2015

Real Estate Transactions: Cases and Materials on Land Transfer, Development and Finance, 6th Ed.

Gerald Korngold
New York Law School

Follow this and additional works at: https://digitalcommons.nyls.edu/fac_books

Recommended Citation
https://digitalcommons.nyls.edu/fac_books/13

This is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Books by an authorized administrator of DigitalCommons@NYLS. For more information, please contact camille.broussard@nyls.edu, farrah.nagrampa@nyls.edu.
EDITORIAL BOARD

ROBERT C. CLARK
DIRECTING EDITOR
Distinguished Service Professor and Austin Wakeman Scott
Professor of Law and Former Dean of the Law School
Harvard University

DANIEL A. FARBER
Sho Sato Professor of Law and Director, Environmental Law Program
University of California at Berkeley

SAMUEL ISSACHAROFF
Bonnie and Richard Reiss Professor of Constitutional Law
New York University

HERMA HILL KAY
Barbara Nachtrieb Armstrong Professor of Law and
Former Dean of the School of Law
University of California at Berkeley

HAROLD HONGJU KOH
Sterling Professor of International Law and
Former Dean of the Law School
Yale University

SAUL LEVMORE
William B. Graham Distinguished Service Professor of Law and
Former Dean of the Law School
University of Chicago

THOMAS W. MERRILL
Charles Evans Hughes Professor of Law
Columbia University

ROBERT L. RABIN
A. Calder Mackay Professor of Law
Stanford University

CAROL M. ROSE
Gordon Bradford Tweedy Professor Emeritus of Law and Organization and
Professorial Lecturer in Law
Yale University
Lohse Chair in Water and Natural Resources
University of Arizona
To David,
Ethan, Ellie, Gabriel and Benjamin,
Margaret and Matt,
and, especially, Alice
G.K.

To Jan
P.G.
American real estate practice over the past thirty-five years has been marked by significant changes. The U.S. mortgage finance crisis beginning in 2008 and its aftermath triggered the largest upheaval in residential and commercial mortgage loans since the Great Depression, and its effect on business and legal structures continues to evolve. What began as a cataclysm in the secondary market for American home mortgages became a global financial crisis because many lenders held secondary market securities or had issued “credit default swaps” that effectively made them insurers of the securities. When the value of the securities dropped, the closely tied financial system was on the brink.

The 2008 financial crisis was emblematic of one of the key changes in U.S. real estate transactions over recent decades—a move in many areas towards nationalization and uniformity in what is technically an area of the law within the purview of state regulation. For example, the growth of title insurance has increased the security and efficiency of real estate transactions and contributed to the evolution of a national market for real estate finance. Because title policies are backed by large, resourceful institutions and generally follow nationally uniform standards, title insurance has drawn major institutional lenders and sophisticated financing schemes into every corner of the country. The federal government, the secondary mortgage market, and securitization of mortgage debt have played an increasingly important role in nationalizing and systematizing real estate finance; form mortgage documents promulgated and required by national lenders and insurers are increasingly replacing local finance documents. Enhanced federal and state environmental regulation influences virtually every real estate sale, exposing the parties to potentially devastating liability; public sector incentives as well as private commitment have led to green building initiatives across the country. The civil rights and consumer movements have also left their mark, principally on residential real estate sales. Globalization has increasingly affected American real estate transactions, as U.S. companies expand abroad and U.S. real estate debt is held by non-U.S. entities and individuals. Technology and new service providers across the country have brought competition and commoditization of aspects of work, resulting in changes in how lawyers represent clients in transactions.

The 2008 mortgage crisis was triggered by a combination of various factors: the value of residential mortgage-backed securities in the secondary market crashed, due to speculative lending practices, an unmanaged subprime market, and the bursting of the bubble of an overheated property market. The secondary market essentially collapsed and as of today has only partially rebounded. Federal agencies are still grappling with implementing rules to prevent risky lending behavior and defining permitted credit default swaps for the future. Various agencies have recently settled actions with lenders packaged and sold misleading mortgage-backed securities, with more likely to come. Fannie Mae and Freddie Mac, quasi-governmental agencies that insured home mortgages and facilitated the secondary market, were placed into conservatorship by the federal government because of
looming liabilities; their future has not yet been resolved. The story of the secondary market continues to evolve.

As the mortgage crisis spread into a larger financial crisis, borrowers defaulted on home mortgages when they lost their jobs. Often the values of their homes sank below the amounts they still owed on their loans. This led to widespread foreclosures. The foreclosures spawned significant litigation attempting to unwind assignments of mortgages from secondary market transactions and to determine whether the party bringing foreclosure truly had standing under centuries old doctrines. There was a spate of lender misbehavior in some of the foreclosure activities as well, triggering equitable relief and consumer law actions. Federal and state legislation was passed to assist troubled borrowers, including loan modification programs. While the number of foreclosure actions has decreased as of this writing, troubled borrowers remain and the residential real estate markets in many areas remain well below their 2008 levels. This too is a real estate story that continues to unfold.

Some of the recent changes in real estate transactions, such as the spread of title insurance, have taken work away from lawyers. Other changes, because they implicate a wide and complex range of legal issues, have magnified and complicated the real estate lawyer’s role. It is no longer sufficient to know the law on title conveyancing and mortgages. The real estate lawyer today must also grasp at least the basics of federal income taxation, personal property security, environmental regulation, bankruptcy, and products liability law. After the 2008 financial crash, the real estate lawyer will also need to understand federal and state lending and consumer credit regulation and ongoing changes in that law. The attorney must also have a feel for the informal legal culture created by the many nongovernmental institutions and individuals involved in real estate transactions—brokers, title companies, surveyors, appraisers, lenders and their various trade associations.

And yet, despite the rise and effect of new forces, real estate practice still requires a firm grounding in fundamental concepts such as real estate contracts, mortgages and foreclosure, title systems, and brokerage. These are the vocabulary and the grammar of the sophisticated real estate lawyer. New judicial decisions, legislation, business practices, and transaction structures that respond to emerging economic and social demands are built on this foundation. For example, court opinions and legislative debate on the proper response to the post-2008 foreclosure crisis almost always have been framed within the context of applying or changing longstanding doctrines in order to achieve a desired result; alternative financing vehicles designed by lenders have been based on past precedent and practices.

The essential role of the real estate lawyer has also not altered over the years. This book continues to frame issues from the perspective of a lawyer assembling a successful transaction and not simply litigating a deal gone bad. The task of the transactional lawyer requires great sophistication, wisdom, and at times subtlety. All parties in a deal want
it to close, and according to the economists each should be in a better position if it does. Each party, however, wants to obtain as great of an advantage as possible. The skilled transactional lawyer will advance the client's interest but also will ensure that the interests of all parties are aligned (or else the transaction ultimately will fail), the parties don't walk away from the deal, and the long term relationship between the parties remains intact.

This book, therefore, encompasses emerging, as well as traditional, fields of real estate law. Part One covers the basic elements of real estate transactions, using the residential transaction and as-built commercial transaction as a vehicle for exposing the fundamentals of the role of the attorney, brokers, real estate contracts and conveyancing, title assurance, and secured financing. Part Two covers commercial real estate transactions, exploring contemporary innovations in financing and leasing techniques and examining current issues related to distressed properties, environmental regulation and green buildings, globalization of real estate transactions, and the development and operation of shopping centers. Part Three presents all tax materials, including residential and commercial issues.

Although real estate transactions have become increasingly subject to nationalizing influences, real estate law remains in many respects the creature of local rules. As a consequence, one message should be emphasized here: no real estate lawyer can safely ignore applicable state law when counseling on any transaction, large or small.

Real estate law is a happy blend of practical insight and academic perspective, a mix that we have tried to convey in the pages that follow. Colleagues in practice and in academe have provided helpful comments for the preparation of various editions of this book. We are particularly grateful to Todd Davis and Jonathan Adler for their help with the environmental law materials, Edward Hurtuk, Charles Daroff and Zachary Paris for their insights on new developments in real estate law, Andy Morriss for his ideas on many subjects, Leon Gabinet for his comments on the tax materials, and Hiram Chodosh and Erik Jensen for insights on globalization issues. We also appreciate Kevin McMunigal’s and Bob Lawry’s comments on professional responsibility issues, Morris Shanker’s comments on bankruptcy, and Bill Warren’s ideas on shopping centers. Last but not least, Jim Hagy has been a generous and terrific source of wisdom on real estate law, lawyering, and pedagogy.

Many law teachers who used various editions of this casebook have been generous with their suggestions. For their thoughtful comments, we are indebted to Professors Steven B. Baslaw, J. Wendell Bayles, Roger Bernhardt, Zareh H. Beylerian, William M. Blackburn, Michael Braunstein, Pamela W. Bray, John D. Briggs II, D. Barlow Burke, Jr., K.C. Collette, John W. Fisher II, Robert L. Flores, Ken Harmon, Theodore B. Hertel, Jr., John F. Hicks, Alex Johnson, John W. Larson, Carl H. Lisman, Ward F. McDonald, George K. Miller, Thomas Mitchell, C. Robert Morris, Phillip J. Nexon, Lindsay F. Nielsen, John R. Nolon, Georgette Chapman Poindexter, Patrick A. Randolph, Jr.,

A Note on Style. Most of the cases and other materials appearing in these pages have been edited. The deletion of sentences and paragraphs is indicated by ellipses; the deletion of citations is not indicated. Most footnotes have been excised. The remaining footnotes retain their original numbering. Authors' footnotes are lettered.

G.K.
P.G.

New York, New York
Stanford, California
September, 2014
# SUMMARY OF CONTENTS

**PREFACE** ................................................................. V

**TABLE OF CASES** .................................................. XXIII

## PART ONE. BASIC ELEMENTS OF THE REAL ESTATE TRANSACTION

### Chapter I. Arranging the Deal ........................................ 3
A. An Introduction to the Conveyancing Industry ................. 3
B. Lawyers ...................................................................... 15
C. Brokers ...................................................................... 29

### Chapter II. Performing the Contract ................................. 73
A. Risk of Loss .................................................................. 73
B. Statute of Frauds ....................................................... 82
C. Contract Conditions .................................................... 91
D. The Calculus of Remedies .......................................... 121

### Chapter III. Closing the Contract ................................. 157
A. The Formalities of Transfer ........................................ 158
B. Liabilities That Survive the Deed ................................ 187

### Chapter IV. Assuring Title ........................................... 237
A. The Record System ..................................................... 237
B. Abstracts, Opinions and Title Insurance ...................... 286
C. Increasing the Efficiency of Title Assurance ................. 313

### Chapter V. Financing the Purchase ................................. 337
A. The Forms, Sources and Terms of Home Finance .......... 337
B. Junior Liens .................................................................. 409
C. Transfers of Mortgaged Property and Mortgage Interests 426
D. Mortgage Default ....................................................... 451
E. Financing Through the Land Sale Contract ................... 520

### Chapter VI. Building on the Basics: Condominium and Other Communal Arrangements for Home Ownership ............. 535
A. Management and Control ............................................ 542
B. Restraints on Alienation ............................................. 547
C. Restrictions on Occupancy and Use .............................. 551

## PART TWO. ELEMENTS OF THE COMMERCIAL REAL ESTATE TRANSACTION

### Chapter VII. Commercial Land Finance .......................... 563
A. Mortgages .................................................................... 565
B. The Ground Lease and Leasehold Mortgage .................. 670

### Chapter VIII. Properties in Distress .............................. 695
A. Workouts and Lender Remedies ................................... 696
B. Bankruptcy ......................................................................................... 708

Chapter IX. The Environment and Real Estate Transactions:
   From Regulation to Green Buildings .................................................. 735
   A. Environmental Liability: CERCLA and Related Statutes ............ 735
   B. Green Buildings and Leases .............................................................. 787

Chapter X. Globalization of American Real Estate Transactions
   and Finance ............................................................................................ 803
   A. Foreign Investment in U.S. Real Estate ............................................ 804
   B. American Investment in Foreign Real Estate .................................. 815

Chapter XI. Building on the Basics: The Shopping Center
   Development .......................................................................................... 833
   A. The Concept ..................................................................................... 834
   B. Finance and Land Use Approval ....................................................... 842
   C. Leasing and Operations ...................................................................... 847

PART THREE. FEDERAL INCOME TAXATION AND
   REAL ESTATE TRANSACTIONS

Chapter XII. Residential Property ......................................................... 907

Chapter XIII. Commercial Ownership and Development ................ 921
   A. Tax Planning: How Property Is Held ............................................... 921
   B. Deductions: Leverage, Depreciation and Tax Shelter .................... 940
   C. Disposition: Deferring the Recognition of Gain (and Loss) ............. 957
   D. Sale-Leaseback Transactions ......................................................... 981

INDEX ...................................................................................................... 995
## TABLE OF CONTENTS

### PREFACE .............................................................................................................. V

### TABLE OF CASES ............................................................................................ XXIII

## PART ONE. BASIC ELEMENTS OF THE REAL ESTATE TRANSACTION

### Chapter I. Arranging the Deal .................................................................................. 3

A. An Introduction to the Conveyancing Industry ......................................................... 3
   United States Department of Housing and Urban Development, A Study of Closing Costs
   for FHA Mortgages .................................................................................................. 8
   Notes ....................................................................................................................... 12

B. Lawyers ................................................................................................................... 15
   In re Lanza ............................................................................................................. 17
   Notes ....................................................................................................................... 21

C. Brokers .................................................................................................................... 29
   Beth E. Nagalski, Note, Ending the Uniformity of Residential Real Estate Brokerage
   Services: Analyzing the National Association of Realtors’ Multiple Listing Service
   Under the Sherman Act ......................................................................................... 29
   Notes ....................................................................................................................... 32
   1. Seller’s and Buyer’s Liability to Broker ............................................................... 36
      Business Consulting Services, Inc. v. Wicks .................................................... 36
      Tristram’s Landing, Inc. v. Wait .................................................................... 41
      Notes ................................................................................................................... 44
   2. Broker’s Duties to Seller and to Buyer ................................................................. 48
      Joseph M. Grohman, A Reassessment of the Selling Real Estate Broker’s Agency
      Relationship with the Purchaser ..................................................................... 48
      Daubman v. CBS Real Estate Co. .................................................................... 51
      Hoffman v. Connall ......................................................................................... 60
      Notes ................................................................................................................... 66

### Chapter II. Performing the Contract ......................................................................... 73

A. Risk of Loss .............................................................................................................. 73
   Brush Grocery Kart, Inc. v. Sure Fine Market, Inc. ................................................... 73
   Notes ....................................................................................................................... 78

B. Statute of Frauds ....................................................................................................... 82
   Hahne v. Burr ......................................................................................................... 82
   Notes ....................................................................................................................... 87

C. Contract Conditions .................................................................................................. 91
   1. Financing ............................................................................................................. 92
      Homler v. Malas ............................................................................................... 92
      Notes ................................................................................................................... 94
   2. Marketable Title ................................................................................................. 96
      Caselli v. Messina ............................................................................................. 96
      Notes ................................................................................................................... 100
   3. Other Problem Areas ......................................................................................... 103
      a. Zoning ............................................................................................................ 103
         Dover Pool & Racquet Club, Inc. v. Brooking ............................................... 103
Table of Contents

b. Quantity ........................................................................ 105
   Cedar Lane Ranch, Inc. v. Lundberg .................................. 105

b. Attorney Approval .......................................................... 112
   Moran v. Erk .................................................................. 112
   Notes ............................................................................. 116

D. The Calculus of Remedies .............................................. 121
   1. Specific Performance .................................................. 121
      a. Buyer's Right to Specific Performance ..................... 121
         American Law Institute, Restatement of the Law of
         Contracts—Second ................................................. 121
         Kelley v. Leucadia .................................................. 122
      b. Seller's Right to Specific Performance ..................... 128
         American Law Institute, Restatement of the Law of
         Contracts—Second ................................................. 128
         Mohrlang v. Draper ................................................. 129
   2. Damages ....................................................................... 132
      a. Buyer's Damages .................................................... 132
         Beard v. S/E Joint Venture ....................................... 132
      b. Seller's Damages .................................................... 140
         Kuhn v. Spatial Design, Inc. ..................................... 140
   3. Rescission ..................................................................... 144
   4. Vendee's and Vendor's Liens ......................................... 145
      a. Vendee's Lien ........................................................ 145
         New York Law Revision Commission, Recommendation
         to the Legislature Relating to the Vendee's Lien on
         Land to Secure Restitution or Damages ..................... 145
      b. Vendor's Lien ........................................................ 146
         Askren v. 21st Street Inn ......................................... 146
   Notes ............................................................................. 149

Chapter III. Closing the Contract ....................................... 157
   John H. Kupillas, Jr., Attorney Etiquette at Residential Real
   Estate Closings ................................................................ 157

A. The Formalities of Transfer ............................................. 158
   McDonald v. Plumb ......................................................... 158
   Notes ............................................................................. 161
   1. Deed Elements and Construction ................................. 162
      Priest v. Ernest W. Ball & Associates, Inc. ...................... 163
      Note ........................................................................... 169
   2. Delivery and Escrow ..................................................... 170
      a. Delivery ................................................................. 170
         Wiggill v. Cheney .................................................... 171
         Note ....................................................................... 172
      b. Escrows ................................................................. 173
         In re Akivis .............................................................. 173
   Notes ............................................................................. 175
TABLE OF CONTENTS

3. The Description .............................................................................. 177
   Donald A. Wilson, Reading, Interpreting, and Writing Land Descriptions, in Land Surveys: A Guide for Lawyers and Other Professionals (Mitchell G. Williams, ed.) ............................................................. 177
   Marshall v. Soffer ........................................................................... 180
   Notes ....................................................................................................... 184

B. Liabilities That Survive the Deed ......................................................... 187
   Reed v. Hassell ....................................................................................... 187
   Notes ....................................................................................................... 191
   1. Fitness of the Premises ................................................................. 193
      a. Liability of Seller ...................................................................... 193
         i. Tort .................................................................................. 193
            Stambovsky v. Ackley ..................................................... 194
            Notes ................................................................................ 199
         ii. Warranty .......................................................................... 205
            Wawak v. Stewart .......................................................... 205
            Blagg v. Fred Hunt Co., Inc ........................................... 209
            Notes ............................................................................. 211
      b. Liability of Lenders and Others ................................................ 217
         Rice v. First Federal Savings and Loan Ass'n of Lake County .... 220
         Jeminson v. Montgomery Real Estate and Co. ..................... 221
         Jeminson v. Montgomery Real Estate and Co. ..................... 225
         Notes ................................................................................ 226
   2. Title ................................................................................................. 229
      Brown v. Lober ............................................................................ 230
      Notes ............................................................................................... 234

Chapter IV. Assuring Title ................................................................. 237
   A. The Record System ....................................................................... 237
      Notes ....................................................................................................... 238
      1. Types of Statutes ....................................................................... 239
         Corwin W. Johnson, Purpose and Scope of Recording Statutes 239
         Argent Mortgage Company, LLC v. Wachovia Bank, NA ........... 241
         Notes ....................................................................................... 245
      2. The Conditions of Protection ..................................................... 247
         a. Notice .................................................................................. 247
            Corwin W. Johnson, Purpose and Scope of Recording Statutes 247
            Kinch v. Fluke .................................................................... 249
            Sanborn v. McLean ........................................................ 253
            Notes ................................................................................ 256
         b. Purchaser for Value ............................................................... 260
            Corwin W. Johnson, Purpose and Scope of Recording Statutes 260
            Anderson v. Anderson ........................................................... 262
            Note ...................................................................................... 266
c. Circuitous Liens ................................................................. 267
   In re Distribution of Proceeds from Sheriff’s Sale of
   Premises 250 Bell Road, Lower Merion Township,
   Montgomery County ....................................................... 267

3. The Title Search .................................................................... 270
   a. The Indices ...................................................................... 270
      Note, The Tract and Grantor-Grantee Indices ................. 270
      Notes ............................................................................. 272
   b. Title Standards ................................................................ 274
      Lewis M. Simes & Clarence B. Taylor, Model Title
      Standards ...................................................................... 274
      Note ............................................................................. 278
   c. Extent of Search: The “Record Chain of Title” Problem ... 279
      Morse v. Curtis .................................................................. 279
      Sabo v. Horvath ................................................................ 281
      Corwin W. Johnson, Purpose and Scope of Recording
      Statutes ........................................................................ 284
      Notes ............................................................................. 285

B. Abstracts, Opinions and Title Insurance .................................. 286
1. The Abstract and the Lawyer’s Opinion .................................. 287
   Joyce Palomar, 1 Patton and Palomar on Land Titles .......... 287
   Seigle v. Jasper ..................................................................... 290
   Notes ................................................................................. 295
2. Title Insurance ........................................................................ 298
   D. Barlow Burke, Law of Title Insurance .............................. 298
   Laabs v. Chicago Title Insurance Co ................................... 302
   Notes ................................................................................. 307

C. Increasing the Efficiency of Title Assurance ............................ 313
1. Marketable Title Acts, Statutes of Limitations and Curative
   Acts .................................................................................. 314
   H & F Land, Inc. v. Panama City-Bay County Airport and
   Industrial District ............................................................... 315
2. Title Registration: The Torrens System .................................. 323
   John L. McCormack, Torrens and Recording: Land Title
   Assurance in the Computer Age ......................................... 323
   In re Collier ......................................................................... 325
   Notes ................................................................................. 334

Chapter V. Financing the Purchase ............................................. 337
A. The Forms, Sources and Terms of Home Finance .................. 337
1. Forms ................................................................................ 337
   American Law Institute, Introduction to the Restatement of
   the Law of Property (Third): Mortgages ............................. 337
   C. Phillip Johnson Full Gospel Ministries, Inc. v. Investors
      Financial Services, LLC ................................................... 339
   Notes ................................................................................ 346
2. Sources ............................................................................... 350
   a. Changes in the Primary Lending Market ......................... 350
b. Secondary Market and Securitization ............................................................ 355
Kurt Eggert, Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine ............................................................ 355
c. The Subprime and Mortgage Finance Crisis of 2008 ............................................................ 361
Gerald Korngold, Legal and Policy Choices in the Aftermath of the Subprime and Mortgage Financing Crisis ............................................................ 361
Notes ........................................................................................................... 365
3. Terms ........................................................................................................... 367
Goebel v. First Federal Savings & Loan Association of Racine ............................................................ 368
Notes ........................................................................................................... 374
4. Evaluating the Borrower and the Security ............................................................ 382
United States Bureau of Consumer Financial Protection, Ability-to-Pay and Qualified Mortgage Standards Under Truth in Lending Act (Regulation Z) ............................................................ 382
J. Kevin Murray, Issues in Appraisal Regulation: The Cracks in the Foundation of the Mortgage Lending Process ............................................................ 386
Notes ........................................................................................................... 389
5. Discrimination, Subprime Mortgages, and Predatory Lending ............................................................ 390
Associates Home Equity Services, Inc. v. Troup ........................................................................... 390
Notes ........................................................................................................... 402
B. Junior Liens ........................................................................................................... 409
1. Refinancing ........................................................................................................... 409
Aames Capital Corporation v. Interstate Bank of Oak Forest ............................................................ 409
Notes ........................................................................................................... 416
2. Modification of the Senior Mortgage ........................................................................... 418
Burney v. McLaughlin ........................................................................................................... 418
Notes ........................................................................................................... 425
C. Transfers of Mortgaged Property and Mortgage Interests ............................................................ 426
1. Transfers by the Mortgagor ......................................................................................... 426
a. Duties of the Transferee ......................................................................................... 426
First Federal Savings and Loan Association of Gary v. Arena ............................................................ 427
Note ........................................................................................................... 432
b. Limitations on the Transferor ......................................................................................... 433
Notes ........................................................................................................... 434
2. Transfers by the Mortgagor ......................................................................................... 437
a. Payments on the Note ......................................................................................... 437
Giorgi v. Pioneer Title Insurance Co. ......................................................................................... 437
Doyle v. Resolution Trust Corporation ......................................................................................... 439
b. Securitization and MERS ......................................................................................... 445
Gerald Korngold, Legal and Policy Choices in the Aftermath of the Subprime and Mortgage Financing Crisis ............................................................ 445

Notes ........................................................................................................... 365
| Notes .................................................................................................................. | 446 |
| D. Mortgage Default ................................................................................................ | 451 |
| Notes .................................................................................................................. | 454 |
| 1. Methods of Foreclosure .................................................................................. | 459 |
| a. Strict Foreclosure .......................................................................................... | 459 |
| Robert H. Skilton, Developments in Mortgage Law and Practice ....................... | 459 |
| Note .................................................................................................................. | 460 |
| b. Foreclosure by Court Action and Sale ............................................................ | 461 |
| Robert H. Skilton, Developments in Mortgage Law and Practice ....................... | 461 |
| United States Department of Housing and Urban Development v. Union Mortgage Company ................................................................................................................. | 462 |
| Notes .................................................................................................................. | 465 |
| c. Foreclosure by Power of Sale ......................................................................... | 468 |
| Robert H. Skilton, Developments in Mortgage Law and Practice ....................... | 468 |
| Rosenberg v. Smidt ............................................................................................ | 471 |
| Notes .................................................................................................................. | 481 |
| d. Foreclosure in the Era of MERS .................................................................... | 483 |
| Eaton v. Federal National Mortgage Association ............................................... | 484 |
| Notes .................................................................................................................. | 492 |
| e. Deed in Lieu of Foreclosure ........................................................................... | 495 |
| Jesse Saslow, Comment, Incentivizing Deeds-In-Lieu of Foreclosure: An Argument for Expansion of the Home Affordable Foreclosure Alternatives ("HAFA") Program ................................................ | 495 |
| Notes .................................................................................................................. | 500 |
| 2. Statutory Redemption ....................................................................................... | 500 |
| Robert H. Skilton, Developments in Mortgage Law and Practice ....................... | 500 |
| Matcha v. Wachs ............................................................................................... | 503 |
| Note .................................................................................................................. | 508 |
| 3. Deficiency Judgments and Antideficiency Legislation .................................... | 509 |
| Cornelison v. Kornbluth ..................................................................................... | 509 |
| Notes .................................................................................................................. | 517 |
| E. Financing Through the Land Sale Contract .................................................... | 520 |
| Comment, Forfeiture: The Anomaly of the Land Sale Contract .......................... | 520 |
| Skendzel v. Marshall ........................................................................................... | 523 |
| Dirks v. Cornwell ............................................................................................... | 526 |
| Notes .................................................................................................................. | 530 |
| Chapter VI. Building on the Basics: Condominium and Other Communal Arrangements for Home Ownership ................................................................. | 535 |
| Notes .................................................................................................................. | 539 |
| A. Management and Control ............................................................................... | 542 |
Comcast of Florida, L.P. v. L'Ambiance Beach Condominium Association, Inc. ................................................................. 542
Notes .................................................................................... 545

B. Restraints on Alienation ................................................. 547
Jones v. O'Connell ................................................................. 547
Note .................................................................................... 550

C. Restrictions on Occupancy and Use ......................... 551
Levandusky v. One Fifth Avenue Apartment Corp. .............. 551
Notes .................................................................................... 558

PART TWO. ELEMENTS OF THE COMMERCIAL
REAL ESTATE TRANSACTION

Chapter VII. Commercial Land Finance ........................................ 563

A. Mortgages ........................................................................ 565

1. Terms ............................................................................. 565
   Charles C. Smith & Harold A. Lubell, The Promissory Note:
   Forgotten Document ....................................................... 565
   a. Usury ........................................................................... 570
      NV One, LLC v. Potomac Realty Capital, LLC ............. 570
      Notes ........................................................................... 579
   b. Recourse vs Nonrecourse Loans .................................. 581
      Heller Financial, Inc. v. Lee ........................................ 581
      Note ........................................................................... 587

2. Construction Finance ....................................................... 587
   a. The Construction Loan .............................................. 589
      Philip D. Weller, Fundamentals of Construction 
      Lending ..................................................................... 589
      J.I. Kislak Mortgage Corporation v. William Matthews 
      Builder, Inc. ............................................................... 595
      Note: Obligatory and Optional Advances ................. 597
   b. The Permanent Loan ................................................. 601
      Milton Davis, The Permanent Lender's Role in the 
      Construction Process ............................................... 601
      Penthouse International, Ltd. v. Dominion Federal 
      Savings and Loan Association .................................... 604
      Notes ........................................................................... 633
   c. Subordinated Purchase Money Financing .................. 636
      Middlebrook-Anderson Co. v. Southwest Sav. & Loan 
      Ass'n ......................................................................... 636
      Notes ........................................................................... 644
   d. Other Construction Liens ........................................... 646
      i. Mechanics' and Materialmen's Liens ..................... 646
      Williams & Works, Inc. v. Springfield Corp. .......... 646
      Notes ........................................................................... 654
      ii. Fixtures ................................................................... 658
      James J. White & Robert S. Summers, Uniform 
      Commercial Code ..................................................... 658
Table of Contents

Capitol Federal Savings and Loan Association v. Hoger ................................................................. 661
Note ................................................................................................................................. 669
B. The Ground Lease and Leasehold Mortgage ................................................................. 670
Ira Meislik, Basic Principles of Ground Lease Agreements ................................................... 670
Nancy R. Little, Financeable Ground Leases: An Overview ................................................. 676
1. Calculating Ground Rent ................................................................................................. 681
   936 Second Avenue L.P. v. Second Corporate Development Co., Inc. ......................... 681
2. Mortgaging the Leasehold and the Fee ........................................................................... 684
   Balch v. Leader Federal Bank for Savings ........................................................................ 684
   Notes ............................................................................................................................. 690

Chapter VIII. Properties in Distress .................................................................................. 695
A. Workouts and Lender Remedies .................................................................................... 696
   Michael H. Goldstein & Adam M. Starr, Navigating the Distressed Real Estate Workout ... 696
   Note ............................................................................................................................... 704
   CUNA Mortgage v. Aafedt ......................................................................................... 704
   Note ............................................................................................................................... 707
B. Bankruptcy .................................................................................................................... 708
   Kenneth N. Klee, One Size Fits Some: Single Asset Real Estate Bankruptcy Cases .......... 708
   BFP v. Resolution Trust Corporation ............................................................................. 712
   RadLAX Gateway Hotel, LLC v. Amalgated Bank ....................................................... 719
   Notes ............................................................................................................................. 725

Chapter IX. The Environment and Real Estate Transactions: From Regulation to Green Buildings ................................................. 735
A. Environmental Liability: CERCLA and Related Statutes ......................................... 735
   1. Liability of Sellers and Buyers .................................................................................. 737
      a. The Statutory Scheme ........................................................................................... 737
         Michael P. Healy, Direct Liability for Hazardous Substance Cleanups Under CERCLA: A Comprehensive Approach ................................................................. 737
         Tanglewood East Homeowners v. Charles-Thomas, Inc ........................................... 740
         Notes ....................................................................................................................... 745
      b. Avoiding Liability/Brownfields ............................................................................ 752
         i. "Innocent Owner" Defense .................................................................................... 752
            United States v. Serafini ...................................................................................... 752
         ii. "Bona Fide Prospective Purchaser" Defense ......................................................... 759
            Spencer M. Wiegard, Note, The Brownfields Act: Providing Relief for the Innocent or Providing New Hurdles to Avoid Liability? ................................................. 759
            PCS Nitrogen Incorporated v. Ashley II of Charleston, LLC .................................. 763
            iii. By Agreement .................................................................................................. 767
               Niecko v. Emro Marketing Company ................................................................. 767
               Notes .................................................................................................................. 770
# Table of Contents

2. Lender Liability .............................................................................. 775
   United States v. Fleet Factors Corp. ............................................. 775
   Notes ............................................................................................... 784

B. Green Buildings and Leases ................................................................. 787
   1. Defining Green Buildings............................................................ 787
      J. Cullen Howe, Overview of Green Buildings .................................. 787
   2. Green Leases ............................................................................. 793
      S. Michael Brooks, Green Leases and Green Buildings ...................... 793
   3. Owner Issues ............................................................................. 798
      Brandon Robinson & James Smith, Overview of Green Building and Associated Legal Issues .................................................. 798
      Note ................................................................................................ 800

Chapter X. Globalization of American Real Estate Transactions and Finance ............................................ 803

A. Foreign Investment in U.S. Real Estate ........................................................................ 804
   1. Economic and Political Forces .................................................. 804
   2. Federal Tax Issues ........................................................................ 807
      Fred B. Brown, Wither FIRPTA? .................................................. 808
      Gregory W. Hummel & Steven R. Ratz, Withholding Requirements Under FIRPTA ................................................................. 810
   3. Other Federal Regulation ................................................................ 811
   4. State Regulation ............................................................................. 813
      Note: State Legislation .................................................................. 814
      Notes ............................................................................................... 814

B. American Investment in Foreign Real Estate ........................................................................ 815
   1. Limitations on Ownership ............................................................. 815
      Michael Boreale, Note, Beachfront Property in Arizona? Loosening the Restrictions on Foreign Acquisition of Mexican Real Estate and the Implication for Arizona Investors .................................................. 816
   2. Foreign Real Estate Systems .......................................................... 822
   3. U.S. Legal Restrictions .................................................................. 826
# Table of Contents

## Notes ........................................................................................................... 829

## Chapter XI. Building on the Basics: The Shopping Center Development ........................................................................................................... 833

### A. The Concept .......................................................................................... 834
Dennis L. Greenwald, *The Reinvention of the Shopping Center* ........ 834
Michael D. Beyard & W. Paul O'Mara, *Shopping Center Development Handbook* .......................................................... 837

### B. Finance and Land Use Approval ............................................................ 842
Michael D. Beyard & W. Paul O'Mara, *Shopping Center Development Handbook* .......................................................... 842

### C. Leasing and Operations ....................................................................... 847
1. Coordinating Landlord and Tenant Interests ......................................... 847
Michael D. Beyard & W. Paul O'Mara, *Shopping Center Development Handbook* .......................................................... 847
2. Tenant Rights and Obligations ................................................................ 852
   a. Tenant's Rights and Obligation to Use the Premises ....................... 852
      *Oakwood Village LLC v. Albertsons, Inc.* .................................. 852
   b. Tenant's Business Activities—Exclusive Rights and Restricted Activities ................................................................. 864
      *In re Trak Auto Corp.* ................................................................. 871
   c. Tenant's Right to Assign .................................................................. 877
      *Rowe v. Great Atlantic & Pacific Tea Co., Inc.* ......................... 877
   d. Tenant's Percentage Rent Obligation ............................................. 881
      *Hartig Drug Company v. Hartig* ............................................... 881
   e. Tenant's Obligation to Landlord's Mortgagee ................................ 886
      *Miscione v. Barton Development Company* ................................ 886

### Notes .......................................................................................................... 886

## PART THREE. FEDERAL INCOME TAXATION AND REAL ESTATE TRANSACTIONS

### Chapter XII. Residential Property ............................................................. 907
Nicholaus W. Norvell, Comment, *Transition Relief for Tax Reform's Third Rail: Reforming the Home Mortgage Interest Deduction After the Housing Market Crash* ......................................................... 907
Joseph A. Snoe, *My Home, My Debt: Remodeling the Home Mortgage Interest Deduction* ................................................................. 908
Dennis J. Ventry, Jr., *The Accidental Deduction: A History and Critique of the Tax Subsidy for Mortgage Interest* ................................................. 912

### Notes .......................................................................................................... 915

### Chapter XIII. Commercial Ownership and Development ...................... 921
A. Tax Planning: How Property Is Held ...................................................... 921
   *Malat v. Riddell* ............................................................................. 922
   *Biedenharn Realty Co., Inc. v. United States* .................................. 924

### Notes .......................................................................................................... 936
**TABLE OF CONTENTS**

B. Deductions: Leverage, Depreciation and Tax Shelter ................................. 940
   1. Tax Shelter Through Depreciation Deductions .................................... 940
      Commissioner of Internal Revenue v. Tufts ......................................... 940
      Notes ......................................................................................................... 949
   2. Reform of Tax Shelters ........................................................................ 952
      a. The 1986 Tax Reform Act .................................................................. 954
      b. The Revenue Reconciliation Act of 1993 .......................................... 956
         Note ........................................................................................................ 957
C. Disposition: Deferring the Recognition of Gain (and Loss) ...................... 957
   1. Tax-Free Exchanges .............................................................................. 957
      Welton James Fischer, Tax Free Exchanges of Real Property
      Under Section 1031 of the Internal Revenue Code of
      1954 .................................................................................................... 957
      Starker v. United States ......................................................................... 963
      Biggs v. Commissioner of Internal Revenue ......................................... 972
   2. Taxes on the Installment Plan ................................................................ 979
      Notes ......................................................................................................... 980
D. Sale-Leaseback Transactions .................................................................. 981
   Frank Lyon Co. v. United States ................................................................. 981
   Notes ......................................................................................................... 993

INDEX ........................................................................................................... 995