . . . . .	11-68
		[iii] Discharge of Wraparound Mortgage . . . . .	11-68
		[iv] Fraud Claim Against Wraparound Lender . . . . .	11-69
	[e]	Payment to Independent Escrow Agent . . . . .	11-69
	[f]	Payment to Lock-Box Account with Prior Lender . . . . .	11-69
	[g]	Escrow Fund to Cover Deficiency Between Payments on Prior and Wrap Mortgages . . . . .	11-70
	[h]	Prepayment of Underlying Mortgage . . . . .	11-70

**TABLE OF CONTENTS**

lxiii

[i] Prepayment of Wraparound  
Mortgage . . . . . 11-70

[j] Minimize Unnecessary Recording  
Fees . . . . . 11-70

[k] Preserve Interest Deductions . . . . . 11-71

**CHAPTER 12**

**Construction Loans**

§ 12.01 General . . . . . 12-5

[1] Traditional Stages of Construction  
Financing . . . . . 12-5

[2] Alternative Types of Construction  
Financing . . . . . 12-6

[a] “Open-End” Construction  
Financing . . . . . 12-6

[b] Funding from Non-Institutional  
Lenders . . . . . 12-6

[3] Chapter Scope . . . . . 12-6

[4] Closing Documents and Requirements . . . . . 12-7

§ 12.02 Construction Lender’s Requirements: Construction  
Loan Commitment/Application . . . . . 12-8

§ 12.03 Construction Lender’s Closing Requirements . . . . . 12-9

[1] Need to Understand Lender’s Practices,  
Local Laws and the Particular  
Transaction . . . . . 12-9

[2] Construction Loan Agreement . . . . . 12-9

[a] Compliance with “Permanent”  
Commitment . . . . . 12-9

[b] Borrower’s Obligation to Borrow  
Funds . . . . . 12-10

[c] Borrower’s Obligation to Fund  
Deficiency . . . . . 12-10

[d] Borrower’s Use of Loan Proceeds  
for Construction . . . . . 12-10

[e] Covenant by Borrower to Construct  
Improvements . . . . . 12-11

[f] Separate Documentation for  
Non-Construction Loan . . . . . 12-11

[g] Lender’s Obligation to Make  
Advances . . . . . 12-11

[h] Waiver of Borrower’s Right to  
Give a “Cut-off” Notice . . . . . 12-13

[i] Construction Loan Account . . . . . 12-13

[j] Construction Loan Budget . . . . . 12-13

[k] Regulatory Requirements for  
Loan Provisions . . . . . 12-14

## REAL ESTATE FINANCING

	[l]	Retainage . . . . .	12-14
	[m]	Right to Continue Disbursements if Project Changes . . . . .	12-14
	[n]	No Third Party Beneficiaries . . . . .	12-14
	[o]	Lender Not Borrower's Agent . . . . .	12-15
	[p]	No Reliance on Lender . . . . .	12-15
	[q]	No Obligation to Borrower Regarding Advances . . . . .	12-15
	[r]	Reaffirmation of Representations on Each Advance . . . . .	12-16
[3]		Proof of Recordation of Construction Loan Agreement . . . . .	12-16
[4]		Notice of Lending . . . . .	12-16
[5]		Construction Note . . . . .	12-16
	[a]	Maturity Date and Principal . . . . .	12-16
	[b]	Requirements of Negotiability . . . . .	12-17
[6]		Interest Reserve Agreement . . . . .	12-17
[7]		Construction Mortgage . . . . .	12-17
	[a]	Secured Amount . . . . .	12-17
	[b]	No Subordinate Liens . . . . .	12-18
	[c]	Separate Mortgages for Each Advance . . . . .	12-18
	[d]	Failure to Fund "Permanent" Loan . . . . .	12-18
	[e]	After-Acquired Property . . . . .	12-19
	[f]	Fixtures . . . . .	12-19
	[i]	Proof of Commencement and Completion of Construction . . . . .	12-19
	[ii]	Recital in Mortgage . . . . .	12-19
	[g]	Accessions to Goods . . . . .	12-19
	[h]	Architectural Plans . . . . .	12-20
	[i]	Purchase Money Priority . . . . .	12-20
[8]		Property Insurance . . . . .	12-21
	[a]	Errors and Omissions . . . . .	12-21
	[b]	Other Perils . . . . .	12-21
	[c]	Reporting . . . . .	12-22
	[d]	Nonreporting . . . . .	12-22
	[e]	Exclusions . . . . .	12-23
	[i]	Exclusion for Property Outside of the Premises . . . . .	12-23
	[ii]	Exclusion for Property not Owned by Owner . . . . .	12-23
	[iii]	Exclusion for Phased Projects . . . . .	12-23
	[iv]	Vacancy Exclusion . . . . .	12-23
[9]		Liability Insurance . . . . .	12-24
[10]		Title Insurance Policy . . . . .	12-25
	[a]	Coverage Against Mechanics' Liens . . . . .	12-25



**TABLE OF CONTENTS**

lxv

[i] ALTA Endorsement 32-06 . . . . . 12-26

[ii] Other ALTA “32”  
Endorsements . . . . . 12-27

[iii] ALTA Endorsement 33-06 . . . . . 12-27

[iv] Endorsement Regarding  
Failure to Disburse  
Sufficient Funds . . . . . 12-27

[v] Additional Assurances  
Required in States Where  
Unrecorded Mechanic’s  
Liens May be Prior to a  
Recorded Mortgage. . . . . 12-28

[11] Guarantee. . . . . 12-29

[12] Payment and Performance Bonds  
and Alternatives . . . . . 12-29

[a] Performance Bond . . . . . 12-29

[b] Payment Bond . . . . . 12-30

[c] Limitations on Bonds. . . . . 12-30

[d] Letter of Credit and Insurance as  
Alternatives . . . . . 12-30

[e] Designation of Co-Obligees. . . . . 12-31

[f] Bonding of Contractors Other  
Than General Contractor. . . . . 12-31

[g] Notice to Lender of Default and  
Opportunity to Cure . . . . . 12-32

[h] Consent to Changes . . . . . 12-32

[i] Consent to Release by Lender  
of Owner . . . . . 12-32

[j] Approval by Surety of Construction  
Loan Documents . . . . . 12-33

[k] Creditworthiness of Surety or  
Other Credit Provider . . . . . 12-33

[13] Construction Contracts . . . . . 12-33

[a] Variations in Form of  
Construction Contract . . . . . 12-33

[i] Owner, Architect and General  
Contractor . . . . . 12-33

[ii] “Stipulated Sum” . . . . . 12-34

[iii] “Cost Plus a Fee” and  
“Guaranteed Maximum” . . . . . 12-34

[iv] “Fast Track” . . . . . 12-34

[v] “Design-Build” . . . . . 12-34

[vi] Construction Manager . . . . . 12-34

[b] Waiver of Right to File Lien. . . . . 12-34.1

[c] Waiver of Claim to Undisbursed  
Loan Funds . . . . . 12-35

[d] Consent of Contractor to Plans . . . . . 12-35

## REAL ESTATE FINANCING

	[e] Consent of Lender and Surety to Changes . . . . .	12-35
	[f] Notice of Default and Opportunity to Cure . . . . .	12-35
	[g] Consistency with Loan Documents . . .	12-36
	[h] Subordination to Construction Mortgage . . . . .	12-36
	[i] Contract Covering All Work . . . . .	12-36
[14]	Proof of Recordation of Construction Contract . . . . .	12-36
[15]	Assignment of Owner's Rights in Construction Contract . . . . .	12-36
[16]	Waiver by Subcontractors . . . . .	12-37
[17]	Assignment of Rights to Licenses, Permits and Agreements . . . . .	12-37
[18]	Undertaking of General Contractor . . . . .	12-37
[19]	Undertaking and Consent of Architect or Engineer . . . . .	12-38
[20]	"Permanent" Loan Commitment . . . . .	12-39
	[a] Nonfundable Standby Commitment . . . . .	12-39
	[b] Fundable Standby Commitment . . . . .	12-39
	[c] Preconditions to Funding . . . . .	12-39
	[d] Notice of Default and Opportunity to Cure . . . . .	12-39
[21]	Assignment of "Permanent" Loan Commitment . . . . .	12-40
[22]	Buy-Sell Agreement . . . . .	12-40
	[a] Advance Approval by "Permanent" Lender of Closing Documents . . . . .	12-40
	[b] Separate Documents for Construction and "Permanent" Loans . . . . .	12-41
	[c] Conflicting Interests of Construction Lender and Permanent Lender . . . . .	12-41
[23]	Inspection of Mortgaged Property . . . . .	12-41
[24]	Affidavits Regarding Commencement of Construction . . . . .	12-42
[25]	Engineering and Environmental Reports . . . . .	12-42
[26]	Proof of Utility Connections . . . . .	12-42
[27]	Certificates of Compliance with Zoning and Building Laws . . . . .	12-43
[28]	Approval of the Plans and Specifications . . .	12-43
	[a] General . . . . .	12-43
	[b] Green Building Standards . . . . .	12-43
[29]	Building Permits and Other Construction Approvals . . . . .	12-43
[30]	Prudent Loan Administration After Initial Closing . . . . .	12-44

**TABLE OF CONTENTS**

	[a]	Preconditions to Advances After Initial Closing . . . . .	12-44
		[i] Lien Waivers . . . . .	12-44.1
		[ii] Affidavit by General Contractor . . . . .	12-44.1
		[iii] Receipt for Payment . . . . .	12-44.2
		[iv] Updated Survey . . . . .	12-44.2
		[v] Updated Title Endorsement. . . . .	12-44.2
		[vi] Invoices and Architect’s Certificate . . . . .	12-44.2
		[vii] Proof of Sufficiency of Remaining Loan . . . . .	12-44.3
	[b]	Disbursement of Construction Loan Through Title Insurer . . . . .	12-44.3
	[c]	Disbursement of Loan to Contractors . . . . .	12-44.3
	[d]	Satisfaction of Conditions of “Permanent” Commitment. . . . .	12-44.4
	[e]	Consents to Change Orders; Amendments to Approvals, Prospectus, and Loan Agreement. . . . .	12-44.4
	[f]	Notice to Surety . . . . .	12-44.5
	[g]	Notice from Mechanic . . . . .	12-44.5
	[h]	Monitor Expiration Dates. . . . .	12-44.5
	[i]	Repayment of Construction Loan . . . . .	12-44.5
	[31]	Requirements for Final Construction Loan Advance. . . . .	12-44.5
	[32]	Sale of Construction Loan . . . . .	12-44.6
	[33]	Other Requirements. . . . .	12-44.6
§ 12.04		Borrower’s Requirements for Construction Financing. . . . .	12-45
	[1]	Guarantee of Payment. . . . .	12-45
	[2]	Minimizing Construction Period. . . . .	12-45
	[3]	Election to Capitalize Development Expenses . . . . .	12-45
	[4]	Revolving Credit . . . . .	12-45
	[5]	Minimizing Retainage. . . . .	12-46
	[6]	Advances for Stored Materials. . . . .	12-46
	[7]	Advances for Soft Costs. . . . .	12-46
	[8]	Deficiency in Costs During Construction . . . . .	12-46
	[9]	Option to Obtain Gap Financing After Construction . . . . .	12-47
	[10]	Right to Reallocate Construction Budget. . . . .	12-47
	[11]	Consistency of Loan Documents with Other Documents . . . . .	12-47
	[12]	Bonds . . . . .	12-48
	[13]	Short Deadlines for Lender Decision. . . . .	12-48
	[14]	Delays Beyond the Borrower’s Control. . . . .	12-48

**REAL ESTATE FINANCING**

[15]	Development by Different Owner/Borrowers (as Members of an LLC) of a Single Project to Be Used as a Condominium on Completion . . . . .	12-48
[16]	Miscellaneous Borrower Requirements . . . . .	12-49
[17]	Other Borrower Loan Requirements . . . . .	12-50
§ 12.05	Requirements of “Permanent” Lender . . . . .	12-50.1

**CHAPTER 13****Purchase Money Financing**

§ 13.01	General. . . . .	13-2
[1]	Definitions . . . . .	13-2
	[a] Installment Land Contract . . . . .	13-2
	[b] Purchase Money Financing . . . . .	13-3
[2]	Chapter Scope . . . . .	13-3
§ 13.02	Seller’s Basic Requirements for Installment Land Contract . . . . .	13-4
[1]	Right to Accelerate Balance Due . . . . .	13-4
[2]	Waiver of Defenses . . . . .	13-4
[3]	Installment Contract Must Be in Recordable Form, and Should Be Recorded in Some States . . . . .	13-4
§ 13.03	Seller’s Alternative Provisions for Installment Sale Contract . . . . .	13-5
[1]	Possible Ineffectiveness of Deed in Escrow . . . . .	13-5
[2]	Qualifying for Installment Sales Reporting . . . . .	13-5
	[a] Deferral of Seller’s Income Tax on Sale . . . . .	13-5
	[b] Acceleration of Tax on Pledge or Sale . . . . .	13-6
	[c] Effect of Installment Sales Contract . . . . .	13-6
	[d] Wraparound Purchase Money Financing . . . . .	13-6
	[e] Contingent Interest May Accelerate Seller’s Gain . . . . .	13-7
	[f] Installment Sale May Be Subject to FIRPTA . . . . .	13-7
[3]	Current Payments of Interest at No Less Than Applicable Federal Rate . . . . .	13-7
[4]	Structuring Loan as “ <i>Bona Fide</i> ” . . . . .	13-9
[5]	Preconditions to Subordination . . . . .	13-9
[6]	Include “Mortgage” Provisions in Installment Contracts . . . . .	13-9

**TABLE OF CONTENTS**

[7] Option to Repurchase May Be Recharacterized as Mortgage . . . . . 13-9

§ 13.04 Purchaser’s Requirements for Installment Land Contract . . . . . 13-10

[1] Title Insurance . . . . . 13-10

[2] Recordation of Installment Land Contract . . . . . 13-10

[3] Trust to Hold Unit Until Title Closing . . . . . 13-10

[4] Conditions to Payment of Purchase Price . . . . . 13-10

[5] Purchaser Takes Possession of Property . . . . . 13-10

§ 13.05 Purchaser’s Concerns and Alternative Provisions . . . . . 13-11

[1] At Risk Rules . . . . . 13-11

[2] Below-Market Financing . . . . . 13-11

[3] Payment of Interest on Existing Mortgages . . . . . 13-11

[4] “Rolling” Subordination . . . . . 13-11

[5] Options . . . . . 13-11

[6] Contingent Interest May Delay Buyer’s Depreciation . . . . . 13-12

[7] Tax-Motivated Resale by Purchaser . . . . . 13-12

§ 13.06 Seller/Lender’s Basic Requirements for Purchase Money Financing . . . . . 13-13

[1] Commercial Loans . . . . . 13-13

[a] Income Tax Compliance . . . . . 13-13

[i] Interest rate . . . . . 13-13

[2] Residential Loans . . . . . 13-13

[a] Purchase Money Exclusions from Loan Originator Rules . . . . . 13-13

[i] One Property Exclusion . . . . . 13-13

[ii] “Three Properties” Exclusion . . . . . 13-14

[iii] Additional Requirements for Both Exclusions . . . . . 13-14

**CHAPTER 14**

**Loans Secured by Single-Family Homes**

§ 14.01 General . . . . . 14-5

[1] Definitions . . . . . 14-5

[a] Adjustable Rate Mortgage . . . . . 14-5

[b] Buy-Down . . . . . 14-5

[c] FNMA . . . . . 14-5

[d] FHLMC . . . . . 14-6

[e] Graduated Payment Loan . . . . . 14-6

[f] Growing Equity Mortgage . . . . . 14-6

[g] Price-Level Adjusted Mortgage . . . . . 14-6

## REAL ESTATE FINANCING

	[h] Reverse Mortgage . . . . .	14-6
	[i] Shared Equity Mortgage . . . . .	14-7
	[j] Shared Appreciation Mortgage . . . . .	14-7
	[k] Subprime Loans . . . . .	14-7
	[2] Chapter Scope . . . . .	14-8
§ 14.02	Lender's Requirements Prior to Loan	
	Application . . . . .	14-9
	[1] Advertising Guidelines . . . . .	14-9
	[2] Pre-Application Disclosures . . . . .	14-9
	[a] Application Fee . . . . .	14-9
	[b] Credit Report and Appraisal Fees . . . . .	14-10
	[c] "Rate Lock" . . . . .	14-10
	[d] Truth-in-Lending Pre-Application Disclosures . . . . .	14-10
	[e] Appraisal Notice . . . . .	14-11
	[3] Form of Application and Other Requests for Information . . . . .	14-11
	[4] Regulation B Monitoring Information . . . . .	14-12
	[5] Real Estate Settlement Procedures Act ("RESPA") . . . . .	14-12
	[a] Scope of RESPA . . . . .	14-12
	[b] Servicing Notice . . . . .	14-12
	[c] Limits on Kickbacks, Fee Sharing, and Lender's Designation of Affiliated Service Providers . . . . .	14-13
	[d] Good Faith Estimates . . . . .	14-13
	[6] E-Consents . . . . .	14-14
	[7] Underwriting Best Practices . . . . .	14-14
	[8] Licensing and Registration Requirements . . . . .	14-14
	[9] Legal Compliance by Lender's Service Providers . . . . .	14-14
§ 14.03	Lender's Requirements for Post-Application	
	Disclosures . . . . .	14-15
	[1] RESPA Disclosures . . . . .	14-15
	[a] HUD Guide . . . . .	14-15
	[b] Good Faith Estimates . . . . .	14-15
	[c] Homeownership Counseling Notice . . . . .	14-16
	[d] Notice of Servicing Transfer . . . . .	14-16
	[2] Truth-in-Lending Disclosures . . . . .	14-16
	[a] Scope of Truth-in-Lending . . . . .	14-16
	[b] Truth-in-Lending Pre-Closing Disclosures . . . . .	14-16
	[c] Notice of Right of Rescission . . . . .	14-18
	[d] Waiver . . . . .	14-19
	[3] Notice of Adverse Action or Incomplete Application . . . . .	14-19
	[4] Notice of Right to Appraisal . . . . .	14-20
	[5] Initial Disclosure of Right to Cancellation or Termination of PMI . . . . .	14-20

**TABLE OF CONTENTS**

	[a]	Applicability . . . . .	14-20
	[b]	Distinction Between “Cancellation” and “Termination” . . . . .	14-20
	[c]	“High-Risk” Mortgages . . . . .	14-21
	[d]	Content of Initial Disclosures for Borrower-Paid PMI . . . . .	14-21
	[e]	Content of Initial Disclosures for Lender-Paid PMI . . . . .	14-21
	[f]	No Fees to Borrowers for Disclosures . . . . .	14-22
	[6]	Disclosure of Credit Scores . . . . .	14-22
§ 14.04		Lender’s Requirements for Commitments and Related Disclosures . . . . .	14-22.1
§ 14.05		Lender’s Requirements for Closing Documents . . . . .	14-23
	[1]	Note . . . . .	14-23
	[a]	Publicly Available Objective Interest Rate . . . . .	14-23
	[b]	Signatories . . . . .	14-23
	[c]	Other Restrictions on Payments . . . . .	14-23
	[i]	Balloon Payments . . . . .	14-23
	[ii]	Late Charges . . . . .	14-23
	[iii]	Prohibition of Prepayment Penalties . . . . .	14-24
	[iv]	Negative Amortization . . . . .	14-24
	[v]	Notices Regarding Lender’s Acceptance of Partial Payments . . . . .	14-24
	[2]	Mortgage . . . . .	14-25
	[a]	“Due on Sale” and “Due on Encumbrance” Provisions . . . . .	14-25
	[b]	Limit Scope of Lien . . . . .	14-25
	[c]	Homestead Restrictions . . . . .	14-25
	[d]	Release of Dower Rights . . . . .	14-26
	[e]	Permitted Exceptions . . . . .	14-26
	[f]	Lender’s Determination That Borrower Can Repay the Loan . . . . .	14-26
	[g]	Qualified Mortgages . . . . .	14-26.1
	[h]	Notices to Borrower of Loss of Anti-Deficiency Protection . . . . .	14-29
	[i]	No Mandatory Arbitration or Waiver of Right to Litigation . . . . .	14-30
	[j]	NMLSR ID . . . . .	14-30
	[3]	Other Security Instruments . . . . .	14-30
	[4]	Notice to Co-Signer . . . . .	14-30
	[5]	Disclosure Statements . . . . .	14-31
	[a]	RESPA Settlement Statement . . . . .	14-31
	[b]	Hybrid Mortgage Disclosure . . . . .	14-32

## REAL ESTATE FINANCING

	[c]	Counseling for Negative Amortization Loans . . . . .	14-32
	[d]	Truth in Lending Closing Disclosures . . . . .	14-32
[6]		Escrow Account . . . . .	14-33
	[a]	Escrow Amounts . . . . .	14-33
	[b]	Escrow Account Statements . . . . .	14-33
	[c]	Escrow Account . . . . .	14-34
[7]		1099-S . . . . .	14-34
[8]		Appraisal and Credit Report . . . . .	14-35
	[a]	Copies of Appraisal and Credit Report . . . . .	14-35
	[b]	Illegal Restrictions on Appraisers . . . . .	14-35
	[c]	Requirements for Appraisals . . . . .	14-36
[9]		MERS . . . . .	14-36.1
[10]		Insurance Policies . . . . .	14-38
	[a]	Title Insurance Policies . . . . .	14-38
	[b]	Homeowner Property and Liability Insurance Policies . . . . .	14-39
		[i] Flood Insurance . . . . .	14-40
		[ii] Residency Requirements . . . . .	14-40
[11]		Single-Premium Credit Insurance . . . . .	14-40
[12]		Debt Cancellation Contracts . . . . .	14-41
[13]		“High-Cost” Loans and “Higher-Priced” Loans . . . . .	14-41
	[a]	High-Cost Mortgage Loans . . . . .	14-41
	[b]	“Higher Priced” Loans . . . . .	14-42
[14]		Borrower’s Acknowledgment of No T-in-L Rescission . . . . .	14-43
[15]		Inspection Report . . . . .	14-44
[16]		Contract of Sale . . . . .	14-44
	[a]	Down Payment Amount . . . . .	14-44
	[b]	Restrictions on Assignment . . . . .	14-44
	[c]	Release Prices . . . . .	14-44.1
[17]		Loan Reserves . . . . .	14-44.1
[18]		Internet Sites Providing Property Information . . . . .	14-44.1
§ 14.06		Lender’s Concerns . . . . .	14-45
	[1]	Plain Language Laws . . . . .	14-45
	[2]	Unconscionability; Unsophisticated Parties . . . . .	14-45
	[3]	Loan Originator Compensation . . . . .	14-45
	[a]	Ban on Yield Spread Premiums . . . . .	14-45
	[b]	Dodd-Frank Restrictions . . . . .	14-45
	[4]	“Predatory Lending” and Subprime Lending Restrictions . . . . .	14-46
	[a]	Predatory Lending Laws Generally . . . . .	14-46
	[b]	Definition of Predatory Lending . . . . .	14-47



**TABLE OF CONTENTS**

lxxiii

	[c]	Federal Preemption of State and Local Laws . . . . .	14-49
	[d]	Impact of Laws on Secondary Market Purchasers and Ratings of Securitized Loans . . . . .	14-49
	[e]	Restrictions on “Flipping” . . . . .	14-50
	[f]	Liability for Steering of Borrowers to Unsuitable or Predatory Loans . . . . .	14-50
	[5]	Privacy Requirements . . . . .	14-51
	[a]	Restrictions on Disclosure of Personal Information . . . . .	14-51
	[b]	Regulations Relating to Identity Theft . . . . .	14-51
	[6]	Risk of Loss of Priority to Secured Party Whose Lien Is Noted on a Certificate of Title for a Manufactured Home . . . . .	14-51
	[7]	Preemption of Conflicting State Laws . . . . .	14-52
	[8]	Lender’s Document Preparation Fees . . . . .	14-53
	[9]	Regulatory Requirements . . . . .	14-53
	[10]	Senior Housing . . . . .	14-54
	[11]	Consumer Fraud . . . . .	14-54
§ 14.07		Lender’s Post-Closing Requirements . . . . .	14-57
	[1]	Notice of Change in Payments or Balloon . . . . .	14-57
	[2]	Escrow Accounts . . . . .	14-57
	[3]	Records . . . . .	14-58
	[a]	CRA . . . . .	14-58
	[b]	HMDA . . . . .	14-59
	[4]	Homeownership Counseling Notice . . . . .	14-59
	[5]	Escrow Accounts for Purchaser Downpayments . . . . .	14-59
	[6]	Periodic Statements . . . . .	14-59
	[7]	Compliance with Billing Error Procedures . . . . .	14-60
	[8]	Assumptions . . . . .	14-60
	[9]	PMI Notification . . . . .	14-60
	[10]	Transfer of Servicing or Other Rights . . . . .	14-61
	[11]	Loan Modifications . . . . .	14-62
	[12]	Giving Information to Credit Reporting Agencies . . . . .	14-62
	[13]	Servicer Restrictions . . . . .	14-62
	[14]	Loans Payoffs . . . . .	14-62.1
§ 14.08		Borrower’s Requirements and Concerns . . . . .	14-63
	[1]	Maximizing Acquisition Financing . . . . .	14-63
	[2]	Documenting Deductibility of “Points” . . . . .	14-64
	[3]	Eliminate PMI When L-T-V Drops Below 80%; PMI Deduction . . . . .	14-65

**REAL ESTATE FINANCING**

[4]	Transfer of Residence to Trust or Entity; Other Transfers . . . . .	14-66
	[a] Transfers for Estate Planning . . . . .	14-66
	[b] Transfers and Medicaid Eligibility . . . . .	14-67
	[c] Transfers for Asset Protection . . . . .	14-67
	[d] Risks of Transfers . . . . .	14-67
[5]	Property and Liability Insurance . . . . .	14-68
	[a] Insurability & Cost . . . . .	14-68
	[b] Appraisal . . . . .	14-69
	[c] Residency Requirement . . . . .	14-69
	[d] Insurance Requirements of Entity Owners . . . . .	14-70
	[e] Insurance Coverage Gaps . . . . .	14-70
[6]	Co-Ownership by Unmarried Persons . . . . .	14-71
[7]	How Developers Can Maximize Deferral of Gain from Home Sales . . . . .	14-71
[8]	Government Benefits . . . . .	14-72
	[a] FHA Mortgage Loans to First-Time Homebuyers . . . . .	14-72
	[b] HUD Homes . . . . .	14-72
	[c] HCV Homeownership Program . . . . .	14-72
	[d] Uncertain Future of Inflation Reduction Act of 2022 . . . . .	14-72
	[i] Tax Benefits for Residential Property . . . . .	14-72
	[ii] Other Funding for Residential Property . . . . .	14-73

**CHAPTER 15****Loans Secured by Condominium, Homeowners  
Association and Time Share Units**

§ 15.01	General . . . . .	15-2
	[1] Definitions . . . . .	15-2
	[a] Condominium . . . . .	15-2
	[b] Homeowners Association . . . . .	15-2
	[c] Planned Unit Developments . . . . .	15-3
	[d] Time Shares . . . . .	15-3
	[e] Unsold Units . . . . .	15-3
	[2] Chapter Scope . . . . .	15-4
§ 15.02	Lender's Requirements for Loan Secured by Condominium Unit . . . . .	15-5
	[1] Condominium Declaration and Bylaws . . . . .	15-5
	[2] Mortgage . . . . .	15-6
	[a] Legal Description . . . . .	15-6
	[b] Preconditions to Subordination of Mortgage . . . . .	15-6
	[c] Condominium Provisions . . . . .	15-7

**TABLE OF CONTENTS**

lxxv

	[3]	Property and Liability Insurance . . . . .	15-8
	[4]	Title Insurance. . . . .	15-8
	[5]	Offering Plan. . . . .	15-9
	[6]	End Loan Commitment. . . . .	15-10
	[7]	Purchase Agreement . . . . .	15-10
	[8]	FNMA/FHLMC Approval . . . . .	15-10
	[9]	Assignment of Sponsor’s Rights . . . . .	15-11
	[10]	Engineer’s Report and Pre-Conversion Rents . . . . .	15-11
	[11]	Notice to Condominium Association . . . . .	15-12.3
	[12]	Other Requirements. . . . .	15-12.3
	[13]	Post-Closing Requirements. . . . .	15-12.4
§ 15.03		Lender’s Concerns Regarding Condominium Loans. . . . .	15-12.6
§ 15.04		Borrower’s Requirements for Condominium Loans. . . . .	15-15
	[1]	Minimize Presale Requirements. . . . .	15-15
	[2]	Separate Mortgages on Each Condominium Unit. . . . .	15-15
	[3]	Phasing Development . . . . .	15-15
	[4]	Pay Less Than <i>Pro Rata</i> Common Charges on Unsold Units. . . . .	15-16
	[5]	Unit Owner’s Property and Liability Insurance (HO-6) . . . . .	15-16
	[a]	Recommended Changes to HO-6 Policy. . . . .	15-16
	[b]	Avoid Duplicate “Walls In” Coverage by both Master and HO-6 Policies. . . . .	15-16.1
§ 15.05		Lender’s Requirements for Loans Secured by Units in Homeowners Associations or Planned Unit Developments. . . . .	15-17
§ 15.06		Lender’s Requirements for Time Share Loans . . . . .	15-18
§ 15.07		Lender’s Requirements for Loans to Condominium and Homeowners Associations . . . . .	15-19

**CHAPTER 16**

**Loans Secured by Cooperative Units**

§ 16.01		Definitions . . . . .	16-1
	[1]	Cooperative Unit. . . . .	16-1
	[2]	“Condop”. . . . .	16-2
§ 16.02		Lender’s Requirements for Cooperative Loans. . . . .	16-3
	[1]	Security Agreement. . . . .	16-3
	[2]	Possession of Stock Certificate and Proprietary Lease . . . . .	16-3
	[3]	UCC-1 Financing Statements . . . . .	16-3
	[4]	Leasehold Mortgage or Assignment. . . . .	16-4

	[5]	Recognition Agreement . . . . .	16-4
	[6]	Stock Power in Blank . . . . .	16-4
	[7]	Assignment of Proprietary Lease in Blank . . . . .	16-5
	[8]	UCC, Judgment and Tax Lien Search . . . . .	16-5
	[9]	Title Insurance or UCC Insurance . . . . .	16-5
§ 16.03		Lender's Concerns Relating to Cooperatives . . . . .	16-6
	[1]	Regulatory Requirements . . . . .	16-6
	[2]	Compliance with "80/20" Rule . . . . .	16-6
	[3]	High Percentage of Unsold Units . . . . .	16-6
	[4]	Rights of Tenants After "Deconversion" . . . . .	16-6
	[5]	Unenforceability of Special Sponsor Rights . . . . .	16-7
	[6]	Engineer's Report . . . . .	16-7
§ 16.04		Borrower's Requirements and Concerns . . . . .	16-8
	[1]	Ownership of Cooperative Unit by Trust or Entity . . . . .	16-8
	[a]	Ownership by Trust . . . . .	16-8

## CHAPTER 17

### Structured Finance ("Securitizations")

§ 17.01		General . . . . .	17-4
	[1]	Definitions . . . . .	17-4
	[a]	"Securitization" and "Structured Finance" . . . . .	17-4
	[b]	"Bankruptcy Remote Entities" . . . . .	17-5
	[c]	"Conduit" Lenders . . . . .	17-5
	[d]	"Pass-Through" and "Pay-Through" Structures . . . . .	17-5
	[e]	REMICs . . . . .	17-6
	[f]	CDOs . . . . .	17-6
	[2]	Advantages for Borrower . . . . .	17-6
	[3]	Chapter Scope . . . . .	17-7
§ 17.02		Securitization Requirements for Loan Documents . . . . .	17-8
	[1]	Property-Specific v. Pool Requirements . . . . .	17-9
	[2]	Special Purpose Entities and Other Bankruptcy-Remote Entities . . . . .	17-10
	[a]	Bankruptcy Remote Entities . . . . .	17-10
	[b]	Special Purpose Entities . . . . .	17-10
	[c]	Effectiveness of Bankruptcy Remote SPE Restrictions . . . . .	17-11
	[i]	Cases When Bankruptcy Remote SPE Restrictions Were Ineffective . . . . .	17-11
	[ii]	Methods of Strengthening Bankruptcy Remote SPE Restrictions . . . . .	17-13

**TABLE OF CONTENTS**

lxxvii

[d] Preference for Delaware LLCs . . . . . 17-14

    [i] Indefinite Term . . . . . 17-15

    [ii] Contractual Means of  
        Avoiding Dissolution . . . . . 17-15

    [iii] Consent to Bankruptcy by  
        Disinterested Non-Member. . . . . 17-16

    [iv] Subordination of Fiduciary  
        Duties to Equity Holders  
        in Favor of Bondholders. . . . . 17-16

    [v] Dissolution Only by Court  
        Order . . . . . 17-16

    [vi] Preference for Protective  
        Provisions in Articles of  
        Organization of LLC . . . . . 17-17

    [vii] Prohibition on Indirect  
        Amendments of  
        Organizational Documents. . . . . 17-17

    [viii] Irrevocable Proxies Granted  
        to Lender. . . . . 17-17

[e] Accounting Requirements for SPEs. . . . . 17-18

[f] Reducing Risk of “Alter Ego”  
    Claims . . . . . 17-18

[g] Terms of Engagement of  
    Independent Directors . . . . . 17-18.1

[3] Bankruptcy Waivers . . . . . 17-18.2

    [a] Bankruptcy Waiver by Borrower. . . . . 17-18.2

    [b] Bankruptcy Waiver by Creditors. . . . . 17-18.2

[4] Ownership of Issuer . . . . . 17-18.3

[5] Criteria for “True Sale” . . . . . 17-18.3

[6] Security Instruments Perfecting Trustee’s  
    Security Interest in the Collateral . . . . . 17-18.5

[7] Appraisals . . . . . 17-18.5

[8] Financial Statements . . . . . 17-18.6

[9] Tenancies. . . . . 17-18.7

    [a] Vacancies and Low Diversity . . . . . 17-18.7

    [b] Lease Term and Tenant Quality . . . . . 17-18.7

    [c] Borrower’s Lease Certification . . . . . 17-18.8

    [d] Mortgage Provisions. . . . . 17-18.8

    [e] Tenant Estoppels . . . . . 17-18.8

    [f] Additional Disclosures for  
        “Significant Obligor”. . . . . 17-18.8

[10] Credit Leases. . . . . 17-18.9

[11] Property and Liability Insurance . . . . . 17-19

[12] Servicing Agreements . . . . . 17-21

    [a] Servicing Fees . . . . . 17-21

    [b] Rating of Servicer . . . . . 17-21

    [c] Advances by Servicer. . . . . 17-21

## REAL ESTATE FINANCING

[13]	Management Agreements . . . . .	17-22
	[a] Credentials of Managing Agent . . . . .	17-22
	[b] Termination of Managing Agent . . . . .	17-22
[14]	Engineering Reports . . . . .	17-22
[15]	Environmental Reports and Insurance . . . . .	17-23
	[a] Property-Specific Requirements . . . . .	17-23
	[b] Pool Requirements . . . . .	17-24
	[c] Environmental Insurance . . . . .	17-25
	[i] “Full Loan Balance” Lender Policy . . . . .	17-26
	[ii] Policy Should Be 125% of Principal . . . . .	17-26
	[iii] Reasonable Conditions to Payment . . . . .	17-26
	[iv] Notice of Claim . . . . .	17-26
	[v] Coverages . . . . .	17-26
	[vi] Database Searches; Borrower Questionnaires; Policy Addendum . . . . .	17-26
	[vii] Coverage Should Not Be Voided by Borrower Fraud . . . . .	17-27
	[viii] Excluded Risks . . . . .	17-27
	[ix] Policy Term . . . . .	17-27
	[x] Prepayment of Premium; No Policy Termination . . . . .	17-28
	[xi] Deductibles . . . . .	17-28
	[xii] Named Insureds . . . . .	17-28
[16]	Special Hazard Reports . . . . .	17-28
[17]	Subordinate Debt . . . . .	17-29
	[a] Subordinate Mortgages . . . . .	17-29
	[b] A/B Structure: Senior and Junior Indebtedness Secured by One Mortgage . . . . .	17-29
	[c] Mezzanine Loans . . . . .	17-31
	[d] Preferred Equity . . . . .	17-32
	[e] Unsecured Debt . . . . .	17-32
[18]	Bankruptcy Bond . . . . .	17-32
[19]	Reserves, Guarantees, and Other Credit Enhancement . . . . .	17-32
	[a] SEC Regulation AB . . . . .	17-32
	[b] Derivatives . . . . .	17-32
	[c] Criteria for Investment of Reserves . . . . .	17-33
[20]	Legal and Other Opinions . . . . .	17-33
	[a] Bankruptcy-Remote LLC Opinions . . . . .	17-33
	[b] Perfection . . . . .	17-34

**TABLE OF CONTENTS**

lxxix

	[c]	Insolvency and True Sale . . . . .	17-34
	[d]	Nonconsolidation Opinion . . . . .	17-36
	[e]	Enforceability of Credit Enhancement . . . . .	17-37
	[f]	Defeasance . . . . .	17-37
	[g]	Municipalities and Public Purpose Corporations . . . . .	17-39
	[h]	Other Opinions . . . . .	17-39
	[21]	Mortgage Warehousing . . . . .	17-40
	[22]	Post-Closing Actions . . . . .	17-41
	[23]	Other Property-Specific Requirements . . . . .	17-42
	[24]	Other Pool Requirements . . . . .	17-43
§ 17.03		Concerns of Holders of REMIC Residual Interests . . . . .	17-44.1
	[1]	Regular Interest in REMIC . . . . .	17-44.1
	[2]	Residual Interest in REMIC . . . . .	17-44.1
	[a]	“Phantom” Income to Holder of Residual Interest . . . . .	17-44.1
	[b]	Unrelated Business Income and Bar to Offset of Net Operating Losses . . . . .	17-44.1
	[c]	“Insignificant” Residual Interests . . . . .	17-45
	[d]	Regulatory Concerns of Banks . . . . .	17-45
	[e]	Tax on Transfers of Residual Interests to Disqualified Organizations . . . . .	17-45
§ 17.04		Securities Law Issues in Securitizations . . . . .	17-46
§ 17.05		Recommendations of Industry Groups . . . . .	17-47
§ 17.06		Accounting Requirements for Securitizations . . . . .	17-49
§ 17.07		Regulatory Requirements for Securitizations . . . . .	17-50
	[1]	Generally . . . . .	17-50
	[2]	Risk Retention & Other Dodd Frank Requirements . . . . .	17-51
	[3]	Margin and Capital Requirements for Uncleared Swaps . . . . .	17-53
§ 17.08		Borrower Concerns for Securitizations . . . . .	17-54
	[1]	Limits on Additional Securitization Costs . . . . .	17-54
	[2]	Nonconsolidation Opinion . . . . .	17-54
	[3]	Substitution of Collateral . . . . .	17-54
	[4]	Defeasance, Assumption and Yield Maintenance . . . . .	17-55
	[a]	Defeasance . . . . .	17-55
	[b]	Assumption . . . . .	17-56
	[c]	Yield Maintenance . . . . .	17-57
	[5]	Other Requests for Rating Confirmations . . . . .	17-57
	[6]	Cash Management . . . . .	17-58
	[7]	Servicing Issues . . . . .	17-59

§ 17.09	Alternative Forms of Securitization . . . . .	17-61
[1]	Covered Bonds . . . . .	17-61

## CHAPTER 18

### Sale-Leasebacks; Synthetic Leasing

§ 18.01	Sale-Leasebacks Generally . . . . .	18-3
[1]	Definitions and Types of Transactions . . . . .	18-3
[a]	Sale-Leasebacks . . . . .	18-3
[b]	Sale-Leaseback/Leasehold Mortgage . . . . .	18-4
[c]	Sale-Subleasebacks . . . . .	18-4
[d]	“Bond” Transactions . . . . .	18-4
[e]	Tax-Exempt Bond Transactions . . . . .	18-4
[f]	Leasing to or by Tax-Exempt or Foreign Persons . . . . .	18-4
[g]	Master Limited Partnerships and Corporate Roll-Outs . . . . .	18-5
[h]	Reservation of Interest by Seller . . . . .	18-5
[2]	Chapter Scope . . . . .	18-5
[3]	Closing Documents and Requirements . . . . .	18-5
[4]	Reasons for Sale-Leasebacks . . . . .	18-6
[a]	Income Tax and Other Advantages to Seller/Tenant . . . . .	18-6
[i]	Deduction of Rent and Depreciation of New Leasehold Improvements . . . . .	18-6
[ii]	Depreciation of Existing Building . . . . .	18-6
[iii]	Sale-Leaseback Yields Greater Proceeds . . . . .	18-7
[iv]	Accounting Advantages . . . . .	18-7
[b]	Income Tax and Other Advantages to Purchaser/Landlord . . . . .	18-7
[i]	Depreciation . . . . .	18-7
[ii]	Usury . . . . .	18-7
[iii]	Appreciation in Value of Property . . . . .	18-8
§ 18.02	Closing Requirements for Sale-Leasebacks . . . . .	18-9
[1]	Sale to Purchaser/Landlord . . . . .	18-9
[a]	Recorded Transfer of Present Ownership Interest to Purchaser/Landlord . . . . .	18-9
[b]	Recorded Transfer of Future Interest to Purchaser/Landlord . . . . .	18-9
[i]	Rule Against Perpetuities . . . . .	18-9
[ii]	Title Insurance for Holder of Future Interest . . . . .	18-10



**TABLE OF CONTENTS**

	[c]	Protective Mortgage if Sale Recharacterized as Loan . . . . .	18-11
	[d]	Assignment of Leasehold Interest . . . . .	18-11
	[e]	Appraisal . . . . .	18-11
	[2]	Leaseback to Seller/Tenant . . . . .	18-12
	[a]	Requirements for Lease . . . . .	18-12
	[i]	Mortgageability . . . . .	18-12
	[ii]	Level Rents . . . . .	18-12
	[iii]	Purchaser/Landlord Not “Operator” . . . . .	18-12
	[iv]	Merger and Non-reliance Provisions . . . . .	18-12
	[b]	Other Closing Requirements . . . . .	18-13
	[3]	Accounting . . . . .	18-13
§ 18.03		Compliance with Accounting and Regulatory Requirements for Sale-Leasebacks . . . . .	18-14
	[1]	Active Use by Seller/Tenant . . . . .	18-15
	[2]	Initial Investment and Continuing Investment . . . . .	18-15
	[3]	Risks and Rewards Transferred to Purchaser; Seller Has No Continuing Involvement . . . . .	18-16
	[4]	Regulatory Requirements . . . . .	18-16
§ 18.04		Recharacterization of Sale-Leasebacks . . . . .	18-17
	[1]	In General . . . . .	18-17
	[2]	Factors Leading to Recharacterization as a Loan . . . . .	18-18
	[a]	Purchase Price Not at Market Rate . . . . .	18-18
	[b]	Rent Not at Market Rate . . . . .	18-18
	[c]	Option Price Not at Market Rate . . . . .	18-19
	[d]	Post-Sale Improvements by Seller/Tenant . . . . .	18-19
	[e]	Tax Avoidance Intent . . . . .	18-19
	[f]	Purchaser Does Not Expect Profit . . . . .	18-19
	[g]	Property Purchased for Seller/Tenant’s Use . . . . .	18-19
	[h]	Seller/Tenant Assumes Benefits and Burdens of Ownership . . . . .	18-20
	[i]	Purchaser/Landlord’s Right to Be Repaid Upon Refinancing . . . . .	18-20
	[j]	Seller/Tenant’s Right to “Pay Off” Purchaser/Landlord . . . . .	18-20
	[k]	Purchaser/Landlord’s Right to “Put” Property . . . . .	18-20
	[3]	Factors Supporting Original Form as a Sale-Leaseback . . . . .	18-20
	[a]	Reasonableness of Original Sale Price, Rent and Option Price . . . . .	18-20

**REAL ESTATE FINANCING**

	[b] Personal Liability of Purchaser/Landlord on Mortgage. . . . .	18-21
	[c] Purchaser/Landlord Is Not Guaranteed a Fixed Return. . . . .	18-21
	[d] Sale-Leaseback Will Not Cause a Significant Loss of Tax Revenue. . . . .	18-21
	[e] Purchaser/Landlord Is Independent and Not Single-Purpose. . . . .	18-22
	[f] Non-Tax Business Motives . . . . .	18-22
	[g] Purchaser/Landlord Not in Lending Business. . . . .	18-22
	[h] Third Party Lender. . . . .	18-22
	[i] Seller/Tenant Not Obligated to Exercise Options . . . . .	18-22
	[j] Accounting Classification . . . . .	18-22
	[k] Purchaser Makes Equity Investment. . . . .	18-23
	[l] Purchaser/Landlord Gets Insurance and Condemnation Proceeds. . . . .	18-23
§ 18.05	Financing of “Synthetic” Leases . . . . .	18-24

**CHAPTER 19****Pledges of Real Estate Mortgages and Notes**

§ 19.01	General. . . . .	19-3
	[1] Definition of “Pledge” . . . . .	19-3
	[2] Closing Documents and Requirements . . . . .	19-3
	[3] Vulnerability of Pledges to Fraud . . . . .	19-3
	[4] Risk of Loss of Pledged Notes. . . . .	19-4
	[5] Claims by Third Parties to Pledged Notes . . . . .	19-4
	[6] Necessity of Perfected Pledge in Securitizations or Other Sales of Loans. . . . .	19-4
	[7] Chapter Scope . . . . .	19-4
§ 19.02	Mortgage Warehousing. . . . .	19-5
§ 19.03	Basic Requirements for Pledge of a Loan. . . . .	19-7
	[1] Security Agreement and Other Requirements for a Security Interest. . . . .	19-7
	[2] Warranties by Debtor/Pledgor . . . . .	19-8
	[3] Assumption of Liability on Note as a Result of Endorsement by Transferor. . . . .	19-8
	[4] Estoppel or Endorsement by Maker. . . . .	19-9
	[5] Delivery of Possession of Original Note and Related Collateral . . . . .	19-11
	[6] Negotiation of Mortgage Note . . . . .	19-13
	[a] In General. . . . .	19-13
	[b] Secured Party as Holder in Due Course . . . . .	19-13
	[c] Risk of Using “Allonge” . . . . .	19-16

**TABLE OF CONTENTS**

lxxxiii

[7] Assignment of Note and Mortgage . . . . . 19-16

    [a] Recordation of Assignment . . . . . 19-17

    [b] Risks to Secured Party of Failing  
        to Record Assignment . . . . . 19-17

    [c] Secured Party Must Check Record  
        Chain of Title . . . . . 19-18

    [d] Need for Title & UCC Insurance . . . . . 19-18.1

    [e] Recording as Precondition to  
        Foreclosure of Mortgage . . . . . 19-18.1

    [f] Nonperforming Loans . . . . . 19-18.1

    [g] Absolute Assignment of Record  
        vs. Assignment as Security . . . . . 19-19

    [h] Assignment of Deeds of Trust . . . . . 19-19

        [i] Undisclosed Payee Deeds  
            of Trust . . . . . 19-19

        [ii] Disclosed Payee Deeds  
            of Trust . . . . . 19-19

    [i] Recordation of Security Agreement;  
        UCC Transfer Statement . . . . . 19-20

[8] Appointment of Substitute Trustee . . . . . 19-20

[9] Assignment of Deeds to Secure Debt . . . . . 19-20

[10] UCC Assignments . . . . . 19-20

[11] UCC-1 Filings by Secured Party . . . . . 19-21

    [a] “Blanket” UCC-1 Best for  
        Secured Party . . . . . 19-21

    [b] UCC-1 Filings Permitted for  
        Instruments . . . . . 19-22

    [c] Other Advantages to Secured  
        Party . . . . . 19-22

    [d] Concerns of Debtor Regarding  
        Blanket Filing . . . . . 19-23

[12] Notice of Pledge . . . . . 19-23

[13] Due Diligence as to Pledged Loans and  
    Collateral; Perfection of Security  
    Interest in Collateral . . . . . 19-23

    [a] Generally . . . . . 19-23

    [b] Appraisals . . . . . 19-24

[14] Additional Due Diligence if Debtor Is Not  
    the Originator of Pledged Loans . . . . . 19-25

[15] Securities Law Opinion . . . . . 19-25

[16] Precautions to Prevent Fraud . . . . . 19-25

    [a] In General . . . . . 19-25

    [b] Notes with Computer Codes  
        or Glyphs . . . . . 19-26

    [c] Certificates of Execution and  
        Possession . . . . . 19-27

    [d] Signature Comparisons . . . . . 19-28

**REAL ESTATE FINANCING**

	[e]	Signature Guarantees . . . . .	19-28
	[f]	Notarization by Identifiable Person . . .	19-28
	[g]	Updated Title Insurance Endorsement in Favor of Secured Party . . . . .	19-28.1
	[h]	Verification of Payment History . . . . .	19-28.1
	[i]	Signs of Fraud . . . . .	19-28.1
	[j]	Due Diligence and Monitoring by Secured Party of Debtor's Lending Practices. . . . .	19-28.2
§ 19.04		Liability of Law Firms and Other Possessory Parties for Lost Notes, Third Party Claims and Other Risks . . . . .	19-29
	[1]	In General . . . . .	19-29
	[2]	"Lost Note" Affidavit and Indemnity . . . . .	19-29
	[3]	Waivers by the Debtor . . . . .	19-30
	[4]	Liability Insurance. . . . .	19-30
	[5]	Risk of Liability to Third Party Claiming an Interest in Pledged Notes . . . . .	19-31
§ 19.05		Accounting Treatment of Borrowing Secured by Mortgage Loans . . . . .	19-33
§ 19.06		Drafting Issues and Alternative Provisions . . . . .	19-34
	[1]	Repurchase Agreement May Be Better for the Lender. . . . .	19-34
	[2]	Pledges of Risk Retention Interests in Securizations. . . . .	19-34

**CHAPTER 20****Participations and Syndications**

§ 20.01		General. . . . .	20-3
	[1]	Definitions . . . . .	20-3
	[2]	Chapter Scope . . . . .	20-3
	[3]	Closing Documents and Requirements . . . . .	20-4
	[4]	Reasons for Participations. . . . .	20-4
§ 20.02		Participations and Syndications . . . . .	20-6
	[1]	Regular Participation. . . . .	20-6
	[a]	Priorities Among Participants . . . . .	20-6
	[b]	Risk of Improper Action by Lead Lender. . . . .	20-6
	[c]	Methods of Limiting Risk of Improper Action by Lead Lender . . . . .	20-6
	[i]	Legend on Loan Documents. . . . .	20-6
	[ii]	Delivery of Loan Documents and Payments to Trustee, Agent or Bailee. . . . .	20-7
	[d]	Risk of Loss of Setoff Against Borrower . . . . .	20-8

**TABLE OF CONTENTS**

lxxxv

	[e]	Risk of Setoff of Borrower’s Deposits with Lead Lender . . . . .	20-8
	[f]	Risk Participant May Be Unsecured Creditor of Lead Lender . . . . .	20-8
	[g]	Minimum Credit Standards for Lead Lender . . . . .	20-9
[2]		Assignment of Record . . . . .	20-9
	[a]	Recordation and Filing of Assignment . . . . .	20-9
	[b]	UCC-1 Filing Against Lead Lender . . . . .	20-10
	[c]	Notice of Assignment . . . . .	20-10
	[d]	Possession by Trustee, Agent or Bailee . . . . .	20-10
	[e]	Participant as Holder in Due Course . . .	20-11
	[f]	Perfection of Assignment; Title & UCC Insurance . . . . .	20-11
	[g]	Additional Risk to Participant Owning Portion of Loan . . . . .	20-11
[3]		Noteholder Agreements . . . . .	20-12
[4]		Loan Syndication or Consortium . . . . .	20-12
[5]		Joint Venture or Partnership; SPE . . . . .	20-13
[6]		Credit Derivatives . . . . .	20-13
	[a]	Credit-Default Swap . . . . .	20-13
	[b]	Total Rate-of-Return Swap . . . . .	20-14
	[c]	Credit-Linked Notes . . . . .	20-14
§ 20.03		Drafting Participation and Syndication Agreements . . .	20-15
	[1]	Presumption Against Implied Obligations and for Implied Powers . . . . .	20-15
	[2]	Management and Control . . . . .	20-15
	[3]	Ownership Rights of Participants . . . . .	20-16
	[4]	Lead Lender as Fiduciary for Participants . . .	20-16
	[5]	Representations by Seller . . . . .	20-17
	[6]	Representations and Waivers by Participants and Disclaimers by Lead Lender . . . . .	20-18
	[7]	Acquisition of Collateral for Loan . . . . .	20-20
	[8]	Sharing of Expenses and Future Advances . . .	20-20
	[9]	Relations Between Senior and Junior Parties . . . . .	20-21
	[10]	Waiver and Consent by Participant in Favor of Counsel to Lead Lender . . . . .	20-22
§ 20.04		Characterization of Participation as Loan Rather Than Sale . . . . .	20-22.1
	[1]	Adverse Consequences of Recharacterization as Loan . . . . .	20-22.1
	[2]	Checklist of Characteristics of Participation Interests Deemed to Be Unsecured Loans . . . . .	20-22.1

**REAL ESTATE FINANCING**

	[3]	Lead Lender as a Fiduciary for Participants Indicates Sale of Participation Interest . . .	20-23
	[4]	Accounting Treatment of Participation . . . . .	20-24
§ 20.05		Characterization of Participation as Security . . . . .	20-25
	[1]	Redefinition of Which Notes Are Securities . . .	20-25
	[2]	Cases Determining Whether Participation Interests Are Securities . . . . .	20-26
	[3]	Checklist of Characteristics of Participations Deemed Securities . . . . .	20-27
	[4]	State Securities Laws . . . . .	20-29
§ 20.06		Naming Participant as Insured in Title Insurance Policy . . . . .	20-30
§ 20.07		Compliance by Banks with Regulatory Requirements . . . . .	20-31
	[1]	Comptroller of the Currency Circular Regarding Participations . . . . .	20-31
	[2]	Lending Limits . . . . .	20-31
	[3]	Other Regulatory Requirements . . . . .	20-31

**CHAPTER 21****Sales of Mortgage Loans**

§ 21.01		General . . . . .	21-3
	[1]	Chapter Scope . . . . .	21-4
	[2]	Growth of Secondary Market . . . . .	21-4
	[3]	Closing Documents and Requirements . . . . .	21-5
§ 21.02		Structure of Sale Depends on Which Party Is Dominant . . . . .	21-6
	[1]	Secondary Market Purchasers . . . . .	21-6
	[2]	Investment Banks and Rating Agencies . . . . .	21-6
	[3]	Funded Loans Allow Less Flexibility Regarding Existing Loan Documentation . . . . .	21-6
	[4]	Federal Programs . . . . .	21-7
§ 21.03		Issues Commonly Negotiated in Sale of a Funded Loan . . . . .	21-8
	[1]	Legal Compliance of Documents and Holder . . . . .	21-8
	[2]	Genuineness and Enforceability . . . . .	21-9
	[3]	Recourse Against Seller . . . . .	21-9
		[a] Purchaser's Perspective . . . . .	21-9
		[b] Seller's Perspective . . . . .	21-11
	[4]	Ownership of Loans; Title and UCC Insurance . . . . .	21-12.1
	[5]	Seller's Estoppel Regarding Unpaid Balance . . . . .	21-12.2
	[6]	Escrows and Adjustments . . . . .	21-13
	[7]	Purchaser Authorization Regarding Due Diligence . . . . .	21-13

**TABLE OF CONTENTS**

lxxxvii

	[8] No Modifications by Seller . . . . .	21-13
	[9] Defaults and Litigation . . . . .	21-13
	[10] Physical Condition and Legal Compliance of Collateral . . . . .	21-14
	[11] Waiver and Consent to Legal Representation. . . . .	21-14
	[12] Conditions Precedent to Seller’s Obligation to Sell . . . . .	21-14
§ 21.04	Purchaser’s Requirements for Purchase of Mortgage Loans . . . . .	21-14.2
	[1] Advantages of “Holder in Due Course” Status. . . . .	21-14.2
	[2] Requirements for “Holder in Due Course” Status. . . . .	21-14.2
	[3] Estoppel or Endorsement by Maker. . . . .	21-16
	[4] Possession of Notes and Other Collateral . . . . .	21-18
	[a] Bankruptcy Code Protection of Purchasers Without Possession . . . . .	21-19
	[b] “Holder in Due Course” Must Have Possession. . . . .	21-20
	[c] Lost Note Affidavits. . . . .	21-20
	[5] Negotiation of Note. . . . .	21-21
	[a] General . . . . .	21-21
	[b] Risk of Using “Allonge” . . . . .	21-22
	[6] Assignment of Note and Mortgage . . . . .	21-23
	[a] Prerequisites to Enforceability. . . . .	21-24
	[i] Recordation of Mortgage. . . . .	21-24
	[ii] Notice of Assignment . . . . .	21-25
	[iii] Assignment of Note vs. Assignment of Mortgage . . . . .	21-25
	[iv] U.C.C. vs. Real Property Law . . . . .	21-27
	[b] Purchaser Must Check Record Chain of Title. . . . .	21-28
	[c] Need for Title & UCC Insurance . . . . .	21-29
	[d] Assignment of Claims and Other Rights . . . . .	21-30
	[e] Conflict of Interest if Same Attorney Represents Assignor and Assignee. . . . .	21-30.1
	[f] Assignment of Foreclosure Bid and Foreclosure Judgment. . . . .	21-30.1
	[g] Compliance with Bankruptcy Rules Regarding Claim Transfers . . . . .	21-30.1
	[i] Procedural Requirements for Transfers of Bankruptcy Claims . . . . .	21-30.1
	[ii] Risk of Disallowance or Subordination of Claim . . . . .	21-31

## REAL ESTATE FINANCING

	[h] Transferee Must Have “Control” of Its e-Note . . . . .	21-32
[7]	Assignment of Deed of Trust . . . . .	21-32
[8]	Assignment of Deeds to Secure Debt . . . . .	21-33
[9]	Appointment of Substitute Trustee of Deed of Trust . . . . .	21-33
[10]	UCC Assignments . . . . .	21-33
[11]	Notice of Assignment . . . . .	21-34
	[a] Borrower Cannot Ignore Notice of Assignment . . . . .	21-34
	[b] Exceptions: Agency and Estoppel . . . . .	21-35
	[c] Borrower’s Right to Demand Production of Original Note . . . . .	21-36
	[d] Advantageous for Purchasers to Give Notice . . . . .	21-36
	[e] Recorded Assignment of Mortgage Is Notice to Transferee, Not Maker. . . . .	21-37
	[f] Consumer Laws . . . . .	21-37
	[g] Flood Insurance Notices . . . . .	21-38
[12]	UCC Financing Statement Filing . . . . .	21-38
[13]	Due Diligence as to Loans and Collateral . . . . .	21-40
	[a] Generally . . . . .	21-40
	[b] Appraisals . . . . .	21-41
	[c] Consumer Loan Documents . . . . .	21-41
	[d] Compliance by Originating Lender with Applicable Laws . . . . .	21-41
	[e] Assignability of Seller’s Legal Rights Pursuant to the Loan Documents . . . . .	21-42.1
[14]	Additional Due Diligence if the Seller Is Not Original Lender . . . . .	21-43
[15]	Securities Law and “True Sale” Considerations . . . . .	21-43
	[a] Legal Opinions on Securities Law and “True Sale” . . . . .	21-43
	[b] Insider Trading Restrictions . . . . .	21-44
[16]	Income Tax Considerations . . . . .	21-44
[17]	Risk of Champerty Defense . . . . .	21-46
[18]	Purchase of Electronic Note . . . . .	21-48
[19]	Risks Based on Identity of Purchaser . . . . .	21-48.1
	[a] Risk When Purchaser of Loan Is Also Buying Assets . . . . .	21-48.1
	[b] Purchaser Is a Borrower or Co-Guarantor . . . . .	21-48.1
[20]	Risk of Avoidance of Sale as Fraudulent Transfer . . . . .	21-48.1
[21]	Risk of Equitable Subordination . . . . .	21-48.1
[22]	Risk of Impairment of Cross-Default and Setoff Provisions . . . . .	21-48.2



## TABLE OF CONTENTS

lxxxix

[23]	Risk of Bankruptcy of Party to Contract of Sale . . . . .	21-48.2
[24]	Sales of Distressed Loans . . . . .	21-48.2
	[a] Generally . . . . .	21-48.2
	[b] Federal PPIP Program . . . . .	21-48.2
[25]	Regulatory Requirements . . . . .	21-48.4
	[a] Consumer Debt Sales . . . . .	21-48.4
	[b] Third Party Purchasers of Risk Retention Interests . . . . .	21-48.6
§ 21.05	Criteria for a “True Sale” . . . . .	21-48.7
§ 21.06	Precautions to Prevent Fraud . . . . .	21-50
§ 21.07	Liability of Possessory Parties for Lost Notes, Third Party Claims and Other Risks . . . . .	21-51
	[1] In General . . . . .	21-51
	[2] “Lost Note” Affidavit and Indemnity . . . . .	21-51
	[3] Waivers in Favor of Seller-Servicer . . . . .	21-51
	[4] Liability Insurance . . . . .	21-52
	[5] Risk of Liability to Third Party Claiming Interest in Notes . . . . .	21-52
§ 21.08	Accounting Treatment of Sale . . . . .	21-54
	[1] Loan Sale or Secured Borrowing? . . . . .	21-54

## CHAPTER 22

### Loan Modifications

§ 22.01	General . . . . .	22-11
	[1] Definitions . . . . .	22-11
	[a] Loan Extension . . . . .	22-11
	[b] Loan Forbearance Agreement . . . . .	22-11
	[c] Loan Modification . . . . .	22-11
	[d] Loan Workout . . . . .	22-11
	[2] Chapter Scope . . . . .	22-12
	[3] Closing Documents and Requirements . . . . .	22-12
	[4] Why Modify the Loan? . . . . .	22-12
	[a] Lender’s Reasons for Loan Modifications . . . . .	22-13
	[i] Avoidance of Litigation . . . . .	22-13
	[ii] Avoidance of Transfer Taxes in a Foreclosure Action . . . . .	22-13
	[iii] Lender’s Lack of Management Experience . . . . .	22-13
	[iv] Risk of Bankruptcy Reorganization by Borrower . . . . .	22-14
	[v] Increased Liability of Owner or Mortgagee in Possession . . . . .	22-14

**REAL ESTATE FINANCING**

	[vi] Preserving Lien Priority . . . . .	22-15
	[vii] Additional Payments to Lender . . . . .	22-15
	[viii] Accounting Incentives for Loan Modifications . . . . .	22-16
	[ix] Regulated Lenders Can Do Loan Workout as a TDR . . . . .	22-17
	[x] Regulatory Impact of Loan Modifications . . . . .	22-21
[b]	Lender’s Reasons Against Loan Modifications . . . . .	22-24
	[i] Regulatory Restrictions . . . . .	22-24
	[ii] Immediate Liquidation Yields More . . . . .	22-24
	[iii] Modification Requires Lender to Loan Additional Funds. . . . .	22-25
	[iv] Application of Cash Collateral Against Loan Balance . . . . .	22-25
	[v] Borrower Diverting Net Cash Flow from Mortgaged Property . . . . .	22-25
	[vi] Lack of Trust in the Borrower . . . . .	22-25
	[vii] Income Tax Incentive for Lender to Enforce or Modify Nonperforming Loan . . . . .	22-25
	[viii] Securitizations, Syndications, & Participations . . . . .	22-25
	[ix] Other Alternatives for Lender. . . . .	22-26
[c]	Borrower’s Reasons for Loan Modifications . . . . .	22-26
	[i] Income Tax Consequences of Foreclosure . . . . .	22-26
	[ii] Accounting Incentives for Loan Modification . . . . .	22-26
	[iii] Defer Loan Payments . . . . .	22-27
	[iv] Avoid Litigation Costs . . . . .	22-27
[d]	Borrower’s Reasons Against Loan Modifications . . . . .	22-27
	[i] Litigation Will Yield a Better Outcome for the Borrower. . . . .	22-27
	[ii] Other Alternatives for Borrower . . . . .	22-28
§ 22.02	Lender Requirements for Loan Modification Agreements . . . . .	22-29

**TABLE OF CONTENTS**

[1] Waivers, Estoppels and Representations  
by Borrower and Obligors . . . . . 22-29

[a] Generally . . . . . 22-29

[b] Reinstatement of Accrued Charges  
Following a Default . . . . . 22-30

[c] Avoiding Lender’s Waiver of  
Other Material Defaults . . . . . 22-30

[d] Reaffirmation of Original  
Representations . . . . . 22-31

[e] Release of Lender . . . . . 22-31

[f] Extension or Reduction of Statutes  
of Limitations; Acceleration &  
De-acceleration . . . . . 22-31

[g] Truth in Lending Waivers . . . . . 22-33

[h] Waivers of Anti-Deficiency Laws  
and Redemption Rights . . . . . 22-33

[i] Claims by Borrower’s Trustee in  
Bankruptcy or Third-Party  
Creditors . . . . . 22-35

[j] Consent to Relief from Automatic  
Stay & Other Bankruptcy  
Waivers . . . . . 22-35

[k] Agreement Not to File Bankruptcy  
Petition . . . . . 22-36

[l] Consent to Dismissal of  
Bankruptcy Case . . . . . 22-36

[m] Other Bankruptcy Waivers . . . . . 22-36

[n] Other Waivers & Estoppels  
Generally . . . . . 22-36

[2] Consideration to Borrower . . . . . 22-37

[3] Other Loan Modification Documents . . . . . 22-38

[a] Loan File and Original  
Documents . . . . . 22-38

[b] Letter from Borrower Prior to  
Negotiations . . . . . 22-38

[c] Enforcement of Lender Remedies . . . . . 22-40

[i] Enforcement of Lender’s  
Remedies During Workout . . . . . 22-40

[ii] Avoiding False Threats . . . . . 22-40

[iii] Premature Assertion of  
Unripe Default . . . . . 22-41

[iv] Demanding Adequate  
Assurance of Future  
Performance . . . . . 22-42

[v] Lender’s Default Letter . . . . . 22-42

[vi] Lender’s Notice of  
Acceleration . . . . . 22-43

**REAL ESTATE FINANCING**

	[vii] Acceptance of Payments . . . . .	22-43
	[viii] Borrower Defense of Temporary Commercial Impracticability . . . . .	22-44
	[ix] Failure to Negotiate in Good Faith . . . . .	22-45
	[x] Court Stipulations . . . . .	22-45
	[xi] Judicial Limits on Lender's Discretion . . . . .	22-45
	[xii] Litigation Hold Notice in Exceptional Cases . . . . .	22-46
[d]	Financial Disclosure of Borrower and Guarantors . . . . .	22-46
	[i] Financial Statements . . . . .	22-46
	[ii] Affidavit of Assets and Liabilities . . . . .	22-47
	[iii] Budget . . . . .	22-47
	[iv] Certified Rent Roll . . . . .	22-47
[e]	Leases . . . . .	22-47
[f]	Updated Engineering Report & Appraisal or Evaluation . . . . .	22-47
[g]	Recordable Mortgage Modification Agreement . . . . .	22-49
[h]	Amendments to Loan Agreement and Note . . . . .	22-50
[i]	Commitment to Make Loan or Provide Financial Accommodations . . . . .	22-50
[j]	Agreement Containing Covenants by Lender . . . . .	22-51
[k]	Updated Title Insurance Policy & Other Searches . . . . .	22-51
[l]	Proof of Recording of Modification Agreement and Other Instruments . . . . .	22-52
[m]	Affidavit of Exemption from Mortgage Recording Tax . . . . .	22-52.1
[n]	UCC Financing Statements . . . . .	22-52.1
[o]	Security Interest Insurance or Post-Closing UCC, Judgment and Lien Searches . . . . .	22-52.1
[p]	Updated Opinion of Counsel . . . . .	22-52.1
[q]	Updated Good Standing Certificates . . . . .	22-52.2
[r]	Evidence of Authority of Representatives . . . . .	22-52.2
[s]	Consent of Equity Holders . . . . .	22-52.2
[t]	Consent of Guarantors and Other Obligors . . . . .	22-52.3

**TABLE OF CONTENTS**

xciii

[u] Consent of Participants and Other Holders . . . . . 22-52.3

[v] Consent of Holders of Prior Liens . . . . . 22-52.4

[w] Consent of Holders of Subordinate Liens and Interests . . . . . 22-52.4

[x] Consents of Other Third Parties . . . . . 22-52.5

[y] Reports and Returns . . . . . 22-52.6

[z] Avoid “Replacement” Mortgage and Instead Modify or Assign Existing Mortgage . . . . . 22-52.7

[aa] Other Requirements . . . . . 22-52.8

    [i] WARN Acts . . . . . 22-52.8

    [ii] Amendment of Swaps and Other Derivatives . . . . . 22-52.8

    [iii] Other Documents and Requirements . . . . . 22-52.8

[4] Drafting Issues and Alternative Provisions . . . . . 22-52.8

    [a] Cross-Collateralization . . . . . 22-52.9

    [b] Protections for Mortgage Lender Secured by More Than One Property . . . . . 22-52.9

    [c] Additional Collateral . . . . . 22-52.11

    [d] Management and Control . . . . . 22-52.11

        [i] Environmental Liabilities . . . . . 22-52.11

        [ii] Appointment by Lender of Borrower’s Officers or Directors . . . . . 22-52.12

        [iii] Control by Lender Over Borrower’s Stock . . . . . 22-52.12

        [iv] Equitable Subordination . . . . . 22-52.13

    [e] Lender as Mortgagee in Possession . . . . . 22-52.13

    [f] Agreement with Independent Managing Agent . . . . . 22-52.13

    [g] Lockbox Agreement . . . . . 22-52.14

    [h] Confessions of Judgment . . . . . 22-52.14

    [i] Additional Guarantees and/or Obligors . . . . . 22-52.14

    [j] Additional Equity Contributions . . . . . 22-52.16

    [k] Release of Collateral or Obligors . . . . . 22-52.17

    [l] Impairment of Collateral . . . . . 22-53

    [m] Adding Arrears to Principal . . . . . 22-53

    [n] Application of Partial Payments to Loan . . . . . 22-54

## REAL ESTATE FINANCING

[o]	Application of Net Cash Flow to Loan . . . . .	22-55
[p]	Avoiding Taxes from Loan Modifications . . . . .	22-56
[i]	“Material Modifications” . . . . .	22-56
[ii]	Modification of Purchase Mortgages . . . . .	22-58
[iii]	Purchasers Modifying Debt Instruments After Purchase . . . . .	22-58
[iv]	REMIC Taxes . . . . .	22-60
[v]	Taxes on Mortgage Trusts and REITs . . . . .	22-61
[vi]	Contingent Interest . . . . .	22-62
[vii]	Tax-Exempt Instruments . . . . .	22-62
[q]	Effect of Modifications to “Grandfathered” Loans . . . . .	22-63
[r]	Enhancing Deductibility of Bad Debt . . . . .	22-63
[s]	Subordination of Insider Claims . . . . .	22-64
[t]	Satisfaction of Preconditions by Other Lenders . . . . .	22-64
[u]	Bankruptcy Issues . . . . .	22-64
[i]	Default and Ipso Facto Clauses . . . . .	22-64
[ii]	Rejection of “Court Approved” Loan Modification Agreement as Executory Contract . . . . .	22-64
[iii]	Equitable Disallowance of Debt Claim . . . . .	22-65
[iv]	Equitable Subordination . . . . .	22-65
[v]	Equal Priority Rule . . . . .	22-65
[vi]	Filing Stale Proof of Claim Subject to a Statute of Limitations Defense . . . . .	22-66
[v]	Deed in Escrow . . . . .	22-66
[w]	Actual Exchange of Debt for Debt . . . . .	22-67
[i]	Loss of Priority of Liens or Security Interests . . . . .	22-67
[ii]	Avoidance as Preference or Fraudulent Transfer . . . . .	22-68
[iii]	Impact of Exchange (with Same Principal Amount) on Original Issue Discount . . . . .	22-69

**TABLE OF CONTENTS**

xcv

[iv]	Impact of Exchange (with Different Principal Amount) on Original Issue Discount . . . . .	22-70
[v]	Reducing Additional Taxes on Replacement Notes . . . . .	22-70
[x]	Exchange of Debt for Equity . . . . .	22-71
[y]	Compliance with Securities Laws & Trust Indenture Act . . . . .	22-72
[z]	Curing Sponsor’s Defaults Under Offering Plan . . . . .	22-73
[aa]	Avoiding Usury . . . . .	22-74
[bb]	Avoiding Liability for Tortious Interference with Third Parties . . . . .	22-74
[cc]	Bankruptcy Court Approval . . . . .	22-74.1
[dd]	Federal HOPE Program for Distressed Homes . . . . .	22-74.1
[ee]	Other Programs for Residential Loan Modifications and Refinancings . . . . .	22-74.2
[i]	Federal “Making Home Affordable” Program . . . . .	22-74.2
[ii]	Other Governmental Loan Modification Programs . . . . .	22-74.4
[iii]	Loan Modification Programs Not Sponsored by Government Agencies . . . . .	22-74.4
[ff]	Restrictions on Loan Modifications with Consumers . . . . .	22-74.5
[i]	Truth-in-Lending . . . . .	22-74.5
[ii]	Illegal Acts By Foreclosure “Consultants” . . . . .	22-74.5
[iii]	Lender Liability for Lack of Good Faith . . . . .	22-74.5
[gg]	Federal Relief Programs . . . . .	22-74.6
[i]	2008 Troubled Asset Relief Program (“TARP”) . . . . .	22-74.7
[ii]	2020-2021 Paycheck Protection Program (PPP) . . . . .	22-74.8
[iii]	2020-2021 Economic Injury Disaster Loans (SBA) . . . . .	22-74.8
[iv]	2020 Main Street Lending Program (Federal Reserve) . . . . .	22-74.8
[v]	Corporate Credit Facilities (Federal Reserve) . . . . .	22-74.9

**REAL ESTATE FINANCING**

	[vi]	Term Asset-Backed Securities Loan Facility (Federal Reserve) . . . . .	22-74.9
	[vii]	Foreclosure & Eviction Moratoriums and Forbearance . . . . .	22-74.10
	[viii]	Incentives for Loan Workouts Under the CARES Act . . . . .	22-74.12
	[ix]	CARES Act Tax Provisions . . . . .	22-74.12
	[hh]	Obstacles to Loan Modifications by Servicers Affecting Pools . . . . .	22-74.13
	[i]	Modifications of Loans Only if Default Has Occurred or Is Reasonably Foreseeable . . . . .	22-74.13
	[ii]	Sales of Distressed Loans . . . . .	22-74.13
	[iii]	Guarantees of Distressed Loans . . . . .	22-74.14
	[iv]	Conflicts Among Classes of Investors . . . . .	22-74.14
	[v]	Liability of Servicers . . . . .	22-74.17
	[ii]	Antitrust Liability . . . . .	22-74.17
	[jj]	Preemption of Legal Restrictions . . . . .	22-74.18
§ 22.03		Borrower's Requirements for Loan Modification Agreements . . . . .	22-74.19
	[1]	Waiver by Lender of Existing and Probable Defaults, & Extensions . . . . .	22-74.19
	[2]	Limit Reaffirmation of Representations . . . . .	22-74.21
	[3]	Limit Release of Lender . . . . .	22-74.21
	[4]	Consideration to Lender . . . . .	22-74.21
	[5]	Consent by Lender to Future Reorganization on Same Terms . . . . .	22-74.22
	[6]	Other Loan Modification Documents . . . . .	22-74.22
	[a]	Amendment of Original Negotiable Note . . . . .	22-74.22
	[b]	Proof of Authority of Lender . . . . .	22-74.23
	[c]	Certified Copy of Lender's Signed Minutes . . . . .	22-74.23
	[d]	Lender's Financial Statements . . . . .	22-74.24
	[e]	Demand for Adequate Assurance of Future Performance by Lender . . . . .	22-74.24
	[f]	Consents of Third Parties . . . . .	22-74.24
	[7]	Drafting Issues and Alternative Provisions . . . . .	22-74.24
	[a]	Minimizing Income Taxes from Loan Workouts . . . . .	22-74.24
	[i]	Avoiding Income Taxes from Material Modifications . . . . .	22-74.24
	[ii]	Deduction of Borrower's Costs . . . . .	22-74.26



**TABLE OF CONTENTS**

xcvii

	[b]	Effect of Modifications to “Grandfathered” Loans . . . . .	22-74.26
	[c]	Avoiding Income from Discharge of Indebtedness . . . . .	22-74.26
	[d]	Election to Reduce Basis . . . . .	22-74.29
	[e]	Additional Equity Contributions or Partners . . . . .	22-74.30
	[f]	Additional Guaranties . . . . .	22-74.32
	[g]	Additional Loans . . . . .	22-74.36
	[h]	Payments by Persons Other Than Borrower . . . . .	22-74.36
	[i]	Avoiding Cross-Collateralization . . . . .	22-74.36
	[j]	Compliance with Securities Laws and Accounting Requirements . . . . .	22-74.36
	[k]	Avoidance of Default Interest . . . . .	22-74.37
	[l]	Amendment of Swaps and Other Derivatives . . . . .	22-74.37
	[m]	Deduction for Worthless Equity Interests . . . . .	22-74.38
	[8]	Enforcement of Borrower Remedies . . . . .	22-74.38
§ 22.04	Loan	Consolidations . . . . .	22-74.39
	[1]	Why Consolidate the Loans? . . . . .	22-74.39
	[a]	Reasons in Favor . . . . .	22-74.39
		[i] Usury . . . . .	22-74.39
		[ii] Simplification of Foreclosures and Administration . . . . .	22-74.39
		[iii] Common Charges . . . . .	22-74.39
		[iv] Regulatory Restraints . . . . .	22-74.40
		[v] Guarantor of First Mortgage Only . . . . .	22-74.40
		[vi] Inability to Foreclose Mortgages Independently . . . . .	22-74.40
	[b]	Reasons Against . . . . .	22-74.40
		[i] Consolidating Mortgages May Reduce Lender’s Interest Claim . . . . .	22-74.40
		[ii] Regulatory Incentives to Avoid Consolidation . . . . .	22-74.41
		[iii] Increasing Lender’s Control Over Class of Unsecured Creditors . . . . .	22-74.43
		[iv] Avoiding Loss of Priority of Construction Mortgage . . . . .	22-74.43
		[v] Avoiding Loss of Priority of Purchase Money Mortgages . . . . .	22-74.44

**REAL ESTATE FINANCING**

		[vi] Greater Marketability . . . . .	22-74.44
		[vii] Intervening Liens . . . . .	22-74.44
		[viii] One Action Rule . . . . .	22-74.44
	[2]	Lender Requirements for Consolidations . . . . .	22-74.44
		[a] Recordable Mortgage	
		Consolidation Agreement . . . . .	22-74.45
		[b] Other Documentary Requirements . . . . .	22-74.45
	[3]	Lender Requirements for Unconsolidated	
		Mortgages . . . . .	22-74.46
	[4]	Contractual Flexibility . . . . .	22-74.46
	[5]	Consolidation of Lien or Loan . . . . .	22-74.47
§ 22.05		Loan Extensions (and Forbearances) . . . . .	22-74.48
	[1]	Why Enter into a Loan Extension? . . . . .	22-74.48
		[a] Reasons in Favor . . . . .	22-74.48
		[b] Reasons Against . . . . .	22-74.48
	[2]	Lender Requirements for Loan	
		Extensions . . . . .	22-74.48
		[a] Recordable Mortgage Extension	
		Agreement . . . . .	22-74.48
		[b] Updated Title Insurance Policy . . . . .	22-75
		[c] Consent of Guarantors and Other	
		Obligors . . . . .	22-76
		[d] Consent of Participants and Other	
		Holders . . . . .	22-77
		[e] Consent of Holders of Subordinate	
		Liens . . . . .	22-78
		[f] Consideration to Borrower . . . . .	22-78
		[g] Updated Flood Insurance	
		Documents . . . . .	22-78
	[3]	Drafting Issues . . . . .	22-79
		[a] Forbearance Not New Value . . . . .	22-79
		[b] Extension of Purchase Money	
		Mortgages . . . . .	22-79
		[c] Premature Termination of PMI for	
		Fixed Rate Residential Loan . . . . .	22-79
		[d] Extended Maturity Date Should	
		Pre-Date Expiration of Insurance	
		by Two Years . . . . .	22-79
		[e] Restriction on Extensions of Loans	
		in REMICs . . . . .	22-80
§ 22.06		Pooling Defaulted Debt and Securitizing Senior	
		Tier . . . . .	22-80.1
§ 22.07		Deferral of Loan Payments Pending Orderly	
		Liquidation . . . . .	22-81
	[1]	Advantages for Borrower . . . . .	22-81
	[2]	Immediate Interim Lien . . . . .	22-81
	[3]	Intercreditor Agreement . . . . .	22-82
	[4]	Priority for Fully Secured Creditors . . . . .	22-82

**TABLE OF CONTENTS**

§ 22.08	Forbearance Agreement Coupled with Stipulated Foreclosure Judgment. . . . .	22-83
	[1] Lender Requirements for Foreclosure Documents . . . . .	22-83
	[a] <i>Lis Pendens</i> . . . . .	22-83
	[b] Summons and Complaint. . . . .	22-83
	[c] Acknowledgment by Borrower and Other Parties of Service. . . . .	22-83
	[d] Stipulation to Judgment . . . . .	22-84
	[e] Judgment of Foreclosure and Sale. . . . .	22-84
	[f] Forbearance Agreement . . . . .	22-84
	[g] Other Foreclosure Documents . . . . .	22-84
	[i] Appraisal . . . . .	22-84
	[ii] Creditors' Rights . . . . .	22-84
	[iii] UCC Insurance. . . . .	22-85
	[iv] Foreclosure Deed. . . . .	22-85
	[v] Foreclosure Litigation Documents. . . . .	22-85
	[vi] Notice to Insurer of Foreclosure . . . . .	22-86
	[vii] Liability Insurance During a Foreclosure Proceeding. . . . .	22-86
	[2] Drafting Issues for Lender . . . . .	22-87
	[a] Entry of Judgment . . . . .	22-87
	[b] Length of Forbearance . . . . .	22-89
	[c] Multiple Properties. . . . .	22-89
	[d] Effect of Merger Affecting a Portion of Collateral . . . . .	22-89
	[e] Agreements Regarding Bidding. . . . .	22-90
	[f] Military Service . . . . .	22-90.1
	[g] Extension May Allow Junior Liens to Survive Foreclosure. . . . .	22-90.2
	[h] Avoidance as Fraudulent Transfer or Preference . . . . .	22-90.2
	[i] Lender's Duty to Maintain Mortgaged Property. . . . .	22-90.3
	[j] Compliance with Consumer Laws. . . . .	22-90.3
	[3] Borrower Requirements for Foreclosure Documents . . . . .	22-90.4
	[a] Quitclaim Deed. . . . .	22-90.4
	[b] Other Requirements . . . . .	22-90.4
	[4] Drafting Issues for Borrower . . . . .	22-90.5
	[a] Credit for Value of Property . . . . .	22-90.5
	[b] Lender's Agreement to Bid . . . . .	22-91
	[c] Amount of Bid . . . . .	22-91
	[d] Borrower's Option to Purchase. . . . .	22-91
	[e] Recognition of Passive Losses. . . . .	22-92

## REAL ESTATE FINANCING

§ 22.08A	UCC Sales by Secured Party . . . . .	22-92.1
	[1] Secured Party Documentary	
	Requirements for UCC Sale . . . . .	22-92.1
	[a] Search for Other Creditors . . . . .	22-92.1
	[b] Notice of Sale or Other	
	Disposition . . . . .	22-92.1
	[c] Ads for Public Sale . . . . .	22-92.2
	[d] Terms of Sale . . . . .	22-92.2
	[e] Confidentiality Agreement . . . . .	22-92.3
	[f] Due Diligence Materials . . . . .	22-92.3
	[g] Certification of Loan Documents,	
	as Amended . . . . .	22-92.3
	[h] Intercreditor Agreement . . . . .	22-92.3
	[i] Senior Loan Documents . . . . .	22-92.4
	[j] Organizational Documents for	
	Issuer of Interests to be Sold	
	in UCC Sale . . . . .	22-92.4
	[k] UCC Insurance for Buyer . . . . .	22-92.5
	[l] Legal Opinion to Purchaser at	
	UCC Sale . . . . .	22-92.5
	[m] Secured Party's Notice of Its	
	Proposal to Retain Collateral . . . . .	22-92.5
	[n] Consent to Retention of Collateral . . . . .	22-92.5
	[o] Transfer Statement . . . . .	22-92.6
	[2] Issues for Secured Party	
	Holding UCC Sale . . . . .	22-92.6
	[a] Choice of Remedies . . . . .	22-92.6
	[i] Public Sale . . . . .	22-92.6
	[ii] Private Sale . . . . .	22-92.6
	[iii] Retention of Collateral in	
	Satisfaction of Loan . . . . .	22-92.6
	[iv] Judicial Enforcement . . . . .	22-92.7
	[v] Collection Rights Under	
	UCC § 9-607 . . . . .	22-92.7
	[b] Compliance with Securities Laws . . . . .	22-92.7
	[c] Sale Must Be Commercially	
	Reasonable . . . . .	22-92.7
	[d] Transfer Taxes . . . . .	22-92.8
	[e] UCC Foreclosure by Mezzanine	
	Lender Affiliated with One	
	Member Against Another	
	Member . . . . .	22-92.8
	[f] Clogging of the Right	
	of Redemption . . . . .	22-92.8
	[g] Impact of Transferee's Bad Faith . . . . .	22-92.9
	[3] Issues for Debtor . . . . .	22-92.9
	[a] Debtor Remedies . . . . .	22-92.9
	[i] Injunctive Relief . . . . .	22-92.9

**TABLE OF CONTENTS**

§ 22.09 Consensual Bankruptcy Reorganization Plan . . . . . 22-93

[1] Advantages to Lender . . . . . 22-93

[a] Payment of Pre-Petition Debt . . . . . 22-93

[b] Cross-Collateralization . . . . . 22-93

[c] Defeating Fraudulent Transfer  
and Preference Claims. . . . . 22-94

[d] Avoidance of Mortgage or  
Transfer Taxes . . . . . 22-94

[2] Lender’s Requirements . . . . . 22-94

[a] Bankruptcy Court Approval. . . . . 22-94

[b] Release of Lender and Other  
Third Parties. . . . . 22-94

[c] Post-Petition Security Interest . . . . . 22-95

[d] Additional “Bankruptcy” Defaults. . . . . 22-96

[e] Maximizing Payments to Lender. . . . . 22-96

[f] Turnover of Rents . . . . . 22-96

[g] Loan Modification Documents . . . . . 22-96

[h] When Secured Lender Must File  
a Proof of Claim . . . . . 22-96

[3] Limits on Modification of Home  
Mortgages . . . . . 22-96.1

[4] Borrower’s Requirements . . . . . 22-97

[a] No Abandonment of Mortgaged  
Property by Trustee . . . . . 22-97

[b] Best Practices for Counsel  
to Debtor . . . . . 22-98

**CHAPTER 23**

**Deeds in Lieu of Foreclosure**

§ 23.01 General. . . . . 23-3

[1] Definition. . . . . 23-3

[2] Lender’s Reasons for Deed in Lieu . . . . . 23-3

[3] Lender’s Reasons Against Deed in Lieu . . . . . 23-3

[a] Subordinate Liens. . . . . 23-3

[b] Environmental Liability . . . . . 23-4

[4] Borrower’s Reasons for Deed in Lieu . . . . . 23-4

§ 23.02 Requirements of Lender . . . . . 23-5

[1] Settlement Agreement Between Lender  
and Borrower . . . . . 23-5

[a] Signed at Closing . . . . . 23-5

[b] Representations by Borrower. . . . . 23-5

[c] Bankruptcy Limits on Surrender  
of Collateral . . . . . 23-6

[2] Borrower’s Estoppel Affidavit . . . . . 23-6

[3] Deed in Lieu of Foreclosure. . . . . 23-6.1

[a] No Escrow . . . . . 23-6.1

## REAL ESTATE FINANCING

	[b]	Recital of Consideration . . . . .	23-7
	[c]	Nonmerger Clause . . . . .	23-7
	[d]	Lender's Affiliate as Grantee . . . . .	23-8
	[e]	Transfer Tax on Deed in Lieu . . . . .	23-8.1
[4]		Assignments of Other Property Interests . . . . .	23-9
[5]		Bulk Transfer Notices . . . . .	23-9
	[a]	UCC . . . . .	23-9
	[b]	Pre-Closing Notices Required by Sales Tax Laws . . . . .	23-9
[6]		Sales Tax Returns . . . . .	23-9
[7]		Environmental Report . . . . .	23-10
[8]		Engineering Report . . . . .	23-11
[9]		Release of Borrower and Guarantors . . . . .	23-11
	[a]	Requirements of Title Insurer and Borrower . . . . .	23-11
	[b]	Condition of No Avoidance of Deed in Lieu . . . . .	23-11
	[c]	Covenants Not to Sue or Limited Releases . . . . .	23-12
	[d]	Discharge of Mortgage Upon Payment . . . . .	23-12
	[e]	Survival of Mortgage May Save Mortgage Recording Taxes . . . . .	23-12.1
	[f]	Requirement of Consideration to Grantor . . . . .	23-13
	[g]	Partial Credit Against Debt for Deed in Lieu . . . . .	23-13
	[h]	Avoidance of Deed in Lieu as Preference . . . . .	23-13
	[i]	Avoidance of Deed in Lieu as Fraudulent Transfer . . . . .	23-14
	[j]	Statutory Release Unless Waived . . . . .	23-14
[10]		No Assumption or Indemnity of Borrower on Debt . . . . .	23-14
[11]		Refusal of Grant Deed . . . . .	23-15
[12]		Title Insurance Policies . . . . .	23-15
	[a]	Creditors' Rights Exclusion . . . . .	23-16
	[b]	No Option or Other Retained Interest or Claim of Borrower . . . . .	23-17
	[c]	Judicial Foreclosure . . . . .	23-18
	[d]	Other Affirmative Insurance . . . . .	23-18
[13]		Legal Opinion . . . . .	23-18
[14]		Property Insurance Policy . . . . .	23-19
[15]		Appraisal . . . . .	23-19
[16]		Financial Statements and Solvency Opinion . . . . .	23-20
[17]		Management Agreement . . . . .	23-20

**TABLE OF CONTENTS**

ciii

	[18] Brokerage Agreement . . . . .	23-21
	[19] Construction or Renovation Agreement. . . . .	23-21
	[20] Compliance with Regulatory Requirements . . . . .	23-21
	[21] Compliance with Accounting Requirements . . . . .	23-21
	[22] IRS Reporting Requirements . . . . .	23-22
	[23] Requirements Relating to Unsold Condominium, Cooperative or HOA Units: Offering Plans . . . . .	23-23
	[a] Amendment Disclosing Deed in Lieu . . . . .	23-23
	[b] Auctions Pursuant to Plan . . . . .	23-24
	[24] Avoiding “Successor Liability” . . . . .	23-24
	[25] Other Requirements. . . . .	23-25
§ 23.03	Requirements of Borrower . . . . .	23-26
	[1] Minimizing Income Taxes . . . . .	23-26
	[2] Guarantee to Avoid Income Tax Liability. . . . .	23-27
	[3] Obtaining “Abandonment” Loss. . . . .	23-27
§ 23.04	Alternatives and Variations. . . . .	23-28
	[1] Transfer of Stock or Equity Interests in Borrower . . . . .	23-28
	[2] Partnership or Joint Venture with Developer . . . . .	23-28.1
	[3] Loan Refinancing . . . . .	23-28.1
	[4] Agreement with Developer-Contractor. . . . .	23-28.1
	[5] Sale of Property in Lieu of Foreclosure . . . . .	23-28.2
	[a] Advantages for Borrower. . . . .	23-28.2
	[b] Auctions . . . . .	23-29
	[i] Restrictions on Bidders . . . . .	23-29
	[ii] Buyer’s Strategy . . . . .	23-29
	[iii] Publicity . . . . .	23-30
	[iv] With or Without Reserve . . . . .	23-30
	[v] Minimum Bid and Sale Prices. . . . .	23-30
	[vi] Individual or Bulk Sales . . . . .	23-30
	[vii] Pooled Sales. . . . .	23-31
	[viii] Terms of Sale. . . . .	23-31
	[6] Sale of Loan in Lieu of Foreclosure . . . . .	23-31
	[a] Tax Impact on Lender May Be Capital Loss . . . . .	23-31
	[b] Tax Impact on Borrower of Sale to Related Party. . . . .	23-31
	[c] Auctions . . . . .	23-32

**Appendices**

<b>APPENDIX A:</b> Checklists for Real Estate Loans .....	A-1
<b>APPENDIX B:</b> Lists of Forms and Variations.....	B-1
<b>TABLE OF ABBREVIATIONS</b> .....	TA-1
<b>INDEX</b> .....	I-1