

ANews

President's Message

It is hard to believe that 2014 is almost here. I look forward to our agenda and events for the coming year with enthusiasm and excitement. There are a number of changes planned for 2014 that will enhance the ability of the College to deliver benefits to its members.

Before we look to the New Year, however, we need to take a moment and reflect on the events of the past year and thank the Fellows who worked so hard to make them happen. The October meeting in Vancouver was an enormous success. Not only did Vancouver present us with great weather and bright red maple leaves sometimes a foot across, but it welcomed the 232 Fellows and 116 guests who attended. Many thanks to Ann Cargile and the Meetings Committee for their choice of venue. The quality of the programming, which is one of the defining characteristics of the College, was as varied as it was interesting and informative. Those in attendance got to see programs, among others, on real estate issues in the development of healthcare facilities, the profound impacts of Dodd-Frank and a fascinating insight into the changes in real estate led by changing demographics, particularly those referred to as Gen Y (ages 18-35). To me at least, the program on commercial insurance was not only informative, but a bit scary. Often we rely on the risk managers of our clients to such an extent that it can be difficult when we have to deal more directly with the issues ourselves. There were also excellent presentations on risk retention, guarantees

for joint ventures, the future of the law and issues with co-lenders, where often the biggest battles are now between the lenders. All members of the College ought to look at the excellent materials for these programs available electronically for your review.

Bringing these tremendous programs to the College is a major effort, often by more than 50 Fellows. Planning now starts at least 18 months before a program is presented. For example, in the weeks before Vancouver the next program for Kauai was nearly final and planning for Boston pretty firm. The Program Committee for 2013 was led by Peggy Rolando, who is moving to the Board of Governors. She is turning the reins over to Marilyn Maloney, who worked hard

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side-by-side with Peggy, for 2014. Thank you, Peggy. The Vancouver program was capably led by Beth Mitchell as Vice-Chair of Fall Meetings, who was assisted by Larry Bensignor as the Meeting Leader and Neil Kessler, Gordy Scannell and Dean Pappas as coordinators. Thanks for your efforts.

Another major initiative for this past year was the increase in electronic programs. Even for a well-attended meeting, we only have about 30% of the members able to participate. Electronic programs help reach the broader membership and also present timely, informative programs between meetings. The Program Committee heads these efforts too, led by Nancy Little, who is Vice-Chair for webinars and ACREL Live, and assisted by Jack Fersko and Marie Moore. There have been a large number of these programs this year. The partnership with American Law Institute Continuing Legal Education (ALI-CLE) generated several programs and an unexpected source of revenue in 2013. Among them was a program on the Interstate Land Sales Act and one of the most successful of year for ALI-CLE on Non-recourse Carveout Guarantees for Commercial Loans. These ALI-CLE programs have extended materials and offer CLE credits for participants. On a slightly simpler level are ACREL Live programs which cover topics of interest, but are limited to ACREL Fellows as the audience. This year's programs included, among others, one on rehabilitation tax credits and one on money laundering. Finally, there has also been an increase in committee calls on topics of general interest, which are not guided by the Program Committee, but provide yet another avenue for participation by ACREL Fellows.

Finally, there has been substantial progress on ACREL Shares, a new software platform for participating in ACREL. Gordon Tanner and Dan Smith have put in tremendous efforts on this software and its implementation. This year it was tested extensively by the Program Committee and to a lesser degree by the Executive Committee. It will fundamentally change how Fellows and committees of ACREL share information. More about some of the benefits of ACREL Shares later in this letter.

I cannot talk about these programs and the success of the past year without thanking those who so generously contributed. Jonathan Shils, my predeces-

sor, and Ann Saegert, the immediate past president this year, have mentored me and put in long, long hours doing what needed to be done for the College. Ann led the movement to transparency and Jonathan has continued and spent hundreds of hours on the graying of the College, including working to clarify the guidelines for admission and working closely with the Membership Development and Member Selection Committees. In December we had 54 nominations for new members and a healthy list of prospects for the future. That is the most in several years and is a direct result of all of these efforts. Going forward we must continue to build on this foundation. We also have had great contributions from the leaders of the substantive committees and the Board of Governors. I would especially like to thank the Board members who are rolling off this year, Foster Gaillard, Meg Meister, Gail Stern and Greg Stein. Finally, I would like to thank Steve Waters, who was the Board member on the Executive Committee this year and also served as the liaison with the Programs Committee for his terrific efforts.

Of course none of these things would have been possible without the dedication, hard work, institutional knowledge and good humor of Jill Pace and Henri Keller. We cannot thank them enough for their efforts.

While we had a terrific year by any standard, we must continue to forge ahead. There is much hard work remaining to be done. This great institution can only be as successful as the future efforts by all Fellows make it. This organization is not a product of any leader or group of individuals, but of the members and their contributions as a whole. We only have the camaraderie and cutting edge programs because of the efforts of a large number of Fellows.

Changes in the practice of law, in the delivery of legal seminars and education, and in the participation of lawyers in external organizations is continuing, and even accelerating. You cannot prevent change, but only adapt to it, make it your friend and strive to stay ahead of change. In 2000 Kodak was one of only a handful of companies that was in the Fortune 100 in both 1900 and 2000. Kodak invented much of the technology in digital cameras. In 2001 Kodak had its most profitable year ever, but after its bankruptcy in 2012 Kodak has virtually ceased as a consumer

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company. It failed to adapt to change. Likewise, Blockbuster virtually owned the video and DVD rental business. In 2004 it had over 9,000 stores renting its video products. Today it has none. While it continues to do streaming video, Blockbuster has been shunted aside by Netflix and other competitors.

The changes confronting ACREL necessitate that we deal with change and do it effectively. While ACREL is not in the technology business, it is not immune to change. One of the defining attributes of ACREL is cutting-edge programming. New sources of legal education and programming arrive monthly. The revamping of the Programs Committee and its increase in size were designed to keep it abreast of change and continue to give it the resources needed. We are engaging a working group to assist the Programs Committee in trying to stay ahead of the changes in electronic programming.

In attempting to make ACREL more valuable to its Fellows and the firms and companies where they work, ACREL is planning rolling out ACREL Shares to all committees in 2014. This will give each committee a blog, and give all Fellows enhanced access to the huge library of ACREL materials, including both organization materials and past program materials with improved search capabilities. I am sure that as the implementation goes forward, we will be adding more enhancements. This will be an exciting change.

One final request -- plan to make 2014 the year that you assist in finding a younger member to

nominate to ACREL. A replacement for yourself, so to speak. Dealing with the graying of the College has been a serious issue since Mike Rubin started the focus several years ago. If even 35% of the Fellows would find a replacement before they retire or undertake senior status, the graying of the College would no longer be an issue. Fellows were chosen because of their give back to their localities and regions and the profession. Consider your give back to ACREL to be finding a nominee who will continue the tradition of incredible collegiality along with cutting-edge legal skills.

I look forward to the next year with tremendous enthusiasm. This is a terrific organization and it will come through these changes improved and with even stronger bonds among Fellows. Happy Holidays and a prosperous and successful New Year to all!



Tom Kaufman

STAFF BOX

The ACREL Newsletter is published by the
American College of Real Estate Lawyers

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Meetings Calendar

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

2015 Mid-Year Meeting
March 26-29, 2015
JW Marriott Camelback Inn
Scottsdale, AZ

2015 Annual Meeting
October 22-25, 2015
Four Seasons Hotel
Baltimore, MD

Unwary Landlords May Lose Right to Damages when Terminating Defaulting Tenant's Lease

by Edward M. Bloom¹

A decision of the Supreme Judicial Court of Massachusetts (SJC) earlier this year in the case of *275 Washington Street Corp. v. Hudson River International, LLC*, 465 Mass. 16 (2013), essentially left the landlord of a defaulting tenant with no remedy because the landlord's lease form did not adequately provide contract damages for the landlord following its termination of the lease. The SJC stated that a "landlord left without an adequate remedy following breach of the lease by a tenant has only itself to blame for entering into a lease that fails to provide such a remedy."

In April 2006, the landlord leased premises in downtown Boston to a tenant for 12 years for use as a dental practice. Just a year into the lease, the tenant closed its doors, made some intermittent monthly payments during the next 12 months, but then notified the landlord that it was not going to make any further rent payments nor was it planning to return to the premises. As a result, in May 2008, two years into the lease, the landlord terminated the lease and brought a contract action against the tenant and the tenant's guarantor.

A Superior Court trial judge assessed over \$1million in damages against the defaulting tenant and the company that had guaranteed the tenant's lease obligations. Yet the Massachusetts Appeals Court and the SJC, while agreeing that the tenant had clearly breached the lease and abandoned the premises, ruled that the landlord would have to wait 10 years in order to collect any damage award.

Without knowing anything more about this case or the legal arguments put forth by the Appeals Court and the SJC to justify their decisions, common sense tells us that this outcome is incorrect. In fact, one might even be tempted to sum up this case by citing Dickens' 1838 novel, *Oliver Twist*, and Mr. Bumbles' reply when the court informs him that the law supposes that "your wife acts under your direc-

tion". "If the law supposes that" replies Mr. Bumble, "then the law is an ass."

However, one cannot so simply dismiss this case because there are important lessons to be learned. To begin with, under Massachusetts common law, once a lease is terminated for any reason, including a tenant's default, the tenant is no longer liable to pay rent thereafter accruing unless there is an enforceable lease provision specifying damages due the landlord as a result of the termination. Accordingly, commercial lease lawyers in Massachusetts typically preserve a landlord's right to damages by employing several common provisions. One provision requires the tenant to continue to pay landlord each month, as damages, the monthly rent required by the lease, as if the lease had not been terminated. Other provisions require the tenant to pay, as liquidated damages, a lump sum which may involve (i) a full acceleration of the remaining rent due under the lease discounted to present value; (ii) a partial acceleration equal to the amount by which the aggregate rent due for the remaining lease term exceeds the current fair market rent for the remainder of the term, discounted to present value; or (iii) a dollar amount equal to the monthly rent due for a period of anywhere from six months to two years.

The landlord in this case had nothing in its lease other than a provision that, upon lease termination as a result of the tenant's default, the tenant was to indemnify the landlord against all loss of rent and other payments which the landlord may incur by reason of such termination. But the SJC, upholding the Appeals Court ruling in this case, concluded that "[w]here the specific remedy is indemnification and no other time period is established as to when payment is due, ... under our common law ... the indemnified amount shall become due at the end of the original lease period."

¹ Edward M. Bloom is a partner in the real estate department of Sherin and Lodgen LLP and a past president of the Real Estate Bar Association for Massachusetts (REBA). This article is reprinted with permission from *REBA News*, a publication of REBA.

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Unwary Landlords...

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The Court reasoned that indemnification is a liability contingent upon events thereafter occurring, such as a fire or other casualty, relettings and defaults by replacement tenants, so that the full amount which the tenant must pay for the remainder of the term cannot be fully ascertained until the period ends.

In this case, such a holding means that the landlord will have to wait until 2018 to determine its damages, a result leaving the landlord, practically speaking, without a remedy. As the SJC said: “We recognize the possibility, as did the Appeals Court, that our common law rule, which requires the landlord to wait until 2018 to determine post-termination damages under the indemnification clause, ‘may in effect make it impossible for the landlord to recover its true damages from this corporate tenant or guarantor, because of the protections afforded by legal processes, such as dissolution or bankruptcy.’”

The lessons to be learned from this harsh decision are these: If an indemnification clause is to be used by a landlord as a remedy for a tenant’s default, the provision must set forth a date or dates prior to the end of the lease term for the landlord to recover damages. For example, the clause can require the tenant to indemnify the landlord each and every month for the loss of rent that was due under the lease or provide for the determination of damages upon the reletting of the premises. Secondly, and more importantly, a landlord must set forth in its lease detailed and specific contract damages for which the tenant will be liable when the lease is terminated by reason of the tenant’s default. These provisions should reflect the liquidated damages clauses referred to above and should, at a minimum,

grant to the landlord the benefit-of-its-bargain damages that are typical under the common law governing contracts in general.

The SJC missed a golden opportunity to change the common law regarding lease terminations, which creates a trap for the unwary landlord. The reason why a tenant is no longer liable to pay rent once a lease is terminated for any reason, including a tenant’s default, flows out of the common law concept that a lease is a conveyance of an estate in land and once the estate terminates and the landlord regains its estate, the tenant no longer owes any rent because its estate has ended.

The Real Estate Bar Association for Massachusetts filed an amicus brief with the SJC urging it to view a lease as a contract rather than an estate in land and thus allow the common law of contracts to govern a tenant’s damages when the contract is breached. The SJC definitively agreed that a commercial lease is a contract rather than a conveyance of property, but it decided that there was no reason to change the common law that has governed leases in Massachusetts for over 100 years. Accordingly, it continues to apply the common law that flows out of the concept of a lease being an estate in land rather than applying the common law rule governing contracts (which would grant the landlord its benefit-of-the-bargain damages) even if the lease itself did not spell out these damages. So while Mr. Bumble’s comments may be too harsh a view of this decision, the SJC’s ruling that a commercial lease is a contract, but is not governed by the common law of contracts, defies all logic. ■

ACRELades

Thomas Barbuti, Douglas Bregman, Priscilla Carroll, Timothy Chriss, David Fishman, Nancy Haas, Thomas Hauser, David Kochanski, Edward Levin, Searle Mitnick, Mark Pollak, Gregory Reed, Kevin Shepherd, Lawrence Shulman, Raymond Truitt, Roger Winston, Fred Wolf III, and James Wright were recognized as Maryland Super Lawyers.

Send us your news for future issues!

ACREL Gatherings!

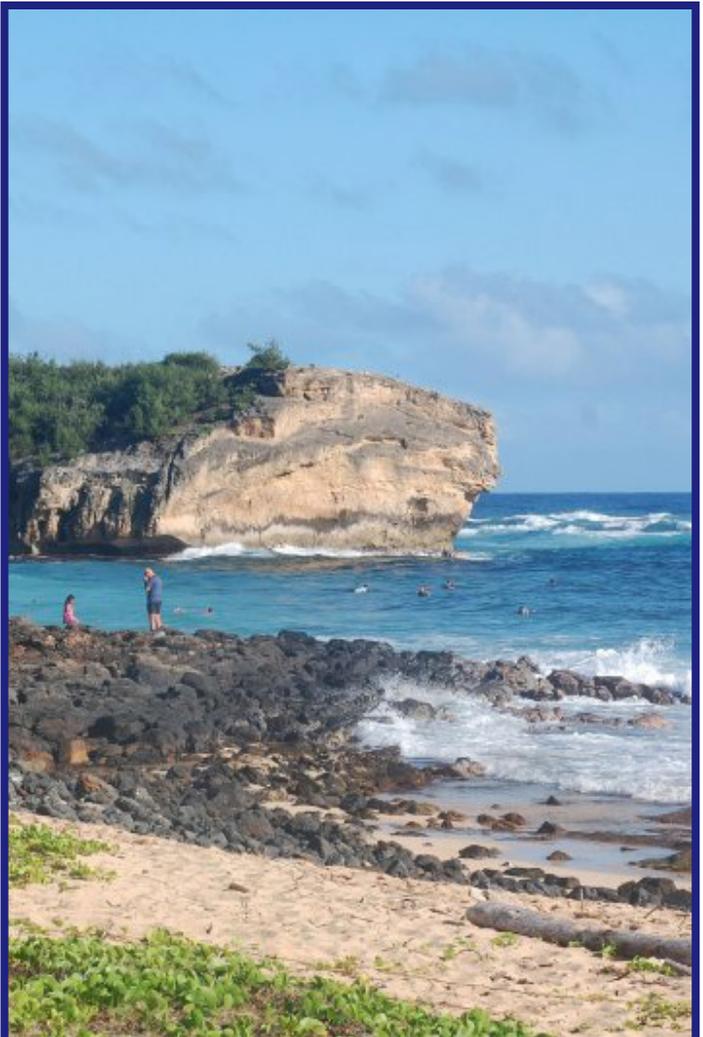
Please consider holding an ACREL event in your city.

Fellows who have attended these gatherings have been pleased with the opportunity to connect with their ACREL colleagues.

The event can be whatever you want it to be! You can have a speaker, discuss prospective members or just have lunch or a cocktail party.

Options range from brown bags at a law firm to cocktails at a local hotel.

If you are interested in holding a session, please contact **Angela Christy** at angela.christy@faegrebd.com, (612) 766-6833, or **Cathy Gale** at cgale@bhfs.com, (303) 223-1139.



Think this looks appealing?
You can be there in just a few months!

Register today for the Spring meeting in Kauai, HI. Discounts are available for those who register early!

Registration materials are available online, at www.acrel.org, on the private home page.

Contact Henri Keller, hkeller4501@acrel.org, with any questions you may have.

Aloha!



Got Programs?

If you'd like to volunteer, or communicate ideas for Plenary Sessions, Roundtables, or Internal Webinars, contact programideas@acrel.org

With Vancouver in the rear view mirror and Kauai on the horizon, the Programs Committee wants to thank those Fellows who attended the Vancouver Programs and responded to the evaluations survey. We had a 58% response rate which is very good and your responses gave us valuable information which we are already using in the selection of topics for future meetings and planning and preparing for individual session presentations. Overall the evaluations of the educational program were very favorable and lead us to conclude that ACREL is providing both relevant and interesting substantive content to its Fellows and through The ACREL Papers to their firms.

The evaluations are forwarded to the individuals who were responsible for each session presentation as important feedback to the efforts which they invested on behalf of the College and are carefully reviewed by the Programs Committee, the Executive Committee and the Meetings Committee. Suggestions from the Naples meeting resulted in scheduling changes in Vancouver that proved helpful (and based on the survey responses, much appreciated). These will be carried forward and your suggestions from Vancouver are under consideration for additional changes to the meeting format and to the structure of the evaluations survey itself which, for those of you who have not responded to one in the past year, is vastly different in its look and ease of use.

On behalf of the Programs Committee, I thank you again for your participation in the evaluations process and your contributions to the top notch programming provided by the College for its Fellows. We look forward to seeing many of you in Kauai, in March.

David S. Gordon
Programs Committee Vice-Chair,
Evaluations & Orientation



ACREL Fellows, led by President Jonathan Shils, spent a productive afternoon at the Greater Vancouver Food Bank Society as part of the ACREL Cares! Project during the Annual Meeting in Vancouver.