Spring 2026

The
ABSTRACT

American College of Mortgage Attorneys

ACMA Fellows—Partner with the Best®

CONTENTS

President's Column

By: Dena M. Cruz, Senior Underwriting Counsel, Stewart Title Guaranty Company, San Francisco, CA

Dear Fellows:

It is a very exciting time to be in a leadership role with ACMA. Ideas imagined years ago have been implemented and are gaining momentum. Importantly, under the leadership of Past Presidents, **Andrew Palmieri** and **John Murphy**, we have seen mission-aligned growth throughout virtually every ACMA committee and initiative. For example:

Strategic Plan

In the fall of 2025, at the Annual Meeting in San Antonio, Texas, the Strategic Planning Task Force, under the leadership of Co-Chairs **Diana Palecek** and **Beth Lee**, presented ACMA's new strategic plan to the Board of Regents. The Board unanimously approved the new plan which now allows us to begin the next phase of the task force - Implementation. Special thanks to the task force members **Joy Barrist, Hilary Gevondyan, Cheryl Kelly, Judy Lam, James Papadimitriou, Jonathan Thalheimer, Brion Winters** and **Lydia Stefanowicz**, for the countless hours expended on developing and obtaining approval of ACMA's new strategic plan.

The next step in setting our strategic direction is to work with ACMA's committees in defining and implementing our short- term and long- term objectives. As such, ACMA has created a new committee, the "Strategic Plan Implementation Committee." Deftly led by Co-Chairs, **Diana Palecek** and **Wogan Bernard**, and Co-Vice Chairs, **Brion Winters** and **Hilary Gevondyan**, the Implementation Committee will provide advice and guidance in developing realistic action plans that further the goals and pillars contained in ACMA's new Strategic Plan.

Foundation

During the 2024-2025 ACMA year, then-ACMA President **John Murphy** created a task force to study the possibility of creating a supporting charitable foundation to launch new externally focused programs that are consistent with ACMA's mission. At the 2025 Annual Meeting in San Antonio, the ACMA Board of Regents authorized the incorporation of the ACMA

Foundation in the State of Georgia and the application to the Internal Revenue Service for tax-exempt status as a 501(c)(3) charitable foundation. The ACMA Foundation was incorporated with the Georgia Secretary of State on October 20, 2025, and its initial Board of Directors and officers adopted Bylaws, Governance Policies and Organizing Resolutions on December 10, 2025.

On January 9, 2026, ACMA Foundation filed an IRS Form 1023 – Application for Tax-Exempt Status with the Internal Revenue Service, with the Foundation being classified as a 509(a)(2) supporting organization carrying out and facilitating the exempt purposes of ACMA. A favorable IRS determination letter is anticipated by the Summer of 2026; however, the Foundation is now permitted to solicit charitable contributions, provided that it discloses that its tax-exempt status is pending. To lawfully solicit funds, 40 states (inclusive of the District of Columbia) require tax-exempt organizations to register with their state. The Foundation has engaged a third-party servicer to complete those applications.

Although ACMA and the Foundation are independent entities with independent boards, the two entities are inextricably connected. ACMA is the sole member of the Foundation, and consequently, the ACMA Board of Regents, acting at times through the Executive Committee, elects the Foundation's directors. In addition, ACMA and the Foundation maintain separate, independent finances; however, as a wholly-controlled entity, their financial statements may, but need not, be consolidated. ACMA and the Foundation intend to jointly hold Spring and Annual Meetings. They hope to license each other's work product and facilitate each other's projects and programs. ACMA and the Foundation are presently negotiating an Affiliation Agreement that will establish the parameters of their relationship and provide guidance for future leadership.

With the organizational work almost complete, on March 11, 2026, ACMA's Executive Committee, on behalf of ACMA, elected a new independent Board of Directors for the Foundation. The Directors will serve staggered terms that are subject to renewal and term limits as set forth in the Foundation's Bylaws. The new directors are **Ofonedu-Ime Goodwyn, Elizabeth Lee, Ken Miller, John Murphy, Diana Palecek, Andrew Palmieri, and Meg Scoopmire.** In mid-March, the Foundation Board of Directors held its first official meeting, at which it elected the following ACMA Fellows to be officers: President: Andrew Palmieri; Vice President: John Murphy; Treasurer: Ofonedu-Ime Goodwyn; and Secretary: Meg Scoopmire. The board also will meet in April in conjunction with the Spring Meeting.

As stated at the 2025 Annual Meeting, the mission of the Foundation is to (i) increase public knowledge of real estate finance law and practice through educational programs, (ii) advance the development of real estate finance law through research and development, (iii) deliver pro bono legal services in the area of real estate finance law, (iv) engage in community-based charitable endeavors, and (v) provide opportunities to individuals interested in real estate finance law. In furtherance of the Foundation's mission, the Foundation

Board will be meeting over the coming months to create volunteer committees to develop and implement the following projects: the creation of a Real Estate Finance Institute, a Real Estate Finance *Pro Bono* Clearinghouse, Scholarship and Pipeline Programs, and Community Outreach Programs. It intends to implement these projects through charitable solicitations, legacy-giving, and grant applications.

I am extremely appreciative of all the hard work **Andrew Palmieri, John Murphy** and **Management Solutions Plus** (**MSP**) have expended to create the Foundation. The Foundation furthers ACMA's Core Values and is consistent with the Pillars and Goals in ACMA's Strategic Plan. I am excited about all of the possibilities the Foundation can and will achieve!

Membership

ACMA's Membership Committee met earlier this year to review nominations for fellowship in the College. Under the leadership of ACMA President-Elect **James Papadimitriou**, the Membership Committee completed the laborious process of reviewing a large number of new Fellow applications, and I am happy to report that 19 new Fellows were selected for induction to the College. ACMA membership now exceeds 500 Fellows. A second round of solicitations for new Fellow applications soon will be underway. If you know of someone in your firm or company, within your jurisdiction or in another jurisdiction, who you think might be a good candidate for admission into the College, I encourage you to reach out to James or MSP to learn more about how to start the application process.

Now that the Membership Committee has acted on the most recent group of nominations, the Membership Engagement Committee led by **Joy Barrist** and **Philip Duffy** will be actively involved in on-boarding activities with the new Fellows, including encouraging them to join committees.

Future Meetings

I look forward to seeing many of you at our Spring Meeting, to be held **April 23-25, 2026**, at the historic Broadmoor in beautiful Colorado Springs, Colorado. In addition to the various governance meetings and two hours of high-quality CLE, the Spring Meeting will offer ample opportunities for our Fellows and their guests to enjoy one another's company at ACMA's receptions, excursions and dine-arounds. The Broadmoor is known for its beautiful grounds, well-appointed rooms, attentive service and excellent dining opportunities, so this Spring Meeting should prove to be a very productive and fun meeting for everyone who is able to attend. Also, if you wish to play golf at the Broadmoor with a group of other Fellows and spouses/guests, please reach out to ACMA's Golf Czar, Brion Winters, who is planning an informal Spring tournament during the meeting for all who are interested.

This Fall, **September 17-19, 2026**, we will hold our Annual Meeting at the Ritz-Carlton Bacara in Santa Barbara, California. I am very excited about this choice of venue, as I graduated from UCSB and began my legal career at a firm in Santa Barbara. Whether you are wine touring, golfing at the adjacent Sandpiper golf course, playing pickleball, shopping in its historic downtown or just lounging by the

2026
REGIONAL CHAIRS

Alabama, *Christina A. Graham*
Alaska, *Sarah C. Gillstrom*
Alberta, *Michael L. Dyck*
Arizona, *Craig K. Williams*
Arkansas, *J. Cliff McKinney III*
British Columbia, *David R. Bain*
California, *Caroline W. Dreyfus*
Colorado, *Joseph E. Lubinski*
Connecticut, *Jane E. Ballerini*
Delaware, *Sara T. Wagner*
District of Columbia, *Julia E. Schmidt*
Florida, *Jin Liu*
Georgia, *Johnny D. Latzak, Jr.*
Hawaii, *Terri Ann M.K. Motosue*
Idaho, *David S. Jensen*
Illinois, *Michael J. Delrahim*
Indiana, *Jeffery C. Dack*
Iowa, *Hallie E. Still-Caris*
Kansas, *Matthew S. Gough*
Kentucky, *Amanda L. England*
Louisiana, *Susan M. Tyler*
Maine, *Jason G. Howe*
Manitoba, *John D. Stefaniuk*
Maryland, *Benjamin A. Kelley*
Massachusetts, *Wendy M. Fiscus*
Mexico, *Rolando Christian Escalante Aguilar*
Michigan, *Howard B. Goldman*
Minnesota, *David A. Meyer*
Mississippi, *Ann C. Taylor*
Missouri, *Cheryl A. Kelly*
Montana, *Kevin Heaney*
Nebraska, *Matthew J. Kivett*
Nevada, *Douglas C. Flowers*
New Hampshire, *James D. Kerouac*
New Jersey, *Jeffrey A. Petit*
New Mexico, *Debora E. Ramirez*
New York, *Andrew L. Jagoda*
North Carolina, *Christopher M. Celio*
North Dakota, *Jeremy D. Holmes*
Nova Scotia, *(Vacant)*
Ohio, *Julie A. Schoepf*
Oklahoma, *Michael S. Laird*
Ontario, *C. Mario Paura*
Oregon, *David A. Hepler*
Pennsylvania, *Dominic J. De Simone*
Puerto Rico, *Pedro A. Morell*
Quebec, *Philipp Duffy*
Rhode Island, *Amy T.M. Oakley*
Saskatchewan, *Michael W. Milani, K.C.*
South Carolina, *Mark S. Sharpe*
South Dakota, *Amy L. Arndt*
Tennessee, *Brooks R. Smith*
Texas, *Dawn M. Lewallen*
Utah, *Landon A. Hardcastle*
Vermont, *Andre D. Bouffard*
Virginia, *Kellye Curtis Clarke*
Washington, *Virginia M. Pedreira*
West Virginia, *Joyce F. Ofsa*
Wisconsin, *Brenda Stugelmeyer*
Wyoming, *Dale W. Cottam*

infinity pool, there is something for everybody to do in beautiful Santa Barbara.

Future Changes

As many of you have become aware, after 10 years as ACMA's Executive Director and almost 50 years in association management, **Chip Deale** has made the decision to retire at the end of this year. All of us want to express our sincere gratitude to Chip for his able leadership in managing the day-to-day affairs of the College since February 2017. Because of his tireless leadership, steady wisdom and endless dedication to the College, every corner of the College has flourished under his leadership. Chip is leaving a legacy that will continue to grow long after today.

Jennifer Lynch will succeed Chip as ACMA's new Executive Director. Jennifer joined the staff of MSP in June 2025, bringing over 20 years of association management experience to MSP. Most of her expertise comes from having worked with professional societies, including the American Health Law Association and the American Immigration Lawyers Association, where she served as Senior Director of Governance and Component Relations and Director of Membership. Additionally, she has managed membership and governance activities at associations in the finance and education industries. She has an extensive background in membership recruitment and retention, leadership training and development, and is known for her strategic mindset and collaborative leadership style. Please make a point of saying hello to Jennifer at the Spring Meeting. If you can't join us in Colorado, I am sure a short "Welcoming Note" will be appreciated, or you can meet her at the September Annual Meeting.

I also wish to express my appreciation for the long-standing commitment made by MSP to provide high quality client service support to ACMA. Thank you, **Chip Deale, Linda Bernetich, Dawn Rosenfeld, Zachary Jarman, Stephen Froehlich, Caroline Bentley, Victoria Baltz,** and **Deryck White.** I have no doubt that MSP will continue to be our "partner," providing excellent support and services to ACMA and the Foundation.

Final Thoughts

As my message to you draws to a conclusion, I would be remiss if I did not highlight the work of our *Abstract* editorial team, led by Editor-in-Chief, **Linda Koffman**, with Final Copy Editor **Sara Toner Wagner, and Candace Cunningham and Laura McClellan, as Assistant Editors,** *The Abstract* team strives to provide us with cutting edge articles that are practical and useful in our Fellows' practice areas. I particularly appreciate their continued promotion of ACMA's new Fellows. This outreach furthers ACMA's Core Values: *Collegiality, Business and Professional Development, Knowledge and Respect.* New and returning Fellows, if you (or a prospective new Fellow you would like to nominate for induction into the College) are interested in submitting an article to *The Abstract* or serving on *The Abstract* Subcommittee, please reach out to Linda. The editors will appreciate hearing from you!

There are many reasons to be excited about the future of the College. With a growing membership base, strong committees, sustainable budget and the development of the Foundation, ACMA appears to be well positioned for a bright future as it seeks to implement ACMA's new strategic plan.

Thanks for your support of the College and its mission to partner with the best!

Very Respectfully,

Dena M. Cruz
ACMA President 2026

Executive Director's Report

By Chip Deale, FASAE, CAE (Ret.)

"Did You Know?" – The Sequel!

For some movies, just one version isn't enough (at least in the minds of the studios and directors, if not the audiences!). Instead, there has to be at least one sequel – if not multiple – to the original. For example, my adult-age daughters and I are big fans of the *Toy Story* franchise, which began 30 years ago, and has had three sequels and one spin-off film, with another sequel scheduled for this year.

So, you might ask, how does that apply at all to ACMA? Here's the explanation. In 2020, during his term as President, the delightful Norm Roos and I had very frequent phone calls with one another on a wide range of ACMA-related matters. On one of those calls, Norm was seeking to find some information on a particular Fellow and couldn't locate it. When I, as diplomatically as possible, pointed out that what he sought was posted on the ACMA website, Norm proclaimed, "I didn't know that!"

The thought then occurred to me that if someone as long-active in the College as was Norm wasn't aware of all that the then-website offered, then how likely was it that less-engaged Fellows would know what's available. As a result, in my column in the Spring 2020 edition of *The Abstract,* I raised and answered the question of "Did you know?" about a variety of material that Fellows could tap into on the site and put to use in their day-to-day work.

Fast forward six years to today. Not only has ACMA added quite a few new Fellows during the past half-dozen years, but it also launched a new website last July with more streamlined navigation and a focus on the resources that Fellows most often tap into. But, many of you likely aren't fully aware of the new site's features and capabilities. Thus – voila! – the sequel! This column offers a convenient opportunity to inform you of a sampling of the wealth of resources available to you on the website.

For example, ***"Did you know?"***. . .

That there is a Fellows-Only User Guide to help you navigate around and locate key features of the site? Take a few minutes to click through the slides in the guide book for a quick tutorial.

And did you know . . . that if you're looking to locate information on an ACMA Fellow and/or refer business to another member, you can "Connect with a Fellow" to view their profile, and the Business Referral Program reporting form literally takes seconds to complete and submit? While you are on that page, read the testimonials from a few Fellows about the value they (and their firms) receive from the program.

Did you know . . . that your complimentary access to the digital/web-based *Mortgage Law Summary* is just a click away via the single sign-on link ("ACMA Fellows Login Here") on the MLS page?

Also, did you know . . . that the **Resources** navigational tab (top-right of every page on the site) has drop-down options that will redirect you to past editions of *The Abstract*, the ACMA Blog (offering succinct posts authored by Fellows on recent cases, statutes and industry trends), and **CLE Material** (from previous Annual Meetings, Spring Meetings and Webinars)?

In addition, did you know . . . that the charters for ACMA's committees (describing their purpose) and the rosters for each of the committees are posted in the Volunteer section of the site? If you are interested in becoming engaged with a committee, fill out and submit the Volunteer Involvement Form – or just contact the ACMA office to express your interest.

Finally, did you know . . . that on your personal Profile page (link to it is a drop-down under the Fellows Only navigational tab) you can access all emails that have been sent to you by ACMA (in case you've missed any or they've been blocked by your spam filter) and view invoices that either are pending or have been paid (if you need receipts or documentation)? Click the "Email History" and "Invoices" tabs above your name and headshot on the page. Also, take the time to make sure your profile is fully populated – that's the information that other Fellows see when they search for you.

All of the preceding just touches upon the vast array of resources on the website that you can leverage for your benefit. Take a "test drive" around it and see what you can discover! Bookmark your favorite pages for easy access in the future. And, if you need more help, email Linda Bernetich or me or call us at the ACMA office. We'll be glad to say, "Did you know . . .?"!

Thanks, as always, for your support of ACMA!

Editor's Notes

By: Linda S. Koffman, Smith Gambrell & Russell LLP, Los Angeles, California

I am pleased to present the Spring 2026 issue of *The Abstract*.

Spring Articles

The first article is a collaboration among **J. Cliff McKinney III of Quattlebaum, Grooms & Tull PLLC in Little Rock, Arkansas, Julia Forrester Rogers of SMU Dedman School of Law in Dallas, Texas, and David S. Jensen of Parsons Behle & Latimer in Boise, Idaho,** and discusses the Uniform Mortgage Modification Act (UMMA), which the Uniform Law Commission developed to establish "safe harbors" for common mortgage modifications, ensuring these changes do not jeopardize the validity or priority of the underlying mortgage. UMMA aims to reduce transaction costs, deter unnecessary litigation, and make it easier for lenders and borrowers to negotiate practical loan workouts that can prevent defaults and foreclosures. In this article entitled *"Any Port in a Storm: Exploring the Safe Harbors of the Uniform Mortgage Modification Act",* the authors explore the legal and practical challenges that prompted UMMA's drafting, the structure of the Act, and its implications for lenders, borrowers, and their counsel.

In *"Full Rent Acceleration as Enforceable Liquidated Damages in Commercial Leases: What Massachusetts' High Court Means for Risk Allocation and Drafting"* **Francesco A. (Frank) De Vito, Partner at Verrill Dana LLP in Boston, Massachusetts,** discusses the recent Massachusetts Supreme Judicial Court opinion in Cummings Properties LLC v. Hines wherein that Court upheld the enforceability of a full rent acceleration clause in a commercial lease as liquidated damages, affirming that such clauses are not inherently penalties and do not require a landlord to relet the premises. That Court applied a "single look" approach, focusing on the circumstances at contract formation. It concluded that actual damages resulting from the default were difficult to ascertain at lease signing and the liquidated damages provision was a reasonable forecast of anticipated damages, even if it resulted in a windfall for the landlord.

Next in his series of issues relevant to those in retirement or looking forward to retirement, **Ned W. Graber, retired from AIG Investments,** discusses various ways to make and the tax implications of lifetime gifts to children and grandchildren, including payments for education, expansions to 529 plans in the 2025 tax bill, the new Trump accounts, and methods to help an adult child or grandchild buy a house in his article entitled *"Warm Hand Gifts to Children and Grandchildren."*

Wendy S. Gibbons, Senior Vice President in Corporate Underwriting, and Dawn M. Lewallen, Senior Division Underwriter, National Commercial Services, both of First American Title Insurance Company discuss several less commonly requested ALTA Loan Policy endorsements that may be relevant in commercial financing transactions, depending on the transaction structure, in their article entitled *"Not Your Standard Loan Policy Endorsements: Specialized Endorsements that Supercharge Loan Policies in Commercial Financing Transactions".* This article highlights how these endorsements address deal-specific risks and outlines the underwriting considerations that affect their availability and use.

Finally, **John D. Stefaniuk, Partner at Thompson Dorfman Sweatman LLP in Winnipeg, Manitoba, Canada** discusses the restrictions on alienation of First Nations reserve land under the Indian Act (Canada) in his article entitled *"Mortgage Financing on Reserve Lands in Canada".* These restrictions create unique challenges to both borrowers and lenders. The evolution of First Nations land codes address some of those issues and create new ones. This article is an introduction to the considerations in real property lending on reserve land.

New Fellows

Next, in our series of articles from Fellows elected to ACMA in 2025, we include six short articles which highlight some of their respective areas of professional expertise.

In his article *"The Equal Credit Opportunity Act and Spousal Guaranties",* **Jonathan D. Block of Honigman LLP in Bloomfield Hills, Michigan,** examines how the current split in the circuit courts regarding the interpretation of The Equal Credit Opportunity Act and Regulation B relating to spousal guaranties has resulted in confusion for lenders, borrowers, spousal guarantors and attorneys alike. This article will provide a brief overview of the history of The Equal Credit Opportunity Act, the leading case law on the subject and steps need to be taken to rectify the statutory–regulatory mismatch.

Amy H. Clayton and J. Whitney McGreevy of Womble Bond Dickinson (US) LLP in Greenville, South Carolina explore the nuanced and often complex aspects of South Carolina property tax law in their article entitled *"SC Property Owners and Tenants Beware of Potential Property Tax Consequences"*. It addresses a variety of common scenarios, including property transfers, rollback taxes, fee-in-lieu-of-tax (FILOT) projects, and the allocation of tax responsibilities under lease agreements, while highlighting common pitfalls property owners, tenants, and practitioners should avoid.

In her article entitled *"Federal Intervention in Housing: The Evolving Roles of Canada Mortgage and Housing Corporation (CMHC) and Build Canada Homes (BCH)"* **Stella Di Cresce of Stikeman Elliott LLP in Toronto, Ontario, Canada** examines how Canada's federal housing strategy is increasingly reshaping real estate finance through the expanding role of Canada Mortgage and Housing Corporation (CMHC) and the launch of Build Canada Homes, signaling a more interventionist approach to housing supply and affordability. Together, CMHC and Build Canada Homes are altering how multi residential projects are financed, structured, and delivered, with direct implications for lenders, developers, and their legal advisors.

Michael A. Discenza of Harris Beach Murtha in Pittsford, New York examines how general economic conditions (such as GDP growth, inflation and unemployment) impact the commercial real estate market in his article entitled *"A Tidal Wave of Uncertainty"*. More specifically, this article focuses on how economists' expectations have changed from the end of 2024 (and even early 2025) to the Spring of 2025 (100 days into the current administration) due to changes in the overall economic outlook and what this means for the looming debt wave.

Kelly Iffrig and Brett Sharp both of RGA Reinsurance Company in Chesterfield, Missouri co-wrote *"Wire Fraud Defense: Best Practices for Commercial Transactions"*. As fraud continues to escalate in commercial transactions, with business email compromise schemes driving billions in annual losses and exploiting routine communication channels, this article outlines a layered, practical approach to mitigation—including secure communication protocols, rigorous authentication procedures, system maintenance, real time monitoring, and comprehensive employee training—to help organizations reduce exposure to increasingly sophisticated threats. By institutionalizing these safeguards, commercial and mortgage industry participants can better protect transactions and minimize the risk of irretrievable financial loss.

Last, but not least, in his article entitled *"When Joint Venture Financing Fails: Mortgage Structures, Value Protection, and Partner Alignment"*, **Daniel Kofman of Blake, Cassels & Graydon LLP in Toronto, Ontario, Canada** reviews key considerations and potential pitfalls of joint venture financings which are essential to protecting the interests of each stakeholder and managing complex financing relationships effectively. He discusses why establishing separate mortgage rights, clearly addressing shortfalls, carefully structuring guarantees, and planning for potential imbalances in capital contributions are all critical to a successful and smooth-running joint venture agreement.

The Abstract Subcommittee

A heartfelt thank you to Sara Toner Wagner of Richards, Layton & Finger, P.A. in Wilmington, Delaware who continues to graciously serve as a final copy editor for *The Abstract* and to Candace Cunningham, who recently retired from Robinson & Cole LLP in Hartford, Connecticut and who will be retiring from *The Abstract* Subcommittee. Thank you, Candace, for your many years of service.

Final Thoughts

I appreciate all who have contributed to this issue of *The Abstract* and invite those of you who are interested in writing an article or serving on *The Abstract* Subcommittee to reach out to me at lkoffman@sgrlaw.com. Articles for the Fall edition are due at the end of the first week in June, 2026.

Any Port In A Storm: Exploring The Safe Harbors Of The Uniform Mortgage Modification Act[i]

By David S. Jensen, Parsons Behle & Latimer; J. Cliff McKinney III, Quattlebaum, Grooms & Tull PLLC; and Julia P. Forrester Rogers, SMU Dedman School of Law

I. Introduction

In 2024, the Uniform Law Commission approved the Uniform Mortgage Modification Act ("UMMA"). UMMA creates clear "safe harbors" for the most common types of mortgage modifications, ensuring that these changes do not jeopardize the validity or lien priority of the underlying mortgage. Under UMMA, modifications such as extending maturity, lowering interest rates, capitalizing unpaid interest, adjusting escrow or insurance requirements, or altering financial covenants are expressly protected. Within these safe harbors, the mortgage continues to secure the obligation as modified, retains its priority regardless of whether the modification is recorded, and the modification is not treated as a novation. By providing this statutory certainty, UMMA reduces transaction costs, deters unnecessary litigation, and makes it easier for lenders and borrowers, both residential and commercial, to negotiate practical loan workouts that can prevent defaults and foreclosures.

For decades, courts and attorneys have wrestled with whether a modification to a mortgage or note would cause the mortgage to lose its priority, particularly when junior lienholders were in the picture. Some courts preserved priority for common changes like maturity extensions, while others held that changes were materially prejudicial and stripped the senior lien of priority. This patchwork of case law forced lenders to seek junior lienholder consents, pay "ransom" fees, or risk litigation, all of which increased costs for borrowers and discouraged loan workouts. This also added to the cost of a modification, especially if the lender felt compelled to hire outside legal counsel or obtain opinion letters, which is especially burdensome when the borrower's financial distress necessitates the modification. UMMA responds to this problem by offering a uniform solution based on a carefully defined list of safe harbor modifications that preserve mortgage priority as a matter of law. This article explores those safe harbors, the exclusions, and UMMA's implications for lenders, borrowers, and counsel navigating mortgage modifications in practice.

This article addresses three principal topics. The first part reviews the legal and practical challenges that prompted the drafting of UMMA, including conflicting case law, novation risks, and recording uncertainties. The second part outlines the structure of UMMA, with particular attention to the ten safe harbor modifications and the exclusions that remain governed by other law. The third part considers the implications of UMMA for lenders, borrowers, and their counsel, including its benefits, potential limitations, and prospects for adoption across the states.

II. Background: Why UMMA Is Needed

The ULC's Role

The Uniform Law Commission (ULC), also known as the National Conference of Commissioners on Uniform State Laws, was established in 1892. It is a non-profit body comprised of state-appointed attorneys, judges, legislators, and law professors dedicated to drafting model and uniform acts that promote clarity and consistency across the nation. Among mortgage attorneys, the ULC is most notable for the Uniform Commercial Code. However, the ULC has other notable signature products, including the Uniform Trust Code, the Uniform Limited Liability Company Act, and the Uniform Electronic Transactions Act.

The ULC imposes a rigorous process to adopt new acts like UMMA. The proposal for this Act began with the Joint Editorial Board for Uniform Real Property Acts, which is a group comprised of representatives from every major real property law group: ULC, RPTE, ACREL, ACMA, ALTA, and CAI, including ACMA Fellows Nancy Little, Jim Wine, Wilson Freyermuth, Julie Rogers, and Cliff McKinney. After approving the proposal from this group, the ULC then formed an official study committee that spent approximately two years examining and considering the issue. A formal drafting committee was then formed, which spent approximately three years carefully drafting and refining UMMA. UMMA was read line by line at two annual meetings of the ULC, where all commissioners were invited to provide additional input. The final act was approved by a vote of all states in July 2024 and recommended for adoption throughout the country.

UMMA's drafting committee was chaired by ACMA Fellow Jack Burton, with ACMA Fellow Julie Rogers serving as the reporter. The drafting committee also included ACMA Fellows David Jensen and Cliff McKinney.

The Motivation for UMMA

Mortgage modifications are a common and often necessary tool for both residential and commercial borrowers. A modification might extend maturity, reduce payments, capitalize unpaid interest, or adjust loan terms to avoid foreclosure or convert construction financing into permanent financing. Although modifications occur often, their legal consequences have been uncertain for a long time. The problem is priority: the order in which lienholders receive payment when a borrower defaults, files for bankruptcy, or faces foreclosure. Preserving priority encourages lenders to approve modifications. Without clear statutory guidance, parties encounter inconsistent and sometimes conflicting court rulings. Most courts have held that extending maturity did not disturb priority, while others found that extending maturity was materially prejudicial to junior lienholders and stripped the senior mortgage of its priority. Courts also wrestle with whether a modification could amount to a novation, effectively extinguishing the original secured obligation and leaving the mortgage without collateral support. Even when priority was ultimately maintained, uncertainty has fueled litigation, raised transaction costs, and often compelled lenders to secure junior lienholder consents, sometimes at the cost of "ransom" payments.

The lack of uniformity compounds the problem in interstate and multistate transactions. Out-of-state lenders, unfamiliar with local statutes or case law, often refuse to rely on them, effectively treating states without clear guidance as too risky. Inconsistent rules not only delay or discourage loan workouts but also increase the likelihood of foreclosure, to the detriment of both borrowers and lenders. Against this backdrop, UMMA was designed to clarify the law, lower transaction costs, maintain priority where appropriate, and enable modifications that keep loans viable while shielding junior lienholders from real prejudice.

Mini Case Law Review

Without UMMA or a similar state law, courts must rely on common law principles to determine whether a mortgage modification preserved or destroyed the senior lien's priority. The results are uneven, fact-specific, and often unpredictable. Some courts hold that extensions of maturity or capitalization of arrears preserved priority, while others find that similar changes materially prejudiced junior lienholders and stripped the senior lien of its position. In addition, courts sometimes treat substantial modifications as "new" loans, raising novation and recording concerns. This patchwork of authority not only generates costly litigation but also discourages lenders from agreeing to modifications that could benefit both borrowers and junior lienholders. The following cases illustrate the conflicting approaches that inspired UMMA's approach to the safe harbors.

***Fraction v. Jacklily, LLC (In re Fraction)*, 622 B.R. 642 (Bankr. E.D. Pa. 2020), aff'd, No. 20-4939, 2021 WL 4037508 (E.D. Pa. Sept. 3, 2021).** In *Fraction,* the Bankruptcy Court addressed whether senior mortgage modifications caused the senior lien to lose priority to a junior mortgage recorded between the modifications. The modifications extended maturity, recapitalized arrears, and reduced the interest rate. The court held that the changes were not "new advances" but simply recapitalization of obligations already secured, and that lowering the interest rate and extending maturity benefited the junior lienholder by making default less likely. As a result, the senior mortgage retained full priority, leaving the junior unsecured. Following the logic in *Fraction,* UMMA places extensions of maturity, capitalization of arrears, and interest reductions squarely within its safe harbors, eliminating litigation over whether such borrower-friendly adjustments erode priority.

***Citizens & S. Nat'l Bank of S.C. v. Smith,* 277 S.C. 162, 284 S.E.2d 770 (1981).** In *Citizens & Southern National Bank,* the South Carolina Supreme Court considered a subordination arrangement in which a purchase-money mortgage was subordinated to a bank's loan. When the bank later extended the time for repayment without the subordinated mortgagee's consent, the court held that this material modification prejudiced the subordinated lienholder and reversed the priorities. Despite being a neutral or beneficial modification, the court nevertheless punished the senior lienholder for the modification. UMMA directly addresses this uncertainty by designating maturity extensions as a safe harbor modification, preserving priority as a matter of law regardless of junior consent.

***In re Fair Fin. Co.,* 834 F.3d 651 (6th Cir. 2016).** In *In re Fair Finance Company,* the Sixth Circuit examined whether a restated loan agreement constituted a novation that extinguished a prior lien. The trustee argued that the 2004 restated agreement created a "new" obligation, voiding the earlier lien and rendering subsequent transfers avoidable as fraudulent. The district court dismissed the case, but the court of appeals reversed, holding that whether there was a novation was a factual question inappropriate for resolution on a motion to dismiss. The case shows the risks associated with courts treating modifications as potential novations, which could potentially wipe out lien priority altogether. In contrast, UMMA offers certainty by clearly stating that safe harbor modifications are never considered novations, ensuring that the mortgage remains to secure the debt as modified.

***Burney v. McLaughlin,* 63 S.W.3d 223 (Mo. Ct. App. 2001).** The Missouri Court of Appeals in *Burney* faced a scenario where a senior lender repeatedly modified its note, raising interest rates, adding cross-collateralization provisions, and extending maturity, without the junior lienholder's consent. The court concluded that only the prejudicial aspects of the modifications (such as interest increases and added collateral obligations) should lose priority, while the original terms of the senior lien remained intact. *Burney* highlights the "split priority" doctrine many courts embrace, subordinating only the harmful aspects of a modification. UMMA reflects this balance by automatically applying safe harbor changes that preserve priority, while excluded changes (such as increased principal or interest) still undergo traditional prejudice analysis.

***Shultis v. Woodstock Land Dev. Assocs.,* 188 A.D.2d 234, 594 N.Y.S.2d 890 (App. Div. 1993).** In *Shultis,* a senior mortgagee modified its note once with junior consent and then again without consent, raising the interest rate to 16% and extending maturity. The New York court held that the unauthorized interest increase prejudiced the junior and required a partial subordination of the senior lien equal to the additional interest. However, the maturity extension alone was not prejudicial and did not alter priorities. *Shultis* reflects the nuanced, case-by-case approach courts sometimes apply, distinguishing between harmless and harmful modifications. UMMA codifies this distinction by excluding interest increases, but expressly protecting maturity extensions as safe harbors.

Lennar Ne. Partners v. Buice, 49 Cal. App. 4th 1576, 57 Cal. Rptr. 2d 435 (1996). In *Lennar,* a senior lender amended its loan by increasing principal, raising the interest rate, and extending maturity without junior consent. The trial court ruled the senior lost priority entirely, but the appellate court reversed, holding that only the modifications lost priority while the original loan retained its senior status. This decision illustrates the compromise many courts have reached when dealing with significant modifications. UMMA brings predictability to this area by declaring which modifications are automatically safe and which remain subject to case-law "material prejudice" analysis.

These cases demonstrate the unpredictable patchwork of common law rules governing mortgage modifications. In some jurisdictions, as in *Fraction,* courts preserve priority for maturity extensions and capitalization of arrears. In others, as in *Citizens & Southern,* the same modifications may cause a senior lien to lose its position. Still, other courts, as in *Burney, Shultis,* and *Lennar,* attempt to strike a middle ground by subordinating only the prejudicial aspects of a modification, while *Fair Finance* highlights the additional risk that courts might recharacterize a modification as a novation, thereby extinguishing the lien altogether. UMMA addresses this uncertainty by codifying safe harbors for common borrower-friendly changes. The safe harbors provide certainty that certain specified modifications do not affect priority, require recording, or constitute a novation, while leaving more substantial alterations to be addressed under existing law. In doing so, UMMA replaces a confusing and costly body of case law with clear, uniform rules that reduce litigation and facilitate loan workouts that benefit both lenders and borrowers. The next section outlines the structure of UMMA, its safe harbor provisions, and the exclusions that remain subject to traditional priority rules.

III. The Architecture of UMMA

UMMA is concise but carefully crafted. Its heart lies in Section 4, which sets out the effect of mortgage modifications and enumerates the ten categories of safe harbor modifications that preserve priority. Surrounding provisions define key terms, clarify UMMA's scope, preserve existing statutes on recording and government liens, and include standard uniform law provisions on electronic signatures, uniformity of application, and transition. These sections strike a deliberate balance by providing certainty for the most common and least controversial modifications, while leaving more substantial or potentially prejudicial changes to be governed by existing law. Because Section 4 is where the Act really does its main work, Part IV of this article focuses on that section in detail.

Definitions (Section 2). Although definitions often receive little attention, Section 2 is essential because it determines just how broadly UMMA applies. The term "mortgage" is defined to include not only traditional mortgages but also deeds of trust, trust deeds, indentures, and other instruments that create a consensual lien on real property. Likewise, "mortgage modification" includes changes to related agreements such as promissory notes, guaranties, or assignments of leases and rents. This expansive drafting reflects modern practice, where loan workouts often require coordinated amendments to multiple documents. By also defining concepts like "financial covenant" and "recognized index," the Act ensures that it directly addresses both residential and commercial transactions. The main point for attorneys is that UMMA governs all agreements related to a secured loan, not just the recorded mortgage.

Scope (Section 3). Section 3 establishes what UMMA covers. Subsection (a) applies UMMA to mortgage modifications, but subsection (b) clarifies that the act does not affect important areas of existing law, such as recording statutes, statutes of limitations, tax lien priorities, and rules for future advances. Subsection (c) then specifies exclusions. UMMA does not apply to modifications that release or add collateral, substitute or release obligors or guarantors, or transfer the loan itself. These carve-outs reflect changes that are more likely to prejudice third parties and therefore remain governed by traditional law. Sections 2 and 3 set the outer boundaries of the Act, ensuring that Section 4's safe harbors apply to common, low-risk modifications while leaving more consequential changes to established doctrines of mortgage and recording law.

IV. The Safe Harbors: Ten Common Modifications

Section 4 is the core of UMMA. Section 4 uses safe harbors to avoid the consequences of the existing patchwork of case law. Section 4 establishes ten safe harbor categories of common modifications, each of which is expressly protected from challenges to lien validity, priority, or novation. For modifications within these safe harbors, UMMA declares as a matter of law that the mortgage continues to secure the obligation, retains its original priority regardless of recording, and is not extinguished by novation. The safe harbor framework is UMMA's most innovative contribution, replacing uncertainty and litigation with clear, predictable rules that facilitate workouts for both residential and commercial loans.

1. Extension of Maturity Date. Extending the maturity date of a loan is one of the most frequent and least disruptive workout tools, but it has historically produced divergent results in the courts. Some courts, such as the bankruptcy court in *Fraction*, treat an extension as neutral or even beneficial to junior lienholders, reasoning that postponing repayment deadlines reduces the risk of foreclosure and preserves junior equity. Other courts, most notably the South Carolina Supreme Court in *Citizens & Southern,* have held that an extension without junior consent materially prejudices subordinated lienholders and strips the senior mortgage of its priority. The safe harbor eliminates this uncertainty by expressly providing that extensions of maturity do not affect the validity or priority of a mortgage. For lenders, this means a maturity extension can be offered as a lifeline to a distressed borrower without exposing the lien to priority disputes or ransom demands from junior interests. For borrowers, this safe harbor increases the likelihood that lenders will grant additional time rather than pressing forward with foreclosure.

2. Decrease in Interest Rate. A reduction in the interest rate is an example of a borrower-friendly modification, yet even this simple concession has sometimes raised priority concerns. Under traditional case law, the effect of an interest reduction on junior lienholders is rarely litigated; however, the logic of *Fraction* clearly shows that lowering the rate decreases the borrower's overall debt burden, makes default less likely, and thus improves the junior's position. By explicitly stating that a decrease in interest is a safe harbor, UMMA codifies what most attorneys would see as common sense. This safe harbor allows lenders to grant rate relief, whether temporary or permanent, without concern that a junior lienholder might later claim the modification was prejudicial. This clarity should encourage more frequent use of interest reductions as a workout tool, especially in residential settings where affordability is crucial in keeping a borrower in the home.

3. Certain Changes in Interest Calculation. The third safe harbor reflects the realities of modern lending, where loans often feature floating rates tied to indices that may be discontinued or modified. This safe harbor covers four specific changes: substituting a new recognized index when the prior index is no longer available, adjusting the spread over the index, converting from a floating to a fixed rate, or converting from a fixed to a floating rate, provided that the change does not increase the rate at the time of modification. This approach affirms the common law principle that neutral or downward adjustments are not prejudicial, while leaving rate increases outside the safe harbor, as illustrated by *Shultis,* where an unconsented increase from 11% to 16% was held to prejudice the junior lienholder. This also means that market-driven adjustments, such as replacing LIBOR with SOFR, will not trigger priority disputes as long as the borrower's rate does not increase at the time of modification.

4. Capitalization of Unpaid Obligations. Workout agreements often involve rolling past-due interest, escrow advances, and other arrears into the principal balance. Without statutory clarity, juniors have sometimes argued that such recapitalization constitutes a "new advance" that should be subordinated to their lien. In *Fraction,* however, the court rejected this argument, holding that capitalization simply restructured obligations already secured by the senior mortgage and therefore did not prejudice juniors. This provision adopts this reasoning by declaring capitalization of arrears to be a safe harbor. This provision is particularly important in practice because capitalization is a key factor in many residential loan modifications. Capitalization of arrears can bring the loan current, halt default interest and late charges, and allow the borrower to resume regular payments. For commercial loans, capitalization can be a way to restructure obligations without refinancing. By treating capitalization as a safe harbor, UMMA ensures that lenders can use this tool without risking litigation or loss of lien priority.

5. Forgiveness, Forbearance, or Reduction of Debt. The fifth safe harbor protects modifications that forgive principal, waive accrued interest, or grant temporary forbearance. Although courts have generally regarded these concessions as beneficial to juniors, the absence of statutory clarity has sometimes made lenders cautious. This safe harbor eliminates doubt by explicitly including these types of debt reduction. The reasoning is that lowering the borrower's total obligation improves repayment chances, reduces the risk of foreclosure, and increases the likelihood that juniors will recover some value. Forbearance provisions, common in both residential and commercial practice, are clearly protected by this safe harbor, removing the need for lenders to seek junior consent when offering short-term payment relief. This safe harbor encourages lenders to proactively use forgiveness and forbearance, confident that these modifications maintain their lien's priority.

6. Modification of Escrow or Reserve Account Requirements. The sixth safe harbor recognizes that escrow and reserve accounts are routine features of both residential and commercial lending. Changes to these arrangements, whether increasing or decreasing reserves for taxes, insurance, or operating expenses, rarely prejudice junior lienholders and may actually enhance their position by ensuring that essential obligations tied to the collateral are funded. Without statutory protection, however, lenders risked arguments that such changes materially altered the borrower's obligations. This safe harbor blocks those challenges to escrow and reserve modifications. For residential borrowers, this means servicers can adjust escrow calculations to reflect rising tax or insurance costs without jeopardizing lien priority. For commercial lenders, it permits negotiations over debt-service reserves or repair escrows without triggering priority disputes. In both settings, this safe harbor encourages practical adjustments that better secure the collateral.

7. Modification of Insurance Requirements. Insurance obligations protect the value of the collateral and are often renegotiated during workouts. Requiring additional insurance does not harm juniors, while reducing insurance requirements generally does not prejudice them if the property remains adequately protected. Junior lienholders can impose their own insurance requirements for the mortgaged property and should not rely on insurance requirements in the senior mortgage. This safe harbor protects this commonsense result by declaring modifications to insurance requirements to be permitted. For example, a lender may require the addition of flood insurance coverage or accept different coverage limits in exchange for lower premiums. This rule is particularly important in multistate lending, where insurance requirements can vary significantly by jurisdiction and lenders need uniform assurance that adjustments will not impair their lien.

8. Modification of an Existing Condition to Advance Funds. The eighth safe harbor covers modifications of, or waivers of, conditions precedent to loan advances. Under common law, new advances outside the scope of the original mortgage could jeopardize priority, especially if they prejudiced juniors. But if the loan documents already contemplated future advances, most courts agreed that waiving or altering the conditions to make those advances was not materially prejudicial. This safe harbor embraces that principle, explicitly protecting modifications of existing advance conditions. For example, in a construction loan, a lender might waive a condition that all subcontractors be paid before disbursing the next draw. Far from harming juniors, such a waiver may allow the project to proceed and preserve collateral value. The safe harbor formalizes this principle, preventing litigation over routine construction-loan adjustments.

9. Modification of a Financial Covenant. Financial covenants are staples of commercial lending, from debt-service coverage ratios to net worth requirements. These covenants often need adjustment when market conditions shift or when a borrower restructures its operations. This safe harbor makes clear that modifying financial covenants does not impair the priority of the senior mortgage. This rule recognizes that such covenants measure borrower creditworthiness or collateral adequacy, and changes to them typically pose no prejudice to juniors. For example, lowering a debt-service ratio covenant may permit a borrower to continue operating, thereby preserving value for all lienholders. UMMA gives lenders and borrowers flexibility to adapt covenants without risking lien litigation by treating covenant modifications as safe harbors.

10. Modification of Payment Amount or Schedule Resulting from Another Safe Harbor. The final safe harbor ensures that downstream changes in payment amounts or schedules triggered by another safe harbor modification do not create priority disputes. For instance, extending maturity or lowering the interest rate will necessarily alter the amortization schedule. Under common law, some courts treated such changes as independent modifications requiring analysis of material prejudice. This safe harbor eliminates this uncertainty by providing that payment schedule changes resulting from another safe harbor are themselves protected. This provision is critical for practical application because it prevents the absurd result of a safe harbor modification being deemed prejudicial simply because it adjusted the borrower's payment schedule. UMMA makes the safe harbor regime workable in real-world transactions by covering the most important types of modifications.

UMMA transforms the way lenders, borrowers, and their counsel can approach loan workouts by establishing ten safe harbors. Instead of analyzing conflicting case law or negotiating with junior lienholders over routine adjustments, parties now have a statutory guarantee that common modifications maintain lien priority, do not require re-recording, and are not considered novations. This certainty reduces transaction costs, streamlines documentation, and removes a powerful obstacle to voluntary loan modifications, especially in multistate portfolios where lenders previously had to analyze different state rules. At the same time, UMMA preserves the traditional "material prejudice" standard for excluded modifications, striking a balance between predictability and protection of junior lienholders. UMMA delivers the clarity that courts could not, and its adoption has the potential to encourage more frequent and efficient workouts that keep loans viable and foreclosures at bay.

V. What's Outside the Safe Harbors

UMMA does not cover every type of loan modification. By design, UMMA offers statutory certainty only for changes that courts generally viewed as non-prejudicial to junior lienholders. Modifications that fall outside the enumerated safe harbors remain subject to common law. In practice, these excluded matters fall into two broad categories: (1) modifications not listed in Section 4(b) of UMMA, and (2) transactions expressly excluded from UMMA's operation by Section 3(c).

Modifications Not Listed in Section 4(b).

Modifications that are not listed in Section 4(b) may or may not cause material prejudice with a corresponding loss of priority under common law. The most common modifications that prejudice junior lienholders, and are thus not among UMMA's safe harbors, are increases in principal and increases in interest rate. Courts have long recognized that such changes enlarge the borrower's obligations in ways that can harm junior lienholders by reducing equity in the collateral and increasing the risk of foreclosure. In *Burney,* a series of modifications that raised the interest rate, added fees, and cross-collateralized unrelated properties were found to materially prejudice juniors, leading the court to apply a split-priority remedy. The split priority remedy preserved the senior lien's priority as to the original obligation but subordinated the prejudicial modifications. Similarly, in *Shultis,* a court held that an unconsented increase from 11% to 16% was prejudicial and subordinated the senior lien to the extent of the additional interest. And in *Lennar,* the court confronted a loan that had been modified to increase both the principal and interest and concluded that the prejudicial aspects should lose priority, but not the entire loan. These cases illustrate the continuing role of common law outside UMMA's safe harbors. Attorneys should remember that while UMMA provides clear rules for some minor modifications, it leaves more significant changes to a court's decision.

Exclusions in Section 3(c).

The Act also carves out three categories of transactions that it does not attempt to regulate: (1) the release of, or addition to, collateral; (2) the release of, addition of, or change in obligors or guarantors; and (3) the assignment or transfer of a mortgage or obligation. These exclusions make sense. Changes in collateral can significantly alter the security available to juniors; adding or releasing obligors may affect creditworthiness in ways that prejudice junior lienholders, and loan transfers are already governed by Articles 3 and 9 of the Uniform Commercial Code. By leaving these categories outside UMMA, the drafters ensured that UMMA would not disrupt well-established areas of law or inadvertently upset the expectations of third parties. A key point is that workouts involving collateral substitutions or guarantor changes still require traditional analysis and, often, the consent of affected lienholders.

The Continuing Role of Common Law.

Because UMMA preserves the traditional "material prejudice" test for modifications outside the safe harbors, the case law remains highly relevant. Courts may find partial subordination, as in Burney and Shultis, or, in rare cases, complete loss of priority if the modification effectively rewrites the loan. UMMA does not alter this framework; instead, it narrows the scope of contested modifications by removing the most common and least controversial disputes from litigation. From a policy perspective, this approach strikes a careful balance between certainty and efficiency where consensus exists and allows for flexibility where the equities are more complex.

For lenders and their counsel, the takeaway is twofold. First, the safe harbors can be relied on without fear of priority loss, but only within their express limits. Second, outside the safe harbors, the old rules still apply, and courts may analyze modifications for prejudice to junior lienholders. In practice, this means that increases in principal or interest, cross-collateralization, and obligor substitutions should be approached with caution, often requiring junior consent, title insurance endorsements, or additional protective documentation. UMMA provides a valuable roadmap for distinguishing between changes that are statutorily secure and those that remain risky.

VI. Recording, Priority, and Novation Issues

Recording Not Required for Safe Harbors.

One ongoing issue in mortgage modification law is whether a modification agreement must be recorded to preserve the lien's priority. Courts have rarely addressed the issue, but attorneys often recommend recordation as being the most cautious approach. For residential borrowers, the need for acknowledgment and recording often created real hurdles, delaying or stopping modifications when they were most needed. UMMA solves this problem by stating that safe harbor modifications keep their priority regardless of whether they are recorded. This approach lowers transaction costs and allows loan workouts to move forward more quickly, without requiring lenders to get new notarizations and re-record documents that mainly serve to record changes already agreed upon.

Interaction with State-Specific Statutes.

While recording is not required under UMMA to maintain priority, the Act recognizes that recording might still be necessary for other reasons under state law. For example, in Arizona and Texas among other states, statutes mandate that an extension of the maturity date be recorded to prolong the statute of limitations for enforcing a deed of trust. In Ohio, a distinctive provision states that a mortgage modification does not take effect until it is delivered to the county recorder. UMMA's commentary encourages states to consider whether to keep or change such provisions when enacting the Act. In practice, this means that although the Act guarantees lenders will not lose priority for failing to record a safe harbor modification, attorneys still need to pay attention to state-specific rules that impact enforcement, statutes of limitations, or the validity of modifications for other purposes.

Novation Risk Eliminated Within Safe Harbors.

Equally important, UMMA eliminates the risk that safe harbor modifications will be treated as novations. Under common law, a significant modification could be considered a new obligation, extinguishing the original debt and leaving the modified obligation without collateral support. The Sixth Circuit's decision in *In re Fair Finance Company* shows how risky this doctrine can be, as the court considered arguments that a restated loan agreement was a novation that nullified the original security interest. To prevent this, Section 4(a)(4) states that safe harbor modifications "are not a novation." For lenders and their counsel, this is an essential assurance that restating a note to extend its maturity, reduce the interest rate, or capitalize arrears will not threaten the lien. UMMA thus eliminates one of the most severe risks related to loan modifications.

UMMA's approach to recording, priority, and novation reshapes the legal landscape for routine loan workouts. By removing the requirement to record safe harbor modifications, UMMA lowers friction and costs; by stating that such modifications do not affect lien priority, it eliminates the uncertainty that previously led to costly litigation; and by dismissing novation arguments, it guards against the risk that a mortgage could lose all security through what was meant to be a simple restatement. These three protections work together as a package, allowing lenders and borrowers to concentrate on restructuring obligations without worrying that the workout might undermine the mortgage itself.

VII. Uniformity and Interstate Lending

Importance for MultiState Lenders.

Perhaps the strongest selling point of UMMA is the uniformity it could provide across jurisdictions. Without its adoption, lenders operating nationally or regionally must navigate a confusing array of case law: a modification upheld as harmless in Pennsylvania under *Fraction* might have stripped priority entirely in South Carolina under *Citizens*

& Southern. That lack of predictability imposes real costs, and attorneys must research state-specific precedent for every modification; borrowers are forced to wait while lenders assess risk, and in many cases, lenders simply decline to proceed with a workout. By enacting a single, nationally consistent rule for the most common types of modifications, UMMA offers multistate lenders a uniform framework. Safe harbor changes would no longer require state-by-state analysis, allowing portfolio managers and servicers to move forward with modifications more efficiently and confidently.

Role of Title Insurance.

The uniformity of UMMA also has important effects on the title insurance industry. Title insurers often require endorsements whenever a loan is modified, even for routine changes like extending the maturity or recapitalizing arrears. These endorsements increase cost, cause delays, and add complexity to what are otherwise straightforward workouts. UMMA's declaration that safe harbor modifications do not affect lien priority challenges the rationale for such endorsements in those cases. Insurers may still require endorsements for modifications outside the safe harbors, such as increases in principal or interest, but for the most common adjustments, the Act removes a major barrier. For lenders, this reduces friction in the servicing process; for borrowers, it lowers closing costs and speeds up the relief process. UMMA's predictability may also motivate insurers to create streamlined endorsement practices for non-safe-harbor modifications, knowing exactly where statutory certainty begins and ends.

Intercreditor Agreements.

The Act also respects the common contractual arrangements found in commercial lending. Senior and junior lenders often negotiate detailed intercreditor agreements that address modifications, defaults, and enforcement rights. UMMA is not meant to override these private agreements. Instead, it fills the gap when no agreement exists or when involuntary liens, such as judgment liens or mechanics' liens, come into play. Intercreditor agreements will still determine priority between the parties involved. Attorneys must keep in mind that UMMA applies only when there are no negotiated terms. The provisions of an intercreditor agreement will still be respected, and lenders cannot depend on UMMA to override their own contractual obligations.

Residential vs. Commercial Application.

The Act applies broadly to both residential and commercial mortgages, depending on the context. In the residential arena, the Garn–St. Germain Depository Institutions Act prohibits the enforcement of due-on-encumbrance clauses, which means that homeowners often add junior financing, such as second mortgages or home equity lines. UMMA provides assurance that safe harbor modifications of a residential first mortgage, such as a rate reduction or maturity extension, retain their priority against those junior liens, preserving the senior's position while allowing borrowers access to relief. On the commercial side, due-on-encumbrance clauses remain enforceable, and intercreditor agreements often address priority issues. Even so, UMMA provides clarity where judgment creditors, mechanics, or other non-consensual lienholders intervene, and it gives lenders confidence that standard modifications will not destabilize their first-lien position. In both settings, the uniformity of the Act reduces uncertainty, lowers costs, and increases the willingness of lenders to work with distressed borrowers.

VIII. Adoption of UMMA

Uniform acts like UMMA do not automatically become law unless individual state legislatures adopt them. The ULC depends on the commissioners appointed in each state to advocate for adopting the acts. These commissioners heavily rely on support from key groups, such as ACMA, to promote the acts and aid in the adoption process. The authors strongly believe that every state would benefit from adopting UMMA, and we also confident that every ACMA Fellow can see the Act's value. Therefore, please consider this a plea for your support to enact UMMA in your state.

The efforts have already begun with Nevada and Utah becoming the first states to enact UMMA. Additionally, as of this writing, it is currently pending in the West Virginia legislature. But there is still much work to be done.

Your Role as an ACMA Fellow.

UMMA's adoption brings tangible benefits: in states where it applies, lenders and borrowers gain legal clarity for the most common modifications, reducing the need for junior consent, title endorsements, and litigation. In contrast, states without the Act remain tied to conflicting case law and unpredictable outcomes. These variations hinder efficient workouts and discourage modifications even when they are advisable. Adopting UMMA would create nationwide consistency, improving outcomes for everyone involved in the process.

As ACMA Fellows, you are uniquely well-placed to influence adoption outcomes. Uniform Law Commissioners look to practitioners for insight into on-the-ground challenges, and none is more persuasive than firsthand accounts of how legal ambiguity impairs workouts and adds cost and delay. A well-positioned letter, email, or conversation with your state's ULC Commissioners highlighting UMMA's practical benefits can make a difference. The Act is drafted, vetted, and ready for use. It only requires championing from professionals like you to cross the finish line.

So, what can you do if you want UMMA enacted in your state? Start by contacting your ULC Commissioners. If you don't know who they are, then contact ACMA Fellow Cliff McKinney, who currently chairs the ULC's Legislative Committee and can put you in touch with the correct people. Cliff's email address is cmckinney@qglaw.com, and his phone number is 501-379-1725—contact him anytime about this. Additionally, the ULC staff offers a wide range of resources to assist with enactment and can provide support, such as memos detailing how certain issues directly impact your state and how UMMA would specifically apply to where you live. The role of professionals such as ACMA Fellows cannot be understated in the process of getting UMMA adopted across the country.

IX. Conclusion

The Uniform Mortgage Modification Act offers what common law could not: certainty, efficiency, and predictability in the mortgage modification process. UMMA eliminates guesswork that has long troubled lenders and borrowers by introducing ten clear safe harbors. This removes disputes over recording, priority, and novation for the most common workout tools. At the same time, UMMA respects existing law by keeping more significant or potentially prejudicial modifications under traditional standards. The result is a well-balanced law that lowers costs, promotes voluntary modifications, and helps preserve value for all parties.

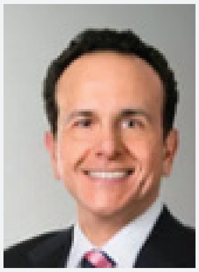
For multistate lenders and national practitioners, the benefits of consistency are significant. Instead of dealing with a patchwork of conflicting state laws, UMMA provides a single, dependable framework that encourages uniform practice. Early adoption in Nevada and Utah demonstrates that states are beginning to see the value of this reform. However, UMMA's success relies on wider adoption, which will only happen if key stakeholders, such as ACMA Fellows, actively back it.

The authors believe UMMA is, quite literally, a safe harbor in the storm of mortgage modification law. It protects lenders and borrowers from the unpredictable seas of case-by-case prejudice analysis and provides a steady course for loan workouts that can prevent defaults and foreclosures. The task now is to ensure that UMMA is widely adopted. By engaging with your state's Uniform Law Commissioners and lending your professional voice to the effort, you can help bring this important statute into law. In doing so, you will not only strengthen your own practice but also contribute to a more stable and efficient mortgage system nationwide.

Endnotes

1 By Cliff McKinney, Julie Rogers, and David Jensen. For additional discussion of the Act, see Julia Patterson Forrester Rogers, *Facilitating Mortgage Modification to Save Homes and Mitigate Lender Losses,* available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5383176.

Full Rent Acceleration as Enforceable Liquidated Damages in Commercial Leases: What Massachusetts' High Court Means for Risk Allocation and Drafting



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Introduction

In *Cummings Properties LLC v. Hines,* 492 Mass. 867 (September 25, 2023), the Massachusetts Supreme Judicial Court affirmed the enforceability of a commercial lease's full rent acceleration clause as liquidated damages, confirming that such provisions are not per se penalties and need not be conditioned on a landlord's reletting of the premises. The Court's decision reversed the Appeals Court and restored confidence that negotiated acceleration provisions can be enforced as written, subject to the traditional liquidated damages analysis.

Applying a "single look" approach, the SJC evaluated the clause based on the circumstances at contract formation, a framework that, while used in some jurisdictions, is not universal and therefore warrants careful drafting by leasing practitioners operating in multiple jurisdictions. The Court held the clause was not an unenforceable penalty, that its enforceability did not turn on if, or when, the premises were relet, and that the guarantor was sufficiently sophisticated to be bound by the provision.

For ACMA members, the opinion underscores that remedies provisions allocating default risk beforehand—when negotiated by sophisticated parties—are likely to be honored in Massachusetts without a mandatory offset for future reletting.

Facts of the Case

Cummings Properties, LLC, the landlord and the plaintiff, entered into a five-year lease with Massachusetts Constable's Office, Inc., the tenant, for office space in Woburn, Massachusetts. The monthly rent was $1,364.50. At the time of the decision, the landlord owned over eleven million square feet of commercial real estate in Woburn. The tenant, a service of process company, had recently secured a new contract with the Massachusetts Department of Revenue. The tenant moved its offices to Woburn, where it expected that most of its business with the Department of Revenue would occur.

Darryl C. Hines, the defendant, the founder and the sole officer and director of the tenant, guaranteed the lease. Hines agreed to "personally and unconditionally guarantee[] the prompt payment of rent by LESSEE and the performance by LESSEE of all financial and nonfinancial obligations arising out of…this lease."

Less than a month after the parties signed the lease, the Department of Revenue "suspended its contract" with the tenant. The guarantor contacted the landlord to "explore his options with regard to the lease". The landlord permitted the tenant to pay the security deposit of $2,700 in three equal installments, but refused to release the tenant from the lease or make any other accommodations.

The following month, the tenant failed to pay the rent due.

The lease permitted the landlord to terminate the lease and accelerate the rent if the tenant defaulted on a payment and failed to cure within ten days pursuant to the following clause:

> "In the event that ... LESSEE defaults in the observance or performance of any term herein, and such default is not corrected within 10 days after written notice thereof, then LESSOR shall have the right thereafter, without demand or further notice, to declare the term of the lease ended, and/or to remove LESSEE's effects, without liability, including for trespass or conversion, and without prejudice to any other remedies. If LESSEE defaults in the payment of any rent, and such default continues for 10 days after written notice thereof, and, because both parties agree that nonpayment of said sums is a substantial breach of the lease, and, because the payment of rent in monthly installments is for the sole benefit and convenience of LESSEE, then, in addition to any other remedies, the net present value of the entire balance of rent due herein as of the date of LESSOR's notice, using the published prime rate then in effect, shall immediately become due and payable as liquidated damages, since both parties agree that such amount is a reasonable estimate of the actual damages likely to result from such breach."

The landlord delivered a default notice to the tenant, asserting that failure to pay rent due within ten days "shall result in the automatic termination of the lease without further notice," eviction and liquidated damages owed to landlord in the amount of $74,076.24, which the landlord later described as representing two months' rent plus the "[n]et present value of future rent owed pursuant to the commercial lease."

The tenant failed to cure and the landlord filed a summary process action against the tenant. Shortly thereafter, the landlord and the tenant resolved the action with an agreement for judgment, providing for a judgment for the landlord on possession and damages and a waiver by the tenant of all rights of appeal. Hines signed the judgment on behalf of the tenant. Inexplicably, the tenant was not represented by counsel.

Approximately one year after the tenant vacated the premises, the landlord relet the premises by entering into a new four-year lease with a new tenant. Almost three years after entering into the new lease, the landlord filed a complaint in Superior Court against Hines, as guarantor under original lease, to enforce his obligations under the lease.

Trial Court

The trial judge in Superior Court ruled in favor of the landlord. The judge concluded that the liquidated damages provision was enforceable because "damages equivalent to the amount owed during the full term of the contract" was a reasonable estimate of the landlord's anticipated damages. The Court also determined that the guarantor was "sufficiently sophisticated" to be held to the terms of the lease, including the rent acceleration clause. The court awarded the landlord $82,143.01, comprising damages, prejudgment interest, and costs.

Appeals Court

The Appeals Court reversed the Superior Court, holding that the liquidated damages provision "bears no reasonable relationship to expected damages and is thus unenforceable as a penalty." The Appeals Court was clearly troubled by the significant benefit the landlord would receive because the acceleration clause would permit the landlord to relet the premises, collect rent from the new tenant, "and recover all the remaining rent owed by [the tenant], without having to account for the rent received from the new tenant during the term of the original lease."

SJC Decision

The SJC reversed the Appeals Court and affirmed the Superior Court, concluding that the liquidated damages provision was a reasonable prediction of damages at the time the lease was entered into by the parties. The Court acknowledged that a liquidated damages provision can result in an "unwarranted penalty" and "harsh results" for some and a "windfall" for others. However, the Court noted that "[i]t has long been the rule in Massachusetts that a contract provision that clearly and reasonably establishes liquidated damages should be enforced, so long as it is not so disproportionate to anticipated damages as to constitute a penalty."[1]

A. Single Look Approach

The Court tests the enforceability of liquidated damages clauses by analyzing the circumstances at the time the contract was formed, known as the "single look" approach.[2] This is in contrast to the "second look" approach, which considers the circumstances at the time of the breach.

The Court wrote that under the single look approach, a liquidated damages clause will be enforced if (1) the actual damages resulting from a breach were difficult to ascertain at the time the contract was signed; and (2) the sum agreed on as liquidated damages represents a "reasonable forecast of damages expected to occur in the event of a breach."[3]

As to the first prong, the Court held that the trial judge properly concluded that damages were difficult to ascertain. The guarantor had claimed with no evidence that the landlord was a "high-volume commercial landlord" likely to relet the premises upon a default. The Court agreed with the trial judge's conclusion that "there was no way to predict when a breach might occur, whether or when a new tenant would be secured, what the new rent might be, and what costs [the landlord] would incur in the meantime…"

As to the second prong, the Court held that where, as here, the liquidated damages amount provided for in the lease represents the agreed-on rental value of the property at the time of the breach and decreases during the term of the lease, it is a "reasonable anticipation of damages that might accrue from the nonpayment of rent."[4] The Court noted that it never has required that liquidated damages clauses account for future rents from a new tenant to be enforceable.

The Court further noted that "where a contract is unambiguous and freely entered into, it is preferable for parties to bargain with one another as they see fit, rather than to have courts step in to decide whether and how to restructure a contract because certain contingencies were not accounted for by one of the parties."

B. Second Look Approach

The Court's reasoning is an express repudiation of the second look approach. The Court conceded that the second look approach allows for an "after-the-fact adjustment to avoid a windfall" for the landlord by considering the reasonableness of the provision against the actual damages from the default. But the Court maintained that the single look approach best reflects the expectations of the parties, promotes certainty, resolves disputes efficiently and avoids litigation. The second look approach, in the Court's view, encourages litigation so an aggrieved party can attempt to show that the liquidated damages amount is unfair.

The Court stated that many jurisdictions similarly have determined that under the single look approach, actual damages are not relevant in determining the enforceability of a liquidated damages clause.[5] The Court further noted this is the case even where enforcing the clause resulted in the party that did not commit the breach receiving more than it would have under the original contract.[6] The Court further noted that despite some jurisdictions adopting the single look principles, they have included exceptions in the analysis to change it significantly.[7]

C. Sophistication

The guarantor claimed, in what seemed like a final, desperate attempt to avoid liability, that he was not a sophisticated party; therefore, he should not be bound by the liquidated damages provision. The Court rejected this contention, relying on the trial judge's determination that the guarantor was "sufficiently sophisticated to be held to the provisions of the contract he signed." At trial, the guarantor contended that his previous lease was an informal arrangement and this had been his first lease negotiation with a large commercial landlord. He stated that he did not read the lease carefully before signing it on behalf of the tenant and as personal guarantor, and he was not represented by an attorney. However, the record showed that he had started at least two businesses, converted the tenant entity from a for-profit to a not-for-profit company, had up to ten employees and ran another company that provided tax preparation services. This all contributed to the trial judge's determination of the guarantor's sophistication.

REBA and Abstract Brief

It is worth noting that the Real Estate Bar Association for Massachusetts and the Abstract Club[8], filed a joint amicus brief with the SJC, urging adoption of the Appeals Court's approach. In simple terms, the amici argued that the primary objective of default damages is to give the landlord the benefit of its bargain, which is to put the landlord in the same position it would have been had no default occurred[9], not to permit the landlord to receive "duplicative rent payments for the same premises for the same periods of time."[10] Permitting "full rent acceleration" without accounting for fair market rental value in almost every circumstance of a tenant default overstates damages and functions as a penalty.[11]

The amici framed longstanding and conventional commercial leasing practice as requiring damages provisions to account for reletting income, contending that a full acceleration remedy typically yields amounts grossly disproportionate to anticipated loss unless offset by the premises' fair rental value.[12]

They advocated affirmance of the Appeals Court's reasoning that a reasonable forecast at formation must include either crediting reletting rents or discounting the stipulated sum to reflect the likelihood of reletting.[13]

The SJC disagreed. By upholding full acceleration as a permissible liquidated measure without a mandatory reletting offset, the Court declined the amici's proposed rule that would effectively require embedding mitigation into every acceleration formula. In short, while the amici characterized "modified rent acceleration" (net of fair market rental value) as the conventional and legally tenable approach, the SJC held that Massachusetts law does not deem a full acceleration clause a penalty per se, and that enforceability remains a function of the traditional liquidated damages test applied to the parties' bargain.

Takeaways

The SJC's analysis returns to first principles: were damages difficult to ascertain at formation, and was the stipulated sum a reasonable forecast of anticipated loss? Answering those questions in the affirmative, the Court rejected a rule that would require offsets for future reletting or impose a duty to net out potential mitigation within a liquidated damages amount . Enforceability turned on the parties' agreement and the clause's reasonableness at formation, not on subsequent reletting out-comes, and was not conditioned on whether or when the landlord relet the premises.

For commercial finance and leasing counsel, the emphasis on contract certainty and party sophisti-cation signals that well-drafted acceleration provisions—negotiated between knowledgeable par-ties—will be honored unless shown to be punitive rather than compensatory.

End Notes:

[1] Cummings Props., LLC v. Hines, 492 Mass. 867, 869–70, 217 N.E.3d 604, 607–08 (2023), citing TAL Fin. Corp. v. CSC Consulting, Inc., 446 Mass. 422, 431, 844 N.E.2d 1085 (2006), citing Kaplan v. Gray, 215 Mass. 269, 270-273, 102 N.E. 421 (1913).

[2] Cummings Props., LLC v. Hines, 492 Mass. 867, 870, 217 N.E.3d 604, 608 (2023), citing Kelly v. Marx, 428 Mass. 877, 880, 705 N.E.2d 1114 (1999).

[3] Cummings Props., LLC v. Hines, 492 Mass. 867, 871, 217 N.E.3d 604, 608 (2023), citing NPS, LLC, 451 Mass. at 420, 886 N.E.2d 670, quoting Cummings Props., 449 Mass. at 494, 869 N.E.2d 617.

[4] Cummings Props., LLC v. Hines, 492 Mass. 867, 872, 217 N.E.3d 604, 609 (2023), citing NPS, LLC, 451 Mass. at 422, 886 N.E.2d 670, quoting Cummings Props., 449 Mass. at 496-497, 869 N.E.2d 617.

[5] See, e.g., Old Colony Constr., LLC v. Southington, 316 Conn. 202, 222, 113 A.3d 406 (2015); Proulx v. 1400 Pa. Ave., SE, LLC, 199 A.3d 667, 673-674 (D.C. 2019).

[6] See, e.g., Guiliano v. Cleo, Inc., 995 S.W.2d 88, 100-101 (Tenn. 1999); Stein Eriksen Lodge Owners Ass'n v. MX Techs. Inc., 2022 UT App 30, ¶¶ 57-59, 508 P.3d 138.

[7] "See, e.g., General Elec. Capital Corp. v. Nucor Drilling, Inc., 551 F. Supp. 2d. 1375, 1381 (M.D. Ga. 2008) (mitigation required under Georgia law to enforce liquidated damages clause); Fortune Bridge Co. v. Department of Transp., 242 Ga. 531, 532, 250 S.E.2d 401 (1978) (liquidated damages clauses presumed unen-forceable in close cases); 172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Ass'n, 24 N.Y.3d 528, 536-537, 2 N.Y.S.3d 39, 25 N.E.3d 952 (2014) (remanding judgment enforcing liquidated damages clause for consideration of actual damages); Frank Nero Auto Lease, Inc. v. Townsend, 64 Ohio App. 2d 65, 71, 411 N.E.2d 507 (1979) (mitigation required to enforce liquidated damages clause)."

[8] REBA is the largest specialty bar in the Commonwealth of Massachusetts, a non-profit organization in existence for over 100 years with nearly 2,000 members practicing throughout the Commonwealth. The Abstract Club is a voluntary association of experienced real estate lawyers. Founded over 150 years ago, with membership limited by its by-laws to 100 members, it is comprised of lawyers who are considered leaders in the field of real estate law.

[9] CUMMINGS PROPERTIES, LLC, Plaintiff-Appellee, v. Darryl C. HINES, Defendant-Appellant., 2023 WL 3236315, at 13.

[10] CUMMINGS PROPERTIES, LLC, Plaintiff-Appellee, v. Darryl C. HINES, Defendant-Appellant., 2023 WL 3236315, at 19.

[11] CUMMINGS PROPERTIES, LLC, Plaintiff-Appellee, v. Darryl C. HINES, Defendant-Appellant., 2023 WL 3236315, at 23–24.

[12] CUMMINGS PROPERTIES, LLC, Plaintiff-Appellee, v. Darryl C. HINES, Defendant-Appellant., 2023 WL 3236315, at 23–24.

[13] CUMMINGS PROPERTIES, LLC, Plaintiff-Appellee, v. Darryl C. HINES, Defendant-Appellant., 2023 WL 3236315, at 27.

Warm Hand Gifts To Children And Grandchildren

By Ned W. Graber, AIG Investments (Retired)

An estimated $105 trillion will pass on to younger generations through 2048, with $62 trillion expected to come from the upper 2% of all households.[1] When can their younger family members benefit the most from this money? For family legacies, a person may want to share their wealth with loved ones during their lifetimes rather than planning to pass it down by will or testamentary trust. If a person lives into their 90s, their grown children may inherit the money close to their own retirement and already have enough accumulated savings to fund the lifestyle they desire. Additional money may not as useful if given later. Donors may want to offer financial support to adult children or help fund their grandchildren's education. Children or grandchildren need help now to purchase a home. Paying off student loans can allow grandchildren the cash flow to save for their retirement and relieve their stress. Warm hand gifts allow the donor to witness how their family members benefit from the gifts. Treating loved ones to large family vacations can be a joy to several generations. Lifetime gifts can also provide a good opportunity to teach family members financial literacy about how to handle and invest money.

A person considering making a lifetime gift to their children or grandchildren should answer two questions. First, does the donor have enough assets that they can afford to make the gift without jeopardizing their own retirement lifestyle? Gift and charitable programs should only involve money that is not needed for the donor's own current lifestyle and anticipated needs. Second, what impact will the gift have on the recipient and other family members? If handled improperly, gifts can undermine the recipient's independence. They can generate hard feelings among other family members who do not receive them. A donor should plan ahead to keep gifts fair. A person should be cautious about giving too much to the first grandchild if there may be more than one. A donor may want to start a gift program in small amounts in order to assess how the recipient is using the money. A gift of a manageable amount of cash or stock allows the recipient to practice stewardship. The donor may also want to require a commitment from the child or grandchild. For example, the donor can encourage a student to apply for merit scholarships by offering to match the amount of scholarships awarded. While many young adults would welcome a sudden inflow of cash, it may not be desirable for the child to have immediate use and control over the funds, especially if the account is sizable, or expected to grow over time. In those cases a trust or other structure that allows a person to control how and when the beneficiary spends the money may be advisable. Before giving to a grandchild, it is best to consult with their parents about what they would like the children to have and what their children want.

A person who has decided to make annual gifts to their children and grandchildren may be concerned about creating unrealistic expectations with respect to the gifts. To avoid the perception of an annual annuity, the donor may want to make more generous gifts in years their investments perform well, and reduce or eliminate gifts when they incur poorer investment performance. By making the amount of the gift contingent upon portfolio performance, the recipients will have the opportunity to learn a valuable lesson to reduce spending during tougher times. Another approach is to have some specific purpose behind the gift, such as payment for college tuition, a semester abroad, or the down payment on a home. With a specific purpose the money will go toward something the child or grandchild needs and will appreciate and remember.

Taxes

Federal Gift Tax. Any person contemplating a lifetime gift should be familiar with federal gift taxes. Gift taxes backstop the federal estate tax to prevent the wealthy from avoiding estate taxes by depleting their estates through lifetime gifts. A gift is any transfer by an individual donor of cash, property or value for less than adequate and full value. For tax purposes, the gift amount for property is the item's fair market value at the time of the gift. There is no limit on how much a person can give, but Federal gift taxes are payable when all lifetime gifts exceed the combined lifetime exemption for gifts and estate assets. The lifetime federal tax exemption was raised in the U.S. Budget Reconciliation Bill[2] ("**2025 Tax Bill**") to $15 million per person for 2026. This amount is inflation adjusted. A couple can give $30 million if the estate of the first to pass elects portability of the unused portion of the lifetime exemption on the deceased spouse's Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return. The federal gift tax ranges from 18% to 40%, with values exceeding the exemption amount by more than $1 million taxed at 40%.[3] Generally, the donor pays gift taxes, but if not, the recipient or deceased's estate is liable for the tax.

State Taxes. Connecticut has a gift tax at a rate of 12% on gifts in excess of the lifetime exemption that is equal to the federal lifetime exemption.[4] In New York gifts made within 3 years of death are pulled back into a decedent's estate. 12 states and the District of Columbia have their own estate taxes. Some states have quite low estate thresholds. For example, Massachusetts imposes an estate tax on estates over $2 million with rates between 0.8% and 16%.[5] 5 states impose inheritance taxes. Maryland has both estate and inheritance taxes. If a person lives in a state with estate or inheritance taxes, especially with a low exemption, those taxes may be one reason to consider relocation to a state with more favorable or no such taxes.

Generation-Skipping Transfer Tax. The generation-skipping transfer tax ("GSTT") is a federal tax on a gift or inheritance that prevents the donor from avoiding estate taxes by skipping children in favor of grandchildren. With the GSTT, transfers to grandchildren are taxed the same amount as if the inheritance came from their parents. GSTT is not required to be paid on any of those gifts until their combined value exceeds the federal lifetime exemption for gifts and estate assets ($15 million per person in 2026). Any amount that exceeds the lifetime exemption is subject to a flat 40% tax.[6] It may be owed in addition to any other federal gift and estate tax.

GSTT is triggered when property is transferred by gift or inheritance to an individual or to a trust for their benefit (other than a spouse) that is at least 37½ years younger than the donor.[7] The person making such a gift is referred to as the transferor and the recipient as the skip person. A grandchild is a skip person. A skip person does not have to be a family member. GSTT is assessed when the gift or transfer is made, which may occur before or after the death of the transferor. While still alive, the transferor can give the gift directly to the skip person. Upon death, the transferor's will may either stipulate that property is bequeathed to a skip person, or establish a trust from which distributions will be made to a skip person.

The taxation of a GSTT depends on whether the transfer is a direct or an indirect skip. Direct skips occur when assets are transferred from one individual to a skip person, either outright or in trust. For direct skips, the transferor or their estate pays the tax or utilizes the GSTT exemption at the time the transfer takes place, based on the value of the assets received by the transferee. An example of a direct skip is giving money in excess of the annual gift exclusion to a grandson for a down payment on a house. This gift would skip the donor's own child, thus avoiding the possible gift tax that would apply if the gift had passed from donor to their child and then from their child to the grandchild. Another example of a direct skip is establishing an irrevocable trust for the benefit of a person's grandchildren with instructions for the trustee to pay all their college expenses until the youngest grandchild is 25 years old. At that point, the trust would divide into equal shares, with each grandchild receiving their share outright and free of trust. Every distribution from this trust would be subject to the GSTT, including the final division when the trust terminates. An indirect skip involves a skip person and a non-skip person, usually through the creation of a trust.. The non-skip person is the primary beneficiary who receives property before it is transferred to the skip person. An example is when a grandmother creates a trust for the benefit of her son and upon his death the principal passes to his children. The transferor or their estate is responsible for paying the GSTT for direct skips. For indirect skips, the skip person pays the GSTT when the distribution occurs.[8]

To avoid the GSTT on the initial transfer, transferors must allocate some or all of their federal lifetime gift and estate tax exemption, sometimes referred to as the GSTT exemption. Allocations of the GSTT exemption reduce the federal lifetime gift and estate tax exemption leaving less exemption to protect the transferor's estate from estate taxes. The GSTT exemption may be used for both outright transfers as well as transfers in trust. If the GSTT exemption is allocated to a transfer in trust, any growth on the trust assets to which the allocation was made is subsequently sheltered from any GSTT in the future. Taxpayers who make any direct skips in excess of the annual exclusion must report all GSTT direct skips (including the annual exclusion) on Form 709, United States Gift (and Generation- Skipping Transfer) Tax Return.[9]

Annual Gift Exclusion. A person may give up to the annual gift tax exclusion ($19,000 in 2026) to any other person without having to report the gift or reducing their lifetime estate and gift tax exemption or GSTT exemption.[10] The annual gift tax exclusion is inflation-adjusted each year. A spouse can also give the same amount, doubling the amount (up to $38,000 per recipient in 2026) that a couple can give to any one person. If a married couple gives community property, the gift is treated as if each spouse gave one-half of the property. Spouses can also agree to "split" a gift that is not community property if certain requirements are met. Form 709 should be filed for all split gifts. For example, a married couple may transfer $266,000 in 2026 to their 2 children and 5 grandchildren without reducing the couples' lifetime estate and gift tax exemption. All gifts in excess of the annual exclusion reduce the lifetime gift and tax exemption, and require the donor to file a Form 709 United States Gift (and Generation- Skipping Transfer) Tax Return by April 15 of the following year. However, they do not have to pay a gift tax unless and until the total amount reported on all their Form 709s over the course of their life exceeds the federal lifetime gift and estate tax limit.

Direct medical and direct tuition payments are two exceptions to the annual gift exclusion that allow a person to make a gift without reducing their lifetime estate and gift exemption or incurring the federal gift tax or GSTT. If the donor gives the money directly to the recipient for medical or tuition expenses, however, the payment does not qualify for these exceptions.

Direct Payments for Medical Expenses. Under Section 2503(e) of the Internal Revenue Code,[11] payments made directly to medical service providers, such as hospitals, doctors, dentists, or clinics, for someone's medical expenses qualify for unlimited tax-free gifts without reducing their annual gift exclusion or triggering any gift tax. The gifts must be made for expenses that would qualify as deductible itemized medical expenses, including health insurance premiums if they are paid directly to the insurance provider. Any amount for which the patient is reimbursed by insurance does not qualify for the exclusion and is subject to gift tax.[12] Payments for annual checkups, non-prescription medications and unnecessary medical expenses, such as cosmetic or elective procedures, do not qualify. The beneficiary does not have to be a relative. A person should obtain and keep a receipt with their tax records to prove that they made the payment directly to the medical care provider.

Direct Payments for Tuition. Under Section 2503(e) of the Internal Revenue Code, a person can pay an unlimited amount for someone's tuition expenses to qualified educational schools without reducing the donor's annual gift exclusion or triggering any gift tax. Tuition gifts made directly to an education institution, such as a primary, secondary schools, high schools and colleges and universities, are allowed tax free in unlimited amounts for direct tuition costs. Payments cannot be used for other expenses related to the student's education, such as books, supplies, room, and board or other fees. The beneficiary need not be a relative. Qualification of pre-schools is fact-specific. The IRS has ruled that a children's day care center satisfied the definition of educational organization for purposes of exemption from certain taxes when it had a regular enrollment, planned educational activities, and instruction from a staff of teachers and assistants.[13] If the primary purpose of the day care program is more custodial than educational, payments would not qualify.

Direct payment of college tuition by grandparents may affect the student's eligibility for financial aid because the money may be considered either untaxed student income or a funding resource. If the student is likely to qualify for need-based aid, one method to avoid this problem is for grandparents to contribute to the parent's 529 account, or they can wait until the student graduates and help repay any education loans.[14]

Federal Kiddie Tax. All income earned on invested funds owned by a minor is taxed at the minor's tax rate. This investment income may trigger a federal or state kiddie tax, potentially making the child's income taxable at their parent's higher rate. The federal kiddie tax is a tax imposed on income unrelated to employment earned by individuals 18 years of age or under or full-time students under age 24 who are claimed as dependents. It is designed to stop parents from placing investments in their children's name to avoid paying income taxes. Salaries or wages earned by the child are not subject to the kiddie tax. In 2026, the first $1,350 of unearned income is tax-free, the next $1,350 is taxed at the child's rate and any amount above $2,700 is taxed at the parents' rate. These threshold levels are inflation adjusted each year. Some states impose their own kiddie tax. For this reason, it may be prudent to limit the amount of income-generating investments owned by the child that produce dividends and interest and prioritize investments that generate little or no taxable income.

Savings Accounts

529 Educational Plans. 529 plans are a tax-advantaged savings plans sponsored by states to help pay for education. Contributed funds and all income earned thereon grow free from federal income tax in a 529 account. Withdrawals are tax-free when used for eligible educational expenses.[15] Eligible education expenses are for students enrolled at least half-time in any college, university, vocational school or other postsecondary educational institution eligible for U.S. Department of Education student aid programs.[16] Eligible

education expenses include tuition, fees, room and board, textbooks, supplies, computers, peripheral equipment such as a printer, and internet access. Funds can cover off-campus housing, food and utilities up to the room and board allowance included in the school's cost of attendance. Amounts up to a $10,000 lifetime limit per beneficiary can be withdrawn to pay principal or interest on a designated beneficiary's or their sibling's student loan. Interest paid with 529 funds does not qualify for the student loan interest deduction. The 2025 Tax Bill expanded eligible expenses to allow tax-free withdrawals for a wider workforce, on-the-job training, tutoring, vocational training in skilled trades, and post-secondary credential and professional licensing and continuing education programs required to keep a post-secondary credential active. This includes tuition, miscellaneous fees, books, exam costs and supplies for programs listed under the Workforce Innovation and Opportunity Act.

There is no annual distribution limit for college tuition. $20,000 per student (in 2026, an increase from $10,000 in 2025) can be distributed each year from a 529 plan to pay for tuition at a private or parochial elementary, middle and secondary private school, including educational therapies for K-12 students with disabilities. The 2025 Tax Bill expanded eligible expenses for K-12 students to include the cost of materials for curricula and online educational materials, books and other educational materials, dual-enrollment fees for college courses taken in high school, tutoring or educational classes outside the home, fees for advancement placement tests, college admission exams and educational therapies for students with disabilities. Homeschooling expenses are not covered. Most 529 plans are created under state law. The new 2025 Tax Bill expansions of K-12 benefits may require new legislation on a state-by-state basis, as not all states currently consider K-12 expenses as qualified expenses for tax purposes. Money in a 529 plan can be withdrawn at any time for non-qualified expenses. However, non-qualified withdrawals will be taxed as income to the beneficiary for federal and state income tax purposes, together with a 10% withdrawal penalty on the earnings portion of the withdrawal.

Anyone can contribute to a 529 account, including relatives and friends. There are no income limits for contributors and no age limits on beneficiaries. Contributions must be in cash, not stocks, bonds or other intangibles. Total contributions cannot exceed the maximum aggregate contribution limit set by the state for its plan. These limits apply per beneficiary and range from $235,000 in Georgia and Mississippi to $621,411 in New Hampshire in 2025.[17]

Contributions are treated as gifts and subject to federal gift tax laws, and the funds in a 529 plan are removed from the donor's estate. Generally a person cannot contribute more than the annual gift tax exclusion without filing a Form 709. Without using their lifetime estate tax exemption, a person can superfund a 529 plan account with 5 years' worth of tax-free gifting into a single calendar year, contributing up to $95,000 ($190,000 for a married couple) per beneficiary to a 529 plan in 2026. In this case the donor is treated as having given $19,000 to the beneficiary in each of the next four years so that person cannot use the annual gift exemption to make additional annual gifts to that beneficiary for the next four years.[18] A person can even make six years' worth of contributions in just two months by contributing one year's worth of gifts in December, followed by five years' worth of contributions in January. Front-loading a 529 plan allows time for compound growth and transfers wealth out of the donor's estate. Superfund contributions are required to be reported on Form 709. A superfund contribution can be made every 5 years. Technically, a person could contribute more than the $95,000 in a single year, but the lifetime estate and gift tax exemption would be reduced.

Some state plans do not conform to the all federal rules, and the state tax treatment of 529 plans may vary based on the particular 529 plan in which the person participates and their state of residence. A person for federal income taxes cannot deduct 529 plan contributions, but some states offer a state income tax deduction for contributing to their plan.[19] If the applicable state tax law does not conform with the federal tax law, 529 plan distributions used to pay certain expenses, such as principal and interest on qualified student loans, may result in adverse state tax consequences to the account owner or designated beneficiary. For example, California taxes withdrawals for primary or secondary education, plus an additional 2.5% tax penalty.[20] A person should confirm state tax treatment of 529 plans with their adviser.

Prepaid tuition plans and savings plans are two general types of 529 plans. Prepaid plans allow a person to prepay tuition at an in-state, public college, locking in the cost in today's dollars and at current tuition rates. Unlike other 529 plans, prepaid tuition plans do not cover other qualified expenses such as room and board, books and supplies. Savings plans may be issued either by a state or a financial advisor. Investment options and fees vary between plans. The account owner of state savings plans manage their own investments within the plan's online account portal. Savings plans available through investment advisors typically charge a higher fee, but financial advisors manage the plan's investments. All states offer at least one 529 plan, although prepaid tuition plans are less common. A person does not have to invest in their own state's plan, but some states offer residents a state tax deduction for doing so. The state that sponsors a plan does not control where the child can go to school and students can use the money to attend a qualified school in any state.

529 Plans are more flexible than custodian accounts. A 529 account allows the donor to designate who will manage the funds. The beneficiary does not have control over the money in a 529 account, even when they reach the age of majority. Generally, investments can be changed only twice a year, or when there is a change of beneficiaries. Account owners can change the beneficiary on the account at any time, providing flexibility as additional children or grandchildren are born, or if the child decides to take a different path, the account owner can change the account beneficiary so that the money will go toward paying for another family member's education. Leftover funds in one account can be moved from one child's 529 account to another without paying any penalties. The account never expires. 529 savings can stay invested in case the beneficiary later decides to go to college or needs the funds for other qualified expenses, such as workforce training. A person can even start saving for a child's education before a child is born by opening a 529 plan, naming oneself as a beneficiary and start contributing. Once the child or intended beneficiary is born, the account owner can switch the beneficiary to the child before they need to use the education funds.

Unused money in a 529 plans can be rolled over from the 529 account to the beneficiary's Roth IRA without federal tax or penalty subject to several rules.[21] The 529 account must have been open for more than 15 years. The rollover amount from a 529 plan to a Roth IRA is capped at a lifetime limit of $35,000. The Roth IRA must be in the beneficiary's name. 529 contributions made within the preceding 5 years cannot be rolled over. The transfer is subject to the beneficiary's annual IRA contribution limit and the beneficiary must have annual income equal to or greater than the contribution amount, so partial rollovers may be necessary.

Only 5.64% of the 529 account balance owned by a parent is used to calculate the Expected Family Contribution under the Free Application for Federal Student Aid ("**FAFSA**").[22] Distributions from and assets in a 529 account owned by a grandparent, other relative or anyone else besides a dependent student or one of their parents will have no effect on the student's FAFSA.[23] However, grandparent-held 529 plans are still be considered on the CSS Profile that is used by over 200 institutions to award financial aid.[24]

Custodial Account for Minors. The Uniform Gift to Minors Act ("UGMA") and The Uniform Transfer to Minors Act ("UTMA") allow gifts to be held for minor children who otherwise could not legally own property. Under a person's state version of UGMA and/or UTMA, a person can set up a custodial account and designate someone, including themselves, to manage the account until the child reaches the age of majority in that state, usually age 18 or 21. Custodial accounts contain standard provisions in accordance with local law and are easy to create. There are no contribution limits, and the funds are not limited for educational purposes. Contributions to a custodial account are subject to the annual gift limit. All gifts made to a custodial account are irrevocable. UGMA accounts accept gifts of cash or securities to minors. UTMA accounts are similar, but they also accept transfers of real estate, art, royalties and patents and other assets not permitted in a UGMA account. Funds in these accounts are considered as student assets for federal financial aid purposes and can limit the amount of college grants a student may receive.

Custodial accounts give a person more investment flexibility than 529 plans. A 529 plan allows only cash contributions. 529 plan investments are restricted to the options permitted by the state's plan. With an UGMA or UTMA account, a person can choose whatever investments are available with their broker. Custodian investment accounts are taxable, and are subject to the kiddie tax. The major disadvantage of custodial accounts is that when the child attains the age of majority, they gain complete ownership and control of the account. The donor may not want this transfer of control to an 18 or 21 year old. Thus, custodial accounts are appropriate only when the total amount gifted is relatively small.

Trump Accounts. The 2025 Tax Bill created a new type of tax-advantaged savings accounts, known as Trump accounts, under Section 530A of the Internal Revenue Code.[25] These accounts will be opened automatically for children that are U.S. citizens born between January 1, 2025, and January 1, 2029, upon issuance of a Social Security number. For accounts opened by the U.S. Treasury, these children will receive a one-time $1,000 deposit from the U.S. Treasury into the federally managed account for the benefit of the child. Starting in 2026, parents, legal guardians, adult siblings, or grandparent can open a Trump account for any child who is a U.S. citizen or resident and will be under the age of 18 anytime before the end of 2028 by making the election on IRS Form 4547 or through an online application on trumpaccounts.gov. Unlike a traditional or Roth IRA, there is no earned income requirement by the child or income limits on the parents. Beginning July 4, 2026, parents and relatives of the child can contribute up to $5,000 (adjusted for inflation after 2027) per year to the account. No contributions can be made into a Trump account after the child reaches age 18. Contributions are not tax-deductible. Employers of a parent can contribute up to $2,500 per employee toward a Trump account, subject to cost-of-living adjustments after 2027. That contribution is an annual limit per employee and not per dependent and will not be treated as income to the employee or child. A child can have both a Trump account and a traditional or Roth IRA if they are under age 18 and meet the earned income requirements for IRA contributions. The contributions to a Trump account do not reduce the amount that can be contributed to the IRA account. Parents do not choose the investments. The accounts must be invested in a single diversified fund that tracks a broad U.S. stock index. The funds must also be unleveraged and have annual fees no higher than 0.1%. Earnings grow tax-deferred. If the beneficiary dies prior to the year in which they turn 18, the account loses its tax-deferred status, and the entire balance (minus any direct individual contributions) becomes taxable to the designated beneficiary, or to the account beneficiary's final tax return if no beneficiary is named. Contributions from parents/guardians or other individuals create basis in the account.

No withdrawals are allowed before January 1 of the year the child reaches age 18. The child takes ownership of the account when they turn 18. At that point, the account is treated as a traditional IRA, although it contains a mix of after-tax dollars (direct individual contributions) and pre-tax dollars. Withdrawals of earnings, employer contributions and the $1,000 federal contribution after the growth period are taxed as ordinary income. Withdrawals would appear to be subject to the 10% early withdrawal penalty applicable to traditional IRA accounts, unless the withdrawal qualifies for one of the early withdrawal exceptions, such as for qualified post-secondary school tuition, books, room and board, first-time home purchases, and unreimbursed medical expenses. The child could hold the account until they retire which means it could be an 18-year head start on retirement savings.

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There are many uncertainties about the accounts. Will permitted distributions from funds received by an employer be taxed as ordinary income? Are employer contributions subject to the annual $5,000 cap? It appears that annual required minimum distributions will be required if the account still has assets when the child turns 75.[27] Although a Trump account can be rolled into a standard IRA once the beneficiary turns 18, Trump accounts are not subject to the IRA aggregation rules under IRC Section 408(d)(2), so there may be advantages to keeping them separate from other IRAs, such as for example, for making backdoor Roth contributions. But for a young adult in a relatively low tax bracket, there also could be significant benefits to converting the whole account to a Roth IRA at age 18, making any future growth tax-free. Withdrawals may be subject to state income taxes, if applicable. The IRS has issued an overview of Trump accounts in Notice 2025-68, but more guidance is needed from the IRS on these new Trump accounts to provide clarity.

A 529 plan offers more flexibility and tax benefits than a Trump account if the purpose is to finance education. Trump accounts could reduce need-based aid. Trump balances also appear likely to be treated like minor custodial assets on the FAFSA, counted as the student's property and assessed at a higher rate than parent-owned 529 assets. A Trump account, however, employs the financial principle of compounding to gain a head start of retirement. Assuming an 8% return, compounded monthly, maximum contributions for 17 years and with no additional contributions thereafter, an account would be worth approximately $187,794 at age 18 and $4,277,306 by age 68. Parents may also want to collect the free $1,000 contribution.

Help Establish a Roth IRA Account. When a child or grandchild starts earning thier own income, a person can help them build a nest egg by setting up a Roth IRA account and giving the child or grandchild an amount equal to their contribution to the Roth IRA or 401(k). If the person is under the age of 18, a custodial Roth IRA account will be necessary until they reach the age of majority. Roth distributions taken after age 59½ are tax-free and RMDs are not mandatory for Roth IRA owners.

Make Gifts In Kind. A stock or other asset may be given in-kind instead of giving cash. If a person makes a gift in-kind during their lifetime, the tax basis of the donor is carried over. An in-kind gift does two things for the donor. First, it transfers any capital gains taxes that would be due upon the sale of the stock from the donor to the recipient who may be in a lower tax bracket. Subject to the Kiddie Tax, if a recipient's income falls below those thresholds, they can turn around and sell that stock without gain, unless the sale pushed them into a taxable position. For example, if a child has taxable income under $49,450 if single, or $98,900 if married (in 2026), their capital gains tax rate is 0%.[28] Second, a gift of stock moves any future dividend income that the stock could generate from the donor to the recipient if they decide to hold the stock. Before making an in-kind gift of an asset that has substantially appreciated, a person should consider whether it would be better to hold the asset until they pass when the cost-basis of all assets in a person's estate is stepped-up to its fair market value on the date of death. Such person's heirs would pay no or less taxable gains tax on the assets. Conversely, if the asset has an unrealized capital loss, a donor should take the opportunity to sell the securities first to realize the losses, and then give the proceeds. Gifts of investment grade bonds municipal bonds are more favorable than EE savings bonds because the interest is higher for muni bonds and is free of federal income tax and some state and local taxes. If a person is contemplating gifts of gold coins, the federal long-term capital gains tax on collectibles is up to 28%.[29] A better gift would be gold exchange-traded funds or stocks in gold-mining companies to avoid the higher tax on collectibles.

Establish a Trust. The most versatile way to make gifts to minors is by establishing a trust. Whether for a minor or an adult, trusts are complicated and should only be set up with the aid of an estate and trust attorney. Trust are expensive to set up, operate and require payment of annual accounting fees and taxes. For this reason, they are appropriate only for substantial gifts, over $100,000, or for special circumstances where the family member needs assistance with managing the money.

All the foregoing options for parents to save on their children's behalf have drawbacks of one kind or another. Taxable custodial accounts like UGMAs or UTMAs are transferred in full to the child at the age of majority. 529 plan funds are limited to qualified educational expenses. No contributions can be made to Trump accounts after a child reaches age 18. A child cannot contribute to retirement accounts like traditional and Roth IRAs to them, or have funds contributed on their behalf, until they have earned income. If a person is unsure of their children or grandchildren's educational plans, or they want to reserve the money for other purposes, a person may want to consider a taxable brokerage accounts. These accounts are very flexible, but there is no tax-free growth or tax-free withdrawals. The money can be used for any purpose. However, if owned by a parent or beneficiary, a taxable account would be an asset counted in determining eligibility for federal financial aid.

Help a Child or Grandchild Acquire a House

A person can help an adult child or grandchild buy a home by giving them the amount of the down payment or the cost of the home, making a loan for all or a portion of the purchase price, co-signing a mortgage, jointly owning a home with the recipient, or buying a home outright for the use of their children or grandchildren.[30] There are advantages and disadvantages with each of these methods.

Money Gifts. The easiest way to help a family member with a home purchase is to give the child or grandchild enough money to make a down payment or buy a house outright. If they make a down payment of at least 20%, the child or grandchild will not be required to purchase mortgage insurance.[31] A gift of money avoids the complications of a loan and possible damage to the family relationship if a loan is not repaid. Mortgage lenders generally allow a relative to give the entire down payment, but they will require recent bank statements and a letter signed by the donor and the home buyer that provides the name of the donor, the amount of the gift and a statement that the donor does not expect to be repaid. If a person wants to give money to a child for a house that exceeds the annual gift tax exemption, they could give part in one calendar year and the rest next calendar year to use two year's exemptions. If the child is married, the donor can give money to the child and spouse. If the donor is married, a split gift can be made to double the size of the gift tax exemption. The donor must file a Form 709 Gift Tax Return if the gift exceeds the annual gift tax exemption.

Loan to Help Buy a House. A person can lend the money for a mortgage on the house. The parent may prefer the financial discipline that comes with a loan instead of a gift. Intra-family loans are often made at a lower interest rate than a conventional mortgage loan. If a person wants to lend money to help finance a portion of the home purchase, the process is more complicated. A third party mortgage lender will take into consideration the monthly debt payment due on the family loan when deciding whether the home buyer can qualify for a mortgage.[32] If a relative choses a loan, they should make sure that the child or grandchild can repay the loan. It is estimated that only 56% of loans to family members are repaid in full.[33] A good guideline is that a home-buyer should keep their housing costs, including utilities, below 30% of their gross income.[34] Can the prospective borrower obtain preapproval for a conventional mortgage? If the child or grandchild cannot qualify for a conventional mortgage loan, the family loan may result in a bad financial decision instead of helping the prospective borrower. A parent does not want to enable poor financial habits and undermine a young adult's independence. Intra-family loans made for one child, but not others, can create jealousy, resentment, and enormous damage to family dynamics and relationships. Unpaid loans may create lasting family rifts. If a person does not want to act as the loan servicer, there are services such as National Family Mortgage that will establish and service the loan, send email payment reminders, collect and credit payments, and issue year-end IRS 1098 and 1099-INT tax forms.[35]

It is important to understand the tax implications for intra-family loans. Inter-family loans are business transactions. Borrowers who itemize can only deduct interest on a loan secured by a mortgage if the mortgage or deed of trust has been properly recorded in the appropriate real estate records. To avoid being considered a gift, any intra-family loan that exceeds $10,000 must be evidenced with a promissory note and charge an interest rate at least equal to the Applicable Federal Rate ("**AFR**").[36] There are three tiers of AFR rates. About the twentieth day each month, the IRS announces a Revenue Ruling with prescribed AFR for short-term (term of 3 years or less), mid-term (term of 4 to 9 years) and long-term rates (term over 9 years) for annual, semiannual, quarterly and monthly compounding loans.[37] For long-term loans, the AFR is significantly lower than the current mortgage loan rate. For example, on December 19, 2025 when the average rates for a thirty-year mortgage loan were 6.21% per annum,[38] the December AFR rate was 4.46% for loans of more than nine years.[39] If the interest charged is below the appropriate AFR in effect at the time a family loan is made, the IRS may impute interest by taxing the lender on the difference between the AFR and the interest rate the lender actually charged. The IRS may treat the difference between the loan's actual interest rate and the AFR as a gift. Interest on the loan will be taxable to lender.

If a portion or all of a loan is forgiven, taxation will depend upon the nature of the transaction. When a lender forgives a debt, taxable forgiveness occurs and that amount is considered income to the borrower.[40] The borrower may end up owing income tax on the debt forgiveness unless forgiveness is considered a gift. The lender can avoid tax liabilities by limiting forgiveness to gift tax exemptions. If the amount forgiven exceeds annual gift tax exemption, it will require the filing of a gift tax return. There cannot be any prearranged agreement for the lender to forgive the borrower's interest or principal payments, or the entire intra-family loan will be considered a taxable gift. The IRS will consider any amounts forgiven that exceed the annual gift tax exclusion ($19,000 in 2026) as a taxable gift, which will count against the lender's lifetime gift and estate tax exemption. The loan documents should provide that the forgiveness is at the lender's absolute discretion. The note should also be enforceable against the borrower by the lender's estate if the lender dies during the term of the loan. Any forgiveness of the loan should be documented to ensure clarity and mitigate potential misunderstandings.

Family loan structures can be creative to best suit a borrower's need. Relatives can structure a "balloon note" that allows the borrower to pay interest only for a set period of time. The relative may forgive the annual interest or some of the principal of the note over time, by either utilizing the balance of the annual exclusion gift or, for a larger amount, the lifetime gift exemption.

Co-sign a Mortgage Loan. If the child or grandchild is unable to qualify for a mortgage, a relative can co-sign the mortgage loan. This is the least advisable method to help a child or grandchild. Co-signing for a mortgage increases the relative's own debt-to-income ratio and could make it more difficult for them to borrow for their own purposes. If the child or grandchild defaults, the co-signer is contractually obligated to pay the loan and the co-signer's own credit rating may suffer. Also, some mortgage lenders do not allow co-signers.[41] Co-signing a mortgage note can create the same inter-family problems as a direct loan to a child or grandchild. A co-borrower or joint applicant can share ownership of the loan and assume responsibility for payments from the beginning. In general, the co-borrowers combined must deposit at least 20% of the sales price, and the child or grandchild must cover the first 5% of the down payment with their own funds.[42] Otherwise, the property may qualify as an investment, in which case the mortgage lender may charge a higher interest rate for the loan and may require more financial reserves.

Use of House. A person can buy a house and permit a child or grandchild to live in it. The IRS considers that the use of a property rent-free as a gift. Therefore, if a parent or grandparent purchased the home and allows the child or grandchild to use it, the parties should enter into a formal lease agreement with the occupant as a tenant. The parent or grandparent may choose to forgo the rent by applying the annual gift exclusion, in which case, the use of the annual exclusion to cover rental payments should be documented.

Trust Ownership of House. If the child or grandchild is the beneficiary of a trust, the trust may be able to buy a home. The beneficiary can live in the home rent-free. As an asset of the trust, the home is protected from the child's creditors or in the event of a divorce. A non-grantor trust can also make an interest-free loan to a beneficiary. If the child is successful in her own right and does not need the assets in the trust for living expenses, the assets can stay in the trust for the duration of the child's life, and pass to the next generation, depending on the terms of the original trust agreement.

Transfers of Property to Adult Children. A parent may want to sell the family home or other property to a child at below fair market value. In this event, IRS considers the difference between the bargain sale price and fair market value as a gift. The seller will not owe gift taxes unless the total lifetime gifts exceed the lifetime estate and gift tax exemption, but they will have to report the gift by filing IRS Form 709 United States Gift (and Generation-Skipping Transfer) Tax Return. Calculation of the amount of sale and gift requires a proportional allocation of basis between the sale and gift portions of the transaction. Sales should be compared to inheritances. If the parents hold the property until their death, inherited property usually receives a step-up in basis equal to the fair market value of the property at the time of death, which could be more advantageous than the basis in a bargain sale.

Conclusion

A donor of lifetime gifts needs to be familiar with federal estate and gift tax laws. There are several ways that a person can make lifetime gifts to their grandchildren and adult children without incurring federal gift taxes. Donors can make gifts up to the Federal annual gift tax exclusion, or use the exceptions for direct medical and tuition payments without reducing their lifetime federal gift and estate exemption. If a gift exceeds the annual gift tax exclusion or falls outside of one of the exemptions, transferors can make gifts without incurring federal gift taxes by using a portion of their generous lifetime federal gift and estate tax exemption, but they are required to report the gift. Direct payment of tuition for education and contributions to 529 plans are the best methods for assisting education of grandchildren. Trump accounts may be an opportunity to provide a head start for savings for young children and grandchildren. There are several ways to help an adult child or grandchild purchase a home, but the preferred method depends upon many individual circumstances.

End Notes

[1] *Cerulli Anticipates $124 Trillion in Wealth Transfers Through 2048,* https://www.cerulli.com/press-releases/ (December 5, 2024)

[2] Public Law No. 119-21, 139 Stat.72 (July 4, 2025)

[3] 26 U.S.C. §2501

[4] https://portal.ct.gov/drs/individuals/individual-income-tax-portal/.estate-and-gift taxes/

[5] https://mass.gov/info-details/massachusetts-estate-tax-guide

[6] Instructions for Form 706-GS(T), https://www.irs.gov/pub/irs-pdf/i706gst.pdf

[7] 26 U.S.C. §2613

[8] Troy Segal, *What Is the Generation-Skipping Tax (GSTT) and Who Pays?* https://www.investopedia.com/terms/g/generation-skipping-transfer-tax.asp

[9] https://www.journalofaccountancy.com/issues/2009/oct/20091804/

[10] 26 U.S.C. §2503; www.irs.gov/Business and Self-Employed/Frequently Asked Questions on Gift Taxes. IRS Publication No. 559

[11] 26 U.S.C. §2503(e)

[12] Treas. Reg. § 25.2503- 6(b)(3)

[13] Revenue Ruling 78-446, 1978-2 C.B. 257

[14] Jeffrey Trull, *13 Easy Ways Grandparents Can Help Pay for College*, https:savingforcollege.com/article/ (October 6, 2025)

[15] IRS Publication 970, https://www.irs.gov/publications/p970

[16] Topic no. 313, Qualified tuition programs (QTPs), https://www.irs.gov/taxtopics/tc313

[17] Kathryn Pomroy, 529 Plan Contribution Limits for 2025, https://www.kiplinger.com/personal-finance/529-plan-contribution-limits?utm_term (September 3, 2025)

[18] *What is a 529 plan?* www.fidelity.com/529-plans

[19] Shane W. Cummings, *Three Reasons You Need to Use a 529 Plan (and Two Reasons You Don't),* www.kiplinger.com/personal-finance/ (September 4, 2024)

[20] Mike Toth and Dan Lips, *The 529 Education Revolution Is Here,* Wall Street J. (August 28, 2025) p. A13

[21] Division T of SECURE Act of 2022 §126, Public Law No: 17-328

[22] Eileen Ambrose, *How State 529 Plans Can Go Beyond Saving for College*, www.kiplinger.com/personal-finance/

[23] How Do 529 Plans Affect Financial Aid? https://www.savingforcollege.com/intro-to-529s/ (October 14, 2025)

[24] https://cssprofile.collegeboard.org

[25] §70204, Public Law No. 119-21

[26] https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-exceptions-to-tax-on-early-distributions

[27] Notice 2025-68

[28] Rev. Proc. 2025-32, 26 CFR 601.602

[29] *Topic No. 409, Capital Gains and Losses*, https://www.irs.gov/taxtopics/tc409

[30] Emma Patch, *How to Help Your Children Buy a Home,* www.kiplinger.com/real-estate/ (June 9, 2025)

[31] Eileen Ambrose, *Smart Ways to Give (or Lend) Money to Family,* www.kiplinger.com/article/spending//t065-c000-s002 (June 6, 2019)

[32] *Id.*

[33] Josh Koebert, Family Lending: Nearly Half of Loans to Family Members Remain Unpaid [Study], https://financebuzz.com/lending-money-to-family-members-survey (January 15, 2025)

[34] https://archives.hud.gov/local/nv/goodstories/2006-04-06glos.cfm

[35] https://www.nationalfamilymortgage.com

[36] 26 U.S.C. §7872

[37] https://www.irs.gov/applicable-federal-rates

[38] https://www.forbes.com/advisor/mortgages/current-30-year-mortgage-rates/

[39] Rev. Rul. 2025-24

[40] 26 U.S.C. §61(a)(12)

[41] Alvina Lo, *Four Ways Parents Can Help Kids Be First-Time Home Buyers*, www.kiplinger.com/real-estate/ (June 17, 2023)

[42] Emma Patch, *How to Help Your Children Buy a Home,* www.kiplinger.com/real-estate/ (June 9, 2025)

Not Your Standard Loan Policy Endorsements: Specialized Endorsements that Supercharge Loan Policies in Commercial Financing Transactions

By Wendy S. Gibbons and Dawn M. Lewallen, First American Title Insurance Company

While many commercial loan policy endorsements are requested as a matter of course, others are more closely related to transaction structure and risk profile and may not appear on standard lender checklists. In sophisticated financing transactions, those less familiar endorsements can provide meaningful coverage when used appropriately. This article reviews several American Land Title Association (ALTA) Loan Policy endorsements that a lender's counsel may not regularly encounter, but that may be relevant depending on how a transaction is structured.

Expanding Coverage Through Endorsements

Endorsements are used to revise the Covered Risks, Exclusions from Coverage, and Conditions of a title insurance policy. These modifications provide enhanced protection for the named insured, often in response to specific risks or the transaction structure. Because endorsements increase the insurer's liability, they typically require additional underwriting scrutiny.

Regulatory Landscape and Negotiability

The availability and negotiability of title insurance endorsements vary by jurisdiction. In certain states, regulatory authorities may restrict the types of endorsements that may be issued. As a result, the endorsements discussed in this article may not be available in all jurisdictions. Counsel should consult with the title company to confirm whether a particular endorsement is authorized in the state where the property is located. Where not expressly prohibited by state regulation, endorsement modifications may be permitted with the title insurer's approval. Endorsement fees and/or premium charges may apply, particularly in jurisdictions that utilize filed rate manuals.

The ALTA endorsement forms discussed in this article are available on the ALTA website for reference at www.alta.com. Any underwriting guidelines or issuance considerations described in this article are general in nature, not specific to any title insurer, and may vary by company and by transaction.

The ALTA 20-06 First Loss- Multiple Parcel Transactions Endorsement (06-17-06)

Transaction structure often drives the need for non-routine coverage. A useful illustration is the ALTA First Loss Endorsement, which addresses how loss is measured when a loan is secured by multiple parcels or types of collateral. When collateral consists of multiple, independent parcels, standard loan policy provisions may require a lender to exhaust remedies against unaffected parcels before a covered loss is established.

The ALTA 20-06 is designed for "property portfolio" loans and allows the insured lender to assert a claim under the title policy for a loss affecting any individual parcel without requiring acceleration of the entire debt or foreclosure against all collateral. The endorsement modifies the claim and loss valuation provisions in the ALTA Loan Policy.

Under the standard loan policy, the insurer is obligated to indemnify the lender only for actual loss resulting from a covered title defect. Loan Policy Exclusion 3.c. reinforces this principle by excluding coverage where the insured has not suffered any loss or damage. In a multi-site transaction, the lender may remain over-secured despite a title defect affecting a single parcel. Absent the First Loss endorsement, the insurer may argue that no compensable loss exists until the lender accelerates the loan, forecloses on all collateral and exhausts guaranties or other remedies, all of which may be commercially undesirable or inconsistent with the lender's relationship with the borrower.

The endorsement provides that, in the event of a covered loss, the insurer agrees to pay the Material Impairment Amount, defined as the amount by which the covered claim diminishes the value of the collateral below the outstanding indebtedness.

Issuance of this endorsement requires review of the mortgage or deed of trust and the loan agreement to confirm that the collateral consists of at least two parcels of land, or land and personal property, and that each parcel is functionally independent. A common example is a portfolio loan secured by multiple real estate projects (i.e., office, multifamily, or nursing facilities) located in different geographic areas either in the same state or different states.

The ALTA 42 Commercial Lender Group Endorsement (5-2-24)

The ALTA 42-06 Endorsement is designed for commercial transactions involving syndicated lending structures, where a lead lender acts as agent for a group of participating lenders holding fractional interests in a single indebtedness. The endorsement addresses potential loss of coverage resulting from post-policy transfers of participation interests that may otherwise fall outside the policy definition of "Insured" and potentially trigger Loan Policy Exclusion 3(d) for post-policy matters.

To address this risk, the endorsement provides coverage against loss or damage resulting from the invalidity, unenforceability, or lack of priority of the insured mortgage arising from post-policy transfers of portions of the indebtedness by participants.

The endorsement defines each "Participant" as a lending institution that is a member of the "Lender Group" and provides that each participant is an insured under the policy to the extent of its ownership interest in the indebtedness, whether acquired before or after the Date of Policy. It also expressly contemplates changes in the composition of the lender group over the life of the loan and affirms continued enforceability and lien priority, provided that the mortgage expressly permits such transfers and the participant acquires its interest as a bona fide purchaser without knowledge of title defects.

Issuance requirements typically include review of the participation agreement and the loan documents to confirm the existence of multiple participants and to understand post policy transfer mechanics. The title insurer will also review the insured mortgage or deed of trust for disclosure that participant interests may change over time and will confirm under applicable state law that syndicated lending arrangements are permitted. In jurisdictions where such arrangements are restricted or regulated, the endorsement may be unavailable or subject to additional requirements.

It is customary for Schedule A, item 1 to identify the Insured as the lead or administrative lender acting on behalf of the participants. Section 1(b) of the endorsement prohibits issuance on land containing a one-to-four-family residential dwelling.

The ALTA 30.1 Commercial Participation Interest Endorsement (07-01-21)

The ALTA 30.1 endorsement addresses a fundamentally different form of lender participation than that covered by the ALTA 42-06. This endorsement applies to commercial loan transactions in which the lender receives, as additional security, a contingent participation interest tied to the borrower's equity, appreciation in value, or cash flow generated by the mortgaged property, typically calculated pursuant to formulas set forth in the loan documents.

In some transactions, a private investment lender may offer a reduced interest rate in exchange for a participation interest in the borrower's equity. This structure is common in sponsor-driven or value-add transactions where the lender seeks to participate in upside performance while remaining secured by a traditional mortgage lien.

The risk addressed by the endorsement arises from the contingent and unliquidated nature of these types of participation interests. Unlike traditional debt, shared equity, appreciation, or cash flow interests cannot be determined at Date of Policy and depend on future performance. Absent this endorsement, if the participation structure caused impairment in the validity, priority and enforceability of the insured mortgage, there would be no coverage for this risk under the base loan policy. ALTA 30.1 insures against loss or damage if , as of the Date of Policy, the shared equity, shared appreciation and cash flow participation provisions contained in the insured mortgage and/or loan documents result in invalidity, unenforceability, or loss of priority of the insured mortgage.

The endorsement contains specific exclusions from coverage. It does not insure the correct calculation of the participation interest and excludes coverage for violations of usury, unconscionability, consumer protection laws, and truth-in-lending violations. It also excludes disputes regarding calculation of equity, appreciation or cash flow amounts, failure to comply with statute or regulations participation interests, post-policy mechanics' liens, and loss of priority from failure to pay recording or similar intangible taxes.

Issuance requires a review of the insured mortgage and loan agreement to confirm the nature of the participation provisions and an analysis of applicable state law to confirm participation interests are permitted and do not impair lien validity or priority. In jurisdictions where shared equity or participation features are restricted or regulated, the endorsement may be unavailable or subject to additional requirements.

The ALTA 38-06 Mortgage Tax Endorsement (12-03-12)

Only a limited number of jurisdictions impose a true mortgage tax and the ALTA 38-06 should be requested only where such a tax exists and where state law creates a title risk tied to non-payment or underpayment.

The endorsement defines "Mortgage Tax" broadly to include any recordation, registration, or related tax or charge required to be paid upon recording of the insured mortgage. Covered Risk 9(f) of the standard Loan Policy already insures against loss arising from failure to properly file, index, or record the insured mortgage, which necessarily requires payment of recording fees. Accordingly, the ALTA 38-06 is intended to address specific statutory risks associated with mortgage taxes rather than general recording fees and the endorsement's utility should be evaluated in light of existing policy coverage.

The endorsement provides coverage against loss or damage resulting from the invalidity, unenforceability, or lack of priority of the insured mortgage due to failure to pay the mortgage tax as of the recording date. Coverage applies only after the insured has paid all mortgage tax deficiencies, including interest and penalties. The endorsement does not insure against the tax itself, but rather against the title consequences arising from nonpayment.

The ALTA 38-06 expressly excludes liability for payment of the tax and disclaims liability for the accuracy of tax calculations. Because mortgage tax computations often rely on borrower-provided information and may be subject to differences in opinion as to the amount owed, title insurers may require the borrower to execute an indemnity to address potential deficiencies.

Issuance requires confirmation that underpayment or nonpayment of the mortgage tax does not impair the validity, enforceability or priority of the mortgage lien and that deficiencies may be cured by later payment. Coverage under the ALTA 38-06 is distinct from escrow or settlement obligations related to tax collection and remittance at closing.

Many states provide statutory exemptions from mortgage tax. In those jurisdictions, lender's counsel must ensure proper exemption documentation is recorded and that any applicable tax is paid at recording. Some states, such as Tennessee, provide that nonpayment or underpayment of mortgage tax does not impair lien validity, enforceability or priority. See Tenn. Code Ann. § 67-4-409 11(b)(11)(A). In these jurisdictions, the practical utility of the ALTA 38-06 may be limited.

The ALTA 43-06 Anti-Taint Endorsement (12-02-13)

In complex credit facilities combining a fully funded term loan with a revolving credit component, lenders face the risk that repayments and re-advances under the revolving line could impair the priority of the term loan lien.

The ALTA 43-06 endorsement applies to commercial loan facilities that incorporate both revolving credit and term loan components secured by the same insured mortgage. It insures against the loss of priority of the term loan lien resulting from repayments and re-advances under the revolving credit component. In effect, it ensures that the revolving feature does not "taint" the priority of the term loan.

The endorsement does not modify the effect of Exclusion 3.d. with respect to post-policy matters affecting the revolving credit component. Additionally, Covered Risk 10 relates to lien priority only as of the Date of Policy. As a result, the policy as amended by the ALTA 43-06 insures against loss or damage resulting from the loss of priority of the term loan component of the insured mortgage due to revolving credit loan advances made after the Date of Policy, but does not provide coverage for the future advance aspects. Coverage for future advances requires an ALTA 14 Future Advance Endorsement.

Issuance typically requires review of the loan agreement to confirm the presence of both term and revolving components. Definitions in the loan agreement are incorporated by reference, and the loan agreement is identified in Section 2(a) of the endorsement. The insured mortgage must also secure both obligations and include any statutorily required language.

State law review is required to confirm advances under the revolving credit component do not impair the priority of the term loan and to identify any disclosure requirements necessary to preserve priority.

ALTA 45-06: Pari Passu Mortgage Endorsement (12-01-14)

The ALTA 45-06 endorsement applies to transactions in which two or more mortgage lenders agree that their liens will share equal priority regardless of recording order. "Pari passu" meaning "in equal step" denotes that the insured mortgage shares the same lien priority as other designated mortgages. Pari Passu arrangements are typically documented through recorded mortgage provisions or an intercreditor agreement. While payment rights among pari passu lenders may differ, the defining feature is equal lien priority with respect to the mortgaged property.

The endorsement insures against loss or damage resulting from the invalidity or unenforceability of the insured mortgage due to pari passu provisions and against loss arising from failure of the insured mortgage to maintain equal priority with other designated pari passu mortgages.

Issuance requires review of the insured mortgage, the other pari passu mortgages, and any intercreditor agreement to confirm that the documents establish equal lien priority. Each loan policy must include a corresponding endorsement cross-referencing the other pari passu mortgages. The title insurer will also require that the pari passu relationship be disclosed in the public record, either through express language in the recorded mortgages or a recorded intercreditor agreement or memorandum.

State law must recognize and enforce para passu lien arrangements. Even if the lender does not wish to record the intercreditor agreement, it will remain as a Schedule B exception and be referenced in the endorsement. Issuance generally requires that all pari passu mortgages be insured by the same title insurer.

Conclusion

Complex financing endorsements are not merely transaction add-ons; they are integral components of risk allocation in commercial real estate financing. Understanding how these endorsements function, the regulatory constraints that affect their availability, and the underwriting considerations behind them help counsel manage expectations, reduce closing risk and facilitate productive negotiations that keep transactions moving forward.

The views expressed in this article are solely those of the author and not those of First American Title Insurance Company or any of its affiliates.

Mortgage Financing On Reserve Lands In Canada

By John D. Stefaniuk, Thompson Dorfman Sweatman LLP

Introduction

Commercial land development generally requires third party financing, and development on First Nation reserve lands in Canada is no exception. There is incredible diversity among Canadian First Nations and reserves; some are located near urban centres; some are so remote that there is no access other than ice roads and air. Then there has been the recent advent of "urban reserves" (often created in satisfaction of long-standing, unmet, historic land claims) - - - reserves created within existing urban centres by agreement among all four governments: the First Nation; the federal and provincial Crowns; and the municipal government. Some urban reserves are created specifically with development in mind with a view to economic reconciliation for the benefit of First Nations.

This article is intended to provide an introduction to the considerations at play in mortgage financing of reserve land established under treaty and subject to the *Indian Act*[1]. Mortgage lending on land within the scope modern land claims agreements (often referred to "modern treaties") can be the subject of entirely different rules, and that is beyond the scope of this article.

Canada's history of treaty-making with First Nations goes back almost as far as the arrival of the British and French to what is now Canada. The process has resulted in a patchwork approach to the management of First Nations land.

First Nations rights in reserve land have been consistently viewed as collective rights that exist for the benefit of current and future generations of First Nation members. The protection of those collective rights has given rise to limitations on the ability of First Nations to alienate reserve land. Restrictions on alienation were intended to protect a First Nation's land base and governance capacity, but they are now criticized as paternalistic and a barrier to economic growth. They can impose significant complications on a First Nation's ability to mortgage land interests and access capital. To address these concerns, First Nations and the federal government have developed various mechanisms to facilitate secured lending on reserve lands.

Terminology

In this article, and in Canada in general, the terminology used when referring to Indigenous peoples and federal laws affecting Indigenous peoples differs from the language used in the United States. In Canada, the term "Indigenous" is the preferred term to refer to the original peoples of North America and their descendants. It encompasses three distinct groups of Indigenous people: First Nations, the Inuit, and the Métis. The Inuit are Indigenous peoples inhabiting the Arctic regions of Canada. The Métis are a distinct Indigenous people with mixed Indigenous and European ancestry. First Nations are the diverse groups of Indigenous peoples who are neither Métis nor Inuit.

In Canada, the term "Indian" is a legal term that refers to specific First Nations people who have registered status under the *Indian Act*. Its use in other contexts may be offensive to those to whom it applies. Similarly, the term "Aboriginal" is still used, but it may be considered outdated.

Land set aside for the use and benefit of Indians under the historic treaty-making process is referred to as a reserve. The term "reservation" is not used in Canada. A group of First Nations people associated with a particular reserve are referred to in the *Indian Act* as a "band". In other contexts, it is preferable to refer to the same group as a "First Nation".

Background

For the last three hundred years, the Government of Canada has entered into land agreements with hundreds of First Nations. This has resulted in a patchwork system for land management, with each approach reflective of its era's goals and underlying philosophies for First Nations' land management.

As early as 1701, the British Crown entered into agreements with Indigenous groups for their respective land use rights. This marked the beginning of Canada's historic treaties. The treaty-making process was formally established by the *Royal Proclamation of 1763*. The *Royal Proclamation* prohibited private land deals with Indigenous peoples and provided that only the Crown could negotiate the surrender of Aboriginal title. Treaties signed after the *Royal Proclamation* ceded (at least in the view of the Crown's representatives) Aboriginal title in large areas of land to the Crown in exchange for permanent reserves and other concessions.

In 1867, Canada's original constitution, the *Constitution Act*, 1867, gave the federal government exclusive jurisdiction over "Indians, and Lands reserved for the Indians".[2] Over the next 50 years, Canada entered into the Numbered Treaties, covering much of Ontario and the Prairie Provinces.[3] The Williams Treaties and Robinson Treaties were entered into by the Crown and First Nations in southern Ontario. The Douglas Treaties were entered into with First Nations on Vancouver Island.

The use and surrender of reserve lands from the historic treaties is governed under the federal *Indian Act*[4], legislation which traces its origins to the time of Canada's Confederation, and which continues to govern the relationship between First Nations and the Government of Canada to this day.

The modern treaty era began in 1973 after the Supreme Court of Canada recognized Aboriginal title as a legal right, encouraging the settlement of outstanding land claims. Modern treaties have been negotiated in British Columbia, Saskatchewan, Quebec, Newfoundland and Labrador, and across the territories. They are intended to enable rights to resource development, land management, and self-government.[5]

In 1996, a political shift led to the *Framework Agreement on First Nation Land Management* (the "*Framework Agreement*"). The *Framework Agreement*, first ratified under the *First Nations Land Management Act* (now the *Framework Agreement on First Nation Land Management Act*), allows First Nations to reclaim some authority for land management. By publishing a land code, a First Nation may opt out of 44 land-related provisions of the *Indian Act*.[6]

As a result of these agreements, three categories of First Nations land management have emerged: reserve lands under the *Indian Act*, reserve lands under the optional *Framework Agreement on First Nation Land Management Act*, and lands under modern treaties. Each framework includes barriers to secured financing.[7]

Restricions on Alienation

For almost all of Canadian history, agreements on the management of First Nations land have included restrictions on alienation. Purporting to protect Canada's Indigenous peoples from the fraud and abuse of settlers in land purchases, The *Royal Proclamation of 1763* prohibited the alienation of Aboriginal lands to third parties. These same restrictions were carried into the *Indian Act*, where they are generally justified in reference to the protection of Indigenous land base and culture, and capacity for self-government.[8]

Restrictions on alienation are a key characteristic of reserve land in Canada. Section 28(1) of the *Indian Act* renders any instrument conferring land rights from a band or member to a non-member void. As a corollary to this prohibition, and as articulated in section 89(1) of the *Indian Act*, reserve lands cannot be used as collateral in secured financing transactions.9 This imposes a significant financial barrier to projects on reserve lands. Studies have shown that Indigenous businesses have only been able to access one tenth of the financing available to mainstream Canadian businesses.[10] In addition, the existence of several land management regimes increases the information costs associated with transactions on reserve lands.[11]

Financing: Reserve Lands Under the Indian Act

Reserve land is the most significant form of land holding for Canadian First Nations. It is land owned by the Crown for the use and benefit of First Nations.[12] Alienation of reserve land is restricted under the *Indian Act*. Under section 37(1), reserve lands "shall not be sold nor title to them conveyed until they have been absolutely surrendered" to the Crown.[13] The sale of land to third parties is technically possible if the federal government acts as an intermediary, accepting the surrendered land and conveying it to a third party. An absolute surrender must be accepted by the Governor in Council (i.e., federal Cabinet) and assented to by a majority of band members at a meeting or referendum.[14] The surrender process has fallen out of favour, especially after a series of cases in which the federal government was found liable to First Nations for failing to fulfill its fiduciary duties in negotiating historic surrenders.

Without an absolute surrender, reserve lands remain subject to the prohibition of mortgages under the *Indian Act*. There are two exceptions to this prohibition that allow for the financing of reserve land. First, reserve land may be subject to a mortgage if the mortgage is in favour of an Indian or a band.[15] Second, a mortgage can be held against leasehold interests on designated reserve lands. Mortgaging the leasehold interest is the most common means of mortgage financing on reserve lands.[16]

Reserve land must be designated before an interest in the land can be granted to a non-member. Unlike surrendered lands, designated lands retain their status as reserve lands.

The designation process is outlined in sections 38(2) and 39.1 of the *Indian Act*. It requires that the designation is assented to by a majority of a band's electors, is then recommended to the Minister by the band council, and is accepted by the Minister for designation.[17] The band council's recommendation can be shown by way of a "band council resolution" (also known as a "BCR"). The terms of the designation should be clear enough to receive the electors' and Minister's approval, but general enough that the designation can accommodate some changes to the development plan without a new referendum.[18]

The lease and designation process may also trigger the *Impact Assessment Act*.[19] The *Impact Assessment Act* outlines a process for assessing the environmental impacts of projects on federal lands, which includes "reserves, surrendered lands and any other lands that are set apart for the use and benefit of a band and that are subject to the *Indian Act*, and all waters on and airspace above those reserves or lands." It also includes the waters and airspace of those reserves or lands. An impact assessment may be required for proposed developments prior to Ministerial approval of a designation.

It is important to note that a developer will not have any interest in the land unless or until the land is designated and the lease is granted. Conditional leases are generally not permissible under the *Indian Act*. The designation process may take 6 to 12 months.[20] Investors and developers will remain vulnerable during this period, and they should be aware of the additional risks inherent in projects on reserve lands.

Once the land is designated, the First Nation may provide sub-leases to non-members without Ministerial approval. Often, the land is subleased to a First Nation's development corporation, which, in turn, provides a lease to a property developer. Depending on the terms of the designation and lease, the lessee may have to pay fair market rent and may be subject to periodic rent review. Each lease and sublease may be used as security in a mortgage loan. If a lessee defaults on rent payment, each sublease could be in jeopardy if the lessee fails to fulfill obligations under the mortgage. If a lessee defaults on a mortgage payment, however, the effect of enforcement on subleases is unpredictable.[21] As most standard mortgage terms apply only to the provincial land title system, specific terms will likely have to be negotiated.

Unless the First Nation has established a land code, discussed below, reserve lands fall under the Indian Lands Registry.[22] The Indian Lands Registry is an information registry for recording interests in reserve lands. It does not provide certainty of title or assurances of priority interests. Lenders will often charge a higher interest rate, given the nature of the Indian Lands Registry. The Indian Lands Registry has longer processing times than provincial land title systems. It can take up to six weeks to register an interest in the Indian Lands Registry System, whereas most provincial land title systems have same-day registration. Lenders will have no assurance that their mortgage is registered for up to six weeks, and they will likely have to release funds prior to completion of registration. While some of this risk can be largely mitigated with the purchase of title insurance gap coverage, developers and lenders should consider this additional expense.[23]

Financing: Reserve Lands Under the Framework Agreement on First Nation Land Management Act

The government of Canada and First Nations entered into of the *Framework Agreement on First Nation Land Management* in 1996, allowing First Nations to establish their own land codes.[24] Since then over 100 First Nations have established a land code. Prior to 2022, the *First Nations Land Management Act*[25] allowed a First Nation to opt out of 44 provisions of the *Indian Act* related to environmental and land management, including the processes for surrenders and designations.

Replacement legislation, the *Framework Agreement on First Nation Land Management Act*[26] (the "*Framework Agreement Act*") gives the *Framework Agreement* the force of law. The *Framework Agreement Act* contains 13 provisions, and it defers to the opt-in and management processes described in the *Framework Agreement*[27].

Financing reserve lands under the *Framework Agreement* Act is also limited to the mortgaging of leasehold interests; however, it provides that the processes for approval and management of real property interests may be established in a First Nation's land code.

The *Framework Agreement* confirms that section 29 and subsection 89(1) of the *Indian Act*, which prohibit the mortgage of freehold interests, continue to apply to reserve land.[28] A land code may provide that some or all of the requirements for the creation of leasehold interests remain applicable.[29] Alternatively, a land code may establish new processes for the creation and mortgage of a leasehold interest. Therefore, while the type of interest that a First Nation may grant in reserve land has not expanded, the structure of the leasehold interest may be simplified. A First Nation may now contract directly with developers based on the provisions in its land code. Leases no longer require approval from the Minister.[30]

The process for financing reserve lands under the *Framework*

Agreement Act may therefore vary by First Nation. Each land code will reflect a First Nation's desire for preservation of culture weighed against their capacity for economic growth. This may lead to the proliferation of distinct forms of land tenure. Potential developers should be aware of information and transaction costs that arise from novel interests. First Nations already appear to have recognized the benefits of standardization. Many existing land codes are based on the model code prepared by the Indigenous-led First Nations Land Management Resource Centre.[31] Developers may benefit from familiarization with this model code.

Interests in reserve lands under the *Framework Agreement Act* are registered in the First Nations Land Registry System.[32] Under the *Framework Agreement*, the federal government must establish and maintain a separate register for each First Nation with a land code in force.[33] The First Nations Land Registry is similar to the Indian Land Registry, but registration in the former provides greater benefits. The First Nations Land Registry accords priority to all interests based on the time and date of registration, and it gives priority to a registered interest over an unregistered interest.[34]

In 2023, the Government of Canada committed funding over 3 years (2023-2026) for the co-development of a new First Nation-led land registry. This is intended to replace the existing First Nations Land Registry System. It will be available to all First Nations operating under the *Framework Agreement* and any self-governing First Nations. The modern land registry will be owned, managed and administered by First Nations.[35] It is a response to criticisms of the current level of service provided under the current federally operated registry.[36]

A Brief Word on Lands Under Modern Land Claim Settlements

Although inalienability remains a key characteristic of reserve lands, modern land claim settlements have created new and unique systems of First Nations land tenure, including alienable title. Prior to these agreements, there was no mechanism that allowed a First Nation to sell land to a third party while also retaining jurisdiction over that land. Now, some First Nations can retain jurisdiction over land alienated to non-members.

The Nisga'a Final Agreement, for example, provided the Nisga'a Nation with fee simple title possession to a portion of their traditional territory. It also stated that the Nisga'a Nation has the power to transfer any parcel of the estate to any person in fee simple or in any lesser estate or interest. This can be done without the consent of Canada or British Columbia. The Nisga'a Nation will retain governance authority over the land, even if it is alienated to non-members.[37] Therefore, the Nisga'a Nation can sell, lease, mortgage and encumber all lands demarcated under the Nisga'a Final Agreement without losing capacity to govern their traditional territories. This is recognized as part of a trend toward property law reform that increases economic certainty and financial investment in First Nations.[38]

Land transactions and financing in the Nisga'a Nation are governed by both provincial and Nisga'a law. The Schedule to the *Nisga'a Final Agreement Act* provides some provisions on the application, registration, and cancellation of provincial and federal title systems.[39] The *Nisga'a Land Title Act* and other relevant Nisga'a statutes include greater detail on the Nisga'a title system. Under the *Nisga'a Land Title Act*, the registrar must maintain a fee simple register "all indefeasible titles for land the fee simple ownership of which has been required to be registered under ... the Nisga'a Landholding Transition Act." They must also maintain a "restricted register" for all other indefeasible titles. An estate must be registered before it can be mortgaged. Mortgages of a fee simple estate or lease are included in the fee simple register. Mortgages of a Nisga'a Nation entitlement and mortgages of a Nisga'a Village entitlement must be included in the restricted register.[40]

Other Financing Options and Supports

Having recognized the difficulty of securing financing for on-reserve development, many Canadian governments and financial institutions have developed alternative funding options for projects on reserve lands. Some financing alternatives are only available for First Nation governments, Status Indians, or projects that are entirely Indigenous owned, but others provide more flexible eligibility requirements.

Indigenous Financial Institutions are one potential source of alternative financing. They are community-based, Indigenous-led financial organizations that provide lending and support services to Indigenous businesses. Their interest rates are sometimes higher than traditional bank loans. Government initiatives such as the Indigenous Growth Fund may allocate funds to Indigenous Financial Institutions to increase their investment capacity.[41]

Most Indigenous Financial Institutions provide financing exclusively to Indigenous entrepreneurs. Some require that any business receiving funds is wholly Indigenous owned, but many require at least 51% Indigenous ownership.[42] If First Nations and non-Indigenous developers are interested in a partnership, they may be eligible to access these funds. Some Indigenous Financial Institutions also have requirements for their recipients' place of residence or province of operation.[43] Others provide funding based on the place of business and the potential for local employment,[44] which may allow non-Indigenous recipients to participate in community-based development projects.

Loan guarantees may also be available to finance on-reserve development by providing the necessary security for a loan. However, similar to Indigenous Financial Institutions, they focus on supporting Indigenous-owned projects. The current Ministerial Loan Guarantee offered by the Minister of Indigenous Services Canada supports lenders who are financing housing loans on-reserve.[45] Indigenous businesses may also be eligible for the Canada Indigenous Loan Guarantee, but this is only available to Indigenous rights holders and their wholly owned subsidiaries.[46] The availability and eligibility of other loan guarantees will vary based on government priorities. For example, the Manitoba Indigenous Loan Guarantee Program recently provided security for wind power projects with 51% ownership by Indigenous organizations and approval of Chief and Council.[47]

There are many other programs and institutions that provide funding to majority Indigenous-owned developments, such as the Aboriginal Entrepreneurship Program, the First Citizens Fund, and the First Nations Finance Authority. Developers may benefit from reviewing the available programs to see if any align with their project goals.

Conclusion

In Canada, the process for financing reserve land will vary based on the nature of the First Nations' agreement with the federal government and applicable Indigenous law. Any development should proceed with an understanding of the various financing regimes. If a First Nation has developed a land code, it will be subject to the *Framework Agreement on First Nation Land Management Act*, and financing must occur according to the provisions of the land code. First Nations without a land code continue to be governed by the *Indian Act*. The mortgage of a leasehold interest will require a land designation with the approval of band members and the Federal Minister. By contrast, First Nations that have signed modern land claim agreements will be subject to a distinctive system of federal and Indigenous law, which may allow for the mortgaging of fee simple interests. Developers and investors should be familiar with the regime that applies to a potential project. Conversations with the affected First Nation should begin early and continue throughout the life of a project. A strong relationship with the First Nation's government will allow developers to understand and manage the risks associated with projects on First Nations land.

End Notes

1 RSC 1985, c I-5 [Indian Act].

2 s 92, being Schedule B to the Canada Act 1982 (UK),1982, c 11.

3 Government of Canada, "Treaties", *supra* note 1.

4 *Supra* note 2.

5 Government of Canada, "Modern Treaties" (last modified 10 June 2025), online: <https://www.rcaanc-cirnac.gc.ca/eng/1677073191939/1677073214344>.

6 Government of Canada, "First Nation Land Management: Policy and Legislation" (1 August 2023), online: <https://www.rcaanc-cirnac.gc.ca/eng/1686318557963/1686318775639> [Government of Canada, "First Nation Land Management"].

7 Scott Hitchings, "Real Property Security Interests on First Nations Reserved Lands" (2017) 80 Sask L Rev 125.

8 Malcolm Lavoie, "Why Restrain Alienation of Indigenous Lands?" (2016) 49 UBC L Rev 997.

9 Supra note 1.

10 Momentus Global, "Addressing Gaps in Indigenous Access to Finance: Pre-Scoping Report" (16 October 2023), online (pdf): <https://fnfmb.com/sites/default/files/2024-01/2023-10-16_idb_pre-scoping_study_final_report.pdf> ["Alienation of Indigenous Lands"].

11 Lavoie, "Alienation of Indigenous Lands", supra note 7.

12 *Ibid.*

13 *Indian Act, supra* note 8.

14 *Ibid,* s 39(1).

15 *Ibid,* s 89(1).

16 *Ibid,* s 89(1.1).

17 *Ibid.*

18 Brent Lehmann, "Overview of Legal Matters to be Considered in For-Market Development of First Nation Reserve Lands" (2021), online: <https://www.ratcliff.com/publications/overview-legal-matters-be-considered-development-reserve-lands/>.

19 S.C. 2019, c. 28.

20 John Doolan & Emma Grolla, "Getting Down to Business: The Low-Down on Doing Deals on First Nation Land" (Workshop delivered at the International Council of Shopping Centers and Canadian Law Conference, Toronto, 21-22 September 2022) [unpublished] online: <https://www.icsc.com/uploads/event_documents/Workshop_-_Getting_Down_to_Business_The_Low-Down_on_Doing_Deals_on_First_Nation_Land.pdf>.

21 Hitchings, *supra* note 6.

22 Lehmann, *supra* note 16.

23 *Ibid.*

24 First Nations Land Management Resources Centre, "Framework Agreement Signatory First Nations Across Canada" (last modified 78 July 2025), online: <https://labrc.com/signatory-first-nations/>.

25 SC 1999, c 24.

26 S.C. 2022, c. 19.

27 Government of Canada, "First Nation Land Management", supra note 5.

28 *Framework Agreement on First Nation Land Management,* 12 February 1996, s 15.1, online: <https://labrc.com/wp-content/uploads/2023/03/Framework-Agreement-on-First-Nation-Land-Management-Dec-2022.pdf> [Framework Agreement].

29 *Ibid,* s 15.3.

30 Hitchings, *supra* note 6.

31 Malcolm Lavoie, "The Implications of Property as Self-Government" (2020) 70 U Toronto LJ 535.

32 Government of Canada, "Land Registration" (last modified 19 April 2016), online: <https://isc.gc.ca/eng/1100100034803/1611929056890>.

33 *Framework Agreement,* s 51.

[34] Jean Yuen, “Conveyance of a Leasehold Interest in First Nations Lands” (6 Dec 2018), online (article): <https://www.boughtonlaw.com/2018/12/conveyance-of-a-leasehold-interest-in-first-nations-lands/>.

[35] Government of Canada, “First Nation Land Management”, *supra* note 5.

[36] Angie Derrickson & Brittany Hall, “An Overview of the First Nation Land Governance Registry” (Presentation delivered at the BC Links to Learning Conference, Vancouver, 3 December 2024) [unpublished] online: <https://links-to-learning.ca/files/fn-land-registry-systems.pdf>.

[37] *Nisga’a Final Agreement,* 27 April 1997, online: < https://www.rcaanc-cirnac.gc.ca/eng/1100100031292/1542998607479>.

[38] Sari Graben, “Lessons for Indigenous Property Reform: From Membership to Ownership on Nisga’a Lands” (July 2014) 47 UBCL Rev 399.

[39] *Nisga’a Final Agreement Act,* SBC 1999, c 12.

[40] *Nisga’a Land Title Act,* enacted by Wilp Si’ayuukhl Nisga’a (Nisga’a Lisims Government) (30 October 2014), online: <https://www.nisgaanation.ca/wp-content/uploads/2024/07/Nisgaa-Land-Title-Act-Unofficial-Consolidation-1.pdf>.

[41] National Aboriginal Capital Corporations Association, “Indigenous Financial Institutions” (last visited August 14, 2025), online: <https://nacca.ca/indigenous-financial-institutions/>.

[42] See the Alberta Indian Investment Corporation, Stó:lō Community Futures Corporation, and First Peoples Economic Growth Fund for examples of Indigenous Financial Institutions with ownership requirements.

[43] See the Saskatchewan Indigenous Enterprise Foundation and Nishnawbe Aski Development Fund for examples of Indigenous Financial Institutions with location of residence or province of operation requirements.

[44] See the Beaver River Community Futures Development Corporation, Northern Enterprise Fund Inc., däna Näye Ventures, and the Burns Lake Native Development Corporation for examples of Indigenous Financial Institutions that may provide funding to non-Indigenous recipients for community-based development projects. Many of these have specific requirements for the place of business.

[45] Government of Canada, “Ministerial Loan Guarantees” (31 March 2020), online: <https://www.sac-isc.gc.ca/eng/1100100010759/1533297595541>.

[46] Government of Canada, “Canada Indigenous Loan Guarantee Corporation” (16 December 2024), online: <https://www.canada.ca/en/department-finance/news/2024/12/canada-indigenous-loan-guarantee-corporation.html>.

[47] Government of Manitoba, “Manitoba Indigenous Loan Guarantee Program” (last visited 14 August 2025), online: <https://www.gov.mb.ca/milgp/index.html>.

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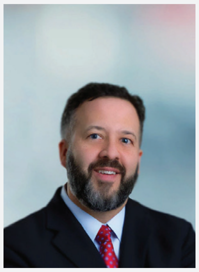
The Equal Credit Opportunity Act and Spousal Guaranties



By Jonathan D. Block, Honigman LLP

Introduction

Recently in my work on Honigman's opinion review committee, an issue has come up a few times as to whether our firm can deliver an unqualified opinion as to the effect of The Equal Credit Opportunity Act ("ECOA") on the enforceability of a spousal guaranty.[1] Looking at prior opinions, this is an issue that our opinion committee had historically never been forced to address as our standard opinion form included a broad exclusion for consumer protection laws and we had never been challenged on such exclusion. Candidly, I always considered these types of consumer protection laws in general to be important to protect homebuyers from unfair or deceptive financial practices with residential lenders instead of affecting the commercial sector. However, after a deeper dive on the subject it became apparent my initial view on the issue was misguided and the ECOA does in fact apply to commercial lending especially in the case of family businesses.[2] Not only that, the effects of the ECOA on commercial lending presents a number of complications for lenders as to spousal guaranties since the applicable statutory and regulatory framework are contradictory and the case law is inconsistent.

ECOA History

By way of quick background, the ECOA (enforced primarily through the Consumer Financial Protection Board ("CFPB")) was enacted in 1974 to eliminate discrimination in credit transactions and, in particular for this article, as it relates to preventing credit decisions based on marital status as opposed to objective financial criteria.[3] More specifically, the ECOA was intended to prevent lenders from refusing to extend credit to married individuals unless their spouse co-signed the guaranty. This historical lending practice most often impacted married women, regardless of whether the applicant's income and creditworthiness was sufficient to independently qualify for the loan as the lender would typically require a spousal guaranty.[4] So in the context of a married couple where the husband seeks a loan, his wife would typically be required to sign a personal guaranty. However, the plain text of the ECOA falls short in protecting the spouse executing the guaranty as only individuals who actually seek credit (i.e., the applicant) and not third parties that guaranty the loan are protected under the ECOA. In contrast, Regulation B which supplements the ECOA provides detailed rules and guidelines governing credit application decisions expands the definition of "applicant" to include guarantors.[5] The inconsistent use of the term "applicant" in the ECOA and Regulation B has resulted in confusion for the courts, lenders, borrowers and spouses who are required to guaranty the loan of their spouse.

Split in Case Law

The inconsistent use of the term "applicant" between the ECOA and Regulation B has resulted in a split in the circuit courts' decisions. The Eighth Circuit's decision in *Hawkins v. Community Bank of Raymor*e is one of the leading case rejecting the inclusion of guarantors within the definition of "applicant."[6] In *Hawkins*, two spouses challenged the enforceability of guaranties they were required to sign for loans made to their husbands' business. The court held that Regulation B's definition of "applicant" was invalid to the extent it included guarantors, reasoning that the statutory text in the ECOA unambiguously limited "applicant" to those who request credit. The court emphasized that guarantors do not request credit. Instead, guarantors merely promise to pay if the applicant defaults. The Supreme Court granted certiorari in *Hawkins* and ultimately affirmed the Eighth Circuit's decision in Hawkins by an equally divided Court; thus, leaving the circuit split unresolved. A frequently cited case limiting the definition of "applicant" to the plain text of the ECOA came out of the Seventh Circuit in *Moran Foods, Inc. v. Mid Atlantic Market Development Co.*[7] Although the case was ultimately decided on other grounds, the decision takes a strong position against expanding the ECOA beyond its original text and instead using the definition of "applicant" in the regulatory interpretation. To sum up, in circuits that follow the Eighth Circuit, spousal guarantors cannot bring ECOA claims and, thus, guaranties executed by spouses cannot be challenged under the protections of the ECOA. Although the Eighth Circuit's decision and other concurring circuits significantly narrows the ECOA's protective scope, such decisions at least provide some clarity for lenders as to the enforceability of spousal guaranties.

Other circuits have taken the opposite approach, deferring to Regulation B's interpretation of "applicant" and holding that, as a result of the language in Regulation B, guarantors are "applicants" under the ECOA. In *RL BB Acquisition, LLC v. Bridgemill Commons Development Group, LLC,*[8] the Sixth Circuit, for example, upheld Regulation B's definition, reasoning that the ECOA is ambiguous and that the expanding the definition of "applicant" is reasonable. Therefore, in the Sixth Circuit a spouse acting as guarantor would have standing to challenge the enforceability of a spousal guaranty under the ECOA and this court's decision would appear on its face to prevent credit decisions based on marital status as opposed to objective financial criteria as intended by the ECOA. However, as a practical matter, the implications of *RL BB Acquisition, LLC* are militated by the Spousal-Signature Rule which is also included in Regulation B.[9] The rule states generally that a creditor may not require the signature of an applicant's spouse unless the applicant does not independently qualify for the credit. Lenders have been able to circumvent the obstacles presented by the broader interpretation of "applicant" in *RL BB Acquisition, LLC* by using the Spousal-Signature Rule as a tool to compel spousal guaranties even when the spouse is not an applicant.

The practical consequence of the circuit court split means in jurisdictions that reject the definition of "applicant" from Regulation B, spouses who were compelled to sign guaranties have no recourse under the ECOA. A lender can enforce the guaranties regardless of whether the spouse's signature was required based on marital status. In jurisdictions that accept the definition of "applicant" from Regulation B, spouses may challenge the spousal guaranty. However, the outcome of those challenges depends on whether the lender can articulate a non discriminatory reason for requiring the spousal guaranty under the Spousal-Signature Rule. The end result means that the protections given to spouses under the ECOA depends in part on your geographic location and presents uncertainties for lenders and guarantors strictly in the context of the ECOA and Regulation B as it relates solely to the definition of applicant.

Path Forward

Before looking at ways that Congress or the CFPB can act to rectify the current circuit split, I would make three observations. First, based on the Supreme Court's recent ruling in *Loper Bright Enterprises v. Raimondo*[10] and the current administration's somewhat aggressive stance in reining in unelected regulatory agencies, it would seem that if the Supreme Court was presented with the opportunity to look at the issue of the inconsistency in the definition of "applicant" in the ECOA and Regulation B, it would rule in favor of the approach taken in *Hawkins* and limit the definition of "applicant" to the statutory text. I would also note that under the current administration and in the wake of *Loper Bright Enterprises* I do not see any solution coming from CFPB or other regulatory agency. Second, I think family and business relationships have dramatically changed and become more sophisticated over the last 50 years so perhaps the ECOA's approach to lending protections are simply outdated. In many instances and in addition to customary lender underwriting practices, lenders making loans to family businesses and other lending situations most impacted by the ECOA can make a strong case that concerns over the treatment of marital property in divorce, the overall complexity of combined household assets and bank accounts and estate planning strategies to protect assets from creditors justify the need for a spousal guaranty even though the spouse has no ownership interest in the business and, although less persuasive in my opinion considering the entanglement of marital assets, receives no direct benefit from the loan. Third, although this article does not consider the effects of consumer protection laws at the State level, it is conceivable that a State could strengthen its consumer protection laws to fill the void left by the weakening of the ECOA but that has a number of other implications and is a discussion left for another day.

Regardless of whether the Supreme Court is presented with the issue as to the inconsistent use of the term "applicant" in the ECOA and Regulation B, Congress should step in and clarify the text of the ECOA. Congress could for example amend the ECOA to clarify the definition of "applicant." Congress could explicitly state that guarantors are not applicants, thereby eliminating the statutory–regulatory mismatch that has produced the circuit split. Alternatively, Congress could take a different approach and expand the definition under the ECOA to include guarantors, thereby providing spousal guarantors with standing under the ECOA. In reality though, I have seen no evidence that Congress is in a hurry to step in and try to correct this statutory-regulatory mismatch. If Congress did decide to clarify the definition of "applicant" in the ECOA it would seem based on Congress' somewhat indifferent approach to gender -based protections that more likely than not Congress would clarify that the definition of "applicant" does not include guarantors. It is worth emphasizing though that even if the ECOA definition of "applicant" is clarified one way or the other, spouses would still have the challenge of navigating the effects of the Spousal-Signature Rule.

Although subject to further debate, the current trend towards limiting the power of unelected regulatory agencies and the administration's and Congress' general indifference towards consumer protections based on gender would suggest that the original protections intended to be afforded by the ECOA have been and will continue to be diminished. The end result being that the non-owner spouses (especially women) will continue to be required by lenders to sign spousal guaranties even when the spouse is not an applicant. As simply a matter of public policy, many in this country would argue that the benefits originally intended by the ECOA at this point provide limited, if any, real protections for spouses. However, putting public policy aside, the trend toward reining in the power of unelected regulatory agencies including CFPB and thereby limiting the impact of the ECOA does provide some clarity for lenders, borrowers, spousal guarantors and their respective counsel. First, lenders should feel more confident that a spouse cannot effectively challenge a spousal guaranty based on the ECOA. Second, although borrowers and spousal guarantors would typically be seen as opponents of the weakening of the ECOA at least there is some predictability and married couples can make more informed decisions about risks underlying business loans. Third, counsel for both lenders and borrowers will likewise welcome some predictability as to the impact of the ECOA on lending so they can more effectively advise their clients.

Conclusion

In terms of next steps, the simplest solution to put this issue to rest is for Congress to take action to fix any issues surrounding the ECOA. As our elected officials, Congress can amend the terms of the ECOA and once and for all provide clarity one way or the other as to the ability for spouses to challenge (or not) spousal guaranties. It is with some disappointment that I believe that this Congress will not take any steps one way or the other to resolve the inconsistencies and unpredictability surrounding the ECOA and Regulation B unless the current administration finds a strong political motivation to press Congress to take action. Thus, the statutory-regulatory mismatch will continue to live on and lenders, borrowers, spousal guarantors and their respective counsel will continue to be stuck in the current lending landscape.

End Notes

1 Equal Credit Opportunity Act, 15 U.S.C. § 1691(a).

2 *See, e.g.,* U.S. Small Business Administration, *Small Business Lending Statistics* (annual reports).

3 Legislative history of ECOA, S. Rep. No. 93 278 (1973).

4 *See, e.g.,* Elizabeth Renuart, *Unequal Protection: The Misuse of Spousal Guarantees*, 65 Consumer Fin. L.Q. Rep. 123 (2011).

5 Regulation B definition of "applicant", 12 C.F.R. § 1002.2(e).

6 *Hawkins v. Cmty. Bank of Raymore,* 761 F.3d 937 (8th Cir. 2014), *aff'd* 136 S. Ct. 1072 (2016).

7 *Moran Foods, Inc. v. Mid Atl. Mkt. Dev. Co.*, 476 F.3d 436 (7th Cir. 2007).

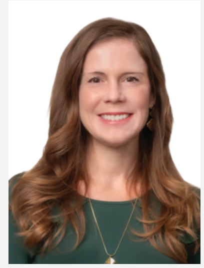
8 *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC,* 754 F.3d 380 (6th Cir. 2014).

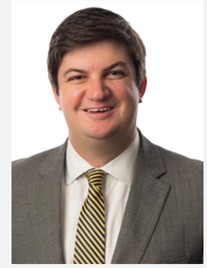
9 Spousal Signature Rule, 12 C.F.R. § 1002.7(d).

10 *Loper Bright Enterprises v. Raimondo,* 603 U.S. 369 (2024).

SC Property Owners and Tenants Beware of Potential Property Tax Consequences

By Amy H. Clayton and Whit McGreevy, Womble Bond Dickinson US LLP





The complex property tax system in South Carolina directly impacts owners of owner-occupied property and also has a waterfall effect on tenants who reimburse landlords for property tax pass-throughs under net leases. Property owners and tenants need to be particularly mindful of certain scenarios where the complicating factors of property taxation in South Carolina can create a twisted knot of issues to untangle. Understanding the property tax implications of property transfers, as well as timely and accurate real property tax filings, is critical for owners and tenants to achieve potential tax savings and pay the appropriate amount of property taxes in this tax landscape.

Basic Property Tax Calculation

As a baseline for understanding, ad valorem real property taxes in South Carolina are determined by the following calculation:

(fair market value) x (applicable assessment ratio) x (local millage rate)

- The fair market value of the property is generally determined based on a County-wide reassessment every five years and any increases in fair market value based on such County-wide reassessment are capped at 15% over the prior fair market value. Assessable Transfers of Interest, discussed below, are an exception to this general rule. Agricultural properties ordinarily have a lower tax valuation than developed properties.
- The applicable assessment ratio for real property in South Carolina is 4%, 6%, or 10.5%. Most properties classified as agricultural, as well as owner-occupied, primary residence properties, enjoy a special 4% assessment ratio. Commercial properties, including those used for warehousing and distribution, as well as agricultural properties owned by certain types of corporations, and non-owner-occupied residential properties are taxed at the 6% assessment ratio. Manufacturing properties are taxed at a nominal 10.5% assessment ratio, although recent changes in the tax laws provide an "effective" 6% assessment ratio for most manufacturing properties[1].
- The local millage rates vary by County in South Carolina and are a combination of the sum of rates for County, school district, municipal (if applicable), and special tax districts to support fire services, water, sewer, road maintenance, recycling, recreation, and other similar services. Millage rates frequently increase on an annual or bi-annual basis to accommodate County and municipal budgets.

Assessable Transfers of Interest

Outside of the every 5-year, 15% capped County-wide reassessment discussed above, South Carolina has a "point of sale" reassessment statute which allows County Tax Assessors to reassess the fair market value of a property as a result of certain types of transactions, most notably arms' length sales, including both direct deed conveyances and transfers of 50% or more of the equity interest in entities that own real property ("Assessable Transfers of Interest" or "ATIs")[2]. Unlike the County-wide reassessment, the County Tax Assessor does not have to apply a 15%, or any cap, to the new assessed fair market value post-ATI, and the new fair market value of the property for tax purposes typically approximates the purchase price for the subject property after an ATI-triggering sale. Thus, ATIs can result in a significant property tax increase. *The effect of ATIs can result in two virtually identical properties, side by side, having highly disparate fair market values if one has sold recently and the other has not.*

To partially mitigate the tax increase for certain properties taxed at the 6% assessment ratio pursuant to S.C. Code Ann. § 12-43-220(e), owners can apply for a 25% "partial exemption" from the full effect of County Tax Assessor's new post-ATI fair market value of the property by submitting an application or notice to the County Tax Assessor on or before January 30 (not 31st) of the year after the ATI occurs. If the property is eligible and the partial exemption is timely and properly applied for by the property owner, the County Tax Assessor must reduce the new post-ATI fair market value of the property by 25%.[3] *The property owner must affirmatively apply for this 25% partial exemption before the strict January 30 (not 31st) deadline. The application or notice form required by the County Tax Assessors differs for each county in South Carolina. Purchasers of real property in South Carolina must be mindful of the deadline and use the correct application or notice form and process.*

To complicate matters, the 25% partial exemption (from the new post-ATI fair market value of a property) is not available for properties taxed at 4% or manufacturing properties taxed at 10.5%, even if the manufacturing properties have an "effective" tax rate of 6% pursuant to S.C. Code Ann. Section 12-37-220(52). Even 10.5% manufacturing properties that, post-ATI, will no longer be used for manufacturing and will revert to the 6% assessment ratio, are not eligible for the 25% partial exemption because the property must be taxed at the 6% assessment ratio *both before and after the ATI* pursuant to S.C. Code Ann. Section 12-43-220(e).

Also, properties subject to Fee In Lieu of Tax Agreements ("FILOTs" or "FILOT Agreements") also do not qualify for the 25% partial exemption, even if the applicable assessment ratio in the FILOT Agreement is 6%. FILOT properties are subject to a contractual fee in lieu of tax, rather than being expressly subjected to a 6% rate by S.C. Code Ann. § 12-43-220(e). That said, properties subject to a FILOT are typically insulated from ATI tax increases because FILOT Agreements generally fix the tax value of real property at its income tax basis for the life of the FILOT and can usually be transferred to a buyer in a sale as further discussed below. However, if the FILOT Agreement is not transferred to the buyer, the buyer elects to terminate the FILOT Agreement, or if the term of the FILOT expires, then an ATI would occur, and the 25% partial exemption would not be applicable.

In addition, purchasers who acquire real property in South Carolina through transfers of greater than 50% of the equity interests in an entity that owns real property (rather than a deed transfer) have an affirmative legal obligation to file a notice of this transfer with the County Tax Assessor within 45 days after the transfer, and the failure to report such transfer can subject the property to a civil penalty of $100 - $1,000 per year after the notice is required, together with any other penalties that may apply. The purpose of this filing is to notify the County Tax Assessor of the ATI, which would not otherwise be apparent because no deed is recorded.

Thus, ATIs can have a significant impact on the property taxes for recently acquired properties in South Carolina, and purchasers must be aware of the effect of these taxes in their future business planning. Further, navigating the 25% partial exemption availability and FILOT applicability, as well as the affirmative notice requirements for non-deed transfers, is both complex and critically important.

Sale and Development of Agricultural Property and Rollback Taxes

A property classified as agricultural property is typically taxed at a special 4% assessment ratio[4] and has a lower agricultural value for tax purposes. However, upon the sale of agricultural property, the property loses its special agricultural valuation and assessment ratio, whether or not it is then immediately developed, unless the new owner can file an application to continue the agricultural status by January 15 of the year following the sale. This application requires that the owner affirmatively certify that the property will be used for agricultural purposes and meet certain other requirements.[5] Therefore, in the year after a sale of agricultural property, the taxes will typically increase as a result of (i) the loss of the 4% special agricultural assessment ratio, and (ii) the loss of the lower agricultural valuation. The new valuation is typically the fair market value of the property determined by the County Tax Assessor as a result of the ATI that occurred due to the sale. However, properties classified as agricultural prior to an ATI, which are then reassessed post-ATI, are not eligible for the 25% partial exemption discussed above, which is only available to properties taxed at the 6% assessment ratio in the year of the sale and the year following the sale.[6]

The construction of new improvements or additions to real property also subjects a property's value to reassessment in the year after the completion of the improvements.[7] The fair market value of such new improvements is appraised by the County Tax Assessor and added to the fair market value of the land and any existing improvements. Thus, once vacant land is developed the tax value of the property increases commensurate with the appraised value of the improvements, in addition to any post-ATI increase that may have occurred.

In addition, anytime a property changes its use from agricultural use to any other use, which typically occurs upon new construction, the County Tax Assessor will assess rollback taxes on the property. Rollback taxes are a one-time payment, as opposed to annual property taxes, and are calculated by determining the difference between what taxes had been paid based on the agricultural classification, and what would have been paid if the property had been valued, assessed and taxed on a non-agricultural basis for the three years immediately preceding the year the change in use occurs.[8] For example[9], for a property that is subject to rollback taxes has an agricultural value of $50,000, applying the 4% agricultural tax assessment ratio, and an assumed 0.350 millage rate yields an annual property tax of $700 ($50,000 x 0.04 x 0.350). If the property is sold for $1,000,000 and the new assessment ratio is 6%, the new annual property tax will be approximately $21,000 ($1,000,000 x 0.06 x 0.350). Rollback taxes would be calculated for the 3 years prior to the date the property changes to a 6% assessment ratio, thus yielding an estimated rollback tax payment of ($21,000 - $700) x 3 =) $60,900.00. The allocation of responsibility for such payment, as between a seller and a purchaser, of property is a frequently negotiated issue in purchase and sale agreements, although vis-à-vis the County Tax Assessor, the purchaser is the party responsible.

Thus, purchasers of agriculturally taxed property are hit on multiple tax fronts: the loss of the 4% assessment ratio, the higher non-agricultural tax value, the unavailability of the 25% partial exemption from the post-ATI tax increase, and upon development of the property, rollback taxes and increased tax value based on the value of the improvements.

Benefits of a Fee in Lieu Tax Agreement

Owners and/or tenants of properties that make at least $2.5 million in capital investments in a South Carolina county within a five (5) year period may negotiate for a fee-in-lieu of property tax. Capital investments include investments in real property, improvements, and personal property. The benefits of a FILOT Agreement for properties are typically a fixed 6% assessment ratio, a fixed millage rate[10], and a fixed real property valuation for the term of the agreement. In addition, owners and/or tenants of properties that invest at least $400 million in capital improvements or a $125 million capital investment combined with the creation of at least 125 new full-time jobs may negotiated for a "Super" FILOT with a fixed 4% assessment ratio. In addition to these benefits, FILOT Agreements also eliminate rollback taxes and can be paired with Special Source Revenue Credits to achieve additional cost savings. FILOT Agreements are not recorded, so a request for any applicable agreements is an important diligence item for South Carolina commercial properties.

When property that is subject to a FILOT Agreement is sold, the value of the property should not experience a post-ATI tax increase as a result of the sale due to the benefit of the FILOT in fixing the value of the property for the duration of the FILOT term. To maintain the benefits of the FILOT Agreement through property transfers, the property owner must generally assign its rights under the FILOT Agreement to the subsequent owners. In most instances, County consent to that transfer is required. Failure to do so could cause a subsequent owner to lose the benefits of the FILOT Agreement and among other issues, the transfer would constitute an ATI and subject the property to revaluation (without the benefit of the ATI 25% partial exemption, which is only applicable to properties subject to the 6% assessment ratio outside of a FILOT Agreement).

Some counties in South Carolina tax real property that is subject to a FILOT Agreement on an ad valorem tax basis, rather than a fee-in-lieu of tax basis, prior to the property's "placement in service"[11]. Thus, in these counties, vacant land that is subject to a FILOT Agreement, but upon which improvements have not yet been completed, could still be the subject of an ATI if a transfer occurs prior to the issuance of a certificate of occupancy for the improvements.

Effect of Taxation in Arrears

Property taxes in South Carolina are taxed in arrears, and tax bills are issued in late October or early November each year based on ownership and improvements as of December 31 of the prior year. Therefore, any changes in ownership or the completion of construction of improvements during a given year do not impact taxes until the following year, and transactions occurring early in the year can have a long lag time before impact. For example, for a property that sells in January 2024 or for which improvements are completed in January 2024, the post-ATI or post-construction value will not impact the tax bill until October/November of 2025, for which payment is not due until January 15 of 2026.

Determination of Tax Value, Appeals, and FILOT Tax Returns

Under the standard ad valorem property taxation process in South Carolina, County Tax Assessors determine the fair market value for properties, and when a reassessment occurs, send a reassessment notice to property owners alerting them that the tax value of their property has increased (or in rare cases, decreased) due to a County-wide reassessment, an ATI, or the completion of improvements.

These notices must be mailed by October 1 of the year of reassessment but are typically mailed in the summertime of the year after these events have occurred. Property owners may then file appeal of the reassessment if they disagree with the property value conclusion reached by the County Tax Assessor, which appeal must be filed within 90 days after mailing the reassessment notice. *Thus, it is critical for owners of properties subject to ad valorem taxes to review any reassessment notices and timely file appeals with the County Assessors if they believe the new assessed value of a property is incorrect.*

Unlike under ad valorem taxation, owners of properties subject to a FILOT Agreement—not the County Tax Assessor—determine the value of their properties by filing tax returns with the South Carolina Department of Revenue (the "DOR") indicating their income tax basis for the property, both for the land acquisition cost and the construction cost of the improvements. The DOR then uses the information from these returns to inform the County Tax Assessors of the tax value and assessment ratio to use for the FILOT properties, and the County Tax Assessor then generates the tax bills on this basis. *Owners of properties under FILOT Agreements must make certain that these tax returns (PT-300s) correctly state the value of the FILOT property and take advantage of the benefits that the FILOT Agreement provides, i.e., fixed property valuation for the term of the FILOT Agreement. Among other inaccuracies, owners who acquire property after it has been "placed in service" often incorrectly report their own acquisition cost, which can be a significantly higher value than the cost basis for the property, that should lock in for the term of the FILOT Agreement. Thus, they inadvertently create their own "ATI", even when the FILOT Agreement should protect against this tax increase.* As noted above, to continue the benefits provided under a FILOT Agreement post-sale, a property owner must generally assign its rights under the FILOT Agreement to the subsequent owners, and County consent to such transfers is required in most instances.

Upon receiving the tax bills, FILOT property owners should also confirm that the County has applied the numbers correctly in the calculation of the tax bill, i.e., applied the correct, fixed property value, assessment ratio, and millage rate from the FILOT, as well as any special source revenue credits. County Assessors typically issue multiple tax bills for FILOT property, and sorting out the information to confirm accuracy can be difficult.

Impact on Leases

Tenants are not in the driver's seat when it comes to property taxes but typically bear the brunt of the tax burden. In addition, landlords are less motivated than owners of owner-occupied properties to make these filings when they can pass through the taxes to their tenants (although lower tax pass-throughs can, of course, make for a more attractive leased property).

In negotiating the terms of a net lease and underwriting expected lease costs, tenants need to be able to rely on the accuracy of the landlord's estimates for the taxes, insurance, and maintenance costs for a property that will be passed through to tenants based on their proportionate share of the building occupied. For existing buildings, these estimates should be based on such costs incurred in prior years and should reasonably approximate future charges. However, for new construction, the calculation of these estimates is more tenuous. Landlords may base their initial tax estimates on pre-construction (undeveloped) land values, and potentially a lower 4% agricultural assessment ratio. This is a particular risk given South Carolina property taxation in arrears, which results in a long time before the impact of construction is felt. Tenants are frequently surprised to receive a large increase in tax expense pass-throughs in the second year of their lease which they did not bargain or account for during lease negotiations and underwriting.

Tenants should thoroughly evaluate the basis for landlord's pass-through tax projections and whether they account for completed improvements. In addition, when landlords request reimbursement for pass-through taxes, tenants should request to see and examine the landlord's property tax returns and tax bills to discern whether, for example, the benefits of any applicable FILOT Agreements (fixed property value at cost upon initial placement in service, no increase in value upon sale of the property, fixed millage, correct assessment ratio), or any other exemptions or tax savings have been applied, such as Special Source Revenue Credits[12]. In addition, tenants can sometimes negotiate in their lease the right to appeal a new tax value for the property if the landlord fails or elects not to do so, particularly for single-tenant properties where the tenant bears the entire tax burden.

In addition, for leased properties that are not subject to a FILOT and are later sold, the post-ATI value of the property can dramatically increase the tax value for such properties. In this situation, a landlord sells a property and realizes significant gain on its initial investment, but ultimately, the tenant, who receives none of the benefit of such gain, is left holding the bag on the post-ATI higher tax bill. However, tenants can try to negotiate up front in their leases potential protections to mitigate the full impact of the ATI on pass-through taxes. Most landlords are unwilling to provide a blanket exclusion of any post-ATI tax increase from the tenant's tax responsibility, but some middle ground may be found. For example, some landlords will, at a minimum, agree to file for the 25% partial exemption from the full impact of the ATI, and if they fail to do so, the Tenant would not be held responsible for the balance of the post-ATI taxes over the amount which the tax bill would have been lowered, had the ATI 25% partial exemption been attained.

Our attorneys regularly assist clients negotiating FILOT Agreements, navigating South Carolina's complex system of property tax filings and tax appeals, reviewing tax returns and tax bills, and undertaking other property tax analysis. We can also assist with lease negotiation to help tenants and landlords achieve a balance of protections against tax increases, as well as real estate sales and acquisitions. Please contact Amy Clayton, Amy.Clayton@wbd-us.com, or Whit McGreevy, Whit.McGreevy@wbd-us.com, should you desire assistance with any of these matters.

End Notes

[1] *See* S.C. Code Ann. Section 12-37-220(52).

[2] This is not an exhaustive list of all events constituting ATIs. *See* S.C. Code Ann Section 12-37-3150.

[3] The 25% partial exemption will not reduce the fair market value of a property below the fair market value prior to the ATI (the floor).

[4] Agricultural property of certain corporations is taxed at a 6% assessment ratio, but these properties do still enjoy the lower agricultural valuation, if not the lower 4% assessment ratio.

[5] *See* S.C. Code Ann. Section 12-43-220(d).

[6] Agricultural properties taxed at 6% are also not eligible for the 25% partial exemption, which is only available to *commercial* properties taxed at 6% pursuant to S.C. Code Ann. Section. 12-43-220(e).

[7] S.C. Code Ann. Section 12-37-670 creates an exception to this general rule and permits Counties to pass an ordinance to list previously untaxed improvements to real property on the County tax rolls on the first day of the next calendar quarter after a certificate of occupancy is issued for the structure, and thus, in such Counties, the additional property tax attributable to new improvements accrues beginning on such date and is payable when taxes are due on the property for the property tax year. The applicability of this method of taxation is not uniform throughout the State, as some Counties have passed such an ordinance and others have not.

[8] *See* S.C. Code Ann. Section 12-43-220(d)(4).

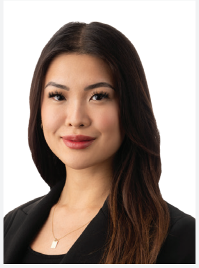
[9] There are nuances to this calculation, so this is a rough estimate. Also, rollback taxes are not always "rolled forward" immediately after a sale. The timing of rollback assessment varies among counties, and some counties do not ever roll the rollback taxes forward until the property is developed (and what constitutes "developed" varies as well, be it issuance of a building permit, certificate of occupancy or otherwise). For example, in some counties, an undeveloped property can be held as undeveloped for three years without rollback taxes being assessed, and the rollback taxes then "roll off" the tax rolls and are never assessed; or if the property is developed two years after a sale, rollback taxes would only be assessed for one year out of the three possible years. However, even if rollback taxes are never assessed, or the assessment is delayed, for purposes of annual property taxes, the assessment ratio of a property assessed at the 4% agricultural assessment ratio prior to sale will nonetheless change to a 6% assessment ratio and a new ATI assessed value post-sale unless the new owner can reapply for the 4% agricultural assessment ratio and meet the conditions thereof.

[10] While most counties lock in a fixed millage rate for the duration of the term of the FILOT Agreement, others provide for adjustments every 5 years in accordance with S.C. Code Ann. Section 12-44-50(A)(1)(b).

[11] A term used in FILOT tax analysis, which is typically understood as the issuance of a certificate of occupancy for improvements.

[12] Special Source Revenue Credits are typically offered for less than the full duration of the terms of the FILOT Agreement and can provide for substantial tax reductions that are then phased out.

Federal Intervention in Housing: The Evolving Roles of Canada Mortgage and Housing Corporation (CMHC) and Build Canada Homes (BCH)



By Stella Di Cresce and Emily Feng, Stikeman Elliot LLP

Canada's Housing Affordability and Supply Challenge

Canada's housing supply has been the subject of increased policy focus in recent years, due to affordability concerns, rapid population growth, and post-pandemic construction delays and cost pressures. The Canadian federal government is responsible in addressing housing supply through policy development, funding, and coordination with provinces, municipalities, and the private sector, and has introduced various measures aimed at increasing housing supply and improving affordability. Such measures include responses through two federal agencies: Canada Mortgage and Housing Corporation (CMHC), which anchors the housing system through financing, insurance, and program administration, and Build Canada Homes (BCH), a new delivery focused agency intended to accelerate housing construction and expand affordable supply.[1]

The Role of CMHC and its Impact on Financing and Development in Canada

CMHC is Canada's national housing agency and the central federal institution responsible for mortgage loan insurance, securitization, and the administration of major federal housing financing programs. Its mandate is to help Canadians meet their housing needs by supporting homebuyers, lenders, housing providers, and governments through financial tools, funding programs, and housing market analysis. In practice, CMHC functions as the federal housing system's primary financing and regulatory engine.

A core aspect of this role is CMHC's delivery of the National Housing Strategy (NHS) which was launched in 2017 as a long-term federal framework to improve housing outcomes for those in greatest need. The NHS represents a commitment of more than $115 billion over at least ten years and consists of a suite of coordinated initiatives rather than a single program. CMHC administers these initiatives on behalf of the federal government by, among other things, evaluating and prioritizing applications, managing funding flows, and overseeing borrowing and appropriations. Through bilateral agreements with provinces and territories, CMHC administers approximately $15.7 billion from the NHS's overall commitment, with funds cost matched and delivered by provincial and territorial governments to address local housing priorities.

By way of example, CMHC administers several core federal housing programs that support development, ownership, and affordability, and these programs are already shaping how projects are structured in practice. The Apartment Construction Loan Program (ACLP) provides low-cost financing for new rental construction, while CMHC's mortgage loan insurance products support both homeownership and small rental properties by enabling access to high ratio financing at more stable interest rates. CMHC also administers the Affordable Housing Fund (AHF), which provides capital for the construction and renewal of affordable and community housing, and the Housing Accelerator Fund, which incentivizes municipalities to reform land use planning and streamline development approvals.

These tools are influencing development behavior across the market. Federal affordability incentives administered through CMHC have contributed to an increase in condominium rental conversions and rental first development strategies, driven by access to favorable financing terms. In April 2024, the federal government announced a $15 billion top up to the ACLP, followed by the introduction of CMHC's Frequent Builder framework in July 2024 to streamline applications for repeat users of the ACLP and the AHF. In September 2025, an additional $1.5 billion in loans was announced for the AHF's New Construction Stream, supporting the creation of more than 5,000 new units. These rental focused measures are translating into measurable outcomes, with purpose-built rental construction accounting for approximately 47% of all housing starts across Canada's six largest census metropolitan areas in 2024, reflecting a significant shift in development practices.

Developers are also increasingly structuring projects to meet affordability benchmarks tied to federal funding and insurance eligibility. CMHC's Quarterly Financial Report for the third quarter of 2025 shows continued growth in transactional homeowner mortgage insurance, with insured units increasing by approximately 43% year-over-year, driven in part by the introduction of 30-year amortizations on insured mortgages and declining interest rates. Demand for CMHC's multi-unit mortgage insurance products also remains strong, reflecting sustained reliance on CMHC backed financing to deliver and preserve rental housing supply.[2]

The Creation and Mandate of BCH and its Impact on Financing and Development

The federal government has taken the position that the scale of Canada's housing crisis can no longer be addressed through business-as-usual approaches, a conclusion that led to the creation of BCH as a new federal entity with a direct housing delivery mandate. Launched on September 14, 2025, by Canadian Prime Minister Mark Carney, BCH is tasked with building affordable housing at scale and at speed.

BCH's mandate is organized around three core pillars. First, the agency is intended to function as a federal delivery platform for large scale affordable housing projects. With an initial capitalization of $13 billion, it will deploy flexible financing, approve large portfolio developments, and leverage publicly owned land to reduce development risk and accelerate project timelines. Second, BCH will actively promote faster and more cost-efficient construction methods, including factory-built, modular, and mass timber housing, supported through bulk procurement and long-term financing arrangements designed to shorten build times and reduce costs. Third, the agency will apply the federal government's "Buy Canadian" policy by prioritizing projects that rely on Canadian materials and domestic supply chains.

The agency has been directed to move quickly. Early initiatives include the delivery of approximately 4,000 factory-built homes across six federal sites, with longer term capacity of up to 45,000 units across the federal land portfolio, using a "direct build" model under which BCH oversees construction. Initial sites are located in Dartmouth, Longueuil, Ottawa, Toronto, Winnipeg, and Edmonton.

BCH remains at an early stage, but several likely market impacts are emerging. Its mandate suggests a more flexible approach to financing, with deal terms tailored to project scale, delivery method, and affordability outcomes. A focus on larger portfolio transactions may provide more predictable, long-term capital to affordable housing providers seeking to scale their holdings. BCH is also expected to support modern methods of construction through financing structures that reduce risk and fill gaps not currently addressed by private capital, particularly for factory built, modular, and mass timber projects.[3]

The Relationship Between CMHC and BCH

The introduction of BCH does not replace the role of CMHC. Rather, the two institutions operate in a complementary manner within an expanded federal housing framework.

CMHC continues to serve as the primary federal platform for housing finance and regulation. Its core functions include mortgage loan insurance, securitization, the administration of federal housing funding programs, and the application of affordability and underwriting requirements tied to those programs. For lenders and developers, CMHC remains the principal interface for insured financing, program eligibility, and compliance with federal affordability criteria.

BCH, by contrast, is intended to play a more operational role. Its mandate focuses on direct participation in housing delivery, including acting as a development partner, assembling land, approving portfolio scale projects, and accelerating construction timelines. While CMHC regulates, insures, and administers funding, BCH is designed to remove delivery barriers and mobilize capital and land more actively. Together, these agencies reflect a two-pillar federal approach that combines financial infrastructure with direct supply side intervention.

Impact on Legal Practice

CMHC and initiatives such as BCH are poised to significantly influence legal practice as government involvement in affordable housing finance, construction, and development increases. This is evident through the rising number of CMHC financings and the introduction of specific eligibility requirements, including affordability covenants and reporting obligations. As a result, understanding CMHC programs and their criteria will become essential for advising clients throughout the development sector. Coupled with the objectives of BCH, these changes are expected to broaden and shift the focus of legal practitioners engaged in housing-related legal matters. Accordingly, it is advisable for Canadian finance lawyers to deepen their understanding of CMHC funding requirements, and BCH initiatives concerning development and financing, in order to effectively advise on real estate deals involving multi-residential financing transactions. As federal involvement deepens, understanding how CMHC requirements intersect with BCH's delivery mandate will be increasingly central to advising clients across the housing development and financing landscape.

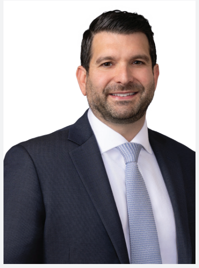
End Notes

1 Housing Shortages in Canada (CMHC); What Regional Data Reveals About Canada's 2026 Housing Outlook (Altus Group)

2 Canada Mortgage and Housing Corporation (CMHC): Meaning, History (Investopedia); What is the strategy? (CMHC); CMHC gives up on comparing housing affordability to 2004 levels (The Globe and Mail); Prime Minister Carney launches Build Canada Homes to supercharge homebuilding across the country (PM of Canada); Build Canada Homes and CMHC: What Affordable Housing Leaders Need to Know Now (Telelink); Apartment Construction Loan Program (CMHC); What is CMHC Mortgage Loan Insurance? (CMHC); Funding for community (social) housing (CMHC); Affordable Housing Fund (CMHC)

3 Accelerating construction through the National Housing Strategy (CMHC); Building solutions – The impact of CMHC loans on Canada's rental development efforts (Altus Group); Build Canada Homes: Market Sounding Guide (Government of Canada)

Budget Reconciliation Bill Provides Significant Housing Credit Expansion



By Michael A. Discenza, Harris Beach Murtha Cullina PLLC

President Donald Trump's high profile One Big Beautiful Bill Act drew a great deal of public attention when it passed last July, but components that added up to the most substantial expansion of federal affordable housing resources in 25 years did not garner top headlines.

The sweeping budget reconciliation package – passed on Independence Day -- narrowly passed through the House of Representatives on July 3, 217-214, with all Democrats and two Republicans voting no, and mirrored the version of the bill approved by the Senate on July 1. Headlines and controversy focused on tax cuts, border security, increasing defense and cutting spending on Medicaid and the Supplemental Nutrition Assistance Program.

But the housing credit provisions in the One Big Beautiful Bill Act ("Reconciliation Bill") included two long-sought reforms:

1. A permanent 12% increase in 9% low-income housing tax credit ("LIHTC") allocations, beginning in 2026; and
2. A permanent reduction in the 50% bond financing threshold to 25%.

Together, these changes are projected to finance 1.22 million additional affordable homes nationwide over the next 10 years, according to Novogradac, a national professional services organization specializing in real estate, affordable housing, community development and renewable energy – 80,000 units from the 9% LIHTC expansion, and 1,143,000 units from the 4% bond threshold reduction.

Overview

The LIHTC offers a dollar-for-dollar reduction in a taxpayer's income tax liability in return for making a long-term investment in affordable rental housing. State agencies award LIHTCs to developers, who then sell the LIHTCs to private investors in exchange for funding for the construction and rehabilitation of affordable housing. These funds allow developers to borrow less money and pass through the savings in lower rents for low-income tenants. Investors, in turn, receive a 10-year tax credit based on the cost of constructing or rehabilitating apartments that cannot be rented to anyone whose income exceeds 80% of area median income ("AMI"). Generally, LIHTC properties serve households with incomes no more than 60% of AMI; however, properties that make use of the average income test may serve households earning up to 80% of AMI, so long as the average unit designation in the property is no more than 60% of AMI.

There are two types of LIHTCs available to developers. The 9% LIHTC is generally reserved for new construction and rehabilitation projects not utilizing certain additional federal subsidies and was originally intended to deliver up to a 70% subsidy. The 4% LIHTC is typically used for projects utilizing federally tax-exempt bond financing and was originally designed to deliver up to a 30% subsidy. The 30% and 70% subsidy levels are computed as the present value of the 10-year stream of tax credits divided by the development's qualified basis (roughly the cost of construction, excluding land). The subsidy levels (30% or 70%) are explicitly specified in the Internal Revenue Code, though they may be higher due to a number of legislative changes.

12% increase in 9% LIHTC allocations

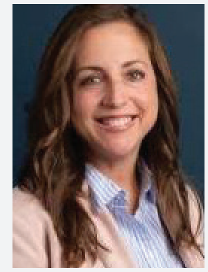
The amount of LIHTCs that state housing finance agencies have to allocate each year is comprised of several components. The largest component is a per-capita multiplier which is multiplied by the state's population. As a result of the Reconciliation Bill, the multiplier increased from $3.00 in 2025, to $3.416 for 2026. For states with populations under 1.14 million, LIHTCs are allocated based on a small state minimum rather than by using the per-capita multiplier. In 2025, the small state minimum was $3,455,000. Following the Reconciliation Bill, the small state minimum will be $3,953,600. As there are no sunset provisions in the Reconciliation Bill with regard to these increases, they will be permanent. The total amount of 9% LIHTCs issued nationally for 2026 is an estimated $1 billion.

For purposes of illustrating the effect of this increase in the 9% LIHTCs in New York State, using the $3.00 multiplier and a population of 19.5 million, New York State had $58,500,000 in LIHTCs available in 2025. Following the passage of the Reconciliation Bill, in 2026 (using the 3.416 multiplier), New York State will have $66,612,000 in LIHTCs available.

Reduction in the 50% bond financing threshold to 25%

State housing finance agencies provide tax-exempt bond financing that generates "as-of-right" 4% LIHTCs for multifamily rental housing projects developed by private and not-for-profit developers. Prior to the passage of the Reconciliation Bill, in order to qualify for the 4% LIHTCs, at least 50% of a project's aggregate basis (essentially, land plus depreciable assets) had to be financed by private activity bonds. If the project failed the 50% test, the project would lose at least half of the 4% LIHTCs and the corresponding equity investment, most likely resulting in the failure of the project. Pursuant to the Reconciliation Bill, the 50% bond financing threshold was lowered to 25% for properties placed in service after December 31, 2025. Thus, for each project looking to qualify for 4% LIHTCs, only 25% of the project's aggregate basis needs to be financed by private activity bonds.

The 25% reduction in the bond financing threshold means that states can award volume cap to a greater number of projects, which will make it easier for more projects to access tax-exempt bonds and, thus, 4% LIHTCs. It is estimated that lowering the 50% test to 25% will generate approximately 1,143,000 additional affordable homes between 2026 and 2035. It should be noted that the 25% threshold is a minimum requirement. Most transactions can support permanent debt in the range of 35% to 45% of the aggregate basis, or well in excess of 25%. Since the goal is to increase affordable housing without increasing the cost of each project, volume cap should be allocated in an amount equal to the greater of (i) 30% of the project's aggregate basis or (ii) the project's permanent supportable debt.



Wire Fraud Defense: Best Practices for Commercial Transactions

By Kelly Iffrig and Brett Sharp, RGA Reinsurance Company

Wire Fraud on the Rise

Fraudulently induced wire transfers have emerged as one of the most significant financial threats in commercial transactions. Mortgage lenders, settlement agents, and commercial counterparties should all be aware of the risks involved and actively take intentional steps to mitigate chances of wire fraud. According to the Federal Bureau of Investigation's Inter-net Crime Complaint Center ("IC3"), the reported losses from cyber-enabled fraud in 2024 totaled $16.6 billion.[1] Among the reported fraud, business email compromise ("BEC") where a party was tricked into authorizing fraudulent wire transfers or changing payment instructions was the 7th most reported crime with over $2.7 billion in reported losses across more than 21,000 complaints.[2]

For example, in August 2024, Orion, a Luxembourg-based company traded on the New York Stock Exchange, was targeted in a scheme resulting in fraudulently induced outbound wire transfers totaling approximately $60 million being sent to bank accounts owned by the cybercriminals.[3] The IC3 further noted that scammers "are increasingly using custodial accounts held at financial institutions for cryptocurrency exchanges or third-party payment processors, or having targeted individuals send funds to these platforms where funds are quickly dispersed."[4] Although police agencies have had some success in clawing back stolen funds, typically once the fraud is committed, the money is gone for good. These trends reflect the current state of wire fraud in the real estate and commercial context, where social engineering and compromised communication channels become the prevailing form of fraud.

Preventing wire fraud requires a layered approach that addresses how parties communicate, how identities are verified, how transactions are monitored, and how curated policies and procedures are created and implemented.

Secure Communication Channels

Financial institutions can stay ahead of evolving wire fraud by ensuring that there are secure communication channels that will reduce the risk of misdirected funds. The people engaging in BEC or other socially engineered wire fraud schemes typically exploit routine electronic communications, particularly emails, to impersonate the various trusted parties involved in the transfer of funds.

Parties should establish and document secure communication protocols at the start of a transaction, ensuring all parties involved are educated. The set of legitimate and mutually agreed upon protocols should be communicated through pre-established and secure channels between parties.[5] Further, financial institutions should encourage the use of encrypted portals, secure messaging platforms, or verified phone calls for communication.[6] Clients and counterparties both should be informed at the very beginning of the process about how fund distribution details will be shared and verified to reduce the likelihood that a last-minute communication with new false instructions will be erroneously adopted. In addition to having established communication protocols, implementing technical email security measures and customer awareness further strengthens defenses.

These secure communication practices not only create barriers to prevent fraud, but they also help align all stakeholders on expectations before funds are moved in a commercial transaction. In high-stakes mortgage and commercial transactions, where the cost of fraud is devastating and recovery extremely unlikely, the establishment of clear secure communi-cation protocols is essential to mitigating the risk of fraud.

Implement Authentication Protocols

Even where secure communication channels exist, wire fraud often succeeds because altered payment instructions are accepted without sufficient verification.[7] Authentication protocols are security measures that require identity verification of users before allowing them to initiate wire transfers.[8] Effective authentication protocols focus on confirming both the identity of the requesting party and the accuracy of wiring details before any trans-fer is authorized.

First, parties should implement robust

verification and internal control measures to ensure that wire instructions originate from legitimate sources. Customer and counterparty identities should be verified using contact information obtained at the outset of the dealing rather than information contained in any last-minute message or the payment request itself. Internal controls should require dual approvals and segregation of duties so that no single employee can independently authorize a wire transfer or approve instruction changes.[9]

Second, parties should require out-of-band authentication and strong access controls as a crucial component of wire authorization. Out-of-band authentication involves using two separate channels to verify a transaction, such as after initiating a transfer online, an individual would enter a code from a text message to complete the transaction.[10] Wire instructions should be confirmed through a secure communications channel, such as a direct phone call to a known and previously validated contact or looking up the actual phone number of the company instead of relying on information provided with the payment re-quest.[11] In addition, multi-factor authentication ("MFA") should be used for all employees with access to email systems and payment platforms to reduce the risk of account compromise.[12] The combined implementation of out-of-band authentication and MFA substantially impede unauthorized access, disrupting fraudsters' attempts to engage in a BEC scheme.

Systems

Maintaining software and systems is crucial for fraud prevention. Outdated systems can have vulnerabilities that fraudsters can exploit to gain unauthorized access or manipulate transactions.[13] At a minimum, parties should ensure that systems are regularly updated and patched, particularly email platforms, document-sharing tools, operating systems, and payment systems used in wire transfer transactions.[14] Regular patching to fix vulnerabilities and improve security should help to limit unauthorized access, but this should be used in conjunction with vulnerability assessments to identify and address potential weaknesses in the parties' systems.[15] Any assessment should be conducted by a security expert who can evaluate the infrastructure to work to reduce the likelihood that fraud can be committed.

Monitor Transactions in Real-Time

Real-time transaction monitoring provides an additional opportunity to detect fraud before funds are transferred to a potential perpetrator of fraud. This monitoring involves continuously analyzing transactions as they occur to detect any unusual patterns or suspicious behavior. This type of monitoring can be implemented through automated fraud detection systems or by heavily scrutinizing last-minute changes. Through detection systems, advanced algorithms and machine learning can analyze transaction data and identify patterns that may indicate fraud, flagging them for further investigation before they occur.[16] Further, if a last minute change is communicated, that change should be independently verified by contacting the appropriate person directly.[17]

Establish Policies

Effective fraud mitigation must work in coordination with policies that support prevention measures. Policies should be clear, comprehensive, easily accessible, and communicated across the organization, particularly in areas of the organization that are responsible for closing communications and fund transfers.[18] As threats are constantly evolving, it is crucial to regularly review and update policies to keep them relevant and effective. This should involve comparing current policies to industry standards and regulatory requirements to ensure up to date compliance.

Audits of policies should be conducted both internally and externally to evaluate the effectiveness of the prevention measures in place. External audits bring a perspective that is new to a team that might reveal blind spots that internal teams may miss. Internal audits, on the other hand, can help maintain a continuous monitoring process to catch and address any potential issues before they escalate. Employees play a vital role in the evolution of policy, and management should ensure that employees are aware of their responsibilities and the importance of adhering to the fraud prevention policies in place to mitigate fraud.

Educate

Policies or procedures are only effective to the extent that employees and other business partners are trained and educated in understanding and applying them. Wire fraud schemes typically rely on human error through social engineering, taking advantage of poorly created or maintained systems and policies, or a general lack of awareness among employees.[19]

Ongoing education and training should emphasize recognizing common red flags, including unexpected changes to wiring instructions, unusual urgency, altered sender information, unusual sender domains, unexpected attachments, and requests that deviate from established procedures.[20] Policies and procedures only add value to the extent that employees and business partners are taught and trained in them. This training must be repetitive and regular to ensure effectiveness and is particularly vital for frontline staff and wire-room personnel.[21]

Cross-training staff and periodic refreshers helps ensure continuity when personnel changes occur and help to minimize loss of institutional knowledge. In addition to education on how to spot and prevent fraud, training should include instruction on what to do when there is suspected fraud or suspicious activity.[22] Ongoing education should rein-force processes for holding or recalling funds when fraud is suspected. Repetition and reinforcement are essential; fraud prevention should, much like the policies employees are using, be ever changing rather than a one-time exercise in care.

Conclusion

Fraudulently induced wire transfers present a growing and significant risk in mortgage and commercial transactions, with losses that are often substantial and difficult, if not entirely impossible, to recover. As recent data has shown and continues to show, these fraud schemes rely heavily on social engineering and compromised communications rather than purely technical attacks.

Risk mitigation requires a multi-tiered strategy that addresses how (i) information is communicated, (ii) instructions and identities are verified, (iii) transactions are monitored, and (iv) fraud prevention practices are embedded in written policies and personnel training. No single safeguard is sufficient on its own to prevent fraud, but through using secure communication practices, enforcing robust authentication protocols, maintaining reliable systems, monitoring transactions, and institutionalizing these measures through policy de-sign, adoption, and revision, and personnel training and education, mortgage and commercial practitioners can significantly reduce their exposure to wire fraud.

End Notes

1 *FBI's IC3 Finds Almost $8.5 Billion Lost to Business Email Compromise in Last Three Years,* https://www.nacha.org/news/fbis-ic3-finds-almost-85-billion-lost-business-email-compromise-last-three-years (April 24, 2025).

2 *Id.*

3 Jonathan Greig, *Carbon black supplier Orion loses $60 million in business email compromise scam,* https://therecord.media/orion-carbon-black-bec-scam-millions (August 12, 2024).

4 *Id.*

5 Terri Luttrell, *Avoiding real estate wire fraud: Key steps for financial institutions,* https://www.abrigo.com/blog/avoiding-real-estate-wire-fraud-key-steps-for-financial-institutions/#:~:text=Implement%20secure%20communication%20channels,funds%20from%20being%20fully%20transferred (July 11, 2025).

6 *Id.*

7 *Id.*

8 Sean De Visser, *10 Effective Ways to Prevent Wire Fraud,* https://www.fpsgold.com/blog/wire-fraud-prevention (September 23, 2024).

9 *Id.*

10 *Id.*

11 John Browning, *Law firm cybersecurity and wire transfer fraud*, https://www.texasbar.com/AM/Template.cfm?Section=articles&Template=/CM/HTMLDisplay.cfm&ContentID=51962.

12 *Id.*

13 Sean De Visser, *10 Effective Ways to Prevent Wire Fraud,* https://www.fpsgold.com/blog/wire-fraud-prevention (September 23, 2024).

14 *Id.*

15 *Id.*

16 Sean De Visser, *10 Effective Ways to Prevent Wire Fraud,* https://www.fpsgold.com/blog/wire-fraud-prevention (September 23, 2024).

17 *Protecting Yourself from Mortgage Wire Fraud: Comprehensive Prevention Strategies and Actionable Advice,* https://www.flpls.com/knowledge-center/protecting-yourself-from-mortgage-wire-fraud-comprehensive-prevention-strategies-and-actionable-advice/ (May 5, 2025).

18 Sean De Visser, *10 Effective Ways to Prevent Wire Fraud,* https://www.fpsgold.com/blog/wire-fraud-prevention (September 23, 2024).

19 *Protecting Yourself from Mortgage Wire Fraud: Comprehensive Prevention Strategies and Actionable Advice,* https://www.flpls.com/knowledge-center/protecting-yourself-from-mortgage-wire-fraud-comprehensive-prevention-strategies-and-actionable-advice/ (May 5, 2025).

20 Sean De Visser, *10 Effective Ways to Prevent Wire Fraud,* https://www.fpsgold.com/blog/wire-fraud-prevention (September 23, 2024).

21 *Id.*

22 *Id.*

When Joint Venture Financing Fails: Mortgage Structures, Value Protection, and Partner Alignment

By Daniel Kofman, Blake, Cassels & Graydon LLP

For investors, developers, and lenders alike, understanding the key considerations and potential pitfalls of joint venture financings is essential to protecting the interests of each stakeholder and managing complex situations effectively.

Separate Mortgage Rights

Separate mortgage rights permit a joint venture participant to mortgage its separate, undivided interest in a project in favour of a third-party lender as security for a loan, even where the other joint venture participant(s) choose not to do so. This is often done for the purpose of cashing out some of the participant's equity in the property, to finance improvements to the project or to invest for other purposes.

For example, consider a co-ownership arrangement between a pension fund (or any other investor) and a developer in respect of a retail shopping centre to be redeveloped. Assume that, in this scenario, the pension fund does not require or desire financing, while the developer does. Separate mortgage financing by the developer can give rise to a host of issues for the pension fund, the developer, and the developer's separate mortgage lender, all of which must be considered.

In such a situation, the pension fund will want to ensure that there is a cap on the principal amount and interest rate for the developer's loan, and that other terms are specified in the loan arrangement with the developer's lender to protect the fund. The fund will also want to know precisely who is holding the mortgage security and will typically require that the mortgage not be assigned or syndicated. For example, the fund may not want the mortgage security assigned to someone that is a competitor to the pension fund, a disreputable lender, or a party that the pension fund would not want to do business with or potentially enter into a joint venture, which could arise in circumstances where the developer defaults under its separate mortgage loan and its lender steps into the developer's shoes as the fund's new co-owner on the project. If there is a default under the separate mortgage loan by the developer, the fund will want the right to receive written notice and an opportunity to cure such default to the extent curable, or other step in rights in the event of a bankruptcy event or other incurable default by the developer. The fund will further want to ensure that, if the lender enforces its security against the developer, that the lender will be bound by any right of first refusal, liquidity rights, restrictions on transfer, and all of the other provisions contained in the joint venture agreement, and that any subsequent party to whom the lender may transfer the developer's interest, when realizing on its security, is similarly bound. It is critical for both co-owners, if they later wish to finance the property collectively (i.e., through a single mortgage secured by a 100% interest in the property rather than separate mortgages), that the developer's separate mortgage lender be required to subordinate its loan in favour of the collective property financing.

Securing separate mortgage rights is particularly important where the co-owners have differing financial profiles or funding needs. Typically, one owner may want to leverage the property with institutional debt, while the other is either disinclined to do so or has alternative sources of financing. Establishing separate mortgage rights allows each co-owner to borrow independently, while protecting each party's equity and interests in the project. It is essential, however, to carefully structure these rights based on the specific needs of the owners and the unique characteristics of the project.

Shortfalls in Value or Sale Proceeds

One significant challenge many joint ventures have faced in the current economic environment, particularly in the development space, is the risk of a post-completion shortfall in value, whether measured against total development costs or anticipated by sales proceeds.

As demonstrated in the example above, perhaps after the joint venture partners complete an extensive redevelopment of the retail shopping centre, its market value is less than the costs that were expended to complete it or valued at less than the amount of an existing loan secured against the property. Such scenarios are particularly sensitive, as they may trigger or expose covenants, guarantees, or other credit support obligations provided by each joint venture partner or their respective affiliate(s). These risks should remain at the forefront when drafting joint venture agreements and carefully considered when negotiating relevant financing documents. It is essential to clearly allocate responsibility for any value or financing shortfall, as an imprecise or uneven allocation may disproportionately jeopardize the financial stability of one party relative to the other(s).

An additional scenario to consider is one in which an institutional investor is entering into a joint venture involving a higher-risk or speculative project. This risk may be compounded with the common situation where a development partner holds only a small minority equity interest in the property and primarily stands to earn significant management fees on the project. This situation can quickly arise in a stressed real estate market or when economic conditions abruptly change. One solution to mitigating this risk could be to allocate any first losses or shortfalls to the developer and its equity interest in the project. In other words, if the project suffers a loss, that loss is first recovered from the developer's ownership interest in the property. A parent guarantee from the developer could also help alleviate some of this risk, although developers are often reluctant to provide them.

The financing provisions outlined in joint venture agreements can often seem straightforward, but they don't always work as expected in practice. For example, in cases where one partner is a well-capitalized investor, and the other has less capital available, the partner with greater financial resources may be reluctant to leverage institutional debt, preferring to use their own resources or retain unencumbered equity. This can create tension if the partner with limited financial resources needs funding from an institutional lender to support their share of the investment. In situations like these, it is essential to address the funding imbalance in the initial documentation. One might consider options such as staged capital contributions, where the partner with greater financial resources provides upfront capital, and the partner with limited financial resources can contribute additional capital at a later stage. Alternatively, a cross-collateralization agreement could allow both parties to share in debt repayment responsibilities in proportion to their investments. Additionally, clauses that outline dispute-resolution mechanisms in these scenarios can be helpful, as financing disagreements may arise and disrupt the efficient operation or development of a project. These risks may be further compounded if such disputes become known to the market through a public process such as litigation, potentially affecting the project's value or market perception.

Financing Provisions in JV Agreements Are Not "One Size Fits All"

Another financing issue to be aware of is how guarantees are handled within joint ventures. Lenders often look for additional collateral and guarantees to support project financing, and they may require one or both parties to backstop the financing with additional credit support. Even if the joint venture has sufficient collateral, individual partners may be required to offer additional corporate or personal guarantees. This is particularly relevant where non-recourse financing is unavailable, or the project being financed is more speculative or risky in nature.

This can create an imbalance if one partner has significantly more at risk than the other. Compounding the issue is that, in many cases, lenders will insist that partner or guarantor liabilities be joint and several obligations, meaning either of the partners or guarantors could be pursued for 100% of the debt or any shortfall. This has the potential to disproportionately expose the partner with greater financial resources if it is faced with a demand from the lender for an amount that exceeds its proportionate interest in the secured property.

Joint venture partners need to discuss up front who will bear these obligations, as certain joint venture investors either refuse or, for regulatory and/or tax purposes, are incapable of providing parent guarantees for their joint venture entities, particularly where one partner or its guarantor may be directly or indirectly guaranteeing the obligations of the unrelated partner or co-owner.

Lastly, it's essential to remember that financing considerations should be addressed throughout the life-cycle of the joint venture. While initial capital contributions and funding responsibilities are typically negotiated and agreed upon at the outset, additional capital requirements or refinancing needs may arise as a project progresses and eventually stabilizes. Regularly revisiting the financing structure and adjusting for evolving needs or risks can help ensure continued alignment between the partners and avoid surprises later on. Recent experience has underscored this point, particularly as rising interest rates, construction costs and lingering office vacancy following the COVID-19 pandemic have significantly impacted projects where such joint venture arrangements were negotiated in very different market conditions.

Conclusion

Establishing separate mortgage rights, clearly addressing shortfalls, carefully structuring guarantees, and planning for potential imbalances in capital contributions are all critical to a successful and smooth-running joint venture agreement. Having these provisions documented clearly and fairly can be the difference between a smooth exit and a contentious one, protecting each partner's financial interests and creating a more resilient partnership overall.

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