ACREL News

President's Message

A new ACREL year has begun and many Fellows have been very busy with ACREL activities already. First, though, thank you for your continued membership and participation in ACREL! I am delighted that you are all renewing your commitment to the College and its mission:

- to promote high standards of professional and ethical responsibility in the practice of real estate law;
- to improve real estate law and practice;
- to make available to the bar and to the public authoritative educational materials in real estate law and practice;
- to inform Fellows of the most current developments in real estate law and practice;
- to address issues of importance to real estate law by participating in law reform matters and legislative, administrative and judicial initiatives;
- and to cooperate and consult with national, state and local bar organizations, government agencies and other groups which have an interest in real estate law and practice.

Many Committees and Fellows are working diligently to carry out this mission. The Programs Committee, under the leadership this year of Ann Waeger, is constantly focused on providing authoritative and topical programs. San Diego, New York and Austin are all currently on the agenda, with San Diego in rehearsal, New York planning almost complete and Austin planning beginning now. Please let Ann know if you have Program ideas.

The Programs Committee also plans ACRELive CLE Programs

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and CLE programs with ALI and, this year, with the ABA Real Property, Trust and Estates Section. See the information about the RPTE CLE elsewhere in this Newsletter. These programs have a shorter planning horizon than the meetings so are a perfect forum for hot topics. Let Jack Fersko know if you have an idea for a topic!

The Member Selection Committee started its work in August and will be meeting soon in Chair Rebecca Fischer's hometown of Denver to determine which of the 51 nominated candidates it will recommend to the Board of Governors for membership in the College. You will be hearing from members of the Committee if you voted for candidates in your state.

The Member Development Committee, under Chair Bill Sklar, is having monthly calls to track the development of potential nominees. If you have potential candidates to recommend for ACREL membership but are not sure that they meet all the membership criteria, please give their names and other information to Bill so the Committee can assist you in developing them as candidates.

The Orientation and Integration Committee would like you to host a local gathering of ACREL Fellows. JoAnne Stubblefield is the current chair. The committee will help you determine the best way for you to organize the gathering. Please plan a local get-together for the Fellows in your area this Spring.

The new Communications Committee under the leadership of Peggy Rolando is going to seek your input on the best way to communicate with you. Watch for a survey later this Spring. Meanwhile, please let Peggy or me know if you have ideas for better communications.

The Meetings Committee, with Chair Susan Talley, is working on meetings for 2018. The 2017 meetings will be in Austin and LA. Check your new directory for dates.

The Substantive Committees officers are busy planning for their meetings in San Diego. I hope you will all become actively engaged in a Substantive Committee – many of them have calls and share information between meetings offering you a way to take advantage of your ACREL membership even if you can't make it to every meeting.

And speaking of meetings – I look forward to seeing many of you at the Grand Del Mar in San Diego March 17 – 20. While the hotel is booked, rooms have been becoming available as people change their plans. Don't be discouraged. Make sure you get your name on the wait list so you have a chance for a room as the wait list clears. The registration materials are posted. The Program includes a public policy forum on sporting venues and their role in community development, sessions on local counsel opinions, federal regulatory impacts on development and ethical decision making, among others. The tours all look terrific. There will be a wonderful ACREL Cares project Saturday afternoon – more about that below. Dine Around registration for Friday night dinners at a variety of local restaurants has just opened, so be sure to sign up for those. Please register for the meeting by February 19th and for the Dine Arounds by March 4.

Many thanks are due to our sponsors for helping to make all of this activity possible: Avison Young, Chicago Title Insurance Company, Commonwealth Land Title Insurance Company, Cushman & Wakefield, Inc., Fidelity National Title Insurance Company, First American Title Insurance Company, Massey Consulting Group,

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Newmark Grubb Knight Frank, Smokeball, Stewart Title Guaranty Company and World Travel, Inc.

It is a true privilege to serve you as your President. I hope you will let me know your suggestions for making the College even better.

Meetings Calendar

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

2017 Mid-Year Meeting
March 30-April 2, 2017
The Four Seasons Hotel
Austin, TX

2017 Annual Meeting
October 19-22, 2017
InterContinental Hotel
Los Angeles, CA

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

Editor
Jill H. Pace
Executive Director

In Memoriam

Paul J. McNamara, Boston, MA

Charles W. Spencer, Dallas, TX

We will miss our colleagues in our future deliberations and extend our condolences to their families and friends.

Volunteer to Help Habitat for Humanity in San Diego!

Join ACREL in San Diego as an ACREL Cares volunteer. ACREL will be volunteering with Habitat for Humanity San Diego's Neighborhood Revitalization program, which empowers residents to revive their neighborhood and enhance their quality of life. Volunteers are needed to help in the Imperial Beach neighborhood, to assist residents with needed repairs, such as exterior home repairs, accessibility, weatherization, safety, landscaping, and painting. Imperial Beach is in the South Bay area of San Diego and is the southern-most beach city in California. The project will be near six brand new homes on 10th Street in Imperial Beach that Habitat just completed.

HFH San Diego has an interesting history. In its early years, it was a cross border operation, building houses in Tijuana, Mexico and San Diego, California. In 1990, President Jimmy Carter was involved in a one-week building blitz that created 107 homes in Tijuana and southeast San Diego. In the early 1990s, Habitat for Humanity International took over efforts in Mexico, but not before 358 homes were built. HFH San Diego has also built over 200 homes in San Diego County. HFH San Diego also runs two stores that sell donated building materials and home furnishings and operates programs to rehabilitate existing homes, in particular, a program to do critical repairs and improvements to homes owned by low/moderate income veterans.

Please consider spending Saturday afternoon helping HFH San Diego. Bring work clothes, durable shoes (no open-toed), and work gloves if you have them. Also remember that you will be working outside in San Diego, so bring hats and sunscreen, as well.

– Angela Christy, Jay DeVaney, Scott Jackson

ACRELades

Andrew L. Herz of Patterson Belknap Webb & Tyler LLP's Real Estate Practice Group has received The New York Bar Association's Real Property Law Section Professionalism Award for his "exceptional contributions of time and talent to New York real estate lawyers." The award identifies a person "possessing an outstanding level of competence, legal ability and achievement; a continuing civility and appreciation for others in his/her practice; a person who has engaged in mentoring of younger attorneys and who has been involved in Bar activities both on a state and local level."

Send us your news for future issues!

The Newest AML Deputy in Town: FinCEN's Geographic Targeting Orders Put the Bull's-Eye on the Title Insurance Industry

*by Kevin L. Shepherd**

The Federal Government's effort to combat money laundering has historically been limited to banks and other traditional financial institutions. Since the terrorist attacks on September 11, 2001, the Federal Government has gradually, but inexorably, extended the reach of its anti-money laundering ("AML") efforts to other related industries, such as casinos, currency exchanges, certain life insurance companies, and dealers in precious metals, stones, or jewels. The real estate industry was initially the target in 2003 for AML regulatory action, and in 2012 the Federal Government imposed AML requirements on residential mortgage lenders and originators. Other than that action in 2012, the real estate industry has not been subjected to Federal Government efforts to impose AML regimes on the industry—until now.

On January 13, 2016, in response to recent media reports that have highlighted the risks of money laundering in "all cash" residential real estate transactions and the lack of transparency in the ownership of entities that acquire these real estate assets, the U.S. Treasury Department's Financial Crimes Enforcement Network ("FinCEN") issued two "Geographic Targeting Orders" ("GTOs") that, starting on March 1, 2016, will require certain title insurance companies to file reports on "all cash" residential transactions in Manhattan and Miami. These reports obligate certain title insurers to report details on the form of payment made and the identity of the owners of the entity acquiring the residential asset. This article discusses the GTOs and their scope, the impact the GTOs may have on the real estate and title insurance industries, and the potential effect the GTOs may have on many real estate and other transactional lawyers.

What Residential Real Estate Transactions Are Covered by the GTOs?

Not every residential real estate transaction in the United States is subject to the GTOs. Instead, the GTOs apply to a "Covered Business" involved in a "Covered Transaction." A Covered Transaction means a transaction in which a Legal Entity (as defined below) purchases residential real property in the Borough of Manhattan in New York City or in Miami-Dade County, Florida for a total purchase price in excess of $3,000,000 (for Manhattan properties) or $1,000,000 (for Miami properties); the purchase is made without a bank loan or other form of external financing; and the purchase is made, at least in part, by using currency or a cashier's check, a certified check, a traveler's check, or a money order in any form. The GTOs define a "Legal Entity" as a foreign or domestic corporation, limited liability company ("LLC"), partnership, or other similar business entity, and a "Covered Business" means a specific title insurance company and any of its subsidiaries and agents.

A Covered Transaction does not include a residential real estate transaction involving a mortgage loan, presumably because FinCEN, the regulatory agency having jurisdiction, already requires residential mortgage lenders and originators to adopt AML programs.

Beneficial Ownership Disclosure

The GTOs are designed not only to flag high value, "all cash" residential real estate transactions in two specific geographic areas, but also to require

* Kevin L. Shepherd is a partner in the Real Estate Practice Group at Venable LLP in Baltimore, and is chair of the American Bar Association ("ABA") Real Property, Trust & Estate Law Section's Working Group on Anti-Money Laundering/Counter-Terrorist Financing Efforts Affecting Lawyers. Mr. Shepherd is a past chair of the Section and is a past president of ACREL.

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that the Covered Business file a report with FinCEN containing details about the purchaser and its beneficial ownership. FinCEN has expressed concerns with the money laundering vulnerabilities associated with the use of business entities to acquire these types of assets and has sought increased transparency on the ownership and control of these entities. Indeed, federal legislative efforts for over a decade have sought to mandate the disclosure of beneficial ownership information for certain business entities. Most recently, FinCEN issued a notice of proposed rulemaking in March 2012, and a related proposed rule in August 2014, regarding customer due diligence requirements for financial institutions. See 77 Fed. Reg. 13046 (March 5, 2012) and 79 Fed. Reg. 45151 (Aug. 4, 2014). Under this proposed rulemaking, which has not yet led to the issuance of final regulations, FinCEN sought to address the need to collect beneficial owner information on the natural persons behind legal entities that establish new accounts at financial institutions. To accomplish this objective, FinCEN proposed a new separate requirement to identify and verify the beneficial owners of legal entity customers (i.e., the natural persons who own or control legal entities) opening new accounts, subject to certain exemptions. This proposed rulemaking is aimed at banks, brokers or dealers in securities, mutual funds, futures commission merchants, and introducing merchants in commodities, and does not cover the real estate industry.

Under the GTOs, a Covered Business involved in a Covered Transaction is required to e-file through the Bank Secrecy Act E-filing system a FinCEN Form 8300 within 30 days of the closing of the Covered Transaction. The Form 8300 must contain information about the identity of the individual "primarily responsible" for representing the "Purchaser" (i.e., the Legal Entity that is purchasing residential real property as part of a Covered Transaction), and the Covered Business must obtain and record a copy of that individual's driver's license, passport, or similar identifying documentation. The Form 8300 must also contain information about the identity of the Beneficial Owner(s) of the Purchaser. The GTOs define a "Beneficial Owner" as each "individual" who, directly or indirectly, owns 25% or more of the equity interests of the Purchaser. As with the information the Covered Business is to obtain about the individual primarily responsible for representing the Purchaser, the Covered Business is required to obtain and record a copy of the Beneficial Owner's driver's license, passport, or similar identifying documentation. If an LLC is the Purchaser involved in a Covered Transaction, the GTOs direct that the Covered Business also provide the name, address, and taxpayer indication number of all the members of the LLC, to the extent not otherwise provided on the Form 8300.

Record Retention Requirements

The GTOs obligate the Covered Business to retain the records relating to the compliance with the GTOs for five years, store the records in a manner accessible within a reasonable period of time, and make the records available to FinCEN or other appropriate law enforcement or regulatory agencies on request.

Duration

The GTOs have a limited shelf life. The GTOs become effective in March 1, 2016 and end on August 27, 2016, which is basically a six month period. But the Secretary of the Treasury has discretion to extend the duration of the GTOs.

Issues

The GTOs present a number of issues of interest and concern to transactional lawyers, nearly all of which are practical rather than academic:

1. What is "Residential Real Property"? The GTOs do not define "residential real property." Although the media reports largely focused on wealthy persons acquiring single family residences by the use of limited liability companies, the use of the phrase "residential real property" is not limited to those residences. Instead, it potentially applies to multi-family housing complexes, apartment buildings, cooperatives, and condominium regimes. This means

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that the GTOs may extend to areas considered to be commercial real estate, albeit residential in nature. The GTO does not indicate whether a "residential real property" loses that character if it also contains other uses, such as a small retail shop or an office that forms a part of the overall residential real estate. In a letter to FinCEN dated January 13, 2016, the American Land Title Association ("ALTA") raised various concerns ALTA had with the GTOs, including the scope of "residential real property."

2. Are Lawyers "Agents" of a Title Insurance Company? The GTOs define a "Covered Business" as a title insurance company "and any of its subsidiaries and agents." The GTOs are designed to require title insurance companies to capture certain information for "all cash" residential real estate transactions that they handle in Manhattan and Miami-Dade County. The GTOs extend the contours of a Covered Business to include the title company's "agents." Of course, a title insurer has agents that issue title insurance policies to buyers. In some jurisdictions, however, a real estate lawyer may act both as a title insurance agent based on a contractual agency between the title insurance company and as the lawyer for the buyer. In that situation, can the Federal Government obligate the lawyer to provide (in the lawyer's capacity as counsel for the buyer) the requested beneficial ownership information about the lawyer's client if doing so could violate the attorney-client privilege or certain state court ethics rules, including the rules concerning the lawyer's duty to protect client confidentiality? See, e.g., ABA Model Rule of Professional Conduct 1.6 ("Confidentiality of Information"). Suppose the lawyer acts as both the counsel for the buyer and the agent for the title insurer, and the buyer instructs the lawyer not to disclose the identity of the members of the buying entity in the form of an LLC? Does the lawyer risk violating the ABA Model Rules by disclosing that client information to the Federal Government? How does the lawyer balance the ethical duty to protect client confidentiality under state law against a potential violation of federal law in this situation?

The ABA has sought to provide guidance on these types of issues. In 2010, the ABA House of Delegates adopted as official ABA policy the Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing ("Good Practices Guidance").
See http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/116.authcheckdam.pdf. The Good Practices Guidance is designed to provide practical and understandable guidance to the legal profession for the development of a risk-based approach to client due diligence in the AML area. The ABA Standing Committee on Ethics and Professional Responsibility ("ABA Ethics Committee") issued a formal opinion on May 23, 2014 discussing a lawyer's ethical obligations to fight money laundering and terrorist financing, including the interaction of the Model Rules and the Good Practices Guidance. Known as Formal Opinion 463, the ABA Ethics Committee's opinion harmonizes the Good Practices Guidance and the Model Rules by concluding that the Good Practices Guidance is consistent with ethical principles, including loyalty and confidentiality. The opinion states that lawyers should adopt client intake and monitoring procedures, such as risk-based control measures, that are designed to ensure that lawyers do not unwittingly engage in providing legal services that facilitate money laundering or terrorist financing. By implementing these procedures, lawyers can thus avoid aiding money laundering and terrorist financing activities in a manner consistent with the ABA Model Rules and with the binding state court ethics rules that closely track the Model Rules. http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_463.authcheckdam.pdf.

3. What is an "All Cash" Residential Real Estate Transaction? The reporting obligations under the GTOs are triggered, in part, if the purchase of residential real estate "is made, at least in part, using currency or a cashier's check, a certified check, a traveler's check, or a money order in any form." If the reporting obligations are triggered because the purchase was made using one of these forms of payment, the title insurance company will need to file a FinCEN

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Form 8300 within 30 days after the closing. Form 8300 contains fields intended to capture six different forms of a "cash" payment: U.S. currency, foreign currency, cashier's check, money order, bank draft, or traveler's check. The GTOs, however, do not apply to electronic fund transfers ("EFTs") because banks already collect information about the originator and recipient of the EFTs and make this information available to regulators upon request.

4. Are Title Insurance Companies Equipped to Perform the AML Functions Set Forth in the GTOs? Banks and financial institutions are accustomed to implementing and maintaining sophisticated AML procedures and protocols, but it remains to be seen whether the title insurance industry will be able to do so—at least in the short term. At this early stage in the process, it is unclear what costs will be incurred by the title insurers to comply with the new AML requirements and whether the title insurers will be able to pass those costs onto the insureds. A part of these costs include training staff to implement an effective AML regime, which will take time and money. Apart from these costs, a title insurer may require that the insured execute an affidavit in favor of the title insurer regarding the information the title insurer is required to provide under Form 8300.

5. When is a Covered Business "Involved" in a Covered Transaction? The GTOs state that a Covered Business must file a Form 8300 as described above if the Covered Business is "involved" in a Covered Transaction. FinCEN's use of "involved" evokes memories of identical language used in the Bank Secrecy Act ("BSA") relating to the real estate industry. The numerous "financial institutions" subject to the regulatory requirements of the BSA include banks, credit unions, and savings associations, but also "persons involved in real estate closings and settlements." Well over a decade ago, on April 10, 2003, the Treasury Department issued an advance notice of proposed rulemaking that sought to impose an AML regime on "persons involved in real estate closings and settlements." 68 Fed. Reg. 17571, Apr. 10, 2003. The proposed rulemaking has since been dormant, but as discussed below the significant policy questions it raised over 13 years ago remain unanswered.

The BSA did not define "involved," which created uncertainty about the scope of the proposed rule. The GTOs do not define what is meant by the use of the word "involved." For example, is an attorney acting as an agent for a title insurance company drafting a deed for the purchase "involved" in a Covered Transaction? What if the attorney simply performs a title examination for the property in question and issues a title insurance commitment as agent for the title insurance company? Is the agent "involved" in a Covered Transaction if the title insurer conducts the closing from the offices of the agent/attorney but otherwise has no personal involvement in the sale transaction? The GTOs do not identify the level and scope of participation that would inform the meaning of "involved." Because non-compliance with the GTOs may trigger civil and criminal liability, the absence of guidance on the word "involved" creates uncertainty about the need to file a Form 8300 for a given Covered Transaction.

6. Will the GTOs be Expanded to Include Other Geographic Areas? Given the limited duration (both temporally and geographically) of the GTOs, FinCEN evidently seeks to "beta test" this initiative on a manageable scale and to evaluate the value of the collected data. If FinCEN believes that this initiative yields information of value to it and other law enforcement authorities, FinCEN may extend this initiative to other areas.

7. Must the Covered Business Provide its Records to Law Enforcement Simply on Request? The GTOs impose recordkeeping obligations on Covered Businesses and obligate them to make these records available to FinCEN, and any other appropriate law enforcement or regulatory agency, "upon request." The GTOs do not specifically define "records," but note that the records include "all records relating to compliance" with the GTOs. It is not clear whether the Covered Business must disclose

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"upon request" even those records collected as part of the Covered Transaction that may be confidential or privileged. One would assume that Covered Businesses could withhold such protected documents, subject to the court's review of the disputed materials on a document by document basis, but the GTOs simply do not address this issue.

8. What Impact will the Disclosure of Beneficial Ownership Information Have on These Transactions? One premise underlying the GTOs is that criminals may be using "dirty money" to acquire high value residential real estate through anonymous entities that mask the true ownership. FinCEN seeks to dissuade these criminals from this form of acquisitive activity by requiring title insurance companies to obtain and report the beneficial ownership of the acquiring entity. Although there may be legitimate reasons why a wealthy individual may seek to form an LLC to acquire high value residential real estate in an "all cash" transaction (including privacy, liability protection, and estate planning), a buyer acquiring high value residential real estate in these geographic areas will need to weigh those reasons against the disclosure requirements of the GTO.

9. Are All Title Insurance Companies in Manhattan and Miami-Dade County Covered by the GTOs? The GTOs do not specify which title insurance companies are covered by the GTOs. Because the effective date of the GTOs is March 1, 2016, FinCEN will presumably notify the title insurance companies that will be covered before that date. In any event, national title insurance companies may encounter challenges in isolating the documentation, processes, and procedures required to comply with the GTOs to a discrete geographic region in the United States.

10. What do the GTOs portend for Real Estate and other Transactional Lawyers Involved in Residential Real Estate Transactions? As noted above, the GTOs cover title insurance companies and their "agents." These agents could include real estate and other transactional lawyers. It is unclear whether the GTOs' reference to "agents" would encompass lawyers, especially since the regulation of the legal profession has historically been the province of the states, especially the state supreme courts (and their state bar agencies) that license attorneys.

Assuming that the GTOs do not seek to regulate lawyers engaged in the practice of law, U.S. lawyers should nonetheless perform a voluntary risk-based assessment of their clients involved in "all cash" real estate transactions. This assessment will allow lawyers to make sure that their legal services are not being used unwittingly to facilitate money laundering or terrorist financing. This type of assessment is more fully outlined in the Good Practices Guidance.

As described in the Good Practices Guidance, of particular concern are situations where the lawyer acts as a financial intermediary and "touches the money" by handling the receipt and transmission of funds through accounts the lawyer actually controls in the act of closing or facilitating a transaction. Without knowing the sources and destination of the funds, a lawyer may unwittingly aid money laundering or terrorist financing activities. For example, a real estate lawyer who represents a seller of real estate may also function as an escrow agent who holds the earnest money deposit in an escrow account and conducts closing by receiving and transmitting the closing funds through the lawyer's escrow account. Lawyers who are involved in these types of "all cash" transactions need to be attuned to the potentially higher risk of money laundering or terrorist financing and perform an enhanced level of client due diligence. The Good Practices Guidance contains more information on the risk-based approach and the risk categories and analysis, together with examples of client intake and monitoring procedures to assist lawyers to detect and prevent money laundering and terrorist financing.

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Conclusion

The GTOs are designed to collect data for FinCEN on whether high value residential real estate is being acquired in "all cash" transactions by wealthy criminals hiding behind the veil of secrecy afforded by LLCs or other business entities. Based on the data FinCEN culls from the GTOs, FinCEN may expand the use of the GTOs and seek to enlist others "involved" in Covered Transactions (in addition to title insurance companies) to file reports on these transactions. These "others" may include accountants, lawyers, and real estate agents. Lawyers who may be subjected to this potential regulatory regime may encounter difficult questions concerning the impact this regime could have on the attorney-client privilege and the broader lawyer duty to protect client confidentiality. The Good Practices Guidance and Formal Opinion 463 seek to provide lawyers with practical guidance on these types of issues, but FinCEN will also need to address thoroughly those concerns, and the scope of both the privilege and the lawyer's duty of confidentiality as reflected in applicable court decisions, before taking any further action in this area. ■

GET YOUR GEEK ON!
TECH WIZARDS WANTED

ACREL's Tech Wizards provide assistance to ACREL Fellows and committees working with ACRELShares! We have a group of dedicated Tech Wizards, but can always use more help.

If you can send an e-mail, open and save a file in Word, or electronically file a pleading in federal court, you are Tech Wizard material.

If you are interested in finding out more about becoming a Tech Wizard, please contact Trev Peterson at tpeterson@knudsenlaw.com or call Trev at 402-475-7011.

No prior wizardry experience required.

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 **Jo Anne Stubblefield** at jstubblefield@hspclegal.com, (404) 659-6600.

Waivers of Subrogation Tips and Issues

by Norman W. Gutmacher, Esq., Benesch, Friedlander, Coplan & Aronoff LLP

In January, 2015 at the request of Beat Steiner on behalf of the ACREL Leasing Committee, I agreed to undertake what I thought would be the simple task of drafting a balanced "waiver of subrogation" clause that could be utilized by landlords and tenants alike, with little negotiation or modification. I thought it might take me two or three hours to draft the clause. Boy was I wrong. As is often the case, the deeper I delved into the clause, the more difficult the task became.

Anyone who has negotiated a lease or contract that included a waiver of subrogation provision knows that it can be a difficult negotiation, partly because many attorneys do not understand the insurance policy and lease provisions that are impacted by the proposed language and partly due to a possible knee jerk reaction that the request for the waiver is a request for someone to give up a valuable right. At the Fall, 2015 Leasing Committee meeting, I presented a list of Waiver of Subrogation tips, issues and concerns. The following is a discussion of some of these items.

First, always keep in mind with respect to commercial leasing that a waiver of subrogation is not really a waiver of subrogation. Rather, a waiver of subrogation is actually a waiver by the insured of the insured's rights (and claims), which waiver has the effect of negating an insurance company's right to subrogation under its insurance policy. Similarly, based on the legal principal that an insurer cannot sue its own insured, the right of subrogation is negated if the party causing the loss is an additional insured under the policy of the party sustaining the loss.

Second, subject to applicable State laws,[1] waivers of subrogation can be utilized in connection with a wide variety of types of insurance, including property insurance, commercial general liability insurance, builder's risk insurance, worker's compensation insurance and automobile insurance. While we typically find waiver clauses in property insurance provisions of leases, they may be appropriate in other situations. Also, with respect to property insurance, the ISO form[2] currently permits a **post-loss** waiver by the landlord (but not by the tenant) in the base property insurance policy[3] , and by endorsement in a CGL insurance policy.[4] The insurance terminology utilized in ISO Forms is "Waiver of Transfer of Rights of Recovery Against Others to Us". See, e.g., as to Commercial Property Insurance, ISO form CP 00 90 07 88, and as to Commercial General Liability Insurance, ISO forms CG 29 88 10 93, CG24 04 05 09 and CG 24 04 10 93.

Third, the waiver clause should waive claims and rights of recovery. Technically speaking, one cannot waive subrogation. Subrogation is the right of a third party (typically of the insurer and generally not a third party who has privity to the lease agreement)

[1] See *Landlord/Tenant Subrogation in All 50 States* by Matthiesen, Wickert & Lehrer, S.C., which can be found on the Matthiesen Website - https://www.mwl-law.com/wp-content/uploads/2013/03/landlord-tenant-subrogation-in-all-50-states.pdf (updated 12/2/15) and *Leases and Property Insurance* by Bill Locke, which can be found at https://acrelshares.sharepoint.com/committees/Insurance_Committee/Final Products/TEMP-Old ACREL/Leases and Property Insurance.pdf (ACREL Spring 2012)

[2] This paper focuses on ISO forms. Some States have adopted insurance forms other than ISO, which may or may not be comparable to the ISO forms identified in this paper.

[3] Section I of ISO Form CP 00 90 07 88 provides in part: "…you may waive your rights against another party in writing . . . after a loss to your Covered Property . . . if, at the time of loss, that party is one of the following: . . . (Y)our tenant." Section I of ISO Form CP 00 90 07 88 also allows for post loss waivers by "someone insured by this insurance" and by business firms owned or controlled by the insured or that own or control the insured. The form can be found at http://www.independentagent.com/Education/VU/SiteAssets/Documents/ISO/CP/CP00900788.pdf?Mobile=1

[4] Note that a waiver of the right to recover damages post-loss is not allowed by a tenant as against its landlord under a standard form ISO property insurance policy that would be carried by a tenant. Therefore it very important for landlords to include the waiver in their leases for the waiver to be effective as against a tenant's insurer. Otherwise, if an insured casualty occurs in its building that is caused by the negligence of the landlord or one of its employees or agents, the insurance company covering a tenant whose personal property or tenant improvements are damaged by the casualty would have a right to seek recovery for the loss from the landlord.

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to step into the shoes of the injured party. One cannot waive someone else's rights. What can be waived are a person's or entity's rights and claims which then defeats the ability of the insurer to step into the waiving person's or entity's shoes. Consider changing the heading on the subrogation paragraph in your leases to make clear the intent of the parties to waive "all claims, direct and by way of subrogation."

Fourth, a waiver of subrogation clause, as it relates to damage to property, should be drafted to cover a waiver of claims and rights covered or coverable by "special perils" or "special causes of loss" form property insurance. It is important to limit the waiver to "special perils" form or "special causes of loss" form property insurance, as opposed to "covered or coverable by insurance", as it is possible that insurance coverage could be obtained from, for example, Lloyds of London, that would be more broad than a special perils form policy.

Fifth, the waiver should never be limited "to the extent of insurance proceeds". While a landlord may know the value of its building, a landlord will most often not know the value of what a tenant has in its premises. Among the issues with this type of limit are: (i) What if insurance is not obtained or if the property is "underinsured" or does not include coverage for laws and ordinances or replacement cost without depreciation? (ii) What if landlord or tenant is self-insuring? (iii) What if insurance coverage is denied by the carrier under the "protective safeguards" endorsement?[5] or if the insurance is cancelled or lapses?

Sixth, if there is a deductible or if coverage is denied or limited by the protective safeguards endorsement (or some other limitation that is triggered by an act or omission on the part of a party), how much of that amount should be excluded from the waiver and who should bear the risk of making up the loss of insurance proceeds?

Seventh, watch out for a reversal of roles and/or conflicting lease provisions, such as where the tenant is insuring the owner's building and improvements, or the landlord is insuring leasehold improvements. Issues to look out for in a lease also include contradictory provisions in the lease, such as one provision whereby the landlord is obligated to restore the building or the tenant's improvements, but another provision in the same lease whereby the tenant assumes responsibility for (and/or indemnifies landlord against) damage to the building or its improvements due to the fault or neglect of the tenant. In these situations, one must be careful in drafting the waiver clause to make certain that the person who is carrying the insurance has the repair/restoration obligation if insurance is insufficient – even if it is a repair/restoration obligation in respect of the other party's property, and to make certain that the liability and indemnification provisions of the lease are consistent with the waiver of subrogation and repair/restoration clauses.

Lastly, when drafting the waiver provision, consider whether or not it is (or should be) broad enough to include the property manager within its scope. A claim by the tenant against the property manager might result in, at best, confusion, if not conflicting claims under the Property Management Agreement.

What follows are two sample forms that take into account some, but not all of the above. Both forms are still a "work in process."

[6] An ISO form of Protective Safeguards endorsement is BP 04 30 07 02, which can be found at http://calmutual.businesscatalyst.com/forms/boprequired/BP0430%200702%20Protective%20Safeguards.pdf. For an excellent discussion of Protective Safeguards see David Gordon's article with a comments memo by Arthur Pape "*INSURANCE REDUX: Reprise and Update on the Protective Safeguards Endorsement*", which was published in the April, 2012 issue of ACREL News and can be found on the ACRELShares website at http://www.acrel.org/Documents/Newsletters/ACRELNewsApril20122.pdf (at page 10).

continued on p. 13

Waivers of Subrogation...

continued from p. 12

Form 1

Except as otherwise provided in the last sentence of this Section, to the extent permitted by applicable law, Landlord and Tenant each hereby releases the other from any and all liability for any loss of or damage or injury to property occurring in, on or about the Premises by reason of fire or other casualty that is or could be insured against under a so-called "special perils" form or "special causes of loss" property insurance policy or under a so-called "contents" insurance policy, regardless of cause, including, without limitation, the negligence of other party. Each of Landlord and Tenant further agrees that, to the extent permitted by applicable law, such insurance carried by either of them shall contain a clause or provision whereby the insurance company permits (or does not preclude) the foregoing release. Because the provisions of this Section are intended to preclude the assignment of any claim described herein by way of subrogation or otherwise to an insurance company or any other person, if required by the terms of the applicable insurance policy, such party to this Lease shall give to each insurance company that has issued to such party one or more policies of property insurance notice of the terms of the mutual releases contained in this Section and each party shall have such insurance policies properly endorsed, if necessary, to prevent the invalidation of such insurance by reason of the provisions of this Section. Notwithstanding anything in this Section to the contrary, the foregoing release by Landlord in favor of Tenant shall not apply, and shall be void and of no force or effect, if Landlord's insurance coverage is denied, invalidated or nullified by reason of any act or failure to act of Tenant, its agents, employees, invitees or contractors.

Form 2

To the extent permitted by applicable law, Landlord and Tenant mutually waive and release their respective rights of recovery against each other, and against the officers, directors, partners, members, shareholders, employees, agents, tenants and subtenants of the other, directly or by way of subrogation or otherwise, for any claim, and for any loss of, or damage to, either landlord's or tenant's property or any operations therein, if such claim, loss, damage or injury results from a cause of loss which is covered or would have been covered by any insurance policy carried by the party sustaining a loss or required by the terms of this lease to be in effect at the time of such loss, damage or injury. To the extent permitted by applicable law, such waiver or release shall be effective without regard to whether any such policy was in effect, without regard to the availability of coverage or limits of liability under any such policy and without regard as to the negligence of the party benefiting from the waiver or release. Landlord and Tenant each shall obtain any special endorsements required by its insurer to allow such waiver of rights but the failure to obtain same shall not impair the effectiveness of this waiver or release between Landlord and Tenant. Any cost for a special endorsement shall be paid for by the party obligated to pay for the required insurance policy hereunder. This clause shall not apply to any claim for willful misconduct or intentional acts that are not covered by the required insurance or to the deductible potion of any insured loss sustained by Landlord.[6]

[6] Neither Form 1 nor Form 2 deals with the issue of the deductible portion of any loss. Also, Form 2 does not reflect the last sentence of the Form 1 – for situations in which insurance is denied or invalidated by virtue of an act or failure to act covered by the a protective safeguards endorsement.

Got Programs?

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

Introducing ACREL's New eCLE Venture

by Roger Winston, Ballard Spahr LLP

The ACREL Programs Committee is pleased to announce that it will soon be offering eCLE programs jointly with the Real Property, Trusts and Estates Section of the American Bar Association ("RPTE"). This joint venture will allow ACREL Fellows to offer cutting edge distance learning programs to ACREL Fellows and the 20,000 members of RPTE, as well as the thousands of lawyers in the RPTE database who have attended RPTE eCLE programs over the past 10 years. These eCLE programs will be screened and monitored by the Programs Committee to insure that ACREL's high standards for programs is always met or exceeded. Special thanks to Ann Waeger, Jack Fersko, Nancy Little, Scott Willis, Marie Moore and John McNearney for making this happen, including putting together the following upcoming finance programs (further details to be provided on ACRELShares and the ACREL website).

1. **March 30, 2016 – Let's Get This Project Built**
   Speakers: Beth Mitchell, Shelli Willis and Meg Meister

2. **April 20, 2016 – It's all About the Money – Leases as Collateral**
   Speakers: Barry Hines, Adam Weissburg and Everett Ward

3. **May 18, 2016 – Covenants and Mortgage Documents**
   Speakers: Suzanne Bessette-Smith, William Rothschild and Susan Talley.

Should you have any questions or wish to suggest a future eCLE program, contact Jack Fersko.

CALL FOR VOLUNTEER EDITORS!

The Publications Committee is looking for a few good volunteers to serve as editors of the ACREL Papers. No previous experience or training necessary (beyond knowing how to read and write)! Our editors typically will edit two to four articles each year, prior to our two meetings. The job of the editors is to lend an extra "eye" to an author's work, and to make any suggestions that could add to the paper's appeal. The time involved is relatively little, but one of the rewards of being an editor is learning more about topics that may help you in your profession or that otherwise appeal to you. It's also a great way to become acquainted with authors who are Fellows who you may not have met.

If you're interested, or have questions, please contact **Deb Macer Chun**, our Publications Committee's Vice Chair – ACREL Papers, at dchun@chunkerr.com, or **Bob Paul**, our Publications Committee's Chair, at rpaul@rgts.com. They'd be delighted to tell you more and answer any questions you might have – and, they can sign you up, right on the spot!