October 1991 Vol. 9 No. 4

NEWSLETTER

AMERICAN COLLEGE OF REAL ESTATE LAWYERS

Message From The President

One of the objectives of the College is the promotion of high standards of professional and ethical responsibility in the practice of real estate law. My recent experience indicates that ACREL can find numerous opportunities to carry out that objective.

Recently, I attended a short program on ethical and professionalism issues confronting real property lawyers. One of the program hypotheticals examined the practice of including in routine residential leases and sales contracts boilerplate that was prohibited or unenforceable under applicable law. The lawyer playing the role of draftsman was asked to explain/justify such practices on behalf of his client. Another panelist took the other side and a third panelist (an ethics expert) explained to the audience the ethical obligations of the draftsman.

I was glad non-lawyers were not present to hear the panelists discussing how it could be ethically okay to include prohibited or unenforceable provisions in such real estate contracts. Typically, these agreements are not reviewed by a lawyer before signing because the agreement is perceived by the tenant/buyer to be a "standard" form; one that cannot be changed without the expenditure of time and money not available to the tenant/buyer. The draftsman of these agreements can capitalize on the fact that no lawyer will be involved on the other side. The panel's discussion brought into sharp focus professionalism issues rather than ethical issues.

The inclusion of unenforceable and *in terrorem* provisions in real estate agreements is sought to be justified on the grounds of economic necessity to prevent small claims litigation by the tenant/buyer against the landlord/seller. In other words, the draftsman prepares the agreement with the expectation that a party to an agreement who does not have a lawyer or cannot afford one will read the agreement and conclude that certain legal rights and remedies are not available. I believe that such practice is ethical under most state rules, but is it professional?

The panelists observed that most states do not penalize a lawyer for such practices and lawyers don't feel any pressure to change their ways. Lawyers appear therefore to be unwilling to police themselves absent the stick of a penalty to be assessed by the state. Also, the practice is justified on the theory that the draftsman is only preparing a form and is not taking advantage of a party to a transaction who is not represented by counsel. A variation on this theme is the intentional failure to mention statutory rights available to a tenant/buyer. If the agreement is silent, the party not represented by counsel will not know of the rights and will not seek to enforce them. That precise situation was not discussed by the panelists.

A Texas jury recently gave a rape victim a very large punitive damage judgment against an apartment management company because the manager said the tenant was not entitled to certain services that a landlord is obliged by statute to provide on request. That misstatement was found to be a deceptive trade practice and a cause of the tenant's injuries. It does not seem fanciful to assume a similar result in a situation where a lease draftsman intentionally omits any mention of tenant services authorized by statute in hopes that the tenant will not ask for them.

In early August, Vice President Quayle's remarks about lawyers were widely reported. In the opinion of the White House Council on Competitiveness, lawyers are responsible for some of the things that make this nation's economy less competitive. Admittedly, some of the observations made by Mr. Quayle and the Council about the litigation process are correct, but I don't know that the Council's recommendations will solve our economic problems. Given the publicity surrounding Mr. Quayle's remarks and the "amens" heard from the public, lawyers should consider improving their public image. The practices discussed by the panel don't do much to help the image of real estate lawyers.

The College distributed to you the ACREL draft Statement of Policy concerning the use of a generic exception to the typical enforceability opinion required in mortgage loan transactions. A great deal of time, energy and thought

CONTENTS

went into the preparation of that draft and I expect more will be expended in fine tuning it.

Have you considered why such an exception to the enforceability opinion is necessary? Typically, our commercial mortgage loan documents include some provisions or remedies that are unenforceable or are unavailable or might not be available for a particular default. As a consequence, counsel for the borrower must point out in the opinion letter those provisions or remedies that are of questionable enforceability under applicable law. Wouldn't a more professional approach be to have the loan documents contain only enforceable provisions?

I don't mean to get on a soap box about these matters, but as members of the most prestigious group of real estate lawyers in the country, it behooves us to do what we can to improve the standing of lawyers generally and particularly the public's perception of each of us. To the extent that we fail to promote professionalism, both by word and in our practices, we abandon the field to our critics and provide the public more grist for their mill.

We expect a great Fall meeting in San Francisco with a large turnout and a cutting edge program on opinions. I particularly look forward to greeting the College members who were admitted to membership at the close of the Spring meeting. Please make every effort to make each of them welcome.

At its August meeting, the Board of Governors authorized retaining a communications consultant to evaluate this newsletter and to make recommendations for its future direction. The Board wants the newsletter to be a valuable method of communication by the College to its members and the Board concluded an evaluation by a professional consultant was necessary. Hopefully, the consultant's recommendations can be received and implemented early next year.

The book publication effort between ACREL and ABA Press will culminate in the next few months with the publication of the first two volumes of The ACREL Papers. You will be receiving advertising material concerning the purchase of those books. The second group of our materials is now in the editing/pre-publication process.

My term as President of the College ends with the close of the San Francisco meeting. I believe ACREL has had a good year and I hope the College and its leadership have been responsive to your needs. Your officers, Board, committees and staff have worked diligently throughout this year to promote the objectives of the College and to serve you. Dick Goldberg becomes President of the College at the conclusion of the Fall meeting and I look forward to his year as our President.

—John S. Hollyfield

ACREL Files AMICUS Brief In ZZZZ Best

by Robert Zinman
Chair, Amicus Curiae Briefs Committee

The American College of Real Estate Lawyers recently filed a brief in the Supreme Court case of *Union Bank v Wolas* (*In re* ZZZZ Best Co.) on Certiorari from the Ninth Circuit (897 F.2d 1479).

The case, which could have a significant adverse affect on real estate mortgage transactions, affirmed the Ninth Circuit's previous holding that the exception to the unlawful preference provision of the Bankruptcy Code for transfers in the ordinary course of business (section 547 (c)(2)) did not apply to long term debt, such as real estate mortgages. This has the effect of making payments of principal and interest during the applicable preference period subject to being set aside as unlawful preferences.

What especially concerned ACREL was that when combined with the holding in the *Deprizio* line of cases, which applies the one year insider preference period to preferential transfers to non-insiders when the loan is guaranteed by an insider (*Levit v. Ingersoll Rand Fin. Corp.*, 874 F.2d 1186 (7th Cir. 1989)), an entire year's payments of interest and principal may be recovered from the lender where the loan is guaranteed by an insider of the debtor.

The Ninth Circuit's decision was based on its interpretation of Congressional intent when Congress removed a former requirement that limited the ordinary course exception to transfers made within 45 days of the incurrence of the indebtedness. An important contribution made by the ACREL brief was to focus attention on previously unavailable legislative history that indicated Congress was aware of the concern of long term lenders when it made the change in the law. For this purpose the American Council of Life Insurance, which had been working with Congress during the drafting of the change, joined with ACREL in the brief.

ACREL further argued that the plain meaning of the ordinary course exception and its legislative history mandated inclusion of long term debt within the class of protected payments and that the Ninth Circuit's decision put long term lenders at a severe disadvantage and made financing more difficult for persons with less than the highest credit rating.

The ACREL drafting team was composed of Bruce Hyman, Walt Taggart, Alan Robin and Bob Zinman, who was Counsel of Record for ACREL. Assisting the drafting committee were Christopher F. Graham and Jill H. Ashman of Thacher Profitt & Wood, and Eugene Yamamoto of Landels, Ripley & Diamond.

The case is set for oral argument before the Supreme Court on November 5, 1991.

1991 ACREL Members

ARIZONA

Bruce B. May
Streich Lang
100 W. Washington
Suite 2100
Phoenix, AZ 85003
602/229-5620

ARKANSAS

Darrell D. Dover
Dover & Dixon
425 West Capitol Avenue
Suite 3700
Little Rock, AR 72201
501/375-9151

CALIFORNIA

Melvyn I. Mark
Titchell, Maltzman, Mark, Bass, Ohleyer and Mishel
650 California Street
29th Floor
San Francisco, CA 94108
415/393-5600

Harry N. Mixon
Prudential Realty Group
4 Embarcadero Center
Suite 2700
San Francisco, CA 94111
415/291-5040

Thomas G. Roberts
Baker & Hostetler, McCutchen Black
600 Wilshire Blvd.
10th Floor
Los Angeles, CA 90017
213/624-2400

Katharine Rosenberry
CA Western School of Law
350 Cedar Street
San Diego, CA 92101
619/239-0391

COLORADO

Mark A. Senn
Senn, Lewis, Visciano, Hoth & Strahle, P.C.
1801 California Street
Suite 4300
Denver, CO 80202
303/298-1122

CONNECTICUT

Mark A. Asmar
Schatz & Schatz, Ribicoff & Kotkin
90 State House Square
Hartford, CT 06103-3902
202/722-1411

Richard D. Jones
Pepe & Hazard
Goodwin Square
Hartford, CT 06103-4302
203/522-5175

FLORIDA

Jerry E. Aron
Gunster, Yoakley & Stewart, P.A.
777 S. Flagler Drive
Suite 500, P.O. Box 4587
West Palm Beach, FL
33402-4587
407/655-1980

GEORGIA

Bruce P. Cohen
Cohen/David & Associates, P.C.
325 Hammond Drive
Suite 112
Atlanta, GA 30338
404/256-7802

Marc Andrew Kauss
Kilpatrick & Cody
100 Galleria Parkway, N.W.
Suite 1750
Atlanta, GA 30339
404/956-2620

Christine N. Markussen
Metropolitan Life Insurance Co.
303 Perimeter Center North
Suite 600
Atlanta, GA 30346-2090
404/393-0630

ILLINOIS

David Glickstein
Greenberger, Krauss & Jacobs
180 North LaSalle Street
Suite 2700
Chicago, IL 60601
312/346-1300

Alan Goldberg
Arnstein & Lehr
120 South Riverside Plaza
Suite 1200
Chicago, IL 60606
312/876-7133

Mark G. Henning
Winston & Strawn
35 West Wacker Drive
Chicago, IL 60601
312/558-5793

INDIANA

James M. Barkley
Melvin Simon & Associates, Inc.
Merchants Plaza
115 W. Washington Street
Indianapolis, IN 46204
317/263-7083

LOUISANA

Leon J. Reymond
Liskow & Lewis
One Shell Square
50th Floor
New Orleans, LA 70139
504/581-7979

Leopold Z. Sher
McGlinchey, Stafford, Cellini & Lang, PC
643 Magazine Street
New Orleans, LA 70130-3477
504/586-1200

MAINE

Charles R. Oestreicher
Verrill & Dana
One Portland Square
P.O. Box 586
Portland, ME 04112
207/774-4000

MARYLAND

Gordon H. Glenn
The Rouse Company
10275 Little Patuxent Parkway
Columbia, MD 21044
301/992-6405

Lewis A. Kann
South Charles Realty Corp
25 South Charles Street
Baltimore, MD 21201
301/528-2458

Mark Pollak
Piper & Marbury
36 South Charles Street
Baltimore, MD 21201
301/539-2530

MASSACHUSETTS

Robert A. Fishman
Nutter, McClennen & Fish
One International Place
Boston, MA 02110-2699
617/439-2000

MICHIGAN

James R. Brown
Mika, Meyers, Beckett & Jones
200 Ottawa Avenue, N.W.
Suite 700
Grand Rapids, MI 49503
616/459-3200

NEW JERSEY

Jeffrey H. Newman
Sills Cummis Zuckerman Radin Tischman Epstein & Gross, P.A.
One Riverfront Plaza
Newark, NJ 07102-5400
201/643-5788

NEW YORK

Donald G. Glascoff, Jr.
Cadwalader, Wickersham & Taft
100 Maiden Lane
New York, NY 10038
212/504-6166

Emanuel B. Halper
Emanuel B. Halper, P.C.
410 Jericho Turnpike
Jericho, New York 11753
516/681-8500

Robert A. Kandel
Kaye, Scholer, Fierman, Hays & Handler
425 Park Avenue
New York, NY 10022
212/836-8206

Alan A. Lascher
Weil, Gotshal & Manges
767 Fifth Avenue
New York, NY 10153
212/310-8144

T. Mary McDonald
Harter, Secrest & Emery
700 Midtown Tower
Rochester, NY 14604
716/232-6500 ►

NORTH CAROLINA
Alfred G. Adams
Van Winkle, Buck, Wall, Starnes and Davis, P.A.
P.O. Box 7376
Asheville, NC 28802
704/258-2991

OHIO
James B. Cushman
Vorys, Sater, Seymour and Pease
52 East Gay Street
Columbus, OH 43216-1008
614/464-6254

Norman W. Gutmacher
Benesch, Friedlander, Coplan & Aronoff
1100 Citizens Building
850 Euclid Avenue
Cleveland, OH 44114
216/363-4591

Richard L. Reppert
Jones, Day, Reavis & Pogue
901 Lakeside Avenue
Cleveland, OH 44114
216/586-7235

PENNSYLVANIA
Ronald M. Agulnick
Crawford, Wilson, Ryan & Agulnick, P.C.
220 West Gay Street
West Chester, PA 19380
215/431-4500

Sanford M. Rosenbloom
Schnader, Harrison, Segal & Lewis
1600 Market Street
Suite 3600
Philadelphia, PA 19103
215/751-2484

SOUTH DAKOTA
P. Daniel Donohue
Davenport, Evans, Hurwitz & Smith
513 S. Main Avenue
P.O. Box 1030
Sioux Falls, SD 57101-1030
605/336-2880

TENNESSEE
William Rowlett Scott
Armstrong, Allen, Prewitt, Gentry, Johnston & Holmes
1900 One Commerce Square
Memphis, TN 38103
901/523-8211

VIRGINIA
James W. Theobald
Hirschler, Fleischer, Weinberg, Cox & Allen
P.O. Box 1Q
Richmond, VA 23202
804/771-9513

STAFFBOX

The ACREL Newsletter is published by the American College of Real Estate Lawyers, 733 15th Street, NW • Suite 700 Washington, DC 20005 202/393-1344. Items from this publication may be reprinted with permission from the editor.

Co-Chairs, Newsletter Committee
Harris Ominsky
Blank, Rome, Comisky & McCauley
Philadelphia, PA

Nina Matis
Katten, Muchin & Zavis
Chicago, IL

Editor
Jill H. Pace
Executive Director

ACRELades

BRUCE J. BERGMAN is the recent author of: "Blessed Clarification: First Mortgage vs. Condominium Common Charges," *19 Real Property Law Section Newsletter 9*, (July, 1991); "Settling the Mortgage Foreclosure - A Lender's 'How To' Perspective," *NSMA Equity - The Journal of the Second Mortgage Profession* (June 1991); and "Eviction After Foreclosure - Has Self-Help Arrived?" *19 Real Property Law Section Newsletter 22* (January, 1991).

LAWRENCE A. KOBRIN authored an article in the *New York Law Journal*, titled "Cautions About New Contract Form," May 1991, which relates to new multi-bar residential transfers. While applauding the new revision, the article notes several cautions. This follows a similar article 2 years ago addressed to new co-op apartment transfers which appeared in the *Law Journal*, March 15, 1989.

HAROLD I. LEVINE is the first recipient of the Illinois State Bar Association Pro Bono Service Award. Levine has founded the Annual Conference on the Prevention of Homelessness, designed to assist attorneys and others to detect and remedy legal problems that cause homelessness. The third such conference is tentatively scheduled for March, 1991.

HARRIS OMINSKY was elected Chairman of the Philadelphia Bar Association's Real Property Section. He recently authored the following articles: "When Lender Benevolence Backfires" (*Pennsylvania Law Journal-Reporter*), "Bankruptcy Ruling Allows Creditor to Jump its Lien Position" (*The Legal Intelligencer*), and " A Disadvantage of Nonrecourse Financing" (*The Mortgage and Real Estate Executives Report*).

The following ACREL Members have been selected as officers of the Real Property Law Committee of the Chicago Bar Association for 1991-1992:

STANLEY P. SKLAR - *Chairman*
CHARLES L. EDWARDS - *Vice-Chairman*
RAYMOND L. WERNER - *Secretary*

MICHAEL H. RUBIN recently wrote a section on Louisiana law for the publication *The Law of Distressed Real Estate*, Baxter Dunaway, Clark Boardman Company, New York.

LAWRENCE A. SHULMAN, "Options to Renew, Expand and Contract (With Forms)," *The Practical Real Estate Lawyer*, (with Jonathan C. Chudnoff), Vol. 7, No. 4, July 1991.

Pennsylvania Supreme Court Halts Historic Preservation

by Harris Ominsky
Blank, Rome, Comisky & McCauley
Philadelphia, PA

Often I heard tales of which I said, 'Now this is a thing that cannot happen.' But before a year had elapsed I heard that it actually had come to pass somewhere. Gimpel the Fool, *Isaac Bashevis Singer*

In a surprising case, the Pennsylvania Supreme Court recently held that application of Philadelphia's historic building preservation law caused an unconstitutional taking of private property without just compensation (*United Artists Theater Circuit, Inc. v. City of Philadelphia*, No. 48 E.D. Appeal Docket 1990, PA Sup. Ct., July 10, 1991). The City has asked the Court to reconsider its decision and has been joined in this petition by the Pennsylvania Attorney General, the National Trust for Historic Preservation, the United States Conference of Mayors, the American Planning Association, the American Institute of Architects and other organizations.

UNPRECEDENTED DECISION

In *United Artists*, the Philadelphia Historical Commission had designated the Boyd Theater as an historic building over objection of the owner. At the designation hearing, the City had presented testimony that the Boyd Theater was an important example of art deco architecture, the work of an important Philadelphia architectural firm, and as a movie palace, represented a significant phase in cultural history.

The owner introduced evidence that an historic designation meant that the owners could not alter or demolish the building or change the property, either inside or out, without consent of the Historical Commission. There was an uncontradicted assertion that after historic designation, the only thing that an owner can lawfully do without a permit is to paint and paper; and could not even move a mirror from one wall to the other.

Despite the owner's complaints about potential controls on its use, when the owner was turned down for a demolition permit, it did not pursue its appeal rights to conclusion. In fact, the voided ordinance expressly affords owners a method to request an exemption from its provisions on the basis of financial hardship. Since the owner had not yet exhausted the available administrative procedures, the City argued that the taking challenge was not even "ripe" for judicial review.

While the Court acknowledged that the objectives of historic preservation are "laudable," it held that the costs associated with those goals should be borne by all the taxpayers and not just the owner of the historic property. Many observers view this decision as a death knell to the movement to preserve our historical heritage. The Court attempted to balance the just compensation section of the Pennsylvania Constitution (Article I, Section 10) against the Pennsylvania Constitutional provision that gives the public a right to "preservation of the natural scenic, historic and esthetic values of the environment" (Article I, Section 27). While the decision purported to deal with the just compensation section of the Pennsylvania Constitution, the United States Constitution and many other state constitutions have the same just compensation provision.

The decision is unprecedented and unorthodox because if the briefs on the application for reargument are correct, the Pennsylvania Supreme Court is the first court in the nation to find an historic preservation law unconstitutional. The U.S. Supreme Court has upheld a similar New York preservation law (*Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 1978), and courts in 25 states have specifically sustained historic preservation ordinances.

In addition, the City maintains that the Boyd Theater case "has imperiled over 15,000 buildings that have been historically certified in Philadelphia over a 35-year period." Two existing historic districts, and five pending districts "supported by their respective communities have also been jeopardized." And municipalities throughout the Commonwealth are now "exposed to millions of dollars of potential liability claims by landowners."

Apparently, none of this background was included in the briefs or the arguments before the decision. In its brief, the owner did not even argue that there was an unconstitutional taking. Essentially, the Court raised this issue in the oral argument and pursued it on its own.

The *United Artists* case does not present the most sympathetic facts to set the framework for historic preservation. After all, it is only a movie theater built in the twentieth century and not the Betsy Ross House or Christ Church. For example, an architect testified that out of a list of 18 features which distinguished the art deco style, only five of them were incorporated in the exterior of the theater. Moreover, he considered the theater a mediocre building and testified that the architectural firm which designed it was not even known for its art deco work.

In addition, the court was troubled by the lack of firmness in the Commission's hearing procedures and by the Commission's apparent control over even interior changes. Although the Court did not mention it, the entertainment industry has dramatically changed over the past 40 years or so; and with the intrusion of television, theater owners have sought to demolish theaters or redesign them to

accommodate small audiences and other tastes. In this context, the Commission's potential control over changes to a theater weighs even more heavily than it would with other types of buildings.

In fact, while three out of the seven Justices concurred with the majority, they would have decided the case against the City merely by a statutory interpretation limiting the ordinance to control of only the exterior of buildings. The concurring Justices did not believe the Court had to throw out the whole ordinance.

WHAT'S LEFT?

The decision leaves many questions unanswered about historic designations. From now on, will municipalities be required to obtain owner-approval to historic preservation? If this precedent is broadly followed, what will be the role of historic commissions throughout Pennsylvania?

Perhaps commissions will still have a role in administering historic programs where owners can be induced to consent. The federal tax laws provide various tax credits for historically certified buildings. Some owners will undoubtedly continue to seek those designations for tax reasons.

But suppose owners are not interested. What is left? Would the Court have permitted Philadelphia to designate a large historic area or district, as municipalities frequently do? The Court expressed concern that the City targeted the Boyd Theater and treated it differently from neighboring properties. It analogized that to "spot zoning," which has been declared illegal.

However, based on the reasoning in the rest of the opinion, it would seem that the Court would have made the same decision even if the case involved an historic district instead of one building. This issue will probably be decided in future cases. One of the issues that troubled the Court was the apparent lack of "due process" in the Commission's designation hearing. The Commissioners appeared to act as witness, judge, and jury. Would a similar ordinance which provides for fairer procedures be more acceptable?

Would it have made any differences if the ordinance did not give the commission such broad powers? Suppose the definition of "historic" was more narrowly drawn and the control over changes limited only to significant historic exterior features?

WHO BENEFITS?

How many other owners will have claims under the Boyd Theater decision? How about owners who do not consent to the designation but do not appeal from the historic designation. To assert their rights, do they have to appeal the designation or may they merely apply for compensating damages?

Can they recover damages even though they intend no alterations and have never been denied a building permit?

Will the ruling apply retroactively to historic designations made before the date of the decision? Old original Bookbinders has now filed a claim under the Eminent Domain Code for a property certified as historic over 21 years ago!

How much time do owners have to challenge the designation or request compensation? Will Philadelphia now be hit with a rash of claims by owners who were designated without consent during the past few years? If that happens, will the City be able to revoke or rescind the designation in order to avoid compensatory claims?

Does the decision mean that owners can merely ignore the now unconstitutional ordinance and its restrictions? If they can, what damages have they suffered?

If the former owners now have rights to compensation, will those rights pass to successors, such as purchasers, foreclosing lenders, heirs or other beneficiaries who now own these certified properties? It is possible that former owners will claim losses resulting from the effect of the historic designation on the value of their properties. A seller may claim that his buyer paid a low price because he was concerned about the historic restrictions against renovations or demolition, and about anticipated delays and the cost of processing needed approvals.

The scope of *United Artists* is not clear, and unless it is clarified or modified, Pennsylvania municipalities will be unwilling to designate historic buildings without owners' consent. Today most municipalities struggle to balance already tight budgets, and they will be unwilling to risk liability to owners by attempting to preserve historic sites.

The Pennsylvania decision is an aberration among all of the decisions that have interpreted constitutional just compensation provisions. However, the Court's view was that the costs associated with historic preservation should be borne by all of the taxpayers, and not just the hapless owner of the historic property. The battle between public goals and private rights continues throughout the United States, and it would not be surprising to find that *United Artists* is argued as precedent in challenging the applications of historic preservation laws and other governmental actions regulating the use of real estate throughout the country.

Calendar

1991 Annual Meeting
October 10-14, 1991
Ritz-Carlton
San Francisco, CA

1992 Annual Meeting
October 22-25, 1992
Four Seasons & Ritz-Carlton
Chicago, IL

1992 Mid-Year Meeting
April 2-5, 1992
Four Seasons
Maui, HI

1993 Mid-Year Meeting
April 21-25, 1993
Marriott Rivercenter
San Antonio, TX