RECHARACTERIZATION ISSUES IN SALE-LEASEBACK TRANSACTIONS

BY JOHN C. MURRAY

Sale-leaseback transactions are subject, under certain circumstances, to recharacterization as either equitable mortgages or joint ventures (although to date no final, reported court decision has recharacterized a sale-leaseback transaction as a joint venture). In a sale-leaseback transaction, the seller-lessee may attempt to have the sale and leaseback recharacterized as an equitable mortgage to, among other things, provide it with an opportunity to "redeem" the property at a foreclosure sale. The courts (including bankruptcy courts) have applied a fact-based analysis to determine whether the substance of the transaction is in accord with its form and the expressed intent of the parties. Although the issue of whether a transaction is characterized as a sale or a mortgage depends to a great extent on the expressed intention of the parties, the economic substance of the transaction—and not its label—ultimately will determine whether it is a true sale-leaseback or a financing transaction. This article will examine the various factors considered, and tests used, by state and federal courts when determining whether to recharacterize a sale-leaseback transaction.

Factors Considered by Courts

Unfortunately, the courts are not consistent on the relevance and weight of the factors that determine whether a document designated as a lease will be recharacterized as a mortgage. The factors that the courts consider include

- the intent of the parties at the time of the execution of the documents, as determined by examining the language in the

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documents and (if there is an ambiguity) by the aid of parol evidence;

- whether there is continued evidence of a debt or liability;
- the relationship of the parties;
- prior unsuccessful attempts to obtain a loan;
- the circumstances surrounding the transaction;
- the sophistication and circumstances of the parties;
- the lack of legal counsel;
- whether the structure of the sale is unusual;
- the adequacy of consideration and whether the purchase price was related to the fair market value of the property;
- how the consideration was paid;
- whether there is written evidence of the debt;
- the belief that the debt remains unpaid;
- whether there is an option or agreement to repurchase;
- the continued exercise of ownership privileges, responsibilities, and/or possession by the seller-lessee, including the obligation to pay property taxes and insurance;
- whether there is a trading of tax benefits for a fixed return; and
- whether the rental payments were calculated to compensate the lessor for the use of the land or in actuality are structured as a return on an investment.

See, e.g., *Robinson v. Builders Supply & Lumber Co.*, 586 N.E.2d 316, 320–21 (Ill. App. Ct. 1992) (setting forth factors, including many of those listed above, considered in determining whether a conveyance should be recharacterized as a mortgage); *In re PCH Associates*, 804 F.2d 193, 200–01 (2d Cir. 1986) (setting forth several of the factors listed above).

Recharacterization is always an uphill battle—the party seeking to recharacterize the transaction is trying to argue that something is not what the parties said it is. Courts are not particularly fond of these cases; they are equitable proceedings and courts generally will hold the party seeking to recharacterize the document or transaction to a high standard of proof. The question of valuation of the property often is crucial. For example, in *U.S. Bank Trust N.A. v. Nielsen Enterprises Md., LLC*, 232 F. Supp. 2d 500 (D. Md. 2002), the plaintiff, a nonsignatory who was attempting to alter the terms of an agreement to which it was not a direct party, sought to have a ground lease transaction (not involving an option) recharacterized as an equitable mortgage. The court refused to recharacterize the transaction, for the following reasons:

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> The Landlord has not received a windfall. As discussed previously, the discrepancy between the value of the land conveyed to the Landlord and the Landlord's consideration is too small to be considered unfair or unjust. Also, this was a transaction among sophisticated parties, which reduces the likelihood of surprise or mistake. Like many real estate deals, the transaction at issue has characteristics of both a land sale and a loan. There is ample evidence, however, that the transaction was a true sale to the Landlord and not just a security device. For example, the Landlord granted Nielsen a 98-year term precisely because a 99-year term, under Maryland law, would make the lease redeemable. See Md. Code Ann., Real Prop. § 8–110 (Michie 1996). Moreover, the absence of a right to prepay is evident from a review of the papers. Metropolitan [Bank & Trust Co., the leasehold lender] had full access to the transaction documents prior to the closing and raised no objection. Finally, the Landlord did not cause Metropolitan's financial predicament. Rather, Metropolitan's failure to perform proper due diligence and its haphazard acceptance of income predictions are to blame.

Id. at 529.

The court also stated, in a footnote, that an equitable recharacterization of the mortgage would pose practical difficulties, such as the issue of prepayment penalties.

> For example, many commercial mortgages have prepayment penalties. To recharacterize the lease and allow the Bank to redeem it without paying a penalty would be to impose upon the Landlord a loan with commercially unreasonable terms. The Bank has not explained how this problem and others like it could be resolved.

Id. at 529 n.7.

The court distinguished the case from a transaction that was originally proposed as a loan but structured as a sale-leaseback. "In the instant case, the parties intended a lease from the beginning. Furthermore, there is nothing illegal about the transaction. . . . In short, there is no

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reason for equity to intervene and recharacterize the lease as a mortgage." Id. at 530.

But other courts (especially in connection with bankruptcy proceedings involving the seller-lessee) have found that a purported sale-leaseback should be recharacterized as a mortgage. For example, *In re PCH Associates,* 949 F.2d 585, 603–04 (2d Cir. 1991), the court focused on the substance as opposed to the form of the transaction, which had been characterized by the parties as a sale-leaseback but that actually had all the economic features of a mortgage-financing transaction with the purchaser-lessor bearing few if any of the risks of ownership. The court held that the transaction was not a lease under Bankruptcy Code § 365 and the deed given to the purchaser-lessor was not an absolute deed but was instead an equitable mortgage. See also *In re Big Buck Brewery & Steakhouse, Inc.,* No. 04-56761-SWR, 04-CV-74771, 2005 WL 1320165 (Bankr. E.D. Mich. May 25, 2005) (ruling that property sale and ground-leaseback transaction was disguised financing agreement and not a bona fide lease under Bankruptcy Code § 365 because seller-lessee retained all the risks and rewards associated with ownership of the property and that the parties' intent would be discerned from totality of the circumstances).

Federal Tax Recharacterization

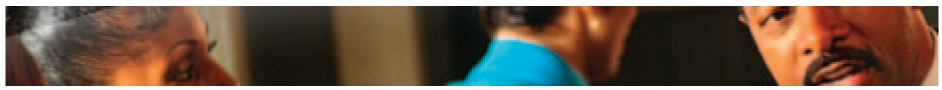
The IRS, when characterizing a transaction for tax purposes, considers the substance of the transaction, rather than its legal form, as controlling. See, e.g., *Helvering v. F&R Lazarus & Co.*, 308 U.S. 252 (1939). Whether a transaction is a sale or a lease for income tax purposes is a question of fact and depends on the intent of the parties as gathered from all the facts and circumstances and whether the benefits and burdens of ownership have passed to the purported purchaser. See *Larsen v. Commissioner,* 89 T.C. 1229, 1267 (1987). See also FSA 199920003, 1999 WL 319513 (May 21,1999) ("Where there is a genuine multi-party transaction with economic substance that is compelled or encouraged by business realities, contains tax-independent considerations, and is not shaped solely by tax avoidance features, the government should honor the allocation of rights and duties effectuated by the parties.").

Bankruptcy Recharacterization

The lessor in a sale-leaseback transaction should be aware that if a bankruptcy petition is filed by or against the seller-lessee after the inception of the lease, the bankruptcy court may under certain circumstances recharacterize the lease as a financing transaction and limit the rights and remedies of the lessor to the value of its collateral as a secured creditor (assuming that the lessor is deemed to have a valid, perfected security interest). Certain provisions of the Bankruptcy Code deal specifically with leasehold interests. Bankruptcy Code § 502(b)(6), which limits the lessor's claim for damages against the debtor-lessee, does not define "lease of real property" as used in that section, but the legislative history makes clear that it applies only to a true or bona fide lease. S. Rep. No. 95–989, at 64 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5850. Bankruptcy Code § 365(a) provides that "the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." Bankruptcy Code § 365(d)(3) and (d)(4), which delineate the rights of the bankruptcy trustee to assume or reject "any unexpired lease of nonresidential real property," apply only to true or bona fide leases. *In re PCH Associates*, 804 F.2d at 198.

The focus is on whether the parties intended to impose obligations and confer rights significantly different from those normally found in ordinary lease transactions. See, e.g., *Barneys, Inc. v. Isetan Co.* (*In re Barney's, Inc.*), 206 B.R. 328 (Bankr. S.D.N.Y. 1997). In this case the court held that whether an agreement constitutes a "true lease" for bankruptcy purposes must be determined by reference to federal law and stated that "[t]he appropriate inquiry is whether the parties intended to impose obligations and confer rights significantly different from those arising from the ordinary landlord/tenant relationship." Id. at 332. The court also noted that when the purported "lease" involves rental payments that are actually payments of principal and interest on a real estate loan, there is no "true" or "bona fide" lease, and Bankruptcy Code § 365(d)(3) and (d)(4), as well as Bankruptcy Code § 502(b)(6), do not apply. Id. at 333.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109–8, 119 Stat. 23 (2005), which was enacted into law on April 20, 2005 (and applies to all bankruptcy cases filed on or after October 17, 2005, with limited exceptions for certain provisions) has enacted changes in the law. To assume the lease and the right to continue as lessee, Bankruptcy Code § 365(b)(1), as amended, provides that the debtor-lessee must cure all



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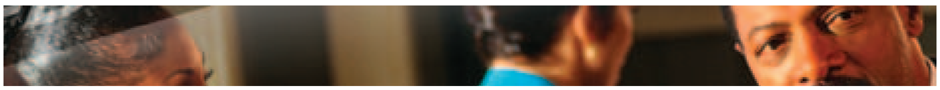
existing defaults (other than nonmonetary defaults) under the lease, including delinquent rent, and provide adequate assurance that it will perform its future lease obligations. Bankruptcy Code § 365(d)(3) requires timely performance by the trustee or debtor in possession under the lease until the lease is assumed or rejected. Before the 2005 changes in the Bankruptcy Code, section 365(d)(4) gave a debtor or trustee 60 days to reject or assume an unexpired lease. If the lease was not assumed within that time, it was "deemed rejected" and the property was surrendered to the lessor, thereby terminating all of the lessee's obligations for performance. This time frame was revised under the 2005 amendments to provide that the lease is deemed rejected (requiring surrender) if the lease is not assumed within 120 days after the filing of the bankruptcy petition or by the date of an entry of an order confirming a plan, whichever date occurs first**.**

Under Bankruptcy Code § 365(g)(1), rejection of a lease in bankruptcy constitutes a breach of the lease. Generally, the rejection gives rise only to a general unsecured claim for damages, which is subject to certain caps under Bankrutpcy Code § 502(b)(6), as discussed further below. 11 U.S.C. § 502(b), (g). Some damages may be recoverable as an administrative priority claim, however, if the trustee or debtor in possession initially assumed the lease but later rejected it. Before the 2005 amendments, a majority of courts had held that the lessor may collect the entire amount due for the assumed-then-rejected lease (including future rent) under Bankruptcy Code § 503(b)(1), which gives administrative priority to "the actual, necessary costs and expenses of preserving the estate . . . ." See, e.g., *Nostas Assocs. v. Costich (In re Klein Sleep Prods.)*, 78 F.3d 18, 26 (2d Cir. 1996) (reasoning that the initial assumption of the lease benefited the estate even though the "benefit turned to dust" when the lease was subsequently rejected). But see *In re Johnston, Inc.*, 164 B.R. 551, 555 (Bankr. E.D. Tex. 1994) (denying administrative priority to a claim for future rent under an assumed lease on the grounds that the estate derived no benefit from the lease once the debtor unconditionally vacated the space). In the 2005 amendments, Congress added a new Bankruptcy Code § 503(b)(7), which makes it clearer that the lessor is entitled to a priority claim for an assumed-then-rejected lease. The new provision limits the collection of future rent, however, to a period of two years following the rejection date or the date of surrender of the premises, whichever is later. Thereafter, the lessor's claim is unsecured (and subject to the Bankruptcy Code § 502(b)(6) caps discussed below).

Bankruptcy Code § 502(b)(6) limits the claim of a lessor for "rejection damages" arising from the termination of a lease of real property to an amount that does not exceed (1) the rent reserved in the lease, without acceleration, for the greater of one year or 15%, not to exceed three years, of the remaining term of the lease following the date the bankruptcy petition was filed or the date the leased property was repossessed or surrendered, plus (2) any unpaid rent due under the lease, without acceleration, on the earlier of such dates. This amount of the lessor's damages, as limited by new Bankruptcy Code § 503(b)(7), is ascertained by reference to the lease agreement and applicable state law. The case law is not consistent on whether the 15% limit on the landlord's damages under Bankruptcy Code § 502(b)(6) is a function of the remaining term of the lease or the amount of rent due. For example, compare *In re Gantos, Inc.,* 176 B.R. 793, 795 (Bankr. W.D. Mich. 1995) (holding that 15% cap refers to remaining rent due under lease), with *Sunbeam Oster Co. v. Lincoln Liberty Avenue, Inc.* (*In re Allegheny Int'l, Inc.*), 145 B.R. 823, 828 (W.D. Pa. 1992) (holding that 15% cap applies to remaining term of lease).

The bankruptcy process treats undersecured creditors differently from secured creditors. Under Bankruptcy Code § 506(a) and (b), an undersecured creditor (a creditor whose debt exceeds the value of the collateral) has two claims against the debtor's estate: (1) a secured claim in an amount equal to the value of the collateral and (2) an unsecured recourse claim for the remainder of the debt. Undersecured creditors have both of these claims under the Bankruptcy Code even if the loan is nonrecourse. If the lease is subsequently recharacterized as a secured financing transaction rather than a true lease, then the lessor-lienholder's claim will be secured as mortgage debt rather than as rent, and the claim can be restructured by the debtor-lessee, with the secured claim of the lessor-lienholder limited to the fair market value of the property. For example, in *In re Wilcox,* 201 B.R. 334, 336–37 (Bankr. N.D.N.Y. 1996), the bankruptcy court held that, because the "Land Contract" agreement between the debtor, as lessee-purchaser, and the lessor-mortgagor, which provided that the debtor was to lease the property for two years and then commence payments on the principal and interest accruing on the purchase price to be paid over the 18-year balance of the contract, was more like a mortgage than a lease, the debtor could "cram down" the claim of the lessor-mortgagor arising from the land contract. See also *United Air Lines, Inc. v. HSC Bank USA (In re UAL Corp.),* 307 B.R. 618, 632–34 (Bankr. N.D. Ill. 2004) ("landlord" under each lease was deemed to have only a secured claim based on a leasehold mortgage).

If all of the legal requirements of a reorganization plan are met, with the



Title insurance insures against defects in title or in the mortgage itself; it does not insure against problems arising from or relating to the underlying debt or the relationship between the insured and other parties to the transaction.

exception of a successful confirmation by creditors, the plan may still be confirmed over the objection of a dissenting class. Under Bankruptcy Code § 1129(b)(1), if the plan does not discriminate unfairly and is fair and equitable to the dissenting class, it can be "crammed down" on the impaired class that votes against the plan. In a cramdown, the debtor, in accordance with Bankruptcy Code §§ 506(a) and 1123(a)(5)(F) and (H) may (1) reduce the principal amount of the secured claim to the value of the collateral, (2) reduce the interest rate, (3) extend the maturity date, or (4) alter the repayment schedule. The debtor also may make a minimal payment on the unsecured claim. The general rule of cramdown is that when a plan provides a dissenting secured class with consideration equal to the amount of its claim or when no class below that of the dissenting unsecured class is to participate under the plan, the plan may be confirmed notwithstanding the dissent. See 11 U.S.C. § 1129(b). If, on the other hand, the debtor's plan does not modify the loan terms in any way, Bankruptcy Code § 1124 provides that the creditor will not be an impaired class and, therefore, will not have the right to vote for or against a plan.

In *In re Waldoff's, Inc.*, 132 B.R. 325 (Bankr. S.D. Miss. 1991), the bankruptcy court held that the agreement between the debtor and an equipment financing company, although structured as a lease, was in fact a secured financing agreement. On the filing of a Chapter 11 bankruptcy petition by the lessee, the assignee of the lessor's interest (which argued that the transaction should be characterized as a true lease) was therefore secured only to the extent of the value of the collateral, based on its filing of UCC financing statements, and was an unsecured creditor for the balance of its claim. Id. at 329. The court stated that "whether a transaction qualifies as a security agreement must be determined from the intent of the parties" and found that the evidence presented to the court supported a finding that the agreement was a secured financing agreement. Id. at 328. When deciding how to classify the agreement, the court took into account the lessee's obligation for all repairs and replacements of the equipment and parts, payment of all taxes, insurance, license, registration fees, and other charges, and the fact that the debtor-lessee's accountant treated the transaction as a financing transaction for tax purposes. The court stated that:

> Whether or not an agreement is considered a lease or a security agreement will determine the type of treatment that may be given to the holder of the claim under the Bankruptcy Code. A lease [that was not terminated pre-petition] must be either assumed or rejected as specifically provided under 11 U.S.C. § 365. A creditor's secured claim may be subject to a modified treatment under a plan of reorganization.

Id.

Focusing on the substance of the transaction, not the form, bankruptcy courts will disregard the characterization or label that the parties have used to describe the agreement and the nature of their relationship and often will employ an "economic realities test" to determine whether the transaction should be characterized as a true lease or as a financing transaction. This test requires the court to determine whether "the parties intended to impose obligations and confer rights significantly different from those arising from the ordinary landlord/tenant relationship." *In re PCH Associates*, 804 F.2d at 199–201. In *Steele v. Gebetsberger (In re Fashion Optical, Ltd.)*, 653 F.2d 1385 (10th Cir. 1981), the court stated that, under the "economic realities" test, "where the terms of the lease and option to purchase are such that the only sensible course for the lessee at the end of the lease term is to exercise the option and become the owner of the goods, the lease was intended to create a security interest." Id. at 1389 (internal citation and quotations omitted).

The following factors are commonly considered to be relevant in determining whether the agreement constitutes a true lease under the economic realities test:

- whether the amount of rental payments was calculated to compensate the lessor for the use of the land, as opposed to being structured for some other purpose, such as ensuring a particular return on an investment;
- whether the purchase price is related to the fair market value of the property, or is calculated as the amount necessary to finance the transaction;
- whether the property was purchased by the lessor specifically for the lessee's use;
- whether the transaction was structured as a lease to secure certain tax advantages;
- whether the lessee assumed the obligations normally associated with outright ownership of the

- property, including the payment of taxes and insurance; and
- whether the agreement permits or requires the lessee to purchase the property at the expiration of the lease term for a nominal consideration. See, e.g., *Barneys, Inc.*, 206 B.R. at 332–33.

Title Insurance for Recharacterization Issues

Will (and should) the title insurance company that is asked to insure a sale-leaseback transaction create a special exception in the title insurance policy as the result of any subsequent recharacterization of the interest of the insured party in the land described in Schedule A? Or is it unnecessary to raise any exception in the first place because the risk of recharacterization is excluded from coverage under the policy exclusions in any event because it is a matter "created, suffered, assumed or agreed to" by the insured, or "[d]efects, liens, encumbrances, adverse claims or other matters . . . attaching to or created subsequent to Date of Policy" (based on the conduct of the parties after the transaction has closed), as set forth in Exclusions 3(a) and 3(d), respectively, of the ALTA Loan Policy (Oct. 17, 1992)?

Title insurance insures against defects in title or in the mortgage itself; it does not insure against problems arising from or relating to the underlying debt or the relationship between the insured and other parties to the transaction. In *Lawyers Title Ins. Corp. v. JDC (America) Corp.*, 52 F.3d 1575 (11th Cir. 1995), the Court of Appeals for the Eleventh Circuit held that the title insurer had no duty to defend a claim that the insured's mortgage was unenforceable because of the insured mortgagee's status as a partner in a joint venture for which the mortgaged property was held in trust, because the exclusion in the mortgagee's title insurance policy for matters "created, suffered, assumed or agreed to" by the insured applied to the claims of the lender and involved actions of the insured in entering into various relationships with the borrower. The court further held that the provision of the policy providing coverage against the "invalidity and unenforceability of the insured mortgage" did not apply because "the provision insures against defects in the mortgage itself, but not against problems arising from or related to the underlying debt." The court noted that "[t]he defenses asserted by [the insured] on behalf of the joint venture . . . all explicitly related to the effect of the parties' relationship on the collectability of the debt underlying the mortgage rather than the validity of the mortgage itself." Id. at 1583. Similarly, in *Ticor Title Ins. Co. of California v. FFCA/IIP 1988 Property Co.*, 898 F. Supp. 633, 640–41 (N.D. Ind. 1995), the federal district court held that, in a sale-leaseback transaction, the seller-lessee's claim that the purchaser-lessor's ownership interest in the property was in fact a mortgage security interest necessarily required proof of the insured party's intent and was therefore not a matter covered by title insurance because of the policy exclusion for matters "created, suffered, assumed or agreed to by the insured claimant."

If the title insurer is aware of the nature of and the facts surrounding a sale-leaseback transaction, is this enough to cause it to be deemed to have provided coverage to the insured under a title policy against the risk of recharacterization unless the title insurer has raised a specific recharacterization exception? It has been suggested that, in connection with recharacterization issues involving sale-leaseback transactions, an investigation by the insurer of the facts surrounding a sale-leaseback transaction may create a sufficient level of knowledge through which the insurer would be deemed to have assumed the obligation to insure or defend against loss from a recharacterization, whether the inquiry was undertaken voluntarily by the insurer or in response to a request by the insured that the policy expressly insure against loss from a sale-leaseback recharacterization. See Thomas C. Homburger & Brian P. Gallagher, *To Pay or Not to Pay: Claiming Damages for Recharacterization of Sale Leaseback Transactions Under Owner's Title Insurance Policies,* 30 Real Prop. Prob. & Tr. J. 443, 488–89 (1995). The title insurer may, therefore, be well advised to disclaim specifically any obligation to indemnify the insured against loss from a sale-leaseback transaction recharacterization. Id. at 489.

Title insurers are justifiably reluctant to issue policies in sale-leaseback transactions without a specific recharacterization exception.

Title insurers are justifiably reluctant to issue policies in sale-leaseback transactions without a specific recharacterization exception. The insured parties in such transactions commonly agree to an exception in the owner's title policy containing language similar to the following:

> Any defect in, or lien or encumbrance on, the title resulting from an allegation or determination that the interest of the insured as evidenced by any or all of the following documents, either jointly or severally, should be or has been recharacterized in any manner.

Or,

RECHARACTERIZATION ENDORSEMENT
ATTACHED TO POLICY NO. ______
ISSUED BY

First American Title Insurance Company

Notwithstanding exception _______ of Schedule B, the Company hereby assures the insured that, in the event of a final determination by a court of competent jurisdiction that the deed dated __________________and recorded as Instrument No. _______________ and the lease shown as exception____ of Schedule B, create a mortgage as of Date of Policy from the lessee in favor of the lessor under the lease with a priority date as of Date of Policy, the insured shall have (in place of and instead of the rights and obligations under this policy) all of the rights and obligations of an insured under an ALTA Loan Policy (Rev. 10-17-92), insuring said mortgage as a lien against the land as of Date of Policy with an amount of insurance of $_______, subject to no exceptions other than those set forth in Schedule B and any statutory lien or right to a lien for services, labor or material heretofore or hereafter furnished for an improvement or work related to the land.

This endorsement is made a part of said policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

First American Title Insurance Company

BY: ____
AUTHORIZED SIGNATORY

FA Special Recharacterization Endorsement (2-2-98)
ALTA Owner's Policy (10-17-92)

> Any assertion or determination that the vesting of title in [the insured] is, or is part of, a loan transaction, including without limitation any assertion or determination that all or any of the following documents, either jointly or severally, constitute a mortgage or other security device(s) or instrument(s).

The purchaser-lessor in a sale-leaseback transaction may request a "recharacterization" endorsement to the owner's policy, which may or may not be available depending on the particular facts of each transaction and applicable legal and regulatory restrictions. The title insurer may, under certain circumstances, be persuaded to issue such an endorsement. The recharacterization tests applied by federal and state courts (including bankruptcy courts), as set forth above, can serve as a useful guideline for title insurers when analyzing the risks of the transaction and evaluating whether and under what circumstances, if any, to issue a recharacterization endorsement and evaluate claim exposure. If the title insurer agrees to issue such an endorsement, it would need to closely investigate and analyze the facts of the transaction and also the underlying documentation. The level of inquiry would depend on factors such as the identity of the parties and the authorization of designated individuals to act on behalf of those parties, the size and scope of the transaction and amount of the policy (or policies) to be issued, and any unusual risks inherent in the transaction. The parties would need to supply the title company with written statements, certifications, and/or affidavits that fully disclose and explain all of the details and risks of the transaction. Written indemnifications in favor of the title insurer may also be required. As mentioned earlier, the recharacterization tests applied by the bankruptcy courts can serve as a useful guideline for title insurers when analyzing the risks of the transaction.

Conclusion

The expressed intention of the parties still is one of the most important (if not the single most important) factor in determining whether a court will recharacterize a sale-leaseback transaction. When the seller-lessee is a sophisticated and experienced real estate developer or investor and is represented by sophisticated legal counsel, and the documents negotiated and drafted by the parties (and their actions and conversations in connection with them) expressly refer to the transaction as a sale-leaseback and make no mention, express or implied, of any other characterization (and in fact specifically disclaim any construction of the transaction as a security agreement or equitable mortgage or any intention to create any relationship between the parties other than as expressly stated), the seller-lessee (or a bankruptcy trustee) likely will face an uphill battle in meeting its burden of proof that the transaction is something other than a sale-leaseback. The parties must document the transaction carefully to avoid recharacterization, and the lease terms (including the rental) should reflect a true market lease and not a disguised financing transaction. Appraisal testimony (including the credibility of the individual appraiser) also can be crucial in determining the value of the property in these types of transactions, which in turn is crucial to the issue of whether the consideration for the transaction is fair and sufficient to prevent recharacterization. ■