Introduction

This book endeavors to provide an understanding of the basic concepts of real estate finance provisions that a lawyer must know and understand to provide effective counsel to borrowers in the context of a commercial real estate loan. This goal will be accomplished through the detailed analysis of key provisions contained in real estate mortgages and several other related mortgage loan documents. Lawyers new to the practice of real estate finance can benefit from a highly practical evaluation of these key provisions; in most instances, they represent important aspects of a mortgage transaction.

This book uses many provisions that were utilized previously in the Federal National Mortgage Association ("Fannie Mae") Deed of Trust form for multifamily housing. However, this book embellishes on those provisions and adds others that are commonly used in commercial real estate loan transactions to expose new lawyers to loan provisions that are commonly used in commercial real estate loan documentation. In selecting these provisions, I have made a few assumptions for several reasons. First, the loan provisions used in this book contemplate that the mortgaged property is an income-producing property, as distinguished from a loan secured by a residence that the borrower would live in and that would not generate any income. A number of these provisions thus relate to the "commercial" nature of the property, such as the treatment of property rents. Second, unlike provisions contained in forms that some counsel for lenders have created and use for their first draft in a loan negotiation, the loan provisions in this book are relatively even-handed and sometimes contain points that the borrower's counsel would want to seek on behalf of his/her client. Finally, in addition to including provisions typically found in mortgages, this book also includes provisions found in other mortgage loan documents, providing a relatively comprehensive set of provisions that are widely used in commercial real estate transactions. When applicable, I have attempted to point out deficiencies contained in any of these provisions when a borrower is represented in a mortgage loan transaction and to give useful strategies when these provisions are negotiated.

As indicated above, this book is organized around the provisions of a mortgage, but it also includes relevant key provisions in other loan documents such as the Note, Loan Agreement, and Assignment of Leases and Rents. Each section of this book sets forth an introduction to and then the verbatim text of a
specific provision of a given key Loan Document (which is set out in italic type), immediately followed by commentary on the italicized provision. My commentary explains what the applicable loan provision means, what functions the provision serves, and any problems with the application or enforcement of the provision from a lender’s or borrower’s perspective. The commentary includes basic information that any lawyer new to mortgage transactions would find helpful, including potential pitfalls to watch for from the perspective of a borrower’s counsel, as well as suggested approaches for dealing with such pitfalls. This commentary also provides a thorough analysis that even a lawyer who is well-seasoned in commercial mortgage loan practice would find useful. At the end of the book, in the Appendix, I have included a full Mortgage and Security Agreement. It includes all of the mortgage provisions in each applicable section of the book that the reader can use to better follow how these provisions fit into an actual mortgage document.

This book can be read cover to cover, especially by someone new to the practice of mortgage transactions. The goal of this book is to provide useful insight to lawyers handling their first mortgage transactions as well as to more seasoned mortgage lawyers looking for a useful reference source.