Property: Subject to Financing Clause: Escalator Provision in Mortgage Commitment Fails to Satisfy Specificity Requirement in Offer to Purchase. (Woodland Realty, Inc. v. Winzenried)

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“persons” to which section 1983 applies. Yet, in the face of these trends, the doctrine of judicial immunity has held fast. The most solid conclusion to be drawn from Sparkman v. Stump is that regardless of the degree of injury resulting from judicial conduct, the judiciary will continue to immunize its brethren with a generous hand.

ANN BOWE

PROPERTY—Subject to Financing Clause—Escalator Provision in Mortgage Commitment Fails to Satisfy Specificity Requirement in Offer to Purchase. Woodland Realty, Inc. v. Winzenried, 82 Wis. 2d 218, 262 N.W.2d 106 (1978). "It would seem to behoove brokers, attorneys and parties to avoid such clauses as they would a plague." As illustrated by a recent Wisconsin Supreme Court decision, Woodland Realty, Inc. v. Winzenried, this recommendation concerning subject to financing clauses has proven to be accurate. The clause in the offer to purchase real estate has been fertile ground for litigation. Changes have been suggested and made, but often to little avail. A brief overview of these changes will demonstrate the types of problems encountered, and the clause used in Woodland and in other recent cases will be examined. These clauses have developed as a result of court suggested changes. Yet Woodland demonstrates the continuing difficulties faced by parties who negotiate real estate agreements which are made subject to buyer obtaining financing. This article discusses some of these problems and suggests alternatives to the subject to financing clause. Finally, a sample clause is drafted as one possible response to Woodland.

Several early Wisconsin cases dealing with the clause illus-

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1. Aiken, "Subject to Financing" Clauses in Interim Contracts for Sale of Realty, 43 MARQ. L. Rev. 265, 300 (1960) [hereinafter cited as Aiken].

2. 82 Wis. 2d 218, 262 N.W.2d 106 (1978).

3. Subject to financing clauses will hereinafter be referred to simply as "clauses."

4. See Kenner v. Edward Realty & Fin., 204 Wis. 575, 236 N.W. 597 (1931), wherein the financing clause merely stated that buyer agreed to financing in a specified amount pursuant to loan negotiations with a third party lender. See also Kovarik v. Vesely, 3 Wis. 2d 573, 89 N.W.2d 279 (1958), wherein the financing clause stated, "This offer is contingent upon buyer's ability to arrange above described financing." Id. at 575, 89 N.W.2d at 281.
trate that the financing condition was given little attention. The issue in litigation invariably concerned the Statute of Frauds and whether a vague clause made the entire contract void. Then, in "Subject to Financing" Clauses in Interim Contracts for Sale of Realty, the author discussed in detail not only the Statute of Frauds problem but also how such clauses, if not definite and certain, could effect the making of the contract itself. The possibility that the clause would be interpreted as a condition precedent, or that such vague clauses would cause the contract to be found illusory for want of mutuality of consideration, was also considered. The publication of this article seems to have marked a turning point in judicial attitudes about the clause.

The first decision dealing with the issue thereafter was Gerruth Realty Co. v. Pire. In that case defendant submitted an offer to purchase subject to financing. In determining that the financing clause was a condition precedent to the performance of the contract, the court stated that only after the conditions were definite enough to be interpreted would the issue of buyer's good faith be raised. Since the Gerruth contingency was found to be too vague, the good faith issue was not reached. Then, in Krause v. Holand, the court held that clauses containing no details would make the entire contract void for indefiniteness.

The Wisconsin Real Estate Examining Board, authorized by statute to adopt rules and write approved forms for real

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5. Aiken, supra note 1.

6. Aiken, supra note 1, at 266-70. The author suggested the following inclusions: amount of loan needed, term, amortization rate, interest, type of loan, escrow provisions, who is to procure loan, and amount of time to procure, whether terms must be "satisfactory" or "reasonable" to buyer, and consequences if lender withdraws after tentative commitment.

7. A second article, Raushenbush, Problems and Practices with Financing Conditions in Real Estate Purchase Contracts, 1963 Wis. L. Rev. 566 [hereinafter cited as Raushenbush], reported the results of a survey of brokers and attorneys conducted to determine custom and usage in the area. The author found that terms such as "subject to financing" were often used without further detail. Id. at 570.

8. 17 Wis. 2d 89, 115 N.W.2d 557 (1962). The financing clause stated, "This offer to purchase is further contingent upon the purchaser obtaining the proper amount of financing." Id. at 90, 115 N.W.2d at 558. See also Boulevard Builders, Inc. v. Snyder, 13 Wis. 2d 466, 108 N.W.2d 914 (1961); Annot., 81 A.L.R.2d 1338 (1962); 46 MARQ. L. REV. 388 (1962-1963). Cf. Long Inv. Co. v. O'Donnell, 3 Wis. 2d 291, 88 N.W.2d 674 (1958).

9. 33 Wis. 2d 211, 147 N.W.2d 333 (1967). The financing clause stated, "Subject to securing a loan by 8/31/64. Otherwise downpayment will be refunded. O.K. Ivar Holand." Id. at 213, 147 N.W.2d at 334.
estate brokers, reacted to this litigation. In *Wisconsin Real Estate Law*, the board stated that brokers should detail the financing needed by buyer. The manual sets out this suggested form:

A mortgage in the amount of Fifteen Thousand Dollars ($15,000) at not to exceed 8% interest per annum on the unpaid balance, monthly payments (including interest, principal, taxes and insurance) not to exceed $250.00 for a term of not less than 15 years."

In two recent cases this advice was followed and, while the clauses in question were far more sophisticated than any before *Gerruth*, they were nevertheless subject to successful challenge for lack of definiteness.

For example, judging the financing clause in *Lien v. Pitts* against the one suggested in *Wisconsin Real Estate Law*, the latter should have been an "adequately detailed financing condition." However, the *Lien* trial judge's decision on motions after verdict suggests that difficulties will be encountered in the interpretation of even such well-drafted contingency clauses. The judge raised two questions of interpretation, one dealing with the definition of a conventional loan and one concerning the scope of the amortization clause.

In remanding for a new trial, the supreme court suggested procedures to be followed in interpreting such financing clauses:

"If the court is to have a manageable task, and at the same time respect what the parties intended, it must not construe financing conditions to give too broad a discretion to buyer, for that is not what the parties intend. Nor must it attempt to write details into financing conditions that have

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11. Wisconsin Real Estate Law § 5.05(b), at 5-12 (1976).
13. 46 Wis. 2d 35, 174 N.W.2d 462 (1970). The financing clause in *Lien* stated: "This offer is contingent upon the buyer, or O'Malley Realty Company, in the buyer's behalf, obtaining a first mortgage loan commitment in the amount $29,000 (Twenty-nine thousand dollars) with interest not to exceed 7 1/4% (seven and one quarter) percent per annum and for a term not to exceed 25 (twenty-five) years. Buyer agrees to cooperate fully in fulfilling the above contingency. . . ."
14. Id. at 37-38, 174 N.W.2d at 464.
15. But see Aiken, supra note 1, at 283.
almost no detail. . . . It should be ready to throw out badly drafted or vague contracts as void for indefiniteness, following the Gerruth Case. . . . For contracts which do contain adequately detailed financing conditions, the court must somehow judge the materiality of the details and the good faith of the buyer, hard as that task is. . . .”

Woodland, the second decision by the court in this area, demonstrates that both the trial judge’s questions and the supreme court’s suggestions in Lien merit further attention.

Woodland

Roy and Carole Winzenried signed an exclusive listing contract with Woodland Realty, Inc. The realtor obtained from Howard and Mary Knight a written offer to purchase which contained the following clause:

“This offer is contingent upon buyer, or Stefaniak Realty, Inc. for buyer, obtaining a first mortgage loan commitment for $25,700.00, with interest not to exceed 8 3/4% per annum and for a term of not less than 30 years, and monthly payments for a principal and interest, not to exceed $193.09 plus 1/12 of estimated annual real estate taxes and 1/12 of annual insurance premium. Buyers agree to co-operate fully in fulfilling the above contingency.”

The Winzenrieds accepted the offer; buyers applied for and received a mortgage commitment from Guaranty Savings and Loan for $25,700 at 8 3/4% interest. One month later, buyers advised the Winzenrieds and their broker that they regarded the offer as null and void because an escalation clause in the loan commitment would allow the lender to increase the loan interest rate.

Woodland Realty brought suit against the Winzenrieds, claiming to have procured a buyer and seeking the agreed upon commission. The Winzenrieds impleaded the Knights as third party defendants. Finding that Woodland Realty had not procured a purchaser, the trial court dismissed the action. Woodland brought this appeal. The sole issue presented to the supreme court, then, was whether Woodland Realty had in fact procured a purchaser. Citing Wauwatosa Realty Co. v. Paar, supra note 6, at 621.

16. 46 Wis. 2d at 44-45, 174 N.W.2d at 467 (footnote added) (quoting Raushenbush, supra note 6, at 621).
17. 82 Wis. 2d at 221, 262 N.W.2d at 107-08.
18. 274 Wis. 7, 79 N.W.2d 125 (1956).
the court stated that under a listing contract, the broker's commission becomes due when a "valid and enforceable contract"\(^{19}\) is signed. The court then examined the offer to purchase to determine its enforceability, focusing on the contingency clause.

The clause was held to be a condition precedent operating "to delay 'the enforceability of the contract until the condition precedent has taken place;' "\(^{20}\) the issue then became whether the escalation clause requirement caused the financing condition to fail. Citing Williston,\(^{21}\) the court restated the general rule that "a condition precedent must be 'exactly fulfilled or no liability can arise on the promise which such condition qualifies.' "\(^{22}\) While recognizing that slight deviations might be permitted, the court held that any such deviations could not be a material part of the condition.\(^{23}\) This reasoning led to the conclusion that the escalation clause was such a material term; therefore, no valid and enforceable contract had been made.

Surprisingly, there was no mention in Woodland of Lien v. Pitts\(^{24}\) in which the court had constructed a framework to aid in the interpretation of subject to financing clauses. Instead, the Woodland court relied on its 1958 decision in Kovarik v. Vesely,\(^{25}\) in which the clause in question was virtually void of details. Concerned with the problem of mutuality of obligation, Kovarik cited Long Investment Co. v. O'Donnell\(^{26}\) as the rule to be followed in such cases. In Long Investment, appellant-seller contended that a contract for the sale of realty would be void for lack of mutuality if buyer had a unilateral right to cancel based on a condition in the contract. Citing Corbin,\(^{27}\) the Long Investment court stated that when a condition is outside a party's control, as is true with a subject to financing clause, there is no problem of want of consideration, and therefore the contract is valid.\(^{28}\)

The Woodland court then found that, although the contract was not void for want of consideration, the condition precedent

\(^{19}\) 82 Wis. 2d at 223, 262 N.W.2d at 108.
\(^{20}\) Id.
\(^{22}\) 82 Wis. 2d at 224, 262 N.W.2d at 109.
\(^{23}\) Id. The court relied on Kovarik v. Vesely, 3 Wis. 2d 573, 89 N.W.2d 279 (1958).
\(^{24}\) 46 Wis. 2d 35, 174 N.W.2d 462 (1970).
\(^{25}\) 3 Wis. 2d 573, 89 N.W.2d 279 (1958).
\(^{26}\) 3 Wis. 2d 291, 88 N.W.2d 674 (1958).
\(^{27}\) 1A A. Corbin, Corbin on Contracts § 163, at 76 (2d ed. 1963).
\(^{28}\) 3 Wis. 2d at 296, 88 N.W.2d at 676.
had not been fulfilled and therefore the buyer's duty had not arisen under the contract. Since buyers were not obligated, the broker was not entitled to his commission.

Yet another line of interpretation could have been followed by the Woodland court—one more in line with Lien v. Pitts, in which the court stated that too much discretion should not be given to buyer. The Woodland court might have reasoned that since buyers had not bargained to include nor exclude an escalation clause, the terms of their loan commitment matched the terms of the financing for which they had bargained in the offer. Kenner v. Edwards Realty & Finance Co. would support this holding:

It seems unreasonable to assume that an independent contract, the terms of which must have been considered and which was to be finally executed by appellant [buyer] to run to a third party [mortgagee], and then under the agreement appellant’s obligations as fixed by the third party and itself were to be assumed by the respondents [seller] . . .

Other jurisdictions have used this line of interpretation. For example, a California buyer sought release from his contractual obligation because his mortgage commitment contained a prepayment penalty. The court stated that buyer had placed no such restriction on obtaining the loan; therefore, he was not entitled to reject the loan because of its inclusion. In a New Hampshire case, buyer sought to recover his earnest money by claiming he had refused financing since the loan terms included an escalation clause and a prepayment penalty. In its decision on the reasonableness of the conditions, the court took into account the mortgage money market existing at the time of the loan and determined that, in light of those conditions, the financing terms were reasonable.

In contrast, the Woodland court, after finding the escalation clause to be a material element, did not look at the reasonableness of the deviation. The court did seek to limit its opinion by stating that, “We do not . . . hold that all deviations are material.” Those drafting an offer to purchase are therefore

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29. 204 Wis. 575, 236 N.W. 597 (1931).
30. Id. at 582, 236 N.W. at 600.
34. 82 Wis. 2d at 224, 262 N.W.2d at 109.
left with the question of precisely what will be considered as material a deviation in the subject to financing contingency as the escalation clause.

**Practical Considerations**

Perhaps the most widely used form for offers to purchase is the one suggested in *Wisconsin Real Estate Law*. The broker for Woodland Realty improved on this form by identifying the party who was to obtain the financing and by adding the phrase, "'Buyers agree to co-operate fully in fulfilling the above contingency.'" Obviously, since this clause was not sufficient, the form found in *Wisconsin Real Estate Law* must be abandoned.

Other suggested standard form clauses which receive some use are found in legal forms texts such as *Nichols' Cyclopedia of Legal Forms* and *American Jurisprudence Legal Forms 2d*. None of these, however, survives the Woodland test, since no mention is made of an escalation clause and the interest rate is set out exactly as in *Woodland*. In both books, the forms specify that receipt of the loan commitment is conclusive proof of fulfillment of the condition, yet such receipt was found not to be conclusive in *Woodland*.

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35. See note 10 *supra*.
36. 82 Wis. 2d at 221, 262 N.W.2d at 108.

Purchaser shall undertake forthwith to secure, in good faith, a commitment for a [mortgage or deed of trust] on the subject real property from a lending institution, in the net amount of not less than ___ Dollars ($___), after payment of all expenses, points, and charges; and shall continue to seek such loan diligently.

The terms of the loan and the expenses thereof shall not be less favorable to purchaser than the following: annual interest rate: ____ per cent (___%); total amortization: ____ years; monthly payment of principal and interest: ____ Dollars ($___); ____ points; other expenses ____ Dollars ($____).

This contract is subject to and conditioned on purchaser's obtaining a commitment for such loan on such terms, or better, on or before ___, 19...
One clause which may survive the Woodland test is found in Real Estate Practice and includes the words "initial interest." This language might survive a Woodland test since buyers did receive an initial interest rate of 8 1/4%. The word "initial" provides for inclusion of an escalator.

However, even if the word "initial," or a term such as "this loan commitment may include an escalation clause," is added, one must still be concerned with the possibility that other financing terms will be considered material. In light of Woodland, one must judge what is as material a term as the escalation clause. Woodland cross-referenced Kovarik as another test — that of deciding whether a term is as material as the phrase, "time is of the essence." Neither is very definitive.

Perhaps more precise is the standard suggested in the trial court's memorandum decision in Woodland. The trial judge agreed with the contention of buyer's attorney that the escalation clause was material because escalation of the interest rate would have an economic impact on buyer's financing. If this is an accurate indicator, the drafter must be concerned with any terms and requirements which might have an economic impact on the buyer.

For purposes of illustration, assume that buyer seeks a conventional first mortgage loan to purchase a single family residence. She/he will be required to sign a mortgage and mortgage note; it is the mortgage note which defines the terms of financing and which contains the escalation clause, if one is included. Under the simplest standard mortgage note, mortgagor prom-


Procurement by Buyer or Broker on behalf of Buyer from a responsible lending institution of a first mortgage loan in an amount not less than $____ with initial interest not to exceed ____% amortizable in equal monthly installments of principal and interest in an amount not to exceed $____ (exclusive of any amount required to be escrowed for real estate taxes and insurance) for a term of ____ years with a loan fee not to exceed ____% of the amount of the loan and lender's closing costs exclusive of the loan fee not to exceed $____.

If Buyer shall furnish Seller with a written financing commitment from his lender within 14 days from the date of acceptance of this offer, or waive in writing this condition within said period, Buyer's obligation shall be deemed satisfied. Otherwise, this offer shall be null and void and all earnest money paid hereunder shall be returned forthwith to Buyer.


ises and agrees to some twenty separate provisions. Which of these must seller and seller's agent be concerned with when accepting an offer subject to a financing clause? If the test suggested above is an accurate indicator, any terms having an economic impact on the financing must be considered. The list would include: the escalation clause, the prepayment penalty, any escrow requirement with respect to insurance and taxes, the late charge provision, any due-on-sale or due-on-encumbrance clauses and possibly the mortgagor's agreement to a six month foreclosure in the event of default. Seller may also need to consider closing costs and points charged as part of buyer's loan cost, since these too have obvious economic impact. This list could grow if the buyer sought financing other than by conventional loan.

Complications abound. Contract language in the standard form offer to purchase,42 the same as used by the broker in Woodland and as approved by the Wisconsin Real Estate Examining Board, may also be too ambiguous. As the broker's attorney in Woodland pointed out, the language immediately following the subject to financing clause in the standard form says, "Buyer agrees that unless otherwise specified, he will pay all costs of securing any financing to the extent permitted by law, and to perform all acts necessary to expedite such financing."43 An escalation clause could be interpreted as a cost of financing, particularly since it is regulated by law.44 However, since the court has stated that the financing contingency is a condition precedent which must be exactly fulfilled before any liability can arise on the promise it qualifies, the duty of buyer to pay costs of financing will not arise if the condition precedent is not exactly fulfilled. Therefore, if the quoted language is to have any effect, it must become part of the condition precedent rather than the body of the contract. As it now stands, buyer's duty to pay all costs of financing can arise only if a condition — getting financing — occurs. This promise, contained in the body of the contract, becomes the same unfilled condition in the financing clause. Since Woodland, buyer may be able to claim that the condition precedent is not ful-

43. Id. lines 27, 28.
44. Wis. Stat. § 138.053 (1975). (This section regulates interest adjustment provisions for an owner-occupied residential property of not more than four units.)
filled because of financing costs required by lender which were not provided for in the subject to financing clause. While seller can point to the contract language, claiming buyer has a duty to pay all costs of financing, buyer may claim that any additional costs not specified in the condition are not the financing bargained for. The condition therefore remains unfulfilled and the duty under the contract never arises. Clearly, this circular argument creates a loophole for buyer.

**GOOD FAITH**

At this point, many questions have been raised and few answered. However, before making any suggestions, the issue of good faith will be considered. Using the *Lien v. Pitts* framework, if the clause in question is not vague, the court must judge the materiality of the details and the good faith of the buyer. Since the *Woodland* court did not find the financing condition vague, it should then have judged materiality and good faith under the *Lien* test. However, once the court in *Woodland* concluded that the escalation clause was a material element, it never considered good faith. *Woodland* therefore changed the *Lien* test. A court must now not only find that a clause is not vague, but also that none of the material elements is missing, before good faith becomes an issue.

As discussed above, the court has held that a contract has mutuality of obligations as long as the condition in question is out of the parties' control. While the *Woodland* court reasoned that obtaining financing was not a condition in buyer's control, buyer did receive the loan commitment and thereafter could have selected one of many requirements to remove her/himself from the contractual obligation. While the court was correct in stating that the lender's decision to give financing is out of buyer's control, this would not be true after a loan commitment is obtained. Once buyer has received the commitment and states that the financing terms are not acceptable, the reasonableness of that statement and the good faith of buyer should be at issue. The decision to accept the financing terms is, after all, not outside buyer's control. A good faith test at this point would be consistent with the good faith required when buyer makes efforts to procure a loan.⁴⁶

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⁴⁵. 46 Wis. 2d at 44-45, 174 N.W.2d at 467.
⁴⁶. See, e.g., Weaver v. Fairbanks, 10 Wash. App. 688, 519 P.2d 1403 (1974) (a decision which made the same comparison between the good faith effort to procure and
Financing is complicated, and lenders require buyer to make many promises. Because of these many requirements, the Woodland buyers found a release from their contract. Corbin pointed out that: "The greater the number of alternatives that by the terms of the promise are left open to the promisor, the less is the limitation upon his own future will; but the promise still remains a sufficient consideration. It remains so until the limitation becomes non-existent, or, it may be, practically negligible." If buyer's conditional promise is not to be illusory, there must be some limitation on buyer's right to refuse financing once a loan commitment is made. A requirement of good faith would be such a limitation.

Other jurisdictions have attempted to resolve some of these issues by looking to the reasonableness of the financing. In an Illinois case, buyer had turned down financing after having received a loan commitment as in Woodland. However, the contingency in Smith revolved around purchaser's "ability" to secure a mortgage. The Illinois court stated that buyer must demonstrate that the terms of financing were not reasonable and further stated that, "[T]his requirement of reasonableness is not a subjective standard to be applied to a sole buyer. Rather, reasonableness is to be determined and interpreted by the court according to business practice and custom in the place where the contract is to be performed."  

Yasuna v. National Capital Corp. also involved lender's requirements in real estate contracts. In Yasuna, a contract to procure a financing commitment between a broker and his principal was at issue; the case parallels Woodland in that the principal claimed that the financing procured was not that bargained for since the loan commitment required progress fees. The Maryland court looked to intent and surrounding circumstances and concluded that, "[T]he inclusion of such charges in the commitment was predictable, since they are rather commonplace in financing transactions . . . ."  

There is a limitation to this approach, as the court pointed out in Gerruth Realty. In order to draw inferences from current...
practices with respect to financing, evidence must show that the "parties contracted knowingly and in the light of any current practices in the community . . . ."\textsuperscript{52} Therefore, even if good faith and custom and usage are considered by the Wisconsin court, the burden of proof will still be a heavy one. A contract without contingencies should therefore be considered as an attractive alternative.

\textbf{Out of the Woodland}

Since "[t]he varieties of nonconformity between contract and offered financing which might be imagined are innumerable,"\textsuperscript{53} the use of an option contract,\textsuperscript{54} in which buyer pays consideration to seller to keep an offer open for a stated period, should be considered in place of a subject to financing clause. No conditions are involved. If buyer is able to obtain financing, a second purchase contract would then be entered into, again with no conditions. It would behoove sophisticated real estate investors and developers to use option contracts. Yet after many years of difficulties, the offer subject to a financing condition continues to be used. While this may be due to ignorance, vested interests of the agent or mere habit, other factors may be involved as well. One is the uncertainty of financing itself and the growing expense of applying for a loan. Added to this is the fact that unsophisticated parties in home sale transactions are frequently unaware of the strength of their credit rating.

While it can be argued that, by taking the property off the market, seller gives something for nothing when accepting an offer with a financing contingency,\textsuperscript{55} buyer's efforts and expenses in attempting to procure financing might properly be considered sufficient consideration.\textsuperscript{56} It is not surprising that buyer prefers not to risk losing the earnest money paid at the time of the offer, since he has already expended a substantial sum for the loan application.

Seller on the other hand, wants to know when the contract

\textsuperscript{52} 17 Wis. 2d at 94, 115 N.W.2d at 560.
\textsuperscript{53} Aiken, \textit{supra} note 1, at 285.
\textsuperscript{54} Id. at 300.
\textsuperscript{55} Id.
\textsuperscript{56} M. Friedman, \textit{Contracts and Conveyances of Real Property} § 1.5, at 95-96 (3d ed. 1975). \textit{See also} White & Bollard, Inc. v. Goodenow, 48 Wash. 2d 180, 361 P.2d 571 (1961). A buyer can expect to spend in excess of two hundred dollars to procure a loan. If buyer's application is rejected, the process and payments must begin again.
with buyer is enforceable—that is, when the house has been sold. Prior to *Woodland*, seller considered the house sold when buyer obtained a loan commitment. However, *Woodland* indicated that the loan commitment was not enough. Therefore, if parties are to continue to offer and accept a contract subject to a financing condition, changes should be made in that condition.

An attempt could be made to draft a clause which would provide for all expenses and promises buyer might be required to meet. Such a laundry list approach is always risky. Another approach might be to attach a form of the mortgage note to the offer, with buyer agreeing to accept all its provisions;\(^{57}\) however, there are problems connected to this procedure as well. For example, in municipalities requiring occupancy permits when a change of residency occurs, some lenders require buyer to secure the permit.\(^{58}\) To secure this permit, structural repairs might be necessary. Since these repairs are not required by the mortgage note, attaching the note to the offer would be unavailing. Additionally, with variable rate mortgages on the rise, the standard mortgage note is becoming a thing of the past.

Another suggestion would require a change in the business practices of lenders. If a prepurchase loan approval were available, the need for a financing condition in the offer would be avoided. At this time, however, lenders require an accepted offer before allowing buyer to make a loan application, and there is probably little chance that this custom will change.

As stated earlier, the option is currently the safest way for seller to contract when buyer is unsure of financing. Since a contract without conditions is the one most preferred by seller, seller should either bargain for an unconditional promise or use the option. Buyer, on the other hand, should bargain for a contract with a subject to financing clause. Obviously, compromise is in order. An offer with a clause to protect buyer in the event financing is not obtained, but requiring a waiver of the condition otherwise, is suggested. Once a loan commitment is obtained by buyer, seller would receive a waiver of the condition signed by buyer;\(^{59}\) in effect, seller then has a contract with-

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57. Annot., 60 A.L.R.2d 251, 263 (1958): "It seems obvious that if the contract includes a complete mortgage form, it cannot be considered incomplete."

58. Municipalities in Milwaukee Metropolitan area which presently require occupancy permits include Cudahy, Fox Point, Mequon and Brown Deer.

59. Signed, formal waiver should be required. See Robert F. Felte, Inc. v. White,
out the contingency.

Even if such a clause is to be part of the offer, parties must still be concerned with making the contract language definite and certain. The clause should give such details as: amount of loan needed, initial interest rate required, terms of the loan, amount required for escrow for taxes and insurance, who is to procure the loan, kind of lender, type of loan sought, loan fee and amount of time buyer is given to procure the loan. The conditional language should also require that buyer submit both the loan commitment and a signed waiver of the condition to seller or seller's agent. The language could also state that failure to sign a waiver of the condition makes the contract null and void. It is to seller’s advantage to keep the time given to buyer relatively short and to make this time of the essence. The writer suggests the following clause:

This contract is subject to buyer or broker on buyer’s behalf obtaining a loan commitment from a reputable lending institution on or before 60 days for a conventional first mortgage loan against the subject property only in the amount of at least $100,000, with an initial interest rate of not more than 6% per annum, for a term of not less than 30 years amortizable in initial monthly payments of principal and interest not to exceed $100 (exclusive of any amount required to be escrowed for real estate taxes and insurance), with a loan fee not to exceed 1% of the loan amount and any other lender’s closing costs not to exceed $100.

If said financing is obtained, buyer agrees to furnish seller with a written loan commitment and an executed written waiver of this financing contingency within 14 days of the

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451 Pa. 137, 302 A.2d 347 (1973) (wherein the court stated that if contract language is unambiguous, waiver must also be unambiguous).

60. If other kinds of loans are to be sought, such as V.A., F.H.A., F.N.M.A., F.H.L.M.C., etc., the offer should so state. If buyer is asking for a particular kind of loan, seller should be most careful in getting a waiver once the loan is granted since state and federal agencies have various requirements which could complicate the problems already discussed.

61. By specifying that buyer need only use the property being sold as security, this language excludes the possibility that buyer could be forced to accept financing with additional security requirements. If buyer intends to bargain with additional properties used as loan security to obtain financing, this should be clearly specified in the clause.

62. Words “initial interest” added in direct response to Woodland. See note 35 supra.

63. By requiring the waiver, that part of the clause stating, “Buyer agrees that unless otherwise specified he will pay all costs of securing any financing,” is given full effect. Buyer will no longer be able to look to the condition precedent as an excuse
acceptance of this offer, or seller may, exercised by written notice to buyer, declare this offer null and void and forthwith return all deposits to buyer.

As this article illustrates, no magic words will make a financing clause free of all doubt. While this suggested clause attempts to include all "material elements" which could have an economic impact on the financing buyer is to procure and adds the word "initial" in specific response to *Woodland*, its strength rests in seller procuring an executed written waiver of the condition. Without the waiver, the issue of whether the condition was fulfilled will still be present.

To summarize, the *Woodland* case reillustrates the problems that arise in drafting an offer to purchase subject to a financing condition. Financing is dynamic and complicated and for that reason makes a contract subject to a financing condition subject to the same complications. Whenever possible, financing conditions should be avoided. When this is not possible, the party in whose favor the condition was made should be required to sign a waiver once the condition has been fulfilled.

**Patricia D. Jursik**

**TAXATION — Tax Free Transfers of Property to Corporations — Transferor in Control of Corporation Despite Direct Issuance of Stock to Third Party.** *D'Angelo Associates, Inc. v. Commissioner*, 70 T.C. 121 (1978). In the recent decision of *D'Angelo Associates, Inc. v. Commissioners,*¹ the Tax Court invalidated yet another transfer scheme designed to avoid section 351 of the Internal Revenue Code which provides for the nonrecognition of gain on the contribution of property to a corporation by its owners. In doing so the court treated a taxpayer who sold some of his assets to a corporation as an owner of the corporation even though he never owned any of the corporation's stock.

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1. *70 T.C. 121 (1978).*

64. Goebel v. First Fed. Sav. & Loan Ass'n, 83 Wis. 2d 668, 266 N.W.2d 352 (1978). Provisions included for the benefit of a party may be waived.

should he/she fail to fulfill this requirement. See note 39 supra.