I. INTRODUCTION

Shopping centers can be said to be "built on a foundation of paperwork as much as they are built on a foundation of reinforced concrete". Indeed the volume of paperwork at times appears to at least match if not grossly exceed the volume of reinforced concrete. For ease I'll use the deceptively simple term Reciprocal Easement Agreement or REA to refer to the enormously complex document or set of documents that seek to set forth all the rights and remedies of all of the parties with interests in a regional shopping center. Despite using the shorthand term "REA", a shopping center agreement more accurately and more often bears the name Construction, Operating and Reciprocal Easement Agreement, Declaration of Covenants, Conditions and Restrictions, the Development and Operating Agreement, the Operating and Reciprocal Easement Agreement or the Shopping Center Operating Agreements and often includes one or more Supplemental Agreements.

Over time lawyers have well honed the finer points of drafting and reviewing an REA. Sophisticated legal draftsmen have concocted the 100 to 200 page REA with state of the art, well integrated provisions. Indeed, if the REA is so well evolved why is it a ripe topic for sophisticated real estate lawyers to discuss? In large measure it is topical because such discussion focuses on sacrificing the integrity of the documents without causing irreparable harm to the paperwork foundations of the shopping center. Lawyers sacrifice the integrity of the REA or contemplate the loss of some of its key provisions for some of the following reasons:

1. The extensive bankruptcy filings involving retailers raise the specter of a bankruptcy court deeming the REA to be an executory contract and permitting the debtor to reject the REA.

2. A bankrupt anchor's assumption of the benefits and burdens under an REA and subsequent sale of its store and assignment of its rights under the REA to a third party despite REA restrictions on such assignment creates a potential chink in the paperwork foundation of the center.

3. Modification or expansion of an existing center requires the consent of all existing parties to the REA and entails existing documents. Starting the legal documentation over from...
scratch, although permitting the use of a state of the art REA, also requires the developer to reopen old negotiations. Particularly where the developer may lack leverage with the existing anchors the developer endeavors to change the existing documents as minimally as possible while still accommodating the expansion or modification of the center.

4. Despite the financial travails of many regional center anchors, including a foray or two into the bankruptcy courts, a number of store chains still exert a surprising degree of negotiating clout. Although the evidence is largely anecdotal, a number of these anchors seem willing to forego some of the benefits of the REA if they can jettison the burdens of the REA.

5. Majors intentionally weaken a number of key provisions of the REA. To dilute operating covenants, a major's operating covenant may be keyed not only to the developer keeping the mall leased and another anchor operating, but the operating covenant of a major may require all or a majority of the other majors in the center to be in operation under the required name. Operating covenants no longer speak broadly of "[store name] or whatever name is being used for all the chain's comparable stores", but can be limited to the name being used in a very small geographical area. Where the accepted REA provision once was "No default under this REA shall entitle any party to cancel, rescind or otherwise terminate this REA", now some majors negotiate termination rights for some specified defaults. The emerging trend may go one step further, routinely permitting termination but specifying certain provisions to survive the termination.

6. In the past a lending institution could be used as the bully to obtain provisions in the REA which enhanced the financeability of the center. Although I can suggest no reason why mortgagees might have surrendered this influence, the battles may be won or lost before the mortgagee has ever commenced its review of the REA.

With these influences in mind I'd like to review certain provisions within an REA and discuss some of the relevant case law and articles.
II. WHAT IS AN REA AND WHERE IS IT USED

In a small strip center the developer owns the entire center and leases to the retail shop owners. Occupancy leases spell out rights of the parties. A retailer with expectations of a "permanent stay" in the center might well enter into a ground lease rather than a simple occupancy lease. Typically, the longer duration ground lease imposes more extensive duties on the tenant to maintain the premises while bestowing near ownership rights to the parcel.

Even in a small center retailers may desire to own their own parcels; particularly so with outparcels. If the center appears to be an integrated whole, however, prudence dictates more extensive agreements between the parties than simply easements for utilities. The more intertwined the operations of the center, the more extensive the contractual provisions and the more voluminous the easements.

Shared ownership impelled the development of the REA. Although in some instances shared ownership can be accomplished by virtue of a partnership agreement, the partnership structure contemplates a sharing of profits and losses which is generally not the goal for the typical developer and retail tenant. Interestingly, one commentator has suggested the application of the Uniform Common Interest Ownership Act to the regional shopping center. More likely though, a court will default to more traditional real property law and contract law in analyzing the rights and remedies of the parties under an REA.

The REA governing the massive regional shopping mall is the more elaborate, complex version of the same REA that developed in the smaller center. Further,

"Whatever their scope, the goal remains the same: to allow several owners of land to use the aggregate land owned by them as a unified, functionally integrated shopping center, thereby enhancing the individual retailer's opportunities to generate business by collectively providing a more complete retailing menu for the consumer appetite."

Quite commonly a large retail center combines ground leased parcels and anchor owned parcels subject to the REA. Although theoretically any right which could flow to the owner of an anchor site could also flow to the tenant under a ground lease, one author has observed that the rights of a tenant as to its portion of the center are generally more restrictive than the similarly situated retailer who owns his own parcel. He credits this phenomena in part to the "subconscious value perceptions concerning fee simple ownership".
The more complex the center, both in its ownership structure and in its physical structure, the more complex the REA. A vertical regional shares the complexity of a horizontal regional, but further taxes the spatial imaging abilities of the draftsman of the REA. The concepts may be comparable, but the added dimension adds a measure of challenge. An urban regional, either vertical or horizontal, often brings with it the complex financing structure of UDAG grants, state and local financing, tax abatements and a wide variety of financing sources. All of the financing must be jerry-rigged onto the remainder of the paperwork foundation of the center.

Mixed use projects require special attention to the competing demands of the various uses. An office park may be coupled with a hotel, retail could be adjacent, or there might be a convention center. Some projects have a residential component, either rental or condominium or cooperative ownership. With a little imagination one can concoct nightmares of conflicting needs. A lawyer drafting the documentation of such mixed use projects needs an ironclad grasp of the layout of the project and a wealth of experience in how these uses can coexist.

III. THE MEGA-MIX OF CONTRACTUAL AND PROPERTY RIGHTS FOUND IN THE REA

A. Easements

Returning to the "basic" REA of the horizontal regional, the typical REA contains of course easements; the imagination of man imposing the only limits on the type, number and extent of these easements. The most obvious are access easements, without a doubt essential to having customers arrive ultimately to a cash register, utility easements, in order to have the electricity to run the cash register, and parking easements, another necessity in the age of the auto. A number of articles discuss in depth the easements commonly created within REAs.\textsuperscript{13}

Easements are a grant of a real property right and can be described as:

"a liberty, privilege, or advantage without profit granted to a person, either individually or by virtue of his ownership of a specified parcel of land, to use another parcel of land for some limited purposes".\textsuperscript{14}

The mix of property rights within the REA create some of the arguments against a bankruptcy court allowing rejection of the REA in bankruptcy.\textsuperscript{15}
B. Restrictive Covenants

In addition to easements, the REA typically includes a number of restrictive covenants. These may address architectural concerns for uniformity within the center, building restrictions, and use restrictions among other covenants. Use restrictions warrant particular attention for at least two reasons. One is the widely accepted belief that the success of any center depends in large measure on achieving the right mix of tenants within the center. Congress formally adopted this tenet of shopping center lore when it adopted Sec. 365(b)(3) of the Bankruptcy Code.

Under that section adequate assurance of future performance needed to assume and assign a lease requires the bankrupt tenant to provide evidence that the financial condition and operating performance of the assignor is similar to that of the assignee and adequate assurance that the percentage rent due under the lease will not decline substantially. In addition, the tenant must provide evidence that the assignment will not disrupt the tenant mix or balance within the center. As hereinafter discussed, the limitation of this provision to leases, rather than a broader application to rights under an REA, causes a disparate result when the use restriction is contained in the REA rather than within a lease. As a result developers exercise more control over tenant mix using the device of a lease rather than relying on a similarly worded covenant in an REA.

The use restriction may also be the vehicle used by the developer, or more likely another retailer, for decidedly anti-competitive purposes. The clear need to avoid nuisance uses, the need to achieve an appropriate tenant mix, the need for all tenants to contribute to the image of the center, i.e. upscale, mid-market, discount or whatever, all compel the use of use restrictions. Just as assuredly, however, a developer often imposes use restrictions so an existing retailer can avoid some form of direct competition within the center.

C. Affirmative Covenants

The affirmative covenants within an REA may be as basic as the obligation to pay taxes on one's parcel or to keep the property insured. In analyzing both affirmative and negative covenants, a lawyer should distinguish personal covenants, from property covenants which run with the land.

"A property covenant differs from a mere contractual agreement or a personal covenant to refrain from certain actions, in that a property covenant properly created, will bind successive owners of all or any portion of the land so restricted, or of any interest therein, and may be enforced by successive owners of all or any portion of the land intended to be benefitted thereby."
The REA invariably recites that the obligations contained therein are intended to run with the land and bind successors and assigns of the owners of the land. An example of such a provision (sitting conveniently on the corner of my desk) is the following:

"It is intended that the covenants, easements, agreements, promises and duties of each Party as set forth in this REA, and in the Allocable Share Agreements, shall be construed as covenants and not as conditions, and that, to the fullest extent legally possible, all such covenants shall run with the land and constitute equitable servitudes as between the Parcel of the respective covenantor, as the servient tenement, and the Parcel of the respective covenantee, as the dominant tenement, binding upon the servient tenement and benefitting the dominant tenement."

The operating covenant imposes the biggest burden on a major. Developers offer significant financial inducements to the anchor stores because the anchor-generated traffic attracts the small retailers to the mall space thereby generating the profit to the mall owner. If an anchor store "goes dark", does not operate in the manner anticipated, or abandons the magnet name, the developer loses the benefit of his bargain. In a worst case the closing of the significant anchor tenant precipitates the ultimate vacancy of the entire center. As important as the anchor's operation under its designated name, the continued operation of an unprofitable store can be very onerous to the store chain. A store chain retrenching and cutting expenses wants the right to downsize or close a store entirely. Requiring a chain, particularly one experiencing financial problems, to continue to operate a non-profitable store can contribute to a chain's ultimate bankruptcy filing.

In addition, institutions financing these stores, anxious to preserve their security, seek assurances that the collateral real estate has value even if the credit falters. Because a bank or insurance company cannot operate under the retailer's name, it requires the right to foreclose the anchor space and lease or sell to another user free of the operating covenant or, at a minimum, that portion of it which requires operation under a specific name.

Because the developer, the retailer and the lending institution have such strong competing interests in the operating covenant, in these tough economic times the operating covenant attracts the most concerted attention.

D. Provisions Relating to REA Itself

Because the REA is so essential to the operation of the center, one commonly finds a provision that if a portion of the
REA is found to be illegal or unenforceable the remainder of the REA will still be in force. From the business perspective, the easements and much of the remainder of the REA will survive despite an unforceable provision.

Also, a breach of the REA will not give rise to the right to terminate the REA. Some anchors have sought to delete this latter provision, or to eviscerate it by enumerating which defaults do permit termination and which specific provisions survive termination. Typically, the easements are destined to survive, but even here a major, if it seeks to "go it alone", may retain exclusive rights to its parking or otherwise limit easements.

IV. THE ECONOMIC CLIMATE

A lawyer might gauge today's economic climate by the fact that Nexus has created a separate file for the Federated bankruptcy cases. The International Council of Shopping Centers ("ICSC") reports that 365 anchor stores closed in 299 shopping malls, 91% of them since 1987. Yet of all those stores, another retailer has opened in 85% of the vacated stores. Even more importantly, not only is the space occupied, but in 60% of the cases the new anchor took over the space in the same month as the old tenant vacated. In the other 40% of the cases, eight months was the median time to replace the deserting anchor, and in only 5 instances was the anchor space vacant for more than two years.

This data suggests that the vision of the regional with one of its major stores shuttered and vacant rarely materializes, particularly when one realizes the ICSC data encompasses all centers not only regional shopping centers. On the other hand the authors of one article, cite the Fashion Island Shopping Center in Foster City, California as an example of a center in which the anchors domino style went out of business to the complete devastation of the center. They also attribute the loss of one of the stores to the wording of the operating covenant. Because the name requirement was keyed to the operation of stores in a particular geographical area, when the chain closed all stores in that area the name restriction disappeared.

Note that the loss of the anchors was not the result of the termination of the REA in a bankruptcy court, an issue much debated by lawyers and discussed hereafter. Within what might someday be familiarly known as a "nameplate case" the court labeled the obligation to operate under a specified name as a mere "nameplate requirement". That case, the ICSC data and common sense all suggest that value resides in the anchor tenant store, and the bankrupt estate realizes more value in assuming and assigning the rights under the REA than from terminating the REA. Although the obligation to operate may be onerous to the bankrupt anchor, presenting a judge with a request to terminate
the REA raises many needlesome issues. Thorny legal issues abound, but the practical concerns weigh most heavily. No bankruptcy judge wants to blow up the paperwork foundation of a major shopping center, thereby creating absolute chaos within the center.

      Far easier is the request to assign the rights under the REA. The bankrupt debtor may in fact have so little substance left that its operation in the center may not be feasible, or if feasible, may be a considerable drain on the bankrupt estate. Substituting a new anchor generally results in cash to the bankrupt estate, relief from the operating requirement where in the bankrupt's business judgment operation looms as a burden and a substitute anchor for the center itself. Although a developer, jealous of retaining the character and quality of the center, may strenuously argue the loss of the benefit of its bargain if the judge approves assignment to a new anchor, the judge may see only the center with an operating retailer, albeit not the original anchor. Bankruptcy inflicts massive injury on most participants, and bankruptcy judges witness a good share of this pain. The substitution of one retailer for the bankrupt original retailer inflicts an injury so subjective and so speculative that a judge may give very short shrift to the developer's claim of injury.

Therefore, because of the value that resides in a tenant's parcel, the presence of replacement anchors willing to pay for this value, and judges hard-pressed to buy into the developer's subtle theories of the merits of perfect tenant mix, we can anticipate far more cases addressing the ability to assign rights under the REA than cases rejecting all or some portion of the REA. This despite good legal analysis suggesting considerable legal risk of REA rejection in a bankruptcy of an REA party.

V. THE TERMINATION CONCERN

When a retailer who is a party to an REA, rather than merely a ground lessee, files for bankruptcy it is presumed that the retailer/debtor can either reject the REA (to the extent it is deemed an executory contract), assume the REA, or assume and assign the REA. Although the assume and assign route will be most commonly followed, often with the tacit consent of the developer and others party to the REA, the rejection of the REA casts the most fear in the hearts of the devotees of the REA. Certainly some portions of the REA meet the definition of an executory contract.

A. Real Property Grants

Yet what of the easements. Easements should survive bankruptcy under the following analysis:
"The traditional formulation of the position opposing termination of the easement rights as a consequence of rejection is that (a) the grant of the easement creates a "property right" in the beneficiary, (b) a trustee under the bankruptcy law may reject and therefore impair "contractual rights," but may not divest another party of a property right created by the debtor, and (c) therefore, the grant of easement may not be impaired by rejection of the operating agreement". 34

Indeed, if these property rights exist would the rejection of the REA and termination of these rights be viewed as an unconstitutional taking of property? 35 Or as one commentator has suggested would the compensation in the nature of damages be sufficient to obviate this concern. 36

Interestingly, the issue of damages raises an innovative argument against rejection of the REA. That argument 37 suggests that the massive damages flowing from rejection of the REA would so overwhelm the estate that the court should find rejection a manifestly unreasonable choice despite the normal deference given to the debtor's choice under the "business judgment rule". 38

Yet in truth, the damages stemming from rejection are quite speculative. The termination of the REA, although arguably freeing the parties of their operating covenants, still leaves the mall and remaining anchor stores structurally intact and doing business. The troublesome issues of lack of easements, although no doubt frustrating any immediate financing, fairly well begs for a practical, business solution. Reentry of the parties into a new REA, albeit one without operating covenants, seems a reasonable guess and, barring truly disproportionate bargaining power, the provisions to which the parties would default in the absence of agreement would certainly be the provisions of the theretofore previously existing REA. If the center operated prosperously the termination might close the bankrupt major, but the remainder of the center might coalesce around a new REA with limited impact from the closed store. The termination might also prompt a developer buy-out of the site or bankrupt tenant sale of the parcel to another retailer perhaps willing to execute an REA.

Of course, if the other anchors were aching to close their stores, the termination of the REA would spell the demise of the center.

B. Severability of Real Property Rights

If the grant of property rights in the nature of easements argues against termination should portions of the REA
be preserved while executory portions terminate? This would be consistent with the business objective of the parties as evidenced by the standard clause of the REA earlier mentioned which allowed for severability of provisions as noted:

"... the parties should provide that the Reciprocal Agreement is intended to be severable, that any illegal or invalid provisions will be severed from the agreement and will not act to terminate the entire agreement, and that such provision will be replaced with as close a provision thereto as may be legal and valid."39

Although the business intent of the parties may well be to preserve as much of the REA as possible even if portions of it, most notably the operating covenant of the retailer/debtor, terminate, this contradicts the general rule that "a debtor may not pick and choose provisions of an executory contract to be rejected and must reject the contract as a whole or assume the contract as a whole"40

Note in the lease context if a bankrupt landlord rejects a tenant lease, the tenant nonetheless retains possession of its real property interest. Although no comparable bankruptcy provision pertains to the property rights under an REA, the lease formulation serves as a model for the rejection of executory provisions with the retention of property rights.41 Another commentator, citing a decision which concludes any fully performed, non-executory portion of an executory contract should not be rescinded as a result of a rejection of an executory contract, states:

"A persuasive argument could be make with respect to the granting of a reciprocal easements or any covenant or servitude that is deemed to run with the land, namely that these covenants would survive the rejection of the REA assuming that the rights in the easements and other covenants have fully vested and have not in any way been terminated as generally determined pursuant to state law."42

Although termination of the REA is troublesome, each of the commentators considering this topic and cited herein 43 suggest the courts ought to seek a balance between the benefits to the bankrupt estate and the detriment to the other parties to the REA in deciding whether to permit termination of an REA. For example:

"the proper analysis should ...[relate to] the substance of the relationship between the parties; the effect of rejection of the so-called property right on the non-debtor party(ies); the degree of reliance by the non-debtor party(ies) on the continued existence of
the right; and the degree of damage to the non-debtor
party(ies) that may result from the elimination of the
right and the general effect on commercial expectations
if such right may be eliminated."44

Also the conclusion of another article:

"In passing upon a request to approve the
rejection of an REA the court should consider not
only the impact of the proposed rejection upon the
debtor estate but also the balance between the
relative value to the estate of the rejection and
the impact of the rejection upon third
parties."45

And lastly:

"in light of the principles under the Bankruptcy
Code that recognize the nature and importance of a
shopping center as an integrated, multi-owner
enterprise, the determination of the treatment of
an REA under Section 365 is subject to analogy
with respect to treatment of leases for premises
of a shopping center..."46

As a practical matter the courts have ended up
balancing the equities not because they have decided REA
termination cases, but because the cases present themselves as
assignment and assumption cases and the equities have been easier
to weigh and the legal issues less weighty.

VI. THE NAMEPLATE CONCEPT

Operating covenants often occur within leases, or in some
instances courts have implied covenants of continuous operation
within leases.47 Despite the now considerable court scrutiny of
operating covenants within leases, sparse case law exists
concerning operating covenants contained within an REA.

In the Net Realty case cited earlier 48 the operating
covenant in question required operation of the store under the
name Korvettes. Korvettes abandoned the lease upon filing
bankruptcy leaving its landlord with the impossible obligation to
operate under the name Korvettes. The court held impossibility of
performance dictated that the landlord render a reasonable
substitute performance; in this instance the lease to another
retailer who would operate a first-class department store. The
court opined that the "ultimate purpose of the EOA [REA] is to
ensure the continued operation of three first-class department
stores in the mall".49 Therefore, the only "sensible"50
approach was the entry into the center of another first class
department store.
Similarly, in the Federated Town Center Case the court viewed a high quality, full line retail store as a fine replacement for the bankrupt anchor in the center. The court had tentatively approved the sale of 8 Jordan Marsh stores to Mervyn's for $80 million dollars. In the Town Center Shopping Center the operating covenant required the name "Jordan Marsh" or "such other name as used by Allied for substantially all of its stores of the same type generally being operated on the east coast of the State of Florida.52

The owner of the center, JMB, raised all manner of objections to Mervyn's and asserted that adequate assurance of future performance required the court to consider tenant mix as a recognized element of shopping center economics.53 The fact that 365(b)3 requiring consideration of tenant mix applied specifically to leases should not be dispositive as to whether such a test should also be used in a court determination of "adequate assurance" under 365(f). In sum its argument was:

"Likewise contrary to Debtor's contention, when the Boca REA and the Jordan Marsh operating covenant are read as a whole and in the context in which they were executed, there can be no doubt that operation of a high quality, full line retail department store at the prime Jordan Marsh anchor location in the Boca Town Center is essential to the full benefit of the bargain to which Town Center Investment Associates is entitled under 365(f)."54

Allied, in response, pointed out the limitations of the Jordan Marsh operating covenant under which Jordan Marsh could substantially upgrade or downgrade its operations without violating its operating covenant.55 No doubt also coloring the court's perspective, Allied had unearthed a JMB internal memorandum indicating that Mervyn's would be a perfect fit for the center.56

The court approved the assignment of the operating covenant to Mervyn's claiming the "nameplate" requirement was the only aspect of performance that Mervyn's could not satisfy.57 The court also noted that such an assignment provision, if honored, would act as a de facto prohibition of assignment unenforceable under the Bankruptcy Code.58

VII. OTHER TIMELY ISSUES

A. Expansions of Existing Centers

Although the bankruptcy courts provide ample grist for lawyers to consider, many practical legal issues reside outside the courts. Fact specific, most are too detailed for consideration here, but I'll mention two general issues.
In this economy dominant regional centers control the market. To aggressively remain the dominant regional, a center may need the attraction of an additional magnet anchor tenant. The legal architecture for this addition of an anchor and usually mall space which will use, in large part, the existing paperwork foundation, will differ from one center to another as much as the brick and mortar architecture will differ.

A common problem arises when a permanent lender abdicates interest in financing the construction of the new anchor and mall space, but retains a first mortgage on the remainder of the developer site. Splitting the developer parcel so that each mortgagee owns a separate and distinct parcel in the event each forecloses can be quite a feat. The developer of course owns both parcels and bridles at the thought of the delay and expense of modifying REA documents to divvy up developer's rights and obligations under the REA, prospective to the date of separate ownership. The majors may resist a formal division insisting there be only one successor to the current developer. Certainly they would resist granting a second party the right to enforce operating covenants, and would exact an inducement for any change in the REA. The bandaid solution to this dilemma may be a mini-REA in which the mortgagees create from the developer parcel two separate parcels. The mini-REA creates easements between the new expansion space and the existing mall, restates both negative and affirmative covenants for the benefit of the sub-parcels and establishes which party has the voting and approval rights of the developer under the larger REA. This gerrymrigged structure, if haphazardly constructed, may, however, offer a faulty foundation if the mortgagees do ultimately foreclose resulting in separate ownership of the parcels.

While untangling the complications created by potential dual ownership, a developer may suggest that the master REA overlays easements on the entire center thus benefitting both the foreclosing construction lender and the foreclosing permanent lender. Although the master REA creates easements over the developer parcel as the servient parcel for the benefit of the other anchor parcels as the dominant parcels, and over the anchor parcels as the servient parcels for the benefit of the developer parcel as the dominant parcel, the master REA does not create easements between the parcels which together compose the developer's parcel. If one party blocked access, restricted parking, or otherwise failed to comply with the REA, the other parties to the REA would have clear rights under the master REA, but the owner of the remaining portion of the developer's site would have a far more tortuous route to a remedy.

A variation of this problem occurs when the construction lender takes a second mortgage on only the new construction. Again, separate ownership of portions of a single parcel can result. Oftentimes, the developer, blinded by the fact he owns the entire parcel and viewing foreclosure as only a
theoretical concern, fails to create adequate documentation to address potential separate ownership. Some particularly messy situations result if a lease space spans both parcels, or if the operating obligations of the developer are met in part by operations on both parcels. Of course, the same dual ownership problems loom if the permanent lender subordinates to the construction lender.

B. Package Deal Negotiating Stance

As difficult as an expansion might be in this economic climate the task becomes immeasurably harder when a retailer attempts to package all its dealings with a single developer into a single bargain. The quid pro quo for an expansion consent in one center could be an added inducement in a second center, or third, or fourth center. Of course what might make sense to a developer in the overall context of his negotiations with a particular retailer may work to the detriment of a party, be it limited partner or mortgagee, who has an interest in only one center. Even more onerous for the developer, a retailer may seek to package all its controversies with another retailer into a single negotiation without regard to whether the developer is a participant in the other centers. Such a position can stymie a developer presented with a limited number of retailers capable of anchoring a center and shackled with the unavoidable need to negotiate with existing anchors on unplanned expansions.

VIII. Conclusion

Economics, perhaps as much as the lawyers, shape the legal framework of a center. Although the REA stands as the commonplace solution to the tricky problems of multi-ownership of a regional retail center, current economic problems, the realities of negotiating compromises, and the dual impediments of time and money all imperil the classic perfection of the textbook REA. Although the dire threat of bankruptcy rejection of a REA will seldom if ever materialize, the bankruptcy courts will no doubt continue to shepherd replacement anchors into the space vacated by bankrupt retailers. Developers, and of course lenders, will consider default and bankruptcy as a distinct possibility rather than a theoretical risk. This realism will color and shape requirements for legal documentation. For the foreseeable future, the complicated issues involving REA's will be those resulting from makeshift solutions to difficult legal issues created by tough compromises and harsh economics.

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ENDNOTES


3. These include notably Federated and its Allied chain, Carter, Hawley, Hale, Hooker and its Bonwit Teller and Saks Fifth Avenue chains and others.


5. See for example In the Matter of Federated Dep't Stores, Inc., Case No 1-90-00131, Slip Opinion, Oct. 9, 1991 (B. Ct., W.D. Ohio) (hereinafter referred to as the Federated Town Center Case).

6. See discussion following at p. 11 et seq.

7. Such a provision is typically found in the REA. If not the matter may be subject to dispute.

8. Infra, n. 3.

9. This may simply reflect how essential a successful anchor is to a regional center.


12. Id. at 590.

13. Id. at 549; Reviewing an REA, supra at 655 et seq.

14. Terkel, supra at 547.

15. See discussion following at p. et seq and the article and cases cited therein.

16. See Terkle, supra at 571 et seq; Reviewing an REA, supra at 652 et seq.


18. See discussion at p. 8 et seq.

19. See Terkle, supra at 576 and cases cited at n. 145.
20. See Terkle, supra at 576 et seq.; Reviewing an REA, supra at 658 et seq.

21. Terkle, supra at 557.

22. Id. at 569.

23. Reviewing an REA, supra at 658.

24. A sample provision: "If any term, provision, covenant or condition of this REA shall, to any extent, be invalid or unenforceable, the remainder of this REA (or the application of such term, provision, covenant or condition to persons or circumstances other than those in respect of which it is invalid or unenforceable) except those terms, provisions, covenants or conditions which are made subject to or conditioned upon such invalid or unenforceable term, provision, covenant or condition, shall not be affected thereby, and each other term, provision, covenant and condition of this REA, unless conditioned upon such invalid or unenforceable term, provision, covenant or condition, shall be valid and enforceable to the fullest extent permitted by law".


27. Id. at n.6.

28. See discussion at p. 8 and the articles cited therein.

29. Net Realty Holding Trust v. Franconia Properties, Inc., 544 F.Supp 759 (E.D. Va., 1982)759,769 (finding substantial performance of the operating covenant despite inability to use the required name); Federated Town Center Case; see discussion infra at p. .

30. See Memorandum of Town Center Investment Associates in Response to Debtors' Motions for Partial Summary Judgment with Respect to Town Center's Objections to Motion of Debtors for Authority to Sell Certain Property Including Leaseholds, and to Assume and Assign Certain Related Agreements to Mervyn's and J.C. Penney Company, Inc., Federated Town Center Case, supra at p. 2 et seq., appearing as Appendix F in Feinstein, N., Materials Related to Shopping Center Reciprocal Easement Agreements, Leases, and the Federated - Allied Chapter 11, International Council of Shopping Centers (hereinafter Town Center Brief).

31. Garfinkel, supra, at 8 et seq.

32. Kahn, supra at 34.

33. See Garfinkle, supra at 8 et seq; also Kahn, supra at 34.

34. Cherkis & King, supra § 4.04.

35. Savage, supra, at 118

36. Id. at 119.

37. Id. at 112.

38. Id. at 112, citing In re Richmond Metal Finishers, Inc., 756 F. 2d 1043.
39. Terkel, supra at 584.

40. Garfinkle, supra at 17 and cases cited in n.80.

41. Kahn, supra at 35.


43. Garfinkle, supra at 24; Savage, supra at 120; Kahn, supra at 36.

44. Kahn, supra at 34.

45. Garfinkel, supra at 24.

46. Savage, supra at 120.


48. Net Realty, supra.

49. Id. at 769.

50. Id. at 769.

51. Federated Town Center Case, supra.

52. Id.

53. Town Center Brief, supra.

54. Id. at 3.

55. Memorandum of Law in Support of Debtor's Motion for Partial Summary Judgment Regarding Enforceability of Operating Covenant of Town Center REA, Federated Town Center Case, supra at p. 4, appearing at appendix E, Feinstein supra.

56. Id. n. 4 at 5.

57. Federated Town Center Case, supra, at 10.

58. Id.