

ANews

President's Message

A short time ago, we were in Scottsdale for the Spring Meeting. The meeting was a huge success because of the concerted efforts of so many of you.

The highlight of the meeting was the Educational Program. ACREL does cutting edge sophisticated programs balanced with updates or new topics important to all Fellows.

The Meeting Leader for the Programs Committee was Deborah Chun assisted by Jane Snoddy Smith as the Chair of the Program Committee and Ann Waeger, as Vice Chair-Spring Meetings. Session coordinators, Janet Johnson, Nancy Little and John McNearney, provided session coordination and support. The Programs Committee starts planning for programs approximately 18 months before each meeting (for example, planning is well underway for the Spring 2016 meeting in San Diego). The session coordinators worked extensively with the speakers making certain the speakers covered the material in the right depth, produced their written materials and ran through several practice sessions with them, so the final product was smooth and well presented without overlap or gaps. The session

coordinators play a major role and are the folks constantly in contact with the presenters.

Thursday's topic was the impact of immigration on real estate. Michael Buckley acted as session leader for the presentation provided by three non-ACREL speakers, Al Preciado, Todd Landfried and Alex Nowrasteh.

Friday was led off by Brian Rider, Denise Cheney, Neil Johnston and Robert Bozarth discussing coastal development and water-related issues.

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Next up were Greg Hummel, Greg Gilbert and Andrew Chapman, of Macquarie Infrastructure and Real Assets, discussing public-private partnerships and concession agreements. Sarah Biser and Jeff Appelbaum then took us into the world of complex-construction contracts. Michael Rothpletz, Loretta Kelly and Martin Dowd followed them plunging us into a program dedicated to a discussion of build-to-suit transactions. William Rothschild and Marianne Ajemian wrapped up Friday's programming with their panel on preferred equity and mezzanine lending.

Saturday began with a discussion for folks that love numbers-based analysis, as Tom Kaufman and Tom Nealon discussed risks, returns and real estate finance terminology. Bill Dunn, John Cameron, Mike Rubin and (non-ACREL Fellow) Arizonian Lynda Shely, then discussed professional responsibility multi-jurisdictional practice issues.

After the large-group programming concluded, the College's business meeting saw Shannon Skinner speaking about recently deceased ACREL co-founder and past president (1988), John Gose, and Steve Cowan, speaking about recently deceased ACREL past-president (1995), Alan Wayte. After the business meeting, consistent with past practice, workshops afforded meeting attendees with the opportunity to do a deeper dive into the programming of Friday and Saturday through small-group workshops and also includes standalone workshops by Brad Molotsky, Mary Alexander and Mark Yura on development proformas and Trev Peterson and Ken Kreider on construction bankruptcy issues.

As always, ACREL's committees met the needs of early-risers by meeting on a face-to-face basis at the crack of dawn before the main

programming began. The Committee meeting agendas included discussions of current topics of interest to Committee members. ACREL secretary, Steve Waters, organized a first-time meeting on Thursday afternoon of in-house counsel. Ideally, the College can provide a forum for in-house counsel working in the real estate industry to meet and discuss matters of interest to them.

The weather in Scottsdale was unseasonably hot, but, as a Chicago-area resident, this writer was prepared to put up with it after a long, cold winter (and also found time to attend a spring training game). The ACRELCares Committee, chaired by Jan DeVancy, organized, with help from Mary Alexander, a landscaping project at the Phoenix Zoo (in 95°F+ heat!) on Saturday afternoon. The meetings concluded with cocktails, dinner and dancing under the stars and included astronomer-led stargazing through telescopes for those that were interested.

Jill Pace and Henri Keller are owed special thanks for keeping the Scottsdale meeting machine rolling along smoothly.

The ACREL Programs Committee has been working hard on compiling an excellent set of sessions for our Fall meeting in Baltimore on October 22-25, 2015. As usual, the program offers a range of high level, cutting edge topics with something for everyone. Highlights include sessions on the development and financing of student housing projects; restrictive covenants in retail leasing; various hot topics in real estate finance, including interest rate protection products (swaps, caps and collars), crowdfunding, Basel III and EB-5; emerging trends in purchase and sale transactions (auctions and representation and warranty insurance); real estate issues associated with the legalization of marijuana; defending title insurance claims; special coverages in connection with

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property and casualty insurance; and technology (use of “apps” in real estate as well as other technology-driven real estate issues such as the effect of drones on retail real estate). Additionally, the Public Policy Committee, in coordination with the Programs Committee, will be offering a session on the expansion and development of ports. Where else do you get this stuff! Over the next few months, ACREL will be sending you emails with more information about these and other topics. We encourage you to plan ahead and register early for the Baltimore meeting, because we expect this to be another top notch meeting thanks to the efforts of all involved.

I hope that we have a record turnout as Baltimore is easy to get to from nearly everywhere.

The Programs Committee has also been very active in providing ACRELive programming. This effort, led by Programs Committee e-CLE Vice-Chair, Jack Fersko, has provided 5 programs since the beginning of 2015. ACRELive programming is presented as an audio program without CLE credit or cost to listeners. Most of these programs last about an hour and provide Fellows with an opportunity to dial into a call and listen as other Fellows provide up-to-date information to them. Some Fellows invite other lawyers in their firms and selected clients to join them in listening to the programming. This is a wonderful opportunity to demonstrate to your colleagues and clients the value provided by your ACREL membership. So far this year, ACRELive programming included a program moderated by Rhonda Jolley provided by Robert Gottlieb and Lee Chilcotte pertaining to 1031 like-kind exchanges, a program provided by David Kuney and Lawrence Dudek pertaining to the recently issued ABI Commission Report, a program moderated by Janet Johnson provided by Alan Di Sciullo and Dan Rubock

pertaining to changes to the ISO forms of insurance policies and the reauthorization of terrorism insurance coverage, a professors' corner program moderated by Mark Brown provided by Joyce Palomar and Jim Smith pertaining to deficiency judgments, and a program moderated by David Van Atta provided by Matthew Leeds and Edward Peterson pertaining to cost allocations and operational issues in mixed use development projects. ACREL's e-CLE efforts also include programming, in conjunction with ALI-CLE presented to Fellows (at reduced cost) and non-Fellows.

ACREL couldn't function without the efforts of its committees. It's tough to single out specific committees, but the standing committees are critical. The Programs Committee, chaired by Jane Snoddy Smith, the Meetings Committee, chaired by Susan Talley, and the Publications Committee, chaired by Bob Paul, are integral to the success of our meetings. The Amicus Briefs Committee, chaired by David Kuney, seeks to, among other things, coordinate appellate friend-of-the court briefing activity among Fellows. The Orientation and Integration Committee, chaired by Angela Christy, has an important role in encouraging Fellows to organize city and regional (state) meetings of Fellows and supervises and coordinates mentoring and integration of newly admitted Fellows. The Finance Committee and Audit Committee, both chaired by Treasurer, Jay Epstein, address non-dues revenue issues and annual audit matters.

Much of the benefit of membership in ACREL comes from participation in the substantive committees. I encourage all of you to get involved with one or more committees of interest to you. If you are a new, or relatively new, Fellow, committee membership is a great way to meet other Fellows and quickly get integrated into the College. I encourage newly admitted Fellows and

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first-time meeting attendees to drop into committee meetings during the upcoming Fall meeting in Baltimore and see what fits you! Kathy Murphy, Roger Winston, Rick Mallory and Peter Aitelli, are tasked with monitoring the College's substantive committees and meet, via conference call, one-on-one, at least twice a year, with the leadership of each substantive committee and coordinate, a twice-a-year all-hands call among all of the substantive committee chairs, to discuss matters of interest to the chairs and generate cross-committee cooperation and programming ideas.

A number of city meetings of ACREL Fellows have been organized through the efforts of the Orientation and Integration Committee this year. These meetings are a great way to get together between the Spring and Fall meetings. The Nominating Committee has finished its work and its proposals will be distributed in the (relatively) near future. Thanks to Tom Kaufman (Chair), Jonathan Shils, Gary Fluhrer, Deb Chun, Marilyn Maloney and Mark Senn for their collective efforts in this important function. ACRELSHares continues to progress and is becoming a very useful tool for how the College lives and works. For this writer, it is a useful tool for all College-related matters.

This year's addition of 47 new Fellows is a major achievement, but is only a step toward assuring that this organization thrives in the future as the baby boomers age up and reduce their participation in ACREL. The Member Selection Committee, chaired by Karen Dennison, worked extremely hard to consider nominees and the nominating process for new Fellows will begin again in the Fall. The Member Development Committee, chaired by Tina Makoulian, is working hard but they need your assistance in suggesting possible new Fellows to them. Take a moment and forward to them the name and contact

information for a possible new member. Likewise, experience has taught us that if we get new members active from the first few meetings after their selection, they are demonstrably more likely to continue to be very active in the College. The Orientation and Integration Committee must find 47 mentors to work with each of our new Fellows. You will be hearing more about this as we seek mentors before Baltimore. This is an important function for the College and anyone who would like to help should contact Angela Christy or me.

I would also like to take the opportunity provided by this article to again thank the sponsors of the ACREL Directory, Chicago Title Insurance Company, Commonwealth Land Title Insurance Company, Cushman & Wakefield, Inc., Fidelity National Title Insurance Company, First American Title Insurance Company, Jones Lang LaSalle, Newmark Grubb Knight Frank and Stewart Title Guaranty Company.



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ACREL Cares at Scottsdale Zoo

At ACREL's Mid-Year Meeting in Scottsdale, AZ, ACREL Cares volunteers planted a variety of milkweed plants that will attract butterflies as part of the Zoo's effort to help re-establish monarch butterfly populations. Volunteers also installed irrigation systems, and assisted with regular clean-up in the area near the Zoo's Conservation Center.



Meetings Calendar

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

2016 Mid-Year Meeting
March 17-20, 2016
The Grand Del Mar
San Diego, CA

2016 Annual Meeting
October 6-9, 2016
Waldorf Astoria
New York, NY

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.

Lease Co-Tenancy – Reasons for Care

by Andrew R. Lubin, Neubert, Pepe & Monteith, P.C.*

Many commentators (including a number from the College) have discussed the dangers associated with co-tenancy lease provisions and the need for careful draftsmanship. The cases of *Kleban Holding Co., LLC v. Ann Taylor Retail, Inc.*, No. 3:11-CV-01879 (VLB), 2013 U.S. Dist. LEXIS 168231 (D. Conn. Nov. 26, 2013)† and *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 232 Cal. App. 4th 1332 (2015), *modified* No. F067327, 2015 LEXIS 130 (Cal. Ct. App. Feb. 9, 2015) illustrate the potential consequences of not heeding this advice.

In *Kleban Holding Co.*, Ann Taylor (“Tenant”) entered a lease for space in a large strip center with a predecessor landlord to Kleban Holding (“Landlord”). The lease contained both opening and operating opening co-tenancy clauses that had been negotiated by the parties. The opening co-tenancy provision was not an issue. The operating co-tenancy clause was as follows:

“(b) *Operating*: In the event Borders, Inc. or fifty percent (50%) of the other retail space in the Center, excluding Tenant, are not open and operating, Tenant shall be entitled to abate Minimum Annual Rent and in lieu thereof pay five percent (5%) of Gross Sales, not to exceed the Minimum Annual Rent otherwise payable in the absence of this paragraph, ***until the tenants meeting the foregoing requirements [emphasis added]*** are again open and operating.” [P.1-2]

Borders, after filing for bankruptcy, abandoned its lease in May 2011. In reliance on the co-tenancy operating provision, two months after Borders

vacated, Tenant commenced paying 5% of Gross Sales rather than Minimum Annual Rent.

Not surprisingly, Landlord brought suit alleging three causes of action: 1) breach of lease; 2) anticipatory breach; and 3) unjust enrichment. Tenant had the matter removed to federal court and both parties filed for summary judgment. Landlord’s primary position was that the word “tenants” in the operating co-tenancy provision meant that it could replace Borders with any other similar retailer. Tenant argued to the contrary that the lease “unambiguously” permitted the abatement of rent if the named tenant “Borders” was not open and operating.

After discussing at some length the law of contract interpretation (including a discussion of the use of the word “or”) and dismissing a string of Landlord posited linguistic interpretations, the Court concluded that the lease language was in fact unambiguous. Pursuant to the clause, the Landlord only had the right to collect Minimum Annual Rent if Borders was open and operating. “[T]he plain language of the Lease dictates that Ann Taylor may pay abated rent until the tenant meeting the foregoing requirement is again open and operating. The only tenant who could fulfill such a request is Borders Inc.” [P.5] No other tenant or other use could substitute for Borders.

The Landlord also argued that the rent abatement would create an \$800,000.00 windfall to the Tenant that no reasonable owner would ever have agreed to. In support of this argument, the Landlord sought to introduce parole evidence from the president of the Landlord’s predecessor as well as the predecessor’s attorney, who drafted the lease. In depositions they stated that it was never their intention to preclude a substitute tenant for Borders. The Landlord’s

* The author is a principal in the New Haven CT law firm of Neubert, Pepe & Monteith, P.C.

† By way of full disclosure, the author’s law firm represented the Tenant in *Kleban*. Although an appeal was anticipated, none was ever taken.

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argument and all extrinsic evidence were rejected because the Court found the lease language was unambiguous and, therefore, extrinsic evidence could not be considered as a matter of law.

The Court stated that it would not “unmake a deal agreed to by two sophisticated parties.” Accordingly, the Tenant neither breached nor anticipatorily breached the lease. As to Landlord’s unjust enrichment claim, the Court simply dismissed it holding that such a cause of action is dependent on the absence of a valid contract. As the lease was valid, there was no unjust enrichment.

If the Court’s decision was not bad enough for the Landlord, there was one final insult to injury. The Court awarded the Tenant costs, expenses and attorney fees as the “prevailing party” based upon the attorney fee clause in the lease.

By interesting contrast, the more recent *Grand Prospect Partners* case also dealt with opening and operating co-tenancy provisions with the landlord faring somewhat better. In *Grand Prospect Partners*, the lease conditioned the opening of the tenant’s store and the payment of rent on another major tenant (Mervyn’s) being open. Prior to the tenant’s opening date Mervyn’s filed for bankruptcy. The tenant neither opened nor paid rent. A further provision allowed the tenant to terminate the lease if the co-tenancy failure continued for twelve months. After twelve months the tenant elected to terminate the lease. The landlord then sued but, unlike the landlord in *Kleban*, the landlord argued explicitly that the co-tenancy provisions were unenforceable as both unconscionable and a penalty. The trial court agreed and, after a jury trial, awarded substantial damages.

On appeal, the California Appellate Court reversed the decision after analyzing the rent abatement and termination provisions separately. As to the termination, the Court determined that California had developed a specific rule that applies to lease termination clauses. It held specifically that the termination

provision was not a penalty (nor a forfeiture) as it was: (i) agreed upon by sophisticated parties and (ii) Mervyn’s act (bankruptcy) had no relation to any act or default by either of the parties. Furthermore, this rule of law superseded the law applicable to the analysis as to whether the termination provision constituted a penalty.

The rental co-tenancy provision, however, was a different matter. Relying on existing California precedent, the Court found that unlike termination provisions, California law required an analysis of whether the rent abatement provision bore any reasonable relationship to the harm anticipated by the tenant. If no reasonable relationship existed, it would be an unenforceable penalty. Since the record disclosed that the tenant did not actually anticipate suffering any harm as a result of Mervyn’s closure, the rent provision was held unenforceable due to the lack of any reasonable relationship to the anticipated harm to be suffered. However, because the lease termination provision was held to be enforceable, the Court awarded the landlord one year of rent as damages plus attorney fees. Had there not been a termination provision, it seems likely that the Appellate Court would have sustained the original trial court holding of substantial damages. Despite its holding, even the Court may have been concerned with the breadth of its decision. In the opinion’s opening lines it states: “This opinion does not establish a categorical rule of law holding co-tenancy provisions always, or never, enforceable. Instead, it illustrates that the determination whether a co-tenancy provision is unconscionable or an unreasonable penalty depends heavily on the facts proven in a particular case.”

As illustrated by these cases, co-tenancy provisions may have unpredictable and potentially disastrous consequences. From the landlord’s perspective, it might be easy to say that co-tenancy clauses should be avoided altogether. However, a landlord may have no choice but to concede the issue in order to attract “appropriate” new tenants who may be unwilling to take a risk in a new (or weak) center without such a

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provision. Assuming that they cannot be avoided, there certainly are techniques that can be used to help minimize the adverse financial impact of a co-tenancy clause while at the same time remaining fair to both parties. While not exhaustive, some of these are as follows:

1. Generic or descriptive tenant replacements should be used rather than specific store references.
2. Rent reductions should be limited to a specified time period, after which time the tenant should be required to elect to either: (a) re-commence paying normal base rent or (b) terminate the lease. A landlord could also reserve for itself the option for early termination if the tenant exercises its rights under an abatement provision. Any rent reduction should also be the tenant's exclusive remedy for any co-tenancy violation.
3. Based on the holding in *Grand Prospect Partners*, it would seem desirable to have an acknowledged relationship between the anticipated loss to the

tenant and the value of the rent abatement. A landlord could also require the tenant to demonstrate proof of loss as a result of the co-tenancy violation (i.e., drop in revenue) before being able to take advantage of the provision.

4. The lease should provide for liberal landlord cure rights before the co-tenancy provisions can be invoked and that the rights cannot be exercised if the tenant is in default.
5. In the event of a lease assignment, the co-tenancy provisions should not be exercisable by the assignee.

By their nature, lease co-tenancy provisions deal with uncertain future events over which the parties may have little control. The *Kleban Holding* and *Grand Prospect Partners* cases provide modern day reinforcement for the proposition that the draftsman must take great care in attempting to bring certainty into an unpredictable arena. ■

ACRELades

Larry Bensignor and **Barry Rosenthal** were each profiled in Legal Bisnow's series, "Top 40: Washington's Top Corporate Counsel."

David Callies received the Owners' Counsel of America Crystal Eagle award, inscribed "For Decades of Property Law Scholarship and Advancing Property Rights Around the World: It's Not Where You Begin, But Where You Arrive."

Jesse Ishikawa received the University of Wisconsin Law School's 2014-2015 "Adjunct Teacher of the Year" award for his course, Commercial Real Estate Transactions.

Robert W. Simmons became the new Executive Director of the Council for Children's Rights. He will oversee one of the largest and most comprehensive advocacy and legal service programs for children in the Southeast, which serves approximately 2500 at-risk children each year.

Linda Striefsky recently received the Deborah Rocker Klausner Leadership Award, presented annually by the Cleveland chapter of Commercial Real Estate Women, Inc. (CREW). The recipient is considered a thought leader, change agent and champion of diversity who exemplifies the highest standards of excellence, integrity, innovation and expertise.

Ira Waldman was awarded Real Estate Lawyer of the Year at the 2nd Annual Who's Who Legal Awards in Washington, DC in April. According to WWL, award recipients "are those lawyers and firms most widely recognized for their achievements by the global legal market."

Send us your news for future issues!



ACREL Gathering in Maryland!

(L-R: Ray Truitt, Searle Mitnick, Tim Chriss, Barry Greenberg, Nancy Haas, Priscilla Carroll, Ed Levin, Larry Bensignor, Kevin Shepherd, Morty Fisher, Tom Hauser, and David Kochanski)

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