

W E L C O M E

A MESSAGE FROM
ANDREW N. KRINSKY



Andrew N. Krinsky

During periods of change and heightened uncertainty, it becomes even more important for legal counsel to stay abreast of the changing goals and needs of their clients. As you prepare for changes resulting from the shifting credit markets and vastly increasing costs for energy and basic commodities, as well as likely changes in the financial and tax environment, you need to reach out to counsel and involve them early in key strategic decisions.

Recently, we have helped clients achieve significant successes in facing the unexpected consequences of the current economic climate: sudden withdrawal of funding by lenders and investors; the failure to consummate mergers and acquisitions or other major transactions; retentions of deposits in defaulted deals; and the need to restructure leases and other long-term obligations.

We pride ourselves on our role as trusted business advisors who bring to the table historical perspective on your business, a fundamental and overriding concern for your welfare, and an optimistic, but realistic, view of future opportunities. We urge you to reach out to us as you prepare to deal with these challenging times.

We hope you enjoy this issue of *The TKD Advisor* and welcome your feedback and suggestions. Please do not hesitate to contact me at 212.216.8080 or by email at akrinsky@tarterkrinsky.com.

MORTGAGE CONTINGENCY CLAUSES: ESSENTIAL PROTECTION FOR PURCHASERS

By Edward Farrell

For many years, it has been standard in the real estate industry that contracts of sale for the purchase from the sponsor of newly constructed or newly renovated residential condominium units or cooperative apartments do not contain a mortgage contingency clause. Accordingly, purchasers would not have the right to terminate a contract of sale if an application for financing were denied or, alternatively, if it was granted for an amount lower than the amount sought.



Edward Farrell

By 2003, in a seller's market, this standard had spread to traditional arm's-length transactions involving sellers of all kinds. At the time, "bidding wars" in residential real estate transactions were common. Many purchasers were willing to assume the risk of entering into a contract of sale without a mortgage contingency clause for two reasons:

- Purchasers wanted their bids to be more appealing to sellers, and
- Underwriting guidelines were not stringent and obtaining financing was not difficult.

Neither of these reasons for waiving a mortgage contingency clause is justified in today's real estate market. Currently, "bidding wars" for residential real estate occur only rarely. More importantly, an increasing number of loan applications are being denied because underwriting standards have dramatically changed and continue to change.

Many people mistakenly believe they will be able to obtain financing so long as their credit report, income and debt ratio justify the loan and meet a lender's guidelines. However, several other factors could result in the denial of a loan application. I have recently been involved in transactions where applications for financing have been denied for

various reasons, including a low appraised value of the property and an insufficient reserve fund in a condominium building. Further, performing due diligence and research are insufficient to protect you in this ever-changing mortgage market. For example, a prospective purchaser who is not a citizen of the United States recently applied for financing from a bank that had customarily issued loans to non-citizens. After the application was submitted, the bank's lending policy to non-citizens changed and the application for financing was denied. In this transaction, the prospective purchaser had been diligent and investigated to find an appropriate lender that would issue financing to a non-citizen, and yet was still unable to obtain financing.

It is impossible to predict how future underwriting changes will impact your ability to obtain financing. The only way to protect yourself is to insist on the inclusion of a mortgage contingency

clause in the contract of sale. Failure to do so could result in a default under a contract of sale and the eventual forfeiture of your downpayment.

In addition to insisting on a mortgage contingency clause, you should request a clause that grants you the right to terminate the contract of sale after the issuance of a mortgage commitment letter in the event the loan is not funded by the lender, unless the failure to fund the loan is due to your fault. I have seen and heard of lenders that have issued an authorization to close a loan and scheduled a closing, but still failed to issue the funds for the closing. On one such occasion, the lender had liquidity issues and the loan proceeds were not funded for several weeks after the loan documents had been signed. Moreover, there are some banks that have gone out of business or have had control of their business assumed by The Federal Deposit Insurance Company, commonly known as the FDIC, after issuing loan

commitments. In today's market, for all of these reasons, it is reasonable to request this additional protection.

Many circumstances, some of which are unforeseen and not within the control of a purchaser, can result in the denial of a financing application. A financing contingency clause is a contract provision that every purchaser should insist be included in every contract of sale.

About Edward Farrell, Partner

Edward is a Partner of Tarter Krinsky & Drogin LLP. He focuses his practice on real estate and mortgage finance, representing large institutional lenders in mortgage loan transactions as well as purchasers and sellers of commercial and residential real estate. Edward is also experienced at drafting and negotiating commercial leases and handling mortgage foreclosure litigation cases. You can reach him at efarrell@tarterkrinsky.com.

TKD SECURITIES TICKER

SEC Approves Proposed Rule on XBRL Compliance

The SEC unanimously approved a proposed rule to implement XBRL (eXtensible Business Reporting Language) using interactive data similar in function to bar codes. The tags uniquely identify individual items in a company's financial statement so they can be easily searched on the Internet, downloaded into spreadsheets, reorganized in databases, and put to any number of comparative and analytical uses by investors, analysts and journalists. The proposed rule would require all U.S. companies to provide financial information using interactive data beginning next year for the largest companies, and within three years for all public reporting companies.

SEC Proposed Anti-Fraud Rule for Short Sales

As part of the SEC's efforts to curb "naked" short selling and undue pressure on thinly-traded securities, the SEC is proposing new Rule 10b-21 to make it a violation of the anti-fraud provisions of the securities laws for a seller to assert fraudulently to a purchaser, broker or clearing agency that the seller has either borrowed or located shares of a stock that the seller plans to sell short.

World's Securities Authorities Organize Roundtable on Accounting Standards

The world's securities authorities have organized a roundtable regarding the creation of an International Accounting Standards Committee Foundation (IASCF) Monitoring Group. The IASCF provides public interest oversight to the International Accounting Standards Board (IASB). The IASCF Monitoring Group would provide organized interaction between national authorities responsible for the adoption or recognition of accounting standards for listed companies and the IASCF at the international level.

THE MORTGAGE MARKET CRISIS, PART I: MORTGAGE FORECLOSURE ‘RESCUE’ SCAMS

By Debra Bodian Bernstein and Edward R. Finkelstein

Mortgage fraud and related scams have been around for years. Recently, though, the implosion of the mortgage market and decline in the economy has led to a sharp increase in mortgage fraud litigation. According to a Mortgage Fraud Report recently issued by the FBI, reports of suspected mortgage fraud rose 31% in fiscal 2007 from 35,617 to 46,717, and more than 33,000 such reports were filed in the first half of fiscal 2008. Tarter Krinsky & Drogin’s Litigation Department has been defending individual and corporate clients in mortgage fraud and related litigation since long before the current proliferation.

One of the most widespread and fastest growing forms of mortgage fraud involves bogus “foreclosure rescue” scams, sometimes referred to as “equity stripping.” In these scams, unscrupulous individuals or companies, who may call themselves “foreclosure rescue specialists,” approach homeowners who are being threatened with, or are already in, foreclosure (often elderly and/or low-income individuals). The “rescue specialist” offers to help the frightened homeowner save his home and repair his credit when, in fact, the homeowner ends up being tricked into selling his home for an amount that is much less than the homeowner’s equity in the home.

One typical version of the scheme is as follows: The rescue specialist convinces the homeowner to sell his house to a buyer selected by the rescue specialist. The buyer is a straw man, recruited by the rescue specialist solely for the purpose of obtaining a mortgage loan. The rescue specialist assures the homeowner that the straw man will deed the house back to the homeowner at the end of a period of time, usually one year. Thus, the homeowner is convinced to sell his house because he is led to believe the sale to the straw man is essentially a temporary sale which is designed to give the homeowner time to repair his credit. The

new mortgage loan that is taken out by the straw man is for an amount in excess of the amount owed by the homeowner on the defaulted mortgage loan. The rescue specialist gives a modest amount of the proceeds on the new loan to the homeowner — often less than \$20,000 — and pays a fee to the straw buyer and pockets the balance of the mortgage proceeds. The homeowner, who has just sold his house to the straw man, has been led to believe that he has pre-paid a year’s worth of payments on the new loan when, in reality, no payments on the new mortgage are ever made. At the end of a year, the straw man becomes the subject of a foreclosure action and the homeowner, who has been reduced to the status of tenant in his home, faces eviction. The homeowner may have had substantial equity in his home at the time the rescue specialist convinced him to sell his house. In such cases, the homeowner’s equity is “stripped” from him in exchange for the nominal sum he receives at the closing of the new loan.

This is not the only form of foreclosure rescue fraud. Variations on theme abound. For instance, in a story reported in local newspapers earlier this year, two brothers were charged with grand larceny for the theft of the home of a retired New York City corrections officer who was suffering from dementia. The pair was arrested after the victim’s daughter – a police officer – discovered that her father’s home had been sold out from under him and a \$400,000 mortgage, for which he was responsible, had replaced a prior mortgage on which he had owed only \$180,000.

The effects of the “equity stripping” go well beyond the distressed homeowner. The con artists borrow money from unsuspecting lenders, with wide-ranging impacts. In a May 2008 ruling involving a property in Brooklyn, the court rescinded a 2004 deed made by a 76-year-old woman with dementia and voided a 2005 mortgage lien



Edward R. Finkelstein



Debra Bodian Bernstein

securing a loan to the con artists. (The mortgage was recorded after a notice of pendency.) This ruling will have major repercussions on the lender, its title insurer and a variety of others.

In the current environment, we can expect an increased incidence of mortgage foreclosure rescue scams and related consequences. Homeowners facing difficult economic circumstances, or foreclosure, must not involve themselves with people or companies claiming to be credit repair experts or foreclosure rescue specialists without seeking independent legal advice. Unfortunately, in difficult economic times, fraudulent scams often proliferate. The prudent homeowner will act cautiously and seek legal counsel before entering into contracts or financial transactions.

About Debra Bodian Bernstein, Counsel

Debra is a commercial litigator, with diverse experience handling a wide array of matters, including contract disputes, insurance coverage, mortgage foreclosures, attorney malpractice, trademark and copyright infringement, libel and employment discrimination. Debra can be reached at dbenstein@tarterkrinsky.com.

About Edward R. Finkelstein, Counsel

Edward focuses his practice in real estate and title defense-related litigation, including matters involving mortgage fraud and equity stripping, and general commercial matters including corporate litigation, asset recovery and mediation. He can be reached at efinkelstein@tarterkrinsky.com.

GETTING TO KNOW... PETER CAMPITIELLO



What do you find most satisfying about practicing law?

What most excites me about my practice is the opportunity to provide "hands-on" assistance to clients by anticipating events, developing long-term strategies and then seeing those plans evolve and be successfully implemented.

How did you first become interested in corporate and securities law?

What originally attracted me was the excitement that occurs in many securities-based transactions, particularly when I realized the influence that effective corporate counsel could provide in structuring the deal, at times taking components apart to make them work better.

How do you think the practice of securities law will continue to change in the next 10 years?

I think the trend in securities law will continue toward mandating increased financial transparency and heightened reporting requirements, with expanded responsibility and liability for management of public companies.

What has been your proudest professional accomplishment?

There have been a number of small victories such as closing a substantial transaction or financing, or getting a client publicly traded.

What is your favorite sports team?

I am an avid and diehard (emphasis on hard) Mets fan.

What is your idea of a perfect way to spend a weekend?

Any weekend I am able to spend with my wife and children as a family.

Peter is a Partner in the Corporate and Securities Practice Group at Tarter Krinsky & Drogin LLP.

F I R M N E W S

Scott Markowitz Leads Bankruptcy Practice Group

Scott S. Markowitz, who recently joined Tarter Krinsky & Drogin LLP as a partner, is leading the firm's Bankruptcy and Corporate Restructuring Practice Group. Mr. Markowitz, formerly a partner at Todtman, Nachamie, Spizz & Johns, P.C., for 10 years, focuses on debtor and creditors' rights, bankruptcy and out-of-court workouts. He has a diverse portfolio of clients, including public and private middle-market companies as well as creditors' committees. In addition, he

counsels individual clients with regard to complex individual debt restructuring.

Internship Program Gets Top Marks

Over the past eight years, TKD has worked with the unique Clinical Semester Program of Nova Southeastern University to bring third-year students to New York from Fort Lauderdale, Florida. During their semester at the firm, the students work full-time in various practice groups to gain exposure to different areas of the law. While they are learning from hands-on experience and one-on-one mentoring from a supervising attorney, they are also

earning their final credits toward J.D. degrees. Nova intern Greg Skiff worked at TKD this past semester, and two associates at the firm, Tara Toevs and Jason Evans, are former interns.

James Hiseler Joins Firm as Paralegal

James R. Hiseler recently joined TKD as a paralegal in the Litigation Practice Group. He was previously employed as a litigation paralegal at David Spector & Associates in Millburn, NJ. James received a B.S. in Diplomacy and International Relations, *magna cum laude*, from Seton Hall University.

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