Spring 2021

The
ABSTRACT
American College of Mortgage Attorneys

CONTENTS

ACMA® AMERICAN COLLEGE OF MORTGAGE ATTORNEYS

1300 Piccard Drive, Suite LL 14
Rockville, Maryland 20850 USA
T (301) 990-9075
F (301) 990-9771
E acma@acmaatty.org
W www.acmaatty.org

President's Column

By Beth H. Mitchell

It is with great pleasure that I write today as the current president of ACMA. I am honored to represent an organization of such talented, committed, and collegial professionals, many of whom dedicate significant time to the College. I have learned a great deal from so many of you during my years with ACMA and welcome the opportunity to give back to the organization that has provided me with so much.

Although this year has started with its well-known challenges—from a worldwide health crisis, to resulting economic upheaval, to political discord—ACMA remains strong. Thanks to the leadership of so many who have come before me and the diligence of ACMA's Budget Committee, our financial condition is solid. We have sufficient resources to continue to serve our Fellows by, among other things, providing high-quality continuing legal education through our meetings, webinars, committee activities, and publications, and by providing an enviable referral network of accomplished real-estate finance attorneys throughout North America. When we are able to meet in person again, we will continue to enhance our meetings to provide the outstanding experiences we all cherish. Our Program Committee, Business Development Committee, Communications and Publications Committee, and so many others dedicate substantial time and effort to creating these opportunities and resources for all of us.

ACMA has also continued to plan for the future. ACMA completed the admission of 31 new Fellows in 2020 and is beginning the 2021 nomination process for additional new Fellows. I encourage each of you to nominate an attorney in your area who has demonstrated the qualities that would make the candidate an important addition to the College. The nomination process is the lifeblood of the College, and I thank the members of our Membership Committee for their efforts in reviewing and vetting all the materials presented to them.

Recognizing that some of our Fellows will be attaining Senior Fellow status, ACMA has begun providing more frequent seminars focused on those individuals while continuing to reach out to new Fellows to enhance our ranks. Our new Senior Fellows Committee and our existing Membership Development and

President's Column

Engagement Committee have provided significant guidance on all these efforts. Through the efforts of our State and Provincial Chairs Committee and the Mexico Fellows Task Force, ACMA has also focused on enhancing our membership within previously underrepresented jurisdictions and has expanded into other parts of North America, welcoming some of our first Fellows from Mexico. And ACMA is continuing to provide leadership opportunities for all our Fellows, adopting more formal guidelines for the rotation of committee chairs and updating our Bylaws (thanks to our Bylaws Committee) to implement these changes.

Consistent with the strategic plan adopted in 2018 and implemented with the assistance of the Strategic Plan Implementation Committee, ACMA also has embraced diversity, equity, and inclusion, both in our recruitment efforts and within the College itself. This year, ACMA has established a new committee focused on Diversity, Equity, and Inclusion. That committee has provided ACMA Fellows with a toolbox of resources that they may use within their own organizations. The committee is also sponsoring one of the sessions at our 2021 Spring Meeting. Only last year, ACMA further expanded our roster of committees to include the Residential and Regulatory Committee, which hosted a Virtual Happy Hour in October for committee members and guests. These new committees demonstrate ACMA's ability to evolve as both our industry and our communities change and develop.

Of course, one of the many benefits of participating in ACMA is the personal relationships we establish with each other. Unfortunately, the pandemic has interrupted our regular in-person gatherings. Like many of you, I have missed the opportunity to meet informally at some new, fabulous destination and to share a cup of coffee, an evening cocktail, a tour or hike, or a round of mini-golf. I am optimistic that we will be able to gather together later this year in St. Louis to share those experiences again. After all our time apart, I expect it to be one of our most enthusiastic and well-attended meetings ever.

In the meantime, though, I am encouraged about how well ACMA has adapted to the virtual world we now inhabit. Thanks to so many in our organization, and particularly our staff at MSP and our Technology Committee, we have been able to continue to learn and laugh together from our individual locales. In addition to hosting our 2020 Spring Meeting and 2020 Annual Meeting online, we have held a number of other virtual events, including three COVID-19 Virtual Forums hosted by our Financial Restructuring and Remedies Committee. We have expanded the offerings at our 2021 Spring Meeting by including sessions earning CLE credits and offering additional non-substantive topics of interest to our Fellows. Many of our state and provincial chairs have also hosted virtual get-togethers for the Fellows within those jurisdictions. And a number of other committees, including our Amicus Brief Committee (which recently had another successful outcome based on one of its submissions), our Capital

President's Column

Markets Committee, our Corporate Counsel Committee, our Opinions Committee, and our Title Insurance Committee, have coordinated virtual committee meetings and/or webinars in between our formal meetings. These virtual events, together with the referral network, the Mortgage Law Summary, amicus brief submissions, blogs, and other publications, among other things, continue to provide the value that we all expect from ACMA.

I am so grateful to all of you who participate in ACMA and dedicate your time. In particular, I also must thank the other officers, Norm Roos (immediate past president), Joyce Elden (president-elect), Rob Sargeant (treasurer), and Andrew Palmieri (secretary), who work tirelessly on behalf of the College, along with executive director Chip Deale and the rest of the MSP staff. We meet at least monthly to address the needs of the College, from planning meetings and events, to managing the College's finances, to formalizing agreements with service providers, to interacting with committee chairs and with as many of you as possible. We are all here to serve ACMA, and we welcome your advice and suggestions throughout the year. Please contact any of us if we can improve the College and your experience.

Thank you again for all your support.

Beth H. Mitchell
President

2020–2021
STATE AND PROVINCIAL CHAIRS

Alabama, *Scott A. Abney*
Alaska, *Stephen D. Routh*
Alberta, *Olivia Colic*
Arizona, *Timothy W. Moser*
Arkansas, *Timothy W. Grooms*
British Columbia, *David R. Bain*
California, *Norma J. Williams*
Colorado, *J. Marcus Painter*
Connecticut, *Andrew R. Lubin*
Delaware, *Joy A. Barrist*
District of Columbia, *Christine Waldmann Carmody*
Florida, *Anthony J. Carriuolo*
Georgia, *William G. Rothschild*
Hawaii, *Janel Yoshimoto*
Idaho, *Christine E. Nicholas*
Illinois, *Michael J. Delrahim*
Indiana, *Jeffery C. Dack*
Iowa, *James C. Wine*
Kansas, *Mark A. Andersen*
Kentucky, *Michael B. Vincenti*
Louisiana, *G. Wogan Bernard*
Maine, *Christopher J. Devlin*
Maryland, *Anna A. Mahaney*
Massachusetts, *Bruce H. Bagdasarian*
Michigan, *Howard B. Goldman*
Minnesota, *Dean L. Bussey*
Mississippi, *P. David Andress*
Missouri, *Cheryl A. Kelly*
Montana, *Kevin Heaney*
Nebraska, *Michael F. Kivett*
Nevada, *Michael E. Buckley*
New Hampshire, *Peter F. Burger*
New Jersey, *Lydia C. Stefanowicz*
New Mexico, *Debora E. Ramirez*
New York, *Malcolm K. Montgomery*
North Carolina, *Frank E. Arado*
North Dakota, *Jeremy D. Holmes*
Ohio, *Julie A. Schoepf*
Oklahoma, *Michael S. Laird*
Ontario, *C. Mario Paura*
Oregon, *Bryan E. Powell*
Pennsylvania, *Dominic J. De Simone*
Puerto Rico, *Pedro Morell*
Quebec, *James Papadimitriou*
Rhode Island, *Diana M. Ducharme*
South Carolina, *Mark S. Sharpe*
South Dakota, *Eric R. Kerkvliet*
Tennessee, *Emily Bowman*
Texas, *Dawn M. Lewallen*
Utah, *Brian D. Cunningham*
Vermont, *Andre D. Bouffard*
Virgin Islands, U.S., *William S. McConnell*
Virginia, *Nancy J. Appleby*
Washington, *Stacy D. Lavin*
West Virginia, *Joyce F. Ofsa*
Wisconsin, *Daniel W. Gentges*
Wyoming, *Ronald J. Lopez*

Executive Director's Report

By Chip Deale, FASAE, CAE, ACMA Executive Director

It's Time to Celebrate...You!

My favorite member of The Beatles, the late George Harrison, lamentingly sang in 1973 that, "I'm living in the material world." Eleven years later, Madonna was happy to sing that, "You know that we are living in a material world."

With apologies to these artists and to paraphrase their song titles, we all have been—and still are to a large degree—living in a virtual world, and most of us have lamented that reality.

As Dena Cruz notes in her Editor's Notes, this edition of *The Abstract* is primarily devoted to pandemic-related issues and their impact on commercial real estate financing; in short, on the day-to-day work of ACMA Fellows. The articles are substantive and vitally important.

But in my column, I'm going to take a different tact. One of the more pleasurable aspects of my job as your executive director is gaining insights on the individuals who are approved as new Fellows. Those insights certainly include their professional experience and areas of focus. But even more so, it's about them as people—who they are, what they do, what appeals to them away from their work. The insights I gain serve as the source material for the brief "profiles" that I write on each new Fellow and which are sent to all members as a recurring series of emails (my hope is that you are reading them!).

What I have discovered about the 82 attorneys who have become Fellows in the past three years (2018–2020) is how incredibly talented and engaged and diverse (in every aspect of that word) they are!

So, this column is a celebration! Not a celebration in the Kool and the Gang sort of way ("Celebrate good times, come on!"). That will have to wait until we all gather in person again. But, rather, a celebration of you. A celebration of your talents, your interests, your "giveback" and, yes, some of your quirkiness!

For example, and as no surprise, you are smart. The educational institutions from which you have graduated (often with honors) range from "A" to (almost) "Z"—from Arizona to Yale, and almost every letter of the alphabet in between. You've studied in Australia, Canada, China, England, Mexico, and all across the United States. So, celebrate your academic achievements and cheer for your alma maters!

The range of your ethnic heritage also is to be celebrated, whether it be Asian, Hispanic, Middle Eastern, or some other culture. The diversity of perspectives and backgrounds that you bring to ACMA makes the College a better, more inclusive organization.

Celebrate also your incredible engagement in your local communities, all of which combine to improve the lives of others where you live and work. You are providing outreach to Latina and Latino small businesses; offering pro bono services to families that require guardianship for disabled children; extending pro bono legal services to asylum seekers; representing heirs of Holocaust victims in the recovery of art stolen by the Nazis; and serving in leadership capacities for a wide array of organizations that would take pages to list here.

Your musical talents are another reason for celebration! As an opera singer, you have performed twice at Carnegie Hall. You are a principal bassoonist in a symphony orchestra. You're a classical pianist. You play the clarinet, the guitar—even the accordion! And you're an alumnus of the early Lollapalooza tours.

You also can celebrate your mastery of the "B's": boxing (a champion); bullfighting; boating (a U.S. Coast Guard Master Captain); backpacking (to the top of the tallest mountain in the contiguous United States); and the bulls (running with them in Pamplona)!

There is cause for celebration of your physical activity or, as one Fellow aptly described it, being a "fitness junkie." There are, of course, the usual activities (golf, tennis, biking, hiking, running [several marathons], fishing [including a semi-professional], hunting, camping, canoeing, water and snow skiing, and scuba diving [including a dive master]). But you also engage in pastimes more off the beaten path: ultimate frisbee (you achieved recognition with the U.S. Olympic Committee), trapeze lessons, and stilt walking!

Continued on page 6

Editor's Notes

By Dena M. Cruz, Berding Weil LLP, Walnut Creek, California

This has clearly been a year of change! In describing the last year, many of you might use the term *Annus Horribili*s, and in the words of Queen Elizabeth, "not look back on the year with "undiluted pleasure."

Fortunately, I have not lost any friends or family during the pandemic (or had to educate young children at home while working full time), and much like the main character in Geraldine Brook's prescient pandemic book *Year of Wonders*, I have chosen to think of the past year as *Annus Mirabilis*—a year of growth and change! My dogs are happy I am home all the time. I have taken up tennis again, volunteered my time to three great nonprofit organizations, and learned to make sourdough bread, and I am playing more (but not better) golf—all with my mask properly in place.

One of the most important decisions I made this last year was to pass on the responsibility for editing *The Abstract* to **Linda S. Koffman**, Smith, Gambrell & Russell, LLP, Los Angeles, California. Recognizing and developing leadership talent is, and has always been, an important goal of ACMA. Linda has been an invaluable resource over the past few years and deserves to take the reins of *The Abstract*.

In this edition of *The Abstract*, we have six articles, five of which address issues encountered as a result of this worldwide pandemic.

Joseph E. Foster ("Ed"), Akerman, LLP, Orlando, Florida, takes the position that the pandemic was reasonably foreseeable. In his article, "The COVID-19 Pandemic Was Reasonably Foreseeable and That May Make It Impossible for Debtors to Assert the Impossibility Defense," Ed discusses various defenses to nonperformance, including force majeure, impossibility of performance, impractibility of performance, and material adverse change.

Justin L. Earley, First American Title Company, Santa Ana, California, has drafted an article titled "Original Sin." In his article, Justin questions what it means for a document/signature to be an "original" in the electronic era. He asserts that it is "time to accept that 'originals' are now more than ink-signed pieces of paper, and to recognize that what is (or is not) an 'original' is generally no longer outcome-determinative as to whether an agreement is 'enforceable.'"

Michael C. Flynn ("Mike"), Buchalter, Los Angeles, California, in "New COVID Residential Mortgage Borrower and Tenant Protections in California: Significant Temporary Mandates—Can They Become Permanent Requirements?" examines the requirements of new COVID-related California laws that have the potential to become permanent law after the crisis is over.

Wendy Gibbons, Old Republic National Title Insurance Company, Charlotte, North Carolina, addresses in her article how the current pandemic has impacted real estate closings. In "RON to the Rescue: The Impact of the Coronavirus on Real Estate Closings," Wendy explores the impact of COVID-19 on the notarization and recording of conveyance documents in real estate closings and the acceleration of the use of remote notarization as a result of the pandemic.

The federal government, agencies, and financial institutions have been working diligently to mitigate the impact of the coronavirus on businesses and individuals, giving more leeway to lenders when faced with a failing loan. **Kenneth Miller,** Parker, Milliken, Clark, O'Hara & Samuelian, Los Angeles, California; **Anthony J Carriuolo**, Berger Singerman LLP, Fort Lauderdale, Florida; **Hilary Gevondyan**, First Republic Bank, San Francisco, California; and **Judy Lam**, Maynard Cooper & Gale, Los Angeles, California, have taken their successful presentation at the 2020 Annual Meeting and submitted an article that addresses ethical concerns that may arise during workout. In the context of a hypothetical involving the initial workout of a distressed construction loan during COVID, "Focusing on the Journey and Not Just the Destination—Ethical Duties of Both In-House and Outside Counsel During the Initial Stages of a Workout" demonstrates how spotting and properly handling ethics issues can pave a smooth road to a successful resolution for all parties involved in the workout.

In *College News*, you will find an article from **Ned Graber**, retired from AIG Investments, titled "How Much Should I Save?" Ned urges us to consider how we are going to support our lifestyle after we retire. Just how big your "nest egg" should be and how long it will last will depend not only on what you save and invest but also on how you elect to spend it after you retire.

Please also read the moving tributes to Steve Bromberg, a much loved former president of ACMA. He will be missed by all.

Finally, an update is provided from ACMA's newest committee, the Residential and Regulatory Committee, by its co-chairs, the above-noted Justin Earley and Mike Flynn.

Many thanks to Ed, Justin, Mike, Wendy, Ken, Anthony, Hilary, Judy, and Ned for the articles they contributed to this issue of *The Abstract*. I also want to thank the authors who submitted articles in time for this edition and who graciously agreed to allow us to publish their articles in the 2021 fall edition once we elected to run with a COVID theme. As always, I invite those of you who have not submitted an article for publication to *The Abstract* to do so. Linda Bernetich will be happy to answer any questions you may have and assist you in publishing your article!

Meanwhile, let us hope we are able to see each other in person at the 2021 Annual Meeting, September 23–25, 2021, in St. Louis.

Executive Director's Report

Continued from page 4

You are published authors (fiction and other genres), painters, photographers, gourmet cooks, coin collectors, tango dancers, and, formerly, an actress and a child model.

And I can't end this celebration of you without mentioning a few unique distinctions that you have achieved. You've been kissed by Elvis (the real one, not some Vegas impersonator), recognized for having the best extreme Christmas lights display in your neighborhood, and gained a reputation for your pumpkin carving skills!

In short, you—each of you individually and all of you collectively—are incredible and amazing! For that, I thank you for the pleasure of knowing more about the 500-person-strong "family" called ACMA. And as we all slowly emerge from the virtual world in which we have been trapped for the past year, I hope that you will take time every day to celebrate who you are, who your ACMA colleagues are, and what the College is as an organization.

Remain safe and well.

The COVID-19 Pandemic Was Reasonably Foreseeable, and That May Make It Impossible for Debtors to Assert the Impossibility Defense

By Joseph E. ("Ed") Foster,[1] Akerman LLP

As the COVID-19 pandemic draws nearer to its conclusion, an increasing number of debtors are expected to assert payment defenses based on *force majeure*, act of God, natural disaster, frustration of purpose, commercial frustration, impossibility of performance, impracticality of performance, material adverse change, and similar concepts. For purposes of this article, we will refer to these defenses collectively as the "COVID-19 defenses."

The assertion of the COVID-19 defenses almost always fails if the triggering event—here the COVID-19 pandemic—was reasonably foreseeable at the time the contract was made. This article explores the foreseeability of the COVID-19 pandemic and concludes that a pandemic of this type has been reasonably foreseeable, and indeed has been expected, for many years.

The relationship between reasonable foreseeability and the COVID-19 defenses

The basic concept of the COVID-19 defenses is to relieve a party from its contractual duties and obligations when its performance of those duties and obligations has been prevented by a force beyond its control, or when the purpose of the contract has been frustrated. But regardless of how the COVID-19 defense is couched, it is likely doomed to failure if the lender can establish that the triggering event—the COVID-19 pandemic—was reasonably foreseeable at the time the contract was made. Whether the COVID-19 defense is couched in terms of:

a. *Force majeure* – where the Restatement (Second) Of Contracts 11 Intro. Note (Oct. 2019 Update) and § 261 effectively insert the element of foreseeability into any *force majeure* analysis;[2]

b. Act of God – where cases such as *Woodard v. Dempsey*, 2016 WL 4079713 (N.D. Ga. 2016); *Lewis v. Smith*, 517 S.E.2d 538, 540 (Ga. App. 1999); *Grote v. Estate of Franklin*, 573 N.E.2d 360 (Ill. App. 1991); *Hoggatt v. Melin*, 172 N.E.2d 389, 392 (Ill. App. 1961); and *Eleason v. Western Casualty & Surety Co.*, 35 N.W.2d 301, 303 (Wisc. 1949) effectively define acts of God in terms of unforeseeable events;[3]

c. Natural disaster – where cases such as *Tasker v. Baugh & Johnson*, 53 S.E. 266 (Ga. 1906) and *IPF/Ultra Ltd. P'ship v. UP Improvements, LLC*, 2008 WL 3896746, at *6-7 (N.D. Ind. 2008) refuse to excuse nonperformance of contracts where the natural disaster was foreseeable;

d. Frustration of purpose – where cases such as *FTC v. A.S. Research, LLC*, 2020 WL 4193507 (D. Colo. 2020) refuse to allow the defense where the triggering event was foreseeable;

e. Commercial frustration – where cases such as *Hilton Oil Transport v. Oil Transport Co., S.A.*, 659 So. 2d 1141, 1147 (Fla. 3d DCA 1995) and *Valencia Center, Inc. v. Publix Super Markets, Inc.*, 464 So. 2d 1269 (Fla. 3d DCA 1985) do not allow the assertion of the defense if the intervening event was reasonably foreseeable and could and should have been controlled by provisions of the contract;

f. Impossibility of performance – where cases such as *Hoosier Energy Rural Electric Cooperative, Inc. v. John Hancock Life Insurance Company*, 582 F.3d 721 (7th Cir. 2009) and *American Aviation, Inc. v. Aero-Flight Service, Inc.*, 712 So. 2d 809 (Fla. 4th DCA 1998) do not allow assertion of the defense if the intervening event was reasonably foreseeable;

g. Impracticability of performance – where cases such as *Bank of America v. Shelbourne Development Group, Inc.*, 2011 WL 829390 (N.D. Ill 2011) refuse the defense if the intervening cause was reasonably foreseeable; or

h. Material adverse change – where cases such as *IBP v. Tyson Foods, Inc.*, 789 A.2d 14 (Del. Ch. 2001) define the concept in terms of unknown events.

The concept of foreseeability is at the heart of all of the COVID-19 defenses. Thus, in preparing for the expected

wave of assertion of the COVID-19 defenses, we must consider whether the COVID-19 pandemic was foreseeable.

But before we do that, two preliminary observations are in order.

Two preliminary observations

Observation 1: The failure of the parties to include pandemics as a triggering event in a *force majeure* clause in a contract should be fatal to the assertion of any of the COVID-19 defenses.

If we assume, as will be demonstrated below, that the COVID-19 pandemic was entirely foreseeable, the failure to include pandemics as a triggering event in a *force majeure* clause in a contract should be fatal to the assertion of any of the COVID-19 defenses. That is because it is well-settled that if the parties to a contract fail to address a reasonably foreseeable risk factor in a *force majeure* clause, that failure should be interpreted as an affirmative decision of the parties to have that risk factor assumed by the obligor, *e.g., American Aviation, Inc. v. Aero-Flight Service, Inc.*, 712 So. 2d 809 (Fla. 4th DCA 1998) – ("If the risk of the event that has supervened to case the alleged frustration was foreseeable there should have been provision for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed.") To the same effect are *Wright v. Logan*, 2010 WL 11507114 at *6 (M.D. Fla. 2010) – ("Thus, impossibility of performance is not intended to excuse the contractual obligations of a party where the relevant business risk was foreseeable and could have been the subject of an express contractual provision.") and *Genuinely Loving Childcare, LLC v. Bre Mariner Conway Crossings, LLC*, 209 So. 3d 622, 625 (Fla. 5th DCA 2017)—("If a risk was foreseeable at the inception of the lease, then there exists an inference that the risk was either allocated by the contract or was assumed by the party.")

Observation 2: In a contract setting, foreseeability is determined from a true foresight perspective—not what the promisor actually foresaw, but instead what the promisor could have foreseen at the time the contract was made.

Any number of loan/contract parties will argue truthfully that at the time they entered into the loan/contract, they had never heard of COVID-19, and had utterly no idea that a pandemic, much less the COVID-19 pandemic, was reasonably foreseeable. That argument should be unavailing. In a contract setting, foreseeability is determined from a true foresight prospective—not what the promisor actually foresaw, but instead what the promisor *could* have foreseen at the time of contracting, *e.g.,* Banks McDowell, *Foreseeability in Contract and Tort: The Problems of Responsibility and Remoteness*, 36 Case Western Reserve L.R. 285, 300 n. 54 (1985) – ("The perspective from which foreseeability is judged distinguishes contract from tort. Contract is concerned with true foresight, examining those consequences which the promisor could have foreseen at the time of contracting.") To the same general effect are *Harvey v. Lake Buena Vista Resort, LLC*, 568 F.Supp.2d 1354, 1368-1369 (M.D. Fla. 2008)—(The doctrine of impossibility of performance should be employed with great caution if the relevant business risk "was foreseeable at the inception of the agreement and could have been the subject of an express provision of the agreement." … "Ultimately, the issue is whether the change was foreseeable." … "Similarly, in this case, 'the winds of change were blowing' and the Resort knew **or should have known** of the 2004 changes to the Florida Building Code…" [Emphasis added.]); *Pleasant Hill Developers, Inc. v. Foxwood Enterprises, LLC*, 885 N.Y.S.2d 531, 534 (N.Y. Sup. Ct. App. 2009) – (Impossibility of performance must be "produced by an unanticipated event that could not have been foreseen or guarded against in the contract."); and *In re SFD@Hollywood, LLC*, 411 B.R. 788, 799 (Bankr. S.D. Fla. 2009) – (The doctrine of impossibility of performance is unavailable if knowledge of the facts making the performance impossible was "available or foreseeable" to the promisor.). *See also*, 30 Williston on Contracts § 77.11, n. 7 (4th ed. May 2020 Update)—("… the defense of impracticability is unavailable where the nonoccurring event could have been foreseen.")

A good example of how this foreseeability/availability requirement plays out in court is found in *Ner Tamid Congregation of North Town v. Krivoruchko*, 638 F.Supp.2d 913 (N.D. Ill. 2009). There, a real estate developer who breached a 2007 contract to purchase real property raised the affirmative defenses of impossibility or impracticability of performance based on the alleged lack of foreseeability of the depth of the Great Recession. The district court rejected the developer's argument and cited newspaper articles and professional journals—characterized as "informed and responsible sources" by the court, *id*. at 925—which demonstrated forewarnings of "significant dislocations in the economy or the real estate market" before the developer entered into the agreement in May 2007, including:

- *New York Times*, July 6, 2005, editorial titled "Risky Mortgage Business."
- *New York Times*, August 26, 2006, article by Paul Krugman, titled "Housing Gets Ugly," expressing concern about the impact of the housing bubble on the economy as a whole.

- *New York Times*, August 27, 2006, stating "while most economists on Wall Street were predicting a soft landing," a crash landing is also a possible ending.
- *MoodysEconomy.com*, August 27, 2006, expressing concern on the potential impact of the housing market on the broader economy.
- *Washington Post*, December 5, 2006, article by Steven Pearlstein, "The new story is the bubble in the commercial real estate market."
- *Wharton Real Estate Profession*, Susan Wachter, February 21, 2007, titled "Could Tremors in the Subprime Market be the First Sings of an Earthquake?" expressing the gravest concern for the future of the economy.
- *USA Today*, March 19, 2007, discussing the likelihood that the subprime mortgage market's woes would throw the economy into a recession at 20%. "While those were fairly long odds, they were not insignificant."

Id., 638 F.Supp.2d at 925–927.

The court noted that these articles were in the public domain, and "Whether he [the developer]—or his banker—saw these or other articles or publications is inconsequential." *Id.* at 927. The court's point was that any contention that the economic downturn was unforeseeable flew in the face of the fact that those economic conditions had in fact been the subject of public debate in 2005, 2006, and 2007. Id. at 927.

See also, Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F.Supp. 429, 441-442 (S.D. Fla. 1975) – ("… Gulf would not prevail because the events associated with the so-called energy crisis were reasonably foreseeable at the time the contract was executed." "… the court would be justified in taking judicial notice of the fact that oil has been used as a political weapon with increasing success by the oil-producing nations for many years …"

Thus, in answering the question of whether the COVID-19 pandemic was reasonably foreseeable, the focus appears to be not on whether the particular parties to a loan agreement or contract had actual knowledge of the reasonable foreseeability of an event, but instead on whether the information was available in the public domain had they chosen to look for it.

The COVID-19 pandemic was reasonably foreseeable

If the focus is on the reasonable foreseeability of the COVID-19 pandemic in recent months, the issue is easy to resolve. As noted in the as-yet unpublished decision in *Belk v. Le Chaperon Rouge Co.*, 2020 WL 3642880 (N.D. Ohio July 6, 2020), "As an initial matter, the Court is not convinced that the financial difficulties posed by COVID-19 'could not have been reasonably foreseen' when the parties reached a settlement on March 12, 2020." *Id.* at *10.

But even if the focus is on the reasonable foreseeability of the pandemic over the last several years, as is demonstrated below, **information on the foreseeability of a pandemic, indeed of a COVID-type pandemic, has been available in the public domain for many years**.

Until it was disbanded by the Trump administration in 2018, the National Security Council maintained a pandemic office, and various public health and national security experts have "warned about the next pandemic for years." Deb Reichmann, *Trump disbanded NSC pandemic unit that experts had praised*, https://apnews.com/ce014d94b64e98b-7203b873e56f80e9a, March 14, 2020. The presence and maintenance of a pandemic office by the National Security Council suggests strongly that the foreseeability and danger of pandemics were known well before the onset of the COVID-19 pandemic.[4]

The risk of a pandemic was also known by the U.S. military, which warned in a 2017 Pentagon plan that a novel respiratory disease—coronavirus was specifically mentioned—posed "the most likely and significant threat" that could "quickly evolve into a multinational health crisis that causes millions to suffer, as well as spark major disruption in every facet of society." Ken Klippenstein, *Exclusive: The Military Knew Years Ago That a Coronavirus Was Coming*, https://www.thenation.com/article/politics/covid-military-shortage-pandemic/, April 1, 2020. *The Nation* article quotes from the Pentagon plan that it was "developed in accordance with (IAW) the revised Department of Defense Global Campaign Plan for Pandemic Influenza and Infectious Disease2 (DOD GCP-PI&ID-3551-13), 15 October 2013 …" Thus, a pandemic has been anticipated and planned for by the military since at least 2013. This is not surprising since *The Nation* article goes on to quote Denis Kaufman, the head of the Infectious Diseases and Countermeasures Division of the U.S. Defense Intelligence Agency from 2014 to 2017, "The intelligence community has warned about the threat from highly pathogenic influenza viruses for two decades, at least. They have warned about coronaviruses for at least five years."[6]

In 2008, the National Intelligence Council (NIC) published its *Global Trends 2025*, a 75-page report devoted

to the potential emergence of a global pandemic. The report noted, "If a pandemic disease emerges, it probably will occur in an area marked by high population density and close association between humans and animals, such as many areas of China and Southeast Asia…"Mathew J. Burrows, *U.S. policymakers knew a pandemic was coming: Why they ignored the warnings*, https://www.atlanticcouncil.org/blogs/new-atlanticist/us-policymakers-knew-a-pandemic-was-coming-why-they-ignored-the-warnings/, April 28, 2020.

In *The Great Influenza, The Story of the Deadliest Pandemic in History* (2018), author John M. Barry notes that the H5N1 avian influenza virus attacked humans directly in 1997 and then "returned with a vengeance" in 2004, with a 60% death rate. That is not a typo. The death rate was 60%, although the number of persons infected has thus far been limited to 400 persons around the world. Per Barry, "It threatened, and it still threatens, to cause another pandemic." In his "Afterward" in the 2018 edition, Barry speaks of the "continued threat of a new, possibly lethal pandemic," and quotes Tom Frieden, a former head of the Centers for Disease Control and Prevention, as saying that what scared him most, what kept him up at night, was concern about an influenza pandemic. Said Frieden, "[It] really is the worst-case scenario."

Deb Reichmann, Ken Klippenstein, Mathew J. Burrows, and John M. Barry are not the only ones to report on warnings about future pandemics. The World Health Organization's Global Outbreak Alert and Response Network (GOARN) first met in Geneva, Switzerland, in April 2000 and identified 20 years ago the need for a global network to deal with global threats of epidemic prone and emerging diseases. See https://www.who.int/ihr/alert_and_response/outbreak-network/en/.

Many warnings have been given as far back as 2005, and even before that, that a global pandemic was a distinct possibility that should be taken seriously.[7] For example:

a. John Walcott, The Trump Administration is Stalling an Intel Report that Warns the U.S. Isn't Ready for a Global Pandemic, https://time.com/5799765/intelligence-report-pandemic-dangers/ March 9, 2020:

> … two officials who have read it say it contains warnings similar to those in the last installment, which was published on January 29, 2019. The 2019 report warns on page 29 that, 'The United States will remain vulnerable to the next flu pandemic or large-scale outbreak of a contagious disease that could lead to massive rates of death and disability, severely affect the world economy, strain international resources, and increase calls on the United States for support.'

The article goes on to report that the 2019 warning of the United States' vulnerability to pandemics—contained in the annual Worldwide Threat Assessment from the U.S. Director of National Intelligence—was the third in as many years. So, since 2017, the U.S. Director of National Intelligence has reported to the U.S. House of Representatives on the danger of pandemics.

b. Kevin Loria, *Bill Gates thinks a coming disease could kill 30 million people within 6 months*," https://www.businessinsider.com/bill-gates-warns-the-next-pandemic-disease-is-coming-2018-4, April 29, 2018. The title to this 2018 article is self-explanatory.

c. Gregory F. Treverton, Erik Nemeth, Sinduja Srinivasan, *Threats Without Threateners? Exploring Intersections of Threats to the Global Commons and National Security*, Rand Corporation, 2012. This Rand Corporation[8] report from 2012 is a treasure-trove on the foreseeability of pandemics:

i. In analyzing its five priority issues—nuclear proliferation, conflict in the Middle East, water scarcity, pandemics and climate change—Rand notes that, **"In current circumstances, only pandemics seem to be an existential threat, capable of destroying America's way of life."** *Id*. at 1. [Emphasis added.] Bear in mind, this statement was made eight years ago.

ii. Rand notes, at p. xi, that "a future pandemic may be virtually certain," but notes that its timing and severity are not certain. But on p. 2, Rand notes that **"Pandemics are a real possibility in the here and now; there is nothing future about them."** [Emphasis added.]

iii. Rand notes, at p. xii, that "Climate change was immediately recognized as an issue of global commons, while pandemics have only recently come to be thought of in that way …" (Bear in mind that the reference to "only recently" was made in 2012.)

iv. Rand deemed the problem of pandemics of sufficient importance that it poses a challenge to our national security. "Do climate change, water scarcity, and pandemics pose challenges to national security? In general, they do…" *Id*. at p. 3.

v. Rand further notes, at p. 4, that "… pandemics top the list of threats—killing one quarter of Americans would not finish off U.S. society but would change it beyond recognition…"

vi. All of the above quotes from the report are preamble to the report's section on Pandemics, starting at p. 7, **"…only pandemics hold the risk of destroying American society within a foreseeable future."** [Emphasis added.]

vii. At p. 9, the report notes that "Global warming seems a certainty and its impact may already be felt, but for the most part the timing and magnitude of its consequences are future and uncertain. Pandemics are similar. While some new virus is a virtual certainty … exactly when a new disease with pandemic potential might strike is uncertain …"

viii. The report notes on p. 10 that "… when pandemics hit, they will be acute …"

ix. The report notes on p. 12 that "By contrast, although the 1918 flu epidemic offered an agonizing preview, **not until the arrival of mass travel by jet did pandemics seem usefully perceived at a global commons issue**." [Emphasis added.] Continuing on this theme at p. 13, the report notes that "**… because of far-reaching airplane travel, pandemics can spread quickly across the world from the origin.**" [Emphasis added.] Footnote 6 to this quote elaborates by reminding us that "This is exactly why H1N1 was classified as a pandemic—the entire world was affected simultaneously, according to a recent Security and Defence Agenda (SDA) report (Dowdall, 2011)." [The reference to Dowdall is to J. Dowdall, *Pandemics: Lessons Learnt and Future Threats,* Brussels: Security & Defence Agenda, 2011.]

x. The report notes on p. 13 that "The most threatening of the three to security, pandemics, is also the one most amendable to national action." [The "three" are climate change, water scarcity, and pandemics.]

xii. The report says of pandemics, on p. 15, that "it is hard to imagine another threat to the very existence of nations, including the United States …"

xiii. In footnote 2 on p. 15, the report notes, "In recent discussions on pandemics hosted by the Security and Defence Agenda, there was strong consensus that H1N1 was mild, but the threat was very real, and provided countries with the opportunity to 'test' their preparedness systems. (Dowdall, 2011)."

xiv. The report notes at p. 23 that SARS, a viral disease in humans, appeared in a "near-pandemic" between November 2002 and July 2003, with an overall mortality rate of 9.6%, which was higher than the mortality rate of the 2009 H1N1 pandemic.

xv. The report notes on p. 24 that "… the world has had the good luck of recently getting to practice pandemic monitoring, initially on a disease, SARS, that was not too easily communicated and then on anther, H1N1, that was not very lethal."

xvi. The report, in its conclusion, notes on p. 41 that "**Pandemics are an obvious global security concern…**"

Something that is "obvious" is obviously reasonably foreseeable.

d. Rem Reider, *Contrary to Trump's Claim, A Pandemic Was Widely Expected at Some Point*, https://www.factcheck.org/2020/03/contrary-to-trumps-claim-a-pandemic-was-widely-expected-at-some-point/, March 20, 2020. This article is another treasure trove for the foreseeability of a COVID-19-like pandemic.

i. "Mark Lipsitch, an epidemiology professor at Harvard University, told us that there was plenty of evidence that a disease of this kind posed a serious threat and that the notion that it could not be foreseen is off base. '**Three years ago, experts were**

saying that bat coronaviruses could become a new pandemic,' he said in an email." [Emphasis added.]

ii. "A week before the Trump administration took office in January 2017, Obama administration officials focused on the dangers of a pandemic in a briefing for top Trump aides, according to Politico. **One of the possible scenarios sketched out included a fast-spreading global disease leading some countries to impose travel bans.**" Says Lisa Monaco, President Obama's homeland security advisor, "**We included a pandemic scenario because I believed then, and I have warned since, that emerging infectious disease was likely to pose one of the gravest risks for the new administration.**" [Emphasis added.]

e. T. Horimoto and Y. Kawaoka, *Influenza: lessons from past epidemics, warnings from current incidents*, Nature Reviews Microbiology, August 2005. This 2005 paper postulated that the then-recent outbreaks of H5 and H7 influenza raised a concern that a new influenza pandemic would occur in the near future.

f. David E. Sanger, Eric Lipton, Eileen Sullivan and Michael Crowley, *Before Virus Outbreak, a Cascade of Warnings Went Unheeded*, https://www.nytimes.com/2020/03/19/us/politics/trump-coronavirus-outbreak.html, March 19, 2020 – ("**As early as the George W. Bush administration**, homeland security and health officials focused on big gaps in the American response to biological attacks and the **growing risk of pandemics**.") [Emphasis added.]

g. Hilary Hoffower, *Bill Gates has been warning of a global health threat for years. Here are 11 people who seemingly predicted the coronavirus pandemic*, https://www.businessinsider.fr/us/people-who-seemingly-predicted-the-coronavirus-pandemic-2020-3, March 20, 2020. From this article:

i. "Infectious disease expert Michael Osterholm has also been warning of a global pandemic for the past decade. According to CNN, Osterholm wrote in *Foreign Affairs* magazine in 2005 that, 'This is a critical point in our history. Time is running out to prepare for the next pandemic. We must act now with decisiveness and purpose.'"

ii. "In a 2006 Flu Pandemic Preparedness Plan, these [Massachusetts] public health officials projected that as many as 2 million people could become ill…"

h. Michael T. Osterholm, *Preparing for the Next Pandemic*, Foreign Affairs, July/August 2005—("A number of recent events and factors have significantly heightened concern that a **specific near-term pandemic may be imminent**. It could be caused by H5N1, an avian influenza strain currently circulating in Asia. At this juncture scientists cannot be certain.") [Emphasis added.] This statement was made 15 years ago.

i. Center for Infectious Disease Research and Policy, University of Minnesota, *Foreign Affairs focuses on pandemic threat*, http://www.cidrap.umn.edu/news-perspective/2005/06/foreign-affairs-focuses-pandemic-threat, June 10, 2005—("*Foreign Affairs* is the second well-known journal in less than three weeks to publish a sizeable collection of articles on the threat of a pandemic. The British journal Nature published 10 articles on the subject in its May 26 issue.")

j. Joseph Young, *We Ignored This Chilling 2007 Warning of a Bat-Diet Coronavirus Pandemic*, https://www.ccn.com/we-ignored-this-chilling-2007-warning-of-a-bat-diet-coronavirus-pandemic/, March 24, 2020—("A 2007 study published by researchers at Hong Kong University **precisely predicted the reemergence of a coronavirus outbreak from bats**. … Studies in the early 2000s warned bats can cause the reemergence of coronavirus.") [Emphasis added.]

k. Emily Baumgaertner and James Rainey, *Trump administration ended pandemic early-warning program to detect coronaviruses*, https://www.latimes.com/science/story/2020-04-02/coronavirus-trump-pandemic-program-viruses-detection, April 2, 2020:

Two months before the novel coronavirus is thought to have begun its deadly advance in Wuhan, China, the Trump administration ended a $200-million pandemic early-warning program aimed at training scientists in China and other countries to detect and respond to such a threat.

The project, launched by the U.S. Agency for International

Development in 2009, identified 1,200 different viruses that had the potential to erupt into pandemics, including more than 160 novel coronaviruses. The initiative, called PREDICT, also trained and supported staff in 60 foreign laboratories—**including the Wuhan lab** that identified SARS-CoV-2, the new coronavirus that causes COVID-19.

The pandemic 'didn't surprise us, unfortunately,' said Jonna Mazet, executive director of the One Health Institute in the UC Davis School of Veterinary Medicine, who served as the global director of PREDICT for a decade. [Emphasis added.]

The fact that the U.S. Agency for International Development launched the project 11 years ago to detect potential pandemic viruses originating in, among other places, Wuhan, China, had detected more than 160 novel coronaviruses with the potential to erupt into pandemics, and that the pandemic did not surprise the global director of the program demonstrates the reasonable foreseeability of the COVID-19 pandemic.

l. And in Florida? South Florida *Sun Sentinel* Editorial Board, *Pearl Harbor, 9/11 and coronavirus*, Orlando Sentinel, April 9, 2020, at A10: "In 2005, when Jeb Bush was governor, health officials predicted 'a crisis remarkably similar to the one playing out now,' the [Tampa Bay] Times reported, 'a virus that could infect more than a million Florida residents.' **Preparation became a priority.**" [Emphasis added.] Unfortunately, Florida cut the funding for that preparation during the administration of Governor Rick Scott. This, despite the fact that during the Scott administration, "Florida experienced its worst tuberculosis outbreak in decades, the Zika virus infested South Florida, and a hepatitis A epidemic was declared a public health emergency." *Id*.

m. As referenced by the U.S. Supreme Court in *Bruesewitz v. Wyeth, LLC*, 562 U.S. 223 (2011) (Sotomayor J., dissenting), the U.S. Congress has recognized the importance of dealing with pandemics when it "authorized the Secretary of Health and Human Services to designate a vaccine designed to prevent a pandemic or epidemic as a 'covered countermeasure.' 42 U.S.C. §§ 247d-6d(b), (i)(1), (i)(7)(A)(i)." *Id*. at 253. This decision appears to be referencing the version of the statute that became effective on December 30, 2005.

n. Finally, as evidenced by statements in a variety of cases decided over the past several decades, many *force majeure* clauses list epidemics as a triggering event, *e.g., U.S. v. Utah Const. & Min. Co.*, 384 U.S. 394 (1966); *Harris Corp. v. National Iranian Radio and Television*, 691 F.2d 1344 (11th Cir. 1982); *U.S. v. Croft-Mullins Electric Co., Inc.*, 333 F.2d 772 (5th Cir. 1964). The inclusion of epidemics as triggering events in *force majeure* clauses is not surprising because a search through virtually any form book, old or new, will reveal epidemics listed as a triggering event in many forms for *force majeure* clauses.

If form makers over the years, and the thousands (millions?) of contract parties who have used their forms, thought it important to include epidemics as triggers for *force majeure* clauses, that equates into a general awareness of the reasonable foreseeability of epidemics. And if epidemics are reasonably foreseeable, it follows that a pandemic ought to be reasonably foreseeable, since it is just an epidemic on a bigger scale. *See*, https://www.dictionary.com/e/epidemic-vs-pandemic/ ("Compared to an epidemic disease, a pandemic disease is an epidemic that has spread over a large area, that is, 'it's prevalent throughout an entire country, continent, or the whole world.'")[9]

Perhaps the only thing that was not foreseeable with regard to the current COVID-19 pandemic is the number of government officials who claim that it was not foreseeable. Because make no mistake, as the above sources and many others demonstrate quite clearly, scientists and public health officials have been sounding the warning for many years—at least the last 20 years—of the likelihood and dangers of an impending pandemic.

Thus, there is a strong argument to be made by a lender that a pandemic on the scale of the COVID-19 pandemic was reasonably foreseeable.

Conclusion

If the COVID-19 pandemic was reasonably foreseeable, the failure to address it in a contractual *force majeure* clause may well bar a debtor from the assertion of any COVID-19 defenses to nonperformance. An analysis of available sources strongly suggests that the pandemic was reasonably foreseeable and that anyone could have learned of the concomitant risks had they wished to do so.

A PARTIAL GLOSSARY OF TERMS[10]

Coronavirus: Coronaviruses are a large family of viruses that are common in people and many species of animals, including camels, cattle, cats, and bats. Coronaviruses are named for the crown-like spikes on their surfaces. Human coronaviruses were first identified in the 1960s. Currently, scientists know of seven different coronaviruses that can infect human beings. These seven are:

a. 229E

b. NL63

c. OC43

d. HKU1

e. MERS-CoV

f. SARS-CoV

g. SARS-CoV-2

The first four coronaviruses listed above are very common and have been known to science for a long time. If you look at the label on a bottle or can of Lysol, one of the things that it likely says is that it kills coronavirus. Depending on how old the bottle or can is, that label may well have been printed before the onset of the COVID-19 pandemic, but the U.S. Environmental Protection Agency has included several Lysol products on the list of disinfectants that may be used against SARS-CoV-2. (https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2)

People are infected with these first four types of coronaviruses all the time all over the world. They cause mild upper-respiratory tract infections, including about 20% of all common colds. https://www.webmd.com/cold-and-flu/cold-guide/common_cold_causes. Rhinoviruses cause another 10–40% of common colds, RSV and parainfluenza viruses cause another 20%, and the remainder are caused by various other viruses. (The causes of 20–30% of all common colds have not been identified.) *Id.*

The last three coronaviruses listed above are less common and more serious. MERS-CoV causes Middle East Respiratory Syndrome, also known as MERS. SARS-CoV causes Severe Acute Respiratory Syndrome, also known as SARS. SARS-CoV-2 causes COVID-19. Scientists think that SARS-CoV-2 is not new and has been infecting animals for some period of time. Now that it has begun to infect human beings, scientists refer to it as a novel (pronounced no'-vel) coronavirus—meaning a coronavirus that has not been previously identified. See https://www.webmd.com/lung/coronavirus-strains#1.

COVID-19: COVID-19 is an acronym. CO stands for corona. VI stands for virus. D stands for disease. 19 is the year in which the virus was identified—2019. COVID-19 is the disease contracted from exposure to SARS-CoV-2, a specific type of coronavirus. The death rate for COVID-19 appears to be somewhere between 0.4% and 3.4%. (For comparison, the death rate for seasonal Influenza A is 0.1%.) A new study by the University of Washington published on May 7, 2020, found that the national death rate is around 1.3%, roughly 13 times the death rate of seasonal Influenza A. https://medicalxpress.com/news/2020-05-covid-staggering-death-infected-symptoms.html. This increased death rate is particularly worrisome since some preliminary estimates are that COVID-19 appears to be much more contagious than Influenza A. Scientists measure the level of contagiousness of a virus via a "basic reproduction number," the R_0—pronounced R-naught. The R_0 for a virus is the average number of unvaccinated people who will be infected from one person with the disease. https://www.healthline.com/health/r-nought-reproduction-number. An R_0 of 1, for example, would mean that, on average, a sick person would infect one other person with the sickness. Seasonal Influenza A has an R_0 of 1.3. So a person with the flu, on average, infects 1.3 other people. COVID-19's R_0 is believed to be between 2 and 3 but may be as high as 6. https://www.livescience.com/new-coronavirus-compare-with-flu.html. So COVID-19 could be more than 4 times as contagious as Influenza A, and 13 times as deadly.[11]

Some simple math: In 2017–2018, a bad flu season in the United States, more than 44 million people caught the flu. Since COVID-19 is perhaps four times as contagious, that would equate to more than 170 million people contracting COVID-19. If the death rate from COVID-19 were 1.3%, that would equate to over 2.2 million deaths in the United States. Given these potential numbers, social distancing and governmental shutdowns of possible infection vectors appear to have been eminently reasonable.

H1N1: This is a combination of human, swine, and bird flu. It is a type of Influenza A but has mutated so that it is not the same as the Influenza A that causes seasonal flu. H1N1 is now believed to be the virus that caused the 1918 influenza pandemic. According to the CDC, during the 1918 pandemic, the virus may have infected a third of the world's population, killing more than 50 million people worldwide, and 675,000 in the U.S. Although, this 1918 influenza strain is sometimes referred to as the Spanish flu, some scientists now think that it originated

in Haskell County, Kansas, and then spread to soldiers at Fort Riley, Kansas, and then on to Europe and the rest of the world when some of those troops headed overseas to fight in World War I. Its misnomer as the Spanish flu was likely a result of the fact that, owing to the desire of the various World War I combatant countries to hide the toll that the influenza pandemic was having on their troops and their ability to wage war, most countries, including the United States, tended to play down the scope of the pandemic, and Spain was one of a very few countries to report that there was a serious pandemic in progress. Thus, the prevailing wisdom at the time was that the pandemic must have originated in Spain. *See* John M. Barry, The Great Influenza, The Story of the Deadliest Pandemic in History (2018).

Despite the large number of deaths from the 1918 H1N1 pandemic, the death rate overall was around 2%, which may not be too different from the anticipated death rate for COVID-19, perhaps lower in the opinions of some scientists.

H1N1 reappeared in 2009, causing a flu pandemic that killed more than 284,000 people globally, including 12,000 in the United States. The death rate for this 2009 pandemic was .02%, about double the death rate for Influenza A, but far short of the death rates experienced during the 1918 influenza pandemic and the current COVID-19 pandemic. https://www.healthline.com/health-news/how-deadly-is-the-coronavirus-compared-to-past-outbreaks#Seasonal-flu.

H5 and H7: H5 and H7 are avian influenza viruses. H5 GsGd and H7N9 viruses have recently caused several hundred human infections with high mortality rates. These viruses have not spread very easily from human to human, but if the viruses evolve so that they can spread by airborne routes, they will likely initiate a pandemic. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6164301/. Scientists at the National Institutes of Health are concerned enough about these viruses that they are urging "continued surveillance and pandemic preparedness efforts." *Id*.

H5N1: This is a type of H5 virus commonly referred to as bird flu or avian flu. It passes from bird to bird but can also be passed from birds to humans. Although that has been rare in the past, infections in Egypt suggest that widespread human transmission may be possible. http://www.emro.who.int/pandemic-epidemic-diseases/avian-influenza/h5n1-egypt-march-2014.html. When H5N1 does infect humans, it is very serious, killing approximately 60% of the people who have been infected with it thus far. https://www.who.int/influenza/human_animal_interface/avian_influenza/h5n1_research/faqs/en/. Scientists are concerned that H5N1 may mutate and cause a pandemic. https://www.nature.com/articles/srep38388.

Influenza A: This is found in humans and animals. It is responsible for most seasonal flu cases, and usually causes the most severe flu cases. H1N1—see above—is likely a mutated form of Influenza A. The death rate for Influenza A is around 0.1%. It kills between 291,000 and 646,000 worldwide annually.

Influenza B: This is found mostly in humans. Cases are usually less severe than Influenza A.

Influenza C: Affects only humans. Much milder than Influenza A or Influenza B. Symptoms are similar to the common cold.

Influenza D: Influenza D is widespread, but currently restricted to cattle and swine. Thus far, it has not exhibited the ability to be transmitted to humans.

MERS: MERS is the acronym for Middle Eastern Respiratory Syndrome. MERS is caused by the MERS-CoV coronavirus. While less contagious than COVID-19, the death rate from MERS may be as high as 34.4% according to the World Health Organization. https://www.who.int/emergencies/mers-cov/en/.

SARS: SARS is the acronym for Severe Acute Respiratory Syndrome. SARS is caused by the SARS-CoV coronavirus. While less contagious than COVID-19, the death rate for SARS globally is 15%, with patients 60 years of age and older having a death rate of 23.25%. https://www.healthline.com/health-news/how-deadly-is-the-coronavirus-compared-to-past-outbreaks#20022004-severe-acute-respiratory-syndrome-(SARS).

Endnotes

[1]Akerman LLP is a 100-year-old law firm with more than 700 attorneys located in 26 offices from coast to coast. Ed Foster is the chair of the firm's Financial Institutions Commercial Litigation Practice.

[2]*See also* Section 2-615 of the Uniform Commercial Code and *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F.Supp. 429, 438 (S.D. Fla. 1975) – (Holding that the burden of proof is on the party claiming excuse, and that, "In short, for U.C.C. § 2-615 to apply there must be a failure of a pre-supposed condition, which was an underlying assumption of the contract, which failure **was unforeseeable**, and the risk of which was not specifically allocated to the complaining party.") [Emphasis added.] *Accord, Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 991-992 (5th Cir. 1976). *See also In Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.*, 910 N.Y.S.2d 408 (N.Y. Sup. Ct. 2010) (Force majeure clauses to be narrowly construed and "Further, there has been no showing that the prospect of a severe economic downturn was not reasonably foreseeable."); 30 Lord, Williston on Contracts § 77:31 4th ed.

[3]*See also* 1 Am.Jur.2d *Acts of God* §§ 8-11; 11 Fla. Jur.2d *Contracts* § 264, noting that an "Act of God" sufficient to excuse the nonperformance of a contract must be "so extraordinary and unprecedented that human foresight could not anticipate or guard against it, and the effect of which could not be prevented or

avoided by the exercise of reasonable prudence, diligence or care."

[4]This is not surprising. As noted in Michael Lewis, The Fifth Risk (2018), "Some of the things any incoming president should worry about are fast moving: pandemics, hurricanes, terrorist attacks." *Id*. at 48. Prior to the current pandemic, the United States had suffered pandemics in 1889, 1918, 1957, 1968, and 2009. John M. Barry, The Great Influenza, The Story of the Deadliest Pandemic in History (2018).

[5]Wasn't clear why this is highlighted (in some places it looks like the intent was for "emphasis added" but not all highlighted sections say "emphasis added" so just asking for clarification as a global comment)

[6]Wasn't clear why this was highlighted

[7]The list of sources that follows is by no means exhaustive. A quick Google search of "COVID knew this was coming," "was the pandemic foreseeable," or any number of other similar searches, reveals a plethora of articles on the subject, virtually all of which conclude that a pandemic like the coronavirus pandemic has been predicted and anticipated by a wide range of people and public and private institutions for many years.

[8]Rand Corporation is a nonprofit corporation that was established in 1948 "… to further promote scientific, educational and charitable purposes, all for the public welfare and security of the United States of America." https://www.rand.org/about/history/a-brief-history-of-rand.html. It has been described as "… an American nonprofit global policy think tank created in 1948 by Douglas Aircraft Company to offer research and analysis to the United States Armed Forces. It is financed by the U.S. government and private endowment, corporations, universities and private individuals." https://en.wikipedia.org/wiki/RAND_Corporation.

[9]A borrower may argue that a pandemic is less foreseeable than an epidemic, and so the failure to include epidemics in a *force majeure* clause should not be viewed as shifting the risk of a pandemic to the borrower—and should not bar the borrower from raising the occurrence of a pandemic as a defense to nonperformance, using one of the doctrines discussed below. But to many borrowers—hoteliers, restaurateurs, apartment complex owners, a local homebuilder, etc.—it really does not matter if the event that is making his/her customers sick and/or unable to pay for services or rent is a local epidemic or a global pandemic. So if the *force majeure* clause did not include epidemics, and so shifted the risks posed by epidemics to the borrower, the lender would argue that it also shifted the risks posed by pandemics.

[10]The sources for many of these definitions include materials readily available at the Centers for Disease Control (CDC) website (www.cdc.gov) and https://www.verywellhealth.com/learn-about-different-types-of-flu-770509#citation-7.

[11]For example, as of May 4, 2020, 15 weeks into the pandemic, COVID-19 had resulted in 68,442 deaths in the United States from 1,177,784 reported cases, a mortality rate of more than 5.8%. By contrast, during 2017–2018, a particularly severe flu season, the United States suffered fewer deaths from the flu, 61,099, over 30 weeks, despite having more than 38 times as many cases—44,802,629. As of August 20, 2020, the United States was reporting 5,545,427 COVID-19 cases and 173,514 deaths, a mortality rate of more than 3.1%. By September 16, 2020, the United States was reporting 6,609,770 COVID-19 cases and 196,023 deaths, a mortality rate of 2.96%. Of course, the actual mortality rate is likely lower than 2.96% since many who have contracted COVID-19 may be asymptomatic and their cases undetected and unreported. *See* Pulmonology Journal, *Evaluating the massive underreporting and undertesting of COVID-19 cases in multiple global epicenters*, June 14, 2020 - https://www.journalpulmonology.org/en-evaluating-massive-underreporting-undertesting-covid-19-avance-S253104372030129X - ("Our data indicate that countries like France, Italy, the United States, Iran and Spain have extremely high numbers of undetected and underreported cases.") That said, the fact remains that COVID-19 is just much more lethal than Influenza A. https://www.healthline.com/health-news/why-covid-19-isnt-the-flu#More-deaths-in-a-shorter-span.

"Original" Sins

By Justin Lischak Earley, First American Title Insurance Company†

The other day, I used an electronic signature feature of Adobe Acrobat to sign some documents for a board of directors on which I serve. After emailing the electronically signed documents to the company's records manager, he thanked me but asked that I follow up with "an original" by mail.

I understand this gut reaction. Historically, the law focused on "original" documents, because mere "copies" could be altered, incomplete, or otherwise unreliable.[1] The records manager sought to avoid these problems by invoking an old rule of thumb to "treat electronic transmissions as copies, and always get an ink-signed original." I will call this the "belt and suspenders approach," or "BASA."

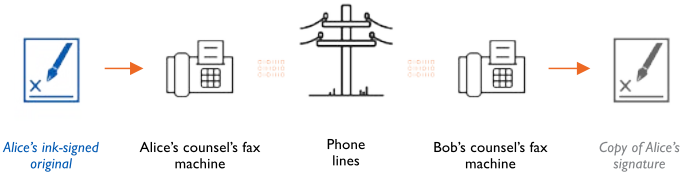
In this article, I challenge the BASA orthodoxy. I contend that it is time we leave behind the 20th century heuristic that anything arriving via an electronic transmission is a mere "copy," and accept this 21st century truth instead:

Original Signature > Wet Ink Signature

Let's consider the common fact pattern of a real estate purchase agreement negotiation between two parties, Alice and Bob. Bob agrees to pay Alice $100,000 for Blackacre, and Alice agrees to deed Blackacre to Bob in exchange for the payment. What happens if a dispute arises between the two about their agreement?

There are actually two different questions bound up in this fact pattern. The first is whether Alice and Bob *have an agreement*.[2] That is, do Alice and Bob have a meeting of the minds?[3] The second question is what it takes to *evidence the existence* of that agreement in the event one must "prove it" to obtain legal enforcement.[4]

For centuries, we real estate lawyers have been conveniently able to collapse these two questions together because the Statute of Frauds requires that an agreement to sell or mortgage real property is not enforceable unless it is both "in writing" and "signed" by the party to be charged.[5] Parol contracts to purchase or encumber real estate are generally unenforceable.[6] Therefore, what it takes to *create* a contract and what it takes to *evidence* that contract are, for our purposes, typically one and the same. For generations of lawyers, that meant obtaining a piece of paper with an ink signature on it.



In the late 1980s, the widespread adoption of the facsimile ("fax") machine threw the first monkey wrench into this worldview. In the fax era, Alice's counsel could place Alice's ink-signed "original" signature page into a fax machine, dial the numbers for Bob's counsel, and the fax machine in Bob's counsel's office would print out a reproduction ("copy") of Alice's signature page.[7] The fax process can thus be graphically represented as follows:

It is important to recognize that this process was, at its core, *still paper-based*: one could not fax an ink signature page that did not physically exist. The entire fax process thus hinged on the existence of the same traditional, ink-signed "original" as had been the case since time immemorial.[8]

The fax machine allowed lawyers to transmit signatures across vast physical distances with near immediate effect. But was this reproduction of Alice's signature as received by Bob's counsel enforceable against Alice? Surely it was not an "original" in the prevailing sense of the word at the time. The "original" of Alice's signature was the physical piece of paper that Alice had signed with a pen, and which remained in the physical possession of Alice's counsel. The fax machine was not a teleportation machine. And the so-called "best evidence rule" still loomed over anyone attempting to rely on a mere "copy" to prove the contents of a document.[9] Several cases from the late 1980s thus evidence a lack of clarity about the law and practice surrounding faxed signatures.[10]

Rightly fearful of a scenario wherein it would prove difficult or impossible to enforce the contract on a mere copy of Alice's signature as emitted by the fax machine, lawyers in the situation of Bob's counsel thus requested that Alice's counsel mail Alice's ink-signed original to them as well. Thus, the BASA was born. As one author of the time period noted, "[T]he custom among cautious users is to mail the fax recipient the original paper as well. The reason is that

the legal utility of fax is perceived as suspect."[11] Another contemporaneous author warned that lawyers should "*Always* save the original (with its [fax] cover sheet attached) of any document faxed to another party."[12]

But at least one commentator at the time took a dim view of the BASA, believing it to be unnecessary and self-defeating:

> The same ill-conceived notion of the [in]validity of fax signatures seems to hold that if a faxed document is going to be sent, the sender should follow up with a mailing of the original.
>
> The necessity of such duplication is rejected by the law of signatures in general and the reasoning of [*Madden v. Hegadorn*] in particular. But of equal importance, a follow-up mailing practice actually may be counterproductive to its goal.
>
> It is loosely thought that a fax sender is protecting himself or herself by making a follow-up mailing of the original. However, the main danger of using a fax is fraudulent signature switching and page switching by the recipient. [In the event of a fraud], the best defense the fax sender can have is to produce the original.[13]

At its core, this commentator's critique is that many at the time failed to distinguish between "originality" and "enforceability." With that point I agree, and the problem remains pervasive today. These two concepts are closely related, but as we will see below, they are not the same.

Notwithstanding this debate, the BASA soon became ingrained practice. And shortly after the BASA was accepted as the *de facto* operating procedure for fax signatures, the birth of the internet created electronic mail ("email"). As law offices gained email access, lawyers saw in email an easy parallel to the fax machine: a computer with a document scanner could be used in the same manner as a fax machine. Lawyers therefore reached for the BASA in this analogous context, and simply adapted the BASA to its new technological environment. Instead of "fax a copy, with original to follow by mail," it became "email a scanned copy, with original to follow by mail." This instantiation of the BASA still exists in commercial real estate practice today.

But there is an important change that happened in the years after the BASA became common practice. In 1999 and 2000, the electronic signature laws UETA and E-SIGN (collectively, the "E-Signature Statutes") came into effect. There are numerous other sources that discuss these foundational laws in detail, and I will not recap them here other than to briefly summarize two key provisions of these laws:

1) An electronic signature is any "electronic sound, symbol, or process" evidencing assent to an agreement;[14] and

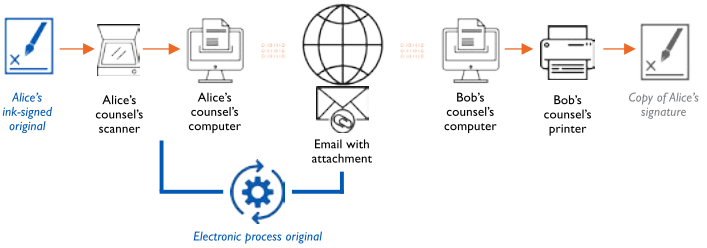
2) An electronically-signed document that can be accurately reproduced is "an original" by statute.[15]

Alas, we lawyers are precedent-based, change-averse creatures. Although the E-Signature Statutes eliminated the legal need for an ink-signed paper "original" in many (if not most) circumstances, we continue to create such ink-signed paper "originals" and to use the BASA for their transmission. In my view, we do so because we often think that an electronic signature has to be some type of formal process provided by a third-party e-signature vendor. But this is not true. As UETA's official commentary notes:

> The idea of a signature is broad and not specifically defined ¼. No specific technology need be used in order to create a valid signature ¼. [T]he essential attribute of a signature involves applying a sound, symbol, or process with an intent to do a legally significant act.[16]

I therefore submit that the E-Signature Statutes wrought a fundamental change in the BASA that few seem to recognize: the electronic process of emailing a scan of a signature page *is now itself an "original."* Consider the ink-signed "original" signature page as executed by Alice. When Alice's counsel places it into a document scanner, the image rendered on Alice's counsel's computer screen is a mere "copy." But the E-Signature Statutes specify that any electronic sound, symbol, *or process* meant to evidence assent counts as a signature. Email is an electronic process. A reasonable person would surely conclude that when Alice allows her counsel (who is acting within the course and scope of client representation[17]) to email Bob's counsel a scan of Alice's signature page, this electronic process is meant to indicate Alice's assent to the agreement.[18] Therefore, as long as the email with the attached signature page scan can be reproduced in an unaltered form, it is itself an "original" under the E-Signature Statutes.

In short, the electronic process of emailing a scan of an ink signature page to a counterparty can transmogrify what was formerly a mere "copy" (the scan) into an "original" (an email with the scan attached).[19] Thus, using the BASA can result in *two* originals—one the ink-singed paper, and one the result of the emailing process, as shown below:



This realization causes one to question why we still utilize the BASA. What *legal* purpose does the BASA now serve? I submit that there is little. At the time the BASA was developed, faxed or emailed signature pages were "copies" of a paper "original," and protecting the sanctity of that ink-signed, physical "original" theoretically had some evidentiary value in the event of a dispute. But the E-Signature Statutes now cause the BASA to collapse upon itself in its ordinary use. Rather than protecting the sanctity of the "original" ink-signed paper, the BASA now creates a competing "electronic original."[20]

As was argued in 1991, so also now 30 years later: "[T]he best defense that a [signature] sender can have is to produce the original."[21] But now, which "original"? The ink-signed paper or the email with an attached scan of the ink-signed paper? Perhaps the distinction does not matter if there is no difference between the two, but how often does one send an email without any accompanying text? In the hands of an opposing litigator, that accompanying text can become a weapon used to contend that the email text alters or amends the substance of the agreement.

To be clear, I am not contending that using the BASA is always improper, nor am I suggesting that we should wholly rewire the everyday machinery of real estate practice just to avoid it. There are exceptions to the E-Signature Statutes where "an [ink] original" may be legally necessary.[22] I also fully recognize that the BASA has *practical* value, especially since many (particularly in the commercial space) are used to it. My point here is simply to show that the BASA is not risk-free. It has become a bit like the intestinal tract's appendix: generally harmless, but when it goes wrong, watch out!

There is a way out of this vortex. It is to accept that "originals" are now more than ink-signed pieces of paper, and to recognize that what is (or is not) an "original" is generally no longer outcome-determinative as to whether an agreement is "enforceable." This is so for two reasons: First, as set forth above, the E-Signature Statutes can turn many (if not most) electronic things into "originals." And second, even when something is technically a "copy," the formerly rigid best evidence rule has now become a low bar to meet in today's electronic age because computers are not subject to the same scribal errors that humans routinely commit.[23]

I submit that we are thus better served by viewing these issues through classic contract offer and acceptance conditions in most circumstances. Although just about any email (whether or not it has the sender's manually typed name or an automatically generated "signature block") can now legally constitute an "original electronic signature,"[24] this matters naught unless the parties have agreed to conduct a transaction by electronic means. And "[w]hether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct."[25] Therefore, the better approach is not to split hairs about whether a signature is an "original," but rather to clearly specify the signature-procedure manner by which an agreement is to become *enforceable*.

A pair of cases indicates the soundness of this approach. In *SN4, LLC v. Anchor Bank*,[26] a distressed property investor and a bank disputed whether the bank had agreed to sell some REO to the investor. The facts were a soupy mess of half-executed contract drafts, emails, and phone calls. The distress investor assembled this muddy fact pattern into a claim that the bank had agreed to sell the REO for a certain price, and sued the bank to enforce the purported deal.[27] Resolving the question in favor of the bank, the court explained:

> [W]hile contracting parties may agree to negotiate and form a contract by electronic means, doing so does not mean that they have also agreed to electronically [sign] whatever agreement may result from their electronic negotiations.
>
> Here, there was no express agreement between the buyers and the bank to electronically [sign] the purported agreement. Moreover, their conduct does not evidence an implied agreement to do so.[28]

A similar result entailed in *Powell v. City of Newton*.[29] In this case, a landowner had a trespass dispute with the city in which he lived. The trespass dispute ripened into litigation, and a trial began. Midway through trial, the parties reached an oral agreement to settle the case by means of the city purchasing part of the landowner's property, which oral agreement was discussed and assented-to in open court, but not fully reduced to writing until after court adjourned. By the time documents were drawn up, the landowner had changed his mind, and refused to execute them.[30] The city attempted to enforce the agreement by claiming that emails between the landowner's counsel and the city's counsel constituted an electronic signature, binding the landowner.[31] The state supreme court rejected this argument, concluding:

> While the attorneys for the parties used e-mail and other electronic means to exchange documents and resolve details of the settlement agreement, their conduct indicated an understanding that the signature required ¼ for this conveyance of land would be [the landowner's] physical signature. ¼ [W]e conclude that the parties did not agree to use electronic signatures in lieu of physical signatures in this transaction.[32]

Neither of these cases feature any dispute about "originality." I submit that this is because in the wake of the E-Signature Statutes and modern formulations of the best evidence rule, "originality" is rarely a material question. Rather, the material question is whether, under the facts and circumstances, the parties agreed to be bound. And there is no reason that we as scriveners need to leave this to chance.

Contract law gives us the power to tailor specific language defining what it takes to accept an offer. We can make these provisions as broad or as narrow as the circumstances should merit. If we want to make things easy for the parties, we can specify that the agreement can be accepted by simply emailing a scanned copy of an ink signature page.[33] The agreement need only expressly say so.[34] If it does, there is no need for an "ink-signed original to follow by mail" under the BASA. As set forth above, the electronic process of emailing a scan of the ink signature page is itself an "original" under the E-Signature Statutes.

If we want to be more restrictive than that, we can be. There are plenty of fact patterns (e.g., a loan workout) where prudence counsels a harder line on this subject, so as to avoid any uncertainty about whether an agreement is finalized and enforceable. If our agreement can *only* be accepted by mailing an ink signature page to the counterparty, the agreement should expressly say so. If the agreement can *only* be accepted by means of sending a web link to a video recording of the signer performing an interpretive dance of his or her acceptance, the agreement should expressly say so.

Defining the exact parameters of how an agreement becomes binding avoids any factual dispute about whether a party intended to be bound. It helps cut through the fronds and brambles of any series of emails, texts, instant messages, phone calls, voicemails, social media posts, smoke signals, carrier pigeon messages, or any other form of communication. Adopting this approach helps us to disentangle the concept of "originality" from the concept of "enforceability." Although combining those concepts made sense in the fax era as a practical rule of thumb, that heuristic has outlived its usefulness. Instead, our focus should be on clearly defining within the text of our agreements what it takes to make those agreements become binding. In so doing, we can avoid the conceptual rabbit hole of "original" sins.

Endnotes

† I currently serve as Underwriting Innovation Director in the Corporate Underwriting Department (a/k/a Home Office Underwriting Department) of First American Title Insurance Company in Santa Ana, California. The views expressed here are entirely my own personal views and may not necessarily be the views of my employer. This is a purely academic article, and my views are in no way, shape, or form investment advice as regards my employer, nor are they legal advice as regards anyone or any situation. I can be found at https://jdlesq.com.

I offer my thanks to Jim Nelson, Chris Hultzman, Justin Scorza, Phil Sholar, Michael O'Neal, and Laura Schmidl for their peer review of this piece. To be clear, the arguments here are solely my own.

[1]*See, e.g., Sauget v. Johnston*, 315 F.2d 816, 817-18 (9th Cir. 1963) ("The primary reason the original of a writing is preferred to a copy is that the copy is always subject to errors on the part of the copyist.").

[2]Restatement (Second) of Contracts § 17(1) (Am. Law Inst. 1981) ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.").

[3]*Id.* cmt. c ("The element of agreement is sometimes referred to as a 'meeting of the minds.'").

[4]*See id.* at § 110(1)(d) ("The following classes of contracts are applicable to a statute, commonly called the Statute of Frauds, forbidding enforcement unless there is a written memorandum or an applicable exception: … a contract for the sale of an interest in land ….").

[5]*See id.*

[6]*See id.* at § 127 ("An interest in land within the meaning of the Statute [of Frauds] is any right, privilege, power or immunity, or combination thereof, which is an interest in land under the law of property ….").

[7]*See, e.g., Madden v. Hegadorn*, 565 A.2d 725, 728 (N.J. Super. Ct. 1989) ("It is common knowledge that 'fax' machines electronically scan documents, reduce the documents to a series of digital signals and transmit them over telephone lines to a receiving machine which reassembles the signals and then reproduces the [transmitted] documents."). Although this discussion about fax machines may seem trite to seasoned attorneys, it is important to remember that there may well be readers of this document who have never heard a phone's dial tone, let alone seen a fax machine. Some of those same readers will become members of the bar in the next few years. For this next generation, the fax machine will be as much a historical relic as was the telegram for my generation of lawyers.

[8]I recognize that even in the early 1990s it was technologically possible to send a fax via computer, without the existence of a physical piece of paper. *See, e.g.*, Marie A. Piccoli, *Executing Real Estate Contracts by Fax*, 9 Probate & Property 15, 16 (Am. Bar Assoc. May/June 1995) ("Faxing can be done by computer, so the sender may not have a hard copy of the faxed document.") Nevertheless, the law at that time did not clearly support the use of electronic signatures, and so contemporary sources of that time show that the usual course of affairs at the time was still based on the existence of a physical piece of paper singed in ink by the contracting parties.

[9]Fed. R. Evid. 1002 ("An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.").

[10]*See, e.g., Bazak Int'l v. Mast Indus.*, 538 N.Y.S.2d 503, 504 (N.Y. Ct. App. 1989) ("At the heart of the dispute are two issues involving telecopied purchase orders."); *Madden*, 565 A.2d at 726 ("[D]efandant Hegadorn stated her position that the [candidate's election filing] was defective because of the facsimile signatures.").

[11]Benjamin Wright, *Fax Pacts*, Network World, Feb. 5, 1990, at 70, *available at* https://books.google.com/books?id=lBwEAAAAMBAJ&lpg=PA69&ots=yMy3iTF19j&dq=benjamin%20wright%20fax%20pacts%20PA1#v=onepage&q=benjamin%20wright%20fax%20pacts%201990&f=false (last visited Jan. 18, 2021).

[12]Piccoli, *supra* n.8, at 16 (emphasis in original).

[13]Richard G. Barrows, *Fax Law – A Compendium of Reported Cases*, 17 Law Prac. Mgt 28 (Am. Bar. Assoc. Nov./Dec. 1991) (not paginated in LexisNexis).

[14]Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7006(5) ("The term 'electronic signature' means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record."); Uniform Electronic Transactions Act § 2(8) ("'Electronic signature' means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with intent to sign the record.") (hereinafter "UETA").

[15]15 U.S.C. § 7001(d)(3) ("If a statute, regulation, or other rule of law requires a contract or other record … to be provided, available, or retained in its original form … that … rule of law is satisfied by an electronic record [that can be accurately reproduced]."); UETA § 12(d) ("If a law requires a record to be presented or retained in its original form … that law is satisfied by an electronic record [that can be accurately reproduced].").

[16]UETA § 2 cmt. (official commentary to the definition of "electronic signature").

[17]*E.g., Link v. Wabash Ry. Co.*, 370 U.S. 626, 634 (1962) ("[E]ach party is deemed bound by the acts of his lawyer-agent …."); Restatement (Third) of the Law Governing Lawyers § 26 (Am. Law Inst. 2000) ("A lawyer's act is considered to be that of the client … in dealings with third persons when … the client has expressly or impliedly authorized the act …."). It is hard to imagine Alice's counsel emailing Alice's signature page unless Alice has expressly authorized her counsel to do so. But even if counsel erred and "jumped the gun" by transmitting Alice's signature page without express authorization, Alice will still probably have a difficult time escaping the contract, because Alice is probably bound to the contract on account of apparent authority anyway. *See* Restatement (Second) of Agency § 2.03 (Am. Law Inst. 2006) ("Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes that the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations.").

[18]That is, unless there is something specific about the facts and circumstances clearly showing that this electronic process was not, in and of itself, meant to evidence assent to the agreement. That is the key point I take up below. For now, it is enough to say that under the E-Signature Statutes, one claiming that a contract is not binding merely because one didn't send "the [ink] original" is going to have a very hard row to hoe.

[19]Technically, one should hedge this statement with two caveats: First, the email with its scan attachment must be accurately reproduced when called upon. *See, e.g.*, UETA §§ 12(d) & 12(a) (providing that a document is an "original" if it "accurately reflects the information set forth in the record after it was first generated in its final form … and remains accessible for later reference"). And second, the facts and circumstances must illustrate that the sender intended to be bound by this electronic act. *See, e.g., id.* at § 2 cmt. ("In any case the critical element is the intention to executed or adopt the sound or symbol for the purpose of signing the record.") (official comment on the definition of "electronic signature"). I submit that in most ordinary circumstances involving Alice and Bob, both caveats will be easily satisfied. Electronic data such as emails are now routinely stored with perfect accuracy and redundant backups, and it's hard to imagine why Alice's counsel would transmit Alice's scanned signature page via email to Bob's counsel if not to indicate Alice's assent to an agreement.

[20]This realization has practical consequences. For example, it calls into question the idea of emailing scans of a party's signature pages, "just to show that they're in one's possession but not to indicate final agreement." It is not hard to imagine how this could be misinterpreted by a counterparty, court, or jury. As set forth below, the solution to this problem is to clearly define what signature procedure is required to finalize an agreement.

[21]*Barrows, supra n.13.*

[22]For example, the E-Signature Statutes do not apply to all types of documents or all types of agreements. There are still places where "an [ink] original" is necessary. *See* UETA § 3(b) (specifying those transactions to which UETA does not apply); 15 U.S.C. § 7003(a) (same, for federal E-SIGN).

[23]*See* Fed. R. Evid. 1003 ("A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate."); *id*. Adv. Comm. cmt. ("When the only concern is with getting the words or other contents before the court with accuracy and precision, then a counterpart serves equally as well as the original, if the counterpart is the product of a method which insures accuracy and genuineness.").

[24]*See, e.g., Khoury v. Tomlinson*, 518 S.W.3d 568, 577-579 (Tex. Ct. App. 2017) ("We hold that the email name or address in the 'from' field satisfies the definition of a signature under existing law.") (collecting and examining cases in accord).

[25]UETA § 5(b).

[26]848 N.W.2d 559 (Minn. Ct. App. 2014).

[27]*Id*. at 562-65.

[28]*Id*. at 567.

[29]364 N.C. 562 (2010).

[30]*Id*. at 563-64.

[31]*Id*. at 567-68.

[32]*Id*. at 568.

[33]This is exactly what one author suggested be done with faxes, way back in 1995. Piccoli, *supra* n.8, at 16 ("If the parties agree, the lawyer can add to the contract a written statement that the parties are entering into a binding agreement by faxed documents.").

[34]For example, some contracts expressly recount that an emailed PDF of an ink signature page constitutes "an original, for all purposes." *Cf.* Fed. R. Evid. 1001(d) ("An 'original' of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it."). This is close, but slightly off target, because it continues to focus on what is "original" rather than how the agreement is made "enforceable." Instead, I submit that the contract should specify that it can be accepted by emailing the counterparty a PDF of the signer's ink signature page, and that the parties agree that this electronic process will constitute a binding electronic signature. If the contract does this, I submit that the email with its PDF attachment is by definition "an original" under the E-Signature Statutes. Under this approach, the parties' intentions about this electronic process are made crystal clear.

New COVID Residential Mortgage Borrower and Tenant Protections in California: Significant Temporary Mandates—Can They Become Permanent Requirements?

By Michael Flynn, Buchalter

The COVID crisis and lockdowns have produced tremendous hardships for those facing loss of income through unemployment, and for businesses facing reduced revenues. The impact has been particularly noticeable in the area of single-family and multifamily residential properties. Homeowners have been unable to make mortgage payments, tenants have been unable to pay rent when due, and property owners and landlords have seen significant reductions in rental revenues.

Federal and state governments moved quickly to address many of these issues. Relief programs such as the Paycheck Protection Program were created to aid small and medium-sized businesses. At the same time, steps were taken across the country to protect homeowners and tenants through increased mortgage forbearance requirements and foreclosure and eviction moratoriums and other restrictions.

These residential homeowner and tenant relief programs have had significant impacts on single-family and multifamily owners and investors, lenders, and landlords. Yet even as these programs are extended in reaction to the continuing COVID emergency, we have seen California take a leading role in creating and implementing new programs and protections that will have an extensive impact on the same single-family and multifamily owners and investors, lenders, and landlords. Further, given the timeframes of some of these new programs, and California's leading position in terms of tenant and borrower protections, these new programs merit examination due to the possibility that many of their requirements will become long-term or permanent mandates.

As the COVID crisis has continued unabated, California has moved beyond the initial forbearance rules and foreclosure and eviction moratoria. It has enacted three new laws, Senate Bills 1079 (SB 1079) and 91 (SB 91) and Assembly Bill 3088 (AB 3088), that impose significant new requirements and restrictions regarding:

- Limitations on mortgage foreclosures and evictions;
- Limitations on the collection of past due rent;
- Foreclosure sale processes;
- New rights for tenants and many unaffiliated third parties to delay the results of trustees' foreclosure sales and ultimately, and after the fact, outbid the high bidder at a foreclosure sale;
- Extended mortgage forbearance requirements.

This article will examine the requirements of these key new California residential mortgage and tenant protection laws, noting how these important yet seemingly temporary COVID-related provisions have the potential to be extended for far greater time periods as the COVID crisis continues. Further, given California's focus on tenant rights, affordable housing, and borrower rights, the article notes how these laws have the potential to become more permanent requirements impacting landlords, residential property owners, and residential lenders.

Initial Implementation of California and Federal Residential Foreclosure and Eviction Moratoria

Following the outbreak of the COVID pandemic, California, like many other jurisdictions, adopted a number of measures to limit both commercial and residential foreclosures and evictions. Initially, Governor Newsom issued an executive order authorizing local jurisdictions to impose such moratoria. Many cities and counties did so, temporarily limiting or banning foreclosures and/or evictions in either the commercial or residential setting, or both.

Meanwhile, consistent with restrictions imposed by Freddie Mac, Fannie Mae, and FHA, over 200 banks and major lenders entered into agreements with California's governor to suspend residential foreclosures and evictions.

Additionally, for several months, the California Judicial Council suspended all court activities related to foreclosures and unlawful detainer matters.

At the same time, Congress enacted the CARES Act, which, among other relief, provided foreclosure and eviction moratoria in relation to residential mortgages that are "federally backed." As a result, the, federal agencies such as FHA, VA and USDA, along with Freddie Mac and Fannie Mae and FHA, imposed and then repeatedly extended various foreclosure and eviction restrictions for single family and multifamily residential properties. For

instance, Freddie Mac and Fannie Mae have extended their foreclosure moratorium on Enterprise-backed, single-family mortgages, and their eviction moratorium on properties that have been acquired by them through foreclosure or deed-in-lieu of foreclosure transactions at least four times, with the latest extension to at least March 31, 2021. FHA extended its single-family foreclosure and eviction moratorium, and the deadline for asking for COVID-related forbearance, until at least June 30, 2021. Similarly, Freddie Mac and Fannie Mae announced that they would extend the deadline for requesting a new or supplemental COVID-19 forbearance agreement for their multifamily loans to March 31, 2021.

California Recently Adopted More Extensive Requirements

All of these residential moratoria had (or, if still in place, have) short timeframes. However, as the COVID crisis has continued, with no short-term end in sight, and particularly recognizing that at some point residential foreclosures and tenant evictions will again commence, late in its 2020 session, the California legislature enacted SB 1079 and AB 3088. Some of the new requirements in these statutes already have lengthy time periods, and if any of them are seen as being particularly helpful to the intended beneficiaries, they may have the potential over time to become long-term or permanent features in California. Many of these time periods for the restrictions and requirements of SB 1079 and AB 3088 were recently extended by the passage of SB 91.

California SB 1079—Foreclosure Delays and Special Bidding Rights for Designated Individuals and Organizations

On September 28, 2020, Governor Newsom signed Senate Bill 1079 into law. The law was designed to help address the need for availability of and preservation of affordable housing. The method chosen creates significant impacts on and changes to the trustee's foreclosure sale process in California.

The law is not designed as a mere short-term solution; it is in effect from January 1, 2021, until January 1, 2026.The law applies to one-to-four-unit residential properties, regardless of whether the owner also owns other rental properties. It creates a number of new foreclosure sale timing and process changes and uncertainties. It allows a number of categories of persons, government agencies, and other entities to delay the results of trustee foreclosure sales, and to after-the-fact outbid the high bidder at the trustee's foreclosure sale.

Historically in California, nonjudicial foreclosure sales on residential real property (based on foreclosure of the underlying deed of trust) have been deemed complete and final when, at the trustee's sale, the auctioneer accepts the final bid and, 15 days later, the trustee records and delivers a trustee's deed to the purchaser. SB 1079 dramatically changes that process, building in new uncertainties and delays.

First, SB 1079 creates several classes of "eligible bidders" who will have special rights to bid on residential properties **after** the trustee's sale:

- "Eligible tenant buyers" (any natural person who at the time of the trustee sale occupies the real property as their primary residence under a rental or lease agreement);
- Various parties who have no connection to the property, such as certain organizations focused on development and preservation of affordable housing, community land trusts, limited equity housing cooperatives, and various government bodies;
- "Prospective owner occupants," which is any natural person who submits an affidavit to the trustee affirming that he or she will occupy the property as his or her primary residence within 60 days of the trustee's deed being recorded and:
  - will occupy it as residence for at least one year;
  - is not the borrower, or the borrower's child, spouse, or parent; and is acting on his or her own behalf, not as an agent of any other person or entity.

Any of these "eligible bidders" can delay a determination of who is the prevailing bidder for 45 days. Instead of the trustee recognizing the high bidder at the trustee's sale as the prevailing bidder, if, at the completion of the trustee's sale, a "prospective owner occupant" (as defined above) is the highest bidder at the sale, he or she is deemed to be the winning bidder. Otherwise, within 15 days of the trustee's sale, any "eligible bidder" may submit a bid or give non-binding notice of the intent to later provide a bid that will exceed the winning bid at the foreclosure sale (or, in the case of eligible tenant buyers, match or exceed the bid). If an eligible bidder provides such a non-binding notice, the eligible bidder has 45 days from the trustee's sale to submit its bid. The trustee must wait for those 45 days and must then deliver title to the eligible tenant buyer or other eligible bidder with the highest bid amount.

This process will likely produce a great deal of uncertainty and delay in the foreclosure process. For instance, will the creation of special classes of eligible

bidders who can delay or overturn the finality of trustee's sales reduce the number of other bidders? Will the risk of delays and losing one's status as the prevailing bidder cause other bidders to reduce the amount of their bids? How will lenders factor in such issues when determining a proper credit bid amount? After all, they will not want to face the risks and costs of the 45 day delay.

And how will lenders and other bidders address the increased risk of waste and nuisance on foreclosed properties, given the likely delays in finalizing trustees' sales?[1] Additionally, of course, the new complexity of the foreclosure process and the introduction of many other interested parties as eligible bidders may greatly increase the amount of litigation challenging the outcome of trustee's sales.

To add further complexity and uncertainty to the foreclosure sale and bidding process, SB 1079 leaves a number of issues unaddressed. The law does not address the impact of a borrower filing a bankruptcy proceeding during the 45-day waiting period while the borrower still possesses legal title. It does not state whether it applies to properties under construction, nor does it address the result if multiple eligible bidders bid the same amount.

Regarding a future extension of SB 1079, these new procedures for residential trustees' sales are to remain in effect until 2026. One hopes that the COVID crisis will be long over by then. If so, there will be a significant length of time during which they operate in a non-crisis environment. That may lead some parties and the legislature to view them as normal, making it more likely they will then become permanent.

AB 3088 – Forbearance Requirements, Tenant Eviction Restrictions

On August 31, 2020, Governor Newsom signed AB 3088, which creates new protections for residential borrowers and tenants, including new forbearance protocols for lenders and new tenant eviction moratoria and delays. In addition, property owners, landlords, and lenders should consider the possibility that if California continues to see COVID hardships, these requirements may well be extended. Further, should they prove popular and/or effective, the legislature may make some of the provisions long term or permanent.

AB 3088 Forbearance Requirements

The new residential mortgage forbearance rules apply to forbearance requests made between September 1, 2020, and September 1, 2021, for loans originated before September 1, 2020. They apply to federal or state-chartered depository institutions, as well as any person required to be licensed with the California Department of Business Oversight or licensed through the Department of Real Estate under the Business & Professions Code. For a material violation of these provisions, a borrower may obtain injunctive relief, damages, restitution, and any other relief, including attorneys' fees and costs.

Borrowers eligible for these forbearance requirements include, among others, natural persons and entities that own a one-to-four-unit property, if the property is currently occupied by at least one tenant, and the entity is not a REIT or a corporation or LLC where at least one member is a corporation.[2] Vacant properties are included only if the property is owned by an individual, successor-in-interest, or someone with a power of attorney for either. The borrower must have been current on payments as of February 1, 2020, must be experiencing a financial hardship that prevents the borrower from making timely payments due, directly or indirectly, to the COVID emergency, and must request a forbearance.

If a forbearance request has a curable defect, the servicer must send the borrower a letter explaining the curable defects, give the borrower at least 21 days from mailed notice to cure the defects, accept additional information provided within 21 days as a revised forbearance request, and respond to the borrower's revised request within five business days of receipt. A servicer must notify the borrower in writing if it denies a forbearance request.

Compliance with the forbearance requirements under the CARES Act is deemed compliance with the above response requirements whether the loan is federally backed or not. This safe harbor means that most lenders/servicers, who likely have processes in place already to address the CARES Act requirements (including the GSEs' protocols put in place to address the CARES Act requirements), are likely already in compliance. However, lenders who do not deal with federally backed mortgages, such as some multifamily lenders, must determine what processes they must follow.

Similarly, AB 3088 also provides that after a COVID related residential mortgage forbearance period ends, a "mortgage servicer shall comply with applicable federal guidance regarding borrower options following a COVID-19 related forbearance." The statute does not define what "applicable federal guidance" means. This leaves open issues such as does a lender/servicer look to agency or GSE guidance for a federally backed loan? Or RESPA requirements for loans for lenders that are covered by RESPA? Again, for loans by lenders who do not originate federally backed mortgages, the servicer may be a small servicer not

covered by applicable rules of RESPA; in that instance, what would be the relevant "applicable" federal guidance?

Perhaps to address these questions, the statute provides general safe harbors for federally backed loans and nonfederally backed loans. A party is deemed to comply with the statute if it complies with the guidance to mortgagees regarding borrower options following a COVID-19-related forbearance provided by Fannie Mae, Freddie Mac, FHA, VA, or the Rural Development division of the Department of Agriculture. While it is not explicitly stated, presumably one should follow the guidance of the agency backing the loan at issue. There is no indication what guidance, if any, to follow if the loan is not federally backed. Further, this is a safe harbor, not a mandate. If, as discussed above, a lender that does not have federally backed loans does not wish to utilize this broad safe harbor, it may be unclear what guidelines it is to follow.

AB 3088 Tenant Eviction Restrictions

Related to the COVID crisis, AB 3088 creates extensive short-term eviction limitations and temporary postponement of payment of rent to protect residential tenants. As noted, many of the time periods provided in AB 3088 have been extended by SB 91. As discussed earlier, California's history as a very pro-tenant and pro-consumer state gives reason to believe that these provisions may well be extended in time as the COVID crisis continues.

Restrictions on Bringing Unlawful Detainer Actions and Recovering Past Due Rent for Rent Due Before August 31, 2020

Under AB 3088 and SB 91, there are limits on evictions of natural persons residing in residential properties based on rents due on or before August 31, 2020. Until August 1, 2021, a landlord may not seek to evict such natural persons unless:

- The tenant was guilty of unlawful detainer prior to March 1, 2020;
- The tenant failed to timely deliver a COVID hardship declaration (discussed below); or
- There is a defined "at fault just cause" or "no fault just cause" basis for eviction.[3]

"At fault just cause" includes matters such as: (1) Rental payment default; (2) Breach of a material term of the lease; (3) Nuisance or waste on the property; (4) Criminal activity by the tenant on the residential real property.

"No fault just clause" includes, among other things: (A) Intent to occupy the residential real property by the owner or their spouse, domestic partner, children, grandchildren, parents, or grandparents (this applies to leases entered into after July 1, 2020, only if the lease contains a provision so providing or the tenant agrees to vacate); (B) Removal of the residential property from the rental market; (C) The owner complying with a government ordinance or order requiring vacating of the property; (D) Intent to demolish or substantially remodel the property.

These restrictions limit the landlord's ability to seek unlawful detainer during this time period to only the above criteria.[4] Further, even if the landlord may bring such an unlawful detainer action, its ability to collect past due rents is barred or limited in most instances. If a tenant delivers a COVID hardship declaration in a timely manner, the landlord may not recover unpaid rents from March 1, 2020, through August 31, 2020, in an unlawful detainer action based on any of the above reasons until July 1, 2021. To ensure that tenants have the opportunity to provide such a hardship declaration, the Notice to Quit served by the landlord must have special COVID-related wording, and must have with it a blank COVID hardship declaration. If the tenant delivers a signed COVID hardship declaration within 15 days, the landlord cannot evict for non-payment of the above rents, and cannot bring an action to collect such rents until July 1, 2021.

Restrictions on Bringing Unlawful Detainer Actions and Recovering Past Due Rent for Rent Due September 1, 2020 through June 30, 2021

There are similar restrictions for failures to pay rent from September 1, 2020, through June 30, 2021. First, the unlawful detainer must be based on the above criteria. Second, an unlawful detainer cannot be commenced until July 1, 2021. Third, the landlord must provide the Notice to Quit language and the blank COVID hardship declaration referenced above. If the tenant delivers a signed COVID hardship declaration within 15 days and pays 25% of rents due, the landlord cannot evict for nonpayment of those rents, and cannot bring an action to collect such rents until July 1, 2021. There are other requirements for high-income tenants.

In addition to the limitations on collection of past rent due, if a tenant is evicted pursuant to a "no fault just cause" criteria, a landlord must provide the equivalent of one month's rent as relocation assistance or rent waiver.

Likelihood of Extension of AB 3088/ SB 91 Requirements and Restrictions

When enacted at the end of the 2020 legislative session, it was unlikely that the legislators envisioned the COVID crisis continuing unabated. However, given the continuing COVID hardships, the California legislature has already found it necessary to enact SB 91 in order to extend many of the restriction periods in AB 3088. One might expect that the AB 3088

residential mortgage forbearance request requirements and restrictions may be extended again if the COVID crisis continues.

Expanded Coverage of California Homeowners Bill of Rights to Protect Owners of Tenant Occupied One-to-Four Residential Units Owned by Parties That Own Three or Fewer Such Buildings.

In an effort to indirectly assist tenants, and to protect smaller landlords so as to avoid foreclosure of tenant-occupied properties, AB 3088 also expands the coverage of the California Homeowners Bill of Rights (CHBOR). The CHBOR provides a number of requirements for lenders and servicers with regard to residential homeowner mortgage modifications and forbearances, defaults, and foreclosures.

The CHBOR normally applies to owner-occupied one-to-four-unit residential buildings. Under AB 3088, it has been expanded through January 1, 2023, to apply to tenant occupied one-to-four-unit residential properties, where the property is owned by a party which owns three or fewer residential properties, each of which contain no more than four dwelling units, and a unit is occupied as a tenant's primary residence pursuant to an arms-length lease that was in effect on March 4, 2020, and that tenant is unable to pay rent due to a reduction in income resulting from COVID. Under AB 3088, the protections of the CHBOR shall apply to the owner of such a property as long as the property remains occupied by a tenant pursuant to a lease entered in an arm's length transaction.

Like the other COVID relief laws discussed above, if the COVID crisis continues, the expiration of this provision may be extended. This may be more likely given that the provision is in place until 2023, making it a more familiar part of the legal requirements landscape for one-to-four unit owners and lenders. Further, given California's interest in protecting tenants and preserving affordable housing, if these protections appear to provide meaningful benefits to tenants, the California Legislature could consider making this provision permanent.

Endnotes

[1]Lenders' and bidders' appetites for large bid amounts may be impacted by a provision in SB 1079 that increases the penalties for owners of vacant residential properties purchased at a foreclosure sale, or acquired through foreclosure, who fail to maintain the property. Under SB 1079, those penalties can now be up to $2,000/day for the first 30 days, and $5,000/day after 30 days.

[2]Such REITs, LLCs, and corporations are covered if the property "contains one or more deed-restricted affordable housing units or one or more affordable housing units subject to a regulatory restriction limiting rental rates that is contained in an agreement with a government agency."

[3]A landlord may not bring an unlawful detainer action for any cause until July 1, 2021, if the actual purpose is to retaliate against the tenant for a COVID-related failure to pay rent.

[4]There are separate restrictions on mobile home evictions, where a tenancy may be terminated only for the following reasons:

- Failure to comply with a local ordinance or state law or regulation relating to mobile homes within a reasonable time after receiving notice.
- Conduct that constitutes a substantial annoyance to other homeowners or residents.
- Conviction for certain crimes (e.g., controlled substances) committed on the premises of the mobile home park.
- Failure to comply with a reasonable rule or regulation of the park that is part of the rental agreement or any amendment thereto, following written notice and failure to cure.
- Nonpayment of rent, utility charges, or reasonable incidental service charges if unpaid following written notice that contains specified language.
- Condemnation of the park.
- Change of use of the park or any portion thereof, provided all required permits are obtained and the tenant is given written notice.

RON to the Rescue: The Impact of the Coronavirus on Real Estate Closings

By Wendy S. Gibbons, Old Republic National Title Insurance Company

This article focuses on the impact of the global Covid-19 pandemic on the notarization and recording of conveyance documents and the acceleration of remote online notarization (RON) in real estate closings. The information provided here is general and intended to help identify common issues. As the pandemic's effects continuously evolve, counsel should check the laws of the state where a property is located and consult with a title company or underwriter for current requirements and guidelines.

Importance of Notarization in Real Estate Transactions

An essential aspect of any real estate transaction is the execution and notarization of conveyance documents, such as a deed or mortgage/deed of trust. State statutes require certain formalities for the execution of conveyance documents, including the requirement for each signatory to personally appear before a person authorized to take acknowledgments, usually a notary, and sign the document or acknowledge the signature as his or her own.

The purpose of the notarization formality is to authenticate the signature of the party executing the document by having the notary verify the identity of the person signing by written certification and allow for the notary's evaluation of the signatory's competency or capacity and whether they executed the document under their own free will. A notary acknowledgment is required in most jurisdictions, if not all, to record an instrument in the public records. State commissions authorize specific individuals to act as notaries. After a signature is notarized, the notary attaches or includes in the body of the conveyance document an acknowledgment. The notary certifies the signer's identity, confirms the person personally executed the document in the notary's presence, or confirms that the person acknowledged the document's signature as his or her own. An improperly acknowledged deed or mortgage is subject to an attack to set aside the instrument by a trustee in bankruptcy or a debtor in foreclosure and may result in the document not providing sufficient constructive notice of its existence in the public records. A defective notarization not only puts the lender's lien position at risk but also may affect the ability of a lender to enforce its mortgage.

The Effect of the COVID-19 Pandemic on Notarizations in Real Estate Closings

Shortly after the president of the United States declared a national emergency following the novel coronavirus disease outbreak on March 13, 2020, state and local governments implemented stay-at-home orders, closed nonessential businesses, and issued social distancing and gathering orders that prohibited or limited in-person real estate closings and notarization of deeds and mortgages. Travel restrictions and global lockdown orders prevented parties from returning to the United States to sign documents. To avoid the delay and disruption of real estate purchase and finance transactions and to protect the safety and welfare of customers and employees, title insurers and their real estate industry partners looked to the expanded use of RON as a solution when in-person closings and notarizations were no longer possible. According to a recent survey of major vendors working in the RON space conducted by the American Land Title Association (ALTA), use of remote online notarization increased 547% in 2020, no doubt attributable to the challenges presented by the pandemic.

What Is RON?

Historically, state laws required traditional wet ink notarization, which involves a signatory who appears before a notary at the closing table and signs the paper conveyance document using a "wet ink signature." The notary verifies the signer's identity, notarizes the document using a "wet ink" signature, and affixes his or her notary seal or stamp onto the document.

RON is the electronic notarization of an electronic document e-signed by a signatory appearing remotely before a notary using two-way audiovisual technology in real time over the internet using a third-party software platform that creates an audiovisual recording of the transaction. The signer's identity is typically verified by using multifactor authentication which requires: 1) presentation of a valid U.S. driver's license (front and back) or other U.S. government-issued ID with photo that must be verified through credential analysis

technology; and 2) knowledge-based authentication (KBA). KBA requires the signer to correctly answer questions based on knowledge of the individual's private information to prove that the person providing the identity information is who he or she purports to be. Typically, knowledge-based authentication questions are generated from public and personal data such as marketing data, credit reports, or transaction history. A true RON transaction involves the electronic execution of all documents, including an electronic promissory note (eNote). Since current technology cannot verify foreign passports and KBA requires a U.S. tax identification number and a U.S. credit history, the use of RON is currently limited to U.S. citizens.

For a notary to perform a RON transaction, the notary is required to sign up with a third-party (vendor) software platform, which creates a recording of the audio and visual communications of the parties signing the documents. Notarization by Facetime, Zoom, Skype, etc. cannot be used. These platforms do not have the capabilities and technology needed for a secure RON transaction. The RON provider provides the notary with access to the platform and training on how to use it to perform RON transactions. There are several companies that provide this service. The RON software platform provides the two-way real-time audiovisual technology that allows the signer and the notary to communicate with each other. The documents to be signed are uploaded to the RON platform. The platform provides the means for the signer and the notary to sign the documents electronically and for the notary to affix an electronic seal. The identity proofing, credential analysis, and KBA are all built into the RON software platform with the RON provider handling identity screenings. The RON software platform also stores the audiovisual recording for the time period required by state law (typically five to seven years) and creates and stores the notary's electronic journal entry for the transaction. If the remote notarization is ever challenged, the audiovisual recording, the identity proofing data, and the notary's electronic journal entry can be retrieved through the RON service provider as evidence of its validity.

Since not all lenders have accepted electronic notes (eNotes), paper remote online notarization (PRON) is a common RON variation. In a PRON transaction, a signatory appears before the notary using real-time, two-way audiovisual technology over the internet to e-sign and e-notarize most documents. The notary verifies the signer's identity in the same manner as described above for RON. Any documents that require a wet signature must also be wet ink notarized by the notary and returned to the settlement agent conducting the closing. The primary factor distinguishing PRON from RON is that at least one paper document, typically the promissory note, is signed and notarized using "wet ink." As the acceptance of e-notes by lenders and investors grows, more and more online notarization transactions will likely be true RON transactions. Recently, the Mortgage Electronic Systems Registry (MERS) reported that, as of December 2020, the use of eNotes registered with MERS increased 261% year over year.

RON is also distinguished from in-person electronic notarization (IPEN), or "e-notarization," because in an IPEN transaction, the notary and signer attend the closing in the same room, and the signer appears before the notary to e-sign digital documents. The notary verifies identity in person and then digitally places the notary's electronic signature and notary seal on the document using electronic signature technology.

In response to the coronavirus pandemic, many states without laws authorizing the use of RON issued executive orders suspending traditional wet ink notary requirements to allow for the temporary use of remote ink notarization (RIN) to comply with COVID-19 public health protocols. In a RIN transaction, the parties attend the closing remotely by two-way real-time audiovisual technology over the internet, and the notary observes the "wet ink" signing of the paper documents. Once the documents are signed, the originals are returned to the notary by overnight delivery for signature by the notary using "wet ink" and physical affixation of the notary seal or stamp. See this ORT chart comparing the different types of notarization.

The Path to RON

Historically, title insurers and their industry partners viewed remote online notarization with skepticism due to concerns relating to fraud, impersonation, undue influence, and capacity. However, this gradually changed as state law and federal law were enacted authorizing electronic signatures, notarizations, and recordings. The adoption by states of the Uniform Electronic Transaction Act (UETA) in 1999 defined "electronic signature" as "an electronic sound, symbol, or process, attached to or logically associated with, a contract or other record and adopted by a person with the intent to sign a record."[1] The UETA provides that electronic signatures are enforceable and have the same legal validity as wet ink signatures.[2] It also authorizes the use of electronic notary acknowledgments subject to compliance with state notary law.[3] Under the UETA, notaries acknowledge documents utilizing an electronic platform. The notary's signature must comply with the UETA's

electronic signature requirements, and the electronic notary seal must include the same information as the physical notary seal. The Electronic Signatures in Global and National Commerce Act ("E-SIGN"), passed by Congress in 2000, set minimum standards for e-signatures and notarizations involving multiple parties in all jurisdictions.[4] The Uniform Real Property Electronic Recording Act (URPERA), drafted by the Uniform Law Commission in 2004 and adopted in most states, authorized the electronic recording of documents with electronic signatures with the same constructive notice as paper documents with wet signatures.[5] Every state has adopted the UETA or a variation of the UETA. As a result of E-SIGN, UETA, and the UPERA, electronic notarization is recognized in all states. However, legal recognition of electronic notarization does not equate to legal recognition and authorization of remote online notarization. Without additional legislation, states' laws still required an in-person meeting between the notary and signatory.

The Revised Uniform Law on Notarial Acts (RULONA), created in 2018 by the Uniform Law Commission as proposed model state legislation, allows a notary to electronically notarize a document when the signer is not physically in the same room as the notary.[6] Many states have used provisions in RULONA in enacting RON legislation, but there is still a lack of consistency among state laws. To standardize and encourage uniform language adoption in RON legislation, the American Land Title Association (ALTA) and the Mortgage Bankers Association (MBA) drafted model legislation that many states now use to enact statutes authorizing RON. The MBA/ALTA model legislation is available for review along with a plethora of information regarding online notarization on the ALTA website at the following link: www.alta.org/advocacy/online-notarization.cfm. Additionally, the Mortgage Industry Standards Maintenance Organization (MISMO) created RON standards in 2019 to promote consistency in the adoption of RON in real-estate financing transactions. Standards include credential analysis, borrower knowledge-based identification, audiovisual and recording requirements, record storage, and audit trails. State regulators use these standards to implement RON legislation.

Although all states permit electronic notarization, notaries cannot conduct remote notarizations in all states. Virginia became the first state to adopt a statute authorizing RON in 2012, followed by Montana and Texas.[7] Over half of the states have enacted RON legislation. Each state's RON law is unique; a state-by-state analysis of RON statutes is outside this article's scope.

Pre-pandemic, approximately 23 states authorized the use of RON. As of December 2020, 29 states have enacted a permanent RON law: Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana (effective 2/1/2022), Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota,[8] Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin. In response to the pandemic, several states took emergency action to authorize online notarization. As of December 2020, the following states that have yet to enact RON issued executive orders or enacted legislation to temporarily allow RIN: Alabama, Arkansas, Connecticut, Delaware, District of Columbia, Georgia, Illinois, Kansas, Louisiana, Maine, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Virginia, West Virginia, and Wyoming. All but two states (California and South Carolina) now allow for some form of online notarization. Additional states will likely pass permanent RON laws soon.

Title Insurer Authorization for the Use of RON

The ALTA 2006 Loan Policy provides coverage for online notarizations. Specifically, Covered Risk 2(a)(iii) of the ALTA 2006 Standard Loan Policy provides coverage against a defect in title caused by a document affecting title improperly created, executed, witnessed, acknowledged, notarized, or delivered. Covered Risk 2(a)(iv) provides coverage for a defect in title caused by failure to perform those acts necessary to create a document by electronic means authorized by law. Because the loan policy provides this coverage, title insurers established conditions and requirements under which its issuing offices may accept documents executed by RON in states where RON is authorized and implemented. In response to the coronavirus pandemic's impact on real estate closings, most title insurers issued updated bulletins authorizing the emergency use of RON subject to certain criteria.

The following list is an example of some requirements a title insurer may require in order to insure conveyance documents notarized remotely. These examples do not represent the requirements of any individual title insurer. Counsel should consult with a title company or underwriter before closing if the parties intend to utilize online notarization.

1. Where the title insurer has authorized emergency use of RON in all states and the District of Columbia, insurance of transactions where RON is used may be limited to particular property types, such as residential, and available up to a specific policy amount. Counsel should consult with a title company or underwriter for specific limitations.

2. A third-party vendor must be used to provide two-way live video and audio communication, create tamper-evident documents, and provide the means for recording and retaining an audiovisual recording and electronic notary journal for a period specified under state law.

3. Multifactor authentication is required to identify the signer in at least two of the three following ways:

    1. Remote presentation of a U.S. driver's license or other U.S. government-issued ID subject to third-party credential analysis.

    2. Knowledge-based authentication, which is a series of questions to be answered by the signer based on the signer's personal knowledge. The questions customarily relate to prior addresses and other personal information.

    3. Biometric identification (facial recognition, fingerprint, or retinal scan). Biometric identification is not yet widely adopted.

4. The notary must be properly registered and physically located in the state where the property is located.

5. All parties to the transaction, including the lender, must consent in writing to the electronic signing of documents and using RON. Lender's closing instructions should authorize the use of RON.

6. If the lender does not use eNotes, the lender's closing instructions should provide instructions to obtain a borrower's "wet signature" on the note.

7. The local government office where conveyance documents are recorded must be open and accept documents notarized by RON for recording, including the option to "paper out." "Papered out" documents are printed versions of documents executed and acknowledged electronically. The option to "paper out" enables the recording of paper copies of electronically executed documents in jurisdictions that do not accept electronic recordings or temporarily cannot accept electronic documents for recording.

8. A document notarized by RON must provide the same constructive service in the public records as a paper document with a wet signature under state law.

9. The title company closing the transaction may require the use of certain approved RON vendors that comply with the minimum standards of the MBA/ALTA Model RON act and MISMO. Generally, title insurers will not accept online notarization of conveyance documents using platforms such as Skype, Zoom, or Facetime because these platforms do not provide the same level of security, identity verification, recording, and encryption capabilities.

10. Some title insurers may require an exception in Schedule B for "any defects, liens, encumbrances or other matters arising out of use of RON" in states without a RON law in place.

As stated previously, RIN is distinct from RON. In states that have not enacted RON legislation, executive orders and temporary legislation has authorized RIN. As the pandemic continues, the state executive orders continue to be extended or progress towards permanent legislation. A concern for title insurers regarding reliance upon temporary executive orders authorizing RON is whether the state's constitution and laws allow these measures. Unauthorized enactment of RON may result in legal challenges to documents remotely notarized. Another concern is the legal uncertainty created by the patchwork of executive orders with varying requirements and conditions. Initially, many executive orders permitted use of Zoom, Facetime, or Skype, which are not considered secure platforms by title insurers. For example, New York Governor Cuomo issued Executive Order No. 202.7 on March 9, 2020, providing that audiovisual technology may be used for any notarial act required under New York State law. The executive order requires the signer to provide a valid photo ID to the notary during a real-time video conference (which could be via Skype, Facetime, or Zoom), requires the person seeking the notary's service to be physically located in New York, and requires a copy of the signed document to be transmitted by fax or email to the notary for notarization. The executive order did not set forth any criteria for identity proofing, multi-factor authentication, encryption, recording, or preservation of the notarial act. To address these issues and promote uniformity

among state executive orders, ALTA drafted a Model Executive Order for states to use.[9] In response to the state executive orders, third-party RON software providers adjusted their platforms to work with RIN. To satisfy title insurer requirements to insure, a notary can sign up with one of these providers that utilize technology similar to that used in RON transactions.

Notwithstanding the above-described issues with some of the state executive orders, title insurers will insure conveyance documents notarized by RIN and authorized by state executive order if the transactions meet certain criteria. The following list is an example of some requirements a title insurer may require when requested to insure conveyance documents acknowledged by RIN. It is not representative of any one title insurer. Counsel should consult with a title company or underwriter before closing if the parties intend to utilize RIN authorized by state executive order or temporary legislation.

1. Online notarization in compliance with the executive order or temporary legislation must take place within the timeframe specified in the order or temporary legislation unless extended by a supplemental order or legislation.

2. Transactions for which RIN are authorized by a title insurer may be limited to particular property types, such as residential, and available only up to specific policy amounts. Counsel should consult with a title company or underwriter for specific limitations, if any.

3. All parties, including the lender, must consent to use of online notarization by way of an audiovisual technology.

4. A third-party vendor must be used to provide two-way live video and audio communication, create tamper-evident documents, and provide the means for recording and retaining the audiovisual recording and electronic notary registry for any period specified under state law. The audiovisual recording must be encrypted if stored by a cloud provider. The audiovisual technology for RIN notarization must satisfy minimum requirements relating to screen-sharing content and network connection.

5. The original wet ink signed documents must be executed and placed in a sealed overnight package in the notary's presence during the live audiovisual conference. The documents must then be sent to the notary by overnight delivery for notarization and the official notarial stamp or seal affixation. The date and time entered by the notary should be the date and time of the wet ink signature of the signer during the audiovisual conference.

6. The person executing the deed or mortgage should show the notary a valid U.S. driver's license or U.S. government-issued photo ID during the audiovisual conference and include a copy of the photo ID with the signed documents sent to the notary.

7. The original wet ink signed documents must be submitted for electronic or physical recording in compliance with state law and the local government office's capabilities.

8. The deed or mortgage signatory must sign a certification under penalties of perjury that he or she was physically in a specific state and county where he or she executed the documents.

9. The notary must be properly registered and physically located in the state where the property is located.

10. The notary must sign a certification identifying the county and state where he or she was physically present when the documents were notarized, attest that he or she was shown a valid U.S. government-issued photo ID during the audiovisual conference, and confirm he or she engaged in direct interaction with the signatory during the audiovisual conference.

11. Funds cannot be disbursed until the title company or settlement agent closing the transaction has physical possession of the original executed documents.

12. Documents to be recorded outside the state where the notary is registered and physically located may not be insured if RIN is used

For both RON and RIN transactions, if an authorized agent is signing documents on behalf of a principal under a valid power of attorney (POA), the agent should make a verbal affirmation during the audiovisual conference that the agent is authorized to act and that the POA is in full force and effect and has not been revoked. If the execution of a power of attorney is to be notarized remotely, the lender must specifically consent to the power of attorney and use of RON. The lender must also expressly consent in writing to use of an agent who is an employee of the settlement service provider or title company closing the transaction.

Interstate Recognition of RON

There is no preemptive federal law that provides for the interstate recognition of RON among the states. Relying on remote notarization across state lines presents additional issues and concerns for a title insurer. For example, Virginia's RON law requires a Virginia notary to be physically located in Virginia but allows for the signatory and/or the property conveyed to be located outside of Virginia. Any conveyance document remotely notarized by a Virginia notary that transfers property or involves a signatory not physically located in Virginia may be subject to additional scrutiny and requirements by a title insurer. This additional scrutiny applies equally to any other state's RON laws that grant remote notaries extraterritorial authority. Factors title insurers are likely to consider when determining insurability include whether the notarization involving out of state property was in-person and whether the law of the land where the property is located specifically permits out-of-state remote notarization of real estate transfer documents. Although it is arguable that the U.S. Constitution's Full Faith and Credit Clause requires each state to respect the "public acts, records and judicial proceedings of every other state," the Constitution's Tenth Amendment guarantees the rights of the states to protect its own citizens. The key question is whether the state where the property is located recognizes the validity of an extraterritorially performed remote notarization. Before allowing a conveyance document to be remotely notarized across state lines, counsel should consult and obtain approval from a title company or title insurer.

RON on the Federal Front

In March 2020, at the outset of the pandemic, Congress introduced Senate Bill 3533 (116th), the Securing and Enabling Commerce Using Remote and Electronic Notarization Act of 2020 ("SECURE Notarization Act"), and its House of Representatives counterpart, H.R. 6364. These bills authorize RON in states where not currently authorized, provide for minimum standards for electronic and remote notarizations, and authorize interstate recognition of RON. The SECURE Notarization Act permits every notary in the U.S. to perform RON. It requires tamper-evident technology, fraud prevention through multifactor authentication, and audiovisual recording of the notarial act. Neither bill was enacted into law by the end of the 116th Congress, so Congress must introduce new federal legislation in 2021 to create a national federal law standard. With the growing trend of states enacting permanent RON legislation that conforms to the ALTA/MBA Model Act and MISMO standards, federal legislation may not be as imperative as it once was at the start of the pandemic.

> Before the pandemic, Fannie Mae and Freddie Mac issued electronic notarization guidance that limited the use of RON.[10] In response to the COVID-19 national emergency, Fannie Mae and Freddie Mac eased their requirements for acceptance of RON and clarified the conditions under which Fannie and Freddie will accept RON in loans.[11] Counsel must consider compliance with both the GSE guidelines and state law standards. The Veterans Administration (VA) has also issued guidance allowing VA loans notarized by RON to be eligible for a guaranty if the notarization is valid under state law.[12]

Gap Coverage and Recording Office Closures in the Time of Coronavirus

Temporary closures of county recorders, clerks, and other government offices due to coronavirus outbreaks or compliance with social distancing restrictions have the potential to disrupt the recording process. Besides closures, government offices operating virtually or in a limited capacity may impact the timely recording of real estate documents. Title companies may be unable to perform sufficient searches to issue title commitments or update a title before closing. Eliminating the gap between closing and recording is especially critical because any delay in recording can cause loss of priority of a mortgage if another lien attaches to the property or the grantor records a conveyance to a third party before recording the mortgage. Nearly a year into the life-altering pandemic, there have been no significant ongoing delays affecting recording conveyance documents. Any recording issues have been county-specific and localized. In many counties, the ability to record or "e-record" electronically proved to be an effective solution that reduced the gap between closing and the date of recording.

The 2006 ALTA Loan policy provides built-in gap coverage in Covered Risk 14 for matters affecting title arising between the date a mortgage loan is closed and the date the mortgage is recorded. The same coverage is provided in the ALTA Short Form Loan Policy and the ALTA Expanded Coverage Residential Loan Policy. The gap coverage built into the policy is negated by the "gap exception" in Schedule B of the title commitment for "Any defect, lien, encumbrance, adverse claim or other matters that appears for the first time in the Public Records or created, attaches or is disclosed between the Commitment Date

and the date of recording." The gap exception is customarily deleted when the title company closes and funds the transaction, and the Insured is provided gap coverage under the policy without the need for a gap endorsement or a separate gap letter.

During the coronavirus pandemic, the willingness of title insurers to cover the gap period between the time of closing and recording has varied. Coverage often depends on whether electronic recording is available in the county where the land is located; whether the property is residential or commercial; whether the recording office is open, closed, or operating in a limited capacity; and whether a sufficient title search of the tax, court, and recorder's office records can be conducted. Some title insurers have agreed to provide gap coverage with no additional requirements for one-to-four family residential properties or for policies up to a certain amount. Other title companies have required the execution of a gap indemnity by the seller or borrower, in which the seller or borrower agree to indemnify the title company for any matters that arise during the gap period. Notwithstanding a recording office's closure, if a title company has already issued its title commitment and can remotely update title before closing and electronically record documents, title can likely be insured with no additional exceptions. Under certain circumstances, the title insurer may cover the gap even if a title update cannot be conducted before closing for a COVID-19 reason if the title has been searched within a reasonable amount of time and a commitment already issued. A title company cannot insure title if they cannot search the public records to issue the initial title commitment. Some title insurers are including an additional exception in the title commitment for the possible inability to record documents and return original documents in a timely manner due to the impact of COVID-19 or the right to refuse to issue a policy if the recorder's office is closed for any COVID-19 related reason. Parties to a real estate closing transaction may also be required to sign a document where the parties acknowledge there may be delays in the recording and the return of original documents from the recorder's office due to COVID-19 reasons. Counsel should consult with a title insurer or company for specific requirements

Endnotes

[1]15 U.S. Code Sec. 7006 (5)

[2] 5 U.S. Code Sec. 7001 (a)

[3]15 U.S. Code Sec. 7001 (g)

[4]15 US Code Chapter 96 et seq.

[5]The Uniform Real Property Electronic Recording Act can be found on the website for the Uniform Law Commission at http://uniformlaws.org

[6]The Revised Uniform Law on Notarial Acts can be found on the website for the Uniform Law Commission at http://uniformlaws.org

7See VA Code Ann. Title 47.1 et seq., MT ST §1-5-601 et seq., TX Govt. §406.001 et seq

[8]SD has limited version-RON can be used only if notary affixes original signature and personally knows the principal

[9]The draft model executive order can be found online at the website for the American Land Title Association at www.alta.org/advocacy/online-notarization.cfm.

[10]See Fannie Mae Single Family Selling Guide A2-5.1-03; Freddie Mac Single-Family Seller/Servicer Guide Ch. 1401.16.

[11]See Fannie Mae Lender Letter -FHFA /GSE Guidelines (LL-2020-03).

[12]https://www.benefits.va.gov/HOMELOANS/documents/circulars/26_20_10.pdf.

Focusing on the Journey and Not Just the Destination—Ethical Duties of Both In-House and Outside Counsel During the Initial Stages of a Workout[1]

By Kenneth Miller, Parker, Milliken, Clark, O'Hara & Samuelian; Anthony J Carriuolo, Berger Singerman LLP; Hilary Gevondyan, First Republic Bank; and Judy Lam, Maynard Cooper & Gale

The cliché that "you are only as good as your last success" is well known by most lawyers.[2] Results matter for both in-house and outside counsel. For outside counsel, good results can help you retain clients; in the case of in-house counsel, good results can help you retain your job. Consequently, it is natural for in-house and outside counsel in the case of workout negotiations to focus on resolving the underlying dispute, with less attention paid to handling ethical issues that may not be top of mind when striving to reach the end result. Ethical issues can easily be overlooked on a rush assignment when the attorney is told to keep it simple or minimize the budget in favor of quickly focusing on the ultimate destination that is the "final answer." Unfortunately, ignoring these ethical issues may, at best, delay or even prevent a successful result and, at worse, result in a breach of the counsel's ethical obligations. This article will discuss some of these often neglected process points and ethical issues from the perspective of both in-house and outside counsel.

In the context of a hypothetical involving the initial workout of a distressed construction loan (during the COVID pandemic), this article will demonstrate how spotting and properly handling these issues during the course of the workout can pave a smooth road to a successful (and ethical) resolution of the case.[3]

Hypothetical No. 1—The Initial Problem

Lender's in-house counsel has advised outside counsel of a brewing issue with one of lender's prominent construction projects downtown. According to in-house counsel, the lender's relationship manager handling this matter has reported that she suspects that the borrower has dissipated construction loan funds, which has led to budget shortfalls and delays in construction completion. The relationship manager is convinced that the borrower is manipulating the lack of manpower during the COVID pandemic to cover up its ongoing failure to manage its construction properly. As a result, the relationship manager wishes to proceed aggressively against the borrower by foreclosing on the lender's deed of trust and seeking the appointment of a receiver to complete construction.

In-house counsel has a very different view as to how this dispute should be handled based on a call with borrower's counsel. According to borrower's counsel, the lender's relationship manager has been fully aware of the cost overruns as well as the borrower's ongoing arguments with its general contractor, but allegedly demanded that the borrower complete the project without first dealing with the construction problems and cost overruns.

The lender's in-house counsel has enjoyed a close, social relationship with outside counsel for years. In-house counsel is concerned that the lender's senior management may support the relationship manager's aggressive suggestions as to the lender's future course of action on this matter; she feels that an aggressive approach may prove disastrous to the organization in terms of both legal and business concerns. Instead, she strongly favors a more tempered approach to allow the borrower another opportunity to complete the construction. She has asked outside counsel to immediately draft and send to her a detailed memorandum as to how best the lender should proceed in this matter so that she may forward outside counsel's recommendations to lender's senior management. How should outside counsel prepare the memorandum to best serve her client?

Who Is the Client?

Rule 1.13(a) of the ABA Model Rules of Professional Conduct – "Organization As A Client" provides as follows:

"A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."

Thus, according to Rule 1.13(a) of the ABA Model Rules of Professional Conduct, in the case of a financial institution, the client is not in-house counsel, the account or relationship officers, or upper/senior management. The client is the organization. Especially in the case of a financial institution, it is critical that outside counsel try to obtain input from all of the organization's decision-makers in order to devise the best course of action

to meet the organization's needs and goals. In this hypothetical, this might be tricky. In-house counsel has simply instructed outside counsel to send a memorandum to her as to how best to proceed, and outside counsel may feel some pressure to craft recommendations based solely on in-house counsel's views to maintain her friendship with in-house counsel and to retain the lender as a client. Doing so, however, may not be best for the client. Without communicating to additional decision-makers, outside counsel may not possess adequate information to know whether her recommendations will best serve her client organization. Further, outside counsel may detect internal inconsistencies by further investigation into the issues with all decision-makers and help in-house counsel by asking the tough questions that might sound more impolitic if coming from in-house counsel.

Failing to sufficiently investigate the claims of both in-house counsel and the relationship manager before devising a strategy for the handling of the case may not just ignore the dictates of Model Rule 1.13 in terms of the identity of outside counsel's client. It may also violate outside counsel's ethical duty to exercise her independent professional judgment found in Model Rule 2.1 of the ABA Model Rules of Professional Conduct. Rule 2.1 of the ABA Model Rules of Professional Conduct provides as follows:

"In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation."

Applying outside counsel's duty to exercise independent professional judgment found in Model Rule 2.1 to the hypothetical may require outside counsel to do more than simply adopt in-house counsel's view of the case. This is supported by the very first comment to Model Rule 2.1 which states:

"A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."

Without complete information, outside counsel may wish to point out the additional information that is needed to make informed recommendations regarding the lender's best course of action. This is particularly important should the matter wind up in litigation, as outside counsel's inquiries should be sufficient to satisfy her duty to the court under Rule 11 of the Federal Rules of Civil Procedure, which provides that with each pleading submitted to the court, the attorney certifies (among other things) that the claims, defenses, and legal arguments are warranted by existing law, or by a nonfrivolous argument for extending or changing existing law, and that the factual contentions have evidentiary support. In our example of the construction loan workout, outside counsel may wish to inquire about the following:

- **Status of construction.** Critical to the decision as to whether to proceed regarding the construction is the status of the construction. In particular, what is the percentage of completion? Are there delays in construction or, worse yet, a stoppage in the construction, and if so, what is the degree and cause of the delays and, if applicable, the projected duration of the work stoppage? Has the lender been aware of the delay or stoppage in the construction, and if not, should it have been? Any stoppage of work in the construction can be disastrous for future construction and could result in the general contractor or subcontractors walking off the project. Further, any past delays or work stoppages could lead to future sequencing issues. Outside counsel should caution the organization that the appointment of a receiver to complete construction will most likely result in a stoppage of the construction to allow the receiver to analyze the status of the construction and oversee any transition to complete the construction.
- **Is the construction loan "out of balance?** Most construction loan agreements contain a provision requiring that the construction loan be "in balance." The term "in balance" refers to whether the remaining loan funds are sufficient to complete construction. In making this assessment, it is important for both in-house and outside counsel to closely review the construction loan agreement to determine the standard regarding the assessment of whether the loan is in balance (i.e., is this determination based on the absolute discretion of the lender or perhaps subject to a broad reasonableness standard which could invite litigation by the borrower?).
- **Availability of funds.** If further funds may be needed, does the borrower have sufficient funds to complete construction, and if

so, might the borrower be willing to contribute such funds for the construction? Also, are there any guarantors, and if so, what is the creditworthiness of the guarantors?

- **Borrower defenses.** The client is also well-served by an early detection and analysis of any potential defenses, which might be more readily spotted by the outside counsel with fresh eyes on the file. Borrower defenses or even counterclaims against the lender may be a blind spot that the client would rather avoid seeing, but early analysis of the client's possible exposure could help the client strategize and perhaps avoid any missteps before filing a foreclosure action or litigation case.
- **Title insurance coverage**. Especially if the construction loan is out of balance, has any mechanics' liens been recorded against the project, and if not, is it likely that the recordation of mechanics' liens is more likely with the appointment of a receiver? Although the appointment of a receiver to an uncompleted construction project can create major disruption in the construction, it is possible to negotiate with the borrower a workout strategy to minimize this disruption, especially if the negotiations include a reduction or elimination of exposure to any guarantors. Mechanics' liens can cause major headaches to construction lenders, especially as title coverage for mechanics' liens has greatly diminished following the recession of 2007. It is therefore important to analyze the lender's exposure to mechanics' liens and whether the lender's mechanic's lien coverage is complete (which is unlikely) or incremental (which is much more likely). Even if the mechanics' lien coverage is incremental, the title insurance endorsement (and in particular, whether the lender was issued an ALTA 32.0 title endorsement or an ALTA 32.2 title endorsement) could be a very significant factor.

Workouts of a construction loan can be difficult because of the breadth and complexity of the issues that may be raised. Working through these preliminary issues and more, hopefully with in-house counsel, the relationship manager and other decision makers, will likely result in a consensus that is more beneficial to the client organization as a whole.

Hypothetical No. 2. – Future Communications

Assume that outside counsel successfully works through these preliminary issues with both the lender's in-house counsel and its relationship manager. Nevertheless, in-house counsel remains skeptical as to how best to proceed and wishes to prepare a detailed memorandum to the lender's entire construction loan team and senior management regarding the potential legal and business issues that may impact the lender's ultimate decisions. In particular, the lender has been very focused on increasing its market share of construction loans to its existing and potential customers, and in-house counsel is very concerned that aggressive handling of the construction loan with this borrower, especially in light of the myriad of issues raised by the COVID pandemic, could be catastrophic to its business origination efforts. Are there any ethical issues that in-house counsel should consider when drafting this memorandum, including whether the contents of the memorandum are protected by the attorney-client privilege?

Attorney-Client Privilege Issues Affecting In-House Counsel's Internal Communications

The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law"[4] and protects confidential communications between the client and the attorney.[5] The purpose of the privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[6] Nevertheless , although the attorney-client privilege promotes broad public interests, it is narrowly construed because the privilege inhibits the search for the truth.[7]

The tension in ascertaining which communications are subject to the attorney-client privilege and which are not, is heightened in the case of communications within an organization by in-house counsel. In-house counsel may perform a variety of functions for the organization in addition to rendering legal advice. In the case of a financial institution, in-house counsel may be the manager of one or more departments related to the organization's lending activities, such as loan production or management of special assets, and she may also be heading other departments essential for the operation and administration of the organization, such as human resources or cybersecurity. Because of her diverse roles within the organization, in-house counsel may have a much greater involvement in the business affairs of the client than outside counsel. As a result, portions of in-house counsel's communication may be non-privileged and nonconfidential when communicating business functions apart from her legal duties or

beyond the handling of a legal matter for the organization.

The courts have been quite cautious and restrictive in extending the protections of the attorney-client privilege in situations where the communication from in-house counsel contains both legal and nonlegal information or commentary. For example, the Court of Appeals of New York raised the following concerns in addressing whether communications from in-house counsel were privileged:

"[S]taff attorneys may serve as company officers with mixed business-legal responsibility; whether or not officers, their day-to-day involvement may blur the line between legal and nonlegal communications; and their advice may originate not in response to the client's consultation about a particular problem but with them, as part of an ongoing, permanent relationship with the organization. In that the privilege obstructs the truth-finding process and its scope is limited to that which is necessary to achieve its purpose [citations], the need to apply it cautiously and narrowly is heightened in the case of corporate staff counsel, lest the mere participation of an attorney be used to seal off disclosure." [8]

The New York Court ruled that the communication from in-house counsel was privileged since the communication from in-house counsel was "primarily or predominantly of a legal character."[9]

A more recent decision issued by a Colorado District Court on a motion to compel production of a memorandum prepared by in-house counsel well demonstrates the careful scrutiny by the courts of the drafting of the communication in applying the primary purpose standard.[10] In that case, the plaintiffs asked the court to compel a corporate defendant to turn over an unredacted version of a nine-page memorandum prepared, in large part, by various lawyers in the defendant's law department. The defendant produced a redacted copy of the memorandum that excluded portions allegedly protected by the attorney-client privilege. The court held that the entire memorandum, *both* the redacted and unredacted portions, was required to be produced. According to the ruling of the court, not only was the primary purpose of the memorandum for business purposes, but "by intertwining the legal advice within a majority contribution of business advice," the defendant, a "sophisticated corporation with a large and experienced legal team available for consultation," implicitly waived the attorney-client privilege. Other courts have also extended the focus of their analysis to not just the drafting of the communication by in-house counsel, but also the specific terms of the request made by the client to in-house counsel leading up to the in-house counsel's communications to the client.[11]

Other courts have developed even more restrictive standards than the primary purpose test in analyzing whether documents drafted by in-house attorneys to their client are subject to the attorney-client privilege. For example, courts in the Ninth Circuit have applied the "because of" standard, which does not consider whether litigation was a "primary" or "secondary" motive behind the creation of a document in determining if a document is protected by the attorney-client privilege. Instead, this standard reviews the totality of the circumstances and affords protection when it can fairly be said that the "document was created because of anticipated litigation and would not have been created in substantially similar form but for the prospect of that litigation."[12] Due to the varying tests applied by the courts, careful review of the applicable standards for assessing whether communications are subject to the attorney-client privilege is critical for each applicable jurisdiction, as even within the Ninth Circuit, there is substantial disagreement as to which standard should apply.[13] Nevertheless, regardless of which standard is applied, the following are a few suggestions to protect attorney-client communications:

- ***Separate privileged material.*** When preparing internal written communications, it may be best to send separate communications for matters that are primarily or predominantly legal in nature, as compared to primarily business-related information, specifically noting the former as attorney-client privileged. If this is not possible or practicable, try to segregate and denote within the same document those matters constituting legal advice from predominantly business oriented discussions.

- ***Drafting Tips.*** In written communications prepared by counsel and sent to the client, a heading is commonly included stating that the written communication is subject to the attorney-client privilege. This heading can lose its impact and importance, however, if overused and found in every memorandum or other written communication. Instead, in-house counsel may wish to try to flag legal discussion in written materials with such statements as "You've asked me for my legal opinion on..." or "my legal advice regarding..."

- ***Don't overshare.*** Remember that attorney-client matters must be treated as confidential by the client and the attorney. Distribution

of privileged material by in-house counsel should be limited to those persons within or outside the organization who are required to receive the information. This may not always be easy. E-mail has a way of getting out of control. The inclusion of in-house counsel as an early addressee on a long e-mail thread may lose the attorney-client privilege after being circulated to people within or outside the organization who may not be required to receive the information.

- ***Educating your legal and non-legal team.*** In-house counsel providing confidential and privileged advice to their client organizations have a duty to inform their organization of the privilege and to take appropriate steps to protect their advice. In fact, failing to inform the client may result in loss of the privilege, especially in the case of disclosure of the communications to non-essential third parties. One common misconception held by non-lawyers (and even less experienced lawyers) is that by simply copying in-house counsel on communications necessarily makes the communications privileged. That is simply not so. Instead, the substance of in-house counsel's communications (predominantly legal versus business advice) will prove key.

- ***Use the phone.*** Although oral communications between an attorney and client are subject to the attorney-client privilege, address sensitive discussions on a phone discussion where appropriate and feasible, rather than in a memorandum or in emails. Discussions may be a better forum and opportunity for sharing sensitive topics that involve both legal and business considerations and allow for questions and multilateral dialogue.

- ***Special problems with working remotely.*** As more people are having to work remotely due the COVID pandemic, new obstacles are arising with respect to the attorney-client privilege. Social distancing requirements have greatly diminished in-person meetings, and both attorneys and client are often working in close proximity with family members and friends. Extra precautions are necessary to ensure that communications remain confidential. This may include working away from family members so that communications with clients or about clients cannot be overheard and working in a room without a digital assistant like Amazon Echo or Google Home.

- ***Know your state's attorney conduct rules, specifically around duties to protect confidential information and duties representing organizations.*** In-house counsel can have an even more nuanced ethical landscape in this arena. In analyzing the above, Rule 1.13 of the ABA Model Rules of Professional Conduct provides that an attorney may have an obligation to "... refer the matter to higher authority in the organization ..." if an act is likely to result in "substantial injury" to the organization or is otherwise a violation of law. However, not all jurisdictions permit reporting out of the organization in those same instances if doing so would violate counsel's duty of confidentiality.[14]

Concluding Thoughts and Additional Suggestions

In the initial stages of a workout, ethical issues that both in-house and outside counsel typically face are often ignored until a later time, when they can often not be corrected. This can be devastating. Failure to develop consensus between competing factions within the client can not only lead to waste of time and money for the client but also missed opportunities. Worse yet, failure to properly structure communications to preserve the attorney-client privilege can result in providing winning ***strategies for your opponent's case*** in addition to the ethical challenges for the counsel involved. Although there are few simple and universal answers to resolve these ethical issues in every case due to varying factual circumstances and ethical standards, remaining mindful of and addressing these issues early can lead to a better outcome for both counsel and the client.

Endnotes

[1]This article is based in large part on a panel discussion presented by the authors at the 2020 Annual Meeting of the American College of Mortgage Attorneys and explores certain ethical duties through an examination of hypothetical scenarios involving a financial institution in the initial stages of a construction loan workout.

[2]The authors are well aware of the quote attributable to Mae West, that "when I am good, I am very good, but when I am bad, I am better" but believe that it may not be applicable in this context.

[3]A quick disclaimer. Any discussion of ethics on a national basis is difficult because there are rules of ethics at the federal level and the state level for each state, as well as at the American Bar Association's (ABA) Model Rules of Professional Conduct, in rules of professional conduct for each state, and in various case decisions. This article cannot adequately discuss ethical rules uniformly, as state rules laws and ethic opinions may vary, so you should check your state law on matters discussed in this article. This article will largely discuss federal law and the ABA Model Rules of Professional Conduct, except where indicated otherwise.

[4]*Upjohn Co. v. United States* (1981) 449 U.S. 383, 389.

[5]See *Silverstein v. Fed. Bureau of Prisons*, (D. Colo. 2009) 2009 WL 4949959, at 4

[6]*Upjohn Co. v. United States, supra*, at 389

[7]*Silverstein v. Fed. Bureau of Prisons, supra*, 2009 WL

4949959, at 8.

[8]*Rossi v. Blue Cross And Blue Shield of Greater New York* (N.Y. 1989) 540 N.E. 2d 703, 705.

[9]*Id* at 705-706.

[10]*RCHU, LLC v. Marriott Vacations Worldwide Corporation* (D. Colo 2018) 2018 WL 3055774.

[11]*See In re Aenergy* (S.D. N.Y. 2020) S.A. 451 F.Supp.3d 319

[12]*See In re CV Therapeutics, Inc. Securities Litigation* (N.D. Cal 2006) 2006 WL 1699536 at 3, citing *In re Grand Jury Subpoena (Mark Torf/Torf Environmental Management), (9th Cir.2004)357 F.3d 900, 908*

[13]*See Apple Inc. v. Samsung Electronics Co., Ltd.* (2015) 306 F.R.D. 234, n. 38

[14]*See* California, for example, which prohibits disclosure of confidential information in virtually all instances except where the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual (Rule 3-100 of the California Rules of Professional Conduct).

ACMA Fellows – Partner With the Best®

ACMA Vision Statement

To provide the best environment in North America for preeminent private practice and in-house commercial real estate finance lawyers to develop professional excellence, trustworthy national business networks and lasting collegial relationships. (Adopted by the ACMA Board of Regents, April 28, 2018)

ACMA Diversity and Inclusion Statement

ACMA is committed to assembling the best and brightest real estate finance attorneys for the advancement of the professional and business goals of its Fellows and their clients. In this desire to Partner with the Best® , ACMA actively seeks diversity and inclusion in all forms in its membership to inform our thinking about industry policies, customary practice and the betterment of the communities in which our Fellows serve. (Adopted by the ACMA Board of Regents, September 5, 2019)

ACMA Racial and Social Justice Statement

ACMA is a professional group of experienced real estate finance attorneys across North America dedicated to developing professional excellence, trustworthy referral networks and lasting collegial relationships. As lawyers, we recognize the critical importance of diversity, inclusion, equity and justice in our organization and our democracy. We reject racism and discrimination of any kind and guard against it, as it jeopardizes the inclusive atmosphere we have cultivated at ACMA, and the close professional relationships and friendships that ACMA fellows enjoy across many miles and many cultures.

Accordingly, we affirm our commitment to mutual understanding, diversity and inclusion, and pledge to redouble our efforts and do our part in educating and leading on these issues, as we fulfill our mission to "Partner with the Best® ."

How Much Should I Save?

By Ned W. Graber, AIG Investments (Retired)

Emergencies can create a sudden need for cash beyond a person's regular income. Large expenses such as home repair, auto replacement, and large medical bills can appear unexpectedly. Comprehensive health insurance can reduce your risk for medical bills. Disability insurance can pay living expenses. Home and auto insurance can reduce exposure for those risks if you maintain coverage and set insurance deductibles consistent with your financial resources. However, even with insurance, there is a need for emergency cash.

Many financial advisors recommend that a working person should keep in cash or cash equivalents a reserve for three to six months of living expenses, including housing; transportation; food; and health, homeowner, and car insurance.[1] One of the easiest sources for an emergency fund for a working person is to set aside all or a portion of tax refunds, bonuses, and pay increases until you have the desired amount.

Another situation to prepare for is a possible loss of employment. Individual needs vary. Two-income couples have different requirements than a single income. If you are the sole earner, you should have six to 12 months of living expenses set aside, while a two-income household probably needs three to six months.[2] You may need to save more if your employer or clients are concentrated in a sector sensitive to economic disruptions. In the public sector, two to four months may be adequate.[3]

How much you should save for retirement depends on what type of lifestyle you intend to maintain. An early retirement date and/or a longer life expectancy means you will need to save more. Starting to save early increases the accumulation period and the total savings for retirement. According to David Blanchett, head of retirement research at Morningstar, couples may need from 54% to 87% of their preretirement income to maintain their lifestyle.[4] Higher-income people and those who have saved more for retirement tend toward the lower end of this range, according to Blanchett.

Fidelity recommends saving 15% of your gross earnings, including employer-matching contributions, until age 67.[5] Saving that amount could produce an income of approximately 54% of your preretirement income. For example, if you saved this amount ($15,000 each year of $100,000 income from age 40 to 67, at an 8% annual return, which is the average return on the S&P 500 from 1957 to 2019[6]), you would accumulate $1,366,372. Using a withdrawal rate of 4%, that would produce an annual income of $54,655. Similarly, saving 15% of an income of $300,000 (three times the previous income) would produce $163,965 using the same assumptions. To that income amount, you would add your guaranteed sources of income such as social security, annuity, and pension payments.

A better method than an income replacement ratio is to calculate how much you will need once you retire. What lifestyle do you want in retirement and how much will it cost? Start with your fixed living expenses and add any amounts that you may reasonably need for unexpected repairs and major expenses during such period that are not covered by insurance. You should reduce your current expenses by the amounts you will not have in retirement, such as contributions to savings and retirement plans, payroll taxes, the reduction in income taxes from a lower income, commuting expenses, etc. Medical expenses, travel, recreational expenses, and other expenses that may increase to support your desired standard of living should be added to the budget. Medical expenses should also be adjusted for the increased cost of living.

Then, using the Multiply by 25 Rule (which is the equivalent of a 4% spending level), multiply your annual expenses by 25 to calculate how much you need to save for your retirement portfolio. Before performing this calculation, subtract from your anticipated expenses the portion that will be covered by guaranteed sources of income such as social security, pensions, and annuities. Then, multiply that annual spending sum by 25. The result can be used as a baseline retirement savings goal. For example, for each $100,000 per year you expect to spend in retirement (in addition to your Social Security and other guaranteed

annual income), you will need to save around $2.5 million. There are numerous online calculators to assist your calculations. Your financial advisor can provide a more comprehensive analysis of savings and an income withdrawal strategy. If your calculation leaves you short of your goal, you may need to consider delaying your anticipated retirement date, drawing on home equity, reducing expenses, or increasing your rate of savings to a level of 20% or more. A method to increase your savings without reducing your current lifestyle is to save the amount of college expenses after the children have graduated or the amount of mortgage payments after paying off a mortgage.

The most tax-efficient method of saving is through retirement accounts. You can contribute $19,500 per year into a 401(k) account, starting at age 40 with the additional catch-up amount of $6,500 beginning at age 50.[7] At an 8% return, the amount saved would be $1,904,174 at age 67. Employer matching increases this amount. At a withdrawal rate of 4% per annum, that is only an income of $76,167 per year. Larger contributions of up to $58,000 per year ($64,500 with catch-up contributions) can be made into a Simplified Employee Pension IRA.[8] You can also contribute $7,200 each year to a Health Savings Account (HSA) for family coverage (plus $1,000 per year if age 55 or older).[9] If you started making the maximum contributions to an HSA for family coverage at age 40 and paid your medical expenses out of pocket, with the additional contributions at age 55 and at a return of 8% return, you could accumulate $699,735 in your HSA by age 67.

Everyone should have a way to raise emergency funds that does not involve selling investment assets, incurring taxes, or paying high interest. The reserve should last long enough so that a person will not have to sell any long-term investments and take actual market losses during a market downturn. When markets are falling, it is rarely a good idea to sell assets to raise cash for needs, especially if you expect the markets to recover quickly, as happened in 2020. The average bear stock market in the United States lasts 14 months.[10] One method is to set aside in safe, liquid investments enough money to cover your unexpected expenses. Examples include treasury bills, money market funds, savings accounts, and certificates of deposit. For retirees, this safety fund should cover one to three years of expenses not covered by guaranteed sources of income such as social security, annuities, and pensions.[11] A three-bucket strategy composed of cash equivalents for 3 years, maturing immediate term bonds for the next 4 to 9 years, and stocks for 10 years and over may be useful for this purpose.

If you are approaching retirement and do not have adequate cash or liquid asset reserves, you should also consider establishing a borrowing source before you retire or early in your retirement to cover emergencies. A line of credit is a good solution when a person does not need the money immediately. It can minimize the amount of cash necessary to be kept in reserve. A person can draw on the line of credit rather than be forced to sell investments during a market downturn. If you have equity in your home and are still employed, you might establish a home equity line of credit. Interest rates are low (about 5%) on these loans, and a person can make interest-only payments until the initial withdrawal period ends (usually after 10 years).[12] If you are 62 or older and own a home, a reverse mortgage line of credit is available that does not have to be repaid as long as the borrower lives in the home. It is easier to establish a borrowing source based upon a steady income before you retire.

If you do not have an emergency fund or a line of credit, there are several tax-efficient methods to cover a financial emergency.[13] First, a person might borrow from family members. Second, a person can tap his/her bank savings accounts, money market accounts, and certificates of deposit. Third, if a person has to tap into longer-term investments, taxable accounts should be used first. Within those accounts, fixed income investments, which may have declined less than equities, are a better option to liquidate than stocks.

Fourth, a person may also be able to take a margin loan against the value of taxable investments, but there is a risk that if values are declining, additional funds may have to be deposited or securities liquidated. Fifth, a person might consider tapping a Roth IRA whose distributions up to the amount of contributions are tax and penalty free. Sixth, a person can borrow from his/her 401(k). Interest rates are usually low (about 5%), and a person has five years to repay the loan. Note, however, that if a person is unable to repay the loan within the five-year period, it will be treated as a distribution (and if the person is younger than 59½ at the time of the loan, subject to a 10% penalty.

Seventh, if a person has lost a job, money in a Health Savings Account can be used to pay medical, dental, and vision expenses not covered by insurance, premiums under COBRA, and to pay health insurance premiums while a person is receiving unemployment benefits. Any withdrawals from an HSA for non-medical expenses are taxed as ordinary income. Eighth, a person can borrow against permanent life insurance policies in an amount up to the cash value at interest rates of 6% to 8%.[14] Distributions from the

cash value instead of a loan are generally taxable.[15] Ninth, withdrawals from most retirement accounts are taxed as ordinary income for federal tax purposes, but if the person is younger than 59½ years old (or younger than 55 and left the job with respect to your former employer's 401(k)), a 10% penalty is imposed. Withdrawals from a 529-college savings plan are not taxed as severely as retirement plans. The portion of withdrawals from 529 allocated to your contribution plans are not taxed. The earnings portion is taxed and a 10% penalty imposed on the earnings portion. Some states, such as California, also impose penalties.[16]

Finally, charging more to your credit cards should be the last resort.

Endnotes

[1]Lisa Gerstner, *11 Solid Ways to Build Wealth*, 74 Kiplinger's Personal Finance, No. 5 (May 2020) p. 44

[2]Emma Patch, *Emergency Funds 101*, 74 Kiplinger's Personal Finance, No. 9 (September 2020) p. 54

[3]*Id*. at p. 55

[4]*Replace 80% of Preretirement Paycheck?* 23 Kiplinger's Retirement Report, No. 4 (April 2016) p. 12

[5]www.fidelity.com/building-savings/maximizing-your-retirement. The replacement income target is 45% of pre-retirement annual income, investment period continues through age 93 and assumes no pension income, 1.5% wage growth; Age 67 is the highest normal retirement age for social security.

[6]J.B. Maverick, *What is the Average Annual Return for the S&P 500?* (Feb. 19, 2020), www.investopedia.com/ask/answers

[7]www.irs.gov/retirement-plans

[8]*Id*.

[9]Rev. Proc. 2020-32, 26 CFR 601.602

[10]*Buttress a Nest Egg With a Cash Stash*, 27 Kiplinger's Retirement Report, No. 1 (January 2020) p. 17

[11]*Lining Up Your Cash Sources for the Next Emergency,* 31 Bob Carlson's Retirement Watch, No. 9 (September 2020) p. 8.

[12]Sandra Block, *Best Ways to Raise Cash*, 74 Kiplinger's Personal Finance, No. 6 (June 2020) p. 53

[13]*If You Need Cash Now, Here's What to Tap First*, Wall Street Journal (August 10, 2020), p. R8.

[14]Emma Patch, *Emergency Funds 101*, 74 Kiplinger's Personal Finance, No, 9 (September 2020) p. 54.

[15]*Lining Up Your Cash Sources for the Next Emergency*, 29 Bob Carlson's Retirement Watch, No. 7 (July 2018) p. 7.

[16]*Id*. at p. 54.

ACMA Fall 2020 and Winter 2021 New Fellows

Canada

Michael L. Dyck
Stikemann Elliott LLP
4300 Bankers Hall West, 888 - 3rd Street S.W.
Calgary, AB, T2P 5C5, Canada
Phone 403-266-9030
Email mdyck@stikeman.com
Website https://www.stikeman.com

John D. Stefaniuk
Thompson Dorfman Sweatman LLP
1700 – 242 Hargrave Street
Winnipeg, MB, R3C 0V1, Canada
Phone 204-934-2597
Email jds@tdslaw.com
Website https://www.tdslaw.com

Mexico

Rolando Christian Escalante Aguilar
De Hoyos y Avilés, S.C.
#77 Aristóteles Street, Int. 203
Mexico City, 11550, Mexico
Phone 52 (55) 52800082
Email rolando.escalante@dha.mx
Website http://www.dha.mx

Alaska

Barbara Simpson Kraft
Davis Wright Tremaine LLP
188 West Northern Lights Blvd., Suite 1100
Anchorage, AK 99503
Phone 907-257-5324
Email barbarasimpsonkraft@dwt.com
Website https://www.dwt.com

Alabama

Christina A. Graham
BBVA USA
15 20th Street South
Birmingham, AL 35233
Phone 205-410-6112
Email christi.graham@bbva.com
Website https://www.bbvausa.com

D. Brian O'Dell
Bradley Arant Boult Cummings LLP
1819 Fifth Avenue North
Birmingham, AL 35203
Phone 205-521-8226
Email bodell@bradley.com
Website https://www.bradley.com

Robert D. Rives
Capell & Howard P.C.
150 South Perry Street
Montgomery, AL 36104
Phone 334-241-8085
Email bobby.rives@chlaw.com
Website https://capellhoward.com

Arizona

Jeffrey S. Pitcher
Stinson LLP
1850 North Central Avenue,
Suite 2100
Phoenix, AZ 85004
Phone 602-212-8568
Email jeff.pitcher@stinson.com
Website https://www.stinson.com

California

Marion Anna Aaron
Stewart Title Guaranty Company
100 Pine Street, Suite 450
San Francisco, CA 94549
Phone 415-403-9013
Email marion.aaron@stewart.com
Website https://www.stewart.com

Colorado

Eric L. Nesbitt
The Law Office of Eric L. Nesbit, P.C.
88 Inverness Circle East, Suite C104
Englewood, CO 80112
Phone 303-741-2354
Email eric@nesbittlawoffices.com
Website https://nesbittlawoffices.com

Illinois

Rasha E. Gad
Quarles & Brady LLP
300 North LaSalle, Suite 4000
Chicago, IL 60654
Phone 312-715-5229
Email rasha.gad@quarles.com
Website https://www.quarles.com

Michigan

Brian Foley
Dickinson Wright PLLC
2600 W. Big Beaver Road, Suite 300
Troy, MI 48084
Phone 248-205-3223
Email bfoley@dickinsonwright.com
Website https://www.dickinson-wright.com

Montana

Charles W. Hingle
Holland & Hart LLP
401 N 31st Street, Suite 500
Billings, MT 59101-1287
Phone 406-252-2166
Email CWHingle@hollandhart.com
Website https://www.hollandhart.com

North Carolina

Kirsten Ellefson Foyles
First Bank
340 Commerce Avenue, Suite 16
Southern Pin, NC 28387
Phone 910-315-5292
Email kfoyles@localfirstbank.com
Website https://localfirstbank.com

Nebraska

R.J. Shortridge
Perry, Guthery, Haase & Gessford, P.C.L.L.O.
233 South 13th Street, Suite 1400
Lincoln, NE 68510
Phone 402-314-5998
Email rshortridge@perrylawfirm.com
Website https://perrylawfirm.com

New Hampshire

James D. Kerouac
Bernstein Shur
Jefferson Mill Building
670 North Commercial Street,
Suite 108
Manchester, NH 03105-1120
Phone 603-623-8700
Email jkerouac@bernsteinshur.com
Website https://www.bernsteinshur.com

Nevada

Michael B. Wixom
Smith Larsen & Wixom
1935 Village Center Circle
Las Vegas, NV 89134
Phone 702-252-5002
Email mbw@slwlaw.com
Website https://slwlaw.com

Oklahoma

Malcolm E. Rosser IV
Crowe & Dunlevy
321 S. Boston Avenue Suite 500
Tulsa, OK 74103
Phone 918-592-9838
Email malcolm.rosser@crowedunlevy.com
Website https://www.crowedunlevy.com

Oregon

David A. Hepler
Schwabe, Williamson & Wyatt, P.C.
1211 SW Fifth Avenue, Suite 1800
Portland, OR 97204
Phone 503-796-2885
Email dhepler@schwabe.com
Website https://www.schwabe.com

Rhode Island

Patricia Antonelli
Salter McGowan Sylvia &
Leonard, Inc.
56 Exchange Terrace
Providence, RI 2903
Phone 401-600-0147
Email pantonelli@smsllaw.com
Website https://www.smsllaw.comO21

Kirsten E. Kenney
Hinckley Allen
100 Westminster Street, Suite 1500
Providence, RI 2903
Phone 401-457-5318
Email kkenney@hinckleyallen.com
Website https://www.hinckleyallen.com

IN MEMORIAM

Stephen A. Bromberg

Bloomfield Hills, Michigan

It is with great sadness that we inform you that former ACMA President Stephen A. Bromberg, of Bloomfield Hills, Michigan, passed away on September 3, 2020.

For more than two decades, Bromberg was named in the *Best Lawyers of America*. In *Chambers USA* 2004, he was described as "one of the deans of the industry," who has "experience second to none," according to interviewees, particularly in the development field. In the 2005 edition, he was described as "the model of a practitioner" who "commands the highest respect and top accolades within the local real estate community for his experience and effective handling of complex cases."

Bromberg earned both undergraduate and law degrees from the University of Michigan. He was a Phi Beta Kappa scholar and received the prestigious Fielding H. Yost award as the best scholar/athlete of his graduation year. His legal expertise was recognized throughout the years in *Chambers USA; America's Leading Lawyers for Business, Real Estate*, 2003–2009, 2013–2015, 2018, and 2019; *The Best Lawyers in America, Litigation – Real Estate; Real Estate Law,* 1987–2021; *Michigan Super Lawyers, Real Estate Law*, 2006, 2017, and 2018; *International Who's Who – Legal*, 2006-2009; and, *Business Top Lawyers Metro Detroit, Real Estate Law*, 2011, 2015–2018, and *Land Use and Zoning Law*, 2013.

Bromberg represented borrowers and institutional lenders, purchasers and sellers, nonprofit entities (including the Detroit Symphony Orchestra), contractors and owners in all kinds of offices, shopping centers, apartments, construction and zoning matters, and in workouts, reorganizations and foreclosures.

In addition to ACMA and the State Bar of Michigan, he was a member of the Detroit, Oakland County, and American bar associations, the American Judicature Society, and the

ACMA PAST PRESIDENTS REMEMBER ONE OF THEIR OWN: STEPHEN A. BROMBERG

Stephen A. Bromberg served as ACMA president from 2002–2003 and had been an ACMA Fellow since 1993. Upon learning of Bromberg's death, many other past presidents shared their remembrances of him. Following is a sample of those recollections.

- **Robert Johnson** (1994–1995): "When we were restructuring ACMA, Steve was an important participant. He was a gentleman's gentleman and added greatly to the esprit de corps of the College."
- **Alfred Adams** (2000–2001): "We all loved to see him dissect a bylaw with great delight. He will be missed as a big part of our history. Steve was one of the individuals, along with many others, who made ACMA great during our formulative years."
- **Tim Konold** (2001–2002): "I remember when I was scouting locations for our Annual Meeting. I visited Whistler and, as we were driving around, I encountered a police-looking car with a door sign reading "Bylaws Enforcement" (which most would refer to as "code enforcement"). I consulted with Steve about the location, and he was initially concerned with the travel distance for many. But, when I sent him a picture of the car, his tone changed and he simply said, "Do It." I was relieved to know that Steve enjoyed our teasing."
- **Howell Crosby** (2004–2005): "Steve was a scholar and most important a jolly good fellow. A true ACMA legend who will be sorely missed. He was a wonderful mentor in the College for me and always available and willing to help or offer guidance."
- **Keith Colvin** (2012–2013): "He was a model of leadership for ACMA."
- **Lou Pettey** (2014–2015): "I had the good fortune to be paired with Steve for the golf tournament one of my first years as a Fellow in ACMA. Being in a golf cart with someone for four hours is a great way to get to know someone. I suppose as

American College of Real Estate Lawyers. In addition to serving as president of ACMA, he served as chairman of the Real Property Law Section of the State Bar of Michigan and chairman-elect, vice chairman, member of its Council, and chairman of its Committee on Land Use and Land Sales.

Bromberg was married to Carol Altman for 67 years and was devoted to his children, David, Nancy (who passed away several years ago), and Daniel; and his five grandchildren, Rafi (Rafael), Leah, Pauline, Alexis, and Maxime.

Donations in his name should be sent to:
Doctors Without Borders–USA
P.O. Box 5030
Hagerstown, MD 21741-5030
(888) 392-0392
https://donate.doctorswithoutborders.org

a result of that meeting, Steve appointed me to the Membership Committee the year he served as its chair. I was privileged to witness his professional demeanor in chairing the committee meetings, but what really impressed me was his fierce defense of the ACMA "brand." He was very careful about what kind of lawyers would become fellows in our College and had no problem passing on applications that failed to pass his muster. Steve was a great ACMA role model."

- **Don Shindler** (2015–2016): "Steve was a generous and welcoming presence to me at my first ACMA fall conference after I became a Fellow. He helped make my introduction to the ACMA fellowship a very enjoyable and important event."

Committee Report: Residential & Regulatory Committee

By Justin Lischak, First American Title Insurance Company
Michael C. Flynn, Buchalter
Co-Chairs, Residential & Regulatory Committee

The Residential & Regulatory (R&R) Committee is a new committee at ACMA. The committee focuses on issues related to residential mortgages and other regulatory issues of interest to Fellows generally and to residential mortgage practitioners in particular. As a new committee, we have emphasized raising our profile inside and outside the College and providing meaningful programming.

As a kickoff event, the R&R Committee hosted its first Zoom-based "intellectual happy hour" in October 2020. The event featured a unique, free-ranging discussion among Fellows and some special guests, including in-house counsel at major institutions such as Fannie Mae, the Mortgage Bankers Association, and the Federal Home Loan Bank system. There was great discussion about a variety of topics, including the regulation of the government-sponsored mortgage entities, the legal nuances of electronic closings, and the future of mortgage regulation at both the state and federal levels. We had about 25 participants, and feedback was very positive. All of the guests asked to be invited to our future virtual happy hours. As this edition of The Abstract was being produced, the committee was hosting another happy hour in early March to which a number of other significant outside guests were invited and with whom Fellows were likely to be interested in talking.

The R&R Committee is currently planning a panel discussion about Tenant Opportunity to Purchase Act (TOPA) issues. As the United States continues to grapple with a housing shortage, some states and municipalities have created restrictions on the transfer of real property used as rental housing. These restrictions (some existing, some proposed) vary greatly, and depending on the terms of the law, can affect everything from the smallest rental home to the largest apartment complex. The panel will explore how TOPA issues can affect a lender's strategy for its collateral. We have recruited some anticipated panelists, including a Washington, D.C., government attorney who has worked on transactions involving tenant acquisitions from the government perspective. This program will be held on April 14 in conjunction with ACMA's virtual Spring Meeting.