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How to Lose a Client With 10 or More Outdated Loan Provisions!

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Outdated Loan Provisions

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The scope of this paper is to identify the most common out of date, incorrect and missing provisions in commercial real estate loan documents.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

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