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**Special Issues in Drafting a Contract with
a CMBS Loan Assumption [with Editing Tips]**

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Kevin graduated from the University of Houston, Bates College of Law, in May, 1981, where he served as the Executive Editor of the *Houston Law Review*. Before law school, he graduated from University of Texas at Austin in December, 1977, graduating with honors and majoring in Finance.

ACTIVITIES

Past Chair, Real Estate Forms Committee, State Bar of Texas.

Past Chair (1993-1996), Dallas Bar Association, Real Property Section.

Member, Various Planning Committees for the State Bar of Texas and University of Houston.

Director, Advanced Real Estate Law Course (1994) (State Bar of Texas).

Moderator, Advanced Real Estate Law Course (1995) (State Bar of Texas).

Speaker/Author: Numerous articles written for real estate related legal topics, including the Dallas Bar Association Real Property Section, State Bar of Texas, South Texas College of Law, University of Texas Law School, University of Houston Law Center, and Southern Methodist University School of Law.

Former Member: City of Allen, Texas Planning and Zoning Commission

Former Member: Allen Independent School District Board of Trustees

Additional information, including copies of CLE presentations, are posted on my website:
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SPECIAL ISSUES IN DRAFTING A CONTRACT WITH A CMBS LOAN ASSUMPTION [WITH EDITING TIPS]

Part 1: Special Issues in Drafting a Contract with a CMBS Loan Assumption.

1. Purpose. The purpose of this paper/ presentation is to describe the loan assumption process when selling property secured by a CMBS¹ loan. These are unique transactions and a mine-field for an uninitiated lawyer.

This paper/ presentation (a) is a guide through the assumption process from application to closing and (b) covers special clauses for a contract.

2. Exclusions, Limitations, and Waivers. As with any paper, there are the usual fine print disclaimers.

I am not discussing general issues in contract drafting. There are many lawyers and many real estate contract forms. There are many CLE articles on drafting or negotiating contracts. There are many approaches to representations, property descriptions, even how to define the proration date to be 11:59 PM on the day before closing. But, what about the period between 11:59.01 and 11:59.02? And, how does one actually measure time?²

I will not attempt to address the laws behind the CMBS loan world. There are originators, master servicers, servicers, reporting agencies, fund managers, etc.³

I am a solo practitioner, with the privilege to represent several large clients that buy under-managed foreclosure properties. They fix them, lease them up, and put an assumable CMBS loan in place. Then they sell the centers to buyers that don't seem to know how to do this.⁴ I have a lot of experience in these transactions and I have come across uninitiated attorneys representing buyers. I hope the advice is helpful.

Finally, any use of this paper is without representation, warranty, or recourse, on the undersigned, whether express or implied, or arising under any statutory or common law, all of which are hereby herein waived by any reader.⁵

3. Summary of the Assumption Process. From my observations, the loan assumption process is:

A. Buyer and Seller sign a contract. The contract is submitted to the servicer.⁶

¹ If you are really uninitiated, this means – Commercial Mortgage Backed Securities.

² “Does anyone really know what time it is? -Chicago Transit Authority

³ All I know about this area is this: when I die and come back, I want to be a servicer. You get to charge \$10,000 and tell people “no”.

⁴ This is the ultimate example of “buy low, sell high.”

⁵ This sentence violates my editing rules discussed below. It is used here as sarcasm.

⁶ As the loan is “owned” by a pool in the name of a bank as the trustee [i.e., a brain dead, non-existing entity], a servicing company handles the day to day questions about the loan.

B. The servicer sends out a form that asks for information and requires a payment of money before anything is started⁷. Only the borrower can contact the servicer.

C. Once the servicer receives the money and information, it contacts its law firm. Soon, you will get the “Hello Letter”. See Exhibit A.

D. Most servicers schedule a “hands on call” to get the parties together and go over the Hello Letter.⁸ The servicer’s attorney also makes sure the buyer/ buyer counsel appreciates and understands the process. The general message is, “do it our way and your deal will close quickly.”⁹ My experience is servicer’s counsel has high fees and they use 1 partner, 2 associates, and 1 paralegal on every issue. The effective hourly rate is over \$3,000. The more you push back [as buyer’s counsel], the higher the fee to your client.

E. You also get the Checklist, see Exhibit B. Your job, as seller or buyer’s counsel is to get all items cleared. Your second job is forcing servicer’s counsel to actually update the checklist and admit they have it. Your third job is to harass people to review and approve the submissions.

F. Finally, you get the Assumption Agreement, see Exhibit C. I have found that servicer’s counsel is willing to change typos, but not much else. You will hear that the Assumption Agreement is the approved form in the public offering securitization package and any substantive changes would have to go to the special servicer and its counsel¹⁰.

As another suggestion/ experience note, the underlying loan documents cannot be changed, period. From the lender’s point of view, the money is out the door, the loan is in the pool, and if the servicer agrees to a change, it can only hurt the servicer later. If your client doesn’t buy the property and assume the loan it is no skin off the servicer’s nose. Read the loan documents early and decide if your client can live with them, as-is.

G. After running the full gauntlet described above¹¹, you will receive permission to close.

What does this mean or why did he put all of this here?¹² Unless you and your client understand the target [i.e., get loan assumption approval] you don’t know what to aim for [i.e., draft a contract]. Hopefully you will see how the comments in the next section tie into the process.

4. The Contract. Exhibit D is an actual contract used in the sale of a modest size shopping center. The names and business details were changed. But this represents a final negotiated contract acceptable to both parties. I have highlighted [in **bold**] the unique provisions for the assumption.

A. As with any assumption, you have to alter the payment of the purchase price:

⁷ You have to pay to play.

⁸ Apparently most people don’t actually read the Hello Letter.

⁹ The alternative message is “do it your way, we bog down, fees run up, and we do it our way.”

¹⁰ See footnote 3.

¹¹ Assuming you survive.

¹² A rhetorical question, but if the paper is about the contract why is this process important?

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