Our Profession Will Experience Many Changes in 2017

By Andrew Lieb

2017 is all about change. With a new Republican administration in the White House and a Republican Congress we will experience many changes in statutes, regulations and public policy throughout 2017, which will affect real estate transactions, litigation and our counsel to our clients related thereto. Our clients will have changed perspective and ever-changing needs. While not all change is good, it's healthy to accept change and embrace it, regardless of one's personal politics.

As an attorney, change is an opportunity, and those of us who best navigate change will emerge as the leaders of our profession as new laws require new legal leaders. Yet, to leverage change we must first have a firm grasp of the current state of the law. This special section in The Suffolk Lawyer delves into what is, to what will be in real estate law. We address client management, complex niche transactions, litigation incident to transactions, solutions to the foreclosure crisis and we even shed some light on the new administration as it relates to housing.

Andrew Lieb

FOCUS ON REAL PROPERTY SPECIAL EDITION

In this edition Kenneth J. Landau, Esq. sets the tone by giving us a new take on the KISS Principle as it relates to real estate transactions in his article "Give Your Real Estate Clients (A) K.I.S.S." Then, the team of Jordan Fensterman, Esq., Howard Fensterman, Esq., and Andrew Kasman, Esq. provides instruction to the practitioner on the crossroads of health law and real estate in "Nursing Home Transactions." Thereafter, Dennis Valet, Esq. sheds some light on claims against real estate brokers that typically result from a case of buyer's remorse in "Caveat Emptor and Why You Shouldn't Sue That Real Estate Broker." Next, past Real Property Committee Chair Irwin Izen, Esq. educates the bar on a recently enacted statute that charges the New York Mortgage Agency to both create and administer the New York Community Restoration Fund in "More Help for Distressed Homeowners." Lastly, Sabine Franco, Esq. sheds some light on the nominated HUD Secretary, Ben Carson, in "Expectations for HUD."

These articles are designed to ground us, educate us and inspire us. They are the foundation of what is today because without learning about today we cannot be prepared to leverage tomorrow.

In my fifth year as the Special Section Editor for Real Property, I need to thank our Editor-in-Chief, Laura Lane, who has made this all possible. Thank you to Ms. Lane and to all our writers. I hope that you enjoy this edition.

Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a law firm with offices in Center Moriches and Manhasset. Mr. Lieb is a past Co-Chair of the Real Property Committee of the Suffolk Bar Association and is the Special Section Editor for Real Property in The Suffolk Lawyer.

Give Your Real Estate Clients (A) K.I.S.S.

By Kenneth J. Landau

Giving your clients (or your coworkers) a kiss might be a bad idea and might be unethical, but if you follow the "K.I.S.S." principles, your clients will be happier and more satisfied with your services in a real estate matter. The "K.I.S.S" principle originally meant "keep it simple stupid," or "keep it short and simple," but in the practice of law, it represents what you must do to keep your clients satisfied by providing them with knowledge, integrity, service and solutions.

When you represent a client in a real estate matter, it is important that you have sufficient *knowledge* concerning the nuances of their particular transaction and that needs to be one of the "areas" that you or your firm concentrate in. If you have a certain expertise or experience in various aspects of real estate, it is ethically permissible as well as good marketing to highlight them (just as doctors advertise themselves as specialists or sub-specialists in specific areas of medicine). In every real estate transaction, it is also important to always provide *integrity*. You do not want to involve clients in any questionable practice in any matter which could create civil or criminal liability for yourself or them. It is important to remember that if you cannot solve their real estate problems and leave your client significantly better off after your services and representation, perhaps it is best not to get involved in their legal matter. The Hippocratic Oath should apply to the legal profession and we should be careful to "do no harm." Integrity also applies to any potential conflicts of interest in a real estate transaction. If you are not sure whether there are potential conflicts of interest, request an opinion from your colleagues or the ethics committee of the bar association. Your license to practice law, your ability to represent a client zealously, and your good reputation are all too valuable to risk in a real estate matter.

Kenneth J. Landau

FOCUS ON REAL PROPERTY SPECIAL EDITION

Providing outstanding customer *service* to clients is now more important than ever. The legal field, especially in real estate, is very competitive. You must make it easy for clients to contact you and promptly respond to their communications and concerns through the method that you or they prefer. Just as it has always been important to return telephone calls, your clients must be kept informed as to the status of their legal matter. Make it convenient for them to contact or meet with you, if necessary, on an evening or a weekend and at a mutually convenient location.

Finally, the last goal of K.I.S.S. means providing affordable, workable *solutions* for your clients in their real estate matters. These solutions must be cost effective and leave them significantly better off than before they retained you. It may mean providing them with additional services (at an additional expense) that will be necessary for them to achieve their goals in the purchase, sale or lease of a property. It also means carefully explaining to them why they need these additional legal or professional services and why they are important to the successful resolution of their legal matter.

To fully inform clients and avoid problems in the handling of a real estate matter, it is important to learn their goals before you undertake to represent them in a real estate matter, whether they are the buyer, seller, landlord, or tenant. It is also important to explore their timetable while advising them of the realistic timeframe for completing the transaction. If they contact you early in the handling of a matter or before they negotiate a deal, you can also advise them of your availability to review any preliminary contracts or agreements before they lock themselves into the same.

Once they have entered into any type of a contract, it is important to advise them what they need to do, what you can or cannot do for them, and for you to follow up and keep them informed as to the status and of any possible problems in completing the matter. You must also be extremely careful in accepting a client who is looking for maximum service and work while offering minimal compensation, as you may be abused, or become the subject of complaints filed. Your goal is a win-win with your clients, providing them with K.I.S.S., resulting in a satisfied client who is willing to compensate you fairly for your knowledge and expertise in the matter.

When a client first consults you concerning a potential real estate matter, exploring solutions may mean that you have to act more as a counselor and advisor than as an attorney to educate them about potential problems and how best to avoid or resolve them. Some of these problems you may not be able to help them resolve or handle for them, but you can still advise them and help steer them in the right direction. To avoid problems, clarify in writing the scope of services covered in your fee and anything not included, for which there will be an additional charge, or any other matters in which you are not representing them.

Real estate attorneys who follow the K.I.S.S. principles will attract more clients and leave these clients more satisfied. Your clients will also be better informed about the law and what you can accomplish for them. Additionally, they will also come to you for other matters and will send referrals to you. And you will minimize distrust and negative feelings about the legal profession. It is a win-win for both you and your clients.

Note: Kenneth J. Landau is a partner in the Mineola law firm of Shayne, Dachs, Sauer & Dachs, LLP, and concentrates in the areas of negligence, medical malpractice and insurance law on behalf of plaintiffs. He is a past dean of the Nassau Academy of Law and hosts the weekly radio show "Law You Should Know," on WHPC 90.3 F.M. or Voicestream at www.ncc.edu/whpc.

Nursing Home Transactions

By Jordan Fensterman, Andrew T. Kasman and Howard Fensterman


Jordan Fensterman


Andrew T. Kasman


Howard Fensterman

When purchasing real estate, a purchaser should always heed the ancient adage Caveat Emptor — "let the buyer beware." This is especially true in nursing home transactions. The risks inherent in purchasing a skilled nursing facility should not be understated. With a thoughtful plan in place the attorney can assist the nursing home real estate purchaser in avoiding the uncertainties and unforeseen dangers in order to help the purchaser successfully and smoothly close the transaction.

Companies and individuals purchasing a nursing facility should have a sound plan in place from the outset. Three of the key elements to consider are:

- Due diligence: Review both the facility's operations and the real estate to learn as much as possible about the existing and potential liabilities affecting both.
- Regulatory filings: Understand and plan to make the multiple regulatory filings that occur incident to a change of ownership.
- Purchase and Sale Agreement: Anticipate and allocate liabilities between the transacting parties.

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What follows is a brief overview of each of these three elements.

Due diligence

As with every real estate transaction, the purchaser must complete its due diligence within a certain time frame. As with a typical real estate transaction, due diligence includes review of title, violations, surveys, parking compliance, environmental (Phase 1 and Phase II where applicable), zoning, contracts, equipment leases, liability insurance contracts, and union agreements. In addition, in nursing home transactions the attorney needs to review contracts and arrangements with other healthcare providers, pharmacy vendors, therapy companies, ambulance providers, transport, service contracts, laundry contracts, maintenance contracts, etc. A determination regarding the assignment and/or ability to bill under the outgoing owner's Medicare and Medicaid provider numbers must also be made. The terms of these arrangements must be reviewed for potential conflicts or other illegal provisions. These contracts impact the value of the facility, and not understanding nursing home specific laws and regulations governing the above noted contracts can lead to serious civil and criminal liabilities.

In a nursing home facility acquisition, in addition to conducting a financial review the purchaser must examine the facility's insurance claims, star rating, incidents, and compliance history. That will involve reviewing the most recent and past inspection reports and surveys relating to the facility, statements of deficiencies and plans of correction and other compliance activity.

The purchaser will often find an array of violations and must ensure that the facility is in compliance before closing. In many cases, these violations may be outstanding and the facility may be operating under a plan of correction. In some cases, the facility could be on a special focus list and may be at risk of losing its provider number. In these circumstances the purchase price should be commensurate with the risk that the incoming purchaser assumes.

Regulatory filings

Unlike standard real estate transactions, the regulatory aspect of a change of ownership can have a great impact on the timing of the transaction. Each of the entities that regulate a long-term care facility, from the state licensing body to the Medicare and Medicaid programs, has its own regulatory requirements for a change of ownership. In many cases, a regulatory body requires the parties to complete an application or multiple applications before closing. Sensitive personal financial information may be required to be turned over for all persons affiliated with the purchase. A new owner must gain regulatory permission to take possession of the facility prior to consummating the purchase.

(Continued on page 24)

Caveat Emptor and Why You Shouldn't Sue That Real Estate Broker

By Dennis C. Valet

When the discovery of a latent defect in a newly purchased home triggers a severe case of buyer's remorse, the real estate brokers involved in the transaction often find themselves in the crosshairs. The erroneous expectation is that these licensed professionals — hired for the purpose of bringing two parties together in a meeting of the minds — are the guarantors of a problem-free transaction. In reality, a real estate broker's liability is limited to the duties owed to the complaining party. Some of these duties are derived from general common law negligence and agency principles, while others are specific to real estate brokers by way of statutes, regulations and administrative decisions. Because consumers tend to purchase or rent a home only a handful of times in their life, their familiarity with the rules governing these agency relationships is often lacking. So, when is it really your real estate broker's fault?

Dennis C. Valet

The three most common causes of action alleged against real estate brokers by consumers are negligence, breach of fiduciary duty and fraud. Each can generally be boiled down to the common legal question: did the broker have a duty to do (or refrain from doing) what the complainant alleges?

The first step in analyzing liability is determining whether the broker has an agency relationship with the complainant. There are five agency relationships possible within a transaction pursuant to statute: A Buyer's Agent, a Seller's Agent, a Broker's Agent, a Dual Agent, and a Dual Agent with Designated Sales Agent. RPL §443 defines each of these agencies, and for the most part they are what they sound like. The tricky part, however, is the fact that purchasers often see more than one home during their search, often with the same broker, and each of those showings may entail a different agency relationship with that broker than the last. In fact, RPL §443 specifically informs a consumer that "[t]hroughout the transaction [they] may receive more than one disclosure form." If a real estate broker shows three houses to the same prospective buyer in one day, that broker may be a Buyer's Agent at one property, a Seller's Agent at another, and a Dual Agent at the third. The byproduct of this fluid agency is a consumer (and sometimes a broker) who may not understand whose interest the broker is supposed to represent. Section 443 of the Real Property Law attempts to eliminate this problem by requiring brokers to inform the parties of their agency relationship using a standardized agency disclosure form. In practice, this disclosure form, even if used correctly, does not truly illuminate the various duties owed by the broker to the consumer.

The disclosure form specifically defines the duties owed to the various parties based upon the agency at hand. For example, "[a] seller's agent has, without limitation, the following fiduciary duties to the seller: reasonable care, undivided loyalty, confidentiality, full disclosure, obedience and duty to account." When dealing with a buyer who is not his principal, a "seller's agent should (a) exercise reasonable skill and care in performance of the agent's duties; (b) deal honestly, fairly and in good faith; and (c) disclose all facts known to the agent materially affecting the value or desirability of the property…" While RPL §443 seems to define exactly what duties are owed and to whom, courts have painstakingly carved out exceptions and expansions on a case by case basis.

For example, with regard to the seemingly simple concept of undivided loyalty, the Court of Appeals in *Sonnenschein v. Douglas Elliman*[i] and its progeny, *Douglas Elliman v. Tretter*,[ii] pulled back on just how far that undivided loyalty must extend. In both cases, a Seller's Agent who owed a duty of undivided loyalty to the seller took prospective buyers to see other properties after showing those prospective buyers the seller's home. The seller alleged that this breached the duty of undivided loyalty as the broker showed the prospective buyers competing homes which they could purchase instead of the seller's home. The Court of Appeals held that the realities of real estate brokerage, which necessarily involves simultaneously representing multiple principals with competing interests, preclude a rule that would limit brokers to a true duty of undivided loyalty. The court was careful to note, however, that this was only the default rule and that the parties were free to craft whatever duties they believed would serve their relationship best.

In one of the few examples dealing directly with a claim of negligence by

(Continued on page 25)

FOCUS ON REAL PROPERTY SPECIAL EDITION

More Help for Distressed Homeowners

By Irwin S. Izen

Recently signed legislation (Senate Bill 8141) has amended section 2401 of the NYS Public Authorities Law, to provide for the New York Mortgage Agency to both create and administer the New York Community Restoration Fund to assist homeowners who are either delinquent on their mortgage payments, or are in danger of going into default because of economic hardship.

The State of New York Mortgage Agency (SONYMA) was created as a public authority back in 1970 to provide mortgages for eligible home buyers. The mortgages offered initially were well below "market" rates, but as conventional rates have gone down, the attractiveness of SONYMA mortgages has declined. Nonetheless, SONYMA mortgages are income restricted and aimed at low to moderate income earners. If the homeowner sold the SONYMA financed home within the "recapture" period, a portion of the "net" profit from the sale was to be repaid to SONYMA.

Now with the creation of a "Community Restoration Fund," the same government agency will be charged with assisting homeowners adversely affected by The National Mortgage Crisis, who are in danger of defaulting on their home mortgages because of "economic hardship."

Irwin S. Izen

No doubt the term "economic hardship" was purposely used to "mirror" the financial hardship claimed under HAMP (Home Affordable Modification Program) guidelines, but no formal definition is provided for in the statute. If a homeowner can demonstrate economic hardship, under Agency (SONYMA) guidelines, then assistance ranging from modification of the existing mortgage, to funding for rehabilitation, to transferring title and renting back the home is available. Defining "economic hardship" in line with SONYMA guidelines will necessitate an application for assistance and trained personnel assisting in this task, however how this application is processed and the timeframe involved will determine the true success of the program.

The funding available through this program will no doubt increase the proliferation of mortgage modification counseling and entities, only with more scrutiny as to funding requests. Another unintended consequence will be the formation of new not for profit entities applying for funding to implement the acquisition, restoration and administration of the funds as they wrestle with novel ideas geared towards keeping the homeowner in their home.

I see the potential for creating "mortgage" administration service firms to aid defaulting homeowners. With "eligible institutions" receiving community rehabilitation funds, these institutions can negotiate with existing mortgagees on modification or purchasing the underlying mortgage and then working on a rental payment for the homeowner to remain. Money will be available for acquisition, rehabilitation and maintenance of the property with strict record keeping and compliance requirements. The restoration of the community and the prevention of further neighborhood deterioration can be accomplished by finding ways to make it more affordable to keep homeowners in their homes and assisting these homeowners in maintaining their properties. There will be the need for property inspections and other compliance reporting on how funds are spent.

A similar mechanism is currently in place at the county level through the use of "Land Banks" as authorized

(Continued on page 24)

FOCUS ON REAL PROPERTY SPECIAL EDITION

The Suffolk Lawyer wishes to thank Real Property Special Section Editor Andrew Lieb for contributing his time, effort and expertise to our February issue. We are thankful that Mr. Lieb has once again volunteered to be a special section editor for The Suffolk Lawyer.

Expectations for HUD Under Carson

By Sabine Franco

Donald Trump has officially nominated Ben Carson to serve as the secretary of the U.S. Department of Housing and Urban Development. Known as HUD, the federal agency is responsible for assisting individuals to secure affordable housing, especially in a time when rents and home prices continue to rise.

Ben Carson, a brilliant neurosurgeon and Detroit native, was born into poverty in the inner cities of Detroit, Michigan. After what he describes as a rebellious childhood, Mr. Carson graduated from Yale University and Michigan State Medical School. When he was 33, he was named Director of Pediatric Neurosurgery at Johns Hopkins Hospital.[1]

His early life while growing up in Detroit connects him to a majority of the people who benefit directly from HUD. This perhaps will be an advantage over previous HUD directors. The question is will this be enough?

Many are concerned that Mr. Carson lacks the experience to handle the job. Especially since decisions made under this administration will likely affect the housing market well after this administration. Like Donald Trump, Mr. Carson's decorated career affords him no experience in government or running a large bureaucracy, and no expertise in housing.

Sabine Franco

Diane Yentel, President of the National Low Income Housing Coalition, an organization dedicated to ensuring low income families receive affordable housing, stated, "[w]ith so many qualified candidates to choose from with deep knowledge of and commitment to affordable housing solutions … Dr. Ben Carson's nomination to serve as HUD secretary is surprising and concerning."[2]

This will not be the first HUD Secretary without housing experience. Steve Preston served under the Bush Administration from 2008 to 2009. Although Preston had experience running the Small Business Administration, a government agency, his background was focused on finance. Preston shook things up quite a bit and accomplished much in his short tenure at HUD. Most controversial and notably are the Troubled Asset Relief Program, the Economic Stabilization Act of 2008, the Housing and Economic Recovery Act of 2008, the government takeover of Fannie Mae and Freddie Mac, and an expansion of Federal Housing Administration (FHA) refinancing.[3]

Preston's effectiveness lends optimism to Carson's lack of experience. Sometimes knowledge and experience in a particular area gets one jaded and near-sighted, focusing too much on intricate details, rather than fearlessly shaking things up. Carson has no affection or sentiment for HUD's current policies and state-of-affairs. This may allow him, once briefed and with a qualified team, to make the changes necessary to fix the areas that may be broken.

"HUD's mission is to create strong, sustainable, inclusive communities and quality affordable homes for all."[4] With a budget in excess of 47 billion dollars, HUD runs the Federal Housing Administration, which provides loans with low money down to allow individuals an opportunity to become homeowners. It also funds the Community Development Block Grant program, a source of funding used by cities for a wide range of community development needs including disaster relief.[5] HUD funds the Housing Choice Voucher program (Section 8), which cities rely on to help pay for housing for the poor. Finally, HUD enforces the Fair Housing Act, part of the Civil Rights Act of 1968, which makes housing discrimination illegal.

Bipartisan housing experts agree that dealing with poverty, which in turn leads to crime, will be the biggest challenge the next HUD secretary will have to face. The American Enterprise Institute, an organization which conducts research on political, national and worldly matters, cited housing assistance programs as among those "ripe for reform'' under the new Trump Administration.

These hot button issues seem to be on Carson's radar. The New York Times quoted Carson saying, "[w]e cannot have a strong nation if we have weak inner cities," "[w]e have to get beyond the promises and start really doing some-

(Continued on page 27)

FOCUS ON REAL PROPERTY SPECIAL EDITION

VEHICLE AND TRAFFIC

Collateral Consequences When Clients are Holders of Class DJ or MJ Permits or Licenses

By David A. Mansfield

The strict plea bargaining policies at the Suffolk County District Court Traffic and Parking Violations Agency concerning offenses committed by holders of learner's permits or Class DJ or MJ permits or licenses lends itself to a discussion of the collateral consequences of a conviction for these offenses.

The specific rules for the license and privilege sanctions are found in Vehicle and Traffic Law §510-c. A conviction for a holder of a Class DJ or Class MJ learner's permit or license will be suspended for 60 days when convicted of an offense designated as a serious traffic violation under §510-c(2).

Serious traffic violations are convictions for operating a motor vehicle in violation of any provision of Articles 25 and 26. The statute recites Article 25 and Article 26 for simplicity. Article 25 offenses are §1120 through §1131. A full list is included in this article to alert defense counsel to the mandatory license/privilege sanctions for each violation which is not clear from the statute.

Article 25 offenses includes: §1120, driving on the right side of the roadway; §1121, passing vehicles proceeding in the opposite direction; §1122, overtaking a vehicle on the left; §1122-a, overtaking a bicycle; §1123, when overtaking on the right is permitted; §1124, limitations on overtaking on the left; §1125, further limitations on driving to the left of center of roadway; §1126, no-passing zones; §1127, one-way roadways and rotary traffic islands; §1128 driving on roadways laned for traffic; §1129(a), following too closely; §1130, divided and controlled access highways, and §1131.

The Article 26 offenses are: §1140, vehicle approaching or entering intersection; §1141, vehicle turning left; §1142 vehicle entering a stop or yield intersection; §1143, vehicle entering roadway; §1144 operation of vehicles on approach of authorized emergency vehicles; §1144-a "move over" for parked, stopped or standing authorized emergency vehicles; §1145, vehicle approaching rotary traffic circle or island; §1146, drivers to exercise due care; §1146-a approaching horses.

Additional serious traffic violations are: §600(1), leaving the scene of a property damage incident; §601, leaving the scene of an incident with a domestic animal; §1111, passing a red light; §1170 railroad crossing violation; §1172 stop sign; §1174 passing a stopped school bus; §1180 speeding, and the speed has to be 10 or more miles an hour over the speed limit; §1182 drag racing; §1229-c(2) seat belt violations by a child, child seat under the age of 16 and §1212 reckless driving.

Should the violation not be designated as a serious traffic violation, a second conviction of any provision of the Vehicle and Traffic Law except parking, stopping or standing will result in the 60-day suspension.

Should your client's learner's permit or driver license be suspended, it will then be considered probationary for six months when restored and the learner's permit or license shall be revoked for a period of 60 days for a violation or violation committed within 6 months of the restoration of the permit or license suspended pursuant to this chapter.

David Mansfield

Any suspension or revocation for a conviction while in a learner's permit, Class DJ Or MJ or probationary license status for the use of a portable electronic device violation of §1225-d or improper cell phone use §1225-c (2a), the penalties are a suspension of 120 days under §510 (2) (b)(xvi) (xvii).

A second conviction within six months of the restoration of the license or permit after the 120-day suspension is terminated will result in a revocation of at least one-year of a probationary license, or a revocation of at least one year for a Class DJ or MJ driver license or learner permit Vehicle and Traffic Law §510(2)(a)(xii) (xiii).

Therefore, it is important to be thoroughly familiar with the collateral consequences for these violations. Surprisingly, an unlicensed violation §509(1) by itself will not trigger an automatic suspension of a permit or a license, although your client is always subject to the possibility of a Department of Motor Vehicles safety hearing with any conviction.

Experience has also shown that even if your client obtains their full license before the case is resolved, the Department of Motor Vehicles will still impose the mandatory license or privilege sanction at a later date.

Note: David Mansfield practices in Islandia and is a frequent contributor to this publication.

OPINION

A Solution to the Foreclosure Crisis

By Irwin S. Izen

Irwin S. Izen

Having attended the Suffolk County Bar Association CLE lecture given by the Charles Wallshein, Esq., on "Suing the Loan Servicer for Mortgage Modification Abuses," and having practiced in the field over the years, I am suggesting a simple, yet practical solution to the mortgage foreclosure crisis.

Our court system is bogged down with hundreds, if not thousands of foreclosure cases sitting in legal "limbo," as distressed homeowners remaining in their homes until the day they are forced to relocate. Often this home represents an emotional tie. The separation anxiety combined with the comfort the home provides flies in the face of logic, resulting in homeowners, often with the aid of trained counsel, looking to remain in their homes for as long as possible. Other than ruining their credit scores, these homeowners should be "sacking" away every last cent for the day when they have to move. Based on this inevitable relocation, the strategy employed is simple: delay, delay and delay. Sometimes this strategy is aided by the mortgagee (Lender) ceremoniously asking for a laundry list of documents throughout the settlement conference stage only to have the documents go "stale" months after submission or by offering a last minute modification that the homeowner cannot afford.

The "Foreclosure Crisis" has contributed to "Urban Legends" of homeowners remaining for years in their homes and of substantial principal reduction that can sway even the most credit conscious homeowner into voluntary default. After all, the Lender is not willing to speak with the homeowner who is current. Why not sacrifice some credit for five years of not paying a mortgage? Financially it is a "no brainer."

The cause of the "Crisis" is not important — the solution is. I have read countless articles written by scholars analyzing the cause of the problem, but never a solution. Attorney General Schneiderman touts his multi- million dollar settlements. Why not use this money to fashion a practical solution?

Lenders are frustrated, the courts are log jammed and homeowners are suffering. The overwhelming majority of those homeowners presented a legitimate hardship — i.e. loss of job, spouse died, etc. — which had thrust them into their current fate, but who desire to remain in their homes. These homeowners were intent on getting back on their feet, and resuming their mortgage payments. Opposite are the homeowners who are looking to "take advantage" of the situation and intent on not paying a dime, despite having income.

Here is where the solution begins. First, there must be a given timeframe, perhaps six months of arrears, before the homeowner is "summoned" into the legal system. It can be as simple as a summons with Notice of Default and can take place at the local district court.

The summons will mandate a settlement conference at which time a series of questions are asked of the homeowner (and any other contributing household members), regarding household finances with the mortgagee (Lender) having an underwriter available to "qualify" the homeowner for a temporary "new" mortgage payment. Like a "trial modification," this will allow the homeowner to start making regular payments, again, to "reestablish" credit while reducing mounting arrears.

Utilizing qualifying ratios similar to those used in a mortgage approval, a temporary payment is calculated. This scenario can be subject to annual review so long as the homeowner continues to make the "new" payment. Ideally, the payment would increase annually as income in the household rises, but this would replace the "trial modification."

At some fixed point in time — say three years — if the homeowner makes the regular payments, a permanent modification can be structured with a "streamline" recasting of the old mortgage. Incentivized principal reduction can be offered and the Mortgagee can either write off the principal forgiven or make application to a fund (AG Schneiderman's settlement funds) for a supplemental payment towards the forgiven debt. By using ratios whereby principal, interest, taxes and insurance (PITI) represent between 30-35 percent of the gross household income, the goal of commencing affordable payments can be attained and much quicker than under the conventional modification application. This is a simple mathematical calculation which can be done easily.

This arrangement will allow homeowners to remain "status quo" until a more lasting solution is negotiated while reestablishing both their credit and self worth, and at worst, can last through the end of any applicable school year. With any luck the market will rebound and that homeowner can rebuild equity.

For those homeowners who have no income, or care not to disclose their income, remaining in the home is not an option. It is this group of people who can best be directed to counseling and who can be offered alternatives. Keys for cash, deed in lieu, short sales and other relocation aid will still be available.

It is those who cannot accept the relocation who bog down the system. Given the homeowner is often not paying insurance or taxes, their monthly nut is greatly reduced. Can a rental be found to accommodate the homeowner with less monthly carrying charges? If the Lender is going to offer relocation money, then perhaps it should be directly paid to the new landlord in an effort to hasten the relocation. This option may be complicated by title issues affecting the property, but as part of this incentive the homeowner would "cooperate" in the foreclosure process so that the mortgagee can minimize financial exposure. A prolonged foreclosure only costs more in insurance, taxes and maintenance. So, give the homeowner the money as an incentive to relocate or surrender title. In this scenario, title is more easily acquired (surrendered or through foreclosure) by the mortgagee and the property marketed for resale. Whether municipalities would like to get these properties for their "lottery" to deserving home buyers is another aspect of the solution that can be developed.

This streamline approach is designed to separate those families with income from those without as the key factor in this solution is the ability to pay — something.

Sounds simple?

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Nursing Home Transactions (Continued from page 13)

Therefore, in connection with any change of ownership, the purchaser should develop a plan to provide notice and seek permission from each of its regulatory bodies. Late and untimely filings can have the unfortunate consequences of delayed closing dates, breached contracts and lost revenue. An experienced nursing home transactional attorney will know to put in place certain protections for the purchaser. It takes approximately one year from submission in New York to obtain a Certificate of Need approval. Therefore, unlike a standard real estate transaction, a closing usually does not occur for 12 to 15 months after the execution of the Purchase and Sale Agreement.

The Purchase and Sale agreements

Once the risk factors have been determined and potential liabilities and other concerns are identified, the purchaser must ensure that the Purchase and Sale agreements (typically an Operations Transfer Agreement and an Asset Purchase Agreement) are drafted by purchasers' counsel to insulate the purchaser from these liabilities. A standard provision in these types of agreements is the "representations and warranties." For example, a seller usually "represents and warrants" that it has operated the facility in compliance with the legal regulations, that it has not received notice of any government investigations, and that its financial statements accurately reflect the results of the facility's operations. From the purchaser's position, the "covenants" made by the seller and contained in the Purchase Agreement also are critical because they address the seller's future conduct, requiring the seller not to take actions to hurt the facility.

A critical element of the Purchase and Sale agreements is the allocation of liabilities. The purchaser will want terms that require the seller to maintain responsibility for liabilities that relate to events occurring before the sale date (even if they do not become apparent until after). The seller of a facility with compliance problems will usually want to negotiate the allocation of liability otherwise. Another consideration is whether the seller will remain financially solvent after the sale.

The above information is by no means intended to be an all-inclusive guide. For any nursing home transaction counsel experienced in handling the matters should be retained.

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Note: Howard Fensterman is the managing partner at the New York law firm Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP. He is involved in all facets of the law firm's practice, including representing corporations, partnerships, LLCs and LLPs, as well as other business entities and individuals in connection with litigation, settlement negotiations, purchase and sale of business entities, asset-based lending, shareholder and partnership agreements, and real estate matters..

Mortgagee Sanctioned $375k (Continued from page 6)

There are three possible outcomes to this requirement. The mortgagee can file a response indicating that the debtor has cured all arrears and is current with all payments as required; the mortgagee can state that the debtor owes money and, if so, provide an itemization; or the mortgagee can fail to comply despite being required to do so.

Here's the enforcement mechanism. If the mortgagee fails to comply with providing any of the information, or if it fails to respond to the Notice of Final Cure, the court may preclude the mortgagee from offering the omitted information as evidence in any contested matter unless the failure was substantially justified or harmless. In other words, any amount the mortgagee may seek to collect, even if owed, will be uncollectable.

In addition, the court may award "other appropriate relief," including reasonable attorney's fees. Rule 3001.2(I). The corresponding Advisory Committee note specifies that sanctions may be imposed for a mortgagee's failure to disclose.

Court awards sanctions for non-compliance

In a recent decision out of Vermont, the court determined that significant punitive sanctions were appropriate in three related cases involving the same mortgagee. In each case, the mortgage servicer, PHH Mortgage Corporation, failed to comply with Rule 3002.1, in that it imposed post-petition fees against the debtor without having provided proper notice. The court disallowed the fees the mortgagee was seeking and imposed sanctions of $375,000. *In re Gravel*, Case No. 11-10112 (Bankr. D.Vt., Sept 12, 2016).

The court determined that a very serious sanction was called for because the mortgagee was not a first-time offender and had been given an opportunity to rectify but failed to do so.

There are not a lot of reported decisions on Rule 3002.1 violations, but the *Gravel* case demonstrates that courts may have little tolerance for mortgagees who flout their obligations under the relatively new statute. The judge in *Gravel* stated: "The court deliberately levies this substantial penalty on PHH to convey a clear message to PHH, and other mortgage creditors, that they may not violate court orders with impunity and will suffer significant monetary sanctions if they conduct their mortgage accounting operations in a manner that fails to fully comply with Rule 3002.1, violates court orders, or threatens the fresh start of Chapter 13 debtors."

Practice pointers

All practitioners who represent Chapter 13 debtors should become familiar with Rule 3002.1 and make sure that mortgagees do not improperly pursue their clients for alleged pre-discharge obligations that they did not disclose.

As demonstrated in the *Gravel* case, courts may be quite willing to impose significant sanctions against mortgagees for failing to comply with the statute and practitioners should consider seeking sanctions for violations.

The rule contains several other provisions that could not all be addressed in this short article. For example, if the lender states for the first time that certain charges are due, when this information could have been disclosed more than a year earlier, the lender may be estopped from obtaining such amounts pursuant to Rule 3002.1(b) and (c).

It should be noted that if a lender violates Rule 3002.1, the debtor can only seek enforcement in the bankruptcy court, and not in the state court where a foreclosure might be pending.

Note: Craig D. Robins, a regular columnist, is a Long Island bankruptcy lawyer who has represented thousands of consumer and business clients during the past twenty-nine years. He has offices in Melville, Coram, and Valley Stream. (516) 496-0800. He can be reached at CraigR@CraigRobinsLaw.com. Please visit his Bankruptcy Website: www.BankruptcyCanHelp.com and his Bankruptcy Blog: www.LongIslandBankruptcyBlog.com.

Help for Distressed Homeowners (Continued from page 14)

under Not for Profit Corporation Law (N-PCL) section 1600. While the purpose of "Land Banks" goes well beyond helping distressed homeowners, the concept of acquiring property can be extended to properties facing foreclosure. By extending the "Land Banks" approach to those properties that are scheduled for auction, or those properties affected by non-performing mortgages, the municipality (the County) could seek funds from SONYMA to either purchase, at auction or buy the discounted non-performing mortgage and then negotiate with the existing homeowner on remaining in the premises. These funds could also be well served in the local municipalities facing the epidemic of "zombie" houses by assisting in acquiring said houses, rehabilitating them and then offering the properties for sale based on some income guidelines, similar to those of SONYMA.

Neighborhood blight is felt at the local level, so the administration of the new Community Rehabilitation Fund needs to be at the local level for any program to be successful.

Note: Irwin S. Izen, is a solo practitioner concentrating in real estate, transactional and business law. He has served as the co-chairman of the Suffolk County Real Property Committee twice, from 2001-03 and 2009-11 and maintains his office at 357 Veterans Memorial Highway, Commack, NY.

The Value of An IME: To Hold or not to Hold (Continued from page 17)

question of whether a plaintiff sustained a "serious injury" as defined by the Insurance Law Section 5102(d), an IME is an extraordinarily powerful and, often necessary, tool for a defense attorney. It is essential if the intention is to move for summary judgment on threshold grounds. However, we do not need an IME physician to tell us that a limb is missing in a case where the plaintiff's leg was amputated in the accident. We also do not need an IME physician to tell us that plaintiff has limitations in his neck after a multi-level cervical fusion surgery. And we certainly don't need an IME physician to tell us that the plaintiff's injuries are causally related to the subject accident because he wasn't informed about the plaintiff's 10 prior accidents or provided with the plaintiff's voluminous pre-accident medical treatment records.

Of course, the impropriety of conduct at these examinations can be seen on both sides. On one hand, there can be the shifty, career IME physician. On the other hand, there can be the obstructionist, opportunistic IME watchdog. In addition to carefully choosing an independent expert physician in only those cases where one deems it beneficial and necessary to do so, the appearance of, and the recording by, IME watchdogs, i.e. non-legal representatives of plaintiffs, at the IME should also be closely scrutinized and objected to. Recently, the Appellate Division, First Department, in the case of *Kattaria v. Rosado*, 2017 N.Y. Slip Op 00091, affirmed the trial's court's decision which granted defendant's motion directing that the plaintiff resubmit to a medical examination by defendant's designated physician, post-note of issue, without the presence of a non-legal representative. The court held that the plaintiff failed to demonstrate "special and unusual circumstances" warranting the non-legal representative's presence at the examination (*Id*). A formal, written objection to the appearance of a non-party representative at the IME, and to the recording of the IME, should be served with every Answer so that it will be no surprise to his attorney that the watchdog and his camera are not welcome at the examination.

An IME can make or break the defense of a case. Just keep in mind that in several cases, it breaks the defense. It is ill advised to reflexively conduct an IME in every case. This should be a calculated decision. If you decide to go forward with an IME, be selective about your physician, and keep in mind there are good arguments against allowing a non-legal representative to monitor or record the examination. In his article entitled "A Pragmatic Approach to Retaining and Presenting Expert Witnesses: Picking All-Stars and Avoiding Busts," Ladd A. Hirsch, Esq. put it best when he compared the decision about whether to retain an expert to the "refrain heard with some frequency when sports fans and commentators discuss their teams during the off season." ("A Pragmatic Approach to Retaining and Presenting Expert Witnesses: Picking All-Stars and Avoiding Busts," by Ladd A. Hirsch [2012]). Often, "[t]he best trades are those that are never made" (*Id*).

Note: Rebecca K. Devlin is an associate at Lewis Johs Avallone Aviles, LLP. Her practice focuses on the representation of clients in complex civil litigation and transportation law. She defends corporate, commercial and individual clients, directly and through their insurance carriers, in all facets of casualty defense litigation, including construction accidents, premises liability, products liability, municipal liability and vehicular negligence.

Why You Shouldn't Sue That Broker (Continued from page 14)

a third party, the Richmond County Civil Court in *McDermott v. Related Assets, LLC*[iii] held that RPL §443 imposed a duty upon the broker to conduct a search of New York City's public record to determine if a property had sewer hookup instead of relying on the representations of the seller. That standard of reasonable care, however, has not found broad support in the Supreme Court.

With respect to third parties, negligence and fraudulent misrepresentation intersect due to RPL §443's duty to "disclose all facts known to the agent materially affecting the value or desirability of the property." On its face, this statute appears to derogate the common law doctrine of *caveat emptor*, which imposes liability in an arm's length transaction only in the event of active concealment, by expanding the circumstances in which a broker must actively disclose information to third parties. However, in *Ader v. Guzman*,[iv] the Second Department held that the duties established in RPL §443 do not "alter the application of the common law of agency."

If a specific duty is important to a consumer, the lesson is clear. They are best served by memorializing their expectations in a written agreement or risk a legal reality which may be different than their own. Buyer beware.

Note: Dennis C. Valet is the Senior Associate Attorney at Lieb at Law, P.C., a law firm with offices in Center Moriches and Manhasset. Mr. Valet focuses his practice on real estate litigation with an emphasis on representing licensed real estate brokerages and their agents.

[i] 96 NY2d 369 (2001).
[ii] 20 NY3d 875 (2012).
[iii] 45 Misc3d 1205(A) (Civil Court, Richmond Cnty., Sept. 16, 2004).
[iv] 135 AD3d 668 (2nd Dept. 2016).

Before E-Discovery Begins: Interrogatories or Depositions? (Continued from page 8)

Require the custodian to submit the interrogatory responses online using a commercial system which permits you to integrate the interrogatory responses with your case management system.

Social media

Social media are web-based and mobile technologies that enable interactive online dialogue. They include the nearly infinite variety of internet forums, blogs and websites permitting users to post and access content including text, music, photographs, and recorded or live-streamed videos. Facebook, launched in 2004, is the most ubiquitous of the social networking platforms, which include MySpace, LinkedIn, and many similar services in the United States and overseas.

The basic features common to all social media are a visible profile for each user, a list of "friends," sections containing "postings," and some kind of privacy controls that allow users to choose who may view their profiles or contact them.

Twitter, started in 2006, is a real-time social networking and microblogging service that lets users broadcast to selected persons, or to the world, what they are doing and thinking at any moment — within a 140-character limit for each "tweet."[i]

Social media in litigation

Since the purpose of social media is to share personal information about activities, lifestyle, and state of mind, courts are regularly allowing parties access to social media accounts in cases which those factors are relevant such as matrimonial actions, personal injury claims, and employment litigation.[ii]

While there can be no reasonable expectation of privacy in information voluntarily posted online and available to anyone with a computer, where a Facebook public profile showed nothing inconsistent with the claims of a party, at least one federal court has held that there is no general right to information restricted from public view by the party. [iii]

You will have to evaluate on a case-by-case basis whether gaining access to online content justifies the cost and effort. Just remember that it may be considered prima facie evidence of professional incompetence not to serve a Litigation Hold Notice[iv] together with the summons and complaint in any civil action.

More on the specifics of social media discovery next issue.

Note: Victor John Yannacone Jr. is an advocate, trial lawyer, and litigator practicing today in the manner of a British barrister by serving of counsel to attorneys and law firms locally and throughout the United States in complex matters. Mr. Yannacone has been continuously involved in computer science since the days of the first transistors in 1955 and actively involved in design, development, and management of relational databases. He pioneered in the development of environmental systems science and was a cofounder of the Environmental Defense Fund. Mr. Yannacone can be reached at (631) 475–0231, or vyannacone@yannalaw.com, and through his website https://yannalaw.com.

[i] See In re Application of the United States for an Order Pursuant to 18 U.S.C. § 2703(d), _ F.Supp.2d _, 2011 WL 5508991 (E.D.Va. Nov. 10, 2011).
[ii] Romano v. Steelcase Inc., 30 Misc.3d 426, 428, 907 N.Y.S.2d 650, 652 (S.Ct.Suff.Cty. 2010)
[iii] *Tominspk* v. *Detroit Metropolitan Airport*, Slip Copy, 2012 WL 179320 (E.D.Mich. Jan. 18, 2012).
[iv] See, "E-Discovery: The litigation hold notice", *The Suffolk Lawyer*, www.scba.org, Vol 32 No. 3, November 2016, pp. 20, 27

Expectations for HUD Under Carson *(Continued from page 15)*

thing."[6] However, Carson is opposed to government dependency, he was quoted by the Washington Post, while referring to his mother, stating, "[s]he didn't like the idea of dependency."[7] Carson, constantly using his own life story, stresses individual strength and self-help over government assistance. House Speaker Paul Ryan Tweeted that Carson is "a shining example of overcoming poverty. He will put focus on dignity rather than dependence."[8]

As Carson's statements are all over the map, from the importance of strengthening inner cities to promoting individual independence, it is hard to get a pulse on what a Carson Administration will do. According to Carson's own statements, he views homosexuality as a choice, doubts the human race contributes to global warming, and thinks abortion should be outlawed in all circumstances, including in cases of rape and incest.[9] Carson has proven to be just as unpredictable as the current state of politics has been, particularly over the past year.

Carson said in a statement to The Washington Post, "[h]aving me as a federal bureaucrat would be like a fish out of water, quite frankly."

As is the case with all cabinet secretaries, Carson needs to be confirmed by the Senate. This election has been nothing but surprises. Democrats seem ready to fight over Carson's appointment. Democratic House Minority Leader Nancy Pelosi has referred to Carson as, "a disturbingly unqualified choice." Oregon Senator Jeff Merkley was quoted saying he was "deeply concerned that the incoming Administration has proposed someone who believes 'poverty is really more of a choice than anything else' to lead American urban development. Telling people that their lack of means is their own problem is not a solution."[10]

Carson may not have government bureaucracy experience nor experience managing a multi-billion-dollar budget, but it certainly is not neurosurgery. Only time will tell how this story is going to end.

Note: Sabine K. Franco is the principal attorney at Franco Law Firm, P.C., a general practice firm located in Garden City New York. Ms. Franco focuses a third of her practice on real estate transactions.

[1] http://www.nytimes.com/2016/12/05/us/politics/ben-carson-housing-urban-development-trump.html?_r=1

[2] http://www.realtor.com/news/trends/doctor-ben-carson-hud-secretary-will-affect-housing-market/

[3] https://en.wikipedia.org/wiki/Steve_Preston

[4] https://archives.hud.gov/local/hi/newsletters/honolulunews0510.pdf

[5] https://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/programs

[6] https://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/programs

[7] https://www.washingtonpost.com/news/powerpost/wp/2016/12/05/trump-to-nominate-carson-to-lead-u-s-housing-urbanpolicy/?utm_term=.0c8fb959bf36

[8] http://www.politico.com/blogs/donald-trump-administration/2016/12/ben-carson-hud-secretary-trump-232184

[9] https://www.washingtonpost.com/news/powerpost/wp/2016/12/05/trump-to-nominate-carson-to-lead-u-s-housing-urban-policy/?utm_term=.0c8fb959bf36

[10] https://www.thenation.com/article/with-ben-carson-at-hud-americas-cities-really-could-become-hellholes/

Pro Bono Attorney of the Month: Lisa S. Fine *(Continued from page 11)*

alistic expectations that we have the ability to be magicians. Typically, they are wrong, but this time Lisa proved them right."

Lisa Fine is a graduate of Boston University (BA 1993) and Hofstra Law (JD 1996). After graduating from law school, Ms. Fine worked for general practice firms in Queens and on Long Island, where she gained significant litigation experience. Eager to break out on her own, Ms. Fine opened the Law Office of Lisa S. Fine in Smithtown in 2004, specializing in matrimonial/family law, personal injury, mediation and arbitration. She is a panel member of the American Arbitration Association, and a certified matrimonial mediator. Ms. Fine enjoys the diverse nature of her practice. "I love to litigate, but I also love serving as a mediator," she explained.

Ms. Fine also enjoys operating in a small-practice environment and is inclined to keep it that way because it allows her to maintain close contact with the clients.

The fact that she ran a small, solo practice is what had previously kept Ms. Fine from volunteering with the Pro Bono Project.

"It was a scary prospect for me," Ms. Fine said. "I was worried that it would be difficult to absorb a pro bono case into my small practice, was afraid that the judge wouldn't be understanding of my circumstances, and was concerned that opposing counsel might be difficult to deal with."

But Ms. Fine's fears were not realized. "The judge was truly understanding and very willing to work with me," she said. "John Toresco and I worked well together, which allowed us to achieve a positive and quick outcome for our clients."

Ms. Fine is so satisfied with her first experience with the Pro Bono Project that she is ready to receive her next referral, even with this first case only just recently ending.

Lisa Fine resides in Suffolk County with her husband and two daughters, who are 14 and 10. In the small amount of spare time she has, Ms. Fine enjoys cooking, reading, listening to music and traveling with her family.

The Pro Bono Project is most grateful for the earnest and skillful advocacy Lisa Fine provided to her very first referred client. For this reason, it is with great pleasure that we honor her as the Pro Bono Attorney of the Month.

Note: Ellen Krakow is the Suffolk Pro Bono Project Coordinator at Nassau Suffolk Law Services.

The Suffolk Pro Bono Project is a joint effort of Nassau Suffolk Law Services, the Suffolk County Bar Association and the Suffolk County Pro Bono Foundation, who, for many years, have joined resources toward the goal of providing free legal assistance to Suffolk County residents who are dealing with economic hardship. Nassau Suffolk Law Services is a non-profit civil legal services agency, providing free legal assistance to Long Islanders, primarily in the areas of benefits advocacy, homelessness prevention (foreclosure and eviction defense), access to health care, and services to special populations such as domestic violence victims, disabled, and adult home resident. The provision of free services is prioritized based on financial need and funding is often inadequate in these areas. Furthermore, there is no funding for the general provision of matrimonial or bankruptcy representation, therefore the demand for pro bono assistance is the greatest in these areas. If you would like to volunteer, please contact Ellen Krakow, Esq. 631 232-2400 x 3323.