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When the Seller Gives a Purchase Money Mortgage - A Lawyer's Primer on Advising the Client

Introduction

Sophisticated banks and mortgage investors understand the consequences and nuances of mortgage lending. It is their business and, for the most part, they know the pitfalls of any particular transaction. While that may also be true of an astute real estate professional constantly involved in buying and selling large numbers of parcels, the average person who does not deal in real estate as a business or profession is likely to be confused and possibly frightened when faced with the prospect of holding a mortgage.

Significantly, though, and much more so in the 1980's than at any previous time, owner financing is often the only way to facilitate the transaction. It is then that the knowledgeable attorney may be called upon to offer a sage explanation of the advantages and disadvantages of giving, or as it is sometimes referred to, taking back, a purchase money mortgage.

The Attorney's Role

To make the point, let's look at this simple example which, while perhaps obvious to skilled counsel, may very well be a mystery to the uninitiated. Suppose seller lists a house for sale at $250,000.[1] Broker produces a buyer who wishes to buy at that price. Buyer has $75,000 cash and would qualify for a bank mortgage of only $150,000. There is thus a cash shortfall of $25,000.

The parties are perplexed and despair that the transaction cannot

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[1] The example could just as well be for a commercial parcel selling for $1,500,000. Even though that may entail technicalities involving, among others, assignment of rents, the principles are basically the same.

be consummated. One of the parties, or the attorney himself, suggests that seller consider giving a mortgage for the difference of $25,000. Now the light appears. Putting aside the problem of the bank possibly prohibiting secondary financing, a genuine solution has been found. If the deal closes, the seller has accomplished his purpose and also made a solid investment - which we will discuss later. At the same time, the purchaser received the property he wanted.

Another example also highlights the concept. Assume again our $250,000 selling price, $75,000 cash and $150,000 bank financing. Again, as mentioned, the purchaser lacks only $25,000 to close. But he is selling another piece of property which will yield a $50,000 profit. That other closing, however, will not occur for six months.

How can the deal be made? A solution could be the seller taking back an interest only purchase money mortgage for six months. At the end of that time, a balloon of $25,000 would be payable, the seller having earned interest for the six months' period. This short term mortgage with no risk should be quite palatable to the seller. It is certainly not onerous for the purchaser and again, it facilitates the transaction.

But there *is* a potential problem. The typical example presupposes a seller delighted with the idea of a purchase money mortgage. Many owners, however, never before having held a mortgage, may be most reluctant to suddenly stand in the shoes of a bank. They often will not understand what it means to finance a sale. They will no doubt approach the situation with considerable trepidation. Understandably, if they are even sufficiently open-minded, they will ask questions, probably of an especially probing nature. If the sale is to take place, they will need intelligent and perceptive answers.

The attorney who can respond to these queries incisively can be of special service to the client. *That* is what this article is about.

Answering the Questions

No doubt the underlying issue for the seller-mortgagee is whether what he is doing is safe. The ready response is "yes", because purchase money mortgages are traditionally viewed as the safest form of mortgage. Seller knows the value of the property and the quality of the title. Presumably, the equity is there. So long as the down payment, or cash component of the transaction, is greater than the total of interest and legal fees accruing during the course of any foreclosure, it's difficult to imagine any loss resulting.

This statement, while entirely valid, presumes the existence of certain safeguards which merit review.

— The Lawyer's Expertise.

If one does not frequently draft sophisticated mortgages - and foreclose them - it is difficult to have a good sense of what they are really all about. An attorney without this background will either be prone to err or simply not be in a position to answer the questions posed by our timorous seller.

All this is by way of suggesting what is no doubt obvious. Before attempting to respond to the questions, discuss some of the concepts with a lawyer who represents lenders. Try to get an outline of the effect of mortgage clauses and how foreclosures are prosecuted. Reading entire texts on the subject is too involved and too burdensome. But there are many "how to" articles which give a succinct, yet in depth analysis.[2] This very article should suffice in great measure, but additional background is always in order. Critically, this is too technical a pursuit to be taken lightly.

— Protective Clauses in the Mortgage

How to properly draft a mortgage easily fills a significant portion of any book on real estate. But there are some salient highlights worthy of note.

One of those is the subject of legal fees. These are not compensable to the foreclosing party unless specific provision for that appears in the mortgage. Unfortunately, the "standard" NYBTU form of mortgage does *not* contain such a clause. The seller's lawyer must be astute enough to insert it.

The significance of this may not be so readily apparent. The explanation, though, is simple. Suppose purchaser defaults on the mortgage, causing seller to begin a foreclosure. The mortgage has no legal fee clause. The foreclosure is heavily litigated over a lengthy period of time. Ultimately, purchaser exercises his right to redeem and, sometime prior to conclusion of the action, pays off the mortgage in full, as is his right. That is, he submits all the principal and interest due.

Seller's attorney then renders his reasonable bill of $6,000 for handling the foreclosure. While seller received everything he was entitled to under the mortgage, he still "lost" $6,000 - the money paid to counsel. That is where the holder of a mortgage can be hurt. But the loss would never have resulted had the mortgage contained the appropriate legal fee clause because then the borrower *would* have been obligated to compensate our seller for "reasonable"

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[2] Suggested examples include: "A Lender's Guide to Foreclosure Actions", 11 *Real Estate Review* 55 (Fall 1981); "A Guide to Mortgage Foreclosure Strategy and Mechanics", 28 *The Practical Lawyer* 11 (June 1982); "Representing the Mortgagor: Can the Mortgage Be Saved? Part I", 55 *New York State Bar Journal* 14 (February 1983); "Can The Mortgage be Saved? Part II", 55 *New York State Bar Journal* 26 (April 1983); "Enforcing the Mortgage: Strategies for Preserving the Investment", 7 *Real Estate Outlook* 11 (No. 3, Fall 1984); "When the Mortgagor Defaults in Real Property Taxes", 56 *New York State Bar Journal* 24 (December, 1984); "Preserving Investments Through Careful Drafting", 46 *Mortgage Banking* 12 (October 1985).

legal fees.[3] The lesson, then, is that a properly worded legal fee clause saves the day under these typical circumstances.

Another vital protective area involves interest on default. All states have a judgment rate of interest. That is the rate of interest an obligation bears upon default. In New York, that rate is nine percent.

Suppose our seller took back a mortgage for $100,000 at fifteen percent interest. Purchaser defaults on the very first payment on January 1. If the mortgage never addressed the issue - and "standard" forms most often will not - that debt of $100,000 bears interest at nine percent. The foreclosure is instituted and finally our defaulter pays off in full on November 1. He properly remits $100,000 of principal and ten months' worth of interest at nine percent, for a total of $106,750.00

The seller had "invested" in a mortgage expecting a rate of return at fifteen percent. He did not get that. The mortgage could and should have provided that upon default, the debt would yield interest at the contract, or mortgage, rate of fifteen percent, which would have totalled a return of $111,250.00. Our seller "lost" $4,500.00. It would not have happened had the mortgage been artfully crafted and contemplated this point. Again, there *is* a way to assure a solid investment.

Assurance also emerges with attention to interest on advances. Were the structure on which our seller holds a mortgage to burn down, in most instances the primary security has been lost. (In some unusual cases the land alone could be worth more without the building.) A requirement of any carefully prepared mortgage will be that the owner maintain and pay for adequate fire insurance, thus assuring the reconstruction of the building should it be destroyed by fire.

What if the owner neglects to pay the insurance premium, causing coverage to lapse? In that event, our seller can advance the necessary sum himself. While that continues the critical protection, seller has paid, perhaps $500. Should he not receive interest on that money? Of course the answer is yes, and similar to the situation of interest on default, the applicable rate should be the percentage in the *mortgage*, not the judgment rate. Recalling our example, that means fifteen percent, not nine percent.

While the interest differential gained by such expert draftsmanship is not in and of itself significant, we are talking about protecting the interests of the party holding a mortgage. That person is entitled to all the safeguards available.

There are yet other areas where payment advances made by our mortgage holder can increase in magnitude. For example, suppose the owner fails to pay real property taxes. Eventually, the taxing authority will divest the owner of title.[4] When that happens, the mortgage is also extinguished. Before that occurs, it is incumbent upon the mortgage holder to pay those taxes himself. That sum is then added on to the mortgage debt and should likewise bear interest at our *mortgage* rate.[5] Since real estate taxes can be substantial, the interest generated here can be meaningful.

Still further, suppose our purchase money mortgage is in a second or even more junior position. A default on some prior mortgage could trigger a foreclosure of that superior mortgage, thus threatening our seller's mortgage. Here too, an advance can be made to the *prior* mortgagee or mortgagees, with that sum added to our debt, to earn interest once again at the *mortgage* rate.

This issue of interest on advances doesn't stop there either. There are any number of other possible expenditures necessary on the part of the mortgage holder to protect his position. These include, for example, such peripheral charges as legal costs to defend any collateral attack on the mortgage, costs to cure violations on the property which owner may ignore and securing the property against vandalism should it become abandoned.

Although encountering these additional costs is unlikely, preparing for the worst is the best way to guarantee success. To be sure, there are dangers attendant to holding a mortgage subjected to the recited problems. There are also the solutions noted.

Another area of concern may be categorized under the heading "additional charges". Suppose the owner submits a check with insufficient funds in his account - something which occurs with surprising frequency. Should our seller have to pay the charge his own bank will assess? Clearly the answer is no, especially when the owner does this with regularity. The mortgage can provide recompense for this and other additional outlays.

Further on this point, and unlike banks, most sellers will not assume the obligation of escrowing for taxes. If receipts for payment of real property taxes are not forthcoming, how does our seller determine whether or not taxes have indeed been paid? The answer is that he must pay for tax searches. This is another item for which he should be reimbursed.

Most anyone who has ever paid a

[3] What a mortgagee pays his attorney is usually not the measure of what he is entitled to recoup. (*Federal Land Bank of Springfield v. Ambrosano*, 89 A.D. 2d 730, 453 N.Y.S.2d 857) (3rd Dept. 1982) The concept of "reasonable" legal fees encompasses a number of factors such as the appropriate amount of time expended by counsel, the fairness of his billing rate and his experience. The court may have to decide that. For the purpose of our example, we assume that $6,000 to have met the test of reasonableness. For a further discussion of legal fees in foreclosure see, *Mortgages & Mortgage Foreclosure N.Y.* Sec. 36.7 (Rev. Ed)

[4] Methods by which the multitude of taxing jurisdictions throughout the state enforce collection of taxes varies so widely that it could not be economically related here. Nor are the procedures relevant to this discussion. It suffices to note the danger resulting from neglect to pay real taxes.

[5] As an aside, the mortgage could provide that advances bear interest at the highest rate allowed by law. That could be more than the amount in our mortgage. Consideration of this concept by seller's attorney would be recommended to find the most beneficial formulation.

mortgage is familiar with the category of expense known as late charges. If banks assess such fees, so too should a purchase money mortgagee. If a payment is late, interest is lost and there should be compensation. That is, in part, the purpose of a late charge, paid to the mortgage holder when choosing to accept a tardy payment instead of foreclosing. Typically, these range between two and five percent and are addressed by statute.[6] Since standard mortgage forms do not encompass this item, careful draftmanship here is a prerequisite.

Attention should also be addressed to inclusion of a due on sale (or due on transfer) provision which is not found in the NYBTU form. Essentially, this is a contractual agreement authorizing the mortgage holder to accelerate[7] the entire amount due on the mortgage if the property securing the loan is sold or otherwise conveyed.

Employment of this clause is of relatively recent vintage. Until approximately the late nineteen sixties, the existence of stable interest rates meant that sales of property encumbered by a mortgage had no deleterious effect upon the lender. When rates became volatile, continuation of older mortgages at what became below market interest rates, adversely impacted upon the profitability of lenders' mortgage portfolios. That problem precipitated the remedy of inserting the due on sale provision in the well drafted mortgage.

This historical footnote bears upon the purchase money mortgage situation. If seller gave the mortgage primarily as an investment, there may be little need for a due on sale clause, although retaining the option to use it can only help. If, conversely, the mortgage represents an accommodation to facilitate the sale, seller may very well not wish to have some future owner - a stranger - being an obligor, especially at a low rate of interest.

The lender can be assured that the due on sale clause has been strictly enforced by case law decisions in New York. Moreover, Section 341 of the Garn-St Germain Depository Institutions Act of 1982[8] preempts any state law prohibitions upon exercise of clauses of this type. Hence, the provision provides substantial flexibility, protection, and stability to the mortgage documents and should always be considered when preparing a mortgage.[9]

— What If I Have to Foreclose?

A primary concern of any lender is what happens when the money due is not paid. Since foreclosure augurs a drastic remedy, it is often shrouded in mystery and portends expensive, time consuming and convoluted litigation.

While in some instances that fear may be well founded, it should not in fact be a problem for our seller. Here is why.

Initially, understand that every mortgage has a set due date, most often on a monthly basis for each payment. There is then usually a grace period. Fifteen days is standard, but that is a matter of choice when the mortgage documents are prepared. It could be more or it could be less. If a payment remains open past the grace period, a lender has virtually an absolute right to avail himself of the remedy of acceleration.

In turn, acceleration is the key element of mortgage enforcement. The mortgage documents will provide that upon the happening of some default -and the most common is failure to remit a payment on time - the lender may, at his option, declare due the *entire* amount of principal and interest.

To explain this most exigent concept, suppose we have seller holding a purchase money mortgage of $50,000. Let us further assume that its term is ten years and the interest rate is twelve percent. The resultant monthly mortgage payment is $717.36. The first payment is due on January 1. By January 16, owner has neglected to pay. Our seller need *not* sue for that $717.36 in default. Rather, he may elect to declare the full $50,000 immediately due and payable with all applicable interest. This election to accelerate may be manifested simply by sending a clear and unequivocal letter to that effect - hardly a burdensome act.[10] If then the full sum is not paid, the seller is free to foreclose. He turns the matter over to his counsel for foreclosure, reasonably safe in the assumption that he will either be paid in full - with interest, legal fees and any sums advanced to protect his position - or he will become the owner of the property at the conclusion of the foreclosure. If the property is worth more than the sum of the mortgage or mortgages on it, our seller cannot lose.[11]

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6 Pursuant to RPL Sec. 254-b(1), two percent is the maximum late charge where the mortgaged property is improved by a one to six family residence.

7 Discussed, *infra.*

8 Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (1982). There are some exceptions to the pre-emption, not relevant to this article. For a more detailed review of Garn-St Germain, see: "Federal Pre-emption of State Law Prohibitions on the Exercise of Due-on-Sale Clauses", 100 *Banking Law Journal* 772 (Nov.-Dec. 1983); "Due-On-Sale as Pre-empted by the Garn-St Germain Act", 12 *Real Estate Law Journal 138* (Fall 1983).

9 Examining the various cases upholding the efficacy of the due on sale clause, and the minority of decisions which declined to do so is important, but beyond the scope of this article. For a detailed review the applicable case law, see: "Due On Sale in New York: Clearer With Time?" 58 *New York State Bar Journal* 27 (May 1986).
Precisely how the clause is drafted to obtain maximum effect is also critical. Guidance as it emerges from the case law is likewise found in the cited article.

10 Filing the summons and complaint (and the lis pendens, which is recommended) with the County Clerk is also, in and of itself, an election to accelerate, so long as the complaint recites acceleration. *Albertina Realty Co. v. Rosbro Realty Corp.*, 258 N.Y.472 (1932).

11 In presenting this scenario, one is constrained to use the words "reasonably safe". No absolute statement could ever be made. We are assuming the mortgage to be properly drafted, executed and recorded, free of fraud, or unusual circumstances, or defenses, which would not be expected in a typical situation. It is extremely difficult, and most often impossible, to defeat a foreclosure. For exam-

Also critical here is this principle. Once the holder of the mortgage has validly accelerated, he is not required to accept any arrears - in our example, that one month overdue. He *may* take the past due sum if he wants to, but he is not obliged to do so.[12] While lenders would usually prefer to be lenient, the comfort for our seller is that he can be rid of this mortgage from the moment it becomes a problem. Although this power given to the mortgage holder appears harsh, the law quite consistently upholds this right to accelerate the moment the grace period has expired.[13] Again, our seller has considerable leverage and protection.

Although it should not be of consequence, a related inquiry to be expected from our seller is how long will a foreclosure take? This is a query not susceptible to a consistent answer. It depends upon so many factors. Most everyone in real estate has heard the apparently conflicting anecdotes, either that foreclosures proceed very rapidly, or that they take forever. Which is it? It depends.[14]

While it cannot be stated with precision, even a skilled foreclosure attorney would probably have difficulty in completing a foreclosure faster than six months, and that is under the best of circumstances. How long a foreclosure search takes, how many defendants there are and how difficult it is to serve them, whether the action is contested and how efficiently the courts are functioning, are but a few of the elements impacting upon the duration of any particular foreclosure case.

But how much time is consumed by the case should not normally be of concern, although counsel should recognize the emotional component on the layman's part. What *is* important is the equity in the property. If the property is worth comfortably more than the aggregate of the mortgage being foreclosed and any prior mortgages, it would take an extraordinary delay for the mounting of interest during the course of the case to extinguish the equity cushion.

— Saving the Day with a Receiver

In the unusual situation of a foreclosure which drags on for a protracted period, the existence of a loss, although quite remote, does become a theoretical possibility. Engagement of a receiver can solve that dilemma. The client should be made aware of this device.

Mortgages are uniform in providing to the foreclosing party the right to obtain the appointment of a receiver. Appointed as an officer of the court, a receiver stands in the shoes of the owner, collects all rents due or to become due, makes needed repairs to preserve the physical integrity of the property and maintains insurance. In a phrase, he protects the security for the mortgage investment.

Receivers are most often obtained for commercial or other income producing properties, for obvious reasons. An owner of a small shopping center, for example, could delay a foreclosure interminably, all the while pocketing the rents and spending nothing for repairs. Since his income would greatly exceed legal fees in defending what is ultimately a hopeless case, there is much incentive for the dilatory tactics. Once a receiver is in place, however, the benefit of procrastination is lost because income goes not to the defaulting owner, but to the receiver, who in turn holds the funds collected to be applied in reduction of the mortgage debt.

A dual purpose is thus served. The owner's will to obfuscate is eliminated *and*, the income derived from the property goes to the mortgage holder. Hence, the issue of delay as an enemy of our seller becomes illusory. Even though commercial parcels are the most common subject of receiverships, they *are* available for the one family house, with like results. Once a receiver is appointed in this latter instance, the owner is bound to pay fair rental, just as if he were a tenant. So, still further protection for our apprehensive seller is available.

— What Rate of Interest to Charge?

Purchaser needs seller financing to buy. Seller wants to give the mortgage to facilitate the transaction. There must now be a weighing of the relative strengths of the parties to arrive at an appropriate rate of interest on the purchase money mortgage.

In resolving the bargaining postures, we can see how much above market rate our seller can charge. As of this writing, mortgage interest rates are hovering in the vicinity of ten to eleven percent. Must our seller charge that rate? No, he could accept less if that is what is required to underwrite the sale. Or, he could make this a

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ple, accepting and retaining an overdue installment could serve as a waiver of acceleration. Since this article does not purport to be an exposition on all the theoretical impediments to foreclosure, it suffices to say that the standard facts recited will support foreclosure and advising a prospective lender of such is responsible advice.

[12] *Sherwood v. Greene*, 41 A.D.2d 881, 342 N.Y.S.2d 990 (1973); *Jamaica Savings Bank v. Cohan*, 36 A.D.2d 743, 320 N.Y.S.2d 471 (2nd Dept. 1971); *Dime Savings Bank of New York v. Dooley*, 444 N.Y.S.2d 148 (2nd Dept. 1981); *Bowers v. Zaimes*, 59 A.D.2d 803, 398 N.Y.S.2d 766 (3rd Dept. 1977).

[13] *Graf v. Hope Building Corp.*, 254 N.Y.1 (1930); *Ferlazzo v. Riley*, 278 N.Y.289 (1938); *Albertina Realty Co. v. Rosbro Realty Corp., supra.; intra alia*

[14] In New York, judicial foreclosure is the method used, pursuant to RPAPL Article 13. Non-judicial foreclosure, or as it is called in New York, "Foreclosure of Mortgage by Advertisement", *is* available, controlled by RPAPL Article 14. For reasons too lengthy to state here, that mode is neither employed nor recommended. The idea that foreclosures can move rapidly probably arises from the non-judicial approach prevalent in twenty-seven *other* jurisdictions: Alabama, Alaska, Arizona, California, District of Columbia, Georgia, Idaho, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginià, Washington, West Virginia and Wyoming.

valuable investment by charging more, assuming, of course, that he has the leverage to do so, which harkens back to the point on bargaining strength.

Having determined this preliminary point, the next query is how much interest will the *law* allow? That is a far more obscure inquiry. Every state has a "legal" rate of interest with any percentage over such rate being deemed civil and, eventually, criminal, usury.

Each jurisdiction has extensive statutory and case law authority on these arcane concepts which vary greatly from state to state.[15] To clarify the subject, observe these points applicable in New York:

- Interest on a loan in excess of twenty-five percent is criminal usury. (Penal Law Sec. 190.40)
- A corporation cannot generally avail itself of the defense of usury. (G.O.L. Sec. 5-521) Thus, a corporate borrower may be charged any rate of interest up to 25%.
- For a second mortgage, a *licensed* lender (i.e., mortgage company) can charge any rate agreed to between lender and borrower (Banking Law Sec. 590-a), up to 25%.
- Banks and other institutional lenders benefit from Federal preemption and on first mortgages can charge *any* rate of interest.
- The "legal" rate of interest which an unlicensed person or entity may charge cannot be in excess of sixteen percent. (G.O.L. 5-501 and Banking Law Sec. 14a(a))

Given all these mandates, what may an individual unlicensed seller charge by way of interest on a purchase money mortgage to an individual purchaser? In New York, is the "legal" rate of sixteen percent the maximum? It is not. New York's highest court has ruled that a purchase money mortgage is not a loan, and therefore not subject to usury proscriptions.[16] Hence, in New York,[17] there is no ceiling whatsoever on the rate of interest on a purchase money mortgage. This certainly creates wide latitude to convert an accommodation mortgage into a solid high yielding investment.

— Will Giving A Mortgage Cost Me Anything?

Overwhelmingly, the answer will be "no". The prevailing custom is that the purchaser pays seller's attorney for preparation of the mortgage documents. Similarly, purchaser underwrites the cost of the mortgage tax (except for .25% which is lender's obligation pursuant to Tax Law Sec. 253) and mortgage recording fees.

— What If A Prior Mortgagee Forecloses?

This is probably the only area where anything remotely resembling a true problem exists. Frequently, although not necessarily, a purchase money mortgage is in a junior or subordinate position. If there is a default on the purchase money mortgage, undoubtedly the prior mortgage or mortgages will also be in default. Even were the purchase money mortgage current, the first could be in default.

Either way, failure to keep any prior mortgages current could, and in most instances would, precipitate acceleration in the manner previously discussed. Once that occurs, the lien of our purchase money mortgage is in danger of extinguishment. The *debt* survives, but the security for that obligation - the property - will be gone if any prior mortgagee completes it foreclosure.

Under these circumstances, the holder of the purchase money mortgage could endeavor to first complete his own foreclosure. A purchaser at such foreclosure sale would make our mortgagee whole and would then assume the responsibility to pay the prior mortgages, having purchased subject to them. That certainly concludes the difficulty.

But if the holder of the purchase money mortgage cannot foreclose before the others, then to protect his security, he must do one of two things. First, he should attempt to reinstate the prior mortgage. That means, pay the arrears and maintain the monthly payments. Those advances are added on to the debt and will be recouped, with interest. Remember, though, after acceleration the lender need not accept arrears and very well may decline to reinstate. That constrains our purchase money mortgagee to pay off a prior mortgage *in full.* If a senior mortgage is perhaps $100,000, its a mighty sum to draw from a bank account.

Again, that advance will come back, with interest, but laying out such an amount is the problem. *That* is the conundrum. The safety is there, but it is an uncomfortable position which may have to be addressed and explained in advance.

Conclusion

The twin subjects of mortgage drafting and mortgage foreclosure fill volumes in New York. Combining these two callings creates a broad arena which tends towards the recondite and technical. It is considerably more than just a closing.

But the purchase money mortgage is so much a part of modern real estate transactions that it behooves counsel to have at least a working knowledge of what they are about. Since it is only the rare seller who faces with confidence the prospect of holding a purchase money mortgage, it is critical, and quite helpful, for counsel to be in a position to at least *explain* how protection is available.

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[15] For a succinct yet comprehensive recitation of the usury laws in all the states, see Dunaway, *The Law of Distressed Real Estate*, Appendix 22A, for which volume this writer is a consulting attorney.

[16] *Mandelino v. Fribourg*, 23 N.Y.2d 145 (1968).

[17] California adopts the same theory. Beyond that, the law varies greatly and in many instances is unclear. It is, therefore, difficult to set forth a firm rule on purchase money mortgage interest rates in other states. Attorneys would have to consult applicable law in other jurisdictions if counseling there.

If a purchase money mortgage is to be prepared, a combination of the standard NYBTU form, together with a rider containing the clauses suggested - available in form books - should give the client the promised solace. Although having to actually foreclose the mortgage is not something to be pursued by a neophyte, there are firms specializing in the field who can help. Significantly though, you will have explained the situation to your client so that he was able to make a rational, reasoned business judgment. That is certainly a valued function of an attorney.

No one familiar with the history of this country can deny that congressional committees are useful. It is necessary to investigate before legislating. But the line between investigating and persecuting is a very fine one and the junior senator from Wisconsin has stepped over it repeatedly. His primary achievement has been in confusing the public mind as between the internal and external facts of communism. We must remember always that accusation is not proof. Conviction depends upon evidence and due process of law. We will not walk in fear, one of another. We will not be driven by fear into an age of unreason if we dig deep in our history and our doctrine. And remember that we are not descended from fearful men; not from men who fear to rise to speak, to associate, and to defend causes that were for the moment unpopular.

This is no time for men who oppose Senator McCarthy's methods to keep silent or for those who approve. We can deny our heritage and our history but we cannot escape responsibility for the results. There is no way for a citizen of a republic to abdicate his responsibilities. As a nation we have come into our full inheritance at a tender age. We proclaim ourselves, as indeed we are, the defenders of freedom wherever it continues to exist in the world; but we cannot defend freedom abroad by deserting it at home.

The actions of the junior senator from Wisconsin have caused alarm and dismay amongst our allies abroad and given considerable comfort to our enemies. And whose fault is that? Not really his. He didn't create this situation of fear. He merely exploited it, and rather successfully. Casius was right: The fault, dear Brutus, is not in our stars; but in ourselves.

—Edward R. Murrow, Sixty Minutes, CBS, April 27, 1975.