ACREL News

President's Message

Happy summer to you all! I hope you are seeing in your practices some improvement in the economy. While the year speeds along, many new, and some continuing, developments are advancing at ACREL.

Have You Registered for the Annual Meeting?

If not, what are you waiting for? October 20 will be here before you know it. Our ever creative Programs Committee, under the leadership of Rob Freedman and with fabulous planning assistance from Larry McLaughlin and Jay Neveloff, has prepared a terrific CLE agenda for us, entitled, *Creative Structures for Dynamic Markets: The Rebirth of Opportunities in the City of Brotherly Love.*

You also are the beneficiaries of tour and restaurant advice from Dick Goldberg, Julian Rackow and an enthusiastic group of Philly ACREL Fellows who could not wait to share their tips. The registration materials can be reached via this link: http://www.acrel.org/Private/DrawMeetings.aspx?Action=GetDetails&MeetingID=21.

Speaking of the Annual Meeting, please do be mindful of the opportunities there to meet Fellows and their guests who are new to ACREL or attending a meeting for the first time. We had a very enthusiastic response to our request for volunteers to serve as Mentors for new Fellows, but we need all Fellows to reach out and make new (and recently new) Fellows and their guests feel very welcome.

Close readers will note that I referred above to new and recently new Fellows. I feel it's important to emphasize that, in addition to the 2011 class of new Fellows, there are many Fellows from the last 2 or 3 years who are just acclimating to ACREL meetings, so please make a special effort to make them and their guests welcome, too. Those of us who regularly attend meetings value the time spent developing friendships among ACREL regulars, so let's all do our best to spread that collegiality.

It's Time [Almost] for Nominations for New Fellows

Those of you with good memories will recall that my last President's Message welcomed the 2011 Class of ACREL Fellows. Well, it's almost time to submit nominations for the 2012 Class! I hope all of you have been giving serious thought to pros-

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pects for ACREL membership. As I visit with Fellows at local ACREL meetings, we always discuss this topic.

I raise the topic of nominations not because we are losing Fellows. Of course, every year some Fellows seek senior status and some retire altogether, as is expected. Even with that natural occurrence, our overall number of Fellows continues to rise and currently is over 950. However, we all know that, much as the innovations of the cosmetics industry allow us to mask it, none of us is getting any younger, and we – each and every ACREL Fellow - always need to pay attention to recruiting new ACREL Fellows.

In particular, I encourage each of you to pull out your Directory and page though the list of the Fellows in your state. How many are approaching or over age 60? Does the roster from your state reflect the diversity of real estate lawyers in your state? I have a feeling we all know distinguished real estate lawyers who belong in ACREL, so it's time for us to each step forward and share that good news with the Member Selection Committee and the other ACREL Fellows.

By the way, there is no tenure requirement as to nominators – all ACREL Fellows may nominate prospective members. I hope our newer Fellows in particular will find the information below helpful as they submit their first nominations.

Speaking of sharing, I want to share with you some tips on nominations that I have gathered through the recent discussions with Fellows, as well as feedback we have gotten from the Member Selection Committee and the Member Development Committee.

➢ Did you know that the Directory and the ACREL website have several resources that will assist you in evaluating prospective nominees and submitting or seconding a nomination?

- These include the Bylaws, which state the standard for admission (Article III, Section 1(a)) and for nominating and seconding (Article III, Section 3). Here is the link to the website for the Bylaws: http://www.acrel.org/Private/DrawCommitteeContent.aspx?Action=CommitteeContent&CommitteeContentID=1599, which also begin on page 7 of your Directory.

- Other resources in the Directory and on the website include the Guidelines for Regular Member Selection and accompanying Commentary. The Guidelines include the ground rules for nominating and seconding and detailed criteria applied by the Member Selection Committee and the Board of Governors.

- The Commentary highlights areas of the criteria that frequently generate questions, namely, our objective to recruit "the best real estate lawyers in the United States", the "distinction" requirement and the "give back" requirement. Here is the link

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STAFF BOX

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to the website for the Guidelines and Commentary: http://www.acrel.org/Private/DrawCommittees.aspx?Action=ShowOneCommittee&CommitteeID=MEM.

I am reminding you about these resources because I find in discussing nominations that Fellows often are not aware that the Guidelines and Commentary exist, or they otherwise are not aware of policies expressed in them. For instance, one Fellow commented to me that he understood that the "give back" requirement had been eliminated. In reality, nothing could be further from the truth. While we all realize that it may be a challenge to identify prospective candidates whose resumes evidence the quantity and quality of "give back" we ACREL Fellows value, the ACREL Board of Governors has re-affirmed more than once in my tenure of Board service that this is a fundamental value.

- If you have questions about the selection criteria or any other aspect of the nomination process, please do reach out to the Member Selection Committee, chaired by Diana Liu (link to roster: http://www.acrel.org/Private/DrawContacts.aspx?MemberID=1108&ContactID=12824&PageID=50), or the Member Development Committee, chaired by Aasia Mustakeem (link to roster: http://www.acrel.org/Private/DrawContacts.aspx?MemberID=1141&ContactID=12923&PageID=50). Particularly if you are from a state with a small number of Fellows or one with little or no diversity, the Member Development Committee may have some concrete suggestions for identifying prospective candidates.

- Compare notes with the ACREL Fellows in your state or city. This can be a helpful way to arrange for introductions if you know a prospective candidate, but other ACREL Fellows in your city or state do not yet know him or her. While I note that we discourage lobbying campaigns, or any pressure exerted by one Fellow on another as to nominations, it is acceptable to discuss prospective nominees. To my mind, this is an appropriate demonstration of ACREL collegiality.

- If you find a potential candidate who does not yet have the quality and quantity of "give back" ACREL expects, consider how you can help that candidate to achieve it. For instance, you can enlist the help of other ACREL Fellows in your state and beyond to make introductions for opportunities to speak or write for a broader audience than the candidate's community affords. The discussions you have while comparing notes on candidates (see preceding bullet) can include this kind of collaboration.

I hope that these comments about nominations are helpful.

Make New Friends and Keep the Old: Webinars with MBA in addition to ALI-ABA

Our webinar production pace is gaining speed and volume. We have presented seven webinars to date this year, all with ALI-ABA.

January 25 *"Why Worry About Conflicts…"* - Mike Rubin, Marilyn Maloney, Nicole Kibert

June 13 *Insurance Issues in Case of Developer, Owner, Landlord, Tenant or Contractor Default* -- Marilyn Maloney, William Locke, Charles Comiskey

June 15 *Seller Financing for Commercial Real Estate* - Mason Stephenson, Todd

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Holleman, Jade Newburn, Jeffrey Usow

June 28 *The Art of Lease Negotiation* - Andy Herz, Art Menor, Ray Truitt

June 29 *Tips for Negotiating Effective Workout Documents* - John Nolan, Steven Davidson, Michael Hamilton and Steve Alden

July 20 *Loan Modifications, Workouts and the FDIC: Is Your Deal Dead if Your Bank Dies?* - Les Nicholson, William Kroener, III, Rex Veal

August 3 *Overreaching by Lenders and Borrowers: Undercutting the Terms of Loan Documents*, Jane Snoddy Smith, Tom Whelan

We have more ALI-ABA programs coming up in 2011:

Sept. 14 *The Social Media Thicket: Surviving and Thriving in a Tangled Web,* Mike Rubin, Kathy Gutierrez

Early Sept. *Basics of Ground Leases,* organized by Sandy Weiner

Early Oct. *Public Private Partnerships in the Age of Economic Distress,* organized by Bob Thompson.

In addition, we recently signed a webinar agreement with the Mortgage Bankers Association. Our first webinar with the MBA is coming in September, dealing with Transfer Fee Covenants. The presenters will include Tamara King, Associate Vice President of Loan Production at the MBA, and, from ACREL, Joanne Stubblefield and Carl Lisman. We are excited about the opportunity offered by the MBA collaboration to bring the ACREL brand to a broader audience, which we feel is a great benefit for our Fellows.

Many of our webinars are replays of programs presented at our ACREL meetings, and some are fresh presentations. If you have suggestions for webinar topics or speakers, whether for presentation by ACREL or with the ALI-ABA or MBA, please contact Steve Waters.

ACREL Logo

We announced the ACREL Logo Policy earlier this year. If you are curious about how this has been put into use by Fellows, you can use this link to see my business card, with logo: http://www.acrel.org/Documents/Committees/StriefskyCard.pdf

These links take you to the websites of Fellows who have included prominent mention of ACREL in their webpages: http://www.bakerdonelson.com/kenneth-p-ezell/; http://www.nyemaster.com/aspx/attorney_profiles.aspx?id=38; http://www.wilentz.com/Attorney_Bio.aspx?ID=1221; http://www.alblawfirm.com/index.cfm?pageid=9&itemid=1&view=21

You may use this link to read the full Logo policy: http://www.acrel.org/Private/DrawCommitteeContent.aspx?Action=CommitteeContent&CommitteeContentID=1958.)

Please let us know about any feedback you receive when you use the ACREL logo.

And the Local ACREL Meetings Keep on Coming

ACREL Fellows have demonstrated the collegiality we all value by attending local meetings this year. Here are those that occurred since the June President's Message:

Cleveland luncheon on June 20, organized by Dianne Coscarelli.

Houston luncheon on June 20 at Liskow and Lewis, organized by Marilyn Maloney.

Dallas reception 5:30 – 7 on August 2 at Winstead PC office, oganized by Ed Peterson & John Nolan.

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These local meetings are coming up:

San Antonio reception 5 to 7 on August 18, co-hosted by Steve Waters and Bebb Francis, in the Haynes and Boone office.

Seattle reception following by dinner on August 30 – organized by Gordon Tanner.

Cocktail reception in September in Atlanta, hosted by Andy Kaus. (The folks in Atlanta enjoyed the April event in Atlanta so much that another was quickly scheduled.)

Chicago event, being organized by Alvin Katz.

Los Angeles event, being organized by Ira Waldman.

Organizing a meeting involves minimal time and effort: pick a date, plan the format and send out email invitations. Some meetings have been sponsored by hosting Fellows or their firms, while others are paid as you go, with costs split by those attending.

The Orientation and Integration Committee is standing by to provide tips and make it as easy as possible for the volunteers to organize. If you are interested in organizing a meeting, please contact Ken Jacobson, Kathy Murphy or Trev Peterson of the Orientation and Integration Committee; Angela Christy, the Board of Governors liaison to the Orientation and Integration Committee; or Jill Pace at the ACREL office. If you are in one of the cities listed above for which a meeting is being planned, you also may reach out to the organizer to offer your assistance.

In any event, please be sure to advise Jill Pace and me as soon as you have a date set, as I have been attending as many of the meetings as I can manage.

Title Insurance Survey Report on Use of Title Assurance in International Transactions

You will find posted on the ACREL Home Page a memorandum setting forth the results of the survey conducted this Spring by Fellows Mike Rubin, Paul McNamara and Dean Rogeness regarding member involvement and experiences in non-U.S. real estate transactions. It is first and foremost a survey by ACREL Fellows of ACREL Fellows and their experiences with such transactions which in itself makes for interesting reading. ACREL has indeed gone global!

The memorandum also includes general information on such transactions and describes ongoing efforts to be pursued, both within ACREL and jointly with the American Land Title Association, to provide to ACREL Fellows useful information on real estate transactions in the major commercial centers of the world. Our thanks to the many Fellows who took the time to respond to the survey. Messrs. Rubin, McNamara and Rogeness, as part of the ongoing project, invite you to share your experiences in the handling of non-U.S. Transactions by sending an email directly to them.

Substantive Committee Opportunities

Did you know that ACREL has a dozen substantive law committees? Some, such as Leasing and Title Insurance, have existed for many, many years, while others, such as Public/Private partnerships and Hotels and Hospitality, are only a couple or so years old . Appointment to a substantive law committee is at your fingertips – just call me or send me an email. Don't be shy – give a committee or two a try. There is no obligation and no waiting! Your Directory includes a list of the committees and committee leadership is in the Directory and on the website. If you are not sure if a committee is the right one for you, you can drop in on one (or three) when you attend the Philadelphia meeting in

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October. Substantive committees are a particularly good way to become involved in ACREL if you cannot attend ACREL meetings regularly, as many committees schedule conference calls and attend to projects all year round You can visit the webpage for each committee to check out the current projects and obtain more information.

Pilot Project: Outreach to Law Schools Continues in Philadelphia

As you know, in Tucson we initiated a pilot project of outreach to law schools located near our meeting sites. We will continue that in Philadelphia. We have initiated contacts with the Deans of the law schools at the University of Pennsylvania, Temple and Villanova. We will invite the Deans to attend our Thursday night reception. We also will invite participation by real estate law faculty from those law schools at our Philly CLE program.

In a trend that we at ACREL find troubling, many law schools have cut back on the number of credit hours devoted to real property law in the curriculum and, given the state of the economy, few students may recognize the appeal of a career in real estate law. The goal of our program is to increase familiarity among law schools, their real estate faculty and law students about ACREL and the developments in real estate law that we find exciting. The Law School Teaching Working Group is developing recommendations for formalizing this pilot project.

Please be on the lookout for our special guests at the Philadelphia meeting and make them feel very welcome at ACREL.

Planning for Meetings in 2012 in Las Vegas and Chicago and for 2013

Larry Shulman is leading the charge for the Programs Committee as we look forward to the 2012 meetings. The program planning for 2012 is very far along. As you know, we plan our CLE programs a year in advance for the most part, so the Programs Committee has begun focusing on 2013 programs, which will be held in Naples, Florida and Vancouver.

We welcome your suggestions for tours and restaurants in Las Vegas and Chicago, and for an ACREL Cares project in Las Vegas.

In addition, your suggestions for ACREL programs and speakers of course always are welcome; please send them on to Larry.

The ACREL Suggestion Box Is Always Open

If you have questions, comments or suggestions on anything regarding ACREL, please do get in touch with me. Your thoughts are always very welcome.

I hope you all enjoy rest of the summer, and look forward to seeing you all of you and your guests in October in Philadelphia.

Best regards,

Call for Volunteers

Fellows interested in writing for and/or speaking at ACREL programs are urged to contact Larry Shulman, lshulman@shulmanrogers.com.

Report of the ACREL Nominating Committee

The ACREL 2011 Nominating Committee, as appointed by President Linda Striefsky, consists of Kevin L. Shepherd (MD) as Chair; Philip D. Weller (TX), Rod Clement (MS), Jay A. Neveloff (NY), Joan H. Story (CA), and Steven A. Waters (TX).

Pursuant to Article VI, Section 2(b) of the Bylaws, Ann M. Saegert (TX) will automatically become the President on January 1, 2012.

Pursuant to Article VI, Section 2(a) of the Bylaws, the Nominating Committee nominates the following individuals for election to the offices indicated for terms commencing January 1, 2012:

Jonathan R. Shils (GA)	President-Elect
Thomas F. Kaufman (DC)	Vice-President
Kenneth M. Jacobson (IL)	Treasurer
Kathryn C. Murphy (MA)	Secretary

Pursuant to Article V, Section 3 of the Bylaws, the Nominating Committee nominates the following individuals for election as Governors for three-year terms commencing January 1, 2012:

Steven R. Davidson (IL)
Vicki R. Harding (MI)
Cheryl A. Kelly (MO)
Lawrence D. McLaughlin (MI)
Ira J. Waldman (CA)

The Committee appreciates having had this opportunity to nominate future leaders of the College. ■

ACRELades

John Daniels was featured in the May/June issue of "Diversity & The Bar," published by the Minority Corporate Counsel Association, in an article entitled, "Powering Up: A Look at the First Generation of Minority Managing Partners."

Jay Epstien was selected by the National Law Journal as one of its "Visionary Leaders" in Washington, DC. He is recognized for his role as an advisor to a broad range of clients, and "…his countless hours recruiting upwards of 75 lawyers to DLA Piper…transforming the firm's practice…" to the top-ranked real estate practice in the U.S.

Howard Gordon was honored as the recipient of the 2011 Traver Scholar Award, created by Virginia CLE and the Real Property Section of the Virginia State Bar to honor those who "embody the highest ideals and expertise in the practice of real estate law." It was named for the "father" of Virginia real estate lawyers, ACREL Fellow **Courtland L. Traver.**

Ira Waldman was inducted into the Bates Scholar-Athlete Society, in recognition of his 40 years of service and loyalty to Bates College, where he has been involved in a wide range of activites, from class agent to Alumni Council member. ■

When New York Law Governs Out-of-State Collateral

by Andrew H. Levy and Micah J.B. McOwen

New York is the most common jurisdiction selected to govern mortgage loan documents, even for collateral located outside New York state (including for multi-asset portfolio loans). Lenders often utilize "split-law" in mortgages (where New York law applies to all aspects except for such items as local state-specific perfection, recovery and other procedural requirements).

However, this practice can have unintended consequences due to some inconsistency in the application of New York's traditional recovery requirements and limitations on recovery to out-of-state collateral.

Before agreeing to apply New York law to a promissory note secured by a mortgage on property in another state, or accepting a guaranty governed by New York law on a multi-state loan facility, or foreclosing in one state while pursuing a debt recovery action in another state, etc., both lenders and borrowers should understand the potential ramifications, and, specifically, the impact of New York's one-action rule (New York State Real Property Actions and Proceedings Law (RPAPL) §1301) and anti-deficiency rule (New York RPAPL §1371) on the recovery process.

The One-Action Rule

New York, like at least 17 other states,[1] has a so-called "one-action" or "election of remedies" rule, which restricts a lender from simultaneously seeking recovery against a debt and foreclosing against the real property collateral securing that debt.

Specifically, in New York lenders must typically choose either to (a) foreclose on the mortgage securing such debt and then sue the borrower (and/or any guarantor) for any deficiency, or (b) sue the borrower/guarantor under the promissory note/guaranty for such debt, execute on that judgment, and then foreclose to satisfy any deficiency.

Lenders may not commence a second action in New York while another New York recovery action is pending, without special permission from the judge in the first action.

Where collateral is outside New York, however, lenders have at times dual-tracked recovery under New York law loan documents by simultaneously seeking to recover on the debt/guaranty in New York while the foreclosure process continues elsewhere in the country. The Appellate Division, First Department reaffirmed this practice in *Cohn*, holding that the one-action rule is inapplicable if the secured property is in another state, at least in states without a one-action rule of their own.[2]

However, given the disproportionate choice of New York law to govern loan documents elsewhere, inevitably other states' judges have interpreted RPAPL §1301, and not always in the same manner as New York jurists.

A New Jersey court, for example, has held

1. Arizona, California, Idaho, Indiana, Iowa, Kansas, Michigan, Montana, Nebraska, Nevada, New Jersey, Oklahoma, South Carolina, South Dakota, Utah, Washington and Wyoming. See generally FORECLOSURE LAW & RELATED REMEDIES: A STATE-BY-STATE DIGEST (Sidney A. Keyles, ed., Section of Real Property, Probate and Trust Law, American Bar Association, 1995).

2. *Wells Fargo Bank Minnesota, N.A. v. Cohn*, 771 N.Y.S.2d 649, 649 (N.Y. App. Div. 1st Dept. 2004). The trial court "noted" that the states of foreclosure did not have a one-action rule, 230 NYLJ, 16, col. 2, at col. 3 (N.Y. Sup. Ct. July 23, 2003), but the First Department was silent on this passage, 771 N.Y.S.2d at 649.

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that despite RPAPL §1301 (and despite New Jersey's own one-action rule), a debt action can be brought in New Jersey during the pendency of, and prior to completing, the foreclosure on a New York property.[3]

In a different scenario, a lender sued guarantors in Idaho federal court under a guaranty governed by New York law while a foreclosure was pending in Idaho state court, i.e., both cases were in Idaho courts. The Idaho federal district court held that RPAPL §1301 could apply whenever a foreclosure and separate proceeding to recover the debt were brought in the same state, whether in New York or not.[4]

These cases show that there is some uncertainty inherent when applying New York law to recovery of debts secured by collateral in other states.

Adding still further nuance, courts (both in and outside of New York) have held that RPAPL §1301's prohibition on simultaneous actions "to recover any part of the mortgage debt" does not prohibit actions by one lender against different debts secured by the same property (e.g., junior/senior debt), or by two lenders against the same debtor. In short, New York's one-action rule "is debt specific and mortgagee specific."[5]

However, distinguishing what constitutes one "mortgage debt" can be difficult. For example, the Third Department stayed one foreclosure because of a debtor's pending litigation against the lender for fraud and deceptive business practices, reasoning that the actions were "sufficiently similar" to merit joint resolution of both.[6]

Yet the First Department has held that an action against a guarantor's alleged breach of a credit agreement created a new "debt stemming from" the principal's breach, distinct from the mortgage debt, and thus a foreclosure action would not be stayed.[7]

As an out-of-state example, the Idaho federal district court in *Boespflug* (discussed previously) agreed with a lender's contention that it was not seeking a deficiency judgment or repayment of loan proceeds, but rather "damages" for bad-boy acts, and accordingly held that RPAPL §1301 should not serve to stay the debt action.[8]

Of course, there is a vast difference between distinguishing different lien parties and priorities, on the one hand, and parsing "types" of recovery under the same loan documents, on the other.

Since most sophisticated commercial lenders insist on the obligations of the mortgagor under a mortgage including the mortgagor's obligations under all loan documents (i.e., a mortgage typically secures not only the money borrowed, but also amounts for damages due to a default), the *Boespflug* court's distinction may be a tenuous one.

If the determinative analysis for recovery rests on whether a specific loan default is within "the mortgage debt," this may create an arena for litigation gamesmanship, with lenders characteriz-

3. *Light v. Granatell*, 410 A.2d 266, 270 (N.J. Super. Ct. App. Div. 1979). Note, however, that the court decided the case in part based on unique circumstances ("strong grounds") making it seemingly inevitable that the plaintiff lender would inevitably resort to a New Jersey action on the note after the New York foreclosure action anyway. See id.

4. *Credit Suisse v. Boespflug,* No. CV08-139-S-EJL, 2009 U.S. Dist. LEXIS 23788, at *10-*11 (D. Idaho March 25, 2009).

5. *Mfrs. Trade & Trust Bank v Dann,* 651 N.E.2d 1278, 1280 (N.Y. 1995).

6. *Nat'l Mgmt. Corp. v. Adolfi,* 715 N.Y.S.2d 526, 528 (N.Y. App. Div. 3d Dept. 2000).

7. *P.T. Bank Central Asia v. Wide Motion Corp.,* 649 N.Y.S.2d 151, 152 (N.Y. App. Div. 1st Dept. 1996).

8. *Boespflug,* supra note 4, *3-*4.

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ing defaults as defaults of a principal/guarantor (and thus separate claims), and borrowers countering that such defaults are borrower defaults (and subject to the one-action rule).

Given such judicial developments, the routine use of New York law to govern in multi-state transactions could lead to varied application of the one-action rule, which in turn could lead to forum shopping and other litigation "gaming" by lenders.

For example, if the rationale of *Boespflug* were widely adopted, a lender could theoretically foreclose in one state, bring a separate action against the mortgagor in another state for the deficiency, and bring a third action for "damages" against a guarantor in yet a third state.

The Anti-Deficiency Rule

Going hand in hand with its one-action rule, New York permits a lender, after successfully foreclosing on a mortgage, to seek a deficiency judgment for the excess of the outstanding loan obligations (and permitted interest, penalties and costs) over the higher of (i) the foreclosure sale price and (ii) the "fair and reasonable" market value of the property.

The motion for the deficiency must be made within 90 days after completion of the foreclosure sale (i.e., delivery of the deed) against any borrower or guarantor that the lender holds responsible, or else the foreclosure sale proceeds are deemed full satisfaction of the mortgage debt.

New York courts have generally held that the strictures of RPAPL §1371 do not apply if the property securing the loan is situated outside the state.[9] Other courts have sometimes ruled the same way,[10] but there have been exceptions. A Texas appellate court prohibited a lender from seeking a deficiency judgment against a borrower under New York loan documents because the lender did not meet the strict requirements of RPAPL §1371 following the foreclosure in Texas.[11]

Similarly, a New Jersey court held that RPAPL §1371 is applicable if the parties agree to New York law in loan documents, despite the property being located in New Jersey.[12]

Assuming that the requirements of New York's anti-deficiency rule do apply, a further wrinkle arises with cross-defaulted or "blanket" notes and guaranties in loans secured by mortgages in multiple counties or even states. New York courts have been somewhat inconsistent regarding when the 90-day period in which to seek a deficiency begins to run.

Despite holding that the one-action rule "is debt specific and mortgagee specific," New York's highest court apparently does not believe that the anti-deficiency rule is subject to the same principle. In *Sanders*, the Court of Appeals held that when a single debt is secured by two mortgages on two different properties with different mortgagors, the 90-day period commences sequentially upon the sale of each one.[13]

9. *Provident Sav. Bank & Trust Co. v. Steinmetz,* 200 N.E. 669, 670-71 (N.Y. 1936); *Lombardo v. Fielding,* 639 N.Y.S.2d 483, 484 (N.Y. App. Div. 2d Dept. 1996).

10. *Chemical Bank v. Dana,* 4 F. App'x 1, 4 (2d Cir. 2001) (holding that RPAPL §1371 did not apply because the secured property was situated in England).

11. *Chase Manhattan Bank, N.A. v. Greenbriar N. Section II,* 835 S.W.2d 720, 724 (Tex. App. 1st Dist. 1992).

12. *Citibank, N.A. v. Errico,* 597 A.2d 1091, 1097 (N.J. Super. Ct. App. Div. 1991).

13. *Sanders v. Palmer,* 68 N.Y.2d 180, 186-87 (N.Y. 1986).

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The Third Department later distinguished *Sanders* by permitting a single deficiency proceeding where the borrower had acquiesced to the staggered foreclosures and did not contest the appraisals establishing the value of the properties.[14]

Could courts view cross-collateralized and cross-defaulted loans across state lines in the same light? Does a lender preserve the ability to bring a deficiency judgment prior to all cross-collateralized mortgages in multiple states having been successfully foreclosed?

Planning Considerations

It is clear that when a loan governed by New York law goes into default, proper recovery strategy on collateral outside of New York may depend upon the court opining. While New York courts have typically held that neither the one-action rule nor the anti-deficiency rule apply, some other courts have held that one or both of these laws could in fact apply.

One possible explanation for the variances is the historic distinction made by courts between "substantive" and "procedural" requirements when reviewing conflicting jurisdictions' laws. Generally, courts utilize the procedural laws of their own jurisdiction but the substantive law of the governing law of choice. But these terms are not consistently interpreted across state lines.

New Jersey courts have held that, while RPAPL §1301 is "procedural," and thus should not apply to a New Jersey action,[15] RPAPL §1371 is "substantive," and thus should apply.[16]

In contrast, the District of Columbia federal district court held that the predecessor statute to RPAPL §1371 was "procedural," and thus New York's anti-deficiency rule did not apply.[17]

Courts frequently note the subtleties between "substantive" and "procedural" laws: Before ultimately determining that RPAPL §1371 was substantive, one Texas court discussed the issue at length in its opinion.[18]

Lenders can minimize the risk of unintentionally restricting their recovery tools when utilizing New York law. For example, multi-state collateral could be pooled not just by asset type, value and other standard underwriting factors, but also in groups based on whether a state has a one-action rule. They could also include clarifying language in the remedies or governing law provisions of loan documents like the following:

> Borrower hereby acknowledges and agrees that from and after any Event of Default, Lender may seek one or more actions, claims and remedies hereunder or under any other Loan Documents, and seek any such actions, claims and remedies concurrently, successively or in any manner Lender may choose, and Borrower hereby expressly acknowledges and agrees that in no event shall New York State Real Property Actions and Proceedings Law §§1301 or 1371 (or any respective successor statute thereto) be interpreted (by the parties hereto or by any court in any jurisdiction, whether in the State of New

14. *Adirondack Trust Co. v. Farone,* 666 N.Y.S.2d 352, 352 (N.Y. App. Div. 3d Dept. 1997).

15. *Granatell,* 410 A.2d at 270.

16. *Errico,* 597 A.2d at 1095.

17. *Bayside Flushing Gardens v. Beuermann,* 36 F.Supp. 706, 708 (D. D.C. 1941).

18. *Greenbriar North Section II,* 835 S.W.2d at 727.

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> York or elsewhere) to so restrict or prohibit any such actions by Lender, Borrower hereby waiving the requirements and protections of such laws to the maximum extent permitted by Applicable Laws in order to give effect to this sentence.

Borrowers could benefit from clarifications of their own, such as that all debt under loan documents constitutes a single "mortgage debt" for purposes of RPAPL §1301 (this may prevent a multi-faceted lender "attack" in recourse loans).

It is difficult to predict whether or to what extent a court in a given state would enforce such provisions, but they could improve predictability during the recovery process and reduce the potential for litigation.

Both lenders and borrowers see advantages in utilizing New York law to govern out-of-state mortgage loans, but it is important to recognize the risks in doing so. When courts outside of the state interpret New York's one-action rule and anti-deficiency laws, the results have been inconsistent.

Lenders and borrowers should understand this risk when originating multi-state loans and planning (or defending against) recovery in states with one-action rules, and consider including clarifying provisions in loan documents with respect to RPAPL §§1301 and 1371. Considering these issues can increase the chances that parties get what they bargain for when applying New York law to the recovery of loan collateral elsewhere.

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Meetings Calendar

2011 Annual Meeting
October 20-23, 2011
The Westin Philadelphia
Philadelphia, PA

2012 Mid-Year Meeting
March 8 - 11, 2012
Four Season Hotel
Las Vegas, NV

2012 Annual Meeting
October 18-21, 2012
Renaissance Hotel
Chicago, IL

2013 Mid-Year Meeting
March 14-17, 2013
Naples Grande Resort
Naples, FL

2013 Annual Meeting
October 17-20, 2013
Four Seasons Hotel
Vancouver, BC, Canada

2014 Mid-Year Meeting
March 27-30, 2014
Grand Hyatt Kauai Resort and Spa
Kauai, HI

2014 Annual Meeting
October 16-19, 2014
InterContinental Hotel
Boston, MA

Come on Down to Florida: The Water is Fine and the Sales are Brisk

by Michael J. Gelfand, Gelfand & Arpe, P.A.[1]

The window of opportunity is open, but perhaps not for long. Florida has taken the lead to reinvigorate failed or failing projects. Florida's "Distressed Condominium Relief Act" can assist many "bulk" sale, purchase and lending transactions concerning Florida condominium units.

The Act will be of special interest to lenders and those working with lenders, as well as for those embarking upon entirely new transactions. The Act has assisted developers and lenders cooperating on the "short sale" of distressed condominium units. The Act has also assisted lenders who obtained and are holding units in their "Real Estate Owned" divisions as well as assisting their subsequent purchasers.

The Act relieves those who buy condominium units in bulk from many significant statutory developer duties, including certain construction warranties, and financial and record keeping obligations![2] It was perceived that these duties, even in today's "price depressed" marketplace, may have inhibited "white knight" buyers from saving "under water" and unsold projects. But, as there always is a "but", the Act, because it is designed to address the current marketplace, is scheduled to sunset, on June 30, 2012. Though there is talk of extending the sunset date, dilly-dallying is not suggested!

The Florida Legislature created for the existing Condominium Act a new Part, VII, and numbered the new bulk sale provisions as Sections 718.701-718.708. In quick summary, these Sections provide:

§718.703 Definitions. An initial threshold for triggering the Act's protections is acquiring seven or more units in a single condominium. Proceeding further, the Act labels two different types of potential investors for different statutory treatment, the Act differentiates between the two as follows:

"Bulk Assignee" who is assigned at least some of the developer's rights; and,

"Bulk Buyer" who receives no assigned rights except for exemptions from one or more of the following: the condominium association's sale marketing limitations, capital contributions, and a right of first refusal.

While there may be multiple Bulk Buyers in a single condominium, there can be only one Bulk Assignee.

To facilitate lenders, the Act was clarified this year to specify that instruments creating a Bulk Assignee may include a certificate of sale and a final judgment of foreclosure; however, to protect lenders, acquisition of units does not automatically create either Bulk Assignee or condominium developer status unless the mortgagee or assignee exercises certain developer rights.

§718.704 Assignment and Assumption. A Bulk Assignee may be exempt from certain

1 Mr. Gelfand is a Florida Bar Board Certified Real Estate Attorney whose practice emphasizes Florida community association law.

2 A Florida condominium unit is a narrowly defined and specific type of real property. Many Florida *fee simple* residential properties located in mandatory membership associations communities are governed by the Florida Homeowners' Association Act, *Florida Statutes* Chapter 720, and do not have developer statutory construction warranties or developer controlled association funding and audit requirements.

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prior developer obligations, including: construction warranties and converter reserve obligations, except for the Bulk Assignee's work; audit; developer appointed director liabilities; failure to fund assessments or budget guarantee if the right to guarantee is not assigned; and, certain other Florida Condominium Act and Declaration of Condominium obligations, unless provided by the Act in the new Part VII. Multiple assignees priority of rights is determined by the date of recording an assignment. Note, insiders and those intending to hinder or defraud are not entitled to these beneficial exemptions. Of course, if a Bulk Assignee desires, such as for marketing or subsequent lender purposes, the Bulk Assignee can expressly assume warranty obligations.

§718.705 Board of Directors and Transition. Transfers under the Act do not trigger transition, or transfer, of control of the condominium association's board of directors. If transition of control to unit owners has not occurred at the time of a bulk transfer, then Bulk Assignees are required to make a good faith effort to acquire items a developer would normally be required to acquire pursuant to Condominium Act to be provided to the condominium association at time of transition, to certify to the condominium association that the missing items are not available, and provide and audit of the condominium association's finances from the date of the bulk acquisition. Substantial compliance with the statutory requirements is required to obtain the benefits of this Part.

§718.706 Offering. Offering more than seven units in any one condominium for sale or for lease in excess of five years, requires a prospectus, a Questions and Answers Sheet, an escrow agreement, and a financial information with disclaimer of missing information if appropriate. A Bulk Assignee must disclose a statement of, and a description of assignment, including the treatment of reserves and contracts. A Bulk Buyer must comply with the declaration of condominium's transfer provisions. Note that the Act's filing and disclosure requirements are not mandated if the bulk purchased units are in turn conveyed in bulk to a single purchaser in a single transaction.

§718.707 Timing. Transfers seeking to trigger the Act's protections must take title as shown by a instrument recorded on or after July 1, 2010, and before July 1, 2012.

§718.708 Liability. A condominium's original developer is not released from liabilities under the Act or declaration.

Of course, this is just a brief summary, including clarifications adopted by the Florida Legislature this year in House Bill 1195, enacted into law effective July 1, 2011, as *Florida Laws* Chapter 2011-196.

So, what are you waiting for? Act now! There is less than twelve months to contract and close! You can do it! There is talk of amending and extending the sunset provisions; however, no bill has been introduced, and you do not want your clients to miss this opportunity. ■

Partnership Disputes: "Marquis of Queensbury Rules"?

by Ray Iwamoto, Schlack Ito, LLLC

In his January 2004 article entitled, "Sweating the Details: Issue and Negotiation Point Checklist for Limited Liability Company Operating Agreement Matters Pertaining to Capital Contributions, Management Structures and Decision-Making, Distributions, Exit Strategies and Indemnification," (*The ACREL Papers Spring 2004,* pp 103-132) our colleague, Ken Jacobson, in footnote 2 poses the following question: "While a discussion of professional responsibility issues is beyond the scope of these materials,…Does counsel represent the sponsor, the LLC or the employees? Would applicable rules of professional conduct preclude counsel from representing the members in a dispute with each other where the counsel had represented the venture in its mortgage financing?"

The law has struggled with the concept as to whether a partnership is to be regarded as an entity or an aggregate of partners. The same probably holds true for limited liability companies. I was involved in litigation involving issues similar to the ones that Ken raises. In connection with these issues, our law firm had to defend against a state court suit that accused us of breaching fiduciary duties. I was local counsel to a partner (Partner B) when it entered into a partnership with Partner A but I did not represent the partnership after it was formed. The partnership was formed to own a hotel in Hawaii. My client also managed the hotel under a hotel management contract.

Partner A gave notice to Partner B that it would arbitrate a claim of mismanagement, breaches of fiduciary duties, and misrepresentation by my client (Partner B) and, to resolve the dispute, gave notice that it was triggering the arbitration clause in the partnership agreement. The parties agreed to stay arbitration while they discussed the matter. During the stay, Partner A demanded access to the partnership books.

My litigation partner responded and treated this as a discovery request. Our law firm then dispatched a paralegal to supervise the production of the books and records. Opposing counsel subsequently amended their claim to breaches of duties, fiduciary and otherwise, by reasons of improper interference with Partner A's right of access to partnership books and records and allowing the lawyers to usurp partnership power to protect the hotel manager. Under the arbitration clause, Partner A named its arbitrator and we had only 10 days to name ours. Since then, when drafting these clauses, I provide for more time. After the panel was selected and arbitration was poised to commence, on the very eve of that commencement, Partner A's counsel filed a civil suit in State court against the law firms defending Partner B, i.e., my law firm and a law firm from the mainland, for breaches of fiduciary duties, a tactic to get our minds off the arbitration.

As I had participated in the negotiation of the partnership agreement, I had to testify at the arbitration and I did so by videoconferencing from the Four Seasons Hotel in Las Vegas where I was attending an ACREL conference. I learned that a limitation of testifying by video conferencing was that I could not see everybody in the arbitration while I testified but they could see me.

The question for the arbitration panel (and thank heaven the middle arbitrator was not only a hotel executive but a very knowledgeable and experienced lawyer) was whether we lawyers represented a partner, the partners or the

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partnership entity. Depending on the answers to these questions, the next question was "did we, as lawyers, breach fiduciary duties to our clients?" Partner A argued that representation of a partner created an implied attorney client relationship between the attorney and the partnership. You will recall that unlike Ken Jacobson's hypothetical, we never at any time represented the partnership. But our client was "Administrative Partner" and produced partnership records for review on behalf of the partnership. In other words, did the partnership turn over the records or did a partner turn over the records to the other partner? If the turning over of the records was a partnership function, then our law firm in supervising the turning over of records represented the partnership and therefore could we or could we not litigate or arbitrate on behalf of one partner against the other?

Partner A argued that since the claims against the hotel operator were claims of the partnership, that Partner B violated its duties to Partner A by retaining the same lawyers to represent both Partner B and the hotel manager in defending against Partner A's claims. As for the lawyers, Partner A argued that the lawyers could not have ethically accepted such engagement and thus engaged in unethical conduct and violated their duties to Partner A. Under Partner A's theory, as we were agents for Partner B, our fiduciary lapses were attributable to Partner B.

Additional interesting questions involved the claims of Partner A against the hotel manager entity, an affiliate of Partner B. Do Partner B's fiduciary duties to its partner require it to step aside and be neutral or to aggressively assist Partner A in litigating or arbitrating claims against the affiliated hotel manager? Can our law firm represent both Partner B and the affiliated Hotel manager?

For expert witnesses, we hired a nationally prominent partnership law professor, a nationally prominent ethics professor, and a University of Hawaii law school ethics professor. The other side hired a local Hawaii lawyer with a focus on ethics. The local lawyer for Partner A cited a single case called Arpadi which stands for the proposition that representation of a partnership creates vicarious representation of the individual partners. *Arpadi v. First MSP Corp.,* 68 Ohio St. 3d 453 (Ohio 1994).

Our University of Hawaii law school ethics professor testified that Arpadi was discredited and in any event there is no case that runs the inference in the other direction, i.e., there is no case that holds that representation of a partner creates an implied attorney client relationship with the partnership.

The attorney expert for Partner A had another novel theory. According to him, Partner B was required to be adverse to the hotel manager, and as a result, Partner B and the hotel manager had to have separate counsel. This was the case even though the executives of both Partner B and the hotel manager were the same people. I don't know if someone asked him the following question: "If I as a human being was Partner B and I as a human being was also the hotel manager under a separate hotel management contract with the partnership, would I have to have two separate lawyers and would I have to have a lobotomy?"

Our partnership law expert testified that the parties agreed to the relationships from the outset and agreed that the affiliate of Partner B would be the hotel manager. He testified that Partner B and the hotel manager had a unity of interest and could mutually defend themselves against attack. He cited a Host Marriot case (I don't have the cite).

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Our nationally prominent ethics professor testified that the answers to these questions depends on the reasonable expectations of the parties and what expectations are reasonable in the context of partnership relationships depends on whether the relationship is in repose or in a dispute. During a dispute, it would not be reasonable for Partner A to expect that Partner B would side with Partner A against its affiliate, the hotel manager. Furthermore, during a dispute, it would be reasonable to expect that Partner B and the lawyers for Partner B and the hotel manager would be protecting the interests solely of Partner B and the hotel manager.

The attorney for Partner A also cited a Hawaii case for the proposition that a lawyer for a fiduciary owes duties to the beneficiary and, therefore, the lawyer for Partner B, with its fiduciary duties to its beneficiary Partner A, also owed duties to Partner A. Our University of Hawaii ethics professor testified that the case did not stand for that proposition but was instead an "implied attorney client relationship" case and had no bearing on our case.

Our nationally prominent ethics professor cited a well known article about the triangular relationship between a fiduciary, the beneficiary, and the lawyer for the fiduciary. See Hazard, "Triangular Lawyer Relationships: An Exploratory Analysis," 1 Georgetown Journal of Legal Ethics 15 (1987). But our expert then testified that this triangular relationship also depends on reasonable expectations, which in turn is influenced by whether the relationship was in repose or in a dispute. With a dispute, you cannot have the normal, customary expectations. In other words, even a triangular relationship depends on what is going on and, here, what is going on is a dispute.

The arbitrators ruled that Partner A was denied appropriate access to the books and records. I suppose this also means that when an arbitration is stayed, there is no arbitration or litigation, and a partner must ignore the dispute and not treat the request for access to records as a discovery request and that, instead, you have to treat it as a request made not within the context of a dispute.

The arbitration panel also ruled that Partner B was entitled to defend itself with counsel of its choice against attacks from Partner A and need not deal with its affiliates by taking the side of Partner A. The panel then denied the relief sought by Partner A, i.e., dissolution of the partnership, or to issue orders that would require Partner B to perform "unnatural acts." The panel cited our expert's testimony that Partner A had no legitimate expectation that Partner B's counsel would protect Partner A's interests. The panel further concluded that we, as counsel for Partner B, acted ethically in all respects and violated no duties to Partner A.

Oh, by the way, what about the litigation filed against the lawyers on the eve of the arbitration hearings? The case proceeded after the arbitration was concluded. The claims were related to the ones that were arbitrated but the arbitration was between the partners. The litigation was against Partner B's counsel and the two executives of Partner B who hired the lawyers pursuant to a claim that doing so was a breach of fiduciary duties as well. The two executives of Partner B were defended by separate mainland counsel and Hawaii counsel. Our mainland co-counsel was defended by separate mainland counsel and Hawaii counsel. Our law firm did not hire mainland counsel but we did hire a Hawaii law firm to represent us. As a result of having to defend ourselves in State court, the arbitration and my description herein became a matter of public record. With this high powered team of lawyers, we won on

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summary judgment and were awarded our legal fees. Due to the number of lawyers involved, the legal fees approached a million dollars just for summary judgment. The case went to the Hawaii Supreme Court where the trial judge's summary judgment on the merits in our favor was upheld but there was a reversal on the attorney's fees which our Supreme Court decided was not authorized under Hawaii law.

As a real estate attorney, I am always impressed with the ingenuity of our litigation brethren in asserting creative legal theories and arguments. Finally, as often stated by loss prevention counsel at ALAS (Attorneys' Liability Assurance Society), there are often no clear answers in ethical quandaries, only good and bad approaches at finding solutions. ■