

PRESENTED AT

55th Annual William W. Gibson, Jr.
Mortgage Lending and Servicing Institute

September 16-17, 2021
Austin, TX

What's Really Negotiable in Lender Transactions?
(What a lender wants!:What a borrower needs!)

Niles W. Holmes

Author Contact Information:

niles•holmes•pc
2609 Thomas Avenue
Dallas, TX 75204

Niles W. Holmes
nholmes@nilesholmeslaw.com
214.855.9866 x101

NILES W. HOLMES
214-855-9866 Phone
972-853-5630 Fax
nilesholmeslaw.com

niles•holmes•pc.
2609 Thomas Avenue
Dallas, Texas 75204

Niles Holmes has participated in various facets of the real estate business since 1984. After receiving his master's degree in real estate, Niles was employed as a commercial real estate appraiser and completed all of the educational requirements for the MAI designation. Subsequently, Niles was employed by a large life insurance company for five years as an investment officer. His duties included real estate lending, foreclosures, workouts, management and sales of acquired properties covering a five state territory. Niles' legal experience also includes serving as the general counsel of a publicly traded small business lending concern and mortgage REIT. Niles was formerly a shareholder in the Dallas office of Winstead P.C. where he served as a member of the firm's opinion committee and as Chairman of the Real Estate Lending Practice Group. Niles is Board Certified in Commercial Real Estate Law by the Texas Board of Legal Specialization. Niles is Board Certified in Commercial Real Estate Law by the Texas Board of Legal Specialization and is "av" rated by Martindale Hubbell for more than 10 consecutive years. Niles has been named as a *Super Lawyer* for the State of Texas for the years of 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020 and 2021. In 2015, 2016, 2017, 2018, 2019, 2020 and 2021, Niles and Niles Holmes PC was named as a *Best Lawyer* and *Best Law Firm in Texas* by the U.S. News and World Report. Niles is a frequent speaker and program coordinator specializing in commercial real estate lending topics including workouts, financial covenants and tenant in common lending. These educational and professional experiences give Niles a unique business and legal perspective to any transaction.

Education

Southern Methodist University, Dedman School of Law

J.D., cum laude, 1992

Order of the Coif; Southwestern Law Journal; Staff SMU Law Review Editor;

American Jurisprudence Award – Real Estate

Texas A&M University; M.Agr., in Land Economics and Real Estate, 1984

Texas A&M University; B.S., Animal Science, 1982

Professional Memberships & Affiliations

State Bar of Texas; Dallas Bar Association; Texas Association of Bank Counsel; The College of the State Bar of

Texas, American College of Mortgage Attorneys, Fellow

Community & Civic Involvement

Lakepoint Baptist Church, Rockwall, Texas

Presentation Topics

- Author/Speaker, What's Really Negotiable in Lender Transactions ? (What a Lender wants! What a borrower needs!), Mortgage Lending Institute, University of Texas School of Law (September 2021)
- Author/Speaker, Can we Still Get a Loan ? Current Issues and Alternatives in Commercial Real Estate Financing, Advanced Real Estate Law Course (July 2021)
- Author/Speaker, Program Coordinator, Modification and Workout Documentation: This Time It's Contagious, Mortgage Lending Institute, University of Texas School of Law (September 2020)
- Author/Speaker, What's Really Negotiable in Lender Transactions ? (What a Lender wants! What a borrower needs!), Advanced Real Estate Drafting Course (August 2020)
- Author/Speaker, Program Coordinator, How to Lose a Client With 10 or More Outdated Loan Provisions!, Mortgage Lending Institute, University of Texas School of Law (September 2020)
- Author/Speaker, HVCRE Changes and Other Federal Codes, Restrictions and Guidelines to Commercial Real Estate Lending, Mortgage Lending Institute, University of Texas School of Law (September 2018)
- Author/Speaker, Financial Covenants for Commercial Real Estate Lending Transactions, Mortgage Lending Institute, University of Texas School of Law (October 2012)
- Author/Speaker, Evolving Loan Structures, Mortgage Lending Institute, University of Texas School of Law (September 2011)
- Author/Speaker, Drafting Creative Financing Documents, Advanced Real Estate Drafting Course (March 2011)
- Author/Speaker, Real Estate Workouts, Advanced Real Estate Drafting Course (March 2010)
- Author/Speaker, Commercial Lending Coordinator, Financial Covenants for Lawyers, Advanced Real Estate Law Course (July 2004)

- Author/Speaker, Preforeclosure Documentation II (This time it is getting personal!), Advanced Real Estate Drafting Course (March 2004)
- Author/Speaker, Commercial Lending Coordinator, Workouts in the 21st Century, Advanced Real Estate Law Course (July 2003)
- Author/Speaker, Program Coordinator, Preforeclosure Documentation, Advanced Real Estate Drafting Course (March 2003)
- Author/Speaker, Form of Lender's Texas Title and Survey Objection Letter, Advanced Real Estate Drafting Course (March 2002)
- Author/Speaker, Texas Annotated Deed of Trust, Mortgage Lending Institute, University of Texas School of Law (October 1999)
- Author, Purchase and Sale Agreements, CLE International (October 1994)

What's Really Negotiable in Lender Transactions?

Table of Contents

I.	INTRODUCTION.....	1
II.	PROVISIONS.....	1
A.	Notice and Cure	1
B.	Restoration Parameter.....	2
C.	Permitted Disposition.....	3
D.	Subordinate Financing.....	3
E.	Express Negligence Doctrine	5
F.	Borrower and Guarantor Anti-Deficiency Statute	6
G.	Workout and Foreclosure Considerations	6
H.	Waiver of Right To Trial By Jury	7
I.	Future Advance Clause.....	8
J.	TARA.....	9
K.	HVCRE	9
L.	Accounting	12
M.	LIBOR Expiration.....	13
N.	Affidavits of Commencement and Completion.....	14
III.	CONCLUSION.....	15
IV.	REFERENCES.....	16

I. INTRODUCTION

The scope of this article is to identify the most common borrower loan comments and a typical lender's counsel's reaction to such comments. In addition to the standard points of contention, there are also a number of fairly recent developments in commercial lending practice, such as the use of interest rate swaps, changes in financing norms and regulatory limitations, whose implications require careful consideration by both borrower's and lender's counsel. Please note that neither these materials nor any related commentary are binding on Niles Holmes PC or its clients.

II. PROVISIONS

A. Notice and Cure

Intro:

The number one comment to all loan documents? Notice and Cure!

Monetary? Non-Monetary? Notice? Grace Period? Late Charges?

Language:

Events of Default. Each of the following shall constitute an "Event of Default" hereunder:

Payment of Indebtedness. If Borrower shall fail, refuse, or neglect to pay, in full, any installment or portion of the Indebtedness as and when the same shall become due and payable, whether at the due date thereof stipulated in the Loan Documents, upon acceleration or otherwise

; provided, however, that a failure by Borrower to pay a regularly scheduled monthly payment due pursuant to the Note shall not constitute an "Event of Default" hereunder unless such failure continues for at least ten (10) days after the due date thereof;

, and such failure continues for five (5) days after written notice thereof from Lender, or otherwise upon maturity or acceleration; provided that, that Lender shall not be required to provide notice and a five-day cure period to Borrower more than once in each calendar year;

Performance of Obligations. If Borrower shall fail, or refuse, to fully and timely perform and discharge, or cause the failure or refusal of the full and timely performance and discharge of, any of the Obligations as and when called for; **provided, however, that a failure by Borrower to timely satisfy an Obligation shall not constitute an "Event of Default" hereunder if (i) such failure does not constitute an Event of Default pursuant to any other subsection of this Article VII other than this Section 7.1(b), and (ii) such failure is fully cured by Borrower on or before the expiration of the**

What's Really Negotiable?

Cure Period (hereinafter defined). As used in this Section 7.1(b), the term "**Cure Period**" means a 30-day period commencing upon Lender's written notice to Borrower of Borrower's failure to satisfy the subject Obligation; **provided, however,** if (1) the subject failure is, by its nature, not readily susceptible to cure within thirty (30) days, and (2) Borrower commences such cure process within the initial 30-day period and diligently pursues same to completion within sixty (60) days of the initial failure by Borrower to satisfy the subject Obligation, then such failure shall not constitute an "Event of Default";

Late Charge. Without limitation of any other remedies available to Lender hereunder or under the Loan Documents, Lender may collect a late charge not to exceed five cents (\$0.05) for each one dollar (\$1.00) for each payment of interest, principal and, if applicable, any other sums due hereunder or under any of the other Loan Documents more than ten (10) days in arrears, to cover the extra expense involved in handling delinquent accounts, **provided, that (a) such late charge shall not be applied to the Outstanding Principal Balance that is payable under this Note in the event of either the occurrence of the Maturity Date, or the acceleration of the indebtedness evidenced by this Note; and provided further that,** (b) should such late charge constitute interest under any applicable law, such late charge, together with other interest to be paid, charged, contracted for, received or reserved against or taken on the indebtedness evidenced by this Note or indebtedness arising under any other Loan Documents, shall not exceed the Maximum Lawful Rate.

B. Restoration Parameters

Intro:

What happens if there is a casualty? or condemnation?

Who controls the proceeds? Can the Borrower use the money to rebuild?

Is it a default?

Language:

Restoration Casualty: An Insured Casualty which (i) occurs prior to that date that is six (6) months prior to the Maturity Date, (ii) has a likely cost of full restoration of the Improvements as determined by Lender not exceeding \$_____.00, (iii) relates to damage to the Improvements that is less than twenty-five percent (25%) of the net rentable square feet of the Mortgaged Property, in its entirety, (iv) occurs when no Event of Default has occurred and is then continuing, (v) in the reasonable judgment of Lender, the Mortgaged Property can be restored in compliance with Legal Requirements within six (6) months to an economic unit no less valuable than the same was prior to the Insured Casualty and adequately securing the Indebtedness and (vi) Lender receives assurances satisfactory to Lender that tenancies or other sources of revenue from the Mortgaged Property, will continue in full force and effect after restoration subject only to rent abatement during the period when any leased premises are untenable.

Restoration Condemnation: A Condemnation which (i) occurs prior to that date that is six (6) months prior to the Maturity Date, (ii) relates to less than ten percent (10%) of the net rentable square feet of the Mortgaged Property, in its entirety, (iii) occurs when no Event of Default has occurred and is then continuing, (iv) in the reasonable judgment of Lender, the Mortgaged Property can be restored in compliance with Legal Requirements

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: What is Negotiable in Lender Transactions? (What a lender wants!: What a borrower needs!)

Also available as part of the eCourse

[2021 William W. Gibson, Jr. Mortgage Lending and Servicing eConference](#)

First appeared as part of the conference materials for the
55th Annual William W. Gibson, Jr. Mortgage Lending and Servicing Institute session
"What is Negotiable in Loan Documents"