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Failure to Advise — *Is There a Corollary Between Residential Real Estate & Commercial Deals?*

The purpose of the following article is to raise the issue of the attorney's responsibility to his or her client to, at a minimum, discuss the utility and risk management aspects of UCC security interest priority insurance. The article continues by drawing a corollary to recent developments in the residential real estate law.

By James D. Prendergast

UCC insurance is available nationwide from all of the major land title companies and is designed to insure the attachment, perfection and priority of security interests in personal property collateral.[1] The framework for this article is taken, and used by analogy, from the article titled "Attorney Malpractice for Failure to Require Fee Owner's Title Insurance in a Residential Real Estate Transaction" by Robin Paul Malloy and Mark Klapow.[2]

Although analogies between real property law and personal property law seldom lead to the correct conclusion,[3] the developments in residential real estate law and practice that lead the authors to conclude that it is malpractice for a lawyer not to advise his or her clients of at least the existence and functionality of residential real property title insurance are similar to developments in the utilization of UCC insurance. Given this similarity of developments, we can reach the similar conclusion that it is malpractice for a lawyer not to advise his or her commercial finance client of the existence and functionality of UCC insurance. If the client refuses to take advantage of UCC insurance, our authors suggest that the attorney have the client sign a disclosure letter from counsel acknowledging that the client has been advised of the existence and functionality of UCC insurance and nevertheless declines to use the insurance for the transaction.

The authors list five factors in reaching their conclusion that it is malpractice for an attorney not to at least advise his or her client of the existence and utility of residential real property title insurance:

- The transformation of the residential real estate market from a local to a fully integrated national and international marketplace. The relevance is the changing point of reference governing the standard of care in the delivery of legal services.
- The general nature of the lawyer's role in the residential real estate transaction. The authors suggest that changing market conditions have modified the lawyer's role in residential real property transactions and the point of reference for malpractice standards.
- The examination of the risks associated with title examination as a result of the public record system. The risks are known but incapable of being eliminated and can only be fully covered by land title insurance.
- The authors then proceed to discuss the three primary methods of title assurance that are used to reduce the risk and clarify the risks of title examination in today's marketplace.
- Finally, the authors clarify the lawyer's duty to obtain fee owner's title insurance in a residential real estate transaction, and then the authors suggest that this duty may extend to non-clients in certain situations.

The authors then conclude with a proposed form that may be used by an attorney in those situations where the client refuses to obtain fee title insurance despite a firm recommendation to the contrary.[4]

A National Market

It must be stressed at this point that the significance of the article on malpractice in the context of residential real estate transactions is that the article is discussing residential and not commercial real estate transactions. Although not directly discussed, I have no doubt that the authors would easily conclude that there is no debate at all as to whether it would be considered malpractice for a lawyer not to advise his or her client of the existence and utility of land title insurance in the context of a commercial real estate transaction. With larger dollar transactions and a better developed national market, commercial real estate accepted land title insurance early on in its development as a cost effective method to shift the risks inherent in determining land title. And the real estate law firms gladly accepted the change as shifting a practice risk for which they were not being reasonably compensated to the insurance companies. The law firms quickly realized that shifting such risks to the insurance companies removed an area of malpractice exposure for which they were not being reasonably compensated. The real estate law firms could make as much money doing a less risky practice.

As a result, the performance standards of care required of commercial real estate lawyers are national, substantially the same in New York, Chicago and Los Angeles, and in Kansas City, Seattle and Denver. However, residential real estate until recent years had been a local industry with arguably a local community standard for judging attorney performance. Further, in many jurisdictions lawyers still write title opinions in lieu of land title insurance in residential real estate transactions.[5] Given the developments in technology, the pressure from financial institutions to reduce transaction costs, and the pressure on the legal profession to cease being the last cottage industry, one would expect that in the near future lawyers will cease to be involved in land title opinion preparation work apart from assisting the underwriting process for land title insurance. The authors' conclusions, therefore, are much more meaningful in the context of residential real property transactions for our analogy to commercial finance than a comparison of commercial personal

property and real property lending, although that comparison would lead to the same ultimate conclusion that it is malpractice for a commercial finance lawyer not to advise his or her client of the existence and functionality of UCC insurance. Although this author would argue that the use of land title insurance in the real estate commercial lending market, and the malpractice risk to the lender's lawyer if land title insurance is not obtained, should be dispositive of the lawyer's responsibility with respect to UCC insurance in commercial personal property lending, if the malpractice argument of our authors with respect to the use of land title insurance in residential real estate transactions is sustained, then there should be absolutely no question of the malpractice risk to the commercial law attorney who does not advise his client to use UCC insurance or at least advise his client of the availability and functionality of UCC insurance.

One of the developments that lead our authors to conclude in the way they did was the transformation of what was basically a local residential real estate market into a national market and the development of the secondary market of Fannie Mae and Ginnie Mae.[6] What began as individual transactions on the local level has now become a fully integrated market operation at the super-regional, national and international levels.[7]

Unlike the residential real estate market with its national secondary market for conforming transactions, the commercial personal property lending market still retains a significant local component, with community financial institutions providing commercial finance on the local level. This local commercial lending market may be akin to the non-conforming jumbo residential real estate market. Further, community banks and other locally centered lenders may make a commercial finance loan secured by personal property but the loan is, in reality, not a loan where the primary or secondary exit strategy for the lender is the liquidation of the collateral.

Given the national statute, the question must be asked as to whether a local standard of expertise to defend a charge of negligent malpractice is available at all to the commercial personal property lawyer.

Rather, the loan is, in essence, a cash flow or relationship or other loan made to the local businessperson on the evaluation of the going concern of the borrower. The personal property collateral is not reliance collateral but is taken primarily in an abundance of caution as prudent banking practice. This is the type of commercial finance loan that is analogous to the jumbo real property residential loan to the bank's good customers and retained by the local real property residential lender in its portfolio.

However, the majority and an ever increasing percentage of the commercial personal property lending market is national in scope, especially given the mergers of financial institutions over the last few years. Most asset-based lenders in significant dollar transactions, more than say $25 million, are either national lending institutions or subsidiaries or other affiliates of national lending institutions, such as Bank of America, Wells Fargo/Foothill, Wachovia Capital Finance and CIT. Many medium-dollar transactions, say more than $10 million, may also be syndicated credits with national or regional financial institutions involved. Finally, many arguably local commercial finance lenders package their portfolios and sell them off to financial intermediaries to increase liquidity.

Even within the lower dollar value commercial finance market, many "local" asset-based lenders compete nationally. Notwithstanding that a significant local market remains for the truly local asset-based lender, the market in which even they play has become national in scope, with the lower dollar transaction asset-based lender in Santa Monica, CA, competing for a transaction in Houston against an asset-based lender from New York. Therefore, although the progression to national market certainly has been different, both in extent and timing, and not as extensive as for conforming loans packaged by financial intermediaries, commercial lending is an industry national in scope with national and international financial institutions competing for most significant and perhaps even meaningful dollar transactions.

The Lawyer's Role

The maturation of the lawyer's role in commercial finance transactions also bears similarities to that of the maturation of the role of the lawyer in real estate transactions. Given the small dollar amounts involved, most significant commercial states no longer have lawyers involved in residential real estate transactions. The development of sophisticated data based title plants and the available of title insurance has provided a cost effective alternative for residential real estate transactions that can no longer or should no longer bear the freight of lawyer opinion involvement. The same is true of lower dollar value commercial finance transactions. Given computer generated loan documentation and credit scoring, many financial institutions no longer bring in inside or outside counsel until a certain dollar threshold is met, e.g., $5 million. Legal requirements on the free market seem to be the only constraint on the elimination of lawyers writing title opinions in residential real property transaction, other than in support of land title insurance, at least below some significant dollar figure.

The alternative to no lawyer involvement, however, is not for the lender to personally bear the risk of failure of title or lien priority. Land title insurance fills the void with a cost effective alternative. In the commercial lending market, UCC insurance offers a cost effective method of risk management between the lender in the lower dollar commercial finance transactions relying solely on the representations and warranties of the borrower or forcing the borrower to engage counsel for an expensive opinion of borrower's counsel with limited marginal utility. The choice is not "either-or" but comparing the cost and utility of insurance in lieu of or to augment the legal opinion.[8]

Our discussion so far has concentrated on the role of the lawyer in preparing an abstract of title or a land title opinion. Perhaps this role has become a bit anachronistic given the development of computerized title plants of national scope. However, the alternative of land title insurance for the legal title opinion does not mean that the lawyer has no role in the real estate residential marketplace. This continuing role raises the issue discussed by our authors concerning competition from non-lawyers. Putting aside the issue of the practice of law by non-lawyers, a topic beyond the purpose of this article, the question remains as to how a residential property transaction is closed to minimize risk to the participants. Generally the parties to a residential real estate transaction are unsophisticated; to be distinguished from the level of expertise of the parties to a typical commercial loan transaction. Given this lack of knowledge, the closing of the transaction needs a manager, someone to collect and disburse funds and to make sure that all documentation is in order. Here is a clear and continuing role for the lawyer, and for his or her competitors in this function, the real estate brokers, escrow companies and the escrow divisions of the land title companies. Again, the law should not be used to keep in place an expensive and outdated transactional methodology, but rather the law should establish competence and licensing standards to protect the consumer, and then let the marketplace determine the most cost effective alternative through uninhibited competition. Law sustained monopolies do not lead typically to market efficiency.

This same role is available to the lawyer in the commercial loan transaction. The lender, having the sophistication often lacked by parties to a residential real estate sale transaction, can conduct the closing, as a table closing, itself. In larger dollar transactions, counsel to the lender may orchestrate the table closing and monitor fund distribution. Even if no legal opinions change hands, the lawyer as ringmaster provides an extremely important function to the risk management of an effective close.

Given the national market for most commercial finance transactions, we need to compare the client's expectations of the lawyer's role in the residential real estate transaction with the lawyer's role in a commercial finance transaction.[9] Among the factors considered by our authors include the client's expectation that the lawyer will ensure that every aspect of the transaction conforms to the applicable requirements of law and that the lawyer will serve as the risk manager for the transaction. The authors conclude that unless the attorney fully understands the demands of the newly integrated residential real estate market and properly manages the risks inherent in that market, the lawyer will not live up to the client's expectations or to the professional requirements for advising a client.[10]

With the exception of the integrated secondary market provided for conforming residential real estate mortgages by Ginnie Mae and Fannie Mae, similar arguments as those made by our authors with respect to lawyers in residential real estate transactions can be made for lawyers in commercial loan transactions. The client does look to the lawyer as the risk manager of the transaction doing what needs to be done so that the transaction closes in accordance with the lender's expectations. This demanding expectation most seriously effects lender's counsel. In commercial finance transactions it is very rare indeed for a borrower's counsel of any substance to provide a priority security interest opinion except perhaps in equity collateralized transactions. However, there is no need for counsel to the borrower to provide such an opinion for lender's counsel is effectively providing a verbal priority security interest legal opinion at the closing table, whether lender's counsel realizes it or not. After all the documents are signed and sitting on the table, the lender's representative will look at his or her counsel and ask "Are we ready to close?" What the representative of the lender is really asking is "Are we ready to close in accordance with my expectations for this transaction including that the security interest of the lender is in first priority position with respect to the collateral of the borrower?" The lender's counsel nods and, bingo, there's the priority security interest legal opinion albeit without the typical exceptions and exclusions. A clear priority opinion! Or lender's counsel can tactfully suggest that its client, the lender, obtain UCC lien priority insurance and shift this priority opinion risk to the insurance company.

Given the similarity in argument between residential realm estate transactions and commercial lending, there is one additional factor that makes the argument for a national standard of care in commercial finance personal property transactions even more dispositive. This factor is that commercial secured transaction law is, to a very great extent with Revised Article 9 of the Uniform Commercial Code and even more so that under former Article 9, a national uniform statute.[11] Real property law remains, to a great extent and notwithstanding the national secondary market, a law that is local. This is not the case for commercial personal property law. Article 9 of the Uniform Commercial Code is a statute enacted in all the States in substantially identical fashion. Except for limited non-uniformity at the edges, Article 9 of the UCC is effectively a national statute, with much wider uniform acceptance that former Article 9. As such, the standard of expertise required of practitioners is national with local standards of expertise fundamentally irrelevant. A lawyer practicing in the area of commercial law needs to be aware of this fact and the utility of UCC insurance to balance or offset this high expertise requirement level.

Given the national statute, the question must be asked as to whether a local standard of expertise to defend a charge of negligent malpractice is available at all to the commercial personal property lawyer. This author would argue that any discussion of the similarity between residential real estate transactions and commercial finance transactions is an interesting academic exercise, and that the national acceptance of Article 9 of the Uniform Commercial Code is entirely dispositive of the level of the required standard of care — a lawyer in Kansas City or Scottsdale practicing commercial law will be or should be held to the same standard of care as the commercial lawyer in Los Angeles or New York.

The national uniformity of Revised Article 9, all 175,000 words, including comments, forces recognition of a resulting national standard of professional competence. As stated in the Special Report of the TriBar Opinion Committee: U.C.C. Security Interest Opinions — Revised Article 9,[12] security interest opinions under Article 9 call for a significant familiarity with Article 9.[13] This should not come as any big surprise. The TriBar Report goes on to advise that "opinion preparers who do not regularly work with Article 9 should consider whether to involve a lawyer familiar with Article 9 in the preparation of the U.C.C. security interest opinion."[14]

A person who is engaged in the general practice of law (or who is engaged as a specialist in a given area of law) represents that he/she has the degree of knowledge and skill ordinarily possessed and used by others engaged in the general practice of law (or as a specialist, as the case may be). The required knowledge and skill must be judged by the standard legal practice in the geographic area of the attorney's practice at the time the attorney represented the client. As we have argued, the relevant geographic area, given a nationally uniform statute, is the nation as a whole and requires a national standard of expertise. An attorney who undertakes to attend to the legal needs of a client represents also that the attorney will use such knowledge, skill and care which attorneys of ordinary ability and skill possess and exercise. The law, therefore, imposes upon an attorney the duty or obligation to have and to use that degree of knowledge and skill that attorneys of ordinary ability and skill possess and exercise in the representation of a client, such as the plaintiff in this case. This is the standard by which to judge the defendant (a general practitioner or a specialist) in his/her representation of plaintiff in this case.

The law does not require that an attorney guarantee a favorable result. The law recognizes that the practice of law according to standard legal practice will not necessarily prevent a poor result. If the attorney has brought and applied the required knowledge and skill to his/her client, he/she is not liable simply because a favorable result has not been achieved or simply because bad results have occurred. The attorney is not an insurer, nor is he/she liable for every error in judgment or mistake. On the one hand, he/she is not to be held accountable for the consequences of every act that may be held to be an error by a court. On the other hand, he/she is not immune from responsibility if he/she fails to employ in the work he/she undertakes that degree of reasonable knowledge and skill exercised by attorneys of ordinary ability and skill.

An attorney who holds himself/herself out as a specialist in a particular field of law represents that, with regard to his/her specialty, he/she has and will employ not merely the knowledge and skill of a general practitioner but that he/she has and will employ that special degree of knowledge and skill ordinarily or normally possessed and used by the average specialist in his/her field. Accordingly, when an attorney holds himself/herself out as a specialist and undertakes as such work for a client, the law imposes the duty upon that attorney to have and to use that degree of knowledge and skill which is normally or ordinarily possessed and used by the average attorney who specializes in the practice of that particular field of law.[15]

Given this general discussion, if we connect the dots to the TriBar Report, clearly the report is advising that, in its opinion, an attorney who ventures into the area of providing a security interest opinion under Revised Article 9 is assuming the mantle of a specialist in the Uniform Commercial Code, or at least to Revised Article 9 and related sections of other Articles, such as Article 1 on scope and choice-of-law, Article 3 on instruments and Article 8 on securities and the relationship of Article 8 to the issue of perfection and priority of security interests in investment property. This national standard of care, and the related level of expertise, in providing a legal opinion as to matters of commercial law is, to state the obvious, no different than the standard of care that is required in the representation of a client, lender or borrower, in negotiating a commercial loan transaction. A lawyer, who represents either a lender or a borrower in a commercial loan transaction, at least as to matters involving the Uniform Commercial

Code, is to be held to the standard of a specialist in commercial law, and that standard is national and not local.

Therefore, notwithstanding the fact that a portion of commercial lending may still be local in scope, the relevant law of the transaction is not local. The commercial lawyer's standard of care is that of an expert in a sophisticated area of the law.

Risks of Determining Lien Priority

The next two factors discussed by our authors are the risks associated with title examination and the methods of title assurance. After considering the risks of ascertaining title, they conclude that the critical difference between abstracts or attorney opinion letters and title insurance is that with title insurance the insured will recover regardless of fault. There are many title risks that cannot be discovered even with the highest standard of care and diligence. As such there is no protection for the buyer or the lender if they suffer loss as a result of one of these impossible to discover defects. Title insurance is the only way to eliminate the risk.

Similar observations can be made about the UCC notice filing system. As with land title records, there are many defects that cannot be discovered by due diligence, such as mis-indexed financial statements, lack of capacity, fraud and intervening filings in the GAP.[16] The only way to cover these non-discoverable filings is, as in the case of land title, through insurance. The lawyer's standard of care does not insure over mis-indexed filings and similar matters. Nor, for that matter, does the typical UCC search company insure the results of their searches or filings.[17] Further, there are many other matters that are not covered, and should not be covered because they are factual matters, by the opinion of borrower's counsel, such as the competence of the borrower. Finally, and it may be useful to repeat, UCC insurance provides all that is usually provided by the opinion of borrower's counsel, and goes beyond the typical opinion of borrower's counsel to cover the priority rather than just the perfection of the security interest. Except for a remedies opinion, which the TriBar considers inappropriate for lender's counsel to request of borrower's counsel because lender's counsel after all wrote the loan agreement and ought to know if it's enforceable, UCC insurance provides coverage for those matters typically included in the opinion of borrower's counsel.[18]

The Lawyer's Duty

The final point raised by our authors is the issue of the lawyer's duty. Their initial observation is that: "Nationalization and integration of real estate markets have forged the development of more uniform standards for judging competence in the same way that securities laws and the Uniform Commercial Code have raised the standards in those fields" (emphasis added).[19] Given this observation, our authors conclude that title insurance is the only appropriate product to fully protect a homeowner or lender from risk of loss and they suggest that a lawyer refuse to represent a buyer or lender that declines coverage. In the alternative, they suggest that a lawyer have his or her client sign a disclosure statement in the event they decline coverage.

As this article hopefully has demonstrated, we end up at the same place with respect to lawyer malpractice for not advising his or her client of the existence and functionality of UCC insurance in commercial lending as in the case for lender's title insurance in the context of residential real estate. UCC insurance, now offered by all the major land title companies, is the only cost effective way to manage the risks associated with determining the priority of a lender's security interest in personal property. Given the generally low premium cost for UCC insurance, and the catastrophic result if a lender is not perfected or lacks first priority in its reliance personal property collateral, there is no truly cost effective alternative to UCC insurance. What can be said about the residential real estate market can be said about the commercial lending market — it is malpractice for a lawyer not to at least advise his or her client of the availability and functionality of UCC insurance. If, for whatever reason, a client is not perfected and in first position, and is primed by another creditor or by the trustee in bankruptcy, the lawyer that did not advise his or her client of the availability of UCC insurance that would have solved the problem may have little defense to the resulting malpractice action. "I knew UCC insurance was available but forgot to discuss it with you" is not a great defense.

UCC insurance is a tool available to the commercial lawyer to solve specific problems and offset known risks. UCC insurance can manage the inherent risks in commercial lending practice, augment the legal opinion practice and resolve factual issues that cannot be answered through the legal opinion. Market acceptance proves the point. The commercial finance lawyer who does not understand the functionality of UCC insurance or neglects to discuss UCC insurance with his or her client faces a malpractice hurtle similar to that faced by the real estate attorney who does not discuss real property title insurance with his or her residential home buyer. The lawyer should tend to that which a lawyer does best and leave to insurance that which insurance does best. **abfj**

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REFERENCES

1. The First American Corporation introduced the UCC Lender's Policy at the Commercial Finance Association meeting in New Orleans in October 2000.

2. St. John's Law Review, Vol. 74, 2000, p. 407 (hereinafter "Real Property Malpractice"). Robin Paul Malloy is Professor of Law and Economics and Director of the Program in Law and Market Economy, College of Law and Maxwell School, Syracuse University. Mark Klapow was, at the time of the article, a graduate of Syracuse Law and clerk to the Honorable Christine O. C. Miller of the United States Court of Federal Claims in Washington D.C.

3. A classic example of the difficulty of analogy between real and personal property law is the matter of burdening a second position creditor by increasing the debtor's obligations on the first.

4. Real Property Malpractice, p. 407.

5. The distinction drawn here is the difference between the real estate lawyer who provides a title opinion to the residential real estate buyer in lieu of a title insurance policy and the real estate lawyer who reviews the status of land title as part of the underwriting process for a land title insurance policy. In the first case the buyer has a malpractice action against the lawyer for title error that should have been discovered. In the second case, the buyer has a policy of indemnity and there is no standard of care defense for covered matters.

6. Real Property Malpractice, p. 415.

7. Id., p. 409.

8. UCC as well as land title insurance is indemnity insurance. In the event of a claim, the insurance company is obligated to defend any covered matter in the action brought to contest title or lien priority.

9. Real Property Malpractice, p. 419.

10. Id., 427.

11. Our authors acknowledge the overriding importance of the national uniform statute to the establishment of a national standard of care. Id., p. 442.

12. Hereinafter, the "TriBar Report." References to the TriBar Report are to the published report in the August 2003 issue of The Business Lawyer, Volume 58, Number 4.

13. Id., p. 1517.

14. Id.

15. This discussion on the general parameters of legal malpractice is taken from the Model Civil Jury Instructions of the New Jersey Judiciary, www.judiciary,state.nj.us.

16. My favorite example grows out of the problem of bogus filings. Militiamen and similar organizations like to file financing statements against judges and peace officers to mess up their credit. You can usually spot a bogus filing because it will say something like "This financing statement is filed under the authority of the Gospel of St. John" in the collateral description box.

There is now a significant additional risk to searchers as a result of the Sixth Circuit decision, on June 21, 2005, in In re: Spearing Tool and Manufacturing Co., Inc. In this case, the bankruptcy court had held that the IRS did not have to follow the equivalent of the UCC debtor-name rules when filing a tax lien and that a bank that did not find an IRS lien filed under a name that would not be found in a UCC search was junior to the IRS. The District Court reversed and held for the bank. The Sixth Circuit reversed the district court and affirmed the bankruptcy court's grant of summary judgment for the government.

The import of this case is that (i) the UCC rules were wholly irrelevant to the IRS's filing of a notice of lien, (ii) it would be "burdensome" for the IRS to play by the UCC rules (if they had been folded into federal law), (iii) the searcher has to search all reasonable alternatives to the debtor's name (including those based on facts that only a particular searcher might know, thus yielding legal different results for different searchers), and (iv) in any event, public policy dictated that the IRS should not have too hard a time of it because of the importance of collecting taxes. The Court reads into Revised Article 9 a standard of the "reasonably prudent searcher," a standard that may have existed under Former Article 9, but a standard that the revision process hoped to get rid of under Revised Article 9. Revised Article 9 uses exact match to determine effective financing statements just for that purpose.

Because the standard search logic of most states will not find a filing that does not have the debtor's correct name (except for "noise words"), this means that searchers have only two effective alternatives: 1) the searcher will have to come up with variations to search and make multiple searches if they want to find IRS liens, and be lucky to diagnose the applicable abbreviations, or 2) use UCC insurance products to shift the clear risk of the Spearing case to the insurance company.

The opinion is recommended for publication and may be found at:

http://www.ca6.uscourts.gov/opinions.pdf/05a0271p-06.pdf

17. Puget Sound Financial, L.L.C., a Washington limited liability company, f/k/a Factors of Puget Sound, L.L.C., Respondent v. Unisearch, Inc., a Washington corporation, Petitioner, 146 Wn. 2d 428 (2002). In this case, respondent financial factors filed a lawsuit against petitioner lien search company, alleging negligence and breach of contract.

18. In clarification of the assertion that UCC insurance provides the substance of the typically required opinion of borrower's counsel in a commercial finance transaction, we provide an endorsement to our EAGLE 9 Lender's Policy that insures against actual loss or damage sustained or incurred by the Insured by reason of lack of Attachment, Perfection, Priority or enforcement, in accordance with the provisions of the Uniform Commercial Code, of the Insured Security Interest in any portion of the Collateral as a result of any of the following:

- the failure of the Debtor to be a [corporation/limited liability company/limited partnership] validly existing and in good standing under the laws under the state of [California];

- the failure of the Debtor to be qualified to do business as a foreign [corporation/limited liability company/limited partnership] in each of the following jurisdictions:

- the failure of the Debtor to have the [corporation/limited liability company/limited partnership] power and [corporation/limited liability company/limited partnership] authority to enter into the [lien granting document/loan agreement];

- **the failure of the Debtor to have duly authorized and approved by all requisite [corporation/limited liability company/limited partnership] action on its part the execution and delivery of the [lien granting document/loan agreement] and the grant of the Insured Security Interest contemplated thereby;**
- **the failure of the Debtor to obtain any consent to the execution or performance of the [lien granting document/loan agreement] required under the laws of the United States or under the laws of the state of [California];**
- **the failure of the [lien granting document/loan agreement] to have been duly executed or delivered by a duly authorized officer of the Debtor or not constituting the legal, valid and binding grant of the Insured Security Interest by the Debtor.**

19. Real Property Malpractice, p. 442.