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Dating Tips For Real Estate Attorneys



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As the recent firestorm of foreclosures plays out in courtrooms throughout the country, judges have made it clear that they have little patience for sloppy or incomplete paperwork forming the basis for a lender's action. Be it on the front page of the New York Times¹ or the recently decided case causing ripples throughout the securitization industry, *U.S. Bank National Association v. Ibanez*,² it is clear that real estate and finance attorneys must pay closer attention than ever to even small details in their agreements, such as the date of a document, which, absent precision, may result in unintended consequences for a client.

Although contained in the first sentence of almost every legal agreement, the significance of the recitation of the date in such agreement's preamble is likely not the main focus of an attorney when drafting. Typically, the date of a document is not a negotiated term and rarely do the parties give any thought to the possible consequences thereof. Significant issues can arise, however, as a result of the date of a document. In this article we will review common drafting customs for dating real estate documentation, as well as possible pitfalls associated therewith.

Most legal documents are either dated on a specific date or dated "as of" a certain date. Typically, drafters use the former when the parties thereto sign an agreement on or before the same day it is to become effective and use the latter when parties reach agreement on the "as of" date and intend for such day to be the effective date but do not finalize the terms of, or execute the relevant documentation until a later date. In addition, the latter convention is often used when the drafter contemplates having the document executed in counterparts by various parties on potentially different dates.



Referring to an effective date that precedes the execution of a contract or other agreement (which can be called "antedating" or "backdating," among other terms) is common practice. New York courts recognize that certain contracts may be legitimately backdated.³ For example, if a mortgage loan is actually advanced on one date, but the loan documents are not completed and executed until several days or weeks later, it is indisputable that the loan was made on the earlier date and thus it is acceptable to state in the preamble of the applicable documentation that it was effective "as of" such earlier date.

The propriety of backdating depends on its purpose and its effect. When the parties intend to be bound from an earlier date or are intending to memorialize a prior act, backdating is acceptable.⁴ Backdating that fabricates the time at which an event occurred or is intended to deceive third parties can be held unenforceable and may even expose an attorney to sanctions and his client to civil, or even criminal, consequences.

With one significant caveat, New York cases have consistently held that where parties to an agreement expressly provide that a written contract be entered into "as of" an earlier date than that on which it was executed, the agreement is effective as of such earlier date and the parties thereto are bound accordingly.⁵ The exception to this general rule is when backdating compromises the rights of a third party. For example, if backdating a document is intended to protect a parcel of property from the claim or lien of creditors or otherwise to the detriment of third parties, it would be held unenforceable as against such third party.

In *Wells Fargo Bank v. Marchione*,⁶ plaintiff bank, as assignee of the original mortgagee, commenced a foreclosure action against the defendant-mortgagor for failure to pay monthly debt service. One of the issues before the court was the chronology of events. The plaintiff bank acquired title to the subject loan through an assignment dated Dec. 4, 2007, which by its terms was made effective "as of" Oct. 28, 2007. The foreclosure complaint was verified by plaintiff's counsel on Nov. 29, 2007 and filed with the county clerk a day later.

The court found that as the verified complaint pre-dated the actual assignment of the mortgage loan, the plaintiff did not have standing to commence the foreclosure proceeding. The court recognized that while parties to a contract may bind themselves retroactively, such backdating cannot be applied to adversely affect the rights of third parties, in this case the defendant-mortgagor. In *Ibanez* the court used reasoning similar to the *Marchione* decision to void two foreclosure sales, stating that "a confirmatory assignment...cannot confirm an assignment that was not validly made earlier or backdate an assignment being made for the first time."

Notwithstanding the legitimacy of antedating, there are circumstances in the real estate finance realm where the execution date, and not the effective date govern. For example, there are a number of New York cases⁷ which state that if a mortgage assignment is in writing, the execution date governs and a written assignment claiming an earlier effective date is deficient unless it is accompanied by proof that the physical delivery of the note and mortgage was, in fact, previously effectuated.

In *LaSalle Bank Natl. Assn. v. Ahearn*,⁸ the plaintiff commenced a foreclosure action in April 2007. The assignment of mortgage which would have given the plaintiff standing to bring the foreclosure action was executed two months after the commencement of the foreclosure action though it purported to be effective as of a date preceding the commencement date of the foreclosure. The

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court found that the attempt at retroactivity was ineffectual and thus the plaintiff did not have standing to bring the foreclosure action since the plaintiff did not have an interest in the mortgage at the time the foreclosure action was commenced.⁹

In the case of a sale of property, courts have held that a sale is generally considered to have occurred at the earlier of the transfer of legal title or the practical assumption of the benefits and burdens of ownership of the subject property. In *Baird v. Commissioner*,¹⁰ the parties entered into a preliminary agreement to purchase property on Aug. 29, 1970 and although the deed was dated that same date, it was not executed until almost two months later and was not recorded until almost a month after that. The court found that ownership was transferred when the preliminary agreement was reached notwithstanding the fact that the deed was not executed or filed until several months later.¹¹ The backdating served as evidence of the parties' intent to transfer the property on the earlier date.

While courts have held that parties to a contract may retroactively bind themselves, attorneys drafting such documents must be aware of the implications and consequences thereof. When entering into antedated loan documents, one needs to be aware that using an "as of" date can affect the accuracy of representations and warranties and the commencement date of covenants. Since representations and warranties are generally effective as of the date on which they are given, unless otherwise stated, if a contract has an "as of" date, the representations and warranties speak as of such day and not the date the contract is signed.

Likewise, the covenants would have started to obligate the parties prior to the actual execution of the relevant document. As such, prudent counsel will always make sure that its client's representations and warranties were true as of the effective date and that it has been fulfilling its covenants accordingly. If, for example, antedated loan documents contain a representation that an operating account with a specific bank had been opened on or prior to the effective date and included a covenant to maintain such an account without co-mingling funds from another property, good practice would demand that the attorney make sure that such account truly existed as of the effective date (rather than the actual date the agreement was executed) and has been properly maintained since.

Similarly, if antedated loan documents contain a representation that a party thereto was duly organized, validly existing and in good standing as of the effective date and had the full power and authority to consummate the transaction and to execute, deliver and perform the agreement, counsel must be sure that the entity was, in fact, formed and had the requisite corporate authority on or prior to the effective date (as opposed to as of the execution date). Failure to recognize such dating issues can lead to a client being in default on the very day it executes a loan document.

Ambiguity may be another potential hazard of antedating a contract. Often contracts that provide for an "as of" date as the effective date, indicate elsewhere in the document that it was executed by the various parties on a different date or may contain a notary acknowledgment with its own date. Absent clear language affirmatively stating its effective date, a document containing one date in its preamble or recitals and another on the signature page may cause an ambiguity as to the commencement of the obligations contained therein. In *Sweetman v. Strescon Industries Inc.*,¹² the subject contract stated that it was "made this 22nd day of April 1976." The contract was not executed, however, until three months later. The issue before the court was whether an indemnification clause in the contract applied to an accident that occurred between the effective date and the execution date. The court stated: "the presence of two different dates creates an ambiguity which opens the matter to evidentiary proof that the date appearing at the beginning of the agreement should not control the inception of rights and liability thereunder." Hence, disclosing the date of execution in an agreement intended by the parties to be operative on an earlier date may, in certain circumstances, jeopardize the parties' objectives.

Real estate and finance attorneys must pay closer attention than ever to even small details in their agreements, such as the date of a document, which, absent precision, may result in unintended consequences for a client.

Additionally, there are situations where, notwithstanding the intentions of the parties to have an agreement effective on a particular date, the date of recording or filing the agreement will govern the effectiveness of the agreement. New York's Real Property Law §290 provides protection against prior unrecorded conveyances and priorities to bona fide purchasers or encumbrancers for value who record their conveyances or encumbrances first and, in turn, to the public at large.

Since New York State's recording statute is a race-notice law, the recording date, and not the execution date or effective date of the instrument, determines priority. For example, if a mortgage is recorded several months after its effective date and/or its execution date (whether or not the mortgage is backdated is irrelevant to this analysis), the mortgagee has a valid lien as of the effective date of the mortgage, but the priority of the mortgage lien is only established as of the date of its recording.

In *Wells Fargo Bank, N.A. v. Perry*,¹³ the bank brought an action seeking a judgment declaring that it was the owner of an unrecorded mortgage encumbering a parcel

of property and requesting a judgment that directed the county clerk to record a copy of the mortgage as of the date on which the mortgage was executed. While the court concluded that the bank indeed owned the mortgage, it refused to direct the county clerk to record the assignment as of the date of its execution as doing so would accelerate the priority of the mortgage adversely affecting the rights of bona fide purchasers and encumbrancers for value who had, in the interim, recorded conveyances and encumbrances.

Although antedating, or backdating, is appropriate and enforceable in certain circumstances, attorneys must make a careful analysis before agreeing to an "as of" date or otherwise dating a document prior to its actual execution, especially in the current climate of increased judicial scrutiny.

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1. Judges Berate Bank Lawyers in Foreclosures (Jan. 10, 2011) New York Times.

2. *U.S. Bank National Association v. Ibanez*, 2011 WL 38071 (Mass.).

3. *SEC v. Solucorp Indus. Ltd.*, 197 F. Supp 2d 4, 11 (SDNY 2002).

4. *Coletto v. Coletto*, 9 A.D.3d 855 (N.Y.A.D. 4 Dept. July 9, 2004); *Matheus v. Jeremiah Burns Inc.*, 129 N.Y.S.2d 841 (Sup. Ct. 1954).

5. *Viacom Int'l Inc. v. Tandem Prods. Inc.*, 368 F. Supp. 1264, 1270 (S.D.N.Y. 1974).

6. 69 A.D.3d 204 (N.Y.A.D. 2 Dept. 2009).

7. *Bankers Trust Co. v. Hooovis*, 263 A.D.2d 937 (N.Y.A.D. 3 Dept. July 29, 1999); *Wells Fargo Bank v. Marchione*, 69 A.D.3d 204 (N.Y.A.D. 2 Dept. 2009); *LaSalle Bank Natl. Assn. v. Ahearn*, 59 A.D. 3d 911(N.Y.A.D. 3 Dept. Feb. 26, 2009).

8. 59 A.D. 3d 911(N.Y.A.D. 3 Dept. Feb. 26, 2009).

9. It should be noted that for purposes of the New York Uniform Commercial Code, attachment of the rights of a purchaser in a note and mortgage occurs upon delivery of the note to the purchaser (a mortgage follows the note it secures). In addition to taking possession, perfection of a purchaser's rights in a note may be achieved by filing a financing statement.

10. *Baird v. Comm'r*, 68 T.C. 115, 114-128 (1977).

11. There are circumstances where the treatment of an effective date may be different under different laws—for example, the court in *Baird v. Commissioner* points out that under the real property law, ownership of real estate is transferred when the deed is executed and delivered, but as a matter of tax law, when a sale is complete is one of fact and focuses on when the benefits and burdens of ownership shifted and not the date the parties included in the deed.

12. 389 A.2d 1319 (Del. Super. July 6, 1978)

13. 23 Misc. 3d 827 (N.Y.Sup. Feb. 20, 2009).