

# LAW REPORT

Los Angeles 213.984.1806 | Washington, D.C. 202.407.9840 | New York 646.403.4953  
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## Mortgage Recording Tax

Mortgage recording tax is a tax imposed by a state on the privilege of recording a mortgage on real property located within the state. It's not in each of the 50 states, but it does exist in some highly populated jurisdictions like New York, Florida, and Washington, D.C. In New York, the mortgage recording tax is imposed by the state and, in addition, New York City, Yonkers, and various counties impose local taxes on mortgages that are recorded in those jurisdictions. The applicable mortgage tax rate in New York City, for instance, is \$2.80 for each \$100 of principal indebtedness. The tax is payable at the time of recording to the recording office of the county in which the mortgaged real property is located. A mortgage and note it secures will not be enforceable if less than the amount of the mortgage recording tax is paid.

In New York, the mortgage recording tax is payable on the amount of principal indebtedness which is, or under any contingency may be, secured on the execution of a mortgage or at any time thereafter, unless a mortgage is exempt from the tax.

### Best Practices to Avoid Mortgage Recording Tax:

**1. Ask the existing lender to assign the existing mortgage to your new lender.** Instead of cancelling the existing mortgage and recording a new mortgage, it's common practice in states with a mortgage recording tax for the existing lender to assign the existing mortgage encumbering the property to the new lender, and following such assignment, for the new lender to amend and restate the existing mortgage in its entirety to fit the terms of the new loan. If additional money is borrowed beyond the amount

of principal indebtedness secured by the original mortgage, then the transaction would initially have two mortgages — an assignment of the original mortgage and a new mortgage securing the additional indebtedness. The mortgage recording tax would be payable on the new mortgage recorded only, since the mortgage recording tax is only intended to be a tax on new money being borrowed. Then, the two mortgages — the assignment of the original mortgage and the new mortgage — would be combined into one single mortgage. Lenders call the process a "Consolidation, Extension or Modification Agreement" or "Modification, Extension, Consolidation Agreement."

- 2. Plan ahead.** When you are ready to refinance your property or sell your property in the future, the mortgage recording tax will come up again. Negotiate in your loan agreement that your lender will not unreasonably withhold or delay an assignment of the mortgage, or will assign the mortgage for a fixed fee.
- 3. When a mortgage partially secures a portion of a single larger obligation.** A commercial mortgage may secure term loans, revolving credit loans, and guarantees of loans made to someone other than the mortgagor, among other things. In New York, when a mortgage secures a portion of a single, larger obligation, the mortgage recording tax can be limited by stating the maximum amount secured, or "cap," by providing that the mortgage partially secures a large obligation, and by adding a "last dollar" clause, stating that the secured amount is the last dollars of the loan to be repaid. This is particularly helpful for a mortgage securing a portion of a large revolving credit line. The last dollar provision will provide that only the amount above the cap will revolve, exempting re-advances of amounts below the cap from mortgage tax.

**4. When a single mortgage partially secures multiple obligations.** In New York, based on recent guidance by New York State's Department of Taxation and Finance, when a mortgage is given as security for multiple debts or obligations and contains a maximum amount secured provision, the mortgage must identify the fraction of the cap that applies to each individual debt. Otherwise, the cap will be pro-rated based on the balance of each debt over the total balance of all debts at the time the mortgage is executed.

Be sure to ask your counsel whether a mortgage recording tax is applicable to your proposed transaction and whether an exemption applies.

*Author's Note: Mortgage recording taxes apply to both commercial and residential real estate transactions. ♦*

*J.J. Sherman counsels clients in the areas of commercial real estate, commercial contracts, social media and entertainment law. She can be reached at [jj@jjshermanlaw.com](mailto:jj@jjshermanlaw.com).*

### SEEKING LOCAL COUNSEL?

Law Offices of J.J. Sherman, P.C. is available to serve as local counsel in *California, New York, Washington, D.C., and Pennsylvania*. We can assist you with a local counsel opinion or provide local counsel advice on your lease, deed of trust, or deed of transfer.

### IN THIS ISSUE:

Mortgage Recording Tax . . . . .	1
Estoppel Certificates . . . . .	2
Spotlight on the Retail Lease . . . . .	3
First of the JOBS Act Rules Published by SEC . . . . .	3
Copyright Update . . . . .	4

## Estoppel Certificates

The estoppel certificate is one of the easiest and most effective forms of due diligence for any commercial real estate transaction involving leased property. It's used by lenders financing property subject to one or more leases. It's also used by buyers purchasing property subject to one or more leases.

### In everyday terms, the estoppel is the equivalent of "Speak Now, or Forever Hold Your Peace."

#### What is an estoppel certificate?

*Black's Law Dictionary* defines "estop" as "to stop, bar, hinder, or preclude." An estoppel is a certificate with a variety of statements regarding a lease delivered by one party (usually a tenant) and relied on by another party (usually the landlord and a buyer of the landlord's interest in the lease or the landlord's lender). It's called an estoppel, because the party delivering the certificate is estopped or precluded at a later date from denying that the statements made in the estoppel certificate are true. In everyday terms, the estoppel is the equivalent of "Speak Now, or Forever Hold Your Peace."

Here are some of the common statements included in an estoppel certificate:

- 1. Entire Agreement.** The certificate says that the lease constitutes the entire agreement between landlord and tenant with respect to the leased premises, and the lease has not been modified, changed, altered, or amended in any respect.
- 2. Lease Term.** The certificate includes the lease commencement date, the lease expiration date, and a statement as to whether any lease renewal options are available to tenant and have been exercised by the tenant. If the lease is a month-to-month lease, then the tenant estoppel certificate should state that fact.

- 3. Who's in possession?** The certificate includes a statement that the tenant has accepted possession of the leased premises, is the actual occupant in possession, and has not sublet or assigned the tenant's leasehold interest. Recipients of the certificate like to be told that all

improvements to be constructed on the leased premises by the landlord have been completed and accepted by the tenant and any tenant construction allowances have been paid in full.

- 4. No Default.** The certificate includes a statement that as of the date of the certificate, there exists no breach or default, nor state of facts which, with notice, the passage of time, or both, would result in a breach or default on the part of either tenant or landlord.
- 5. Monthly Rent.** The certificate states the tenant's monthly base rent and monthly additional rent as of the date of the certificate. The person delivering the certificate certifies that monthly rent has been paid through a certain date and no other rent has been paid in advance, and that the tenant has no claim or defense against the landlord under the lease and is asserting no offsets or credits against either the rent or landlord.
- 6. Security Deposit.** An estoppel states the amount of the security deposit paid pursuant to the lease and states that the tenant has no claim against the landlord for any other deposit.
- 7. No Options.** Prospective purchasers often are concerned that tenants will prove an obstacle to their purchase by exercising an

unknown option or right of first refusal. The estoppel certificate includes a statement that the tenant has no option or preferential right to purchase all or any part of the leased premises, nor any right or interest with respect to the leased premises, other than as a tenant under the lease.

- 8. No Free Rent.** The estoppel includes a statement that the tenant has made no agreement with the landlord nor any agent, representative, or employee of the landlord concerning free rent, partial rent, rebate of rental payments, or any other type of rental or other concession.
- 9. No Bankruptcy.** The estoppel includes a statement that there has not been filed by or against the tenant a petition in bankruptcy, voluntary or otherwise, any assignment for the benefit of creditors, or any petition seeking reorganization or arrangement under any bankruptcy laws.

#### Best Practices for Estoppel Certificates:

- 1. Make sure your buyers, lenders, and successors-in-interest can rely upon the statements made in the certificate.** In order to avoid chasing down the very same estoppel certificate at a later time for a lender or successor-in-interest, ask the person delivering the estoppel to acknowledge that the certificate may be delivered to, and relied upon by, any proposed lender, landlord, tenant, purchaser, or successor-in-interest.
- 2. Tailor the estoppel to your particular transaction.** While most estoppels will be based on a standard form (California Association of Realtors publishes a form; an agreed form of estoppel is also attached to most leases and purchase agreements), if there is a particular matter for which you want clarity from the tenant, ask for it in your estoppel certificate. ♦



### Supplier Diversity Announcement

As a 100 percent woman-owned business certified by the Women's Business Enterprise National Council (WBENC), we are proud to serve as a diversity supplier and help our clients achieve their commitment to diversity. We recognize that businesses gather strength from difference.

Law Offices of J.J. Sherman, P.C. is on the Minority and Women-Owned Law Firm Outside Counsel List of the FDIC.

## Spotlight on the Retail Lease

### Free Rent

Tenants often negotiate for a period of “free rent” at the beginning of their lease term. This free rent period is a key term in any letter of intent and is often the time when the tenant is constructing its tenant improvements. Increasingly, instead of setting the rent commencement after the expiration of the free rent period, landlords are trying to set the rent commencement date at the start of the lease and stating that during the term of the lease, so long as the tenant is not in default under its lease, the tenant will not be required to pay rent for the “free rent period.” While seemingly innocuous, this nuanced wording can mean that if a default does in fact occur at any time during the lease term, rent for the “free rent period” would become due and payable as damages to the landlord — an unexpected penalty to the tenant. During retail lease negotiations, be sure to confirm with your counsel that you are getting the full benefit of any “free rent” that you negotiated in your letter of intent. ♦



## First of the JOBS Act Rules Published by SEC

In the spring of 2012, the Jumpstart Our Business Startups Act (the JOBS Act) was signed into law. At long last, the Securities and Exchange Commission (the SEC) has published the first of the new rules reflecting the law.

**Background:** Companies seeking to raise capital through the sale of securities must either register the securities offering with the SEC or rely on an exemption from registration. Most exemptions from registration prohibit companies from engaging in general solicitation or general advertising. This means they cannot advertise in newspapers, via Facebook, on Twitter, or at crowdfunding sites in connection with securities offerings.

**Final Rules:** Rule 506 of Regulation D is the most widely used exemption from registration of a securities offering. Effective September 23, 2013, U.S. Securities Laws now allow companies to raise money in a private placement (relying on Rule 506 of Regulation D) using general solicitation and general advertising as long as all purchasers in the securities offering are accredited investors. Generally speaking, if an investor is an individual, he or she is considered an accredited investor if his or her net worth is greater than \$1 million excluding the value of his or her primary residence, if his or her annual income is more than \$200,000, or if his or her joint income with a spouse is more than \$300,000.

In its release of the final rules, the SEC reported, “By requiring the SEC to remove the general solicitation restriction, Congress sought to make it easier for a company to find investors and thereby raise capital.”

*The Wall Street Journal* cautiously reported on July 11, 2013, “Such marketing helps the entrepreneurs save time and energy, they say, because they can bypass having to network to find an investor. But the reason many of these laws were put into effect in the first place was to prevent fraud and to stop the public from losing money on what are typically risky ventures.”

**U.S. Securities Laws now allow companies to raise money in a private placement ... using general solicitation and general advertising as long as all purchasers in the securities offering are accredited investors.**

*Author’s Note: Strictly donation-based portals like Kickstarter will remain unaffected by this rule change. Donation-based portals permit individuals to donate money to a fundraising campaign with no expectation of any return on investment, except perhaps some “perks” to say “thank you,” such as a t-shirt or an invite to a special event. ♦*

## CURIOSITY

We are proud to serve as production counsel to “Joshua Sherman Presents,” the new web series launching October 16, 2013 with the short musical film, “Curiosity.” The series will continue with new premieres every other Wednesday.

Upcoming titles include: “A Little Imagination,” “I Keep Christmas in My Pocket,” and “We Talk Without Words.”

The series features music by Gail C. Bluestone, lyrics by Eileen Bluestone Sherman, and choreography by Ryan VanDenBoom. Co-directed by Joshua Sherman and Ryan VanDenBoom.



Watch the musical films now at [www.joshuashermapresents.com](http://www.joshuashermapresents.com).

4470 W. Sunset Blvd. No. 610  
Los Angeles, CA 90027

LA: 213.984.1806  
DC: 202.407.9840  
NY: 646.403.4953

[www.jjshermanlaw.com](http://www.jjshermanlaw.com)

**WHAT'S INSIDE:** ♦ Mortgage Recording Tax ♦ Estoppel Certificates  
♦ Spotlight on the Retail Lease ♦ First of the JOBS Act Rules Published by SEC ♦ Curiosity ♦ Copyright Update

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## Copyright Update

The U.S. Supreme Court in *Kirtsaeng v. John Wiley & Sons* in March 2013 examined the First Sale Doctrine in what has been described by the *ABA Journal* as a “high stakes copyright battle affecting much of the U.S. economy.”

Kirtsaeng was a student from Thailand who needed to pay for his college tuition at Cornell and his post-graduate studies at USC. He coordinated with his family and friends in Thailand to purchase and send him low-priced textbooks that John Wiley & Sons made and sold in Thailand. Then, Kirtsaeng resold them in the United States at a profit. Wiley sued Kirtsaeng, claiming his importation of books was infringing the “importation” provision of Section 602 of the U.S. Copyright Act, which says that “importation into the United States without the authority of the owner of copyright under this title, of copies...of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies...under section 106...”

Kirtsaeng argued that he was protected by the First Sale Doctrine found in Section 109 of the Copyright Act. Section 109(a) says, “Notwithstanding the provisions of Section 106(3) (the section that grants the owner exclusive distribution rights), the owner of a particular copy or phonorecord lawfully made under this title...is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.” He argued that once Wiley sold the books in Thailand, purchasers of the books could dispose of them in any manner, including bringing them to the U.S. and reselling them at a profit. Kirtsaeng argued that “lawfully made under this title” under Section 109(a) applies to copyrighted works made both inside and outside the United States.

The Supreme Court agreed: “We ask whether the ‘first sale’ doctrine applies to protect a buyer

or other lawful owner of a copy (of a copyrighted work) lawfully manufactured abroad.

Can that buyer bring that copy into the United States (and sell it or give it away) without obtaining permission to do so from the copyright owner? Can, for example, someone who purchases, say at a used bookstore, a book printed abroad subsequently resell it without the copyright owner’s permission? In our view, the answers to these questions are, yes. We hold that the ‘first sale’ doctrine applies to copies of a copyrighted work lawfully made abroad.”

No doubt, this ruling will have economic implications for publishers, movie companies, and software firms who used to rely on the importation clause of Section 602 of the Copyright Act. ♦



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