ACREL News

President's Message

As summer ends with the return to school and the enjoyment of the Labor Day holiday behind us, our thoughts turn to the rituals of Fall: raking colorful leaves, watching a football game, paying property taxes and year-end collections. Thankfully, happier events also arrive! Two sure signs of Fall are on our ACREL calendar. The ACREL Annual Meeting occurs next month in Vancouver and soon you will have the opportunity to propose distinguished real estate practitioners for membership to the College!

Now is the time to complete your registration for the Vancouver meeting. The deadline for registration is September 18. Book your reservations at the Four Seasons Hotel in Vancouver to obtain the ACREL rate of $215 CDN before our room block at the hotel is full. Our room block expires September 22 unless filled earlier. While you are registering for the meeting, please consider joining me at the ACREL Cares/ACREL Works community service project Saturday afternoon at the East Vancouver Food Bank to participate in this important College "give back". And don't forget to check your passport to confirm it is current to avoid denial of entry.

The official call for nominations for the College's Class of 2014 Fellows will arrive shortly. This year the Member Selection Committee is chaired by Rich Mallory and will start the vetting of nominees after the period for nomination ends on November 21. The Membership Development Committee has worked hard this year assisting in the identification and development of potential candidates for 2014 and beyond. You likely know many other potential candidates and we suggest that you consider their nomination.

continued on p. 2

IN THIS ISSUE

President's Message
continued from p.1

The Guidelines for Regular Member Selection are on the website at acrel.org and in the ACREL Directory. Nominations of distinguished practitioners, young or older, are welcome. Unless you nominate them by the November 21 deadline, they won't be admitted.

One last point regarding the College's Mid-Year Meeting . . . it is March 27 – 30, 2014 at the Grand Hyatt, Kauai, HI! It is now time to start your planning to attend.

Meetings Calendar

2013 Annual Meeting
October 24-27, 2013
Four Seasons Hotel
Vancouver, BC, Canada

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

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

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

2015 Mid-Year Meeting
March 25-28, 2015
JW Marriott Camelback Inn
Scottsdale, AZ

Report of the ACREL Nominating Committee

The ACREL 2013 Nominating Committee, as appointed by President Jonathan R. Shils, consists of Ann M. Saegert (TX) as Chair; Angela M. Christy (MN), Rebecca A. Fischer (CO), Steven G. Horowitz (NY), Joan Story (CA) and Linda A. Striefsky (OH).

Pursuant to Article VI, Section 2(b) of the Bylaws, Thomas F. Kaufman (DC) will automatically become the President on January 1, 2014.

Pursuant to Article VI, Section 2(a) of the Bylaws, the Nominating Committee nominates the following individuals for election to the offices indicated for terms commencing January 1, 2014:

Kenneth M. Jacobson (IL)	President-Elect
Kathryn C. Murphy (MA)	Vice-President
Roger D. Winston (MD)	Treasurer
Rod Clement (MS)	Secretary

Pursuant to Article V, Section 3 of the Bylaws, the Nominating Committee nominates the following individuals for election as Governors for three-year terms commencing January 1, 2014:

Peter Aitelli (CA)
Michael D. Goodwin (DC)
Margaret A. Rolando (FL)
Susan G. Talley (LA)
Julie A.S. Williamson (FL)

Upon his election as Secretary, Rod Clement's position as a Governor, which expires December 31, 2015, will become vacant. Pursuant to Article V, Sections 3 and 4 of the Bylaws, the Nominating Committee nominates David R. Kuney (DC) to fill the two-year remaining term of Rod Clement.

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

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.

Are Courts "Waiving" Goodbye to Strict Construction in Commercial Agreements?

by Douglas M. Bregman
Bregman, Berbert, Schwartz & Gilday, LLC

Despite the oft-cited proposition that courts are to give effect to the ordinary meaning of unambiguous contractual provisions, the Court of Appeals of Maryland decision in *600 North Frederick Road, LLC v. Burlington Coat Factory, LLC*[1], indicates that courts may, in certain instances, ignore express contractual provisions, regardless of whether a party to the contract has waived it.

Strict Construction is Beneficial for Business

Strict constructionism provides all parties to a commercial real estate transaction with legal and business certainty. While departing from the four corners of an agreement may make some sense where one party has been defrauded, where all parties mutually agree to do so, or to adjust some imbalance in bargaining power, *ex post* modification by the court is certainly less justified where sophisticated business parties have negotiated at arm's length.

The Erosion of Strict Construction

The dispute in *600 N. Frederick* concerned a subsequent amendment to a covenant governing several tracts of land, which amendment was invalid under the express terms of the covenant.

The tract of land at issue had been divided into three parcels, "Parcel One," "Parcel Two," and "Parcel Three," respectively, prior to 1976. In 1976, Danac Real Estate Investment Corporation ("Danac"), then owner of all three parcels, entered into a thirty-year lease agreement with Montgomery Ward ("Ward") for Parcels One and Two. Ward's use of Parcel Two for parking was, pursuant to the lease, subject to Danac's right to develop Parcel Two. And while Danac's right to develop Parcel Two (or Three) required, as a precondition, approval from Ward, approval was not to be unreasonably withheld. Danac subsequently conveyed Parcels One, Two, and portions of Three to various entities.

In 1981, owners of all three parcels entered into a covenant ("1981 Declaration") that, among other things, granted Danac the development rights on Parcel Two (provided that the owner of Parcel One consented, which was not to be unreasonably withheld). Most importantly for this article, the 1981 Declaration provided that it may "be modified or canceled only by written instrument signed by the owners of [all] the Parcels." A few years later, Danac and Ward found themselves involved in litigation after Ward refused to give Danac consent to develop Parcel Two. As a result of the settlement of that case, Danac and Ward entered into an agreement (the "1992 Declaration") that impacted the scope of Danac's development rights and created a "Restricted Development Area" in Parcel Two. This agreement was never signed by the owners of Parcel Three.

In 1998, Ward assigned its interest as a tenant under the 1976 lease to Burlington Coat Factory ("BCF"). BCF then began to operate one of its retail stores on Parcel One, using the parking lot on Parcel Two. In 2003, 600 North Frederick Road, LLC ("600 N. Frederick"), purchased Parcels One and Two. After acquiring the Parcels, 600 N. Fredrick attempted to enter into an agreement with developers on two separate occasions, to construct mixed-use development on Parcel Two. Both attempts, however, were frustrated as BCF refused to give its consent. In response to BCF's repeated refusal, 600 N. Frederick filed a complaint for declaratory relief, asking the Circuit Court,

[1] 419 Md. 413 (2011).

continued on p. 5

continued from p.4

among other things, to declare the 1992 Declaration invalid as a result of it not being signed by the owners of Parcel Three, an express requirement under the 1981 Declaration.

Although the 1981 Declaration unambiguously required the signature of the owners of Parcel Three, both the trial and appellate courts agreed with BCF's contention that the missing signature was irrelevant so long as the owners of Parcel Three were not prejudiced by the modification. In other words, the court departed from its general rule that the plain meaning of unambiguous language is to be given effect.[2]

Both the trial and the appellate courts, cognizant of the lack of Maryland case law on point, based their conclusion on Justice Traynor's 50-year-old opinion in *Hotle v. Miller*, 334 P.2d 849 (Cal. 1959). Hotle involved a husband and wife who had executed a deposit agreement with the bank vesting all title in the surviving spouse. Several years after entering into the deposit agreement, however, the spouses agreed orally to treat all property as community property, irrespective of their title at any time. When the husband passed, his executors attempted to distribute the property in accordance with the deposit agreement as modified by the couple's oral agreement. The executors for the wife's estate, however, sought to prevent this distribution alleging that the oral agreement could not alter the terms of the deposit agreement because the bank was not a party to it. The California Supreme Court, noting the lack of prejudice to the bank, determined that the subsequent oral agreement was valid and therefore modified the deposit agreement.

It is important to note that many of Justice Traynor's contract law decisions use reasoning allowing the court to reach the most beneficial result in market terms, without too much concern for the express contract language.[3] In an attempt to construe contracts to achieve the best transactional result, Traynor often strayed beyond the four-corners of the document. Aside from the factual distinction – an oral agreement between spouses on how their own property is to be distributed versus a covenant between sophisticated business people regarding a complex real estate commercial venture – there was no analogous language requiring the bank's signature or consent to any modification of the deposit agreement (*i.e.*, the deposit agreement was silent). The Court of Appeals approach in *600 N. Frederick*, however, "would apply not only to contracts that are silent on this point, but also those whose express terms are to the contrary."[4]

The Effect of Erosion

It is important to consider the potential implications of this development in contractual interpretation. Aside from creating uncertainty and uneasiness for parties to a commercial contract, it creates a great deal of uncertainty for attorneys drafting contracts when struck with the realization that courts may waive unambiguous provisions. ■

[2] *100 Inv. Ltd. P'ship v. Columbia Town Ctr. Title Co.*, 430 Md. 197, 233-34 (2013); *John L. Mattingly Constr. Co., Inc. v. Hartford Underwriters Ins. Co.*, 415 Md. 313, 326–27 (2010); *Calomiris v. Woods*, 353 Md. 425, 445 (1999); *Maternal-Fetal Med. Assocs., LLC v. Stanley-Christian*, 2013 WL 3941970 (Md. Ct. Spec. App. 2013) (quoting *Nova Research, Inc. v. Penske Truck Leasing Co.*, 405 Md. 435, 447–48 (2008)).

[3] Stewart Macaulay, *JUSTICE TRAYNOR AND THE LAW OF CONTRACTS*, 13 Stan. L. Rev. 812 (1961).

[4] *600 North Frederick Road, LLC, supra note* 1, 419 Md. at 441, n. 18.

State Legislators, Insurers and Courts to Homeowner Associations: We Will Not Insure Intentional Torts

by Adam Leitman Bailey, Esq. & Adam Blander[1]

Introduction

The cover of the October 30, 1975 *Daily News* coarsely summed up President Gerald Ford's announcement denying federal funds to a New York City teetering on bankruptcy: "FORD TO CITY: DROP DEAD." Ford never uttered those notorious words, but his decision was calculated to convey that very message: the Nation refused to bail out a city whose purported reckless excessive spending brought this mess in the first place. Ford's stance was premised on what economists refer to as "moral hazard," which predicts that parties are more likely to engage in harmful behavior if they know they will be insured from the consequences. This logic of "tough love" is also at play in the policy of most states to deny insurance coverage for intentional acts for tort feasors.

The boards of the three principal species of collectively managed housing developments—condominiums, cooperatives, and individual houses on plots deeded subject to reciprocal covenants and restrictions, the collection of all three of which we shall refer to as "Homeowner Associations" (HOA's)—see these same issues in facing suit for actions they have undertaken on a strictly volunteer basis. When it is alleged that HOA board member has purposefully discriminated on the basis of race, for example, the member should not expect to be indemnified for any resultant damages, and may not even be entitled to have the insurer defend the action in court. The law's refusal to insure intentional acts of HOA directors, while understandable, could spawn unintended mischief.

Individual Liability for Board-Members

Board-members of business enterprises must look out for well-being of the entity, on pain of exposure to personal liability. Further, they may be liable for their entity's torts simply by virtue of their participation in voting on the underlying action.

Yet unlike business board members collecting a salary for their services, HOA board members get involved in their spare time without receiving compensation. Liability for damages can thus deter voluntary involvement. As *Jaffe v. Huxley Architecture*, 200 Cal. App. 3d 1188, 1193, 246 Cal. Rptr. 432 (Ct. App. 1988) described:

> The board members of a homeowners association are seldom professional managers, are very often uncompensated and most often are neighbors. Undoubtedly, the specter of personal liability would serve to greatly discourage active and meaningful participation by those most capable of shaping and directing homeowner activities.

Recognizing the risks of imposing limitless liability, many states have exceptions to general corporate agency principals in order to encourage what *Kleinman v. High Point of Hartsdale I Condo*. 108 Misc. 2d 581, 582, 438 N.Y.S.2d 47 (Sup. Ct. 1979) called the "gratuitous quasi-public service" of residential board-membership.

For example, Louisiana Rev. Stat. Ann. § 9:2792.7 immunizes an unsalaried HOA director from

[1]Adam Leitman Bailey would like to thank Bill Locke and Marie A. Moore and a lively ACREL Insurance Committee Spring Meeting in Naples for providing the inspiration for this article.

continued on p. 7

continued from p.6

individual liability when his actions were "in good faith and within the scope of his official functions and duties" and not "willful or wanton." Thus, a condo board's mismanaging of a mold problem, for example, would not expose its members to liability. *Caracci v. Cobblestone Vill. Condo. Ass'n*, 05-784 (La. App. 5 Cir. 3/28/06), 927 So. 2d 542, 546.

Similarly, in California "while a condominium association may be liable for its negligence, a greater degree of fault is necessary to hold unpaid individual condominium board members liable for their actions on behalf of condominium associations." *Ritter & Ritter Inc. v. Churchill Condominium Ass'n*, 166 Cal. App. 4th 103 (2008).

Many states also provide immunity for the discretionary decision-making of directors of not-for-profit corporations, thus encompassing some HOAs. [*See e.g.*,805 Ill. C. S. 105 § 10870 (immunizing unpaid directors and officers of non-profit corporations for "damages resulting from the exercise of judgment . . . in connection with the[ir] duties") ; Wash. Rev. Code Ann. § 4.24.264 (" a member of the board of directors or an officer of any nonprofit corporation is not individually liable for any discretionary decision or failure to make a discretionary decision within his or her official capacity as director or officer unless the decision or failure to decide constitutes gross negligence").]

The Federal Volunteer Protection Act, 42 U.S.C.A. §§ 14501 et seq., similarly protects directors and officers of not-for-profit entities, as defined in the Act, from allegations of simple negligence. [*See Kashani v. Rochman*, B226060, 2013 WL 635962 (Cal. Ct. App. Feb. 21, 2013), in which the court declined to rule on whether the Act applies to HOAs.]

Until recently in New York, the rule of *Pelton v. 77 Park Ave. Condominium*, 38 A.D.3d 1, 825 N.Y.S.2d 28 (2006) gave HOA directors further safeguards, protecting HOA members both from allegations of negligence, and claims of discrimination or other intentional torts. To sue individual members, Plaintiffs were required to plead specific allegations of tortious conduct, independent of the underlying tort committed by the board. The *Pelton* rule, however, was undermined in *Fletcher v. Dakota, Inc.*, __AD3d__, 948 NYS2d 263 (1st Dept. 2012) in which plaintiff sued his co-op and two of its directors, alleging that the board discriminated against him on the basis of race in refusing to approve his purchase of an adjacent apartment. The *Fletcher* court, refusing to apply *Pelton*, wrote, "[A]lthough participation in a breach of contract will typically not give rise to individual director liability, the participation of an individual director in a corporation's tort is sufficient to give rise to individual liability."

Similarly in *Fielder v. Sterling Park Homeowners Ass'n*, C11-1688RSM, 2012 WL 6114839 (W.D. Wash. Dec. 10, 2012) (interpreting Washington State law), the court made clear that judicial deference to the purported "business judgment" of HOA decision-making will not relieve individual directors of liability for intentional discrimination.

On the one hand, *Fletcher* and decisions like it simply apply to HOA's a general corporate doctrine – that directors and officers can be jointly and severally liable for the corporation's torts. Nonetheless, *Fletcher* sent shockwaves through the real-estate legal community, exposing volunteers to liability for actions taken in good faith and within the board's authority, making the procurement of comprehensive Director's and Officer's ("D&O") insurance all the more essential.

Such policies are, however, cold comfort to protect against allegations the law holds to be uninsurable, such as intentional torts and racial discrimination. For these claims, directors could potentially be on the hook for a mere vote. Widespread understanding of such risks in the lay person community could make staffing HOA Boards increasingly difficult.

What Body of Law

While there is scant case-law specifying when HOA board-members can be insured against losses

continued on p. 8

continued from p.7

arising from their commission of an intentional tort such as discrimination, general insurance law provides significant guidance on how courts would approach the issue.

Intentional Acts

The purpose of insurance is to minimize risks from unforeseen occurrences, regardless of whether the losses resulted due to the fault of the insured. Essentially, *all* policies insuring against misconduct deviate from tort law's purpose of deterring harmful behavior, as an insured insulated from the harmful consequences of actions is not sufficiently discouraged against the forbidden behavior. Society nonetheless tolerates this so-called "moral hazard" because shifting responsibility to an insurer allows risk spreading, thus reducing overall costs; and there is a recognition that a moment's inattention is not necessarily justification for a lifetime of suffering. Allowing for insurance also encourages individuals who engage in otherwise beneficial conduct that could expose them to liability to continue that laudable goal while ensuring adequate recovery for injured parties.

While these rationales allow for insuring against negligence, they cannot be extended to cover intentional misconduct. There, the availability of insurance could *directly* incentivize misbehavior, especially if borne of spite or hatred. Since intentional misbehavior is not unplanned or "fortuitous", it is thus beyond the scope of the purpose of insurance agreements, which is the managing of contingencies and risks, not certainties. As the *Ranger* case (549 So.2d 1005, 1007, discussed *infra*) put it bluntly, "it is axiomatic in the insurance industry that one should not be able to insure against one's own intentional misconduct."

That intentional conduct is generally uninsurable largely arises from language in insurance policies themselves. Policies generally expressly exclude the insured's "violation [that is] knowing and willful" as well as "matters uninsurable under the law pursuant to which the policy is construed." (*See, e.g.,* Exemplar Policy issued by Zurich American Insurance Policy). Nonetheless, it can be hard to tell whether a specific act is sufficiently intentional to be excluded from the policy. In *Voorhees v. Preferred Mut. Ins. Co.*, 128 N.J. 165 (1992), the court wrote, "absent exceptional circumstances that objectively establish the insured's intent to injure [e.g., the reprehensibility of the act in question], we will look to the insured subjective intent to determine intent to injure." In *J.C. Penny Casualty Ins. Co. v. M.K.*, 52 Cal. 3d 1009 (1991) the court ruled that child molestation is intentional, wrongful, and harmful as a matter of law, despite expert testimony that the insured intended no harm. In *Germantown Ins. Co. v. Martin*, 407 Pa. Sup. Ct. (1991), the court found that the perceived "irrationality" of the insured's actions have no bearing on an intentionality inquiry, writing, "obviously no rational person would go on a shooting spree, but this in no way lessens the intention character of the conduct, if such intent is evidenced."

Thus, regardless of a contract's provisions, public policy may still require denying coverage, recognizing the public interest in discouraging intentional torts to be greater than that of maintaining freedom of contract. Alternatively, this also invokes the "uninsurable under the law" exclusion.

Codified Uninsurability

Numerous states have codified this reasoning into statutory law. California Insurance Code § 533: provides that "An insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others." Massachusetts Gen. Laws Ann. ch. 175, § 47 states, "[N]o company may insure any person against legal liability for causing injury . . . by his deliberate or intentional crime or wrongdoing, nor insure his employer or principal if such acts are committed under the direction of his employer or principal [.]" So too are there such laws in North Dakota (N.D. Cent. Code Ann. § 26.1–32–04), South Dakota (S.D. Codified Laws § 53-9-3), and Kansas (K.S.A. 40-2, 115).

continued on p. 9

continued from p.8

Coverage Excluded Under Common Law

In most states, however, the "public policy exclusion" is a common law creation. In Florida, *Ranger Ins. Co. v. Bal Harbour Club, Inc.*, 549 So.2d 1005 (1989) fashioned a two-part test to determine "whether a particular policy of civil liability insurance is opposed to public policy." Under *Ranger*, first, a court should engage in a "deterrence" inquiry: a determination if this particular misconduct would be encouraged due to the availability of insurance; and second, determining whether the purpose of the initial imposition of liability is "to deter wrongdoers or compensate victims." Thus in Ranger, the Court prohibited indemnifying losses stemming from intentional housing discrimination on the basis of religion, relying on what it viewed as 1) "Florida's long-standing policy of opposing religious discrimination" (evidenced in the Florida constitution, the Florida Human Rights Act and Fair Housing Act); and 2) the fact that the majority of discrimination defendants are "commercial enterprises" with "far greater resources than [ ] individuals" and therefore rendering such actions uninsurable would "result in relatively few instances where the injury would go uncompensated." Thus, the practical consequence of the Ranger rule is to deny coverage for intentional acts.

This policy prevails in many states across the country. In New York, *Town of Massena v. Healthcare Underwriters Mutual Ins. Co.*, 98 N.Y.2d 435, 445 (2002) holds, "As a matter of policy, conduct engaged in with the intent to cause injury is not covered by insurance." In New Jersey, *Ambassador Ins. Co. v. Montes*, 76 N.J. 477 (1978) recognizes a "general principle" of denying coverage for intentional torts and *Vorhees v. Preferred Mu. Ins. Co.*, 128 N.J. 165 (1992) announces that "public policy" of compensating victims with insurance proceeds cannot supersede the public policy against insurance agreements that "condone and encourage intentionally-wrongful conduct." In Pennsylvania, *Germantown Ins. Co. v. Martin*, 407 Pa. Sup. Ct. 326 (1991) holds intentional acts uninsurable as a matter of public policy, regardless of any irrationally impulsive nature of the action. In Louisiana, *Graham Resources, Inc. v. Lexington Ins*. Co., 625 So 2d 716, 721 (La. Ct. App. 1st Cir. 1993) finds "as a matter of public policy people should not be allowed to insure themselves against acts prohibited by law such as securities fraud." In Ohio, *Gearing v. Nationwide Ins. Co*., 665 N.E.2d 1115 (Oh. 1996) reiterates that "this court has long recognized that Ohio public policy generally prohibits obtaining insurance to cover damages caused by intentional torts." In Mississippi, *Delta Pride Catfish, Inc. v. Home Ins. Co.*, 697 So. 2d 400, 405 (Miss. 1997) rules that an enterprise "cannot purchase insurance coverage for its intentional, illegal activities. People should not be allowed to insure themselves against acts prohibited by law." In Oregon, *Groshong v. Mutual of Enumclaw Ins.*, 143 Or. App. 450 (1996) states that public policy prohibits insurance for intentional housing discrimination. In Alabama, the Federal 11th Circuit found in *American & Foreign Ins. Co. v. Colonial Mortg. Col., Inc.*, 936 F.2d 1162, 1165 (11th Cir. 1991) that "all contracts insuring against loss from intentional wrongs are void in Alabama as against public policy."

However, some states have had rules less emphatic than that of the *Ranger* court. The Illinois Supreme Court in *Dixon Distributing Co. v. Hanover Ins. Co.*, 161 Ill.2d 433 (1994) expressly declined to embrace this public policy exclusion "in the absence of clearly articulated arguments or authority," interpreting an insurance agreement to cover claims of retaliatory discharge. However, subsequently, *Illinois Farmers Ins. Co. v. Keyser*, 956 N.E.2d 575, 578 appeal denied, 962 N.E.2d 482 (Ill. 2011) and *Lincoln Logan Mut. Ins. Co. v. Fornshell*, 309 Ill.App. 3d. 479 (Ill 1999) have cited *Dixon* for the proposition that indemnifying intentional conduct is *prohibited*. Under *Lincoln Logan*, "indemnity against intentional misconduct may be tolerated where it provides benefits for the victim, but not where it compensates the wrongdoer."

Similarly, in Minnesota, several cases have left open the possibility of allowing intentional tort coverage. In *Indep. Sch. Dist. No. 697 v. St. Paul Fire & Marine Ins. Co*., 495 N.W.2d 863 (Minn. Ct. App.

continued on p. 10

continued from p.9

1993), an appeals court refused to read into an insurance policy an intentional acts exclusion when the agreement provided coverage for wrongful acts, yet did not qualify this coverage by reference to negligent conduct. Citing the "competing public policies which favor freedom of contract" the court enforced the policy as is. The court also disputed that the availability of coverage would "stimulate" discrimination, citing approvingly a Sixth Circuit case observing that "common sense suggests that the prospect of escalating insurance costs and trauma of litigation, to say nothing of the risk of uninsurable punitive damages, would normally neutralize any stimulative tendency the insurance might have." However, *St. Paul Fire & Marine Ins. Co. v. Briggs*, 464 N.W.2d 535, 539 (Minn Ct. App.) stated, "It is a central concept of insurance that a single insured will not be allowed, through reckless or intentional acts, to control the risks covered by the policy."

Missouri also appears to have cases with conflicting outcomes. In *White v. Smith*, 440 S.W.2d 497 (Mo.App.1969), a Missouri court of appeals stated that "as a matter of public policy, a liability insurance contract does not afford coverage for damage intentionally inflicted by the insured." *Accord, Keeler v. Farmers and Merchants Ins. Co.*, 724 S.W.2d 307, 309 (Mo.App.1987). Nonetheless, in *New Madrid County Reorganized School Dis. No. v. Continental Cas. Co.*, 904 F.2d 1236 (1990), the Eighth Circuit stated that the language in these two cases was merely dicta, and held that under Missouri law, public policy would not prohibit coverage for intentional acts when the policy expressly provided for it.

Intentional Discrimination Is Uninsurable

Civil rights law recognizes a difference between actions that merely had the unintended consequence of discriminating against certain protected classes of people and actions taken with that specific goal in mind. Under cases such as *Ranger, supra*, public policy does not prohibit insuring against unintentional discrimination, "clearly a legitimate business risk." Insuring against *intentional* discrimination, on the other hand, is deemed contrary to public policy in the vast majority of both state and federal courts. [*See, e.g., Jefferson-Pilot Fire & Cas. Co. v. Sunbelt Beer Distributors, Inc.*, 839 F. Supp. 376, 380 (D.S.C. 1993); *Groshong v. Mutual of Enumclaw Ins. Co.*, 143 Or.App. 450, 458 (1996)]. However, as we saw in *Ind. Sch. Dist. No. 697, supra*; and *New Madrid, supra*, there are some contrary rulings. Insurers, at any rate, systematically exclude intentional acts from coverage.

State insurance departments take a similar view regarding intentional discrimination. A New York State Insurance Department Circular Letter [Circular Letter No. 6, Insurance Coverage for Discrimination Claims Based upon Disparate Impact and Vicarious Liability, New York State Insurance Department (1994)] prohibiting coverage for intentional discrimination nonetheless argued that covering unintentional discrimination in fact *furthers* the public policy against discrimination. Thus, in the employment context:

> [b]y bringing to employers' attention practices that can potentially result in unlawful discrimination, insurers' loss prevention programs and underwriting standards should discourage such practices. Any employer who does not diligently attempt to modify employment procedures accordingly may well be denied insurance coverage. When unlawful acts of discrimination occur nonetheless, coverage will help ensure just compensation for victims.

Similarly, an Ohio Attorney General Opinion Letter (1945 Op. Ohio Att'y Gen. 295, 298) states that violations of Ohio's anti-discrimination statutes "would necessarily amount to an intentional wrong committed against the aggrieved party" and thus uninsurable.

A Broader Duty to Defend

While HOA directors will be unable to procure intentional tort insurance coverage, both as a matter of contract, and as a matter of public policy, the duty of insurers to defend actions is far broader than its

continued on p. 11

continued from p.10

duty to indemnify, obliging the insurance company to provide a vigorous and good faith defense to the insured, regardless of the likelihood the insurer will pay the judgment. For example, *Fieldston Property Owners Ass'n v. Hermitage Ins. Co*., 16 N.Y.3d 257, 264-65, 2011 recently observed that the insurer's duty to defend

> arises whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy. Moreover if 'any of the claims against an insured arguably arise from covered events, the insurer is required to defend the entire action.' It is 'immaterial that the complaint against the insured asserts additional claims which fall outside the policy's general coverage.'(internal citations omitted)

In short, courts look only to the complaint to determine whether the insurer must provide a defense. [*accord,, Isenhart v. General Cas. Co.*, 233 Or. 49 (1962) ("the obligation of the insurer to defend is to be determined by the allegations of the complaint filed against the insured.")] Well advised Plaintiffs' attorneys will therefore invariably plead (if they can) whatever facts or claims necessary to bring the suit within coverage, pleading intentional tort *and* negligence theories in order to bring the insurance company to the table to defend the action, to encourage a settlement agreeable to both parties, and to provide a fund alternative to the actual defendant from where a plaintiff can draw compensation (even if the negligence theory is tenuous).

For example, in *Lime Tree Village Community Club Ass'n, Inc. v. State Farm General Insurance Company*, 980 F.2d 1402, (1993), several homeowners sued their village's association, alleging that the association's recent amendment to its "covenants and restrictions" limiting the community to adults age 55 or over constituted racial and age-based intentional discrimination, in violation of the Fair Housing Amendments of 1988 and Florida State law. The Eleventh Circuit observed that the complaints alleged that the amendment also constituted a breach of the underlying covenants and restrictions, as well as "slander of title," and "restraint of trade," all state claims in which plaintiff need not prove intent in order to prevail. Even if these common-law theories were "merely creative discrimination claims," and even if the insurer would ultimately be exempt from indemnifying the association, the court held that that the insurer nonetheless had a duty to defend "until all covered claims have been removed from the complaints."

The California Supreme Court was less indulgent in *Minkler v. Safeco*, 49 Cal 4th 315 (2010), warning that courts should be "wary of policy interpretations that encourage artful and sham tort pleading" in which a plaintiff will allege intentional tort claims in negligence terms in order bring the suit within coverage.

While ethical considerations forbid sham pleading, obviously any plaintiff seeking compensation should prefer their adversaries being amply insured rather than obtaining a crippling but ultimately unenforceable judgment. Since the client owns the case, if the plaintiff is looking merely to make an example of the defendant without a goal of pecuniary compensation, plaintiff's counsel will have to behave and plead accordingly. But, if the plaintiff wants compensation, counsel should be using all possibilities of good faith pleading of insurable wrongs. Compensation is vastly more likely with the involvement of the insurer.

Possible Responses and Outstanding Problems

One could argue that fear of liability for intentional torts could be overblown, that an innocent director who will not discriminate has nothing to worry about. The United States Supreme Court famously admonished, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007). So too, it would, at first glance, seem that the way to stave off potential liability for discrimination is simply not to discriminate.

continued on p. 12

State Legislators, Insurers and Courts...

continued from p.11

However, that is an overly simplistic answer to the problem of potential and *insurable* liability. Not all persons found by the trier of fact to have discriminated intentionally actually did so. While intent not to discriminate certainly *reduces* potential liability, it does not abolish it.

HOA boards are invariably confronted with extraordinarily sensitive and potentially volatile decisions, such as whether to accept or deny an application for membership or a special residential privilege. Therefore, there is always the risk that a good-faith decision by the board could prompt a spurned applicant, for example, to sue, alleging intentional discrimination, one that could, notwithstanding the truth, prevail in court. This unavailability of insurance coverage therefore potentially puts HOA directors in a serious bind. At the same time, we don't want to reward actual discrimination. Practically, most of those board members sued will receive a free lawyer to defend the merits of the case as plaintiff attorneys almost always sue for more than one claim and at least one claim will be within coverage. But an award by a judge or jury for intentional conduct that would not be insured and the publicizing of just a few such cases could cause volunteer board members to quit their boards *en masse.*

Conclusion

In the vast majority of cases, HOA board membership is both voluntary and thankless. Making it perilous can discourage all but the most foolhardy from serving. It is therefore absolutely necessary that Board counsel be aware of these dangers and be creative in ways to protect the communities they represent so that a board has a reasonable chance to get the most talented members rather than the most naïve. ■

STAFF BOX

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

One Central Plaza
11300 Rockville Pike, Suite 903
Rockville, MD 20852

Editorial Committee
Charles L. Edwards, Chair
Timothy J. Hassett

Editor
Jill H. Pace
Executive Director

Got Programs?

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

National Construction Dispute Resolution Committee Meeting June 6, 2013

Summary of Minutes for the American College of Real Estate Lawyers

Case Administration

AAA Senior Vice President Robert Matlin provided an update on Large Complex Case (LCC) Administration and the expansion of AAA staff in each Regional Office to handle LCC cases. Robert made the following points: (1) LCC cases (claims in excess of $1 million) are increasing in number; (2) new Directors of ADR Services, including LCC cases, are predominantly attorneys; (3) a new search tool will allow parties to access all AAA Arbitrator resumes to find the appropriate arbitrator for their LCC case; and (4) non-attorney arbitrators are required to complete a webinar to qualify for LCC assignments.

AAA Clause Builder

AAA Vice President Mike Marra presented an update of the AAA Construction Clause Builder which allows parties to build a custom construction ADR clause. The Construction Clause Builder is available on line at www.clausebuilder.org

Appellate Rules

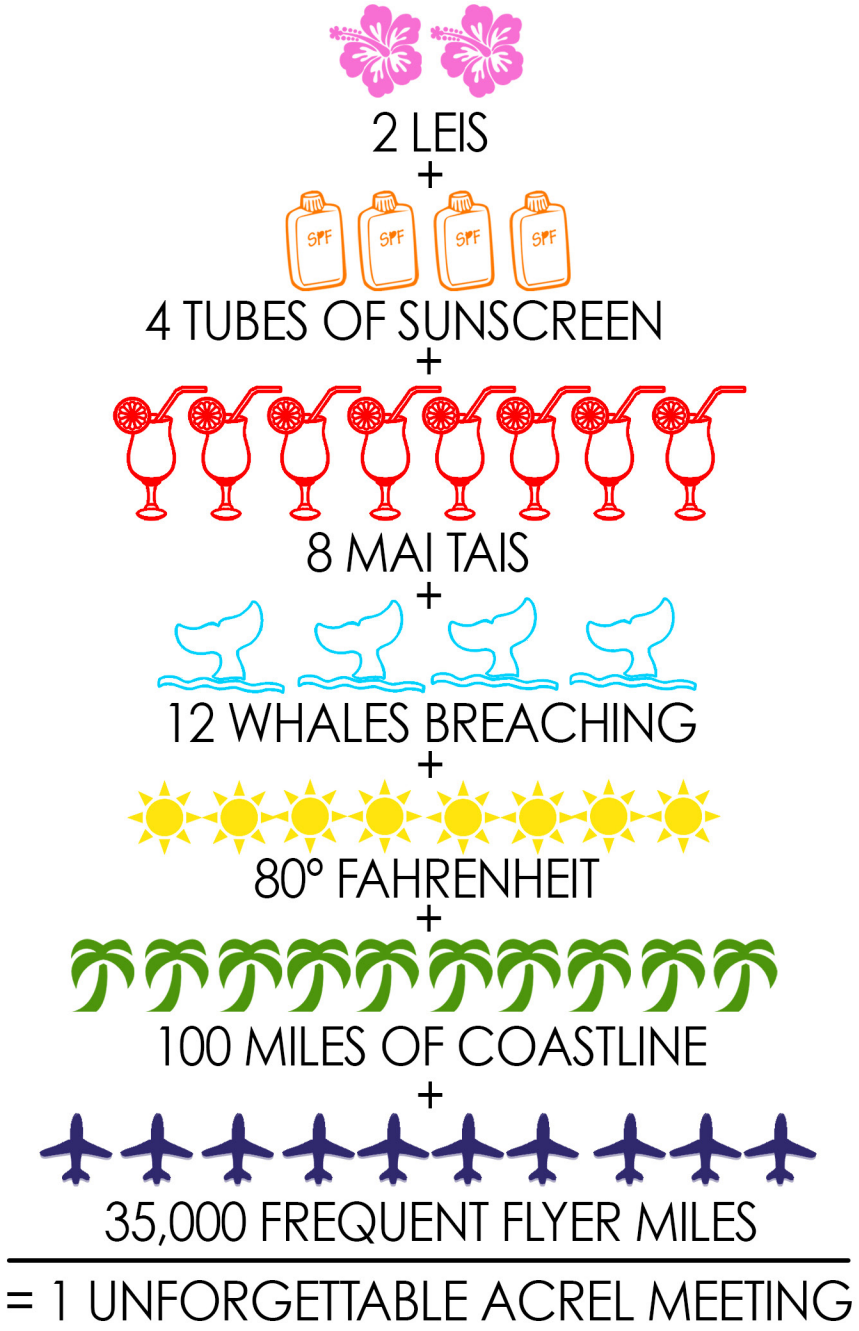
AAA Senior Vice President Robert Matlin provided an overview of the new optional AAA Appellate Rules which will be available in the near future.

The next National Construction Dispute Resolution Committee meeting is scheduled for early December, 2013 in Washington D.C. If any Fellows of ACREL have issues of concern which may be addressed please inform either of the undersigned to permit those issues to be placed on the agenda.

Respectfully submitted,

Stanley P. Sklar
ssklaradr@comcast.net

Bryan C. Jackson
bjackson@allenmatkins.com



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

More information will be available at the Vancouver Meeting this October!
The registration deadline for Vancouver is September 18th.