Fleet Factors: 
A New Basis for Environmental Liability

by Joseph Philip Forte
Thacher, Proffitt & Wood
New York, NY

The U.S. Court of Appeals for the Eleventh Circuit recently issued an opinion that expands a secured lender's potential liability for environmental clean-up costs. The case, United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990) involved interpretation of the secured-creditor exemption under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), an issue of first impression for a federal appellate court. In Fleet Factors the court held that a secured creditor can be held liable for clean-up costs under CERCLA, without being an operator, when the lender "participat[es] in the financial management of a facility to a degree indicating a capacity to influence [n] [entity’s] treatment of hazardous wastes".

I. Facts

The Environmental Protection Agency (the "EPA") brought suit against Fleet Factors Corporation (the "Lender") and the two principal officers and stockholders of Swainsboro Print Works, Inc. ("SPW"), a cloth printing facility, for reimbursement of clean-up costs. The Lender made a motion for summary judgment in its favor. The district court denied the motion on the ground that there were material questions of fact regarding the Lender's liability. The Court of Appeals affirmed the district court's denial of summary judgment and remanded the case for trial.

The Lender in Fleet Factors had entered into a "factoring" agreement with SPW in which the Lender agreed to advance funds against an assignment of the SPW's accounts receivable. SPW granted the Lender a security interest in its equipment, inventory and fixtures, as well as a deed to secure debt (a Georgia form of mortgage) covering the facility's real property. In August, 1979 SPW filed for bankruptcy under Chapter 11 and the factoring agreement continued with the court's approval. In early 1981 the Lender ceased advancing funds. Sometime thereafter, SPW ceased operations and began to liquidate its inventory, while the Lender continued to collect on the accounts receivable assigned to it. In December, 1981, SPW was adjudicated a bankrupt under Chapter 7 and a trustee assumed title and control of the facility. In May, 1982 the Lender foreclosed on a portion of the secured inventory and equipment. The Lender never foreclosed on the facility's real property. The Lender also arranged for an auction of the collateral and for the removal of the unsold equipment by Baldwin Industrial Liquidators and Nix Riggers, respectively.

The EPA inspected the site after the completion of the equipment removal and found 700 drums of stored toxic chemicals and a substantial quantity of materials containing asbestos. The EPA

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Message From the President

Now that you have your 1990 Photo Directory you can flip the page to that ACREL member who just wrote to you and see what she looks like. A special thanks to all of you who took the time to take a picture and send it to us and a special thanks to our Executive Director, Jill Pace, and her Assistant, Judy Tucker, who produced a splendid Directory. It looks great and it will be a useful asset to College members and will enhance our camaraderie.

Our next published directory will combine the Handbook and Directory with the Photo Directory so I hope all of the "not pictured" members will send in their pictures. We welcome any suggestions for improving the Directory.

A warm welcome to our new members. I hope to see you in person at our Annual Meeting. We plan a special reception for new members and first time attendees on Friday evening, October 12th.

A year ago we projected a downturn in the real estate industry in 1990. But we did not expect such a severity in downturn, nor did we expect the savings and loan crisis. The advent of municipal fiscal crisis and the breakdown of infra-structures in the older cities of the Northeast have combined to create a sense of deja-vu of the 70's and the recessions of the 50's and 60's. Re-tooling,

Continued on page 7
Affordable Housing Debate
Taking Center Stage

by Peter W. Salsich, Jr.
Saint Louis University School of Law
St. Louis, MO

The first major overhaul in federal housing policy in over a
decade is undergoing debate in Congress. Major pieces
of legislation in both the Senate and the House offer
prospects of enactment of some type of housing legisla­
tion by the end of the current session.

Concurrently with the federal housing policy debate, numer­
ous cities and states have enacted legislative initiatives and
spurred local efforts to produce more affordable housing or
prevent existing housing stock from being lost to low and moder­
ate income families. A recent report by the Community Develop­
ment Research Center, Graduate School of Management and
Urban Policy of the New School for Social Research in New York,
surveyed the 51 most populated cities and discovered that a
significant number of those cities are funding housing programs
through their own resources. Others have developed active
programs but are dependent on federal or state funds in order to
make those programs productive.

Many states have enacted legislation authorizing the estab­
ishment of a state housing trust fund and appropriating monies to
help seed that fund.

ACREL Housing Committee Organized

Against this background, the College has established a Hous­
ing Committee that has met and developed a recommended plan
of action to encourage College members to participate in the
national effort to respond to the current housing crisis in many of
our cities. The Committee, chaired by Bob Hetlage, has devel­
oped the following plan of action:

1. Gathering, digesting and publishing information about
housing needs to which ACREL members and their firms can
productively respond, and contacts and/or sources for making
contacts with appropriate groups and agencies within the states
and local areas where members are located.

2. Seeking a commitment from members and their firms to
participate at a state or local level.

3. Gathering, digesting and publishing short materials on
programs and types of programs available in the housing area
and sources of information about specific programs for use by
members and their firms who agree to participate.

A long range plan of the Committee is to undertake an analysis
of existing projects to identify what factors lead to successful
projects as a guide to future efforts. The Committee is also dis­
cussing the possibility of co-sponsoring programs with interested
organizations such as the Urban Land Institute.

Also, topics of current interest on housing matters, such as
operation of the Resolution Trust Corporation, the potential of
limited equity co-ops for housing for low income people, and
implementation of the accessibility amendments to the Fair Housing
Act will be discussed from time to time, initially in the newsletter,
and possibly later through separate publications.

The Committee hopes to have a preliminary report on sources
of information regarding housing programs and housing organi­
zations available for interested members at the Annual Meeting.

Pending Federal Legislation

The federal legislation currently under debate has several
components. The centerpiece of the Senate bill (S.566), as
modified by the Senate Banking Committee, is the Housing
Opportunity Partnership (HOP). The Housing Opportunity Part­
nership program is a block grant program that would combine a
number of existing programs into one block grant that would be
disseminated to state and local governments. Based on a recom­
mandation from a national task force which studied housing
policy, the block grant idea is a recognition that states and cities
should have a strong role to play in decisions about how federal
housing dollars are spent. The Housing Block Grant is patterned
after the successful Community Development Block Grant pro­
gram.

The HOP proposal is controversial because of the consolida­
tion of a number of existing programs that have their own interest
groups and the lack of any substantial new money for new housing
construction. While $3.3 billion in new money is authorized in the
Senate bill, most of it would be earmarked for rehabilitation of
existing structures rather than construction of new units.

In the House, a major bill would provide substantial new money
for construction, but in view of the deficit problem, prospects for
success of that portion of the bill are not great. Both the Senate
and the House bills incorporate parts of a major initiative proposed
by President Bush to encourage home ownership by low income
families. That program is known as HOPE, Home Ownership
Opportunities Provided for Everyone.

Both measures also attempt to provide a permanent solution
to the problem associated with pre-payment of federally subsi­
dized mortgages for low income housing units. Under programs

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THROUGH THE LOOKING GLASS — 
DEVELOPMENT IN THE 90’s 

by LEWIS CARROLL’S ALIAS MORTON P. FISHER, JR.

VERSE I 
PEEKING THROUGH THE 
LOOKING GLASS

"All in the golden afternoon
Full leisurely we glide;
For both our oars, with little skill,
By little arms are plied,
While little hands make vain pretense
Our wanderings to guide."

We envision Developer, Alice,
entering a new wonderland,
the world of development
of prime located land.

The purpose of Alice’s
soon-to-be journey,
is to make herself rich,
along with her attorney

Alice is planning a project,
profitable but small,
to be called when completed
Alice’s Wondermall.

As Alice moves through the looking glass
towards the year ’92,
we will try to predict for her
what will be different and new.

The characters in this drama,
each have a name.
Each seeking profit,
recognition and fame.

VERSE II 
QUITE A SITE

The land’s partnership owner will
lease but not sell;
the issues this raises
we all know quite well.

To make matters worse the land is
in Jabberwocky County
which for each new development
exacts a stiff bounty.

For roads and curbs and water and sewer,
will take plenty of bucks for
these amenities to cure.

And the Dormouse delivers
Title report,
with several thorny restrictions
only removable in court.
The Dormouse has been asked
to insure over these and more;
Pity the poor title officer
prostrate on the floor.

Since this is Alice’s first attempt at such an
unusual endeavor
she must find some lenders
who think she’s visionary and clever.

Alice applies to the Mad Hatter,
construction lender renown,
who has the reputation for financing
every project in town.
The problems are complicated
by the need for participants galore
and a permanent commitment
without any floor.

The Mad Hatter’s
commitment requires
a guaranty from Alice,
including a mortgage on Alice’s palace,
but Alice is seeking full exculpation,
on the basis she has
a great reputation.
Though with credit and liquid assets
Alice is without,
the requirement of an LC for the fee
has Alice in a pout.

Now White Rabbit is a permanent lender,
with common market tie;
common market investment will
surely be on the rise.

There are many foreign investors who have
yens, marks and francs
deposited around in a number of off-shore banks
and in a few S & L’s
now gone sour,
leaving the chances of funding
considerably sour.

Unless approval for funding is granted by the RTC,
the entire project could be
way out to sea.

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Note: Quoted material from original text

(Continued on page 4)
VERSE IV
OH FOR A TENANT

The prime anchor tenant will be the Queen of Hearts, the world’s largest seller of varieties of tarts.

The Queen of Hearts is demanding a free right to sublet, but the lenders won’t approve, that’s a sure bet, and the tenant won’t even covenant to operate, with this the lenders refuse to cooperate.

And the loan won’t close because the leases aren’t sound; the lenders won’t even let Alice begin to dig in the ground until amendments are negotiated with changes galore and the permanent lender agrees to a floor.

The loan finally closes and construction is underway; all is bright for Alice, given all the bills to pay and Wondermall opens with a din and a roar.

Customers are lined up at every door of the store. It all looks bright and rosy as the cash registers chime, but suddenly things change; Alice is in for a bad time.

an immediate correction; failing which the lender will seek every recourse even if it means resorting to the courts

VERSE V
THE GLASS BREAKS

"The Queen of Hearts, she made some tarts All on a summer day, The Knave of Hearts, he stole those tarts And took them quite away!"

And when the tarts were gone the deal went south; leaving the White Rabbit down in the mouth.

Default notices are winging from every direction Demanding for each default

"You didn’t believe me then, nor do you want to hear me now, but read this morning Sun and let me say "I told you so!"

The headlines make her case: soaring oil prices and beltway snarls make long-distance commuting unthinkable; electricity shortages; sewer moratoriums; and groundwater declared undrinkable.

Wondermall may be a marvelous mall, but people can’t afford to come there at all.

President Quayle offers prompt reassurance - he says Cassandra’s still wrong:

"Gasoline shortages will slow global warming; exurbia was dumb all along.

We just need a rolling readjustment; we all will be fine come the dawn."

Now maybe he’s right and maybe he’s wrong, but Wondermall can’t even be sold for a song.

VERSARIAN’S EPILOGUE

In walks Cassandra, seen last on Earth Day, and insists upon her little say (though she’s not supposed to be in this play):

In walks Cassandra, seen last on Earth Day, and insists upon her little say (though she’s not supposed to be in this play):

CONTRARIAN’S EPILOGUE

In walks Cassandra, seen last on Earth Day, and insists upon her little say (though she’s not supposed to be in this play):

THE CAST

Developer: Alice
Alice’s Counsel: Tweedledum and Tweedledee
Landowner: The Mock Turtle and the Gryphon, in partnership
Alice’s Construction Lender: The Mad Hatter
Alice’s Leasing Agent: The March Hare
Alice’s Anchor Tenant: The Queen of Hearts
Alice’s Environmental Consultant: Humpty Dumpty
Alice’s Permanent Lender: The White Rabbit
Alice’s Title Insurer: The Dormouse
Alice’s Architect and Contractor: The Walrus and the Carpenter
I. The Revolution is Over - A New Majority Rules (Or Soon Will)

The last two decades have seen a revolution respecting the common law "majority rule" on the right of a commercial landlord to control subletting and assigning of the leasehold estate. Over a dozen cases have addressed the issue, and most of them - identifying an "emerging trend," have refused to enforce lease provisions giving a landlord discretion to withhold consent to proposed sublets and assignments except when, in the judgment of the court, the landlord has acted "reasonably."

The Appendix to this article contains a listing of many of the recent cases, together with some comments as to where they fit on the spectrum of analytic approaches that the article describes. The Appendix also cites five recent cases which have adhered to the traditional view, which most likely is still the technical majority. Despite these five "holdouts" the willingness of courts in so many states to depart from established precedent is a reasonably good indicator that the momentum has permanently shifted. If the new cases have not yet established a majority, it is quite likely they will do so within the next decade.

Prior to this sudden assault, of course, the established law had been that the landlord could restrict subletting and assignment as it wished, so long as a clear provision in the lease gave the landlord that option. Commercial landlords had come to expect control over subletting and assignments as their due, and in a few cases there were abuses - such as provisions that appeared to state that the tenant's mere request for permission to sublet or assign automatically gave the landlord the right to terminate the tenant's lease; or cases in which the landlord refused a reasonable substitute tenant and then, when the original tenant ultimately abandoned, sued the tenant for the term rent without making reasonable efforts to relet.

Perhaps some of the cases in this new "revolution" were responses to such abusive practices, but there really is little that suggests this. Rather, it has appeared that judges at appellate courts around the country have adopted the view that a landlord who agrees to accept a given tenant at a given rent for a set period has no legitimate right to deny a transfer of the leasehold to another tenant unless the new tenant presents significant new risks to the landlord's business.

Landlords, of course, see things differently. First, landlords are uncomfortable with judges and juries, who do not have their dollars invested in the rental property, "second guessing" the reasonableness of their decision on the acceptability of a given tenant. Second, in cases involving a rising market in leaseholds, landlords see a distinct difference in a tenant's renting a premises to conduct a business and a tenant's using a leasehold estate as}

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Affordable Housing Debate
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enacted over 20 years ago, owners of subsidized housing are approaching a point at which it is possible for them to pre-pay their mortgages and take the units out of the subsidized housing market and into the regular real estate market for higher rents or condominium conversions. This has raised fears of a substantial increase in housing problems for low income persons. Solutions that are being sought include allowing investors to recoup their initial investment and to obtain funds to pay exit taxes by permitting not-for-profit groups to purchase the projects when the investor is ready for pre-payment.

Potential Pro Bono Opportunities

Much has been happening in the housing policy area. There is a very real likelihood that by the end of the year a new housing program will be in place. What form it will take is still uncertain, but there is a substantial possibility that local non-profit housing organizations will be invited to compete for funding by cities and states, and that cities and states will be developing housing preservation and production plans as a condition to receipt of federal housing funds. Whether the amount of money actually appropriated is large or small, a new direction in housing policy appears imminent. Communities will be looking for leadership and technical skills to enable them to participate in these new programs. Interested College members will have an opportunity to use their talents and experience to help their communities respond to the housing crisis.

More on the legislation in the next issue of the newsletter.
New Orleans Program Update

The topic of the main program at the 1990 annual meeting in New Orleans will be Partnerships. This program is being organized by Robert Birnbaum of Connecticut and Marvin Leon of California. On Friday, October 12 we will have presentations by the following members:

"Contributions to the Partnership"
Stefan F. Tucker, Washington, DC
Lowell C. Martindale, Newport Beach, CA

"Partnership Management and Distributions"
Nina B. Matis, Chicago, IL
Ronald H. Wilcomes, New York, NY

"Partnership Operational Problems"
Steven M. Alden, New York, NY
William G. Murray, Jr., San Francisco, CA

"Partnerships with Foreign Investors"
David A. Richards, New York, NY
David Tang, Seattle, WA

"Bankruptcy of Partner"
Laurence D. Cherkis, New York, NY

On Saturday morning following the business meeting we will hear about:

"Alternative Investment Vehicles such as Ground Leases, Participating Mortgages, Incentive Management Agreements; Do They Solve the Problems of Partnership?"
Edward N. Barad, Denver, CO
Phillip R. Nicholson, Los Angeles, CA
Albert D. Quentel, Miami, FL

Immediately after windup of the main program topic on Saturday morning we will have Hot Tips on the following subjects from the following speakers:

"DePrizio's - Honor to the Guarantor"
Stephen A. Cowan, San Francisco, CA;

"Statute of Frauds Amendments (SOFA) - A Lender Liability Cushion Against Oral Commitments"
James L. Lipscomb, New York, NY;

"Lawyer Liability Under FiREEA"
Eugene J. Morris, New York NY;

"The New Title Policy Exclusion for Bankruptcy"
James M. Pedowitz, New York, NY; and

"U.S. v. Fleet Factors Corporation - The Lenders Newest CERCLA Dilemma"
Theodore C. Taub, Tampa, FL

The Hot Tips program is being organized by Bernard Rifkin of New York.

On Saturday morning breakfast workshops are being organized by Susan Hoffnagle of Connecticut and Daniel Kellliher of Massachusetts. Sign-ups for these workshops will take place at the meeting in New Orleans.

— Russell L. Johnson
Co-Chair, Program Committee

Coping With the New Rules

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a speculative commodity. The landlords' view is that if the leasehold estate has a "bonus value," and the tenant does not desire to stay, the value should belong to the landlord. In both situations, landlords do not see their positions as either "overreaching" or "unreasonable."

Assuming that landlords' views on the issues have not changed, the question is what should a lawyer representing such landlords do when confronted with the "new wave" of pro-tenant decisions on this issue. Is there any room for the landlord to achieve its goals in the face of the apparent lack of sympathy for the landlord's position in the various court decisions?

As to jurisdictions in which there are existing decisions, the answer depends partly on the theoretical basis the court has used for its conclusions. As to jurisdictions in which the final cases have not yet been decided, lawyers representing landlords would do well to bring to the attention of the court those arguments that "go with the flow"-that acknowledge that there is a new approach to lease interpretation at work, and then seek to achieve the landlord's objectives within the parameters of the new thinking.

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Report of the Nominating Committee

In accordance with Article V, Section 3 of the Bylaws, this report constitutes formal notice of nominations for the Board of Governors by the Nominating Committee.

The Nominating Committee of the American College of Real Estate Lawyers nominates the following persons to serve as officers and members of the Board of Governors for terms starting at the end of the Annual Meeting in October 1990. The term of office of each officer is one year; except as noted below, the term of office of each governor is three years.

John S. Hollyfield of Texas, President-Elect, succeeds automatically to the office of President.

The following persons are nominated as officers:
- President-Elect: Richard R. Goldberg, Maryland
- Vice-President: James L. Cunningham, Colorado
- Secretary: Alan Wayte, California
- Treasurer: Paul E. Roberts, New York

The following persons are nominated for three-year terms (expiring in 1993) as governors:
- William Terry Bray, Texas
- Beverly J. Quail, Colorado
- David Alan Richards, New York
- Donald H. Siskind, New York

In addition, John D. Hastie, Oklahoma, is nominated to complete the term of Alan Wayte which is expiring at the end of 1991.

Message From the President

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creativity and patience should see us through this cycle — workouts, re-structurings and foreclosures will keep us busy. But we should all keep abreast of new technologies and changing national and global conditions which impact on the way we live and work. With this in mind, we are planning, some time in the future, to invite a futurist to meet with our members.

At our Planning Committee meeting in late June, the College gave our Ad Hoc Publication Committee, headed by James Lipscomb, the go-ahead to negotiate a contract with the Real Property, Probate and Trust section of the ABA to publish materials produced by ACREL members. Initially, we will concentrate on publishing hardcover books on major topics presented at our Annual and Spring meetings. Our first endeavor will be the workout program materials presented at Laguna Niguel. The panelists have agreed to devote extra effort to organize their excellent materials for publication. We expect to have plenty of substantial topics and first-rate materials to publish. We congratulate James for launching our ambitious publication efforts. If you are interested in editing and writing, please write to me or contact James Lipscomb directly.

Many of us have been concerned about the implications of the DePrizio decision and I have asked Laurence Cherkis to head an Ad Hoc Committee to analyze the implications of the decision and to combine forces with the National Bankruptcy Conference to consider legislation to counter the impact of the decision. We would like to form a small committee with members familiar with the intricacy of the Bankruptcy Code and interested in participating in this project. So please let me know if you are willing to volunteer for this important matter.

Roger Schwenke and Joe Forte have been active in following new developments in the environmental field and addressing comments on a number of proposals. In particular, we are monitoring the pending legislation dealing with the Innocent Landowner Defense and the Garn Bill, recently introduced to counter the effects of the Fleet Factors decision. These are subjects of primary concern to many landowners, prospective purchasers and lenders. The Fleet Factors case and its implications will be discussed in one of our Hot Tip presentations in New Orleans.

I've appointed an Ad Hoc Committee to study and analyze the recently adopted ALTA Creditors' Rights Exclusion and to recommend modifications. The insurance departments of various states must approve the new Exclusion.

New Orleans, New Orleans, that beautiful French city of wonderful food and gracious people. I'm looking forward to our rendezvous in that historic city. The program promises to be stimulating and constructive. We have choreographed events in such a way to allow us ample time to participate in all the College activities and to enjoy the City's numerous delights. Our Black and White Masque Ball on Saturday night is not formal and we will be entertained by that New Orleans institution — Pete Fountain. If you haven't already signed up you better do so this minute.

I'll see you all there, you hear!

— Flora Schnall
Coping With the New Rules

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deference. Further, and equally important, landlords would like the right to control the economic value in a leasehold if the tenant no longer desires to occupy the premises itself.

It is not yet clear landlords can achieve these goals under the new case law, but the picture is brightening up a bit. One important consideration is whether the basis for the court's decision is concern about restraints on alienation or merely (or primarily) concern about fairness in contract provisions and practice. Another is whether the jurisdiction has adopted a somewhat obscure provision of the Second Restatement on Property.

A. The Restraint on Alienation Cases:

The common law doctrine restricting restraints on alienation of real estate is a device that courts have used on a number of occasions to avoid direct confrontation with the principle of freedom of contract. When the court has concluded that a particular provision of a real estate instrument operates in a way the court disliked, but the provision nevertheless was clearly written, the court's options were limited. A number of courts found that a broad interpretation of the free alienability concept provided doctrinal support for reviewing the reasonableness of harsh contract provisions, at least in real estate agreements.

A lengthy analysis of this doctrine is neither necessary nor appropriate here. But it is appropriate to call attention to the last great movement in the common law courts striking down express provisions in real estate instruments - the "due on sale clause" cases of the mid-80's. Although this started as a consumer movement, the issues soon became broader, and a number of courts concluded that due on sale clauses in commercial mortgages, on balance, "unreasonably restrained" the alienability of the mortgaged property when the mortgagee attempted to increase the economic return on the mortgage as a condition of consenting to transfer.

One would have expected, on the basis of the due on sale clause cases, to see the same kind of analysis applied in the assignment of lease cases. If anything, the concerns about alienability are much more applicable here. And, indeed, a few courts, most notably California in Kendall v. Earnest Pestana and Co. 709 P2d 837 (Cal1985), (but see Section IV of this article for legislative reversal) did base a portion of their holdings against assignment and subletting restraints on the alienability principle.

As one approach to evaluating the assignment clause, Kendall resorted to the "balancing test" used by the California courts in the due on sale issue. The quantum of restraint arising from the provision is balanced against the quantum of justification for its use identified by the court.

The focus of the balancing test as applied in Kendall is the degree to which the alienability of a property interest is restrained at the time the restraint is imposed - in the case of the assignment or sublease clause - at the time the landlord refuses to consent. Thus the entire issue is the justification for the landlord's behavior, not the bargain of the parties.

As a consequence, in jurisdictions that rely upon the restraint on alienation doctrine as a basis for attacking the lease assign-
Fleet Factors
Continued from page 1

cleaned up the hazardous materials, and the federal government then sued the Lender and SPW's two principal officers and stockholders for clean-up costs in the amount of $400,000.

II. CERCLA

CERCLA authorizes the federal government to clean up sites contaminated with hazardous waste and to recover the cleanup costs from the responsible party (or parties). 42 U.S.C.A. §9601 et seq. (1990). These responsible parties include: (1) the present owners and operators of a facility from which there is a release or a threatened release of a hazardous substance; (2) the owner or operator of a facility at the time of hazardous substance disposal; (3) any person who arranged for the treatment or disposal of substances at the facility owned or operated by another; and (4) any person who transported hazardous substances to the facility. 42 U.S.C.A. §9607(a).

CERCLA's definition of "owner or operator" specifically excludes a person who, "without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility." 42 U.S.C.A. §9601(20)(A). Any person or entity which falls within this secured-creditor exemption is exempt from liability under CERCLA as an owner or operator.

III. Standard Necessary for Liability

Existing law prior to Fleet Factors indicated that the CERCLA exemption for secured creditors permitted a lender to provide financial assistance and isolated instances of management advice to its borrower without exposing itself to liability. There would be no risk of CERCLA liability as long as the lender did not participate in the day-to-day management of the business or facility, either before or after the business stopped operations. However, the Eleventh Circuit specifically rejected this interpretation of the exemption as too permissive. The court held that a secured creditor may be liable under §9607(a)(2) of CERCLA "without being an operator, by participating in the financial management of a facility to a degree which indicates a capacity to influence the corporation's treatment of hazardous wastes". The court also held that it is not necessary for the secured creditor to become involved in the "day-to-day operations of the facility" in order to incur liability, "although such conduct will certainly lead to the loss of the protection of [CERCLA's] statutory exemption." Additionally, it is not necessary for the secured creditor to become involved with management decisions regarding hazardous waste. "Rather, a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose."

The court pointed out that although this interpretation of the CERCLA exemption is "less permissive" than that of the lower courts, the decision does not affect the right of a secured creditor to monitor any aspect of the borrower's business without fear of liability. Similarly, the creditor can involve itself in "occasional and discrete financial decisions relating to the protection of its security interest" without exposing itself to liability.

IV. Analysis of the Facts

The court held that prior to the time SPW ceased printing operations, the Lender's involvement with the facility was "within the parameters of the secured creditor exemption to liability". During that time, the Lender regularly advanced funds to SPW against the assignment of SPW's accounts receivable, paid and arranged for security deposits for SPW's utility services, and informed SPW that it would not advance any more money when it determined that its advanced sums exceeded the value of SPW's accounts receivable.

However, the court found that after SPW ceased printing operations at its facility and began to wind down its affairs, the Lender could be found liable under §9607(a)(2) of CERCLA (as an owner or operator of the facility at the time the wastes were disposed of). During that time the Lender required SPW to seek its approval before shipping its goods to customers, established the price for excess inventory, dictated when and to whom the finished goods should be shipped, determined when employees should be laid off, supervised the activity of the office administrator at the site, received and processed SPW's employment and tax forms, controlled access to the facility, and contracted with Baldwin Industrial Liquidators to dispose of the fixtures and equipment at SPW.

Based upon these facts, the court held that "[the Lender's] involvement in the financial management of the facility was pervasive, if not complete", the allegations made by the government "indicate that [the Lender] was also involved in the operational management of the facility" and that "either of these allegations is sufficient as a matter of law to impose CERCLA liability on a secured creditor". Finally the court concluded that "the scope of the secured creditor exemption is not determined by whether the creditor's activity was taken to protect its security interest. What is relevant is the nature and extent of the creditor's involvement with the facility, not its motive."

V. Lenders Encouraged to Investigate and Monitor Borrowers' Actions

The court in Fleet Factors gave no weight to the concern that the more stringent liability standard will provide a disincentive for lenders to involve themselves with borrowers which have potential hazardous waste problems. Instead, the court maintained that this potential for liability should encourage lenders to thoroughly investigate the waste treatment systems and policies of borrowers, and to reflect any increased risk of CERCLA liability in the terms of the loan. Accordingly, lenders will incur only the risks that they bargained for and borrowers, wary that inadequate hazardous treatment can affect their loan, will have great incentive to improve the handling of their hazardous wastes.

VI. Conclusion

Despite the cautionary measures that the court urges lenders to take, potential lender liability for hazardous waste clean-up may not easily be avoided under the Fleet Factors test. Under the "capacity to influence" and "the inference that it could affect hazardous waste disposal" standards the secured lender may find itself liable in a variety of scenarios. A lender risks losing its secured-creditor statutory exemption because it could have exercised control over its borrower's activities regarding hazardous waste treatment. At the same time, a lender that exercises control over its borrower's activities regarding hazardous waste treatment also runs the risk of losing its secured-creditor statutory exemption. More importantly, the decision in Fleet Factors raises substantial doubt that a lender can seize or foreclose on its collateral without incurring liability under CERCLA.

Although Fleet Factors is binding only in the Eleventh Circuit (Alabama, Florida, and Georgia), it is expected to affect courts and lenders nationwide.
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B. The Restatement of Property:

In addition to the common law restraint on alienation doctrine, Kendall also cited, apparently with approval, the Restatement of Property, Second, Section 15(2), which specifically provides that a landlord cannot withhold consent unreasonably to a proposed assignment or subletting. Other cases embraced this approach more directly, resting their entire holding on the provisions of the Restatement, sometimes with very little additional analysis.

Although the Restatement language arguably is an application of the doctrine against restraints on alienation, it also appears to implement a doctrine of “commercial reasonableness.” Like Kendall, it departs from rigid “restraint” analysis when it specifically provides that the parties can agree by contract to give the landlord absolute discretion - so long as such a provision is “freely negotiated.”

“A restraint on alienation without the consent of the landlord of a tenant’s interest in leased property is valid, but the landlord’s consent to an alienation by the tenant cannot be withheld unreasonably, unless a freely negotiated provision in the lease gives the landlord an absolute right to withhold consent.” (emphasis added)

The logical next question for the transactions lawyer is what constitutes a “freely negotiated” provision. One answer, albeit an uncomfortable one in many contexts, is that a provision is “freely negotiated” only when a party may avoid the provision for a reasonable price in terms of other contract concessions. If a landlord offered a tenant a lease with a consent provision that provided for reasonable landlord’s discretion at one rental, and another that provided for absolute discretion at another, lower, rental, and the tenant selected the latter, then it would appear that a “free negotiation” had occurred.

This is not a satisfactory answer for a number of reasons. First, landlords usually would prefer not to sacrifice their discretion at any price. Second, lease negotiations are far more complex than the model suggests, and it would be difficult in many cases to identify what quid went with what quo. Finally, it is unlikely, in the modern world, that the landlord would get what it wanted anyway. The tenant likely would still be able to insist on reasonable behaviour by the landlord for the reasons discussed below.

Other interpretations of “freely negotiated” are perhaps obvious. The parties could separately initial the provision on assignability, or the assignability provision could be placed in larger letters at the beginning or the end of the lease. The problem with these devices is that they might suggest that the assignability provision is not part of the overall bargain for the lease, or that other provisions not treated specially are not “freely negotiated” - which certainly is not the case.

Perhaps a preferable approach would be to cover assignability in a separate document. This would certainly call attention to the provision, but might again suggest that it is not part of the overall lease. Such a problem could be cured, however, by language on this document indicating that it is indeed part and parcel of the overall bargain of the parties.

Most of the above suggestions, however, indicate that the assignment provision is “clearly disclosed,” but do not necessarily indicate that it is “freely negotiated.” Is it enough that the tenant clearly know and acknowledge that transferability is restrained? Official Comment 1 to the Restatement Section states that a provision giving the landlord absolute discretion “is not freely negotiated where [the tenant] has no significant bargaining power in relation to the terms of the lease.” This language does not expressly require that the tenant be able to reject (for a price) the provision giving the landlord discretion. In fact, however, it may be even worse for the landlord. It requires evidence in every case that the tenant has significant bargaining power with respect to the whole lease. Even a negotiated agreement with respect to the transferability of the lease may not be enough. In short, the Restatement appears to leave the question of whether a provision is “freely negotiated” to the judgment of the court at the time the provision is challenged, and thus to deprive the parties of predictability of result at the time of contracting. Full disclosure does not provide certainty of enforceability. None of the cases adopting the Restatement approach discuss this official comment at all, but the adoption of the principle Restatement section most likely would also incorporate this interpretive comment as well.

B. The “Good Faith and Fair Dealing” Cases:

Since the due on sale clause cases were decided, courts in many jurisdictions have taken a decidedly more activist view generally with respect to certain commercial relationships. They have developed the doctrine that a party given a choice of actions under a commercial contract must choose the action that is most consistent with an implied duty of “good faith and fair dealing.” A number of the assignability cases have relied upon this thinking in analyzing the problem. The analysis here seems to be that parties to a contract have a right to assume that the other party will exercise its contract rights in a commercially reasonable manner - hence - the implied covenant flows from the reasonable expectations of the parties.

A recent example of this type of reasoning is the important Maryland Court of Appeals case of Julian v. Christopher, No. 114 (Md. Ct. App. 6/29/90), which holds that, on the basis of this implied duty, the landlord cannot suggest in the contract that it might consent to assignments and subleases when offered, and then unreasonably refuse to consent when the time comes. Like many other cases, Julian concludes that the landlord cannot refuse to consent in order to secure the “bonus value” for itself.

As the above analysis suggests, Julian establishes a clear and easy answer for transaction lawyers seeking to implement the landlord’s goals described above - simply prohibit subleasing and assigning altogether. Then the tenant is not given any basis for believing that the landlord might consent.

Unfortunately, Julian compounds the Restatement confusion when it requires that provisions restricting assignment, or giving the landlord absolute discretion, must be “freely negotiated.” As indicated above, it is difficult to know how this concept should be implemented. Under the Julian rationale, however, it does appear that a better case can be made that a fully disclosed contract provision, even one which the landlord was unwilling to change, meets the “freely negotiated” test. This is because the notion underlying the “good faith and fair dealing” test implemented in Julian is that a tenant not be misled into believing it is getting something that is not there.

Lawyers should be cautious not to overread Julian. The basic thrust is for fair play. If the landlord is really embarking on a course of business in which it anticipates that there will be a number of

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assignments and sublets, it probably should provide for them by contract in advance, and not pretend that they are forbidden. If a landlord who uses a lease with an absolute prohibition on lease transfers later proceeds to negotiate each time a tenant asks for the right to transfer, then it is likely that the courts will conclude that the landlord has implicitly agreed that it will be reasonable in deciding whether to waive the prohibition, despite the absolute language of the lease.

On the other hand, Julian may provide the best hope for those landlords who conclude that they can limit their risk on lease transfer by providing explicitly the circumstances under which they will or will not consent to a lease transfer. It, along with Kendall, would seem to validate a clause that gives to the landlord the right to increase the rentals to market or to obtain some other economic benefit as a condition for consent. Although it is clear that courts tend to view such demands as "unreasonable" when made at the time consent is requested, both cases validate their use in the original contract.

III. Jurisdictions To Which the Revolution Has Yet To Spread:

The notion that a party to a contract implicitly agrees to be reasonable in exercising contract options is likely to be attractive to many courts. It represents an opportunity to avoid unexpectedly harsh results and does not require courts to strain to find some other language in a contract implicitly restricting conduct deemed undesirable. Thus, lawyers in jurisdictions that have not incorporated this doctrine into their interpretation of commercial real estate instruments should anticipate that they may see it before too long.

As this Article has attempted to show, in the lease assignment area, and in many other areas as well, it is likely that the "good faith and fair dealing" rationale may be less frightening than a number of other approaches a court might take to implement any hostility to the assignability clause or other standard commercial practices. The virtue of the "good faith and fair dealing" approach is that it permits parties to allocate clearly consequences in advance. Thus, to the extent that it can foresee problems with lease transfers or issues of wealth allocation resulting from the creation of "bonus value" a landlord can negotiate for provisions in the lease addressing those situations.

Of course, under the old regime, the landlord felt more protected against the unexpected - it could simply state that the tenant had to ask prior consent to a transfer and then wait and see what circumstances existed when the tenant requested permission. In fact, however, despite the language of the cases, landlords never had the unrestricted power to behave unreasonably. Courts have a number of other tools - manipulation of language, discretion over equitable relief and defenses, and control over damage determinations, to name only a few - that have always been available to curtail overreaching.

Thus, by confessing that "good faith and fair dealing" should be the law, at least in the area of commercial lease assignments and subletting, landlords likely aren't losing too much. It is still critical, however, to establish that "freely negotiated" in this context means nothing more than "fully disclosed." Any new litigation in an area might find it necessary to focus attention on this issue.

In addition, lawyers should work with courts to carve out those areas in which landlords are entitled to limit their risk or preserve economic advantage in advance. As Julian indicates, courts are in fact cognizant that parties in the marketplace rely upon the predictability of the contract arrangements, and, to the extent consistent with fairness, courts may be willing, when asked by amicus groups for landlords or others, to provide clarity as to what contract controls over assignment and subletting will be enforced.

An industry guideline from a national landlord's organization might even provide a basis for "trade practice" understandings that would be helpful, assuming counsel are satisfied that antitrust problems could be avoided. Conceivably a court could review and comment on such guidelines.

The courts will not condone abuse, but then, they never really did. Lawyers should not argue for absolute discretion, as this carries with it an opportunity for abuse. The argument should be for reasonable predictability and control over risk.

IV. If You Can't Lick 'Em, Lobby.

Another approach in every jurisdiction, of course, is legislative. This was the ultimate resolution of the due on sale clause controversy. It is also the ultimate resolution of the problems that Kendall created in California. Cal. Civ. Code 1995.220, adopted in 1989, gives to landlords the clarity that Kendall did not. A lease may totally restrain assignments or subletting. It may provide that the landlord can get the "bonus value" if assigning or subletting occurs. If the lease does provide, however, that the lease can be assigned or sublet only with consent or only upon satisfaction of certain conditions, the landlord must be reasonable in determining whether to give consent. In a judicial challenge of the landlord's decision, the tenant has the burden of proof.

CASES REJECTING LANDLORD'S ABSOLUTE DISCRETION:

I. Restraint on Alienation Rationale:

Kendall v. Ernest Pestana Inc. 709 P2d 837 (Cal 1985) (discussed in text - follows both good faith and fair dealing rationale and restraint on alienation approach)

Funk v. Funk, 633 P2d 586 (Idaho 1981) (restraint on alienation rationale - dissent notes that validity of an absolute prohibition is also in doubt under that rationale)

II. Restatement Approach:

Tucson Medical Center v. Zoslow, 712 P2d 459 (Ariz App 1985) (expressly adopts Restatement as the law)


Hendrickson v. Freericks, 620 P2d 205 (Alaska 1980) (dicta) (cites Restatement with apparent approval)

III. Good Faith and Fair Dealing (sometimes described as Commercial Reasonableness)

Homa-Goff Interiors, Inc. v. Cowden, 350 So2d 1035 (Ala 1977) (applies "good faith and fair dealing" rationale, although not by that name - does not discuss whether an absolute prohibition would be valid).

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Americans With Disabilities Act of 1990

by Anita C. Hochstein,*
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Both the Senate and the House of Representatives recently gave final approval to the Americans With Disabilities Act of 1990 ("ADA"). President Bush signed ADA on July 26.

ADA is a civil rights act for disabled persons. It deals with employment (Title I), public services (Title II), public accommodations (Title III), and telecommunications services (Title IV). Although regulations have yet to be issued, ADA may have a significant impact on real estate operations and investment in the United States. This article will highlight briefly a few provisions of ADA, along with some issues raised by them, and will focus particularly on Titles I and III and real estate related issues.

ADA may affect owners, tenants and investors in real estate by requiring physical modifications to existing buildings to eliminate the discriminatory effects of architectural and transportation barriers. It is unclear as of this date what the costs involved will be or how or by whom these costs will be paid.

Background

ADA's stated purposes are:

1. to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
2. to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
3. to ensure that the Federal Government plays a central role in enforcing the standards established...on behalf of individuals with disabilities; and
4. to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities. Section 2(b)

ADA defines a disability, for an individual, as:

A. a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
B. a record of such an impairment; or
C. being regarded as having such an impairment. Section 3(2)

Persons who are currently engaging in the illegal use of drugs are not included (Section 510(a)) and homosexuality and bisexuality are not considered disabilities. Section 511(a). Certain other conditions (transvestitism, pedophilia, exhibitionism, voyeurism, gender identity disorders "not resulting from physical impairments", sexual behavior disorders, compulsive gambling, kleptomania, pyromania) are also excluded as disabilities under Section 511(b).

Title I—Employment

ADA's Section 102 provides that "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." Section 102(a). A "covered entity" includes an employer, employment agency, labor organization, or joint labor-management committee. Section 101(2).

This section also provides that acts of discrimination include, "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." Section 102(b)(5)(A). A "reasonable accommodation" is defined to include the "making of existing facilities usable to employees and usable by individuals with disabilities." Section 101(9). No definition of "readily accessible" is included. In determining whether accommodating a qualified applicant or employee with a disability imposes an "undue hardship," the following factors are required to be considered: (1) the nature and cost of the accommodation needed; (2) the overall financial resources of the facility; (3) the number of persons employed at the particular site; (4) the "expenses and resources" involved; and (5) the type of operation of the covered entity. Section 101(10).

The ultimate effect of Title I is difficult to assess at this time. Regulations issued pursuant to ADA may clarify legislative intent, for example concerning "readily accessible facilities". The Equal

ACRELadies

ACREL members who have recently published real estate books or articles, or received special honors or awards, or participated in interesting events, should send information to the College for inclusion in future issues.


Frank A. St. Claire of St. Claire & Case, P.C., spoke at the Baltic Republics Legal Conference sponsored by the University of Latvia and the Latvian Bar Association, held April 12-14, 1990 in Riga, Latvia S.S.R., on "Concepts of and Issues in Real Property Ownership," "Negotiating Contracts of Sale of Income Producing Real Property," and "Reprivatization of Ownership of Real Property."

Kenelm L. Shirk of Shirk, Reist, Wagenseller & Shirk was the recipient of the "Extraordinary Contributions To The World Rule of Law Award" at the Fourteenth Conference on the Law of the World, held in Beijing, China April 22-27, 1990, sponsored by the World Peace Through Law Center.
Employment Opportunity Commission is required to issue regulations within one year. Section 106.

Title I confirms that employers will have to ensure that their facilities do not present physical barriers to the occupational requirements of disabled employees. Property owners will need to be conscious of their tenant-employers’ need to comply with ADA. Property with physical barriers may be less marketable to employers who must comply with the mandates of ADA. Moreover, ADA does not definitively state who is financially responsible for the cost of modifications to structures that present barriers to the disabled.

Title III—Public Accommodations and Services Operated by Private Entities

Title III takes effect 18 months after ADA’s enactment. In general, this section provides that “no individual shall be discriminated against on the basis of a disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation”. Section 302(a). A “public accommodation” is defined to include an inn, hotel, motel, restaurant, bar, motion picture house, theater, auditorium, museum, shopping center, bakery, grocery store, or other “sales or rental establishment.” Section 302(7).

Many non-governmental (i.e., private) property owners are responsible for compliance with ADA. However, the Joint Explanatory Statement of the Congressional Conference Committee states that the “covered entity is only liable in contractual arrangement for discrimination against the entity’s own customers and clients, not the contractor’s customers and clients.” Section 302(7).

In its definition of discrimination Section 302(b) (iv) includes “a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities... where such removal is readily achievable”. “Readily achievable” means “easily accomplishable” and “able to be carried out without much difficulty or expense.” Section 301(9).

New facilities that are first occupied 30 months or more after ADA’s effective date must be designed and built to be readily accessible to and useable by disabled persons. Section 303(a).

Title V—Miscellaneous Provisions

Title V mandates the issuance of guidelines by the Architectural and Transportation Barriers Compliance Board. Section 405(a).

The guidelines will ensure that buildings, facilities, and vehicles are accessible to individuals with disabilities. The guidelines are required to be issued within 9 months of the date of ADA’s enactment. Section 504(b).

Conclusion

The ultimate impact of ADA depends on the standards set out in regulations which will be issued by the Equal Employment Opportunity Commission and others. The objectives of ADA are to end discriminatory treatment of disabled Americans. However, the use of certain indefinite terms, such as “readily accessible” and “undue hardship”, make the determination of standards of compliance difficult. A complete review of ADA must await the issuance of regulations and a fuller understanding of its requirements.

* The author gratefully acknowledges the assistance of Lisa Spiegel, Harvard University Law School Class of 1992.

**The statements and opinions in this article are those of the author and not necessarily those of Aetna Life & Casualty.

Construction Documents Committee Report

by Leslie A. Nicholson
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Shaw, Pittman, Potts & Trowbridge
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The American Institute of Architects has asked the Construction Documents Committee of the American College of Real Estate Lawyers to review and comment upon AIA’s revisions to its Construction Management documents.

The Committee is reviewing these documents for clarity and consistency with construction industry custom and practice. The Committee has completed its review of the AIA’s A201 CMa, General Conditions of the Contract for Construction, Construction Management Edition, and it has transmitted its comments to the AIA for review.

As the Committee completes its review of the other Construction Management documents, it will also transmit its comments to the AIA. Should the AIA wish to receive any clarification of the comments, it will contact the Committee. The AIA hopes to publish the revised documents later this year or early next year.

ACREL’s Committee has informed the AIA that it is not reviewing the Construction Management documents from the perspective of the Owner, the Architect, the Construction Manager or the contractor, and that the College’s participation in the review and editing of the AIA’s documents should not be used to promote or validate the AIA’s documents. The AIA also understands that the College’s participation does not constitute an endorsement or approval of the AIA’s documents.
Gamble v. New Orleans Housing Mart, Inc., 154 So2d 625 (La App 1963) (an early “good faith and fair dealing” rationale case - acknowledges validity of an absolute prohibition)

Boss Barbara v. Newbill, 638 P2d 1084 (N.M. 1982)

Fernandez v. Vasquez, 397 So2d 1171 (Fla 1981)

Comini v. Union Oil, 562 P2d 175 (Or 1977) (not a lease case - assignment of an oil distributorship)

Newman v. Hinky Dinky Omaha-Lincoln, Inc., 427 NW2d 50 (Neb. 1988) (good faith and fair dealing rationale; expressly refuses to base its opinion on restraint on alienation doctrine or the Restatement, leaving these questions “for another day”)

First Federal Sav. Bank v. Key Markets, 532 NE2d 18 (Ind App 1988) (good faith and fair dealing rationale - good example of stress under this approach on expectation of parties that right to withhold consent will only be exercised “reasonably”)

Julian v. Christopher, No. 114 (Md. Ct. App. 6/29/90) (discussed in text)

IV. Other:

Jack Frost Sales v. Harris Trust & Sav. Bank, 433 NE2d 9-11 (Ill App 1982) (purports to follow Arrington v. Walter E. Heller International Corp, 333 N#2d 50 (Ill App 1975) - which is frequently cited as a pioneering case on this issue, but which involved a lease that provided expressly that consent would not be unreasonably withheld)

Shaker Building Co. v. Federal Lime & Stone Co., 277 NE2d 584 (Ohio 1971) (early case based primarily on interpretation of parties’ intent - not on any implied duty); but see F&L Center v. Cunningham Drug Stores, 482 NE2d 1296 (Ohio App 1984) (readopting the traditional rule)

RECENT CASES ADHERING TO THE TRADITIONAL VIEW


Mann Theatres v. Mid-Island Shopping Plaza Co., 464 NYS2d 793 (NY App 1983)

Isby v. Crews, 284 SE2d 534 (N.C. App 1981)

Snortland v. Larson, 364 NW2d 67 (N.D. 1985)

B&R Oil Co. v. Ray’s Mobile Homes, Inc 422 A2d 1267 (Vt. 1980)