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How to Lose a Client With 10 or More Outdated Loan Provisions!

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I. INTRODUCTION

The scope of this paper is to identify the most common out of date, incorrect and missing provisions in commercial real estate loan documents. Not unlike the job of painting the Golden Gate Bridge, this is a continuous task of any real estate lending lawyer. The sources for these imperfections are varied and often innocuous and accidental. There is the obvious federal and state statutory changes such as the revised Uniform Commercial Code in 2003. There is new federal and state legislation including Patriot Act and "know your customer" requirements and guidelines. There are case law developments like the "express negligence doctrine" discussed in Dresser Indus., Inc. v. Page Petroleum, Inc., 853 S.W.2d 505 (Tex. 1993). There are also developments in lending practices which require modifications like the use of interest rate swaps, condominium structures and tenant in common considerations. Finally, as a result of prior negotiations those provisions that are a result of any of these prior changes may be inadvertently deleted or included in the forms. The discussions, suggestions and sample language provisions can be used to correct, update and fine tune your existing forms and also serve as a basis when acting as local Texas counsel on a transaction. We will also attempt to footnote or otherwise reference any applicable sources of reference, practice points and suggested language.

II. PROVISIONS

A. Notice of Confidentiality Rights

Intro:

In 2003, the Texas legislature enacted a requirement to include a Notice of Confidentiality Rights in all deeds and deeds of trust by or to an individual. This notice must be placed on the first page of any deed or deed of trust that transfers an interest in real property **to or from an individual** in order to record the instrument. The notice must be in bold 12 point type or upper case 12 point type. TEX. PROP. CODE § 11.08. Although it is technically not required in most non-individual transactions, it has become standard practice to include on all recordable documents. However, there are two typical mistakes in the exercise of this standard practice. First, the notice must be in 12 point font in bold or in all caps. Second, in 2007, the original required language was revised. Thus, forms frequently use the original wrong language and it is not in 12 point font.

The original INCORRECT language is as follows:

[NOTICE OF CONFIDENTIALITY RIGHTS: If you are a natural person, you may remove or strike any of the following from this instrument before it is filed for record in the public records: Your social security number or your drivers license number.]

Language:

The revised CORRECT language is as follows:

NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION FROM ANY INSTRUMENT THAT TRANSFERS AN INTEREST IN REAL PROPERTY

Outdated Loan Provisions

BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

Although both formats are not required, this notice is in **bold** and in all **CAPITAL LETTERS**.

B. Express Negligence Doctrine - (Over 25 Years)

Intro:

The Express Negligence Doctrine was essentially created by the Texas Supreme Court in Dresser and Enserch Corp. v. Parker, 794 S.W.2d 2 (Tex. 1990). Simply stated, the scope of a Texas indemnity clause will not cover the negligence of the indemnified party unless the language is conspicuous and provides fair notice of the scope of the indemnity. *See id.*; *see* Footnote 225, Niles W. Holmes, Texas Annotated Deed of Trust, University of Texas Mortgage Lending Institute (1999), as amended by the Annotated Real Estate Series, State Bar of Texas Advanced Real Estate Law Course (2007).

Language:

For example...

EXCEPT FOR THOSE LOSSES, COSTS, LIABILITIES OR EXPENSES THAT ARE CAUSED BY THE WILLFUL MISCONDUCT OR GROSS NEGLIGENCE OF LENDER, BORROWER AGREES TO INDEMNIFY AND HOLD LENDER HARMLESS, WHETHER OR NOT AS THE RESULT OF THE NEGLIGENCE OF LENDER, AGAINST AND FROM ANY LOSS, COST, LIABILITY OR EXPENSE (INCLUDING, BUT NOT LIMITED TO, ATTORNEYS' FEES) RESULTING FROM ANY FAILURE OF BORROWER TO SO PERFORM.

It is considered best practice to include this conspicuous and fair notice requirement in any indemnity provision and to add the following notice statement near the end of the miscellaneous provisions of a document:

NOTICE OF INDEMNIFICATION. BORROWER ACKNOWLEDGES AND AGREES THAT THIS AGREEMENT CONTAINS CERTAIN INDEMNIFICATION PROVISIONS PURSUANT TO SECTIONS HEREOF.

C. Usury - 60 Day Notice

Intro:

Although in this low interest rate, non-acrimonious lending environment, the usury issue has become a distant memory, a properly drafted usury savings clause remains extremely important in certain short term, rescue lending transactions or those with atypical collateral structures. Although most forms have an adequate Texas usury savings clause, the Texas legislature added an additional lender usury protection. This additional development provides the lender the right to notice of and an opportunity to cure any alleged usury, as a condition precedent to any claim made by the borrower seeking usury penalties against the lender. TEX. FIN. CODE § 305.103; *See* Footnote 76, Michael Alessio, Annotated Promissory Note, State Bar of Texas

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