

Table of Contents

Volume 1

PART I. PURCHASE, SALE, AND LEASE

CHAPTER 1. NEGOTIATING THE PURCHASE AND SALE OF REAL ESTATE

I. OVERVIEW OF NEGOTIATION

- § 1:1 Generally
- § 1:2 Covid-19 addendums in real estate contracts
- § 1:3 Due diligence
- § 1:4 Interagency rule temporarily deferring real estate appraisals

II. REAL ESTATE OPTIONS

- § 1:5 Generally
- § 1:6 Types of options
- § 1:7 Handling unique offers subject to first refusal
- § 1:8 Purposes of option
- § 1:9 Options compared to other types of transactions
- § 1:10 —Contract of sale with liquidated damage clause
- § 1:11 —Sale with nonrecourse purchase money mortgage
- § 1:12 —Lease with option to purchase
- § 1:13 Choice of transaction
- § 1:14 Tax aspects of options
- § 1:15 Tax aspects of purchase options—Lease termination and purchase option
- § 1:16 Options and the rule against perpetuities

III. LETTER OF INTENT

- § 1:17 Generally

IV. REAL ESTATE BINDERS

- § 1:18 Generally

V. PARTIES TO THE SALE CONTRACT

- § 1:19 Parties to and date of contract
- § 1:20 Purchase from foreign seller
- § 1:21 —Withholding amount
- § 1:22 —Withholding forms
- § 1:23 —Buyer's responsibilities

- § 1:24 —Affected transactions
- § 1:25 —Penalties for noncompliance
- § 1:26 —Exempt transactions
- § 1:27 —Liability of agents

VI. DESCRIPTION OF PREMISES

- § 1:28 Generally

VII. SURVEYS AND SURVEYORS

- § 1:29 Types of surveys
- § 1:30 Information provided by survey
- § 1:31 Surveyor's certificate

VIII. REPRESENTATIONS AND WARRANTIES BY SELLER

- § 1:32 Generally
- § 1:33 Elements of misrepresentations
- § 1:34 Fraud
- § 1:35 Reformation of contract
- § 1:36 Common representations and warranties by seller

IX. PURCHASE PRICE

- § 1:37 Generally
- § 1:38 Adjustments to price—In general
- § 1:39 Earnout provisions
- § 1:40 Allocations of price—Allocation among different portions of tract
- § 1:41 —Allocation between land and improvements
- § 1:42 —Allocation between real and personal property
- § 1:43 —Allocation of noncompete covenant
- § 1:44 —Allocation of goodwill
- § 1:45 —Allocations under IRC section 1060

X. MANNER OF PAYMENT OF PURCHASE PRICE

- § 1:46 Down payment
- § 1:47 Payment at closing of title
- § 1:48 Payment by taking subject to an existing mortgage
- § 1:49 Payment by execution and delivery of a purchase money mortgage

XI. EXISTING MORTGAGES

- § 1:50 Generally

XII. PURCHASE MONEY MORTGAGE

- § 1:51 Definition and use
- § 1:52 Negotiating conditions to subordination
- § 1:53 Setting up a purchase money performance loan

TABLE OF CONTENTS

§ 1:54 Tax savings and other benefits from installment sales

XIII. THIRD-PARTY FINANCING

§ 1:55 Generally
§ 1:56 Amount and term of loan
§ 1:57 Interest rate and loan fees
§ 1:58 Type of lender
§ 1:59 Diligent application and prosecution of loan
§ 1:60 Time to obtain financing
§ 1:61 Notice to buyer
§ 1:62 Seller's right to act
§ 1:63 Refund of down payment
§ 1:64 Refusal of lender to fund commitment

XIV. TITLE AND TITLE INSURANCE

§ 1:65 Generally
§ 1:66 Disclosures by seller in contract of sale
§ 1:67 Marketable or insurable title
§ 1:68 Conveyance by non-registered foreign entity
§ 1:69 Remedies when title is inadequate
§ 1:70 Abstract of title
§ 1:71 Title insurance

XV. ZONING REGULATIONS

§ 1:72 Generally

XVI. BUILDING VIOLATIONS

§ 1:73 Generally

XVII. CERTIFICATES OF OCCUPANCY, LICENSES, AND PERMITS

§ 1:74 Generally

XVIII. EXISTING LEASES AND TENANCIES

§ 1:75 Generally

XIX. FIXTURES AND PERSONAL PROPERTY

§ 1:76 Generally

XX. CONDITION OF PREMISES

§ 1:77 Generally

XXI. ENVIRONMENTAL HAZARDS

§ 1:78 Generally

- § 1:79 Environmental assessments
- § 1:80 Provisions in contract of sale
- § 1:81 Environmental representations and warranties in sale contracts
- § 1:82 Handling the asbestos problem
- § 1:83 Environmental insurance policies

XXII. DAMAGE, DESTRUCTION, OR CONDEMNATION

- § 1:84 Generally

XXIII. REMEDIES FOR FAILURE TO CLOSE

- § 1:85 Generally
- § 1:86 Default by buyer; seller's remedies
- § 1:87 Default by seller; buyer's remedies
- § 1:88 Default by seller; Specific performance against seller's estate: The doctrine of equitable conversion

XXIV. CLOSING OF TITLE

- § 1:89 Generally
- § 1:90 Date and time of closing
- § 1:91 —Time of the essence clause
- § 1:92 —Sunset clause
- § 1:93 Seller's duty to deliver documents
- § 1:94 Buyer's duty to pay purchase price and fulfill other obligations
- § 1:95 Proration of taxes, rents, interest payments, and insurance premiums
- § 1:96 Duty of each party to pay closing costs

XXV. LAND CONTRACTS

- § 1:97 Generally
- § 1:98 Advantages of land contracts
- § 1:99 Special provisions in land contracts

XXVI. SPECIAL TOPICS AND CASE STUDIES

- § 1:100 Speculating with flip contracts
- § 1:101 —Underlying contract issues
- § 1:102 —Flip contract issues
- § 1:103 How to leverage the real estate contract
- § 1:104 Improving sales price with a sandwich lease
- § 1:105 Buying real estate as a zero coupon investment
- § 1:106 Selling real estate with below-market leases
- § 1:107 Case study of net-leased property acquisition
- § 1:108 Scheduling closings to convert capital loss to ordinary loss

XXVII. ALTERNATIVES TO TRADITIONAL PURCHASE AND SALE

- § 1:109 Generally

TABLE OF CONTENTS

§ 1:110	Using an option in place of an installment sale
§ 1:111	Using a convertible mortgage in place of an installment sales contract
§ 1:112	Using a joint venture in place of a sales contract
§ 1:113	Purchase and sale of flawed properties
§ 1:114	Contract for deed, executory contract for conveyance, or land purchase contract
APPENDIX 1.1.	Contract of Sale
APPENDIX 1.2.	Letter of Intent for Acquisition for Real Estate
APPENDIX 1.3.	Surveyor's Report
APPENDIX 1.4.	Seller's Representations and Warranties
APPENDIX 1.5.	Purchase Price
APPENDIX 1.6.	Guarantee of Minimum Operating Income or Profit for Buyer
APPENDIX 1.7.	Manner of Payment of Purchase Price
APPENDIX 1.8.	Existing Mortgage
APPENDIX 1.9.	Purchase Money Mortgage
APPENDIX 1.10.	Third-Party Financing
APPENDIX 1.11.	Title and Title Insurance
APPENDIX 1.12.	Zoning Change
APPENDIX 1.13.	Building or Zoning Violations
APPENDIX 1.14.	Certificate of Occupancy
APPENDIX 1.15.	Existing Leases and Tenancies
APPENDIX 1.16.	Condition of Premises
APPENDIX 1.17.	Environmental Hazards
APPENDIX 1.17.5.	Lead Warning Statement
APPENDIX 1.18.	Damage, Destruction, or Condemnation
APPENDIX 1.19.	Remedies for Failure to Close
APPENDIX 1.20.	Title Closing Worksheet
APPENDIX 1.21.	Agreement of Purchase and Sale (Short Form for Complex Transaction)
APPENDIX 1.22.	IRS Form 8288: U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests
APPENDIX 1.23.	IRS Form 8288-A: Withholding Statements on Dispositions by Foreign Persons of U.S. Real Property Interests
APPENDIX 1.24.	IRS Form 8288-B: Application for Withholding Certificate for Dispositions by Foreign Persons of U.S. Real Property Interests

CHAPTER 2. TAX-FREE EXCHANGES OF REAL ESTATE

I. INTERNAL REVENUE CODE PROVISIONS

§ 2:1 Generally

II. TAX-FREE EXCHANGES OF INVESTMENT AND BUSINESS PROPERTY

- § 2:2 Generally
- § 2:3 Cash-poor buyer
- § 2:4 Property subject to more than one mortgage
- § 2:5 Exchange for raw land
- § 2:6 Exchange for more finable property
- § 2:7 Exchange for more salable property
- § 2:8 —Exchange of distressed property
- § 2:9 —Exchange of leased offices
- § 2:10 —Exchange of development rights
- § 2:11 —Exchanging partnerships
- § 2:12 —Exchange after trust termination

III. EXCHANGE PARTNERS AND OPPORTUNITIES

- § 2:13 Generally
- § 2:14 Roles and responsibilities of real estate professionals
- § 2:15 Needs and motives of the parties

IV. BOOSTING DEPRECIATION IN A TAX-FREE EXCHANGE

- § 2:16 Generally
- § 2:17 Changing the land-building allocation ratio
- § 2:18 Leveraging property with a higher basis
- § 2:19 Benefiting from changing tax rules—Different recovery periods
- § 2:20 —Component depreciation
- § 2:21 —Exchanges of ACRS and MACRS properties

V. ESSENTIAL ELEMENTS OF TAX-FREE EXCHANGES

- § 2:22 Generally
- § 2:23 Actual exchange of properties
- § 2:24 —Combining build-to-suit with tax-free exchanges
- § 2:25 —Exchange between same parties
- § 2:26 Like-kind properties
- § 2:27 —Foreign real estate
- § 2:28 —Exchange of interests in same partnership
- § 2:29 —Rental property for condominiums
- § 2:30 —Present and future real estate interests
- § 2:31 —Remainder for present interest
- § 2:32 —Distinguishing realty and non-realty assets
- § 2:33 —Billboards for real estate
- § 2:34 —Cooperative for condominium
- § 2:35 —Exchanging timber tax-free
- § 2:36 —Exchanging water rights
- § 2:37 —Condemnation proceeds reinvested in leased land
- § 2:38 Tax-free exchange of personal property

TABLE OF CONTENTS

- § 2:39 —Exchange of multiple personal properties
- § 2:40 —Presidentially declared disasters
- § 2:41 Properties held for productive use in a trade or business or for investment
- § 2:42 Stock in trade or other property held primarily for sale
- § 2:43 —Actual purpose for which property is held
- § 2:44 —Effect of change of purpose
- § 2:45 Partnership interests and tenancies-in-common
- § 2:46 —Rearranging tenancy-in-common interests
- § 2:47 —Tax-free exchange by partner of partnership property
- § 2:48 — —Exchanging real estate between partnership and partner
- § 2:49 Tax-free exchanges between related parties
- § 2:50 —Who are related parties?
- § 2:51 —Exceptions to new rule
- § 2:52 —Extending two-year rule
- § 2:53 —No use of intermediary to avoid rule: Case study No. 1
- § 2:54 —No improper use of intermediary to avoid rule: Case study No. 2
- § 2:55 Tax deferral denied in exchange designed to avoid related party rule: Case study No. 3
- § 2:56 Conservation easement as like-kind property
- § 2:57 State law mitigation credits as like-kind property
- § 2:58 Exchange of fractional interests for whole interests
- § 2:59 Asset protection planning

VI. EFFECT OF NONQUALIFYING PROPERTY (BOOT)

- § 2:60 Effect of boot on gain or loss
- § 2:61 Realized vs. recognized gain
- § 2:62 Boot in form of relief from mortgage obligation
- § 2:63 Effect of boot on basis
- § 2:64 Calculating effect of boot on exchange
- § 2:65 —Cash boot
- § 2:66 —Cash boot and other nonqualifying property
- § 2:67 —Mortgage obligation on one side
- § 2:68 Effect of nonqualifying property (boot)—Boot in form of relief from mortgage obligation: Case study
- § 2:69 Calculating effect of boot on exchange—Mortgage obligation on both sides and cash payment by one side
- § 2:70 How to reduce boot in tax-free exchanges by increasing one party's mortgage
- § 2:71 Reducing boot in tax-free exchanges
- § 2:72 —Physical division of property
- § 2:73 —Creating a cotenancy
- § 2:74 —Exchanging residual interests
- § 2:75 Rules for netting boot received
- § 2:76 —Netting boot received against expenses
- § 2:77 —Netting boot when acting as a conduit

VII. STRAIGHT TWO-WAY EXCHANGES: SAMPLE TRANSACTION

- § 2:78 Generally

- § 2:79 Reason for exchange
- § 2:80 Structuring the exchange
- § 2:81 Tax consequences to participants

VIII. DEFERRED LIKE-KIND EXCHANGES

- § 2:82 Generally
- § 2:83 Preserving the 180-day exchange period
- § 2:84 Final regulations
- § 2:85 —Identification of the replacement property
- § 2:86 —Multiple properties
- § 2:87 —Receipt of replacement property
- § 2:88 — —Avoiding state transfer fees
- § 2:89 —Constructive receipt of money
- § 2:90 —No material and substantial contingency
- § 2:91 —Using cash for improvements to replacement property
- § 2:92 —Safe harbors
- § 2:93 — —Security or guaranty arrangements
- § 2:94 — —Qualified escrow accounts and trusts
- § 2:95 — —Delaware statutory trust interests qualified properties
- § 2:96 — —Interest and growth factors
- § 2:97 —Disqualified persons
- § 2:98 Exchanging Real Estate: Qualified Intermediaries
- § 2:99 The improvement exchange
- § 2:100 Legal title need not pass
- § 2:101 Death of a party
- § 2:102 Reverse exchanges
- § 2:103 —Safe harbor for reverse exchanges
- § 2:104 —Case study: Intermediary need not bear economic burdens and benefits of ownership to effect a deferred tax reverse like-kind exchange
- § 2:105 —Ruling limits same property exchanges
- § 2:106 —Other types of reverse exchanges
- § 2:107 —Illustrations
- § 2:108 Tenancy-in-common interests
- § 2:109 —workouts
- § 2:110 Tenancies-in-common: guidelines for Investors
- § 2:111 TICs and auction rate securities:

IX. MULTIPARTY EXCHANGES

- § 2:112 Generally
- § 2:113 Three-way exchanges
- § 2:114 —Purchase from third party followed by exchange
- § 2:115 —Exchange by owner with third party followed by sale by third party
- § 2:116 —Transfer by owner; payment to third party; exchange by third party
- § 2:117 —Court rulings involving control over escrow funds
- § 2:118 — —Control over escrow funds invalidates exchange
- § 2:119 — —Valid exchange when third party unrelated to taxpayer

TABLE OF CONTENTS

- § 2:120 — —Valid exchange when construction by related party to taxpayer
- § 2:121 —Avoiding purchase money mortgage boot
- § 2:122 —Tax-free exchange with cash alternative
- § 2:123 Four-way exchanges
- § 2:124 Five-way exchanges
- § 2:125 Avoiding transfer taxes on multiparty exchanges

X. AVOIDING A TAX-FREE EXCHANGE AND RECOGNIZING A TAXABLE LOSS

- § 2:126 Generally

XI. COMBINING A TAX-FREE EXCHANGE AND A LEASEBACK

- § 2:127 Generally

XII. PHANTOM GAIN WITH A TAX-FREE EXCHANGE

- § 2:128 Generally
- § 2:129 Tax-free exchange price and property taxes
- § 2:130 Tax-free exchange price and special valuation estate tax

XIII. ACCOUNTING TREATMENT OF TAX-FREE EXCHANGES

- § 2:131 Generally
- § 2:132 Determination of eligible exchanges
- § 2:133 Gain or loss recognition
- § 2:134 Determination of the cost basis of property acquired
- § 2:135 Tax treatment compared with financial reporting treatment

XIV. TAX-FREE REPLACEMENT OF INVOLUNTARILY CONVERTED PROPERTY

- § 2:136 Generally
- § 2:137 Nature of replacement property
- § 2:138 —Like-kind property
- § 2:139 —Similar or related in service or use
- § 2:140 —Presidentially-declared disasters and tangible property
- § 2:141 —Qualifying insurance
- § 2:142 —Form of acquisition
- § 2:143 Replacement period
- § 2:144 Basis of replacement property
- § 2:145 Types of takings
- § 2:146 —Regulatory takings
- § 2:147 —Easements
- § 2:148 Effect of partial taking; treatment of severance damages
- § 2:149 Special situations involving IRC section 1033—Award received after replacement period
- § 2:150 —Court settlement not involuntary conversion
- § 2:151 —Sale of related property

- § 2:152 —Award for destruction and condemnation
- § 2:153 —Sale of damaged trees was involuntary conversion
- § 2:154 —Who can buy replacement property?
- § 2:155 Reporting requirements

XV. TAX-FREE GAIN ON SALE OF PRINCIPAL RESIDENCE

- § 2:156 Generally
- § 2:157 Definition of principal residence—In general
- § 2:158 — —Is physical occupancy required?
- § 2:159 —Mixed-use property
- § 2:160 —Sale of principal residence
- § 2:161 Two-year ownership/occupancy period
- § 2:162 —Denial for insufficient annual use
- § 2:163 —Persons with disabilities; estate taxes
- § 2:164 Partial home sale exclusion
- § 2:165 Partial exclusion rules: Calculating the reduced exclusion: Case study
- § 2:166 Partial home sale exclusion—Hostility justifies partial exclusion
- § 2:167 Entering marriage; divorce; widowhood
- § 2:168 —Entering marriage
- § 2:169 —Divorce
- § 2:170 —Widowhood
- § 2:171 Exclusion of gain from prior rollovers
- § 2:172 Sheltering gain from prior sales
- § 2:173 Rescuing unused prior-law exclusion
- § 2:174 Deferred income can be tax-free profit
- § 2:175 Combining tax-free gain with installment sale
- § 2:176 Live-in, move-out strategy
- § 2:177 Election not to exclude gain
- § 2:178 Maintaining records of improvements
- § 2:179 Alternatives when gain exceeds exclusion
- § 2:180 Be careful when using trusts
- § 2:181 Installment sale of personal residence—Previously excluded gain recognized on reacquisition of residence: Case study
- § 2:182 Passive activity losses do not reduce excluded gain on sale of residence
- APPENDIX 2.1. Checklist of Information Needed From Exchanger
- APPENDIX 2.2. Analysis of Tax Positions of Exchangers
- APPENDIX 2.3. Annual Property Operating Data
- APPENDIX 2.4. Cash Flow Analysis
- APPENDIX 2.5. Agreement Contemplating Acquisition of Property to Be Designated by Exchange Party
- APPENDIX 2.6. Checklist for Drafting an Agreement for Exchanging Properties
- APPENDIX 2.7. Exclusive Authorization to Exchange Property
- APPENDIX 2.7.50. Clause Obliging Buyer to Cooperate with Seller's Like-Kind Exchange

TABLE OF CONTENTS

APPENDIX 2.8.	Agreement as to Difference in Property Values and Method of Paying Amount of Difference
APPENDIX 2.9.	Checklist for Planning a 1031 Exchange
APPENDIX 2.10.	IRS Form 8824: Like Kind Exchanges
APPENDIX 2.11.	IRS Form 1099-S
APPENDIX 2.12.	Certification for No Information Reporting on Sale or Exchange of a Principal Residence

CHAPTER 3. NEGOTIATING THE COMMERCIAL LEASE

I. OVERVIEW

- § 3:1 Generally
- § 3:2 Term of the lease
- § 3:3 Parties to the lease
- § 3:4 Piercing the corporate veil

II. DESCRIPTION OF THE PREMISES

- § 3:5 Generally
- § 3:6 Determining floor size and measurements
- § 3:7 Identifying the loss factor
- § 3:8 Effect of floor configuration on rentability

III. RENT PAYMENTS

- § 3:9 Generally
- § 3:10 Flat rental
- § 3:11 Step-up or step-down rental
- § 3:12 Escalation rental—Adjustment for increased real estate taxes
- § 3:13 — —Checking property tax invoices
- § 3:14 — —Adjustment for increased operating expenses
- § 3:15 — —Negotiable items for escalation clause
- § 3:16 — —Key-wage method of expense escalation
- § 3:17 — —Additional rent payments for electricity
- § 3:18 Cost-of-living rental
- § 3:19 Tax aspects of rent payments—Rent payments to landlord
- § 3:20 —Rent payments by tenant
- § 3:21 —Section 467 rental agreements
- § 3:22 — —Deferred rent-accrual rules
- § 3:23 — —Constant rent-accrual rules
- § 3:24 —Tenant payments under net leases
- § 3:25 —Landlord and tenant as related parties
- § 3:26 Security deposits
- § 3:27 —Form of security deposit

IV. CONDITION OF THE PREMISES

- § 3:28 Generally

- § 3:29 Negotiating the damage and destruction clause
- § 3:30 —Definition of damage and destruction
- § 3:31 —Obligation to restore or repair
- § 3:32 —Abatement of rent
- § 3:33 —Lease termination
- § 3:34 —Broad reach of as-is clause
- § 3:35 Parking space rights

V. ASSIGNMENT OR SUBLEASE BY TENANT

- § 3:36 Generally
- § 3:37 Consent of landlord
- § 3:38 —Arbitrary refusal to consent
- § 3:39 —Consent not to be unreasonably withheld
- § 3:40 —Specific standards to be met
- § 3:41 Holdover tenant liable in trespass to new tenant
- § 3:42 Subleasing strategy in weak markets
- § 3:43 Lease recapture and profit sharing by landlord
- § 3:44 —Recapture provision
- § 3:45 —Profit sharing
- § 3:46 Takeover lease
- § 3:47 Anti-raid provision
- § 3:48 Using sublease clause for expansion planning
- § 3:49 —Controlled expansion
- § 3:50 —Takebacks
- § 3:51 —Puts
- § 3:52 Negotiating the sublease
- § 3:53 —Sublease restrictions in the prime lease
- § 3:54 —Conformity of prime lease and sublease
- § 3:55 —Interdependence of prime tenant and subtenant
- § 3:56 —Divisibility of rights and duties
- § 3:57 Tax aspects of assignment, sublease, or cancellation
- § 3:58 —Tenant's payment for lease cancellation
- § 3:59 —Landlord's payment for lease cancellation

VI. OPTION TO RENEW, EXPAND OR CANCEL; EARLY RENEWAL

- § 3:60 Generally
- § 3:61 Renewal option
- § 3:62 —Renewal based on full CPI increase
- § 3:63 —Renewal based on partial CPI increase
- § 3:64 —Renewal based on CPI plus operating cost increase
- § 3:65 —Fixed renewal rental
- § 3:66 —Renewal rental to be determined
- § 3:67 —Manner and contents of renewal notice
- § 3:68 —Automatic renewal
- § 3:69 Expansion option
- § 3:70 —Automatic pickup provision

TABLE OF CONTENTS

- § 3:71 —Right of first refusal of additional space
- § 3:72 —Conditions of expansion option
- § 3:73 —Cancellation option
- § 3:74 —Lessor's option to cancel
- § 3:75 — —Negotiating the lessor's cancellation option
- § 3:76 —When to consider early lease renewal

VII. OPTION TO PURCHASE AND RIGHT OF FIRST REFUSAL

- § 3:77 Generally
- § 3:78 Purchase option
- § 3:79 —Price
- § 3:80 —Other details of sale
- § 3:81 —When option is exercisable
- § 3:82 —Manner of exercising option
- § 3:83 —Tax aspects of purchase options
- § 3:84 Right of first refusal
- § 3:85 —Legal traps in the right of first refusal
- § 3:86 —Distinguishing real and personal property

VIII. SUBORDINATION AND ATTORNMENT

- § 3:87 Subordination
- § 3:88 Attornment

IX. NONDISTURBANCE AND RECOGNITION AGREEMENTS

- § 3:89 Generally

X. LEASE MODIFICATIONS TO MEET LENDER REQUIREMENTS

- § 3:90 Generally
- § 3:91 Rent obligation and security deposit
- § 3:92 Lease default and termination

XI. WORK LETTERS

- § 3:93 Generally
- § 3:94 Negotiating the work letter
- § 3:95 Tenant construction audit
- § 3:96 Build-to-suit lease—Rent abatement forfeiture

XII. INSURANCE AND EXCULPATION

- § 3:97 Generally
- § 3:98 Tenant loss exposures
- § 3:99 Terrorism Risk Insurance Act
- § 3:100 Insurance requirements of office lease
- § 3:101 Landlord's waiver of claims
- § 3:102 Blanket property insurance and the lease pass-through clause

- § 3:103 Title insurance for tenants
- § 3:104 Lessor's duty of care

XIII. DEFAULTS AND OTHER FAILURES TO PERFORM OBLIGATIONS

- § 3:105 Defining default
- § 3:106 Remedies for defaults
- § 3:107 —Self-help
- § 3:108 —Monetary damages
- § 3:109 —Injunction or specific performance
- § 3:110 —Cancellation of lease
- § 3:111 —Landlord's right to accelerate future rent
- § 3:112 —Duty to mitigate damages
- § 3:113 —Covenant of quiet enjoyment
- § 3:114 —Negotiating the exculpatory clause
- § 3:115 Remedies for default—Forfeiture

XIV. LEASE CONCESSIONS

- § 3:116 Generally
- § 3:117 Rent concessions
- § 3:118 —Accounting and tax aspects of rent holidays
- § 3:119 — —Cash incentives
- § 3:120 — —Rent holidays
- § 3:121 Financing tenant improvements
- § 3:122 —How to handle tenant improvements for maximum tax benefits
- § 3:123 Taking over tenant's existing lease
- § 3:124 —The takeover gambit
- § 3:125 Paying tenant's moving expenses
- § 3:126 Paying tenant's architectural fees
- § 3:127 Other tenant incentives
- § 3:128 Lower rents vs. lease concessions

XV. TENANT EQUITY PARTICIPATION

- § 3:129 Structuring equity leases
- § 3:130 Tenant's contribution
- § 3:131 What tenant receives in transaction
- § 3:132 Management and control
- § 3:133 Potential tenant problems
- § 3:134 Phantom equity leases
- § 3:135 Tax aspects of equity leases

XVI. BROKERAGE COMMISSIONS

- § 3:136 Basic terms of brokerage agreements—Successor landlord's liability for renewal commissions
- § 3:137 Seller's breach of exclusive listing agreement: Broker not the procuring cause of sale

TABLE OF CONTENTS

XVII. SPECIAL LEASE SITUATIONS

§ 3:138	Partitioning leasehold interest—Legal and equitable partition
APPENDIX 3.1.	Checklist for Office Lease Transactions
APPENDIX 3.1.50.	Lease provision mandating compliance with laws and purposes
APPENDIX 3.2.	Lease Provision for Flat Rental Payments
APPENDIX 3.3.	Lease Provision for Step-Up or Step-Down Rental
APPENDIX 3.4.	Rent Escalation Clause Based on Increased Real Estate Taxes
APPENDIX 3.5.	Rent Escalation Clause Based on Increased Operating Expenses
APPENDIX 3.6.	Rent Escalation Clause Based on Porters' Wages
APPENDIX 3.7.	Rent Escalation Clause Based on Cost-of-Living Adjustment
APPENDIX 3.8.	Lease Provision Against Assignment, Mortgage, or Sublet
APPENDIX 3.9.	Lease Provision for Renewal Rent to Be Adjusted According to Price Index
APPENDIX 3.10.	Lease Provision for Renewal Rental to Be Fixed by Arbitration
APPENDIX 3.11.	Automatic Renewal Provision
APPENDIX 3.12.	Lease Provision for Option to Purchase Premises
APPENDIX 3.13.	Lease Provision for Right of First Refusal
APPENDIX 3.14.	Work Letter Checklist
APPENDIX 3.15.	Short Form Net Lease Agreement
APPENDIX 3.16.	Office Lease in Multitenant Building
APPENDIX 3.16.50.	Lease provision for commercial signage
APPENDIX 3.17.	Clauses Covering Advance Rentals and Security Deposits
APPENDIX 3.18.	Right to Assign or Sublet to Related or Merged Corporation; Definition of Subsidiary, Affiliate, and Successor
APPENDIX 3.19.	Mutual Waiver of Subrogation Rights, Including Deductibles; Waivers of Right of Recovery
APPENDIX 3.20.	Manner of Notice of Cancellation of Lease
APPENDIX 3.21.	Parties to Use Commercially Reasonable Efforts to Mitigate Damages
APPENDIX 3.22.	Checklist for Office Building Insurance Coverage

PART II. FINANCING

CHAPTER 4. METHODS OF FINANCING COMMERCIAL REAL ESTATE

I. THE REAL ESTATE FINANCING PROCESS

§ 4:1	What is financing?
§ 4:2	The rise of mixed forms of financing

- § 4:3 Purposes of real estate financing
- § 4:4 —Maximizing use of cash; preserving cash
- § 4:5 —Achieving positive financial leverage
- § 4:6 How real estate loans are classified
- § 4:7 Buying and selling mortgage loans
- § 4:8 Refinancing in anticipation of sale

II. ACQUISITION AND DEVELOPMENT FINANCING

- § 4:9 Generally
- § 4:10 Acquisition financing
- § 4:11 Development financing
- § 4:12 Three-party financing
- § 4:13 Tax increment financing

III. CONSTRUCTION FINANCING

- § 4:14 Generally
- § 4:15 Loan application and commitment
- § 4:16 Loan payouts and inspections
- § 4:17 Repayment of construction loan
- § 4:18 —Function of takeout commitment
- § 4:19 —Permanent loan takeout commitment
- § 4:20 —Standby permanent loan commitment
- § 4:21 Mezzanine financing
- § 4:22 —Intercreditor agreement
- § 4:23 —Rating mezzanine loans
- § 4:24 —Mezzanine exit strategies
- § 4:25 —Value-added equity and mezzanine structures
- § 4:26 —Using a sale-optionback

IV. INTERIM AND BRIDGE FINANCING

- § 4:27 Generally
- § 4:28 Negotiating pointers for interim financing
- § 4:29 Interim financing of new construction
- § 4:30 Interim financing of existing projects
- § 4:31 Short-term financing of undeveloped land

V. PERMANENT FIRST MORTGAGE FINANCING

- § 4:32 Loan application
- § 4:33 Life company mortgage loans
- § 4:34 Loan commitment
- § 4:35 —Types and contents generally
- § 4:36 —Borrower's considerations
- § 4:37 Protecting the lender
- § 4:38 Real estate loans: Guarantees

VI. KEY ELEMENTS OF A MORTGAGE LOAN

- § 4:39 Generally

TABLE OF CONTENTS

- § 4:40 Loan amortization
- § 4:41 —Standing loan
- § 4:42 —Balloon loan
- § 4:43 —Fully amortizing loan
- § 4:44 —Negative amortization
- § 4:45 Interest rate
- § 4:46 Amortization schedule
- § 4:47 —Constant-payment schedule
- § 4:48 —Variable-payment schedule
- § 4:49 Debt service coverage ratios
- § 4:50 Recourse loans
- § 4:51 Nonrecourse loans: carve-out provisions
- § 4:52 Resizing the loan
- § 4:53 Covered bonds

VII. HOW VARIATIONS IN MORTGAGE LOAN TERMS AFFECT RETURN ON EQUITY

- § 4:54 Generally
- § 4:55 Change in amount of permanent mortgage
- § 4:56 Change in length of mortgage term
- § 4:57 Change in mortgage interest rate

VIII. JUNIOR MORTGAGE FINANCING

- § 4:58 Generally
- § 4:59 Junior financing when property is acquired
- § 4:60 Junior financing during ownership—Interim financing pending refinancing
- § 4:61 —Use for property conversion or rehabilitation
- § 4:62 Junior mortgage loan checklist
- § 4:63 Relationship between junior financing and cash flow

IX. WRAPAROUND MORTGAGE FINANCING

- § 4:64 Generally
- § 4:65 Benefits to lenders of wraparound financing
- § 4:66 Legal considerations for borrowers and lenders
- § 4:67 Analysis of economics of wraparound loans
- § 4:68 How wraparound loans can increase investment yield

X. LEASEHOLD MORTGAGE FINANCING

- § 4:69 Generally
- § 4:70 Leasehold mortgage lender's considerations
- § 4:71 Lessee's default under lease mortgage
- § 4:72 Credit tenant lease loans

XI. FINANCING WITH OPTIONS

- § 4:73 Financing with long-term options

- § 4:74 Using a sale-optionback for financing
- § 4:75 Land financing with options

XII. GUIDE TO COMMERCIAL LOAN REFINANCING

- § 4:76 Refinancing commercial loans under pressure
- § 4:77 —Cash flow mortgage
- § 4:78 —Refinancing: Using defeasance
- § 4:79 Small bank troubles
- § 4:80 Debt explosion threat
- § 4:81 Refinancing: Property under pressure
- § 4:82 Banks: Managing bad loans

XIII. REAL ESTATE FINANCING BY CREDIT COMPANIES

- § 4:83 Generally
- § 4:84 Private equity funds
- § 4:85 —Private equity fund structures
- § 4:86 —Opportunity funds
- § 4:87 Understanding investment terminology
- § 4:88 Interest rate swaps
- § 4:89 —Interest rate caps and collars
- § 4:90 Lender liability for improper disclosure

XIV. CROWDFUNDING

- § 4:91 Generally
- § 4:92 Emerging Growth Company (ECG)
- § 4:93 Funding portal
- § 4:94 Exemption from '33 and '34 Acts
- § 4:95 Trading restrictions
- § 4:96 Crowdfunding tax considerations

XV. SELF-DIRECTED IRAS

- § 4:97 Generally
- § 4:98 IRA alternative investments guidance
- § 4:99 IRA prohibited transactions: The 2016 *Thiessen* decision

XVI. TRANSFERABLE STATE INCOME TAX CREDITS

- § 4:100 Transferable state income tax credits generally
- § 4:101 Nontransferable state income tax credits

XVII. STATE ECONOMIC DEVELOPMENT GRANTS

- § 4:102 State economic development grants—Nonshareholder capital contributions
- § 4:103 State development grants to entities taxed as partnerships

XVIII. QUALIFIED SMALL BUSINESS STOCK

- § 4:104 Qualified small business stock: IRC § 1202

TABLE OF CONTENTS

APPENDIX 4.1.	Construction Loan
APPENDIX 4.2.	Takeout Commitment
APPENDIX 4.3.	Mortgage Note
APPENDIX 4.4.	Mortgage
APPENDIX 4.5.	Deed of Trust
APPENDIX 4.6.	Balloon Payment Mortgage
APPENDIX 4.7.	Alternate Rate Mortgage Note With Negative Amortization
APPENDIX 4.8.	Second Mortgage
APPENDIX 4.9.	Wraparound Mortgage
APPENDIX 4.10.	Leasehold Mortgage

CHAPTER 4A. METHODS OF FINANCING RESIDENTIAL MORTGAGES

I. RESIDENTIAL MORTGAGE FINANCING

§ 4A:1	Generally
§ 4A:2	Distressed homeowners
§ 4A:3	Discharge of indebtedness income relief
§ 4A:4	Home Affordable Modification Program (HAMP)
§ 4A:5	Home Affordable Refinance Program (HARP)
§ 4A:6	Bureau of Consumer Financial Protection (CFPB)
§ 4A:7	Coronavirus Aid, Relief, and Economic Security Act (CARES Act)
§ 4A:8	Reverse mortgages
§ 4A:9	The Financial Crimes Enforcement Network (FinCEN); non-financed residential real estate transactions
APPENDIX 4A.1.	Rev. Proc. 2013-16
APPENDIX 4A.2.	Mortgagee Letter 2014-21
APPENDIX 4A.2.50.	Mortgagee Letter 2017-12
APPENDIX 4A.3.	Loan Estimate
APPENDIX 4A.4.	Closing Disclosure
APPENDIX 4A.5.	Consumer Finance Protection Bureau—TILA-RESPA Integrated Disclosure FAQs
APPENDIX 4A.6.	Executive Summary of the Residential PACE Financing Rule
APPENDIX 4A.7.	Modification to Closing Disclosure for PACE Financing Transaction, Model Form

CHAPTER 5. MORTGAGE LOAN COMMITMENTS

I. MORTGAGE BROKERAGE AGREEMENTS

§ 5:1	Generally
§ 5:2	Commissions

II. LOAN APPLICATION

- § 5:3 Generally
- § 5:4 Some suggestions for lenders

III. BASIC LOAN COMMITMENT

- § 5:5 Generally
- § 5:6 Function of the loan commitment
- § 5:7 Pre-commitment negotiations
- § 5:8 Form and contents of the loan commitment
- § 5:9 Oral loan commitments

IV. BORROWER'S IDENTITY AND AUTHORITY

- § 5:10 In general
- § 5:11 Types of borrowers—Individual
- § 5:12 —Corporation
- § 5:13 —Unincorporated association
- § 5:14 —Partnership
- § 5:15 —Joint venture
- § 5:16 —Trustee or other fiduciary

V. KEY PROVISIONS OF LOAN COMMITMENTS

- § 5:17 Generally
- § 5:18 Loan amount
- § 5:19 Interest rate
- § 5:20 Loan term
- § 5:21 Debt service

VI. ACCEPTANCE AND EXPIRATION OF COMMITMENT

- § 5:22 Date of acceptance
- § 5:23 Date of expiration

VII. IDENTIFICATION AND DESCRIPTION OF PROPERTY

- § 5:24 Generally

VIII. PROPERTY SURVEYS AND REQUIRED EASEMENTS

- § 5:25 Generally

IX. TITLE INSURANCE

- § 5:26 Generally

X. EXISTING LEASES AND TENANCIES

- § 5:27 Lender's approval and control of leases
- § 5:28 Verification of tenant's occupancy

TABLE OF CONTENTS

- § 5:29 Master lease
- § 5:30 Subordination of leases
- § 5:31 Certified rent roll

XI. PROPERTY APPRAISAL AND PRICE VERIFICATION

- § 5:32 Generally
- § 5:33 Consumer Financial Protection Bureau (CFPB) appraisal and valuation rules under the ECOA

XII. COSTS AND FEES

- § 5:34 Generally
- § 5:35 Refundable commitment fee or letter of credit
- § 5:36 Nonrefundable commitment fee
- § 5:37 Borrower's guide to fee negotiations

XIII. INSURANCE COVERAGE

- § 5:38 Fire and other hazards
- § 5:39 Liability
- § 5:40 Flood
- § 5:41 Loss of rent and business interruption
- § 5:42 Life

XIV. TAX AND INSURANCE PREMIUM IMPOUNDS OR ESCROWS

- § 5:43 Impounds or escrows
- § 5:44 Tax service contracts

XV. COSIGNERS, GUARANTORS, AND OTHER THIRD-PARTY OBLIGORS

- § 5:45 Generally
- § 5:46 Subordinated junior mortgage as indirect guaranty
- § 5:47 Operating company lease as guaranty
- § 5:48 Real estate loan guaranties—Nonrecourse loans: Carve-outs, single purpose entity, definition of insolvency
- § 5:49 Tax consequences of nonrecourse carve-out guarantee of partnership liability—"Bad boy guarantees"

XVI. FLOOR LOANS, RENTAL REQUIREMENTS, AND COMPLETION HOLDBACKS

- § 5:50 Floor or alternate loans
- § 5:51 Completion holdbacks
- § 5:52 All-or-nothing loans

XVII. PREPAYMENT PROVISIONS

- § 5:53 Generally

XVIII. ANNUAL OPERATING STATEMENTS

§ 5:54 Generally

XIX. DUE-ON-SALE CLAUSES

§ 5:55 Generally

XX. SECONDARY FINANCING

§ 5:56 Generally

XXI. ADVERSE CHANGE IN BORROWER'S FINANCIAL CONDITION

§ 5:57 Generally

XXII. LOCAL COUNSEL: FEES AND SERVICES

§ 5:58 Generally

XXIII. SPECIAL PROVISIONS FOR CONSTRUCTION PROJECTS

§ 5:59 Importance of special provisions

§ 5:60 Lender's review and approval—Final plans and specifications

§ 5:61 —Soil reports

§ 5:62 —Construction contract

§ 5:63 —Environmental impact report

§ 5:64 Agreement with construction lender

§ 5:65 Commencement and completion of construction—Commencement and completion by specified dates

§ 5:66 —Construction progress reports

§ 5:67 —Certificate of satisfactory completion

§ 5:68 —Certificate of occupancy

§ 5:69 —Recertification of appraisal after completion

§ 5:70 —Photographs of completed property

§ 5:71 —Lender's right to inspect property

XXIV. GAP LOAN COMMITMENTS

§ 5:72 Nature and purpose

§ 5:73 Commitment fee: terms and conditions

XXV. CONSTRUCTION LOAN COMMITMENTS

§ 5:74 Generally

§ 5:75 Terms and conditions

§ 5:76 Standby commitments in construction financing

XXVI. ANTICIPATORY REPUDIATION AND EARLY TERMINATION OF A COMMITMENT

§ 5:77 Generally

TABLE OF CONTENTS

- § 5:78 Breach of a commitment
- § 5:79 Resolving disputes between borrower and lender

XXVII. REMEDIES FOR BREACH OF MORTGAGE LOAN COMMITMENT

- § 5:80 Generally
- § 5:81 Lender's remedies for borrower's default
- § 5:82 Borrower's remedies for lender's default
- § 5:83 Borrower's tort remedies
- APPENDIX 5.1. Loan Commitment Letter
- APPENDIX 5.2. Checklist for Construction Loan Commitment
- APPENDIX 5.3. Checklist of Permanent Mortgage Commitment
- APPENDIX 5.4. Construction Loan Commitment with Commentary
- APPENDIX 5.5. Brokerage Agreement

CHAPTER 6. MORTGAGE LOAN UNDERWRITING AND DOCUMENTATION

I. INTRODUCTION

- § 6:1 Generally

II. LENDER'S REVIEW OF LEASES

- § 6:2 Generally
- § 6:3 Business review
- § 6:4 Legal review
- § 6:5 Basic documentation required for review

III. SUBORDINATION OF LEASES TO LENDER'S RIGHTS; NONDISTURBANCE AND ATTORNMEN PROVISIONS

- § 6:6 Generally
- § 6:7 Effect of subordination, nondisturbance, and attornment provisions

IV. LEASE PROVISIONS LIKELY TO BE UNACCEPTABLE TO LENDERS

- § 6:8 Generally
- § 6:9 Commencement of lease term
- § 6:10 Tenant's option to cancel
- § 6:11 Prepaid rent and security deposit
- § 6:12 Property taxes and operating expenses
- § 6:13 Use of premises
- § 6:14 Exclusive, radius, and no-compete clauses
- § 6:15 Duty to repair damage or restore premises—Hazard insurance and use of proceeds—Responsibility for repairs and insurance coverage

- § 6:16 — —Use of insurance proceeds
- § 6:17 — —Waiver of subrogation between landlord and tenant
- § 6:18 — —Option to terminate lease due to damage or destruction
- § 6:19 Condemnation of leased premises
- § 6:20 Tenant's option to purchase or right of first refusal
- § 6:21 Tenant's right to assign lease or sublet premises

V. TENANT ESTOPPEL STATEMENTS OR CERTIFICATIONS

- § 6:22 In general
- § 6:23 Effect of tenant's failure or refusal to execute estoppel statement
- § 6:24 Leases to united states government

VI. LENDER'S REVIEW AND ACCEPTANCE OF BORROWER'S HAZARD INSURANCE

- § 6:25 Generally
- § 6:26 Scope of review generally
- § 6:27 Acceptability of insurance company
- § 6:28 Sufficiency of amount of insurance coverage—In general
- § 6:29 —Effect of coinsurance provisions
- § 6:30 —Effect of agreed-amount endorsement
- § 6:31 Types of coverage—In general
- § 6:32 —Loss-of-rents, business-interruption, and extra expense insurance
- § 6:33 —Liability insurance
- § 6:34 —Personal property insurance
- § 6:35 —Course-of-construction or builder's-risk; vandalism and malicious mischief insurance
- § 6:36 —Workmen's compensation insurance
- § 6:37 —Flood insurance
- § 6:38 Necessity for mortgagee clause or lender's loss payable endorsement
- § 6:39 Proof of insurance coverage

VII. LENDER'S REQUIREMENTS WITH RESPECT TO BORROWER'S TITLE

- § 6:40 Generally
- § 6:41 Special concerns of construction lenders

VIII. TITLE POLICIES AND HOW THEY INSURE AGAINST TITLE DEFECTS

- § 6:42 Generally

IX. PROOF OR ASSURANCE OF TITLE OTHER THAN TITLE POLICY

- § 6:43 Abstract of title; legal opinions
- § 6:44 Certificate of title
- § 6:45 Guaranties of title
- § 6:46 Torrens title

TABLE OF CONTENTS

X. LENDER'S SURVEY REQUIREMENTS

- § 6:47 General considerations
- § 6:48 Methods of describing land and boundaries
- § 6:49 —Government survey method
- § 6:50 —Official surveys, tracts, blocks, lots
- § 6:51 —Metes and bounds
- § 6:52 Review of survey
- § 6:53 Closing loans without surveys

XI. PROMISSORY MORTGAGE NOTE

- § 6:54 General considerations
- § 6:55 Prepayment provisions—Penalty provisions
- § 6:56 —Other provisions in prepayment clause
- § 6:57 Due-on-sale provision
- § 6:58 Late charges
- § 6:59 Nonrecourse provision
- § 6:60 Cross-default provisions
- § 6:61 Cross-collateralization
- § 6:62 Lender's participation in property cash flow
- § 6:63 Balloon mortgage notes
- § 6:64 Funding floor-and-ceiling loan
- § 6:65 Guaranties or note-purchase agreements

XII. MORTGAGE OR DEED OF TRUST

- § 6:66 Necessity for properly drafted, executed, and recorded instrument
- § 6:67 Designation of borrower-mortgagor
- § 6:68 Description of property or interest—Conveyance to trustee under deed of trust—In general
- § 6:69 — —Inclusion of essential easements
- § 6:70 — —Inclusion of borrower's personal property on encumbered premises
- § 6:71 — —Inclusion of after-acquired title or interest
- § 6:72 Impounds or escrow deposits
- § 6:73 Borrower's duties as to insurance coverage—Insurance on borrower's life
- § 6:74 —Hazard insurance
- § 6:75 —Private mortgage insurance
- § 6:76 Borrower's duty to provide annual operating statements
- § 6:77 Borrower's duty to hire or pay for professional property manager
- § 6:78 Lender's right to provide future financing
- § 6:79 Due-on-sale clause
- § 6:80 Cross-default provisions
- § 6:81 Special provisions covering leasehold estates

XIII. COLLATERAL ASSIGNMENT OF LEASES AND RENTS TO LENDER IN MORTGAGE AND BY SEPARATE INSTRUMENT

- § 6:82 Generally

XIV. SECURITY AGREEMENTS AND FINANCING STATEMENTS

- § 6:83 Nature, purpose, and requirements generally
- § 6:84 Form, contents, and recordation of security agreement
- § 6:85 Form, contents, and recordation of financing statement

XV. SPECIAL CONSTRUCTION LOAN REQUIREMENTS

- § 6:86 General considerations
- § 6:87 Checklist of basic requirements for lender's protection

XVI. PURPOSE AND CONTENTS OF COMPLETION AGREEMENT

- § 6:88 Generally

XVII. HOW BUY-SELL AND TRIPARTITE AGREEMENTS PROVIDE ADDITIONAL PROTECTION FOR LENDERS

- § 6:89 Generally
- § 6:90 Borrower's and interim lenders estoppel statements
- § 6:91 Buy-sell agreement
- § 6:92 Tripartite agreement
- § 6:93 Advantages and disadvantages of buy-sell and tripartite agreements

XVIII. SUBORDINATION, NONDISTURBANCE, AND ATTORNMENMENT AGREEMENTS

- § 6:94 Generally

XIX. LENDER'S WAIVER OF RIGHTS AS TO TENANT'S TRADE FIXTURES AND EQUIPMENT

- § 6:95 Generally

XX. PROCEEDINGS AT PERMANENT LOAN CLOSING; PREPARATIONS FOR CLOSING

- § 6:96 In general
- § 6:97 How necessary exhibits and documents are prepared and transmitted to lender for review
- § 6:98 Conduct of closing through an escrow agent
- § 6:99 Follow-up after closing

XXI. PROCEEDINGS AT CONSTRUCTION LOAN CLOSING; LIQUIDATION OF LOAN

- § 6:100 Generally

XXII. LIENS AND ENCUMBRANCES

- § 6:101 Generally
- § 6:102 Federal tax liens

TABLE OF CONTENTS

§ 6:103	Replacement mortgage strategy
APPENDIX 6.1.	Selected Promissory Note Provisions
APPENDIX 6.2.	Selected Deed of Trust (or Mortgage) Provisions Generally
APPENDIX 6.3.	Leasehold Loans: Selected Deed of Trust (or Mortgage) Provisions Where Fee Interest is Subordinated to Leasehold Interest
APPENDIX 6.4.	Leasehold Loans: Selected Provisions Where Fee Interest is Not Subordinated to Leasehold Interest
APPENDIX 6.4.3.	Leasehold Mortgagee Protections: Operational Protections for Leasehold Mortgagees
APPENDIX 6.4.7.	Leasehold Mortgagee Protections: Mortgagees' Notice and Opportunity to Cure
APPENDIX 6.5.	Borrower's Assignment to Lender of Leases and Rents as Additional Security for Loan
APPENDIX 6.6.	Agreement to Complete Construction Where Borrower Fails to Do So
APPENDIX 6.6.5.	Construction Loan Agreement: Select Representations and Warranty Provisions
APPENDIX 6.7.	Buy-Sell Agreement
APPENDIX 6.8.	Estoppel Certificate in Support of Buy-Sell Agreement
APPENDIX 6.9.	Tripartite Agreement

CHAPTER 7. JOINT VENTURES AND PARTICIPATING DEBT

I. OVERVIEW

§ 7:1 Generally

II. OBJECTIVES OF THE PARTIES

§ 7:2 Generally

§ 7:3 Developers/owners

§ 7:4 Lenders/investors

III. ROLES AND RESPONSIBILITIES OF THE PARTIES

§ 7:5 Generally

IV. ALTERNATIVE PARTICIPATING DEBT STRUCTURES

§ 7:6 Using convertible and participating loans

§ 7:7 —Comparing two formats

§ 7:8 —Borrower's viewpoint

§ 7:9 —Lender's viewpoint

§ 7:10 Participating mortgages

§ 7:11 —How banks handle participating acquisition, development, and construction loans

- § 7:12 Convertible mortgages
- § 7:13 Land sale—Leaseback transactions and leasehold mortgage loans
- § 7:14 Using participating leases for financing
- § 7:15 —Methods of landlord participation
- § 7:16 —Subordinated vs. unsubordinated land lease
- § 7:17 —Refinancing or sale proceeds
- § 7:18 —Real estate investment trust or tax-exempt landlord

V. FORMS OF JOINT VENTURES

- § 7:19 Generally
- § 7:20 All-cash equity joint ventures
- § 7:21 Debt and equity joint ventures
- § 7:22 Interim joint ventures
- § 7:23 Equity financing for developers
- § 7:24 —Participating and convertible debt instruments
- § 7:25 —Entity financing
- § 7:26 Credit enhancement

VI. STRUCTURING THE TRANSACTION

- § 7:27 Generally

VII. UNDERWRITING AND RISK ANALYSIS

- § 7:28 Generally
- § 7:29 Developers' ability to perform duties
- § 7:30 Investors' ability to perform duties
- § 7:31 Achieving cash flow goals
- § 7:32 Achieving property appreciation goals
- § 7:33 Relationship of the parties
- § 7:34 Achieving anticipated returns
- § 7:35 Cost of the project

VIII. YIELDS

- § 7:36 Generally
- § 7:37 Correlating yields to risk
- § 7:38 Pricing participation components
- § 7:39 Sensitivity analysis

IX. NEGOTIATING THE FINAL TRANSACTION

- § 7:40 Generally

- APPENDIX 7.1. Participating Mortgage Provisions for Additional Interest—
Participation in Cash Flow and Appreciation
- APPENDIX 7.2. Convertible Mortgage—Purchase of Equity Interest
- APPENDIX 7.3. Agreement Creating Joint Venture

CHAPTER 8. REAL ESTATE SECURITIZATION

I. A BRIEF HISTORY OF SECURITIZATION

- § 8:1 A major recession
- § 8:2 Capital flows and property types in 2010
- § 8:3 Regulators urge balanced approach
- § 8:4 General Growth Properties Bankruptcy
- § 8:5 Resecuritization efforts
- § 8:6 What is securitization?
- § 8:7 Development of securitization
- § 8:8 ABS shift from mortgage to other assets
- § 8:9 Net interest margin securities (NIMS)
- § 8:10 The future of securitization
- § 8:11 The mortgage outlook
- § 8:12 The buying begins

II. IMPACT OF SECURITIZATION ON REAL ESTATE CAPITAL MARKETS

- § 8:13 Generally
- § 8:14 Risk management
- § 8:15 Loan origination and sales
- § 8:16 Capital market expansion and lower costs
- § 8:17 Accounting principles in asset securitization
- § 8:18 A model for understanding securitization
- § 8:19 How CMBS and CDOs differ
- § 8:20 Master servicer and collateral asset manager
- § 8:21 Can you foreclose a CDO?

III. RATING MORTGAGE-BACKED SECURITIES

- § 8:22 Generally
- § 8:23 Property-specific transactions
- § 8:24 —Real estate quality
- § 8:25 — —Location
- § 8:26 — —Tenancy
- § 8:27 — —Leases
- § 8:28 — —History
- § 8:29 — —Management
- § 8:30 — —Construction quality/energy efficiency
- § 8:31 — —Ownership position
- § 8:32 — —Insurance requirements
- § 8:33 — —Title insurance/surveys
- § 8:34 — —Environmental risk
- § 8:35 — —Subordinate debt
- § 8:36 —Legal issues
- § 8:37 —Bankruptcy remote entities

- § 8:38 — —Municipal entities
- § 8:39 — —PPCs
- § 8:40 — —SPCs
- § 8:41 —Transfers, ownership, security interest
- § 8:42 —Other legal opinions
- § 8:43 Commercial mortgage pools
- § 8:44 —Individual loan analysis
- § 8:45 —Cash flow
- § 8:46 Mortgage ratings: new model
- § 8:47 Commercial mortgage pools—Environmental risk in pools
- § 8:48 Credit leases
- § 8:49 Evaluating residential loan originators
- § 8:50 Rating residential mortgage servicers
- § 8:51 Inside the rating process

IV. HOW MORTGAGE SECURITIES ARE STRUCTURED

- § 8:52 Capital stack and B-holder rights
- § 8:53 Pro-rata principal payments
- § 8:54 Understanding A/B structured loans
- § 8:55 Special features of conduit loans
- § 8:56 Special purpose vehicle formation
- § 8:57 Special purpose corporate general partners
- § 8:58 Special purpose corporations

V. RATING LOAN TYPES

- § 8:59 Office buildings
- § 8:60 Cooperatives
- § 8:61 Condominiums
- § 8:62 Construction loans
- § 8:63 Nursing facilities
- § 8:64 Credit lease transactions

VI. REAL ESTATE MORTGAGE INVESTMENT CONDUITS

- § 8:65 Defining the “REMIC”
- § 8:66 Collateralized mortgage obligation: looking at the past
- § 8:67 —Advantages of the CMO over the REMIC
- § 8:68 Types of REMIC interests
- § 8:69 —REMIC characteristics and advantages
- § 8:70 Tax aspects of REMICs
- § 8:71 —Definition
- § 8:72 —Election
- § 8:73 —Asset composition test
- § 8:74 —Ownership instruments: regular and residual interests
- § 8:75 —Transfers of property to a REMIC
- § 8:76 —Taxation of a REMIC
- § 8:77 —Taxation of holders of REMIC interests

TABLE OF CONTENTS

§ 8:78 —Disposition of REMIC interests

VII. OTHER MANAGEMENT ISSUES IN SECURITIZATION

- § 8:79 Choosing loans for securitization
- § 8:80 Pari-passu notes
- § 8:81 Covered bonds
- § 8:82 Refinancing a conduit loan
- § 8:83 Dealing with a balloon mortgage default
- § 8:84 Role of DCRs in rating conduit transactions
- § 8:85 Effect of rising interest rates
- § 8:86 Defeasance: alternative to prepayment
- § 8:87 Effect of fair value accounting
- § 8:88 Effect of Coronavirus on the CMBS market
- § 8:89 Brokers: independent contractors?

VIII. THE SUBPRIME CRISIS

- § 8:90 Who holds subprime debt?
- § 8:91 Analysis of a failed mortgage lender
- § 8:92 Breach of warranty lawsuit
- § 8:93 Title company duty to disclose fraud
- § 8:94 State and federal investigations
- § 8:95 Subprime loan legislation

APPENDIX 8.1. Glossary of CMBS Terms

CHAPTER 8A. SEC: THE DODD-FRANK ACT AND RELATED LEGISLATION

- § 8A:1 An analysis of the Mortgage Reform and Anti-Predatory Lending Act (MRAPLA)
- § 8A:2 Whistleblowers and the SEC
- § 8A:3 Credit rating agencies
- § 8A:4 The S.A.F.E. Act
- § 8A:5 Wall Street: Dodd-Frank Act
- § 8A:6 Volcker Rule: Impact on economy
- § 8A:7 Volcker impact on bridge loans
- § 8A:8 Dodd-Frank seen as too big not to fail
- § 8A:9 Economic Growth, Regulatory Relief, and Consumer Protection Act

CHAPTER 8B. SERVICERS AND RECEIVERS

- § 8B:1 The role of the special servicer
- § 8B:2 Special servicer procedures
- § 8B:3 CMBS quagmire
- § 8B:4 Special challenges
- § 8B:5 Receivership: Distressed real estate
- § 8B:6 Mortgagee's right to appoint
- § 8B:7 Servicers: Agreement on new rules

CHAPTER 8C. DODD-FRANK CREDIT RISK RETENTION REQUIREMENTS

- § 8C:1 Section 15G of the Securities Exchange Act of 1934
- § 8C:2 The final rule implementing § 15G
- § 8C:3 Exemption for Qualified Residential Mortgages (QRMs)
- § 8C:4 Options for meeting risk retention requirements
- § 8C:5 Sunset of hedging and transfer restrictions

CHAPTER 9. CASE STUDIES IN CREATIVE REAL ESTATE FINANCING

I. INTRODUCTION

- § 9:1 Generally

II. HOW PROPERTY OWNERS SUCCESSFULLY DEALT WITH A CASH CRUNCH (REFER TO APPENDIX 9.1.)

- § 9:2 Generally
- § 9:3 Successful remodeling enables partners to mortgage out property
- § 9:4 Business decline creates money crisis
- § 9:5 Methods of raising money considered by partners
- § 9:6 —Unsecured loan plus capital contribution in return for partnership interest
- § 9:7 —Unsecured loan plus creation of limited partnership with new investors as limited partners having a disproportionate share of reportable losses
- § 9:8 —Wraparound mortgage loan from tax-exempt institution
- § 9:9 —Wraparound mortgage loan plus capital contribution to partnership by private investor
- § 9:10 —Conventional second mortgage loan
- § 9:11 —Leasing out food and beverage operation
- § 9:12 Why technique VI was chosen and how it worked out

III. HOW INVESTOR RAISED CASH TO ACQUIRE A PROFITABLE HOTEL (REFER TO APPENDIXES 9.2 AND 9.3.)

- § 9:13 Generally
- § 9:14 Methods considered by investor
- § 9:15 —Why \$22.5 million could not be raised from tax-shelter investors
- § 9:16 —Why a tax-exempt bond issue was not available to investor
- § 9:17 —Other sources of funds
- § 9:18 Investor created a ground lease and a leasehold mortgage
- § 9:19 How investor then syndicated the enterprise and created a subleasehold operating position

IV. HOW INVESTOR, CAUGHT SHORT BY MORTGAGE CRUNCH, SAVED DEAL (REFER TO APPENDIX 9.4.)

- § 9:20 Generally

TABLE OF CONTENTS

- § 9:21 Investor obtains \$4 million of first-mortgage money
- § 9:22 Investor arranges for sales to close simultaneously, subject to first and second mortgages
- § 9:23 Investor packages first and second mortgages and sells them under agreements to repurchase them within four years
- § 9:24 Investor winds up with cash he needs on closing date plus additional sum for expenses and cash profit
- § 9:25 Results for warehousers of mortgage packages
- § 9:26 Position of warehousers of mortgage packages and investor at end of third year

V. HOW PROMOTER RAISED SUFFICIENT CASH TO ACQUIRE ATTRACTIVE SINGLE-INDUSTRY BUILDING (REFER TO APPENDIX 9.5.)

- § 9:27 Generally
- § 9:28 First leasehold mortgage loan plus packaged offering of second leasehold mortgage loan and equity interest
- § 9:29 First leasehold mortgage with balloon plus wraparound leasehold mortgage and partnership interests
- § 9:30 Why promoter chose first leasehold mortgage plus packaged offering of second leasehold mortgage and equity interest

VI. HOW REAL ESTATE MANAGER TOOK DISTRESSED PROPERTIES OFF BANK'S HANDS AND SUBSTANTIAL MONEYS (REFER TO APPENDIXES 9.6 AND 9.12.)

- § 9:31 Generally
- § 9:32 Real estate manager organizes limited partnership which purchases properties for cash and a blanket mortgage
- § 9:33 Bank and manager share decision-making powers and manager gets management fees
- § 9:34 Two classes of limited partnership interests, with bank in one class and investors in other
- § 9:35 Bank receives preferential return
- § 9:36 Manager and investors share in excess earnings
- § 9:37 Allocation of taxable profits and losses
- § 9:38 Right of bank to additional preferential distribution of proceeds of resale or refinancing

VII. HOW INVESTOR, CONFRONTED WITH HUGE CASH REQUIREMENTS, WAS ABLE TO ACQUIRE AN ATTRACTIVE LONG-TERM GROUND LEASE, GIVE HIS INVESTORS SUBSTANTIAL TAX-SHELTERED INCOME, AND RETAIN A LUCRATIVE POSITION FOR HIMSELF (REFER TO APPENDIX 9.7.)

- § 9:39 Generally
- § 9:40 Second leasehold mortgage plus offering of partnership interests plus operating sublease

- § 9:41 Second leasehold mortgage plus offering of partnership interests plus subordinated interest in partnership instead of operating sublease
- § 9:42 Wraparound mortgage loan plus offering of equity interests
- § 9:43 How investor actually went about accomplishing his goals

VIII. HOW SYNDICATOR RAISED TEMPORARY CASH TO MEET SHORT CLOSING DATE (REFER TO APPENDIX 9.8.)

- § 9:44 Generally
- § 9:45 Method 1: offer of convertible partnership notes to private investors
- § 9:46 Method 2: issuance of partnership note secured by unsold interests and part of promoter's partnership interest
- § 9:47 Why method 1 was used

IX. HOW BANK ACQUIRED THE USE OF A SKYSCRAPER WITHOUT REDUCING BANK'S LENDING CAPACITY, A FAMILY OF BUILDER-OWNERS SHELTERED ITS PROFITS FROM THE DEAL, AND SOME FAMILY MEMBERS MADE A TAX-SHELTERED SALE OF THEIR INTERESTS (REFER TO APPENDIXES 9.10 AND 9.11.)

- § 9:48 Generally
- § 9:49 Builder organized two partnerships and set up leasing arrangements
- § 9:50 —Conveyance of land to "fee" partnership consisting of some members of builder-family
- § 9:51 —Lease by "fee partnership" to a "main lease partnership" consisting of all members of builder-family
- § 9:52 —Bank to provide all financing and sublease entire property
- § 9:53 Seven years later some members of the main lease partnership saw chance for tax-sheltered profit from sale of their interests
- § 9:54 Sale to syndicator was arranged to give selling partners tax-sheltered profits and permit syndicator to offer his investors an attractive tax-shelter deal
- § 9:55 Deal was set up to provide maximum tax shelter for purchasers

X. HOW OWNER BUILT NEW SPACE FOR A TENANT AND GIVE THE TENANT THE FLEXIBILITY WITH CANCELLATION RIGHTS

- § 9:56 Generally
- § 9:57 Tenant wants to lease, but not buy, additional space
- § 9:58 Owner reviews the costs
- § 9:59 Owner proposes net lease with rental roughly equal to debt service under self-liquidating mortgage
- § 9:60 Owner and tenant agree on lease terms
- § 9:61 Lease arrangement creates tax problems for owner
- § 9:62 Lease of land with sublease to tenant solves fee owner's tax problems

XI. HOW INVESTOR-BUILDER ACQUIRED AND CONVERTED A LOFT BUILDING TO CO-OP APARTMENTS WITH A MINIMUM OF HIS OWN MONEY (REFER TO APPENDIX 9.12.)

- § 9:63 Generally

TABLE OF CONTENTS

§ 9:64	Acquisition and conversion costs shaped up
§ 9:65	Conversion to rental apartments compared to co-op apartments
§ 9:66	Investor-builder raised the money he needed from a single lender
§ 9:67	Results for lender
§ 9:68	Results for investor-builder
APPENDIX 9.1.	Selected Provisions of Agreement of Limited Partnership Succeeding General Partnership
APPENDIX 9.2.	Selected Provisions of Lease of Land Only
APPENDIX 9.3.	Selected Provisions of Sublease
APPENDIX 9.4.	Agreement to Repurchase Mortgages
APPENDIX 9.5.	Junior Leasehold Mortgage Provisions
APPENDIX 9.6.	Limited Partnership Provisions Concerning Allocations of Tax Losses and Cash Distributions
APPENDIX 9.7.	Wraparound Leasehold Note and Mortgage
APPENDIX 9.8.	Conversion Provision of Promissory Note
APPENDIX 9.9.	Buy-Back of Limited Partnership Interests
APPENDIX 9.10.	Leasehold Mortgage Note
APPENDIX 9.11.	Wraparound Leasehold Mortgage
APPENDIX 9.12.	Joint Venture Agreement

PART III. INVESTMENTS

CHAPTER 10. REAL ESTATE INVESTMENT ANALYSIS USING MODERN FINANCE THEORY

I. OVERVIEW OF FINANCIAL ANALYSIS

§ 10:1	Generally
§ 10:2	Principles and measurement of risk
§ 10:3	Relationship between risk and return
§ 10:4	Economics of diversification and liquidity

II. INFLATION, INTEREST, AND RISK

§ 10:5	Generally
§ 10:6	Present value
§ 10:7	Inflation and constant dollar value
§ 10:8	Real return
§ 10:9	Relationship between risk and real return

III. ESTIMATING RETURN ON INVESTMENT

§ 10:10	Generally
§ 10:11	Net present value
§ 10:12	—Depreciation tax benefits

- § 10:13 —Comparing competitive projects
- § 10:14 Internal rate of return
- § 10:15 —Ranking projects by profitability
- § 10:16 —Differentiating between borrowing and lending
- § 10:17 —Multiple internal rates of return
- § 10:18 —Changes in interest rates over time
- § 10:19 Return on book value of equity
- § 10:20 Payback analysis

IV. CONCLUSION

- § 10:21 Generally

CHAPTER 11. INVESTING IN RAW LAND

I. WHAT IS RAW LAND?

- § 11:1 Generally

II. INVESTING IN RAW LAND: ADVANTAGES

- § 11:2 Low cost
- § 11:3 Potential for high profits
- § 11:4 Diversified locations

III. INVESTING IN RAW LAND: DISADVANTAGES

- § 11:5 No income during holding period
- § 11:6 Lack of institutional financing
- § 11:7 Risk of buying overpriced land
- § 11:8 Physical and legal defects in land
- § 11:9 Zoning regulations

IV. SEARCHING FOR RAW LAND

- § 11:10 Suburban areas
- § 11:11 Rural areas
- § 11:12 —Extension of commuting time
- § 11:13 —Development of existing suburban areas
- § 11:14 —Development of high-speed transportation methods
- § 11:15 —Increased demand for recreational facilities and resorts

V. SELECTING A LAND PARCEL FOR PURCHASE

- § 11:16 Generally
- § 11:17 Identifying land growth patterns
- § 11:18 Predicting urban growth paths
- § 11:19 Identifying growth in rural areas
- § 11:20 Determining land suitable for development
- § 11:21 —Physical features

TABLE OF CONTENTS

- § 11:22 —Legal and regulatory problems
- § 11:23 Valuing raw land
- § 11:24 Buying land for residential development

VI. NEGOTIATING THE LAND PURCHASE

- § 11:25 Price
- § 11:26 Financial leverage
- § 11:27 Matching the financial needs of buyer and seller
- § 11:28 —Working farmers
- § 11:29 —Gentlemen farmers
- § 11:30 —Estates of deceased owners
- § 11:31 —Foreclosure sales
- § 11:32 —Government agencies and municipalities
- § 11:33 —Builders and developers
- § 11:34 —Large corporations
- § 11:35 —Speculators

VII. THE CONTRACT OF SALE

- § 11:36 Generally
- § 11:37 Parties to the transaction
- § 11:38 Description of the property
- § 11:39 Price
- § 11:40 Other conditions—Availability of financing
- § 11:41 —Zoning changes
- § 11:42 —Right of entry pending closing
- § 11:43 —Condition of the land
- § 11:44 —Crops
- § 11:45 —Violations
- § 11:46 —Character of title and title insurance
- § 11:47 —Cure of defects by seller
- § 11:48 —Assignability
- § 11:49 —Liquidated damages
- § 11:50 —Time and place of closing

VIII. PURCHASE MONEY MORTGAGES

- § 11:51 Generally
- § 11:52 Structuring the financing arrangement
- § 11:53 Principal, interest, and manner of payment
- § 11:54 Right of prepayment
- § 11:55 Notice of default
- § 11:56 Personal liability
- § 11:57 Release clauses
- § 11:58 Other provisions
- § 11:59 —Right to demolish existing structures
- § 11:60 —“Future indebtedness” clauses
- § 11:61 —Split mortgage clauses

- § 11:62 —Subordination clauses
- § 11:63 —Existing mortgages

IX. LAND CONTRACTS

- § 11:64 Generally
- § 11:65 Possession
- § 11:66 Purchaser's liability
- § 11:67 Notice of default

X. OPTIONS

- § 11:68 Generally
- § 11:69 Price
- § 11:70 Duration of the option
- § 11:71 Manner of exercising the option
- § 11:72 Options exercisable at different times

XI. MANAGING RAW LAND

- § 11:73 Generally
- § 11:74 Protecting the investment
- § 11:75 Enhancing the investment
- § 11:76 Generating income from the investment
- § 11:77 —Farm leases
- § 11:78 —Recreational uses
- § 11:79 —Other uses

XII. TAX ASPECTS OF RAW LAND INVESTMENT

- § 11:80 Generally
- § 11:81 Capital gain benefits
- § 11:82 Passive vs. investment activity
- § 11:83 —Interest expense
- § 11:84 —Property tax deductions
- § 11:85 —Landowner elections
- § 11:86 —Lender fees
- § 11:87 —Start-up costs
- § 11:88 Deductibility of loan interest
- § 11:89 Capitalization of carrying charges
- § 11:90 How to plan for abandonment loss
- § 11:91 —Establishing abandonment loss
- § 11:92 —Abandonment of partnership interest

APPENDIX 11.1. Checklist: Buying Raw Land for Resale

APPENDIX 11.2. Checklist: Investing in Raw Land Near a City

APPENDIX 11.3. Sample Clauses

APPENDIX 11.4. Sample Agreement: Option to Purchase Property

APPENDIX 11.5. Sale of Land in Subsection

TABLE OF CONTENTS

APPENDIX 11.6. Installment Sale of Land to Developer (With Partial Release Clause)

CHAPTER 11A. INVESTING IN APARTMENT BUILDINGS

- § 11A:1 Basic types of apartment buildings
- § 11A:2 Investment distinctions between garden and high-rise apartments
- § 11A:3 Life cycle of an apartment building
- § 11A:4 Location and physical condition of property; personal inspection of premises
- § 11A:5 Income and expense analysis
- § 11A:6 Reserve for replacements
- § 11A:7 Operating-expense ratio
- § 11A:8 Measuring return on investment generally
- § 11A:9 Two ways to measure return
- § 11A:10 Negotiating purchase and sale of apartment building
- § 11A:11 Eight negotiating techniques: Ploys and counterploys
- § 11A:12 Drafting sales contracts
- § 11A:13 Seller's representations about leases and tenants
- § 11A:14 Seller's representations concerning expenditures
- § 11A:15 Seller's guarantees concerning future performance
- § 11A:16 Financing apartment building investments

APPENDIX A. Checklist for Investing in an Apartment Building

APPENDIX B. Apartment House Investor's Checklist

APPENDIX C. Apartment House Financial and Operating Data

APPENDIX D. Apartment House Data Concerning Owner, Agents, Tenants, and Community

CHAPTER 12. GROUND AND NET LEASES

I. OVERVIEW

§ 12:1 Generally

II. GROUND LEASING FROM THE LANDOWNER'S VIEWPOINT

§ 12:2 Generally

III. GROUND LEASING FROM THE DEVELOPER'S VIEWPOINT

§ 12:3 Generally

IV. FINANCING GROUND LEASEHOLDS

- § 12:4 Generally
- § 12:5 Subordinated vs. unsubordinated fees
- § 12:6 Benefits of subordination for ground tenant
- § 12:7 Landowner's reasons for subordinating fee interest
- § 12:8 Landowner's obligation to execute financing instruments
- § 12:9 Protection for landowner in subordinating fee interest
- § 12:10 Landowner with unsubordinated fee

V. FINANCING THE LANDOWNER'S FEE INTEREST

§ 12:11 Generally

VI. FIXING THE GROUND RENTAL

§ 12:12 Generally

§ 12:13 Net leases

§ 12:14 Initial ground rent

§ 12:15 —Cost-of-living rent increases

§ 12:16 —Percentage rentals

§ 12:17 —Reappraisal rentals

VII. NEGOTIATING THE GROUND LEASE

§ 12:18 Generally

§ 12:19 Conditions precedent to tenant's lease obligation

§ 12:20 —Insurable title

§ 12:21 —Access and assemblage

§ 12:22 —Soil conditions

§ 12:23 —Zoning

§ 12:24 Use and occupancy

§ 12:25 Assignment and subletting

§ 12:26 Buildings, improvements, and signs—Construction

§ 12:27 —Additions

§ 12:28 —Alterations

§ 12:29 —Erection and maintenance of signs

§ 12:30 —Removal of signs and improvements

§ 12:31 —Ownership of improvements

§ 12:32 —Compliance with laws

§ 12:33 Duration of lease and holdover tenancy

§ 12:34 Default provisions

§ 12:35 Sale-leaseback by tenants

§ 12:36 Guaranty of tenant's performance

§ 12:37 Exculpation of tenant

§ 12:38 Insurance, indemnity, and responsibility for losses—Casualty insurance

§ 12:39 —Liability insurance

§ 12:40 —Indemnity

§ 12:41 Condemnation

§ 12:42 —Total condemnation

§ 12:43 —Partial taking

§ 12:44 —Division of condemnation award

§ 12:45 Landlord cancellation clause

VIII. RESIDENTIAL GROUND LEASES

§ 12:46 Generally

IX. SINGLE-TENANT NET LEASES

§ 12:47 Generally

TABLE OF CONTENTS

- § 12:48 Single-tenant net leases
- § 12:49 Key terms of the net lease
- § 12:50 Characteristics of investment-grade property
- § 12:51 —Market characteristics
- § 12:52 —Property characteristics
- § 12:53 Benefits and risks of single-tenant properties

X. SYNTHETIC (OFF-BALANCE SHEET) LEASES

- § 12:54 Generally
- § 12:55 Basic structure of the synthetic lease
- § 12:56 Accounting and tax treatment of the synthetic lease
- § 12:57 Evaluation of the synthetic lease
- § 12:58 Comparison with traditional bond leasing

XI. SANDWICH (OPERATING) LEASES

- § 12:59 In general
- § 12:60 Improving sales price with a sandwich lease
- § 12:61 Case study: sandwich lease transaction

XII. SECURITIZATION OF NET-LEASED PROPERTIES (CREDITBASED FINANCING)

- § 12:62 Generally

XIII. VALUATION OF NET-LEASED PROPERTIES

- § 12:63 Generally

XIV. LEASE ACCOUNTING RULES

- § 12:64 Generally
- § 12:65 Reporting present value leases on balance sheet
- § 12:66 Disclosure of other information
- § 12:67 Planning between purchase and lease

APPENDIX 12.1. Sample Clauses

APPENDIX 12.2. Absolute Net Lease of Office/Warehouse

CHAPTER 13. SALE-LEASEBACKS

I. OVERVIEW

- § 13:1 Generally
- § 13:2 History of sale-leasebacks
- § 13:3 Types of sale-leasebacks
- § 13:4 —Sale-leaseback of land only
- § 13:5 —Sale-leaseback of land and improvements
- § 13:6 Use vs. operating sale-leasebacks

II. SELLER-LESSEE ADVANTAGES FROM SALE-LEASEBACKS

§ 13:7 Generally

III. SELLER-LESSEE DISADVANTAGES FROM SALE-LEASEBACKS

§ 13:8 Generally

IV. BUYER-LESSOR ADVANTAGES FROM SALE-LEASEBACKS

§ 13:9 Generally

§ 13:10 Setting up a net lease deal

§ 13:11 Three key considerations of a net lease

§ 13:12 Rent escalation of a net lease

V. BUYER-LESSOR DISADVANTAGES FROM SALE-LEASEBACKS

§ 13:13 Generally

VI. THE LETTER OF INTENT AND CONTRACT OF SALE

§ 13:14 Generally

§ 13:15 Three-way contracts

§ 13:16 Severability of sales contract and lease

VII. NEGOTIATING THE LEASEBACK

§ 13:17 Generally

§ 13:18 Rent payments

§ 13:19 —Tax consequences of stepped-up rents

§ 13:20 Lessee's obligations

§ 13:21 Mortgage-related lease provisions

§ 13:22 Condemnation-related lease provisions

§ 13:23 Term of lease; renewal option

§ 13:24 Repurchase option

§ 13:25 Usury problems

VIII. TAX ASPECTS OF SALE-LEASEBACKS

§ 13:26 Generally

§ 13:27 Is there a genuine sale or is it a loan and mortgage?

§ 13:28 —The *Lyon case*

§ 13:29 —Tax consequences if the transaction is a mortgage

§ 13:30 Is the lease really an installment sale?

§ 13:31 The tax considerations of the seller

§ 13:32 —How gain or loss is treated

§ 13:33 —Loss on a bargain sale

§ 13:34 —Sale to related parties

§ 13:35 —The deductibility of rental payments

IX. ACCOUNTING FOR SALE-LEASEBACK TRANSACTIONS

§ 13:36 Generally

TABLE OF CONTENTS

- § 13:37 The Jones corporation sale-leaseback transaction
- § 13:38 —Deciding how to account for the transaction
- § 13:39 —The clear specification of lease term
- § 13:40 —Classifying leases as capital or operating leases
- § 13:41 —Accounting for the Jones corporation sale-leaseback transaction
- § 13:42 Avoiding accounting pitfalls
- § 13:43 —Accounting for sales of real estate
- § 13:44 — —Down payments
- § 13:45 — —Prohibited continuing involvement
- § 13:46 —Accounting for sale-leasebacks

X. CASE STUDIES OF SALE-LEASEBACK TRANSACTIONS

- § 13:47 Generally
- § 13:48 Sale-leaseback with lower-credit tenant
- § 13:49 —Case study: family business in trouble
- § 13:50 —The seller's position
- § 13:51 Sale-leaseback of building only
- § 13:52 Negotiating a highly leveraged sale-leaseback
- § 13:53 Setting up a sale-manageback
- § 13:54 Valid business purpose necessary for sale-leaseback
- § 13:55 Sale-leaseback avoids bankruptcy
- § 13:56 Sale-leaseback to avoid foreclosure determined to be equitable mortgage
- § 13:57 How to set up a land sale-leaseback
- § 13:58 Sale-leaseback flexibility
- § 13:59 —Lease layering
- § 13:60 —Management agreements
- APPENDIX 13.1. Letter of Intent for Sale-Leaseback of Land
- APPENDIX 13.2. Sale and Leaseback of Property Subject to Existing Mortgage Tenancies
- APPENDIX 13.3. Sale-Leaseback and Assignment of Lease and Subleaseback
- APPENDIX 13.4. Contract of Sale and Leaseback of a Shopping Center Before Construction
- APPENDIX 13.5. Contract of Sale Contemplating Leaseback of Existing Center
- APPENDIX 13.6. Checklist-Drafting Sale and Leaseback Agreements

Volume 2

PART IV. OWNERSHIP CONCERNS

CHAPTER 14. REAL ESTATE RESTRUCTURINGS AND WORKOUTS

I. DEALING WITH REAL ESTATE IN DISTRESS

- § 14:1 Generally

- § 14:2 Lessons learned
- § 14:3 Recognizing problems early
- § 14:4 Monitoring construction loans
- § 14:5 Distress signals from existing properties
- § 14:6 Retaining outside professionals
- § 14:7 Case study: nipping distress in the bud

II. EVALUATING THE LOAN AND THE PROPERTY

- § 14:8 Generally
- § 14:9 Document and loan review
- § 14:10 Multiple creditor loans
- § 14:11 Environmental review
- § 14:12 Preliminary market analysis
- § 14:13 Checklist for shopping center workouts
- § 14:14 Project visibility and access
- § 14:15 Construction quality
- § 14:16 Off-street parking
- § 14:17 —Office use
- § 14:18 —Shopping center use
- § 14:19 —Multifamily residential use
- § 14:20 —Hotel use
- § 14:21 Tenant leases
- § 14:22 Formulating a marketing plan
- § 14:23 Property checklists

III. LENDER'S ALTERNATIVES

- § 14:24 Overview
- § 14:25 Pitfalls for lenders in real estate workouts
- § 14:26 Dealing initially with a loan default
- § 14:27 Additional collateral
- § 14:28 Preworkout agreement
- § 14:29 Preforeclosure due diligence checklist
- § 14:30 Preforeclosure remedies—Remedies subject to state laws
- § 14:31 —Mortgagee-in-possession
- § 14:32 —Appointment of a receiver
- § 14:33 —Assignment of rents and leases
- § 14:34 Foreclosure and bankruptcy
- § 14:35 —How to create a bankruptcy-resistant workout
- § 14:36 Ownership by the lender

IV. CASH FLOW ANALYSIS

- § 14:37 Generally
- § 14:38 Identifying and increasing revenues
- § 14:39 —Office buildings
- § 14:40 —Shopping centers
- § 14:41 —Apartment developments

TABLE OF CONTENTS

- § 14:42 —Apartment development contract checklist
- § 14:43 —Hotels
- § 14:44 Identifying and controlling expenses
- § 14:45 Alternative uses for distressed real estate
- § 14:46 —Changes in use
- § 14:47 —Form of ownership
- § 14:48 —Incentives for buyers and tenants

V. RESTRUCTURING TECHNIQUES

- § 14:49 Plan of action
- § 14:50 Overview of restructuring alternatives
- § 14:51 Additional loans
- § 14:52 Restructuring an existing mortgage loan
- § 14:53 —The “cash flow” mortgage
- § 14:54 —Structured repayment option
- § 14:55 —Choosing the appropriate structure
- § 14:56 —Changes to senior loan impairing junior loan
- § 14:57 Restructuring an existing mortgage load—Notification to junior lienholder
- § 14:58 Restructuring an existing mortgage loan—Workouts of securitized mortgages
- § 14:59 Lender participation
- § 14:60 How property managers can work with lenders
- § 14:61 Nonrecourse financing
- § 14:62 —Court decisions
- § 14:63 Additional equity
- § 14:64 Other techniques
- § 14:65 Balloon mortgage default
- § 14:66 Tax aspects of workouts
- § 14:67 —Excusing portion of debt
- § 14:68 —Recourse vs. nonrecourse debt
- § 14:69 —Reducing interest rate
- § 14:70 —Original issue discount rule
- § 14:71 —Other loan modifications
- § 14:72 —Debt-equity swaps
- § 14:73 —Insolvency exception
- § 14:74 —Foreclosure

VI. LENDER LIABILITY

- § 14:75 Introduction
- § 14:76 Bad faith
- § 14:77 Bad faith, fraud and punitive damages
- § 14:78 Fraud
- § 14:79 Negligent misrepresentation
- § 14:80 —Court decisions
- § 14:81 Breach of fiduciary duty
- § 14:82 —Borrower misconduct
- § 14:83 Economic duress

- § 14:84 Emotional distress
- § 14:85 Control
- § 14:86 —Agency relationship created
- § 14:87 Spousal guarantees
- § 14:88 Environmental
- § 14:89 Withholding tax

VII. PERFORMING AND NONPERFORMING LOAN SALES

- § 14:90 Introduction
- § 14:91 The decision
- § 14:92 Executing the bulk sale
- § 14:93 Selecting an advisor
- § 14:94 Selecting the assets
- § 14:95 Loan file and documentation review
- § 14:96 Bringing the assets to market
- § 14:97 Valuing the assets
- § 14:98 Investor due diligence
- § 14:99 Closing
- § 14:100 Strategy for the buyer

VIII. BANKRUPTCY LAW

- § 14:101 Overview
- § 14:102 Comparison of Chapters 7 and 11 of the Bankruptcy Code
- § 14:103 —How Chapter 11 reorganizations work
- § 14:104 —Who may utilize Chapter 11
- § 14:105 —Administration of bankrupt estate
- § 14:106 —Secured claims
- § 14:107 —Reorganization plan
- § 14:108 Subchapter V
- § 14:109 Subchapter V case law trends
- § 14:110 Automatic stay
- § 14:111 Single asset real estate cases
- § 14:112 Subchapter V and single asset real estate
- § 14:113 Financing during bankruptcy
- § 14:114 Executory contracts and unexpired leases
- § 14:115 —Assumption
- § 14:116 —Shopping center rule
- § 14:117 — —Court decisions
- § 14:118 —Rejection
- § 14:119 —Shopping center rule—Definition of shopping center
- § 14:120 Trustee's avoiding powers
- § 14:121 Priority of secured lenders
- § 14:122 —Equitable subordination doctrine
- § 14:123 Bankruptcy—Junior mortgages and lien stripping

IX. REAL ESTATE FORECLOSURE

- § 14:124 Overview

TABLE OF CONTENTS

§ 14:125	Standing to foreclose
§ 14:126	Deed in lieu of foreclosure
§ 14:127	—When to use deed in lieu of foreclosure
§ 14:128	—Advantages for lender
§ 14:129	—Disadvantages for lender
§ 14:130	Special legal risks
§ 14:131	—Equitable mortgage
§ 14:132	—Preference or fraudulent transfer
§ 14:133	—Junior mortgages and claims
§ 14:134	—Uncontested or friendly foreclosure
§ 14:135	—Title insurance
§ 14:136	—Brokerage commission
§ 14:137	Acceleration of mortgage
§ 14:138	—Cause of action requires acceleration of debt
§ 14:139	Priority of advances under dragnet clause
§ 14:140	Mortgage erroneously declared paid, estoppel
§ 14:141	Prepayment premiums payable when property forfeited
§ 14:142	Unconscionability bars foreclosure
§ 14:143	Court's ability to set aside foreclosure
§ 14:144	Default interest rate not penalty
§ 14:145	Preforeclosure legal checklist
§ 14:146	Foreclosure on a mezzanine loan

X. METHODS OF FORECLOSURE

§ 14:147	Generally
§ 14:148	Judicial foreclosure
§ 14:149	Foreclosure by power of sale
§ 14:150	Foreclosure by power of sale-Cases
§ 14:151	Nonjudicial foreclosure as fraudulent transfer
§ 14:152	Strict foreclosure
§ 14:153	Strict foreclosure-Mezzanine loan

XI. STATUTORY REDEMPTION AFTER FORECLOSURE

§ 14:154	Generally
§ 14:155	Successor in interest to right of redemption
§ 14:156	Foreclosing the right of redemption, assignment

XII. DEFICIENCY JUDGMENTS

§ 14:157	Generally
§ 14:158	Foreclosure sales: Mortgagee's duty of fairness and good faith
§ 14:159	Anti-deficiency statutes
§ 14:160	Anti-deficiency statutes, junior lienholder
§ 14:161	Anti deficiency statutes and choice of law

APPENDIX 14.1.	Mortgage Clauses to Protect a Lender Against Distressed Real Estate
----------------	---

- APPENDIX 14.2. Recasting Agreement
- APPENDIX 14.3. Forbearance Agreement
- APPENDIX 14.4. Preworkout Letter Agreement
- APPENDIX 14.5. Subordination, Nondisturbance, and Attornment Agreement
- APPENDIX 14.6. Tenant Estoppel Certificate
- APPENDIX 14.7. IRS Form 4219-Statement of Liability of Lender, Withholding Taxes

CHAPTER 15. ENVIRONMENTAL LAWS AND REAL ESTATE TRANSACTIONS

I. OVERVIEW

- § 15:1 Generally

II. COMPREHENSIVE ENVIRONMENTAL RESPONSE COMPENSATION AND LIABILITY ACT (CERCLA)

- § 15:2 Generally
- § 15:3 Strict, and joint and several liability
- § 15:4 Potentially responsible parties
- § 15:5 Private party response actions
- § 15:6 —Contribution from potentially responsible parties (PRPs)
- § 15:7 Defenses to CERCLA liability
- § 15:8 —Third-party defense
- § 15:9 —Innocent landowner defense
- § 15:10 —Expanded defenses: Innocent landowner, contiguous property owner, and bona fide prospective purchaser
- § 15:11 —Security interest exemption
- § 15:12 —Equitable defenses
- § 15:13 Corporate liability
- § 15:14 —Parent-subsidiary corporation liability
- § 15:15 —Successor corporation liability
- § 15:16 — —De facto merger exception
- § 15:17 — —“Mere continuation” exception
- § 15:18 — —“Continuity of enterprise” theory
- § 15:19 —Personal liability of corporate officers, directors, and shareholders
- § 15:20 Lender liability under CERCLA
- § 15:21 —EPA’s lender liability rule
- § 15:22 —EPA/DOJ enforcement policy on lender liability under CERCLA
- § 15:23 Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996

III. OTHER FEDERAL LAWS AFFECTING REAL ESTATE

- § 15:24 Generally
- § 15:25 National Environmental Policy Act (NEPA)
- § 15:26 NEPA case illustration

TABLE OF CONTENTS

- § 15:27 Resource Conservation and Recovery Act (RCRA)
- § 15:28 Clean Water Act (CWA)
- § 15:29 —Supreme Court limits meaning of “navigable waters”
- § 15:30 Clean Water Act—“waters of the United States”
- § 15:31 —“waters of the United States,” navigable waters protection rule (NWPR)
- § 15:32 Clean Water Act (CWA)—Supreme Court rules compliance order is final agency action which recipient may contest in federal court under APA
- § 15:33 Coastal Zone Management Act (CZMA)
- § 15:34 CMZA, federal agency interaction
- § 15:35 CMZA caselaw
- § 15:36 State law protection of coastal areas
- § 15:37 Endangered Species Act (ESA)
- § 15:38 Clean Air Act (CAA)

IV. STATE PROPERTY TRANSFER ENVIRONMENTAL LAWS

- § 15:39 Generally
- § 15:40 California
- § 15:41 Connecticut
- § 15:42 Florida
- § 15:43 Maine
- § 15:44 Michigan
- § 15:45 New Hampshire
- § 15:46 Rhode Island
- § 15:47 South Carolina
- § 15:48 West Virginia
- § 15:49 Illinois
- § 15:50 Iowa
- § 15:51 Minnesota
- § 15:52 Missouri
- § 15:53 New Jersey
- § 15:54 New York
- § 15:55 Ohio
- § 15:56 Oregon
- § 15:57 Pennsylvania

V. COMMON LAW ENVIRONMENTAL CLAIMS

- § 15:58 Generally
- § 15:59 Trespass
- § 15:60 Nuisance
- § 15:61 —Case law
- § 15:62 Strict liability for ultrahazardous activity
- § 15:63 Negligence
- § 15:64 Fraud and misrepresentation
- § 15:65 Caselaw regarding knowledge element
- § 15:66 Statute of limitations awareness

VI. ENVIRONMENTAL SITE ASSESSMENTS

- § 15:67 Generally

- § 15:68 Benefits of environmental site assessments
- § 15:69 —Buyer benefits
- § 15:70 —Seller benefits
- § 15:71 —Lender benefits
- § 15:72 Performance of environmental site assessments
- § 15:73 Environmental impact statements
- § 15:74 Performance of environmental site assessments—Objectives
- § 15:75 —Scope of environmental assessment
- § 15:76 —Phase I ESA
- § 15:77 —Phase II ESA
- § 15:78 —Phase III—Site remediation
- § 15:79 Selecting a consultant
- § 15:80 ASTM standard for environmental assessments in commercial real estate
- § 15:81 —Transaction screen process
- § 15:82 —Phase I ESA process
- § 15:83 Fannie Mae guidelines
- § 15:84 FDIC guidelines
- § 15:85 EPA’s environmental audit policy

VII. SPECIAL ENVIRONMENTAL CONCERNS FOR REAL ESTATE

- § 15:86 Underground storage tanks (USTs)
- § 15:87 —RCRA UST program
- § 15:88 UST 2015 revisions and proposed regulations
- § 15:89 Underground storage tanks (USTs)—RCRA security interest exemption for USTs
- § 15:90 Wetlands
- § 15:91 Regulations redefine “fill material” under Clean Water Act
- § 15:92 Lead
- § 15:93 —Liability for lead-based paint hazards
- § 15:94 Caselaw
- § 15:95 Lead—Federal laws governing lead-based paint
- § 15:96 New York law
- § 15:97 Lead—Lead hazard information pamphlet
- § 15:98 —Disclosures required in sale or lease of pre-1978 housing
- § 15:99 Case law regarding disclosure pamphlet
- § 15:100 Asbestos
- § 15:101 Asbestos, renovation and demolition requirements
- § 15:102 Radon
- § 15:103 Urea formaldehyde foam insulation

VIII. STRATEGIES FOR MINIMIZING ENVIRONMENTAL RISKS

- § 15:104 Generally
- § 15:105 Use of indemnification/release provisions
- § 15:106 —Validity of contractual allocations of CERCLA liability
- § 15:107 Jury trial in CERCLA cases
- § 15:108 Use of indemnification/release provisions—Pre-versus post-CERCLA risk allocations

TABLE OF CONTENTS

§ 15:109	—Broadly worded indemnification/release
§ 15:110	—“As is” clause in real estate contract
§ 15:111	Environmental disclosures, warranties, and representations
§ 15:112	Insurance coverage
§ 15:113	—Insurer’s duty to defend insured
§ 15:114	—Insurer’s duty to defend insured, case law
§ 15:115	—Definition of “occurrence”
§ 15:116	—Definition of “occurrence,” successor liability
§ 15:117	—Trigger of coverage
§ 15:118	—Damages covered by CGL policies
§ 15:119	Pollution liability insurance policies—Duty to defend
§ 15:120	Insurance coverage—“Sudden and accidental” pollution exclusion
§ 15:121	—“sudden and accidental” pollution exclusion, burden of proof
§ 15:122	—Absolute pollution exclusion
§ 15:123	—Owned property pollution exclusion
§ 15:124	Deductibility of environmental cleanup costs
§ 15:125	Environmental property management
§ 15:126	—Benefits of environmental property management
§ 15:127	—Tenant audits
§ 15:128	Environmental management strategies for hotel owners

IX. REDEVELOPMENT OF BROWNFIELD SITES

§ 15:129	Generally
§ 15:130	2018 BUILD Act
§ 15:131	Definition of brownfields
§ 15:132	EPA brownfields program
§ 15:133	State voluntary cleanup laws

X. TAX INCENTIVES TO ENCOURAGE ENVIRONMENTAL CLEANUP

§ 15:134	Generally
§ 15:135	Election to treat certain environmental remediation costs as deductible expenses
§ 15:136	Brownfield exemption from the unrelated business income tax
§ 15:137	New Markets Tax Credit (NMTC)
§ 15:138	Low-income housing credit (LIHC)
§ 15:139	Rehabilitation house tax credit
§ 15:140	Community Reinvestment Act (CRA)
APPENDIX 15.1.	Federal Environmental Offices
APPENDIX 15.2.	State Environmental Offices
APPENDIX 15.3.	Indemnification by Seller—Including remediation costs
APPENDIX 15.4.	Indemnification by Seller
APPENDIX 15.5.	Sample Clause: Seller’s Representations and Warranties
APPENDIX 15.6.	Sample Clause: Environmental Provisions in Loan Commitment Letter

APPENDIX 15.7.	Sample Clause: Mortgagor's Warranty of Compliance With Environmental Laws and Regulations
APPENDIX 15.8.	Sample Clause: Warranty by Seller
APPENDIX 15.9.	Sample Clause: Environmental Audit Clause in Sales Contract
APPENDIX 15.10.	Sample Clause: Environmental Provisions in Mortgage Note (Short Form)
APPENDIX 15.11.	Sample Clause: Environmental Provisions in Mortgage Note (Long Form)
APPENDIX 15.11.50.	Sample Clause: Indemnification for Environmental Claims (Lender's favor)
APPENDIX 15.12.	Sample Clause: Tenant's Compliance With Laws
APPENDIX 15.13.	Sample Clause: Tenant's Use of Hazardous or Toxic Material
APPENDIX 15.14.	Sample Clause: Assignment and Subletting by Tenant

CHAPTER 16. FORMS OF INCOME PROPERTY OWNERSHIP

I. TYPES OF OWNERSHIP

§ 16:1 Generally

II. BASIC TAX CONSIDERATIONS IN CHOOSING ENTITY

§ 16:2 Generally

§ 16:3 Form of ownership: Paying social security taxes

III. NONTAX CONSIDERATIONS IN CHOOSING ENTITY

§ 16:4 Generally

IV. INDIVIDUAL OWNERSHIP (SOLE PROPRIETORSHIP)

§ 16:5 Generally

§ 16:6 Real estate retirement accounts

V. CONCURRENT OWNERSHIP

§ 16:7 Generally

§ 16:8 Tenancy-in-common

§ 16:9 Tenancy-in-common agreements

§ 16:10 Tenancy-in-common—Comparing tenancy-in-common and partnership

§ 16:11 —Large tenancies-in-common

§ 16:12 —Tenancy-in-common tax rulings

§ 16:13 —Are TIC interests securities?

§ 16:14 —Outlook for tenancies-in-common

§ 16:15 Joint tenancy with right of survivorship

§ 16:16 Joint tenancy with right of survivorship: bankruptcy

§ 16:17 Joint tenancy: Severance by unilateral act

TABLE OF CONTENTS

- § 16:18 Joint tenancy not severed by unilateral act
- § 16:19 —Leases
- § 16:20 Tenancy by the entirety
- § 16:21 The unified credit and joint tenancies and tenancies by the entirety—Special rule for pre-1977 joint ownership
- § 16:22 —Impact of new home sale exclusion
- § 16:23 Community property
- § 16:24 Estate tax treatment of encumbered spousal joint property

VI. REAL ESTATE GENERAL PARTNERSHIPS

- § 16:25 Generally
- § 16:26 Checklist of considerations in setting up a partnership
- § 16:27 Advantages of real estate partnership generally
- § 16:28 Partnership compared to concurrent ownership
- § 16:29 Partnership compared to land lease

A. REAL ESTATE ASPECTS OF PARTNERSHIPS

- § 16:30 Tax aspects of partnerships
- § 16:31 —Organizing a partnership
- § 16:32 —Treatment of capital contributions
- § 16:33 —Partnership taxation
- § 16:34 —Partnership taxation-organizational and startup costs final regulations
- § 16:35 —Election not to be taxed as a partnership
- § 16:36 —Taxation of partners
- § 16:37 —Sales and exchanges
- § 16:38 —Tax basis of a partnership interest
- § 16:39 — —Changes made by the Tax Cuts and Jobs Act (TCJA)
- § 16:40 —Basis of partnership property
- § 16:41 Partnership basis overstatement and the period of limitations
- § 16:42 Tax aspects of partnerships—Sale of a partnership interest
- § 16:43 — —“hot assets” rule
- § 16:44 —Liquidation of a partner’s interest
- § 16:45 —Termination of a partnership
- § 16:46 —Increasing partnership’s asset basis on transfer of partnership interest: I.R.C. § 754
- § 16:47 —Debt for equity exchange: I.R.C. § 108(e)(8)
- § 16:48 Spousal joint ventures

VII. LIMITED PARTNERSHIPS AND LIMITED LIABILITY COMPANIES

- § 16:49 Legal aspects of limited partnerships
- § 16:50 —2001 version
- § 16:51 —Status of general partner and limitations on his authority
- § 16:52 —Status of limited partners and extent of limitation of liability for partnership debts
- § 16:53 —Assignment of limited partner’s interest and effect thereof

- § 16:54 —Asset protection planning and the charging order
- § 16:55 Limited partnership fraud concerns
- § 16:56 Tax aspects of limited partnerships
- § 16:57 —Deductibility of partnership losses by partners
- § 16:58 —Allocation of partnership loss or income
- § 16:59 —Unincorporated entities
- § 16:60 Unincorporated entities—subsidiary of foreign entity
- § 16:61 Tax aspects of limited partnerships—Partnership anti-abuse rules
- § 16:62 Comparing general and limited partnerships—Comparison of basic characteristics
- § 16:63 —Partnership between developer and institutional investor
- § 16:64 —Partnership between developer and individual investors
- § 16:65 —Private real estate equity funds
- § 16:66 —RELPs—Dividing up the proceeds
- § 16:67 —General partner’s fiduciary duties
- § 16:68 Limited liability companies
- § 16:69 —Comparing LLCs to subchapter S corporations
- § 16:70 —Comparing LLCs to partnerships
- § 16:71 —Comparing LLCs to regular C corporations
- § 16:72 —Converting partnerships and S corporations to LLCs
- § 16:73 —Joint operating groups
- § 16:74 —Joint ventures
- § 16:75 —Intervention by passive investors
- § 16:76 —Developer and landowner
- § 16:77 —Allocations
- § 16:78 —LLC basis advantage over limited partnerships
- § 16:79 Disregarded entity converted to a partnership
- § 16:80 Limited liability companies—Self-employment tax

VIII. JOINT VENTURES

- § 16:81 Generally
- § 16:82 Fiduciary duty of co-venturer
- § 16:83 Four types of joint ventures
- § 16:84 —Equity joint venture
- § 16:85 —Mortgage joint venture
- § 16:86 —Lease joint venture
- § 16:87 —Standby joint ventures
- § 16:88 Case study of a corporate joint venture
- § 16:89 —Advantages to the company
- § 16:90 —Valuation of land and building
- § 16:91 —Formation of joint venture
- § 16:92 —Termination of joint venture
- § 16:93 Key issues in joint ventures
- § 16:94 —Capital contributions
- § 16:95 —Management and controls
- § 16:96 —Resolution of disputes
- § 16:97 — —Ability to bring action

TABLE OF CONTENTS

- § 16:98 Deadlock
- § 16:99 Key issues in joint ventures—Reports and meetings
- § 16:100 Oral agreements

IX. REGULAR (C) CORPORATIONS

- § 16:101 Legal aspects of corporations
- § 16:102 —How a “close” corporation can bar outside parties
- § 16:103 —Reasons for operating with one or several corporations
- § 16:104 How to use a nominee or straw corporation
- § 16:105 Tax aspects of corporations
- § 16:106 —Accumulated earnings tax
- § 16:107 —Personal holding company tax
- § 16:108 —Tax concerns when incorporating
- § 16:109 —How to set salaries of stockholder-employees
- § 16:110 —C corporation executive compensation—When pay is disguised dividend
- § 16:111 Payment disguised as dividend; case studies
- § 16:112 Payment disguised as dividend; the role of intent
- § 16:113 Payment disguised as dividend; tool of oppression
- § 16:114 Payment disguised as dividend; Changes to the taxation of dividends and corporate income

X. PARTNERSHIP-TYPE (S) CORPORATIONS

- § 16:115 How S corporations work in general
- § 16:116 Built-in gains tax
- § 16:117 Nontax benefits of S corporation
- § 16:118 S corporation compared to C corporation
- § 16:119 Qualifying as an S corporation
- § 16:120 Qualifying as an S corporation: Varying interests distributions and the one class of stock rule
- § 16:121 Qualifying as an S corporation: Commercial agreements and the one class of stock rule
- § 16:122 Restricting transfers of S corporation stock
- § 16:123 Electing and terminating S corporation status
- § 16:124 Relief for late S corporation elections
- § 16:125 S corporations—Basis for loss deductions by shareholders
- § 16:126 Basis for loss deductions by sub S shareholders: Circular flow of funds, back-to-back loans, guaranteed loans—Case studies
- § 16:127 Subchapter S corporation executive compensation—Pay as disguised profit-sharing
- § 16:128 Tax trap when S corporation has excessive passive rental income
- § 16:129 Accumulated earnings and profits and excessive passive income—§ 1375 corporate level tax

XI. MATTERS OF COMMON INTEREST TO REGULAR AND S CORPORATIONS

- § 16:130 Piercing the corporate veil

- § 16:131 Corporations: Financing with equity or debt
- § 16:132 Corporations: Taxpayer wins thin capitalization case
- § 16:133 Treatment of corporate interests as stock or debt

XII. REAL ESTATE INVESTMENT TRUSTS

- § 16:134 Generally
- § 16:135 Impressive long-term record
- § 16:136 Going global
- § 16:137 Investing in REITs
- § 16:138 —Advantages of REITs
- § 16:139 —Disadvantages of REITs
- § 16:140 Finite and infinite REITs
- § 16:141 How to choose a REIT
- § 16:142 Tax aspects of REITs
- § 16:143 —General tax rules
- § 16:144 Definition of real property for REIT purposes- Final regulations
- § 16:145 REIT subsidiaries
- § 16:146 Tax aspects of REITs—How REITs are taxed: Miscellaneous rules
- § 16:147 REITs spinning off REITs
- § 16:148 REITs as financing sources
- § 16:149 How umbrella partnership REITs work
- § 16:150 —Basic structure
- § 16:151 —How an umbrella partnership REIT is formed
- § 16:152 —Umbrella REITs—Tax planning for owners of real estate
- § 16:153 —UPREITs—Exit strategy for Section 8 partnerships
- § 16:154 —Creating value with joint ventures
- § 16:155 —REITs: Understanding funds from operations
- § 16:156 —REITs: Determining the cost of capital
- § 16:157 DownREITs

XIII. TRUSTS AND MISCELLANEOUS ENTITIES

- § 16:158 Generally
- § 16:159 Types of trusts
- § 16:160 Land Trust Agreement Illustration
- § 16:161 Land Trust Agreement Illustration; Illinois trust
- § 16:162 Tax aspects of trust

XIV. THE REAL ESTATE SYNDICATION PROCESS

- § 16:163 Generally
- § 16:164 The syndication structure
- § 16:165 —Advantages of syndication
- § 16:166 —Disadvantages of syndication
- § 16:167 Investment objectives
- § 16:168 Stages of a real estate syndication
- § 16:169 Different categories of syndications
- § 16:170 Crowdfunding

TABLE OF CONTENTS

§ 16:171	—Comparison to syndication
§ 16:172	Important considerations in operating a syndicate
§ 16:173	—Distributing partnership income
§ 16:174	—Factors influencing choice of property
§ 16:175	—Background and experience of the general partner
§ 16:176	—Risk tolerance of limited partners
§ 16:177	—Real estate market conditions
§ 16:178	—Matching property type to investment objectives
§ 16:179	The property acquisition process—Conducting market research
§ 16:180	—Identifying potential acquisitions
§ 16:181	—Acquiring the property
§ 16:182	Developing a business plan
§ 16:183	Evaluating a syndication offering
§ 16:184	—Suitability standards
§ 16:185	—Specified properties
§ 16:186	—General partner's track record
§ 16:187	—Sharing arrangements
§ 16:188	— —Use of proceeds
§ 16:189	— —Compensation to the general partner
§ 16:190	—Tax implications
§ 16:191	—Investment risks
§ 16:192	Syndication case studies
§ 16:193	—Predevelopment land partnerships
§ 16:194	—Syndicated financing
§ 16:195	—Raising short-term funds to meet closing date
§ 16:196	— —Convertible partnership notes to private investors
§ 16:197	— —Issuance of secured partnership note
§ 16:198	—Syndicating a package of distressed properties
§ 16:199	— —Limited partnership and blanket mortgage
§ 16:200	— —Management decisions and fees
§ 16:201	— —Two classes of limited partnership interests
§ 16:202	— —Manager and investors share in excess earnings
§ 16:203	— —Allocation of taxable profits and losses
§ 16:204	— —Right of bank to additional preferential distribution
§ 16:205	— —The bank's expected return
§ 16:206	Limited partnership rollups
§ 16:207	Real estate syndication and 1031 exchanges

XV. CONDOMINIUMS

§ 16:208	Generally
§ 16:209	Condominium features
§ 16:210	Creation of condominiums
§ 16:211	—Constructing a condominium
§ 16:212	—Financing
§ 16:213	—Documentation
§ 16:214	Converting an existing building to condominium ownership
§ 16:215	—Feasibility study

- § 16:216 Operation and management—Initial operation and management
- § 16:217 —Transition from developer or converter to condominium association
- § 16:218 —Role of board of directors
- § 16:219 Board of directors fiduciary duty
- § 16:220 —Case law
- § 16:221 Operation and management—Role of board of directors—Management
- § 16:222 — —Borrowing money
- § 16:223 — —Contracts generally
- § 16:224 — —Insurance
- § 16:225 — —Retaining attorneys and accountants
- § 16:226 — —Agreements with unit owners
- § 16:227 — —Liability of board members
- § 16:228 Taxation of condominiums—Income taxation
- § 16:229 —Real estate taxation
- § 16:230 Sale or lease of individual units
- § 16:231 —Restrictions on sale of individual units
- § 16:232 —Restrictions on rental of individual units
- § 16:233 Other types of condominiums
- § 16:234 —Commercial condominiums
- § 16:235 — —Financing commercial condominium units
- § 16:236 —Mixed-use condominiums
- § 16:237 —Resort condominiums
- § 16:238 — —Management
- § 16:239 — —Rental of units
- § 16:240 —Condominium hotels
- § 16:241 Condominiums: Rating conversion loans
- § 16:242 Time share properties
- § 16:243 —Use of time share property
- § 16:244 —Trading or selling time share units
- § 16:245 —Underlying real estate interests
- § 16:246 — —Contractual and license rights
- § 16:247 — —Leasehold and fee ownership
- § 16:248 —Taxation of time share properties—Income taxes
- § 16:249 — —Real estate taxes
- § 16:250 Condo hotels—Evolution toward a commercial hotel structure
- § 16:251 SEC rental pool ruling

XVI. COOPERATIVE HOUSING CORPORATIONS

- § 16:252 Generally
- § 16:253 Cooperative housing defined
- § 16:254 Developing a cooperative apartment building
- § 16:255 —Financing
- § 16:256 —Documentation
- § 16:257 — —Articles or certificate of incorporation
- § 16:258 — —Bylaws
- § 16:259 — —Contract between sponsor and cooperative corporation
- § 16:260 — —Prospectus or offering plan

TABLE OF CONTENTS

§ 16:261	— —Proprietary lease
§ 16:262	Converting an existing building to cooperative ownership
§ 16:263	—Feasibility study
§ 16:264	—Financing the conversion
§ 16:265	—Documentation
§ 16:266	—Financing the purchase of shares
§ 16:267	Converting cooperative to condominium
§ 16:268	Operation and management
§ 16:269	Taxation of cooperatives—Real estate taxes
§ 16:270	—Income taxes
§ 16:271	Tax and interest deductions by shareholder-tenants
§ 16:272	Restrictions on the sale or lease of cooperative apartments
§ 16:273	Business judgment rule permits shareholder removal

XVII. MATTERS OF COMMON INTEREST TO CONDOMINIUMS AND COOPERATIVES

§ 16:274	Condominiums and cooperatives—A comparison
§ 16:275	Conversion Protection and Abuse Relief Act
§ 16:276	New York's Housing Stability and Tenant Protection Act—Impact on condominium conversions
§ 16:277	Insurance
§ 16:278	Condominium and cooperative conversions—Tax considerations
§ 16:279	Coop and condo tax equivalency payments
APPENDIX 16.1.	Characteristics of Forms of Investment
APPENDIX 16.2.	Summary of Legal and Tax Aspects
APPENDIX 16.3.	Agreement to Hold Real Estate as Co-owners
APPENDIX 16.4.	Agreement to Hold Real Estate as Tenants in Common Pending Improvements
APPENDIX 16.5.	Partnership Agreement to Acquire and Hold Particular Property
APPENDIX 16.6.	Limited Partnership Provisions
Appendix 16.6.10.	Death of limited partner sample clauses
Appendix 16.6.20.	Assignment of limited partnership interest
APPENDIX 16.7.	Agency Agreement Between Nominee Corporation and Beneficial Owner
APPENDIX 16.8.	Real Estate Joint Venturers' Buy/Sell Agreement
APPENDIX 16.9.	Termination of Real Estate Joint Venture
Appendix 16.9.50.	Real estate development joint venture agreement
Appendix 16.9.60.	Management clause, 50/50 real estate joint venture (non-member manager)
Appendix 16.9.70.	Management clause, 50/50 real estate joint venture (member manager)
Appendix 16.9.80.	Management clause, 50/50 real estate joint venture (managing member subject to approval)

- APPENDIX 16.10. Deed In Trust
- APPENDIX 16.11. Land Trust Agreement
- APPENDIX 16.11.50. Land Trust Agreement; lodging provision
- APPENDIX 16.12. General Partnership to Engage in Buying, Selling, and Investing
- APPENDIX 16.13. Agreement Between Developer Corporation and Corporate Property Owner
- APPENDIX 16.14. Agreement to Hold Real Estate as Tenants in Common Pending Improvements
- APPENDIX 16.15. Articles of Organization for Real Estate Limited Liability Company
- Appendix 16.16. Residential Condominium Conversion Application
- Appendix 16.17. Condominium de-conversion request form

CHAPTER 17. REAL ESTATE ASPECTS OF THE AMERICANS WITH DISABILITIES ACT

I. REAL ESTATE ASPECTS OF THE ADA

- § 17:1 Generally
- § 17:2 Alterations to existing buildings
- § 17:3 Alterations and new construction
- § 17:4 When alterations are deemed to be disproportionate
- § 17:5 Terms of compliance
- § 17:6 Penalties
- § 17:7 Planning suggestions
- § 17:8 Accessibility guidelines

II. TRANSACTIONAL CONSIDERATIONS UNDER TITLE III OF THE ADA

- § 17:9 Generally
- § 17:10 Existing leases
- § 17:11 New leases: Compliance with laws clause
- § 17:12 New leases: Other provisions
- § 17:13 Choice of tenants
- § 17:14 Different property uses
- § 17:15 Contracts of sale and mortgages

III. WHAT CONSTITUTES DISCRIMINATION UNDER THE ADA: ANSWERS FOR EMPLOYERS

- § 17:16 Generally

IV. ARCHITECTURAL CONSIDERATIONS UNDER THE ADA

- § 17:17 Generally

V. INCOME TAX ASPECTS RELATED TO ADA

- § 17:18 Generally

TABLE OF CONTENTS

- § 17:19 Disabled access credit under IRC § 44
- § 17:20 Removing architectural and transportation barriers under IRC § 190
- APPENDIX 17.1. ADA Regulations and Technical Assistance Materials

CHAPTER 18. REAL PROPERTY MANAGEMENT

I. IMPORTANCE OF QUALITY PROPERTY MANAGEMENT

- § 18:1 Generally
- § 18:2 Goals of property management
- § 18:3 Matching management strategy to the owner's needs
- § 18:4 Maximizing return on investment

II. MANAGEMENT FUNCTIONS AND ORGANIZATION

- § 18:5 Generally
- § 18:6 Professional management organizations
- § 18:7 Owner management
- § 18:8 Choosing the property management firm

III. THE MANAGEMENT PLANNING PROCESS

- § 18:9 Generally
- § 18:10 Preparing a preliminary plan
- § 18:11 Issues that the plan should address
- § 18:12 Systems for managing the property
- § 18:13 The operating budget
- § 18:14 The management agreement
- § 18:15 Establishing the management fee
 - § 18:16 —Estimating costs
 - § 18:17 —The percentage method
 - § 18:18 —Incentive fees
 - § 18:19 —Start-up fees
 - § 18:20 —Payment of management fees
- § 18:21 The property manager's role in the preacquisition process

IV. PROCEDURES FOR TAKING OVER THE PROPERTY

- § 18:22 Information gathering
- § 18:23 Reviewing the rent structure

V. MANAGING THE PHYSICAL ASSET

- § 18:24 Generally
- § 18:25 Maintenance in brief
- § 18:26 The maintenance staff
- § 18:27 Custodial maintenance
- § 18:28 Corrective maintenance
 - § 18:29 —Work orders, logs, and schedules

- § 18:30 —Maintenance inventory
- § 18:31 Preventive maintenance
- § 18:32 Emergency maintenance
- § 18:33 Contract maintenance services

VI. MARKETING AND LEASING THE PROPERTY

- § 18:34 Generally
- § 18:35 Market surveys and profiles of tenants
- § 18:36 Positioning the property in the market
- § 18:37 —Advertising
- § 18:38 —Public relations
- § 18:39 —Promotional activities
- § 18:40 —Screening prospects
- § 18:41 Leasing
- § 18:42 —Residential leases
- § 18:43 —Commercial leases
- § 18:44 —Lease provisions
- § 18:45 —Leasing unfinished space
- § 18:46 —Security deposits
- § 18:47 —Increasing rents
- § 18:48 —Lease renewals

VII. TENANT AND MANAGEMENT RELATIONS

- § 18:49 Generally
- § 18:50 Occupancy procedures
- § 18:51 Rent rolls and tenant ledgers
- § 18:52 Establishing a rent management system
- § 18:53 Tenant damage of property
- § 18:54 Delinquent rents
- § 18:55 Instituting legal action for nonpayment of rent
- § 18:56 Property rules and regulations violations
- § 18:57 Tenant associations

VIII. FINANCIAL REPORTING AND CONTROLS

- § 18:58 Components of an effective reporting and control system
- § 18:59 Components of an effective purchasing system

IX. ADMINISTRATIVE RESPONSIBILITIES OF THE PROPERTY MANAGER

- § 18:60 Generally

X. COMMUNICATIONS BETWEEN THE PROPERTY OWNER AND MANAGEMENT

- § 18:61 Generally

TABLE OF CONTENTS

XI. ASSET MANAGEMENT

§ 18:62 Generally

XII. LEASE ADMINISTRATION

§ 18:63 Generally

§ 18:64 Lease audit rights of tenants

§ 18:65 Outsourcing lease audits

§ 18:66 Measuring square footage: calculation or fabrication?

§ 18:67 Auditing the operating expense reconciliation statement

§ 18:68 Checking property tax invoices

§ 18:69 Benefits of an electric utility audit

§ 18:70 Audits of common area and overtime electric charges

§ 18:71 Reducing electric utility costs

§ 18:72 Document imaging of lease data

XIII. CORPORATE REAL ESTATE MANAGEMENT

§ 18:73 Real estate separation strategies

§ 18:74 —Synthetic leases

§ 18:75 —Sale-leasebacks

§ 18:76 Pros and cons of sale-leasebacks for sellers and buyers

§ 18:77 Corporate e-commerce planning

§ 18:78 Allocating costs of captive management firm

XIV. LEGAL AND ACCOUNTING SERVICES

§ 18:79 Commercial real estate services by accounting professionals

§ 18:80 Using fair value accounting for investment properties

§ 18:81 Real estate client's right to attorney's case files

XV. REAL PROPERTY TAXATION

§ 18:82 In general

§ 18:83 The assessment process

§ 18:84 Protesting an assessment

§ 18:85 Reduced assessment due to contamination

XVI. INSURANCE

§ 18:86 Risk Analysis

§ 18:87 —Choosing an Insurer

§ 18:88 Subrogation and Waiver

§ 18:89 —Waiver of Right to Recover

§ 18:90 —Consistency With Other Lease Clauses

§ 18:91 —Naming Additional Insureds

§ 18:92 The Anti-subrogation Rule

§ 18:93 Subrogation waivers and residential leases

§ 18:94 Equitable subrogation

- § 18:95 Property Insurance
- § 18:96 —Covered Property and Covered Risks
- § 18:97 —Insurable Interest
- § 18:98 —Co-insurance
- § 18:99 —Replacement Cost and Actual Cash Value
- § 18:100 —Obligations Under the Insurance Policy
- § 18:101 —Special Endorsements
- § 18:102 —Uninsurable Risks
- § 18:103 Business Interruption Policies
- § 18:104 Liability Insurance
- § 18:105 —Occurrence and Claims-Made Coverage
- § 18:106 —Named or Additional Insureds; Contractual Liability
- § 18:107 —Setting the Premium
- § 18:108 Handling Insurance Proceeds and Condemnation Awards for Mortgaged Properties
- § 18:109 —The Mortgagee's Dominant Position
- § 18:110 —The Ground Lessor's Rights In The Income Stream
- § 18:111 —The Mortgagor's Derivative-Claim Position
- § 18:112 —The Occupancy Tenant's Position Of Strength
- § 18:113 —Disbursement Of Funds For Restoration
- § 18:114 Indemnification and Exculpation Provisions
- § 18:115 —Indemnity Clause
- § 18:116 —Exculpatory Clause
- § 18:117 —Insurance for Cooperative and Condominiums Units
- § 18:118 —Insuring Hospitality Properties
- APPENDIX 18.1. Property Manager—Job Description Checklist
- APPENDIX 18.2. Management Agreement Bet. Property Owner and Agent
- APPENDIX 18.3. Property Takeover Checklist
- APPENDIX 18.4. Market Survey
- APPENDIX 18.5. Building Exterior Inspection Report
- APPENDIX 18.6. Work Order
- APPENDIX 18.7. Request for Service by Tenant
- APPENDIX 18.8. Work Order Log
- APPENDIX 18.9. Service Priority List
- APPENDIX 18.10. Property Service Record
- APPENDIX 18.11. Rent Roll
- APPENDIX 18.12. Operating Budget
- APPENDIX 18.13. Statement of Operations
- APPENDIX 18.14. Comparative Statements Between Income and Operating Expenses
- APPENDIX 18.15. Management Summary

CHAPTER 19. VALUATION OF REAL ESTATE

I. PURPOSE OF AN APPRAISAL

- § 19:1 Generally

TABLE OF CONTENTS

II. DETERMINING FAIR MARKET VALUE

§ 19:2 Generally

III. OTHER TYPES OF VALUE

§ 19:3 Generally

IV. REASONS FOR AN APPRAISAL

§ 19:4 Generally

V. THREE APPROACHES TO DETERMINE VALUE

§ 19:5 Generally

§ 19:6 Appraisal report

VI. CONCEPT OF REAL ESTATE DEPRECIATION

§ 19:7 Generally

§ 19:8 Physical depreciation

§ 19:9 Functional obsolescence

§ 19:10 Economic obsolescence

VII. HIGHEST AND BEST USE

§ 19:11 Generally

VIII. COST APPROACH TO VALUE

§ 19:12 Generally

IX. MARKET COMPARISON APPROACH TO VALUE

§ 19:13 Generally

§ 19:14 Drawbacks

§ 19:15 Market comparison approach—Farm land: Case study

X. INCOME APPROACH TO VALUE

§ 19:16 Generally

§ 19:17 Direct capitalization

§ 19:18 —Gross rent multiplier (GRM)

§ 19:19 —Capitalization rate (cap rate)

§ 19:20 —Combined or overall capitalization rate

§ 19:21 Capitalization of income method: Case study

§ 19:22 Yield capitalization

§ 19:23 —Discounted cash flow

§ 19:24 Tax court rejects discounted cash flow analysis for valuing real estate

XI. IMPACT OF INTEREST RATES ON REAL ESTATE VALUES

§ 19:25 Generally

XII. UNDERLYING ECONOMIC FACTORS THAT AFFECT VALUE

- § 19:26 Generally
- § 19:27 Substitution
- § 19:28 Anticipation
- § 19:29 Change
- § 19:30 Competition and excess profit
- § 19:31 Increasing and diminishing returns
- § 19:32 Contribution
- § 19:33 Surplus productivity
- § 19:34 Conformity
- § 19:35 Supply and demand
- § 19:36 Highest and best use

XIII. VALUATION OF FRACTIONAL INTERESTS IN REAL ESTATE

- § 19:37 Generally
- § 19:38 —Shifting the valuation burden of proof to the IRS
- § 19:39 Fair market value for federal tax purposes
- § 19:40 —Control premium
- § 19:41 — —Swing vote
- § 19:42 — —Court rejection of swing vote valuation method—*Simplot*
- § 19:43 —Valuation discounts
- § 19:44 — —Lack of marketability discount
- § 19:45 — —Lack of marketability case study
- § 19:46 Minority interest or lack of control discount
- § 19:47 —Minority interest discount allowed in conjunction with special use valuation—Case study
- § 19:48 Fractional interest discount
- § 19:49 —Case study: Lack of discounts for jointly owned property
- § 19:50 —Case study: Fractional interest discount allowed on transfer of land to partnership
- § 19:51 Blockage discount
- § 19:52 Market absorption discount
- § 19:53 Restricted securities discount
- § 19:54 —Dribble-out method: Case study
- § 19:55 Restricted management accounts—No discounts
- § 19:56 Discount for stock donated to charity affected by its “marching in lockstep” value: Case study
- § 19:57 Key person discount
- § 19:58 Discount for built-in capital gains tax
- § 19:59 —The *Davis* decision
- § 19:60 —The *Eisenberg* decision
- § 19:61 —Built-in capital gain discount available even though gain on condemnation is deferrable
- § 19:62 —Built-in capital gains discount not available to transfer of limited partnership interests
- § 19:63 Dividing asset ownership for discounting value of real estate transfers

TABLE OF CONTENTS

- § 19:64 Limited partnership interests passing at death valued as assignee interests rather than as partnership interests
- § 19:65 Valuation of debt
- § 19:66 —Determining fair market value of private debt—Case study
- § 19:67 Restrictive covenants
- § 19:68 —Section 2703 buy-sell agreements
- § 19:69 —Section 2704
- § 19:70 Indirect gifts to limited partners—Case study no. 1
- § 19:71 Indirect gifts to partners—Case study no. 2
- § 19:72 Step transaction doctrine and indirect gifts
- § 19:73 Discount for installment payments under FLP right to purchase interest
- § 19:74 Voting and nonvoting stock valued as a unitary interest for estate tax purposes
- § 19:75 Tax-affecting discount for sub S corporations rejected by Tax Court: Case study
- § 19:76 Insurance proceeds excluded from business value notwithstanding that buy-sell agreement is disregarded for estate tax purposes: Case study
- § 19:77 Restricted management accounts valued without discounts

XIV. IRC SEC. 2036(A), FAMILY LIMITED PARTNERSHIPS AND DISCOUNTING

- § 19:78 Generally
- § 19:79 Imminent death
- § 19:80 Family misuse of FLP
- § 19:81 Gifts of FLP interests

APPENDIX 19A. Valuing Real Estate for Tax Purposes

APPENDIX 19B. Analyzing Value in Real Estate: Appraisal Concepts

APPENDIX 19C. Revenue Ruling 59-60—Valuation of Closely Held Corporations

PART V. 2015 TAX GUIDE

CHAPTER 20. INCOME TAX PLANNING

I. INCOME TAX AND SOCIAL SECURITY RATES, PERSONAL EXEMPTIONS AND ITEMIZED DEDUCTIONS

- § 20:1 The 2017 Tax Cuts and Jobs Act
- § 20:2 Social Security rates
- § 20:3 Phaseout of personal exemptions
- § 20:4 Income tax rates and brackets for tax years beginning after December 31, 2017, and before January 1, 2026
- § 20:5 Income tax rates and brackets for tax years beginning after December 31, 2012, and before January 1, 2018
- § 20:6 Limitation of itemized deductions
- § 20:7 Corporations
- § 20:8 Self-employment tax—Real estate exception

- § 20:9 —Includible farm rental income
- § 20:10 —Community property and joint returns
- § 20:11 —Special situations
- § 20:12 Health care tax and its impact on capital gains, investment income, annuities, and life insurance

II. CAPITAL GAINS AND LOSSES

- § 20:13 Classifying gain and loss
- § 20:14 Taxation of capital gains and losses: 1997–2003
- § 20:15 Taxation of capital gains and losses: 2003 and thereafter
- § 20:16 Taxation of capital gains and losses: 2013 and thereafter for high-income individuals
- § 20:17 Special rules for capital gains invested in opportunity zones
- § 20:18 Zero tax on certain long-term capital gain and dividends
- § 20:19 Capital gains and installment sales
- § 20:20 Limiting capital gain availability—Tax rate on sales of depreciable property
- § 20:21 Small business capital gains exclusion (I.R.C. § 1202)
- § 20:22 Dealer property vs. investor property
- § 20:23 Converting capital gain to ordinary income—Special rule for real estate
- § 20:24 —Converting ordinary income to capital gain—Change of intent—Case study
- § 20:25 Converting ordinary income from real estate into capital gains: Sale of lots
- § 20:26 Rescission principle

III. REAL ESTATE OPTIONS

- § 20:27 Generally
- § 20:28 How option gives seller more capital gain
- § 20:29 Option cannot give buyer immediate tax losses
- § 20:30 Income tax consequences of real estate options and contract rights: Capital gain or ordinary income
- § 20:31 —I.R.C. § 1234A case study

IV. ORDINARY AND NECESSARY BUSINESS EXPENSES

- § 20:32 Generally
- § 20:33 Trade or business expenses
- § 20:34 Ordinary and necessary expenses
- § 20:35 A real estate trade or business
- § 20:36 Payment of another's expenses
- § 20:37 Flood insurance reimbursements
- § 20:38 Lease acquisition costs
- § 20:39 —Costs incurred by landlord
- § 20:40 —Costs incurred by tenant
- § 20:41 —Impact fees

V. DEPRECIATION OF REAL AND PERSONAL PROPERTY

- § 20:42 Generally
- § 20:43 Tax benefits of depreciation to real estate investors

TABLE OF CONTENTS

§ 20:44	—Deferral of tax
§ 20:45	—Conversion of ordinary income into capital gain
§ 20:46	Real and personal property distinguished
§ 20:47	Tax benefits of depreciation for real estate investors—Erroneous depreciation changes
§ 20:48	Who may take depreciation deduction
§ 20:49	—Shifting depreciation deduction by using lease or mortgage
§ 20:50	Property eligible for depreciation deduction
§ 20:51	Depreciation: Allowed for building variance costs
§ 20:52	Depreciation of land by term holder: Case study
§ 20:53	Depreciation of real property
§ 20:54	—Reclassifying property to shorter life
§ 20:55	—Partial year deduction; midmonth convention
§ 20:56	—Alternative depreciation system
§ 20:57	—Component depreciation
§ 20:58	—Gas station/convenience store
§ 20:59	—Depreciation period for like-kind exchanges and involuntary conversions
§ 20:60	Maximizing depreciation through cost allocation
§ 20:61	—Allocating cost between land and improvements
§ 20:62	—Land/building allocation
§ 20:63	—Land/land improvement allocation
§ 20:64	—Real/personal property allocation
§ 20:65	—When land can be depreciated
§ 20:66	—Erroneous depreciation changes
§ 20:67	Depreciation of personal property
§ 20:68	—Expensing in place of depreciation
§ 20:69	—Partial exemption for advanced mine safety equipment
§ 20:70	Farm machinery and equipment is 5-year property
§ 20:71	Depreciation of personal property—Intangible property
§ 20:72	Lease stripping transactions
§ 20:73	Lease-in/lease-out transactions
§ 20:74	Prefabricated structures
§ 20:75	Component depreciation planning
§ 20:76	—Tax court decision permits component depreciation
§ 20:77	—Potential applications of component depreciation
§ 20:78	—IRS agrees to component depreciation
§ 20:79	Component depreciation (cost allocation or cost segregation)—Limitations on its use
§ 20:80	Hospitality industry—Tax savings with accelerated depreciation
§ 20:81	—Construction cost segregation
§ 20:82	—Tax savings
§ 20:83	—Qualifying construction costs
§ 20:84	Bonus depreciation: I.R.C. § 168(k)
§ 20:85	Leasehold improvements, restaurant property, and retail improvement property-15-year recovery period: I.R.C. § 168(e)(3)(E)(iv),(v)and(ix)

VI. DEDUCTION FOR MANAGEMENT SERVICES BY RELATED ENTITY

§ 20:86	Generally
---------	-----------

- § 20:87 Reallocation of income
- § 20:88 —Burden of proof
- § 20:89 —Documenting related party charges

VII. DEDUCTION FOR EXECUTIVE COMPENSATION

- § 20:90 Reasonable compensation
- § 20:91 —Shareholder employees
- § 20:92 —Failure to pay dividends
- § 20:93 Guidance for shareholder-employees of closely held corporations
- § 20:94 —Checklist
- § 20:95 Court created factors to determine reasonableness
- § 20:96 —Independent investor test
- § 20:97 Reasonable compensation in Subchapter S corporation
- § 20:98 Contingent compensation in closely-held corporation
- § 20:99 Repaying excessive compensation
- § 20:100 When deferred compensation is tax-deductible for real estate development firm
- § 20:101 Structuring retirement payments to retired partner to avoid self-employment tax
- § 20:102 —Exclusion from self-employment tax
- § 20:103 Employee fringe benefits: Pass through entities
- § 20:104 Payment of Medicare insurance premiums

VIII. DEDUCTION FOR INTEREST

- § 20:105 Generally
- § 20:106 Personal loans
- § 20:107 Home mortgages
- § 20:108 —Secured debt
- § 20:109 —Qualified home
- § 20:110 —Part principal residence, part business property
- § 20:111 —Loans taken out before October 14, 1987
- § 20:112 —Loans taken out after October 13, 1987, to buy, build, or improve home
- § 20:113 —Loans during the suspension period: 2018 through 2025
- § 20:114 Debt (to acquire residence) in excess of \$1 million qualifies as home equity debt for deducting mortgage interest
- § 20:115 Qualified debt for home mortgage interest deduction is determined on per-taxpayer basis for unmarried taxpayers—I.R.C. § Code Sec. 163(h)(3)
- § 20:116 Home mortgages—Mortgages taken out after October 13, 1987, for other purposes
- § 20:117 —Deducting points on residential financing
- § 20:118 —Deducting points on residential refinancing
- § 20:119 —Mortgage assumption supports interest deduction
- § 20:120 —Qualified residence includes adjacent land
- § 20:121 —Deductions in exiting old mortgage
- § 20:122 —Interest paid on a mortgage which is an obligation of another person
- § 20:123 —Deduction for mortgage insurance premiums
- § 20:124 Trade or business loans

TABLE OF CONTENTS

§ 20:125	Investment loans
§ 20:126	—Definition of investment interest paid
§ 20:127	—Net investment income
§ 20:128	Allocating interest to specific loans (tracing rules)
§ 20:129	—Loan proceeds in an account
§ 20:130	—Mixing debt with other funds
§ 20:131	—Debt proceeds received in cash
§ 20:132	—Bypassing borrower
§ 20:133	—Repaying debt
§ 20:134	—Sale of financed assets
§ 20:135	—Pass-through entities
§ 20:136	Construction-period interest and taxes
§ 20:137	—Other construction issues
§ 20:138	Uniform capitalization rules and interest deduction
§ 20:139	Maximizing interest deductions during production period
§ 20:140	Effect of tax-exempt investments
§ 20:141	—IRS rules
§ 20:142	—Important IRS ruling on taxable and nontaxable obligations
§ 20:143	Original issue discount and imputed interest
§ 20:144	—Adequacy-of-interest rule
§ 20:145	—Applicable federal rate
§ 20:146	—Time-value-of-money rule
§ 20:147	—Exceptions to original issue discount rules
§ 20:148	—Exception for small transactions—Up to \$2,800,000
§ 20:149	—Other seller financing
§ 20:150	—Exception for cash method
§ 20:151	—Loan assumptions
§ 20:152	Interest distinguished from other payments

IX. DEDUCTION FOR TAXES

§ 20:153	Generally
§ 20:154	When real property taxes are deductible
§ 20:155	Business or investment activities
§ 20:156	Builders
§ 20:157	Prorating real estate taxes
§ 20:158	Mortgage recording taxes—Mortgage tax incurred in connection with acquisition of property
§ 20:159	—Mortgage tax not incurred in connection with acquisition of property
§ 20:160	State real property tax rebates
§ 20:161	—Under 2017 tax cuts and jobs act
§ 20:162	Taxes for local benefits: Fire prevention fees

X. DEDUCTION FOR REAL ESTATE BUSINESS STARTUP EXPENSES

§ 20:163	Startup expenses
§ 20:164	—2004 Jobs Act amendments
§ 20:165	—Trade or business requirement

- § 20:166 —Timing: When trade or business begins
- § 20:167 —Time and manner of making election
- § 20:168 —Taxpayer's role in business
- § 20:169 —Startup costs defined
- § 20:170 —Two types of startup costs
- § 20:171 —Diversifying trade or business

XI. DEDUCTION FOR ENTITY ORGANIZATIONAL EXPENSES

- § 20:172 Generally
- § 20:173 Corporation's organizational expenses: I.R.C. § 248
- § 20:174 Partnership's organizational expenses: I.R.C. § 709
- § 20:175 Making the election
- § 20:176 Expenses relating to entity that never begins business
- § 20:177 Effective date

XII. DEDUCTION FOR WEBSITE EXPENSES

- § 20:178 Generally
- § 20:179 Fifteen-year property
- § 20:180 Five-year property
- § 20:181 Three-year property
- § 20:182 Expensing website costs

XIII. DEDUCTION AND CAPITALIZATION OF EXPENDITURES RELATED TO TANGIBLE PROPERTY

- § 20:183 Generally
- § 20:184 Materials and supplies—Generally (Treas. Reg. § 1.162-3)
- § 20:185 —Definitions
- § 20:186 Election to capitalize certain materials and supplies
- § 20:187 Optional method of accounting for rotatable and temporary spare parts.
- § 20:188 De minimis safe harbor
- § 20:189 Sale or disposition of materials and supplies
- § 20:190 Repairs and maintenance (Treas. Reg. § 1.162-4)
- § 20:191 De minimis safe harbor (Treas. Reg. § 1.263(a)-1(f))
- § 20:192 Amounts paid to acquire or produce tangible property (Treas. Reg. § 1.263(a)-2)
- § 20:193 Amounts paid to improve property (Treas. Reg. § 1.263(a)-3)
- § 20:194 Safe harbor for small taxpayers for buildings
- § 20:195 Safe harbor for routine maintenance
- § 20:196 Betterments
- § 20:197 Restorations
- § 20:198 Adapt property to a new or different use
- § 20:199 Optional regulatory accounting method
- § 20:200 Election to capitalize repair and maintenance costs
- § 20:201 Retail and restaurant remodel-refresh safe harbor

XIV. HOME OFFICE EXPENSES

- § 20:202 Generally

TABLE OF CONTENTS

- § 20:203 Home office deduction rules
- § 20:204 —Portion of room qualifies
- § 20:205 Home office use by employees
- § 20:206 Amount of deduction
- § 20:207 Optional safe harbor deduction method
- § 20:208 Depreciation deductions

XV. RESIDENTIAL IMPROVEMENTS AS MEDICAL DEDUCTIONS

- § 20:209 Generally
- § 20:210 Deductible amount of home improvement expenditure
- § 20:211 Cost of operating and maintaining home improvements
- § 20:212 Homes of handicapped persons
- § 20:213 Specific home improvements—Elevators and inclinator
- § 20:214 —Air conditioning
- § 20:215 —Swimming pools
- § 20:216 —Miscellaneous improvements
- § 20:217 Assisted living payments as medical deductions
- § 20:218 —Medical care defined
- § 20:219 —Determining amount of deduction
- § 20:220 —Limitation on medical deductions
- § 20:221 Year of deduction
- § 20:222 Tax consequences associated with continuing care retirement communities

XVI. MISCELLANEOUS ITEMIZED DEDUCTIONS (I.R.C. § 67(B))

- § 20:223 Generally
- § 20:224 Fully deductible expenses
- § 20:225 Expenses over 2% of adjusted gross income
- § 20:226 Pass-through entities
- § 20:227 Deduction for real estate tax advice
- § 20:228 Investment advice expenses

XVII. DEDUCTION FOR PASS-THROUGH INCOME

- § 20:229 Generally
- § 20:230 Qualified business income deduction
- § 20:231 Exclusions, exceptions and limitations

XVIII. DEDUCTION FOR LOSSES

- § 20:232 Real estate business and investment losses
- § 20:233 —Active trade or business
- § 20:234 —Passive activity
- § 20:235 —Special situations as passive or active activities
- § 20:236 —Treatment of passive losses
- § 20:237 —Exception for real estate businesses—Real property trades or businesses
- § 20:238 — —Material participation
- § 20:239 — —Definition of “activity”

- § 20:240 — —Five percent shareholders
- § 20:241 — —Joint returns
- § 20:242 — —Closely held C corporations
- § 20:243 — —Application of passive loss relief
- § 20:244 — —Limited partners' interests
- § 20:245 —Exception for real estate business—Treatment of entities other than limited partnerships
- § 20:246 —Exception for real estate businesses—Aggregation election
- § 20:247 — — —Case study
- § 20:248 — —Election form
- § 20:249 —Planning for super material participation rules
- § 20:250 At-risk limitation
- § 20:251 —Extent of real estate investors' risk
- § 20:252 —When nonrecourse financing puts investor at risk
- § 20:253 —Convertible debt
- § 20:254 —Carryforward of loss
- § 20:255 —Legal risk vs. economic risk
- § 20:256 —Personal liability on uncertain future obligation
- § 20:257 —Combining activities for at-risk and passive loss rules
- § 20:258 Hobby loss limitations—Hobby loss rule
- § 20:259 —Real estate hobby losses
- § 20:260 —Impact of longer depreciation periods
- § 20:261 —Hobby loss deduction versus for-profit activity
- § 20:262 Theft or casualty
- § 20:263 —Claims that must be filed by taxpayer
- § 20:264 —Measuring personal casualty loss
- § 20:265 —Measuring business casualty loss
- § 20:266 —Buyer resistance and casualty loss
- § 20:267 —Casualty loss not passive
- § 20:268 —Replacement property acquired from related party
- § 20:269 —Tangible property—Presidentially declared disaster area
- § 20:270 Deduction of demolition losses
- § 20:271 Gratuitous payment or loss incurred in a trade or business: case study

XIX. VACATION HOMES

- § 20:272 Generally
- § 20:273 Limited rental use
- § 20:274 Limited personal use
- § 20:275 Substantial rental and personal use
- § 20:276 Planning ideas
- § 20:277 No deduction for time share losses
- § 20:278 No deduction for adverse zoning

XX. HOME LOSSES DUE TO NATURAL DISASTERS

- § 20:279 Generally
- § 20:280 Calculating loss

TABLE OF CONTENTS

- § 20:281 How appraisal increases deduction
- § 20:282 Definition of casualty
- § 20:283 No loss due to conversion to rental property

XXI. INSTALLMENT SALES OF REAL ESTATE

- § 20:284 Generally
- § 20:285 Installment sale method
- § 20:286 Related party restrictions
- § 20:287 Original issue discount and imputed interest
- § 20:288 Repossession by seller
- § 20:289 Additional tax in the form of interest on deferred tax liability
- § 20:290 Seller's reduction of purchase price
- § 20:291 Electing out of election not to use installment sale method

XXII. CONTINGENT SALES OF REAL ESTATE

- § 20:292 Generally
- § 20:293 Maximum price upon conditions
- § 20:294 Fixed payment period with indefinite price
- § 20:295 Indefinite sales price and payment period

XXIII. TAX CREDITS

- § 20:296 Rehabilitation tax credit
- § 20:297 Allocation of rehabilitation credits among partners safe harbor
- § 20:298 Rehabilitation tax credit—Active and passive rehabilitation credits
- § 20:299 —Combining tax credit with depreciation write-offs
- § 20:300 —Tenant rehabilitation expenditures
- § 20:301 —External and internal wall requirements
- § 20:302 —Requirement for substantial rehabilitation
- § 20:303 —Historic structure rehabilitations
- § 20:304 —Rehabilitation risks
- § 20:305 —Recapture of credit
- § 20:306 Disabled access credit
- § 20:307 —Barrier removal deduction
- § 20:308 Low-income housing credit
- § 20:309 Work opportunity tax credit
- § 20:310 Hire Act incentives
- § 20:311 Energy tax credits for homeowners
- § 20:312 Energy tax deduction and credit for commercial buildings
- § 20:313 Health care tax credit
- § 20:314 Transferable state income tax credits

XXIV. TAX INCENTIVES FOR FIRST TIME HOMEBUYERS

- § 20:315 2008 Generally
- § 20:316 Phase out of credit
- § 20:317 Qualified first-time home buyer

- § 20:318 Credit not allowed
- § 20:319 Recapture rules

XXV. CHARITABLE CONTRIBUTIONS OF REAL ESTATE

- § 20:320 Generally
- § 20:321 Charitable contributions in exchange for state or local tax benefits
- § 20:322 Outright gifts
- § 20:323 —Establishing fair market value
- § 20:324 — —Taxpayer loses charitable deduction for failure to substantiate value of gift
- § 20:325 —Market value and adjusted basis
- § 20:326 —Limitation on deductions
- § 20:327 —Charitable gifts of land by developers
- § 20:328 —Charitable gifts of improved real estate
- § 20:329 Bargain sales of real estate
- § 20:330 —Mortgaged real estate
- § 20:331 Contributions for conservation purposes
- § 20:332 Conservation easements: IRS caution
- § 20:333 Estate tax exclusion for land subject to qualified easement
- § 20:334 Charitable remainder trusts
- § 20:335 Charitable contributions of easements in registered historic districts: facade easements
- § 20:336 Charitable contributions of fractional interests in tangible personal property
- § 20:337 Charitable deduction for tainted property
- § 20:338 Charitable deduction for estates and trusts—Amount “Permanently Set Aside”
- § 20:339 No charitable deduction for trust contribution of principal
- § 20:340 Charitable withdrawal power not entitled to annual gift tax exclusion or charitable deduction
- § 20:341 Appraisal requirements for noncash charitable contributions
- § 20:342 Contributions for conservation purposes—Failure to establish fair market value: Case study
- § 20:343 —Quid pro quo transactions
- § 20:344 Certain charitable gifts of real estate identified as tax avoidance

XXVI. TAX-EXEMPT BOND FINANCING OF REAL ESTATE

- § 20:345 Generally
- § 20:346 Private activity bonds
- § 20:347 Use of management contracts
- § 20:348 Exception for qualified residential rental projects
- § 20:349 Exception for certain exempt facilities
- § 20:350 Exception for small-issue bonds
- § 20:351 Exception for redevelopment bonds

XXVII. DISCHARGING REAL ESTATE DEBT

- § 20:352 Generally

TABLE OF CONTENTS

§ 20:353	Debt eligible for exclusion
§ 20:354	Limits of exclusion
§ 20:355	Limited exclusion for discharged home mortgage debt
§ 20:356	Deferral of COD income
§ 20:357	National Mortgage Settlement—Tax treatment
§ 20:358	Debt for equity exchanges by corporations and partnerships: I.R.C. § 108(e)(8)

XXVIII. ABANDONED PROPERTY LOSSES

§ 20:359	Overview
§ 20:360	Establishing abandonment
§ 20:361	Abandonment of partnership interest

XXIX. ENTERPRISE ZONES

§ 20:362	Investing in enterprise zones
----------	-------------------------------

XXX. REIMBURSED RELOCATION EXPENSES

§ 20:363	Reimbursed relocation expenses
----------	--------------------------------

XXXI. PROCEDURAL RULES AFFECTING REAL ESTATE

§ 20:364	Accounting rules for income and expense
§ 20:365	—Limit on use of cash method
§ 20:366	—Premature accruals of deductions
§ 20:367	—Prepaid expenses of cash-method tax shelters
§ 20:368	—Tax years of real estate entities
§ 20:369	—Completed contract method
§ 20:370	—Accounting rules for impairment of assets
§ 20:371	Choosing between cash and accrual method for tax purposes
§ 20:372	—Switching accounting methods
§ 20:373	—Related party transactions
§ 20:374	—Unrelated party compensation
§ 20:375	—Comparing accounting methods
§ 20:376	Accuracy-related and fraud penalties—Failure to pay tax shown on return
§ 20:377	—Accuracy-related penalties-I.R.C. § 6662
§ 20:378	—Accuracy related penalties: Case study
§ 20:379	—Fraud penalty—I.R.C. § 6663
§ 20:380	—Reportable transaction understatement penalty—I.R.C. § 6662A
§ 20:381	—Listed and reportable transactions—I.R.C. §§ 6011, 6111, 6112 and 6707A
§ 20:382	Taxpayer compliance rules and penalties—Aiding and abetting understatements of tax
§ 20:383	—Promotion of abusive tax shelters
§ 20:384	Reporting requirements for real estate transactions
§ 20:385	—What transactions must be reported
§ 20:386	—Who need not report
§ 20:387	—Who must report
§ 20:388	—Designating who must report

- § 20:389 —How report is filed
- § 20:390 Tax return preparer penalties
- § 20:391 Claims for refund, credit, or abatement: Rev. Proc. 2007-21

XXXII. ALTERNATIVE MINIMUM TAX

- § 20:392 Alternative minimum tax for individuals
- § 20:393 —Tax preference adjustments
- § 20:394 —Tax preference items
- § 20:395 —Minimum tax credit
- § 20:396 Personal nonrefundable credits may offset AMT and regular tax
- § 20:397 ISO refundable tax credit
- § 20:398 Alternative minimum tax for corporations
- § 20:399 —Exemption for small corporations
- § 20:400 —Tax preference adjustments
- § 20:401 —Tax preference items

CHAPTER 21. FAMILY TAX PLANNING FOR REAL ESTATE INVESTORS

I. GIFTS OF REAL ESTATE

- § 21:1 Generally
- § 21:2 Gift and estate tax basics
- § 21:3 Valuation of property for gift tax purposes: Adequate disclosure rule
- § 21:4 Annual gift tax exclusion
- § 21:5 —No annual exclusion for gifts of restricted LLC interests
- § 21:6 Gift and estate tax marital deduction
- § 21:7 —Transfers to noncitizen spouses—Qualified domestic trust
- § 21:8 Relationship of gift tax to income tax
- § 21:9 Relationship of gift tax to estate tax
- § 21:10 Advantages of making gifts
- § 21:11 Family installment sales vs. fractional gifts
- § 21:12 —Deeding fractional shares
- § 21:13 —Installment sale
- § 21:14 —Comparing the two methods
- § 21:15 Gift planning for tax losses and gains
- § 21:16 Declaratory judgment to resolve gift tax valuation

II. EXTENSION OF TIME FOR ILLIQUID ESTATES TO PAY FEDERAL TAX

- § 21:17 Generally
- § 21:18 How Section 6166 works
- § 21:19 Requirements to qualify for Section 6166 deferral
- § 21:20 Bonding and security requirements
- § 21:21 Acceleration of payments (recapture of tax)
- § 21:22 Lease of land to LLCs will not cause loss of Section 6166 estate tax deferral

TABLE OF CONTENTS

- § 21:23 Limitations of Section 6166 deferral
- § 21:24 Qualifying real estate for estate tax deferral—Case study 1
- § 21:25 —Case study 2
- § 21:26 IRS guidance: Qualifying real estate as trade or business for estate tax deferral

III. ALTERNATIVE METHODS OF VALUING REAL ESTATE FOR ESTATE TAX PURPOSES

- § 21:27 Generally
- § 21:28 Introduction to special use valuation
- § 21:29 Qualification requirements for special use valuation
- § 21:30 Comparing 50% test and 25% test
- § 21:31 Qualification requirements for real property
- § 21:32 Section 2032A election and agreement
- § 21:33 Recapture tax
- § 21:34 The recapture tax: Exception for qualified conservation contribution
- § 21:35 Recapture tax—Sale of nonagricultural development rights triggers special use valuation recapture tax
- § 21:36 Planning considerations
- § 21:37 Option vs. installment sale
- § 21:38 Use of discounts in connection with special use valuation

IV. PERSONAL RESIDENCE TRUSTS

- § 21:39 Generally
- § 21:40 Qualification requirements
- § 21:41 —Provisions common to both trusts
- § 21:42 —Provisions for QPRT
- § 21:43 Qualifying QPRT 2 for benefit of parent created by beneficiaries of QPRT 1
- § 21:44 Gift tax aspects
- § 21:45 Estate tax aspects
- § 21:46 Income tax aspects
- § 21:47 Generation skipping tax aspects
- § 21:48 Planning considerations
- § 21:49 IRS permits reformation of residence trust but prohibits repurchase of residence from trust
- § 21:50 Layering personal residence trusts
- § 21:51 Planning after expiration of QPRT term
- § 21:52 Qualified personal residence trust—Case study
- § 21:53 Payment of fair market rental after QPRT term: Case study

V. GRANTOR RETAINED ANNUITY TRUSTS (GRATS) AND UNITRUSTS (GRUTS)

- § 21:54 Generally
- § 21:55 GRAT and GRUT qualifications
- § 21:56 Gift tax aspects
- § 21:57 Estate tax aspects

- § 21:58 Income tax aspects
- § 21:59 IRS issues zero-out GRAT regulations

VI. FAMILY LIMITED PARTNERSHIPS

- § 21:60 Generally
- § 21:61 Transfer discounts
- § 21:62 Leveraging with annual exclusion gifts—No annual exclusion for gifts of restricted LLC interests
- § 21:63 Nonrecognition of gain
- § 21:64 Income shifting
- § 21:65 Structuring guaranteed payments to FLP partners
- § 21:66 Planning a freeze partnership or limited liability company
- § 21:67 Increasing partnership asset basis on partner's death

VII. PRIVATE REAL ESTATE ANNUITIES

- § 21:68 Generally
- § 21:69 What is private annuity?
- § 21:70 —How much is the annuity?
- § 21:71 Advantages of private annuities
- § 21:72 Disadvantage of private annuity—Will obligor perform?
- § 21:73 Tax consequences of private annuity—Tax consequences to annuitant
- § 21:74 —Tax consequences to obligor
- § 21:75 Payment of annuity to third party

VIII. PLANNING OPPORTUNITIES WITH SELF-CANCELING INSTALLMENT NOTES

- § 21:76 Generally
- § 21:77 Comparing SCINs with private annuities
- § 21:78 Comparing tax consequences of SCIN and private annuity
- § 21:79 Self-canceling installment note (SCIN) bona fide notwithstanding flaws: Case study

IX. CHARITABLE REMAINDER TRUSTS

- § 21:80 Generally
- § 21:81 Types of charitable remainder trusts
- § 21:82 Charitable deduction limitations
- § 21:83 Contributing appreciated property
- § 21:84 Income tax consequences
- § 21:85 IRS regulations attack accelerated CRTs—Trust beneficiary to recognize gain in appreciated assets
- § 21:86 Consequences of failure to comply with CRAT terms
- § 21:87 Sale of CRUT life interest is sale of capital asset
- § 21:88 Dividing a CRUT without adverse income tax consequences

X. STOCK REDEMPTIONS IN A FAMILY CORPORATION

- § 21:89 Generally

TABLE OF CONTENTS

- § 21:90 Redeeming estate stock in family corporation
- § 21:91 Redeeming stock in family corporation at retirement
- § 21:92 Case studies—Avoiding dividend treatment when redeeming stock in family corporation

XI. USING REAL ESTATE TO FUND A DEFECTIVE GRANTOR TRUST

- § 21:93 Generally
- § 21:94 Estate tax consequences of defective trust
- § 21:95 —Using defective grantor trust as estate freezing technique
- § 21:96 —IDGT structure
- § 21:97 Gift tax consequences of IDGT
- § 21:98 Benefits of taxing trust income to grantor
- § 21:99 Comparing IDGT and SCIN
- § 21:100 Comparing IDGT to GRATs and GRUTs

XII. EMPLOYEE STOCK OWNERSHIP PLANS

- § 21:101 Purpose of employee stock ownership plan (ESOP)
- § 21:102 Tax-free rollover of gain on sale to ESOP
- § 21:103 —Basis of qualified replacement property
- § 21:104 Dispositions of replacement property
- § 21:105 —Avoiding gift on transfer to ESOP
- § 21:106 —Tax-free rollover conditions
- § 21:107 —Valuation of stock

Table of Laws and Rules

Table of Cases

Index