

# Chapter 3

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## Preparing for the Closing

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### § 3:1 Representing the Seller

Once the contract has been executed and delivered, the down payment check must be deposited. The escrow agent should make sure that the check is paid when presented. If the check is dishonored, the seller may either terminate the contract or present the check for payment again (see section 2:3.17).

The next step is to follow the progress of the purchaser's application for the mortgage, keeping in mind the date by which it must be obtained. The date often comes and goes before a written commitment is actually received.



**TIP:** The seller's attorney should anticipate this and be prepared to advise the seller of his options and to extend the closing date if necessary.

Adjustment in the apportionments should be considered if this occurs.

A substantial number of lawsuits over contracts of sale involve mortgage contingencies and other conditions. See section 2:3.1. A cancellation of the contract and return of the down payment should be accompanied by a waiver of all rights and settlement of all claims. See section 2:2.17[C].

Once the mortgage contingency is satisfied, as well as such other conditions as an inspection contingency, the seller's attorney can begin to prepare for the closing.<sup>1</sup> A Local Practice Guide for all sixty-two counties in New York State is being compiled by the Real Property Law Section of the New York State Bar Association, to outline differences in practice, particularly between downstate and upstate, as to title and other searches and readings, mortgage satisfaction and recording practices, and closing fees, etc.<sup>1.1</sup>

#### § 3:1.1 Review Purchaser's Title Report and Arrange for Cure of Title Objections

A title search usually takes about two weeks. The purchaser's attorney is normally responsible downstate for ordering the title report and having copies of it sent to his client's lender and to the seller's attorney. The seller's attorney should review it thoroughly upon receipt, particularly noting any conditions or expiration date and any unexpected exceptions that might be unusually difficult to deal

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1. See Stein, *Preparing for the Commercial Real Estate Closing (Parts I and II)*, 15 PRAC. REAL EST. LAW. 67 (July 1999) and 79 (Sept. 1999).  
1.1. See NYSBA REAL PROPERTY LAW SECTION, <http://www.nysba.org/rpls/>.

with, such as those requiring actions by third parties. The Erie and Monroe County contracts (paragraph 11 of Appendix C3, and paragraph 7B of Appendix C5) require the seller to provide tax and title searches after the date of the contract. The Capital Region contract (paragraph 9 of Appendix C2) allows checking of boxes for delivery of (1) a title abstract and tax search and continuations thereof, or (2) a fee title insurance policy at the expense of (a) the purchaser or (b) the seller, with the seller to provide any available abstract of title without cost to the purchaser. See section 2:2.7[C] for a discussion of provisions in the Erie and Monroe County contracts for title insurance to cure title objections.

There are routine solutions to most ordinary problems raised by a title report. If the title exceptions in the contract were carefully drawn, there should be no surprises.

If judgments or other returns are reported against names similar to the seller's name, the seller should be asked about them and a reasonably detailed affidavit should be prepared to show that they are not against the seller (for example, that the seller did not incur the debt, has never lived at the address of the judgment debtor, and has not done business with the judgment creditor). The title companies sometimes ask the seller for a general affidavit to the effect that

- (1) the seller has been known by no other name for ten years (newlyweds should disclose former names),
- (2) there are no tenants,
- (3) the seller has not encumbered the premises,
- (4) the seller has paid all laborers and suppliers who might be entitled to file mechanics' liens, and
- (5) in New York City, no work has been done that might give rise to a municipal lien.

Title companies will usually insure against collection of estate tax liens out of the premises based upon a representation from an institutional fiduciary that sufficient funds are available or upon an indemnity from an individual fiduciary. This may eliminate the need to obtain formal releases of federal and state estate tax liens, which is time-consuming and often unnecessarily costly.<sup>2</sup> Removal of corporate franchise and other tax liens, particularly in New York City,<sup>3</sup> may

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2. I.R.C. § 6325(c); N.Y. TAX LAW § 249(bb).

3. N.Y.C. Admin. Code § 11-683. *See also* Bethel United Pentecostal Church, Inc. v. Westbury 55 Realty Corp., 760 N.Y.S.2d 60 (2d Dep't 2003) (seller responsible to pay agricultural liabilities tax lien under N.Y. AGRIC. & MKTS. LAW § 306(2)(a)(i) following sale of agricultural land to church).

require additional filings. In some states, a sale by a corporation of half or more of its real estate may require governmental clearance.<sup>4</sup>

Violation reports will have to be examined and estimates of the cost to cure them may have to be obtained. Sidewalk violations in New York City are usually treated as insignificant unless a “Sidewalk Repair Notice” has been issued.<sup>5</sup>

If there is a lien (for example, an existing mortgage) that the seller must pay at the closing out of the purchase price, arrangements should be made in advance with the holder of the lien for the title company to determine the amount due, to make the payment, and to obtain and record a satisfaction after the closing. See sections 3:1.3 and 4:1.2. Arrangements must be made in advance with the purchaser for separate certified checks to be drawn to pay any amounts needed to pay off a mortgage or to clear title objections at the closing. See section 2:2.14.



**TIP:** If any special endorsement or affirmative insurance is a condition to closing, the title company should be asked to issue an endorsement to that effect prior to the closing, if possible.

### **§ 3:1.2 Apply for New York State Gains Tax Clearance**

NOTE: The New York State real property transfer gains tax was repealed, effective June 15, 1996. See section 2:2.15[B].

### **§ 3:1.3 Obtain Satisfactions or Closing Letters from Existing Mortgagees**

If the seller has an existing mortgage or mortgages on the premises, he will have to deliver certificates or closing letters (also called “pay-off” letters) from the mortgagees at the closing.<sup>6</sup> If the mortgages are to be satisfied, but satisfaction pieces will not be delivered at the closing

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4. R. WERNER, REAL ESTATE CLOSINGS 115 (2d ed. 1998) [hereinafter WERNER].
  5. Harlank Realty Corp. v. Rosenstock, 154 N.Y.S.2d 95 (Mun. Ct. 1956); see N.Y.C. Admin. Code § 19-152.
  6. N.Y. REAL PROP. LAW § 274-a. Effective June 16, 1994, the mortgagee of an owner-occupied, one- to six-family residential structure or residential condominium unit must deliver mortgage-related documents (abstract of title, if any, and payoff statement) within thirty days. The amount the mortgagee may charge is limited to \$20 or such amount as may be fixed by the banking board. If the mortgagee fails to deliver the mortgage-related documents, it will be liable for actual damages. *Id.* See also Negrin v. Norwest Mortg. Inc., 263 A.D.2d 39, 700 N.Y.S.2d 184 (2d Dep’t 1999)

(the usual practice), the closing certificates or letters will be delivered to the title closer, who will compute the interest due until he can deliver the check and obtain the satisfactions. The title closer may charge a nominal amount to perform this service. If the title closer is to handle satisfaction of a mortgage after the closing, this should be cleared in advance with the holder of the existing mortgage.



**TIP:** Arrangements must be made with the purchaser to have separate checks drawn at the closing by his lender for the correct amount due.

If the mortgage is to continue, the closing letter will be needed to establish the amount to be credited against the purchase price. The seller's attorney should request that the lender state the unpaid amount of principal and interest, date of maturity, rate of interest (annual and daily), and the amount of any escrow deposits to be transferred. In New York, the mortgagee is required to supply such a certificate in recordable form, but certain institutional lenders are allowed to supply unqualified letters instead<sup>7</sup> (see paragraph 4[d] of the New York Multibar form or paragraph 10 of NYBTU Form 8041). This letter may take up to two weeks to obtain. The mortgagee is also required to execute and deliver a satisfaction piece certifying that the mortgage has been paid or otherwise satisfied and discharged and consenting that it be discharged of record.<sup>8</sup> If the mortgage is being

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(claim of charging unwarranted fees for payoff statement stated cause of action); *Dowd v. All. Mortg. Co.*, 32 A.D.3d 894, 822 N.Y.S.2d 558 (2d Dep't 2006) (N.Y. REAL PROP. LAW § 274-a(2) prohibits a bank from charging a borrower for providing a payoff statement); *Cassara v. Wynn*, 55 A.D.3d 1356, 865 N.Y.S.2d 436 (4th Dep't 2008) (mortgagor raised triable issue of fact whether mortgagee breached requirement to furnish payoff figures and thereby constructively rejected mortgagor's efforts to tender payment satisfying mortgage); *Donerail Corp. N.V. v. 405 Park LLC*, 952 N.Y.S.2d 137 (1st Dep't 2012) (provision requiring payment of existing mortgage satisfied by payment for defeasment securities that entitled seller to a discharge of the mortgage where title insurer committed to insure without exception and seller offered to allow purchaser to escrow an amount sufficient to protect it); *HSBC Mortg. Corp. (USA) v. Pascoe*, 100 A.D.3d 701, 954 N.Y.S.2d 138 (2d Dep't 2012) (mortgagors satisfied statutory requirement of written request for satisfaction of credit line mortgage). On federal preemption as to federal lenders, see *Hall, Federal Preemption of Real Estate Lending Activities of OTS Regulated Lenders*, 30 N.Y. REAL PROP. L.J. 59 (Spring 2002).

7. See *supra* section 2:2.6, note 124.

8. Effective November 7, 2005, failure by a mortgagee to present a certificate of discharge for recording shall result in the mortgagee being liable for \$500 if the mortgagee fails to present such certificate within thirty days (or \$1,000 within sixty days or \$1,500 within ninety days). Mortgagee

assigned to the purchaser's lender, arrangements should be made for an assignment to be delivered at the closing.<sup>9</sup>

### § 3:1.4 Prepare Closing Checklist



**TIP:** To organize his efforts, the seller's attorney should prepare a closing checklist well in advance of the closing (for example, two weeks).

The first step in preparing the checklist is to reread the contract of sale and extract all the closing requirements set forth in the contract, including any riders. For a closing checklist based on NYBTU Form 8041 and the New York Multibar Residential Contract of Sale, see Appendix T. For Forms 154 and 3125, see sections 10 and 11 of Appendices K and L. In fact, two checklists would be advisable: one of the things to be done in preparation for the closing and the other to be used at the closing itself. The preparatory items are discussed generally in this chapter, and they are listed in section 6 of Appendix A. The closing items are discussed in chapter 4, and they are listed in section 7 of Appendix A.

### § 3:1.5 Prepare Deed and Other Closing Documents

The deed should be in the form called for by the contract. Printed forms are usually available.<sup>10</sup> The names and addresses of the parties

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does not include one who makes less than five mortgage loans in any calendar year. N.Y. REAL PROP. LAW § 275(1); N.Y. REAL PROP. ACTS. LAW § 1921(1). *See generally* Bergman, *Paying Off a Mortgage: A (Surprisingly) Convoluted Story*, 77 N.Y. ST. B.A. J. 47 (Mar./Apr. 2005); Freyermuth, *Why Mortgagors Can't Get No Satisfaction*, 72 MO. L. REV. 1159 (2007) (discussing reform proposals in the Uniform Residential Mortgage Satisfaction Act); *Reitman v. Wachovia Nat'l Bank, N.A.*, 49 A.D.3d 759, 854 N.Y.S.2d 179 (2d Dep't 2008) (mortgagee not required to issue satisfaction of credit line mortgage to mortgagors where mortgagors did not make proper written request; merely sending check to reduce outstanding balance to zero was insufficient). As to who must sign the satisfaction piece, see N.Y. REAL PROP. LAW § 321; *HSBC Bank, USA v. Pugkhem*, 88 A.D.3d 649, 931 N.Y.S.2d 635 (2d Dep't 2011) (mere transmission of a check to pay the outstanding balance on a line of credit, accompanied by a letter that does not state that it is intended to satisfy the credit line mortgage, does not require the mortgagee to close the line of credit or issue a satisfaction of mortgage pursuant to N.Y. REAL PROP. ACTS. LAW § 1921(1)). *See also infra* section 4:1.2.

9. *See supra* section 2:2.6, note 127.

10. For New York statutory short forms, see N.Y. REAL PROP. LAW § 258. For other forms, see 7 MARTINDALE-HUBBELL LAW DIRECTORY pt. 1 (1985). Electronic forms are also available. *See, e.g.*, NYSBA's Residential Real Estate Forms on HotDocs.

should be as shown on the contract.<sup>11</sup> If there is more than one purchaser, the seller's attorney should inquire as to the names and manner in which they wish to hold title. Unless otherwise provided, two or more named grantees will hold title as tenants in common.<sup>12</sup> If the purchasers are married, the phrase "husband and wife" should be added after their names to create a tenancy by the entirety.<sup>13</sup> The residence addresses of the parties; the city, town, or village of the premises; and the tax map designation must be filled in.<sup>14</sup> The description should match the description in the contract, which should match the description in the seller's title insurance policy. If the purchaser's title company proposes to insure a different description and the seller is giving a bargain and sale deed without the covenant against grantor's acts, the use of the new description will not impose any additional risk or burden on the seller.

If the seller is a fiduciary, the actual consideration may have to be recited in the deed.<sup>15</sup>

If the seller cannot attend the closing, the seller's attorney must make sure that the deed and other documents, such as an affidavit to the title company, and any other closing documents from the seller, are all properly executed by the seller in advance and acknowledged

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11. See WERNER, *supra* note 4, at 118–23.
  12. N.Y. EST. POWERS & TRUSTS LAW § 6-2.2. A tenant in common is entitled to bring an action for partition and sale. *Wilbur v. Wilbur*, 699 N.Y.S.2d 103 (2d Dep't 1999); *Dalmacy v. Joseph*, 746 N.Y.S.2d 312 (2d Dep't 2002) (ex-boyfriend established entitlement to partition of property owned as tenants in common with ex-girlfriend); *Mark Family Realty, LLC v. Sanko*, 136 A.D.3d 500, 25 N.Y.S.2d 164 (1st Dep't 2016) (partition not inconsistent with thirty-day right of first refusal in tenant-in-common's agreement with other tenants); *Midgley v. Phillips*, 143 A.D.3d 788, 39 N.Y.S.3d 62 (2d Dep't 2016) (tenant-in-common of real property left to him and another upon father's death acquired title by adverse possession where he actually, openly, exclusively, and continuously possessed property for twenty years); *Pichler v. Jackson*, 157 A.D.3d 450, 68 N.Y.S.3d 441 (1st Dep't 2018) (plaintiff entitled to judgment declaring that she possessed undivided 50% interest as tenant-in-common and seeking appropriate share of rental income under common law and N.Y. REAL PROP. ACTS. LAW § 1201 and an accounting); *In re Blango*, 166 A.D.3d 767 (2d Dep't 2018) (deed from distributee who was tenant in common validly conveyed its partial interest only, even if deeds purported to convey full title). A wife, as tenant in common, has been held to have the right to enter into timber harvesting contracts. *O'Brien v. Ginter*, 744 N.Y.S.2d 511 (2d Dep't 2002).
  13. *Id.* See also *Carpenter v. Crespo*, 161 A.D.3d 934, 78 N.Y.S.3d 165 (2d Dep't 2018) (conveyance by one spouse as tenant by the entirety cannot bind the entire fee or impair the nonconsenting spouse's survivorship interest).
  14. N.Y. REAL PROP. LAW § 333. For a discussion of statutory requirements in other states, see WERNER, *supra* note 4, at 126–27.
  15. *Smith v. Reid*, 134 N.Y. 568, 580, 31 N.E. 1082 (1892).

before a notary public. If they are executed outside the state, the appropriate formalities must be observed.

If the seller cannot attend the closing and cannot execute the closing documents in advance, the seller should execute a power of attorney to a person who can be present at the closing (for example, his attorney). In New York, the statutory short form of general power of attorney should be used.<sup>16</sup> The power of attorney must be executed and acknowledged by the seller before a notary public. The seller's attorney should arrange for the seller to call at or just before the closing to confirm that he is alive and well and authorizes the attorney to close.

If the seller is an entity, the seller's attorney must arrange to deliver at the closing all required signatures on, and approvals of, the deed and other closing documents (see section 2:3.5) and documentation that the entity legally exists and is in good standing. Such documentation should include certified copies of the certificate of incorporation, bylaws, and resolutions and a certificate of good standing from the state of incorporation for a corporation, a certificate of qualification to do business where the property is located for a foreign corporation, or a certified copy of the partnership agreement and any required doing-business or assumed-name certificates for a partnership. Arrangements should be made for any required corporate seal to be brought to the closing.<sup>17</sup>

If an existing mortgage is to be assumed,<sup>18</sup> the following should be added after its description in the deed: "which grantee hereby assumes and agrees to pay" (see section 2:2.6) and a signature line and an acknowledgment by the purchaser must be added to the deed. An assignment of any tax and insurance escrow deposits in a form satisfactory to the lender holding them should also be prepared.

The purchase money note and mortgage should be prepared as provided in the contract. Paragraph 1(b) of NYBTU Form 8041 calls for use of standard NYBTU forms. See section 2:2.5 for a discussion of the forms to be used and the provisions to be added. Paragraph 5 of the New York Multibar form calls for use of forms adopted by the New York State Land Title Association, which has adopted the NYBTU forms. The name and address of the seller's attorney should appear in an appropriate place to make sure that the original mortgage will be returned to the seller's attorney after recording. In New York, the

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16. N.Y. GEN. OBLIG. LAW §§ 5-1501, 5-1502A-1503, 5-1505, 5-1506. See *supra* section 2:2.20.

17. The presence of a corporate seal on an instrument is prima facie evidence that the instrument was executed with authority. N.Y. BUS. CORP. LAW § 107; N.Y. NOT-FOR-PROFIT CORP. LAW § 107. However, in New York a deed or other instrument may be acknowledged by a corporation without a seal. N.Y. REAL PROP. LAW § 309.

18. N.Y. GEN. OBLIG. LAW § 5-705.

name and address should be placed on the last page or back page. In Florida, it should appear at the top or bottom of the first page.<sup>19</sup> The purchaser's attorney should be reminded to arrange for a fire insurance policy naming the seller as an insured pursuant to the standard mortgagee clause<sup>20</sup> and evidence of payment of the first year's premium. An unconditional certificate of insurance from the insurer may usually be substituted for an original policy. If the purchaser is an entity, its attorney should also be reminded to obtain all required signatures on and approvals of the mortgage (see sections 2:3.5 and 3:2.5). Any required tax and insurance escrow deposits should be calculated. In connection with a commercial loan, the lender should request an opinion from the borrower's attorney to be delivered at the closing. See section 3:2.5.

A bill of sale for separate transfer of personal property is seldom used in New York. Its use may imply a separate sale, which could be subject to sales tax.<sup>21</sup> If required, the seller should send a bulk transfer notice to creditors.<sup>22</sup>

If the sale involves a tenanted building, the seller's attorney must arrange for preparation and delivery of additional closing documents relating to the tenants, such as the original leases, registration statements, tenant files, notices to tenants, tenant estoppel letters, and security deposits, as well as the assignments required by sections 10.03, 10.06, and 10.08 of Forms 154 and 3125. He should also draft an indemnification agreement as to transferred security deposits for execution and delivery by the purchaser at the closing (see section 2:4.4). Assignments of leases are unnecessary in many jurisdictions, but are often provided for.<sup>23</sup> The seller should consider requiring an assumption by the purchaser of assigned contracts, including leases. Absent an assumption, a grantee is only liable for covenants in leases that run with the land.<sup>24</sup>

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19. FLA. STAT. ANN. § 695.24.

20. N.Y. INS. LAW § 3404(e).

21. N.Y. TAX LAW §§ 1101 *et seq.*; N.Y.C. Admin. Code §§ 11-2002 *et seq.*

22. *See supra* section 2:2.3[F], note 64.

23. WERNER, *supra* note 4, at 171. An assignment of leases is not necessary in New York. N.Y. REAL PROP. LAW §§ 223, 248.

24. DEWINTER, REAL ESTATE CONTRACTS AND CONVEYANCES IN NEW YORK 87 (1992); Longley-Jones Assocs. v. Ircan Realty Co., 67 N.Y.2d 346, 493 N.E.2d 930, 502 N.Y.S.2d 706 (1986) (landlord's obligation in lease to pay brokerage commissions on renewal does not run with the land); Bermann v. Windale Props., 10 Misc. 2d 388, 169 N.Y.S.2d 975 (Sup. Ct. Westchester Cty.), *aff'd*, 4 A.D.2d 746, 164 N.Y.S.2d 817 (2d Dep't 1957) (contract provision for assumption of license to operate washing and drying machines bound purchaser even though license did not run with the land).



**TIP:** The better practice is for the seller's attorney to send drafts of all the closing documents to the purchaser's attorney in advance of the closing.

It is unfair to ask the purchaser's attorney to review documents of any length for the first time at the closing.

### § 3:1.6 Calculate Apportionments

Apportionments are usually calculated as of the midnight before the closing date, so that the purchaser pays for the closing day (see paragraph 18 of the New York Multibar form or paragraph 13 of NYBTU Form 8041; Forms 154 and 3125 refer to the close of business, which should have the same result). Rents should be based on an updated rent schedule at the closing. Interest on existing mortgages will be based on the mortgagees' closing letters. Premiums on transferable insurance policies should be based on receipted bills or canceled checks. Taxes must be calculated separately for each taxing jurisdiction. The seller's attorney should take care to verify the amount of the tax and the fiscal year for each jurisdiction.<sup>25</sup> He should note carefully the period to which each tax bill relates. The New York Multibar form and NYBTU Form 8041 permit use of the old tax rate if the new assessment is fixed before the new rate is fixed.<sup>26</sup> The usual custom in downstate New York used to be to use a 360-day year, dividing each tax amount by the number of days in the period (upstate, a 365-day year is used). In the case of a prepayment, the number of months left in the period and then the number of days in the month of the closing are then determined.<sup>27</sup> Water charges and sewer rents are usually done on the same basis, unless metered.

A methodical step-by-step approach is most likely to produce a correct result. See Appendix Z9. Taxes and insurance should be apportioned even if an escrow for future payments is also required (see section 4:2.2).

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- 25. In New York, there may be county, town or city, village, school district, and other taxing jurisdictions, each with a separate fiscal year.
  - 26. In New York City, this occurs for a month or two before each fiscal year begins on July 1. *See supra* section 2:2.15.
  - 27. If, for example, downstate taxes are \$1,200 per year and due semiannually on January 1 and July 1, the January 1 payment of \$600 was made, and the closing occurs on the following April 5, the purchaser would owe the seller \$286.58:  $\$600/180 \text{ days} = \$3.33$ ; adjust from April 5 through June 30 (26 + 60 days) = 86 days;  $\$3.33 \times 86 \text{ days} = \$286.58$ .



**TIP:** The attorneys should exchange their calculations of apportionments and agree to them in advance of the closing, keeping small discrepancies in perspective.

Fuel oil should be based upon a written statement from the fuel oil company of a reading of the tank as close as possible to the closing date, priced at the then-current price, including any sales tax.

Paragraph 18(e) of the New York Multibar form and paragraph 13 of NYBTU Form 8041 provide that any errors or omissions in computation are to be corrected and that that obligation survives the closing. It has been observed that making these calculations is not the strong point of many attorneys.

If the original closing date was adjourned or delayed, the contract provisions for apportionment may have to be reconsidered. The contract does not usually anticipate delays, except for provisions such as those suggested in section 2:3.15, or provide for interest on the unpaid balance of the purchase price, interest on existing mortgages, or interest on a purchase money mortgage to the seller. In the case of sale of a house or other property that is not income producing, the monetary benefit of the bargain to the seller is delayed and the purchaser is delayed in obtaining possession. If the purchaser is responsible for the delay and requests the adjournment, the purchaser may be required to pay for carrying costs and interest on the unpaid purchase price.<sup>28</sup>

In the case of income-producing property, the parties should keep in mind whether the property is presently profitable to the seller and whether it will be immediately profitable to the purchaser after the closing, rather than just potentially profitable. Generally, the party who bears the burdens of income-producing property should also receive the benefits.<sup>29</sup> In determining who is to bear the costs occasioned by a delay, several factors are relevant:

- (1) the agreement of the parties,
- (2) who is at fault for the delay,<sup>30</sup>
- (3) who is in possession during the delay,
- (4) who retains the rents and profits, and
- (5) local closing rules and customs.<sup>31</sup>

28. *Mayer v. Mfrs. Tr. Co.*, 11 Misc. 2d 359, 170 N.Y.S.2d 43 (Sup. Ct. Westchester Cty. 1957).

29. WERNER, *supra* note 4, at 236.

30. Annot., 7 A.L.R.2d 1204 (1949).

31. WERNER, *supra* note 4, at 236.

The agreement of the parties with respect to adjournment and the handling of apportionments will generally be upheld, but an agreement set forth in the original contract may not be enforced in favor of the party at fault for a delay.<sup>32</sup> If the adjournment agreement provides for closing adjustments as of the original date, the seller is entitled to interest from that date on the unpaid balance of the purchase price at the legal rate and on any purchase money mortgage at the agreed rate.<sup>33</sup> If the parties fail to agree and the seller retains possession, the seller is not entitled to such interest unless the purchaser is at fault and the seller does not retain any rents and profits. If the seller retains the rents and profits, the seller may have to pay interest on the purchaser's down payment. This is the result even if the purchaser is at fault, because the "burdens follow the benefits" rule is superior to the "fault" rule.<sup>34</sup> If the seller is entitled to interest, the purchaser is entitled to the rents and profits less expenses. If the purchaser takes possession and the parties fail to agree, the purchaser is liable for interest, but he retains the rents and profits. If there are no rents and profits, the purchaser will not be liable for interest if the seller was at fault or the buyer tenders the balance of the purchase price.<sup>35</sup>

### § 3:1.7 **Arrange for Utility Readings**

The seller's attorney should remind the seller to arrange for readings of all utility meters, such as those for electricity, water, and gas, as close to the closing as possible and for forwarding of bills to the seller. This should normally be coordinated with the purchaser to make sure that the services are not interrupted. Note that paragraph 18(c) of New York Multibar form and paragraph 14 of NYBTU Form 8041 permit the seller to furnish a water meter reading to a date not more than thirty days prior to the closing, with an apportionment based thereon to the closing. The rate of usage under the old reading is thus used to estimate usage to the closing date. The seller should be encouraged to keep this period as short as possible to lessen objections at the closing.

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- 32. *Id.*; Annot., 75 A.L.R. 316, 318, 349 (1931), *supplemented by* 25 A.L.R.2d 951 (1952).
  - 33. WERNER, *supra* note 4, at 237 (citing Custom VII, Customs in Respect to Title Closings, Real Estate Board of N.Y., Inc.). *See* Appendix S.
  - 34. *Scarлата v. Finazzo*, 125 N.Y.S.2d 110 (Sup. Ct. Queens Cty. 1953); WERNER, *supra* note 4, at 239.
  - 35. Annot., 7 A.L.R.2d 1204, 1222 (1949).

### § 3:1.8 **Remind Purchaser to Deliver Proper Closing Checks**



**TIP:** The seller's attorney should remind the purchaser's attorney to have the purchaser make arrangements to deliver closing checks in the form called for by the contract.

The exact requirements as to the maker of the checks and permissible endorsements should be set forth in the contract, as discussed in section 2:2.4. The seller is entitled to insist on strict compliance with these requirements. Note particularly whether the bank on which the checks are drawn must be local. The purchaser should be warned that checks from money market funds and similar investment vehicles may have to be cleared and reissued by a local bank to meet the contract requirements.

### § 3:1.9 **Arrange for Payment of Transfer Taxes**

The seller's attorney should make a list of all transfer taxes payable by the seller at the closing and all returns and payment requirements. In New York City, there will be: (1) a New York City transfer tax requiring preparation and signing of a return by the seller and the purchaser and payment of a substantial tax, usually by a certified check payable to the Commissioner of Finance; and (2) a New York state transfer tax of a relatively small amount, requiring preparation and signing of a return by the seller and the purchaser and payable by a certified check to the county clerk where the recording is to take place.

A foreign seller should make arrangements to supply a non-foreign affidavit or otherwise comply with the requirements of the Foreign Investment in Real Property Tax Act, if applicable (see section 2:2.15).



**TIP:** Effective July 3, 2004, New York City requires that all RPT, TP-584 and related forms be completed and printed on the Internet-based Automated City Register Information System (ACRIS). Preparation of separate signature pages will be allowed.

Effective September 7, 2004, the RPT, TP-584, Cover Pages and Payment Sheets must be generated in ACRIS for the transfer of a cooperative unit or of a controlling interest in an entity owning real property. Where the seller will be making a concession as to the price, see section 4:2.2 as to reporting on the TP-584 and RP-5217 forms.

A nonresident seller or transferor of real estate in New York is required to file with the Tax Department an estimate and payment of any state income tax due, apply on Form IT-2663 for a certification by the Department, and deliver the certification to the recording officer with the deed to be recorded.

**§ 3:1.10 Obtain Waiver of Right of First Refusal for Condominium Unit**

Most condominium declarations or bylaws give a right of first refusal to the board of managers or unit owners' association to purchase a condominium unit proposed for sale. The seller's attorney should make sure that any required procedures are followed and that a written waiver of any such right will be available in time for the closing. In addition, a statement as to the status of payment of common charges and any other sums due by the seller should be obtained for the closing. If the seller has contributed directly or indirectly to any reserves or similar funds, a statement of those amounts will also be necessary to obtain reimbursement from the purchaser.

**§ 3:1.11 Schedule the Closing**

The exact time and place of the closing should be confirmed with all parties as soon as they are known. Except in rare cases where time is of the essence, either party is entitled to a reasonable adjournment (see section 2:2.9).<sup>36</sup> The last participant is usually the purchaser's lender, which may have a limited schedule of availability. It is usually up to the attorneys for the parties to coordinate this scheduling among themselves, the parties, the lender, and the title company, which must send a closer. It is usually the purchaser's attorney's responsibility to arrange for attendance by the title closer.

If the seller cannot attend the closing, the seller's attorney should arrange for the seller to call at or just before the closing to confirm that he is alive and authorizes the attorney to close.



**TIP:** If the purchaser refuses without good reason to cooperate in scheduling the closing, the seller may make time of the essence (see section 2:2.9).

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36. See Brogan, *Top Ten Reasons Closings Are Adjourned*, 37 NYSBA N.Y. REAL PROP. L.J. 35 (Fall 2009) (including not bringing proof of homeowners' insurance, not bringing photo ID, not bringing certified funds for transfer taxes, not allowing for deduction of closing costs from mortgage proceeds, and lender's closing letter showing legal fees due).

**§ 3:2 Representing the Purchaser**

After the contract has been executed and delivered, the purchaser’s attorney must make sure that the purchaser makes prompt application for the mortgage commitment, promptly arranges for any inspections, and follows through on any other contract contingencies before the relevant contract deadlines expire.<sup>37</sup> The purchaser is obligated by the New York Multibar form and Form 316 to furnish any information required by the lender, to pay any fees of the lender, and to notify the seller of the name and address of the lender. A Local Practice Guide for all sixty-two counties in New York State is being compiled by the Real Property Law Section of the New York State Bar Association, to outline differences in practice, particularly between downstate and upstate, as to title and other searches and readings, mortgage satisfaction and recording practices, and closing fees, etc.<sup>37.1</sup>



**TIP:** If a written commitment is not obtained by the deadline, the purchaser’s attorney should be prepared to advise the purchaser of his rights and to extend the closing date if necessary.

Extensions must be in writing.

**§ 3:2.1 Review Mortgage Commitment**



**TIP:** When the mortgage commitment is received, it should be reviewed by the purchaser’s attorney before acceptance and signing by the purchaser, and a copy should be sent to the seller’s attorney after signing by the purchaser, if required by the contract (see paragraph 8 of the New York Multibar form and paragraph B of Form 316).<sup>38</sup>

The first step should be to compare it to the description set forth in the mortgage commitment clause in the contract of sale to determine whether the condition has been satisfied. Then the terms should be reviewed with the purchaser. If the principal amount is less than expected, arrangements must be made to obtain the necessary funds for the closing. Any interest rate options (for example, variable rates)

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37. See Stein, *Preparing for the Commercial Real Estate Closing (Parts I and II)*, 15 PRAC. REAL EST. LAW. 67 (July 1999) and 79 (Sept. 1999).

37.1. See NYSBA REAL PROPERTY LAW SECTION, <http://www.nysba.org/rpls/>.

38. See generally Edwards, *Commercial Mortgage Loan Commitments: A Borrower’s Perspective*, PROB. & PROP. 28 (July/Aug. 1994).

should be discussed. Prepayment rights and any prepayment penalties should be noted.<sup>39</sup> Sometimes the amount of the penalty is negotiable. Late charges should be noted.<sup>40</sup> Fees charged by lenders have been challenged.<sup>41</sup> If the loan is to be nonrecourse (that is, there is to be no personal liability and recourse is to be limited to the real property), that should be specified in the commitment. See section 2:2.5. Escrow deposits for taxes and insurance may be required.<sup>42</sup> Flood insurance may be required in vulnerable areas.<sup>43</sup>

The federal Truth-in-Lending Act (TILA) requires that lenders disclose to residential borrowers on a Good Faith Estimate (GFE) form information that they can use to compare credit terms and costs, and there are penalties for failure to do so.<sup>44</sup> TILA was amended in

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39. See *supra* section 2:2.5[B], note 101. *But see* A&R Kaliminian, LLC v. Breger, Gorin & Leuzzi, LLP, 763 N.Y.S.2d 52 (1st Dep't 2003) (alleged failure to renegotiate prepayment penalty did not cause harm because client knew bank regarded it as nonnegotiable).
40. See *supra* section 2:2.5[A], note 89.
41. Dougherty v. N. Fork Bank, 753 N.Y.S.2d 130 (2d Dep't 2003) (mortgagee prohibited from charging facsimile fee, but not prohibited from charging attorney fee for preparation of satisfaction); Kidd v. Delta Funding Corp., 751 N.Y.S.2d 267 (2d Dep't 2002) (fact issues existed whether lender's charging illegal processing fees was deceptive).
42. Interest must be paid by a mortgage investing institution on escrow deposits for real property tax or insurance premiums for a one- to six-family residence occupied by the owner. N.Y. BANKING LAW §§ 6-k and 14-b; N.Y. GEN. OBLIG. LAW § 5-601. Annual statements of account must be furnished. N.Y. REAL PROP. TAX LAW §§ 952–59. See *infra* sections 3:2.5 and 4:1.7.
43. See Steen, *What Real Estate Lawyers Ought to Know About Flood Insurance*, 24 N.Y. REAL PROP. L.J. 82 (Summer 1996).
44. 15 U.S.C. §§ 1601 *et seq.* It is implemented by Regulation Z. 12 C.F.R. § 226, which was amended in 1996 to relax penalties for minor disclosure mistakes. 61 Fed. Reg. 49,237 (Sept. 19, 1996). See Appendix Z5; Pechinski v. Astoria Fed. Sav. & Loan Ass'n, 238 F. Supp. 2d 640 (S.D.N.Y. 2003) (charge for assignment of home mortgage was neither a finance charge nor a prepayment penalty, and thus not required to be disclosed); Rochester Home Equity, Inc. v. Upton, 767 N.Y.S.2d 201 (Sup. Ct. Monroe Cty. 2003) (disclosures pursuant to federal law should have preceded lock-in agreement); McAneny v. Astoria Fin. Corp., 357 F. Supp. 2d 578 (E.D.N.Y. 2005) (mortgagors' claims that fees charged when they prepaid their loans were undisclosed charges and prepayment penalties survived dismissal under TILA, but not under RESPA or FDCPA); JP Morgan Chase Bank v. TECL, 24 A.D.3d 1001, 808 N.Y.S.2d 432 (3d Dep't 2005) (de minimis inaccuracies in disclosure statement did not violate TILA); La Salle Bank Nat'l Ass'n v. Kosarovich, 31 A.D.3d 904, 820 N.Y.S.2d 144 (3d Dep't 2006) (fact issues as to counterclaim that lender misrepresented to borrower terms of refinancing of mortgage in violation of TILA); Seaquist & Bramhandkar, *The Whole Truth? The Problem with "Truth in Lending,"* N.Y. ST. B.A. J. 30 (June 2006) (describing problems with TILA calculations); Ngwa v. Castle Point

2008 to require additional disclosures for loans secured by the dwelling of a consumer where the annual rate of interest is variable.<sup>45</sup> Regulation Z was amended by final rule on July 30, 2008 to add four key protections for a newly defined category of “higher-priced mortgage loans” secured by a consumer’s principal dwelling: (1) prohibiting a lender from making a loan without regard to the borrower’s ability to repay the loan from income and assets other than the home’s value; (2) requiring creditors to verify the borrower’s income and assets; (3) banning any prepayment penalty if the payment can change in the initial four years; and (4) requiring creditors to establish escrow accounts for property taxes and insurance of all first-lien mortgage loans.<sup>46</sup> Effective January 30, 2011, TILA was amended to require delivery of more detailed, easier-to-read disclosures in spreadsheet style, including estimates of escrows for taxes and insurance, and maximum interest rates and monthly payments for adjustable rate loans.

The Real Estate Settlement Procedures Act (RESPA) requires delivery of good-faith estimates of settlement charges within three days after submission of a written loan application.<sup>47</sup> Disclosures under TILA and RESPA must be made before borrower signs a rate lock-in agreement.<sup>48</sup> As of October 3, 2015, under the new TRID (TILA-RESPA Integrated Disclosure) Rules the four previously required disclosure forms, including the GFE, have been replaced with two:

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Mortg., Inc., 2008 U.S. Dist. LEXIS 63552 (S.D.N.Y. Aug. 20, 2008) (disclosure at closing satisfied TILA where borrower did not have commitment letter and was not contractually obligated until the closing); *Accredited Home Lenders, Inc. v. Hughes*, 22 Misc. 3d 323, 866 N.Y.S.2d 860 (Sup. Ct. Essex Cty. 2008) (mortgagee’s production of mortgagors’ acknowledgments that they received notice of right to rescind sufficient to defeat defense alleging violation of TILA in foreclosure action); *Holbert v. Fremont Inv. & Loan*, 102 Cal. Rptr. 3d 370, 179 Cal. App. 4th 1067 (2009) (costs of paying prior loan and prepayment penalty on another prior loan did not count against the 8% threshold for HOEPA disclosures); *Jesinoski v. Countrywide*, 135 S. Ct. 790 (2015) (sufficient under TILA to send disaffirming letter within three years of the making of the loan, rather than commencing an action for rescission); Bailey & Treiman, *The Most Significant Title and Foreclosure Cases of the Past Year*, 44 N.Y. REAL PROP. L.J. 20 (Summer 2016) (criticizing *Jesinoski*).

45. Mortgage Disclosure Improvement Act of 2008, Pub. L. No. 110-289.
46. Fed. Reg. 44,522 (July 30, 2008). The new rules took effect on October 1, 2009, except for the escrow requirement, which was phased in during 2010. For the 2010 GFE form, see *infra* Appendix Z10. For the 2015 disclosure forms, see *infra* section 4:2.2.
47. 12 U.S.C. §§ 2601 *et seq.* See Appendix Z5. For the 2015 disclosure forms, see *infra* section 4:2.2.
48. *Rochester Home Equity, Inc. v. Upton*, 1 Misc. 3d 412, 767 N.Y.S.2d 201 (Sup. Ct. Monroe Cty. 2003).

(1) the Loan Estimate and (2) the Closing Disclosure.<sup>48.1</sup> No mortgage broker or mortgage banker may require the use of a particular title insurance company, agency, or agent as a condition for approval of a mortgage loan.<sup>49</sup> The federal Equal Credit Opportunity Act requires notification of approval or denial of the loan application within thirty days.<sup>50</sup> Any other deal points should also be included.



**TIP:** Purchasers have had some success in New York courts in cancelling their contracts of sale when lenders cancelled the mortgage commitments through no fault of the purchasers. See section 2:3.1.

### § 3:2.2 Order and Review Title Report

As soon as the mortgage commitment has been issued and accepted by the purchaser, the purchaser's attorney should order a title search. The custom as to who orders the title search varies geographically, but the purchaser's attorney should make sure that it is done.<sup>51</sup> The title company should be asked to send copies directly to the attorneys for the seller and the purchaser's lender. The search usually takes two weeks to complete. The only risk in ordering the report earlier is that a fee for the search may be charged if the sale falls through for lack of a mortgage commitment. Of course, if there is no mortgage contingency, the search can be ordered as soon as the contract is signed. The search can also be ordered before the contract is signed to assist in obtaining title and survey information that is otherwise unavailable. Title companies are an excellent source of information of many kinds.

In some areas, lawyers have traditionally served as title insurance agents for their clients. Acting in this dual capacity raises some ethical questions, which can generally be resolved by disclosure and

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48.1. See *infra* section 4:2.2.

49. N.Y. BANKING LAW § 595-a.

50. 15 U.S.C. § 1691(d)(1); *Titus v. Mortg. Enters., Ltd.*, 760 N.Y.S.2d 66 (2d Dep't 2003) (mortgagor expressly waived right to assert reliance on alleged verbal assurances from mortgagee's employee regarding loan approval date).

51. See *supra* section 2:3.2. A purchaser who failed to conduct a title search was presumed to have inspected and was charged with notice of facts a proper inquiry would have disclosed. *Tibby v. Fletcher*, 13 A.D.3d 877, 788 N.Y.S.2d 430 (3d Dep't 2004).

consent.<sup>52</sup> The attorney-agent would be well advised to use the RPLS model disclosure and consent form, and have it signed by the client.

The selection of the title company to do the search depends on many factors. The first question is whether to use the same company that insured the seller. Doing so usually expedites matters, and, if it is an acceptable company, is usually a sensible procedure. Some attorneys prefer as a matter of principle to have a different company do the search in order to have an unbiased report on the title (usually only in commercial sales, see discussion of “insurable title” under section 2:2.7[C]). The purchaser’s lender must also approve the title company.

When ordering the search, the purchaser’s attorney must make certain decisions and place specific orders with respect to the survey: that is, whether there is to be a new survey or whether the old survey is to be redated by inspection, and whether the survey must be guaranteed to the purchaser, his title company, or his lender. See section 2:2.7[D][4]. The attorney should also order searches for a certificate of occupancy; building, health, and housing code violations; fire and water department violations; sidewalk violations; real property taxes; and other matters that the title company is prepared to handle. The title company should also be asked to search for filings under the Uniform Commercial Code.

If property has ever been sold by New York City at auction, the attorney representing the purchaser should examine the City Auction Book for restrictive covenants. Such covenants are binding on a purchaser, although they often do not otherwise appear in the real estate records.<sup>53</sup>

Upon completion of the preliminary search of title, an abstract of title will be prepared. An abstract of title is a summary of the most significant aspects of deeds and other recorded instruments of title, arranged in chronological order. The abstract is intended to show the original source and incidents of title and all encumbrances, liens, charges and liabilities to which the property may be subject.<sup>54</sup> The abstract need not show the legal effect or validity of the instruments listed, and it is not an opinion of title.<sup>55</sup> It is customary in many areas

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52. See generally Coffey, *The Lawyer as Title Insurance Agent*, 36 N.Y. REAL PROP. L.J. 5 (Summer 2008); *Title Insurance: Disclosure to and Consent by Client*, 37 N.Y. REAL PROP. L.J. 42 (Winter 2009) (with RPLS model form of consent to attorney acting as agent). See also *supra* section 2:2.7[C], note 170.
53. See Kirschner, *Hidden Covenants Pose a Threat to Auction Purchases*, 200 N.Y. L.J., Nov. 16, 1988, at 36, col. 1.
54. MILTON R. FRIEDMAN & JAMES CHARLES SMITH, *FRIEDMAN AND SMITH ON CONTRACTS AND CONVEYANCES OF REAL PROPERTY* § 31:1 (8th ed. 2017).
55. 1 C.J.S. *Abstracts of Title* § 1 (2005).

for the seller to be required to deliver an abstract of title to the purchaser, either as the sole obligation or as an alternative to delivering a title insurance policy.<sup>56</sup> In most parts of the state, the insurer will issue a title report, usually in the form of a certificate of title or title commitment or binder, commonly called a “title report.” See section 2:2.7[C] for a discussion of provisions in the Erie and Monroe County contracts for title insurance to cure title objections.

A title insurance company has been held liable to a purchaser for negligence in failing to disclose the existence of a mortgage in a title report even where the purchaser did not order the report and had no privity with the title company.<sup>57</sup> However, there is usually a limitation of liability to a nominal amount in a title certificate or report, where no title insurance is purchased. A limitation of liability of \$1,000 in a certified title search has been upheld.<sup>58</sup> Note that the ALTA Certificate of Title provides that any claim arising by reason of the issuance of the certificate shall be restricted to the terms and conditions of the standard form of insurance policy, which itself limits all claims, whether or not based on negligence, to the amount of the insurance. A cause of action for negligence in searching title does not lie in an action on the policy, because the certificate of title provides that it is void upon issuance of the policy and the contract of insurance is distinct and separate from the contract of searching.<sup>59</sup>

When the title report arrives, it should be reviewed promptly, particularly noting any conditions to effectiveness and any expiration

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56. See, e.g., contracts for Capital Region, New York (Appendix C2), Erie County, New York (Appendix C3) and Monroe County, New York (Appendix C5).
57. *Kidd v. Havens*, 171 A.D.2d 336, 577 N.Y.S.2d 989 (4th Dep’t 1991) (contract required seller to furnish title abstract, and court found that the title company was aware that a purchase was pending and that an unidentified purchaser would rely on the report); *Fidelity Nat’l Title Ins. Co. v. N.Y. Land Title Agency LLC*, 121 A.D.3d 401, 994 N.Y.S.2d 76 (1st Dep’t 2014) (title insurer sufficiently alleged that agent knowingly failed to report underlying mortgage and misrepresented that insured mortgage would have first position); *JP Morgan Chase Bank, N.A. v. Hall*, 122 A.D.3d 576, 996 N.Y.S.2d 309 (2d Dep’t 2014) (provider of abstract and title report owed duty of care to purchaser).
58. *Morgan v. Commonwealth Land Title Ins. Co.*, Index No. 1846/89 (Sup. Ct. N.Y. Cty. 1992) (Saxe, J.) (citing *L. Smirlock Realty Corp. v. Title Guarantee Co.*, 70 A.D.2d 455, 466 (2d Dep’t 1979), *modified on other grounds*, 52 N.Y.2d 179 (1981)). In *Smirlock*, the Appellate Division, Second Department, said that “It has been uniformly held that the liability of an abstractor may be limited and controlled by the contract regardless of whether the action is on the contract or in negligence.”
59. *Citibank v. Chi. Title Ins. Co.*, 214 A.D.2d 212, 632 N.Y.S.2d 779 (1st Dep’t 1995).

date.<sup>60</sup> Complete copies of any documents referred to in the title report should be obtained, because a purchaser has been held to have a duty to do so.<sup>61</sup> A copy of the title report should be sent to the seller's attorney, with a letter calling attention to any unusual or unexpected problems. A copy should also be sent to the attorney for any new lender. Note particularly whether there are completed reports on all the various searches ordered. A list should be made of the expected action on all items, that is, whether they will be omitted or excepted from the insurance policy and whether any affirmative insurance will be provided as to any exceptions. Title insurance endorsements should be considered. See section 2:2.7[E][3].

The purchaser's attorney should monitor the progress of the clearing of any title objections. As matters are cleared up, particularly with respect to affirmative insurance, supplemental reports or confirming letters should be obtained from the title company. The purchaser's attorney should make sure that the lender's requirements are satisfied and that the proposed method of clearing title objections is acceptable.

Affirmative insurance may be advisable in connection with ownership by a partnership to protect against denial of liability because of (1) transfers of partnership interests on the ground that the old partnership named as insured in the policy was terminated and a new one formed (the "Fairway" problem),<sup>62</sup> and (2) imputation of knowledge of the old partners to a new partner acquiring an interest in the partnership (the "nonimputation" waiver).<sup>63</sup>

If a condominium unit is being purchased, the title company should be asked for affirmative insurance that the condominium was and still is validly created.

If the premises are not in New York, the purchaser's attorney should determine whether a "New York style" closing will be possible (that is, one in which insurance becomes effective upon delivery of the executed documents to the title closer, regardless of how much time elapses before he records the documents, covering the "gap"

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60. For detailed analysis of sample title reports, see 1 N.Y. PRACTICE GUIDE: REAL ESTATE § 4.07[2] (1986); K. HOLTZSCHUE, REAL ESTATE TRANSACTIONS: PURCHASE AND SALE OF REAL PROPERTY § 9.05.

61. M.R.M. Realty Co. v. Title Guar. & Tr. Co., 270 N.Y. 120 (1936).

62. Fairway Dev. Co. v. Title Ins. Co., 621 F. Supp. 120 [N.D. Ohio 1985]. See discussion of endorsements under 2006 ALTA title insurance policy in *supra* section 2:2.7[E][3].

63. See Colavito, *Transfers of Partnership Interest Raise Title Insurance Concerns*, 16 N.Y. ST. B.A. REAL PROP. L. SEC. NEWSL., Apr. 1988, at 13. See discussion of endorsements under 2006 ALTA title insurance policy in *supra* section 2:2.7[E][3].

between (a) the closing and simultaneous dating of the policy and (b) the recording of the documents).<sup>64</sup> If not, arrangements must be made in advance for simultaneous recording of documents at the appropriate recording offices and preclosing of documents and procedures.

**§ 3:2.3 Prepare New York State Gains Tax Questionnaire**

**NOTE:** The New York State real property transfer gains tax was repealed, effective June 15, 1996. See section 2:2.15[B].

**§ 3:2.4 Prepare Closing Checklist**



**TIP:** The purchaser's attorney should prepare a closing checklist in advance of the closing by rereading the contract of sale and extracting all the closing requirements.

It should cover requirements of the seller and the purchaser, as well as the title closer and the purchaser's lender. For a closing checklist based on NYBTU Form 8041, see Appendix T. For Forms 154 and 3125, see sections 10 and 11 of Appendices K and L. Separate checklists for preparing for the closing and for attendance at the closing are advisable. Items for the preparatory checklist are discussed in this chapter, and they are listed in section 8 of Appendix B. The closing items are discussed in chapter 4, and they are listed in section 9 of Appendix B.

**§ 3:2.5 Verify Representations and Review Deed, Mortgage Loan Documents, and Other Closing Documents**

The purchaser's attorney should assist the purchaser in verifying all representations, warranties, and other promises made by the seller in the contract. See section 2:3.24. This process is usually referred to as doing "due diligence."<sup>65</sup> Some representations can be confirmed by reference to the title report, such as access to a public road, seller's being the sole owner, and tax exemptions and abatements. Others may

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64. See New York coverage endorsement to the 1987, 1992, and 2006 ALTA title insurance policies (Appendices O, P, and P1).

65. Jacobson, *A Narrative Real Estate Acquisition Due Diligence Checklist*, 17 PRAC. REAL EST. LAW. 7 (Nov. 2001); Saltz, *The Essentials of Due Diligence*, 22 PROB. & PROP. 32 (May/June 2008).

be confirmed by certificates or affidavits. An income-producing property usually requires extensive verification of the status of tenants, leases, related contracts, and income and expense items.

The purchaser's attorney should request drafts of the deed and other closing documents for review prior to the closing. The form of deed called for in the contract should be used. The name of the grantee, or grantees, on the deed should be exactly correct. Use of middle initials is desirable to make names more distinctive. If more than one person is the grantee, the nature of their relationship should be specified. If it is not, they will be considered to be tenants in common,<sup>66</sup> and their interests will be presumed to be equal.<sup>67</sup> If they are married, it is sufficient to add words to that effect, such as "husband and wife," to create a tenancy by the entirety.<sup>68</sup> The residence addresses of the parties, the city or town and village of the premises, and the tax map designation must be stated.<sup>69</sup> The legal description of the land in the deed should match the description in the contract and the description in the title report. The attorney should make sure that the seller's title, if any, to the center line of street beds is included.

If an existing mortgage is to be assumed (that is, title is not merely taken subject to the mortgage), the deed or other recorded document must document the assumption.<sup>70</sup> An assignment of any escrow deposits should be delivered in a form satisfactory to the existing mortgagee.

In jurisdictions like New York, where there is a significant mortgage recording tax, the purchaser's attorney should try to arrange for any existing mortgagee whose mortgage is to be paid to assign the mortgage to the new lender instead of satisfying the loan.<sup>71</sup> The purchaser's attorney should prepare a "255 affidavit" reciting that the mortgage recording tax on the existing mortgage has already been paid.<sup>72</sup>

The purchaser's attorney should also request copies of the mortgage loan documents for review in advance.<sup>73</sup> This often is not possible. If it

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66. N.Y. EST. POWERS & TRUSTS LAW § 6-2.2(a).  
 67. *Jackson v. Moore*, 94 A.D. 504, 67 N.Y.S. 1101 (3d Dep't 1904).  
 68. N.Y. EST. POWERS & TRUSTS LAW § 6-2.2(b). *But see Joseph v. Dieudonne*, 124 A.D.3d 601, 1 N.Y.S.3d 250 (2d Dep't 2014) (even if mother and second husband were not legally married, their purchase of property as husband and wife created a joint tenancy).  
 69. N.Y. REAL PROP. LAW § 333; *see also* FLA. STAT. ANN. § 695.21.  
 70. N.Y. GEN. OBLIG. LAW § 5-205. *See supra* section 3:1.5.  
 71. This will probably require a "275 affidavit." *See supra* section 2:2.6, note 127.  
 72. N.Y. TAX LAW § 255.  
 73. For analysis of the 2001 FNMA/FHLMC mortgage form, *see* Baum, *FannieMae/FreddieMac Mortgage*, N.Y. REAL PROP. L.J. 26 (Winter 2002).

is, the documents should first be compared with the commitment for consistency with its terms. Note the discussion at the beginning of section 3:2.1 as to prepayment rights and penalties, late charges, and nonrecourse provisions. If real property tax or insurance premium escrow deposits are required in the mortgage loan documents, the purchaser should make sure that they earn interest for the benefit of the purchaser.<sup>74</sup> Institutional holders of New York mortgages on one-to six-family residences are regulated with respect to several matters, except as otherwise provided by federal law:

- (1) a prepayment penalty cannot be imposed with the exercise of the due-on-sale clause;<sup>75</sup>
- (2) a limit on late charges to 2%, and a minimum fifteen-day grace period;<sup>76</sup>
- (3) the right to copies of appraisal and consumer reports;<sup>77</sup>
- (4) no fee is allowed where the mortgagor pays taxes;<sup>78</sup>
- (5) on tax escrow accounts a minimum interest required;<sup>79</sup>
- (6) insurance escrow accounts;<sup>80</sup>
- (7) no prepayment penalty after one year if the interest rate exceeds 6% per annum;<sup>81</sup> and
- (8) interest on escrow accounts.<sup>82</sup>

When a mortgage investing institution pays insurance bills directly, a notice of cancellation for nonpayment is invalid if it is not sent to both the insured mortgagor and the mortgage investing institution or its designated agent.<sup>83</sup> As to federal savings banks and federal savings associations, state law on prepayment, late charges, and mortgage

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74. Randolph, *The Mortgagee's Interest in Casualty Loss Proceeds: Evolving Rules and Risks*, 32 REAL PROP. PROB. & TR. J. 1 (1997).

75. N.Y. REAL PROP. LAW § 254-a.

76. *Id.* § 254-b.

77. *Id.* § 254-c.

78. *Id.* § 254-d; Standard Fed. Bank v. Healy, 7 A.D.3d 610, 777 N.Y.S.2d 499 (2d Dep't 2004) (mortgagee did not breach contract of fiduciary duty by paying taxes to wrong town and making premature tax payment; mortgagor suffered no actual damages and adverse credit rating was corrected).

79. N.Y. REAL PROP. TAX LAW §§ 952-59.

80. N.Y. BANKING LAW § 6-k; Jacobson, *Another Regulatory Burden: New Requirements Governing Real Property Insurance Escrow Accounts*, 21 N.Y. ST. B.A. REAL PROP. SEC. NEWSL., Spring 1993, at 29.

81. N.Y. GEN. OBLIG. LAW § 5-501(3)(b). As to prepayment, see also *supra* section 2:2.5[B].

82. N.Y. GEN. OBLIG. LAW § 5-601.

83. N.Y. INS. LAW § 3425(n).

escrow accounts has been preempted. Federal rules permit a federal savings association to impose a fee on any prepayment<sup>84</sup> and to impose a late charge for a payment more than fifteen days late.<sup>85</sup> The Office of Thrift Supervision (OTS) takes the position that a late charge may not exceed 5% of the overdue payment. An OTS opinion letter of January 3, 1991, preempted New York requirements of payment of interest, prohibitions of charging of fees, and requirements of providing periodic written statements.

The purchaser should try to eliminate any due-on-sale clause. The purchaser should have notice of all defaults, other than payments of predetermined amounts (for example, fixed payments of principal and interest), and time to cure them (for example, ten days for monetary defaults, thirty days for nonmonetary defaults, and ninety days for bankruptcy filings by others).<sup>86</sup> If a nonmonetary default cannot be cured within thirty days, there should be no default if the purchaser commences cure within thirty days and diligently prosecutes the cure. The lender should not unreasonably withhold or delay any consents, and the lender's expenses of enforcement, including attorneys' fees, should be reasonable. Attorneys for lenders on home loans nearly always insist that no changes may be made in the loan documents. They nearly always win that argument, too, because the purchaser has so little bargaining power. The purchaser's main comfort is that as long as he makes the payments, he will probably never hear from his lender about anything else.

In connection with a loan for a commercial property, a lender sometimes will require an opinion of the borrower's counsel as to entity existence, due authorization, and enforceability, among other things.<sup>87</sup> For guidance in giving such an opinion, reference should be made to any relevant bar association reports, such as ACREL,<sup>88</sup>

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84. 12 C.F.R. § 560.34.

85. 12 C.F.R. § 560.33.

86. Note that the statutory form of New York mortgage has been interpreted to provide for no grace period for payment of principal. *Albertina Realty Co. v. Rosbro Realty Corp.*, 258 N.Y. 472, 180 N.E. 145, 250 N.Y.S. 841 (1932); N.Y. REAL PROP. LAW § 254(2) (1989 & Supp. 1994). To avoid this, "for \_\_\_ days" should be added after "principal."

87. *See, e.g.*, THOMPSON, REAL ESTATE OPINION LETTER PRACTICE (1993); *Remediation Capital Funding LLC v. Noto*, 147 A.D.3d 469, 46 N.Y.S.3d 606 (1st Dep't 2017) (where lender sued purchaser's attorney on opinion letter that loan would not violate any other contract, alleging that purchase contract was a sham, issue whether lender was justified in relying on opinion was a question for trier of fact; lender sufficiently alleged privity-like relationship with attorney for claim of negligent misrepresentation).

88. *The Attorney's Opinion Letter in Real Estate Transactions*, 4 ACREL PAPERS (1992), which includes the "Statement of Policy on Mortgage Loan Enforceability Opinions (12/91)" of the American College of Real Estate Lawyers.

NYSBA,<sup>89</sup> TriBar,<sup>90</sup> and the ABA.<sup>91</sup> A compilation of and topical guide to all the real estate and corporate opinion reports of bar associations throughout the nation was done in 1992 and 1993.<sup>92</sup> Numerous articles discuss the issues.<sup>93</sup>

If the purchaser is an entity, its attorney should remind the purchaser to arrange for all required signatures on and approvals of

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89. New York State Bar Association Real Property Law Section and the Association of the Bar of the City of New York Real Property Law Committee, *1998 Mortgage Loan Opinion Report*, 26 N.Y. REAL PROP. L.J. SPECIAL SUPPLEMENT (June 1, 1998), 334 REAL PROP. PROB. & TR. J. 551 (Fall 1998).
  90. TriBar Opinion Committee, *Third Party 'Closing' Opinions*, 53 BUS. LAW. 359 (1998).
  91. See especially the texts of and discussions of the ABA Legal Opinion Accord and the ABA Report on Adoption of the Accord for Real Estate Secured Transactions in 29 REAL PROP. PROB. & TR. J. (Fall 1994), including Holtzschue, *Opinions on Real Estate Secured Transactions in a Post-Accord World: The Opinion Giver's Perspective*, 29 REAL PROP. PROB. & TR. J. 655 (Fall 1994).
  92. "Opinions on Loans Secured by Real Estate: A Guide to the Reports of the Bar Associations," by the Subcommittee on Comparison of Opinion Reports of the ABA Real Property Section's Committee on Legal Opinions in Real Estate Transactions, June 30, 1992 and 1993 Update, Appendices 2D-3 and 2D-4 to chapter 2D, "Mortgage Loan Opinions," in REAL ESTATE TRANSACTIONS: REAL ESTATE FINANCING (Matthew Bender).
  93. Preble, *The Remedies of Opinion: Finding a User-Friendly Format*, 25 N.Y. REAL PROP. L.J. 130 (Fall 1997); Preble, *The Remedies Opinion Revisited: A Primer for Real Estate Lawyers*, 33 REAL PROP. PROB. & TR. J. 63 (Spring 1998); Levin, *Due Diligence, Legal Opinions and the Inclusive Opinion Report*, 14 PROB. & PROP. 27 (Sept./Oct. 2000); ACREL Attorneys' Opinion Letters Com. and ABA RPP&TL Com. on Legal Opinions in Real Estate Transactions, *Real Estate Opinion Letter Guidelines*, 38 REAL PROP. PROB. & TR. J. 241 (Summer 2003); Exell, Jacobson, Miller & Willis, *The Remedies Opinion and Customary Diligence—The Real Estate Secured Transaction Approach: Is It Consistent with Customary Non-Real Estate Legal Opinion Practice?*, 43 REAL PROP. TR. & EST. L.J. 1 (Spring 2008) (comparing the 1998 TriBar Report with the New York Mortgage Report, the ABA/ACREL All-Inclusive Opinion, and the RPTE/ACREL Real Estate Guidelines, the authors conclude that the real estate and non-real estate legal opinion practices are generally consistent); *Statement on the Role of Customary Practice in Preparation and Understanding of Third-Party Legal Opinions*, 63 BUS. LAW. 1277 (2008); Joint Drafting Committee, *Real Estate Finance Opinion Report of 2012*, 47 REAL PROP. TR. & EST. L.J. 213 (2012) (opinion by lead counsel for obligor); Joint Drafting Committee, *Local Counsel Opinion Letters in Real Estate Finance Transactions: A Supplement to the Real Estate Finance Opinion Report of 2012*, 51 REAL PROP. TR. & EST. L.J. (2016) (opinion by local counsel); Stein, *Model Opinion of Counsel*, 45 N.Y. REAL PROP. L.J. 5 (Winter 2017).

the mortgages.<sup>94</sup> Arrangements should be made to bring any required corporate seal to the closing.<sup>95</sup>

If the purchase involves a tenanted building, the purchaser's attorney should ask to review all the additional closing documents relating to the tenants (see section 2:4.4).

The purchaser's attorney should insist on reviewing as many of the closing documents in advance as possible.

### § 3:2.6 Calculate Apportionments

The seller's attorney should make the initial calculation of apportionments because he is more likely to have access to the necessary facts. See section 3:1.6 for a discussion of the mechanics of these calculations. The purchaser's attorney should review them. The best way to do this is to make the calculations independently. Each step should be written down separately. If there is disagreement among the attorneys as to the result, this will assist in discovering the steps on which they differ. One of the most common errors is to divide a tax payment by the wrong number of months (for example, dividing a semiannual payment by twelve months). Differences of a few dollars are not worth a great deal of argument. Note that paragraph 18(e) of New York Multibar form and paragraph 13 of NYBTU Form 8041 provide that any errors or omissions in computation are to be corrected and that that obligation survives the closing.



**TIP:** The attorneys should exchange their calculations of apportionments and agree to them in advance of the closing, keeping small discrepancies in perspective.

If the original closing date was adjourned or delayed, the contract provisions for apportionment may have to be reconsidered (see section 3:1.6).

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94. For a business corporation, unless the certificate of incorporation provides otherwise, the board of directors may authorize a mortgage without consent of the shareholders. N.Y. BUS. CORP. LAW § 911. For New York religious and not-for-profit corporations, see N.Y. RELIG. CORP. LAW § 12(1); N.Y. NOT-FOR-PROFIT CORP. LAW §§ 509, 511 and 511-a (effective July 1, 2014). For New York partnerships, see N.Y. P'SHIP LAW §§ 20 (general partnership), 98 (limited partnership). A purchase money mortgage to the seller by a religious corporation does not require court approval. N.Y. RELIG. CORP. LAW § 12(1). *See generally supra* section 2:3.5.

95. *See supra* section 3:1.5, note 16.



**TIP:** If the seller of a residence did not timely deliver a Property Condition Disclosure Statement, the apportionments should include a \$500 credit against the purchase price.

### **§ 3:2.7 Arrange for Opening Utility Accounts**

The purchaser should be reminded to arrange for opening of new accounts with all the appropriate utility companies for electric, water, gas, and telephone service. The seller will be asking for final readings and final bills for the utilities.<sup>96</sup> If a new account is not simultaneously opened, some utility companies may shut off service. Deposits are sometimes required in connection with opening a new account.

### **§ 3:2.8 Arrange for Issuance of Fire and Liability Insurance Policies**

The purchaser should be reminded to have fire and liability insurance policies issued or assigned to him before the closing.<sup>97</sup> The holders of any mortgages, including the seller, will probably want to have duplicate original policies delivered at the closing that name them as insureds pursuant to the standard mortgagee clause.<sup>98</sup> An unconditional certificate of insurance from the insurer may usually be substituted for an original policy. They will also probably want to see evidence that the first year's premium has been paid in full. If a condominium unit is being purchased, obtaining unit coverage from the insurer of the building should be considered, to prevent technical gaps in coverage.

### **§ 3:2.9 Arrange for Proper Closing Checks**



**TIP:** Delivering proper closing checks is the most important obligation of the purchaser and often results in difficulties and confusion. The contract requirements should be carefully explained to the purchaser and strictly followed (see the discussion of those requirements in section 2:2.4).

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96. See Augspach, *Water and Sewer Charges in New York City*, 35 N.Y. REAL PROP. L.J. 21 (Fall 2007).
97. See generally Speyer, *Property Insurance Aspects of Real Estate Practice*, 24 N.Y. REAL PROP. L.J. 75 (Summer 1996).
98. N.Y. INS. LAW § 3404(e). For a discussion of the benefits and limited nature of "additional insured" coverage, see Wood, *Insurance Pitfalls for the Additional Insured*, 20 N.Y. ST. B.A. REAL PROP. L. SEC. NEWSL., Apr. 1992, at 13.

The purchaser should be reminded that checks drawn by strangers to the transaction are not permitted, such as checks from the buyer of the purchaser's previous house. He should be warned that checks from money market funds and other investment vehicles may have to be cleared and reissued by a local bank to meet the contract requirements. Any problems should be discussed in advance with the seller's attorney. The purchaser's attorney should make sure that the limit on uncertified checks, usually for payment of apportionment of pre-paid items, can be met.



**TIP:** Remind the purchaser of a residence costing \$1 million or more to arrange for a certified check for payment of the 1% Mansion Tax, payable as indicated in TP-584.

### § 3:2.10 **Have Purchaser Inspect Before Closing**



**TIP:** The purchaser should be reminded to inspect the premises again just before the closing.

Ideally, he should do so on his way to the closing. The inspection should include running the appliances. This may seem embarrassing or somewhat insulting to the seller, but it is essential as a legal matter. The seller's obligation as to the condition of the premises usually does not survive the closing (see paragraph 11(e) of the New York Multibar form and paragraph I of Form 316). Paragraph 12 of the New York Multibar form and paragraph 21 of NYBTU Form 8041 provide that the premises and any personal property included in the sale be in the same condition as they were on the date of the contract, subject only to reasonable use, wear, tear, and natural deterioration. Paragraph 16(f) of the New York Multibar form and paragraph E of Form 316 provide that the systems and appliances be in working order at the closing (see the discussion in section 2:3.4). The purchaser should verify that any smoke or carbon monoxide detectors are installed, if required by law. Paragraph 16(d) of the New York Multibar form requires the seller to deliver the premises at the closing "broom clean."<sup>99</sup> The purchaser's preclosing inspection is intended to verify compliance with these requirements. If any discrepancies are found, the seller should be

99. *Novelty Crystal Corp. v. PSA Institutional Partners*, 49 A.D.3d 113, 850 N.Y.S.2d 497 (2d Dep't 2008) (provision obligating seller to deliver premises vacant and clean was not collateral to the transfer, and did not survive closing; "collateral" discussed).

notified and repair or money damages should be negotiated at or prior to the closing.

**§ 3:2.11 Schedule the Closing**

The time and place of the closing should conform to the contract requirements. Except in the rare cases where time is made of the essence, either party is entitled to a reasonable adjournment (see discussion in section 2:2.9).<sup>100</sup> Aside from delays in clearing title objections, the most likely obstacle to closing on the date set by the parties is the schedule of the purchaser's lender. The lender should be contacted as far in advance as possible to determine the availability of dates. This must then be coordinated with the schedules of the parties, their attorneys, and the title closer. Title closers are almost always available when requested. The purchaser's attorney is responsible for making the arrangements with the lender and the title closer. A routine house closing should take about an hour if everyone is properly prepared, most of the closing documents have been reviewed in advance and the apportionments previously settled.



**TIP:** If the seller refuses without good reason to cooperate in scheduling the closing, the purchaser may make time of the essence.

Having given such a notice, the purchaser must be careful to avoid further negotiation or other conduct that is inconsistent with the notice. See *supra* section 2:2.9.

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100. See Bargon, *Top Ten Reasons Closings Are Adjourned*, 37 NYSBA N.Y. REAL PROP. L.J. 35 (Fall 2009) (including not bringing proof of homeowners' insurance, not bringing photo ID, not bringing certified funds for transfer taxes, not allowing for deduction of closing costs from mortgage proceeds, and lender's closing letter showing legal fees due, indicating default).