

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

REAL ESTATE FINANCING

[c]	Limited Partnerships	2-30
	[i] Disadvantages of Partnerships for Foreign Investors	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

TABLE OF CONTENTS

	[b]	New Exemption from FIRPTA Tax For Investments by Foreign Pension Funds in U.S. Real Estate	2-36.10
	[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

REAL ESTATE FINANCING

	[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
	[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

TABLE OF CONTENTS

- [ii] Valuation Methods Based on Comparable Sales, Income, and Cost 2-47
- [iii] Highest and Best Use of the Property 2-47
- [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

REAL ESTATE FINANCING

	[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

TABLE OF CONTENTS

§ 2.12

- [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
- [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

REAL ESTATE FINANCING

	[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
	[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

TABLE OF CONTENTS

xix

	[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
§ 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

REAL ESTATE FINANCING

	[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
	[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

TABLE OF CONTENTS

	[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
	[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

REAL ESTATE FINANCING

	[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
	[a]	Structured Notes	3-34.17
	[b]	Synthetic Notes	3-34.17
	[c]	Notes with Volatile Returns	3-34.18
[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	3-34.25
	[b]	Lender Must Get “Control” of a “Transferable Record”	3-34.25
	[c]	Lenders’ Requirements for “Systems” Maintaining “Transferable Records”	3-34.26
	[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

TABLE OF CONTENTS

§ 3.04

- [g] Format for eNote 3-34.28
- [h] Payment Intangibles & Controllable
Payment Intangibles. 3-34.28
- [9] Structuring Lender’s Advance as a Loan
Rather Than Equity or Payment 3-34.29
- 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
 - [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

REAL ESTATE FINANCING

[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	3-43
[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
[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	3-51
[d]	Procedures When Customer’s Identity Is Not Verified	3-52
[e]	Records of Identification and Verification	3-53
[f]	Checking Lists of Terrorists & Blocked Persons	3-53
[g]	Notice to Customers	3-53
[h]	When Reliance on Others Is Justified	3-53
[7]	Documents Verifying Identification of Non-Customer Parties	3-55
[8]	Authentication of Internet and Other Electronic Transactions	3-60
[9]	Disbursing Proceeds by Joint Check to Lender and Borrower	3-61
[10]	Proof That Payments to Lender Are Not Subject to Third-Party Rights	3-61
[11]	Payments	3-61
[a]	Checks	3-62
[i]	“Available Funds” May Still Not Be “Good Funds”	3-62

TABLE OF CONTENTS

xxv

		[ii] Risk of Remote Deposit	3-62
		[iii] Duty to Promptly Give Notice of Unauthorized Check Deposit	3-63
	[b]	Wire Transfers	3-63
		[i] “Available Funds” May Still Not Be “Good Funds”	3-63
		[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	3-64
		[i] Preferences	3-64
		[ii] Fraudulent Transfers	3-64
		[iii] Use Safe Security Procedures for Transfers from Bank Accounts	3-64
		[iv] Money Laundering and Transfers From Prohibited Persons	3-64.1
		[v] Erroneous Payments	3-64.1
§ 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

REAL ESTATE FINANCING

	[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
	[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

TABLE OF CONTENTS

xxvii

	[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
	[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

REAL ESTATE FINANCING

	[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
		[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

TABLE OF CONTENTS

	[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
	[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

REAL ESTATE FINANCING

	(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
	[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

TABLE OF CONTENTS

xxxii

	[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
	[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

REAL ESTATE FINANCING

[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
	[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

TABLE OF CONTENTS

xxxiii

	[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
	[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

REAL ESTATE FINANCING

	[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
	[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

TABLE OF CONTENTS

xxxv

[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
	[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

REAL ESTATE FINANCING

	[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	6-54
	[c]	Drafting Options for Security Agreements	6-54
	[d]	Amendments to Security Agreements Required by the Revisions to UCC Article 9	6-55
		[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

TABLE OF CONTENTS

xxxvii

	[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
	[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

REAL ESTATE FINANCING

[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
[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	6-72.1
[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

TABLE OF CONTENTS

xxxix

	[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	6-81
	[e] Other Types of Intellectual Property	6-81
	[i] Trade Secrets	6-81
	[ii] Intellectual Property Licenses	6-82
	[iii] Domain Names	6-82
	[iv] Email addresses, telephone numbers, and fax numbers	6-82.1
	[v] Social Media Rights	6-82.1
[12]	Assignment of Borrower's Rights Under Agreements	6-82.1
	[a] Management Agreement	6-82.2
	[b] Franchise Agreement	6-82.2
	[c] Notice of Assignment to Third-Party Obligor	6-82.2
[13]	UCC-1 Financing Statements	6-82.3
	[a] Revisions to UCC-1s	6-82.3
	[i] Revisions Effective July 1, 2013	6-82.3
	[ii] Revisions Effective July 1, 2023	6-82.3
	[b] National UCC-1 Form	6-82.3
	[c] Description of Collateral	6-82.4
	[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

REAL ESTATE FINANCING

	[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
	[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

TABLE OF CONTENTS

[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

[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

REAL ESTATE FINANCING

[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
[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	6-120.4
[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.	6-120.17
[40]	Organizational Documents of Entities Obligated to Lender	6-120.17
[a]	Formation Documents	6-120.17
[i]	Benefit Corporations	6-120.17
[b]	Good Standing Documents	6-120.18
[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	6-120.19
[i]	Review by CFIUS of Covered Transactions.	6-120.19
[ii]	Premerger Notice to FTC & DOJ	6-120.20
[42]	Borrower's Affidavit.	6-120.21
[43]	Requirements of "Permanent" Lender	6-120.21
[44]	Memorandum of Counsel with Material Terms	6-120.21
[45]	Disclosure of Other Material Information	6-120.22

TABLE OF CONTENTS

[a] Internet Sites Providing Property Information 6-120.22

[b] Lender’s Duty to Disclose Information 6-120.22

[c] Due Diligence May Trigger “Inquiry Notice” 6-120.23

[46] Modification and Consolidation Agreements 6-120.23

[47] Other Documents 6-120.24

§ 6.04 Lender’s Alternative Provisions and Drafting Concerns 6-121

[1] Control of Borrower 6-121

[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

REAL ESTATE FINANCING

	[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
[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 Dagnet 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

TABLE OF CONTENTS

xliv

[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
[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

REAL ESTATE FINANCING

	[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
	[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		Coinsurance 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
		[l] 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

TABLE OF CONTENTS

xlvii

	[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
	[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
	[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 Obligor	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] Guaranty 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

TABLE OF CONTENTS

xlix

[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

§ 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

[11] Modifications to Loan Documents 9-11

§ 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

REAL ESTATE FINANCING

	[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
	[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

TABLE OF CONTENTS

[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

[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
	[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

TABLE OF CONTENTS

	[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
	[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

REAL ESTATE FINANCING

	[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

TABLE OF CONTENTS

	[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
	[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

REAL ESTATE FINANCING

	[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
	[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	11-7
	[c]	Debt Subordination	11-7

TABLE OF CONTENTS

	[d] Equitable Subordination	11-7
	[e] Wraparound Mortgage	11-8
	[f] Intercreditor Agreements	11-8
	[g] Unitranche Loans	11-8
[2]	Chapter Scope	11-8.1
[3]	Closing Documents and Requirements	11-8.1
[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

REAL ESTATE FINANCING

[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
	[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

TABLE OF CONTENTS

	[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
[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

REAL ESTATE FINANCING

[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
	[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

TABLE OF CONTENTS

	[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
	[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
	[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

TABLE OF CONTENTS

lxiii

[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

[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

REAL ESTATE FINANCING

	[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
	[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

TABLE OF CONTENTS

lxv

[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

[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

REAL ESTATE FINANCING

	[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
	[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

TABLE OF CONTENTS

I xvii

	[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
	[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

REAL ESTATE FINANCING

	[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
	[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

TABLE OF CONTENTS

Ixi

	[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
	[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
	[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

TABLE OF CONTENTS

	[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
	[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

REAL ESTATE FINANCING

	[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]	NMLS 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
	[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

TABLE OF CONTENTS

lxxiii

§ 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
	[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

REAL ESTATE FINANCING

	[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
	[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]	Inflation Reduction Act of 2022	14-72
	[i]	Tax Benefits for Residential Property	14-73
	[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

TABLE OF CONTENTS

	[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
	[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] “Condom”	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

TABLE OF CONTENTS

lxxvii

[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

[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 Obligors” 17-18.8

REAL ESTATE FINANCING

[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
[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

TABLE OF CONTENTS

	[20] Legal and Other Opinions	17-33
	[a] Bankruptcy-Remote LLC Opinions	17-33
	[b] Perfection	17-34
	[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
	[4] Credit Risk Transfer Trades	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

	[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

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