ACREL News

President's Message

Welcome to our Twenty New Fellows

Please join me in welcoming our twenty new Fellows to the College. We have a talented and diverse group representing in-house, big firm, solo practitioner, and other practice structures, based in small communities, cities and everything in between, and with geographical diversity from Hawaii to Maine. Thanks to our substantive committee leadership, they are all actively engaged in our committee projects and initiatives and will provide great contributions to our programming and our collegiality in Chicago.

Please Join Me in Chicago October 18-21, 2012

I want to personally invite you to join us in Chicago for the 34th Annual Meeting of ACREL October 18-21 – registration materials will arrive by email in the very near future! In addition to a wide array of both **practical and cutting edge substantive programs**, members and guests will enjoy **lunch with John Malcolm, Shakespeare's close friend since childhood**, who will share with us some of Shakespeare's shrewd real estate investments. Apparently Shakespeare's experiences in the real estate market led to inclusion of eloquent and sometimes bawdy references to land law in many of his plays. Social activities include several **art and architecture tours** (Tiffany glass, the Field Museum, Frank Lloyd Wright, Millenium Park, The Bean and more!!!) as well as an **ACREL Public Service Project** at the Greater Chicago Food Depository. I am particularly pleased that this will be our second public service project of 2012, and will help the Food Depository provide food for school lunches and families in immediate need – no hammer skills or walking on roof girders required for this project! Our Chicago meeting will conclude with a reception and dinner on Saturday evening, with entertainment provided by **Second City** –a very special program designed just for us and with only the very best and most tasteful lawyer jokes included. See you there!

Seeking Qualified ACREL Nominees for 2013

The **2013 Member Selection** process will soon begin, and we are looking

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forward to a robust nominating slate from all of you. The requirements for membership are more fully stated in the Member Selection Guidelines and Commentary, but please note that **a nominee must be a distinguished real property law practitioner with at least 10 years experience in real estate law** (with certain exceptions for those not in private practice), who exemplifies **professional integrity** consistent with ACREL's Statement of Professionalism, and who satisfies the well known and often misunderstood **"ACREL Give Back**" requirement (essentially, substantial speaking, writing and certain other contributions designed to improve real estate law and practice). Because more than half of our Fellows are over age 60, it is extremely important that we seek qualified younger members, consistent with our member selection requirements. There is always a great deal of confusion on the "ACREL Give Back" requirement, so please take a quick look at the "Give Back" Guidelines and Commentary on these requirements on pages 22 -28 of our 2012 Directory, as well as on our website. You may contact Everett Ward (IL) or Roger Winston (MD), our Chairs of Member Selection and Member Development, respectively, if you have any general questions regarding these requirements.

See you in Chicago!

Ann M. Saegert, President

STAFF BOX

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One Central Plaza
11300 Rockville Pike, Suite 903
Rockville, MD 20852 301/816-9811
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The New Rules of Foreclosure Litigation

*by Adam Leitman Bailey and Dov Treiman**

Since the first loans and mortgages changed hands with cloaks and stone in Israel[1] and Greece[2] thousands of years ago,[3] never previously had mortgages caused a worldwide economic collapse of financial markets. Unfortunately, as the federal and state government as well as some judges place barriers and hurdles breaking contracts and preventing lenders from collecting monies owed to them, or foreclosing on the homes pledged as collateral, lenders may eventually run away from traditional lending, leading to a new world of lending where cash and goods are king and bartered in exchange for property. This would destroy most of the equity acquired in an owner's home. Strange judicial decisions have come down and played their part in slowing down the foreclosure process or simply eviscerating the foreclosure action. Fortunately, our appellate courts have come to the rescue and brought the essentials for any government--law and order and predictability of law so that business people and consumers alike can prepare contracts without uncertainty. One of the worst fears of every real estate and dirt lawyer is the unknown of what a court will do if a problem arises with a contract.

Having reviewed all of the New York state appellate foreclosure cases since January 2010, we are discussing some of the most important foreclosure cases decided in that period. Our goal is not to denounce or praise these cases but to teach the practitioner and title professional how to proceed in this new era of mortgage and foreclosure litigation. As a general rule, the courts continue to show far greater restraint against enforcing lenders' claims, but our review has shown that when lender's counsel prepares the papers meticulously in accordance with the new laws, properties do go to judgment and sale.

One interesting pattern emerged. Although the counties of the Second Judicial Department[4] account both for roughly 50% of the population and 50% of owner-occupied housing in the State of New York, over 70% of foreclosures in the State were in the Second Department.[5] While we decline to speculate as to the economic or sociological reasons for the statistical discrepancy, it does mean that the Second Department is leading the way in making foreclosure law.[6]

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* Adam Leitman Bailey *is the founding partner* and Dov Treiman *the landlord-tenant managing partner of Adam Leitman Bailey, PC.* ***Alison Weisman****, a New York Law School student and extern at the firm, assisted in the preparation of this article.*

1 There are references in the Old Testament that provide evidence that there was lending among individuals in the ancient world. Both the Books of Exodus and Deuteronomy indicate that there was lending and that personal property collateral was used to assure repayment of loans. Debtors would pledge their personal property to creditors for the creditor to hold until the debtor repaid the loan. If the loan was not repaid, the creditor was able to sell the pledged property. The Books of Exodus and Deuteronomy refer to two types of collateral: cloaks and millstones. Millstones were equipment used to grind wheat into flour and were valuable possessions because an owner would use a millstone to produce a livelihood. Roger D. Billings and Frank J. Williams, *Abraham Lincoln, Esq: the Legal Career of America's Greatest President* 109-112 (2010).

2 In Ancient Greece, placing a pillar or tablet on the land, inscribed with the creditor's name and the amount of the debt indicated a pledge for land. H.W. Chaplin, *The Story of Mortgage Law,* 4 Harv. L. Rev. 1 (1890).

3 The authors wish to credit New York Law School Professor of Law and Director of the Center for Real Estate Studies, Andrew R. Berman's article "*Once a Mortgage, Always a Mortgage" – The Use (and Misuse of) Mezzanine Loans and Preferred Equity Investments* 11 Stan. J.L. Bus. & Fin. 76 (2005) for leading them to authority on the history of mortgages.

4 The Second Department includes Richmond, Kings, Queens, Nassau, Suffolk, Westchester, Dutchess, Orange, Rockland and Putnam Counties.

5 An analysis of http://www.RealtyTrac.com revealed that as of January 2012 there were a total of 1672 foreclosures in New York and 1185 of these foreclosures were in the Second Department.

6 Such as, for example, the Third Department's overwhelming presence in corrections law.

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No Sale Pending Modification

In *Aames Funding Corp. v. Houston,*[7] the Second Department stayed a foreclosure sale pending a determination on the mortgagor's application for a residential mortgage modification pursuant to the federal Home Affordable Mortgage Program (HAMP).[8]

The loan servicer had notified the homeowner that he might be eligible for a loan modification under HAMP, and the homeowner submitted an application to the loan servicer. While the homeowner's application was pending, the lender published a notice of foreclosure sale.

The court cited Version 2.0 of the "Making Home Affordable Program Handbook,"[9] which was in effect at the time the lower court denied the homeowner's motion to stay the foreclosure sale. The Handbook stated, in pertinent part, that "a servicer may not refer any loan to foreclosure or conduct a scheduled foreclosure sale unless and until … the borrower is evaluated for HAMP and is determined to be ineligible for the program."

Since the loan servicer was a participant in the HAMP program, it was barred from scheduling a foreclosure sale during the HAMP process.

Single Lawsuit Rule

Under New York's equitable relief doctrine, when a borrower defaults on mortgage payments, a lender seeking repayment of a loan may proceed either at law to recover a judgment for the mortgage debt, or may bring an action in equity to foreclose the mortgage, but not pursue both remedies at the same time.[10]

However, that does not deprive a foreclosure plaintiff of a money judgment. If the foreclosure sale is insufficient to satisfy the debt, attorney's fees, and court costs and expenses, the plaintiff may move for a judgment for those sums within the context of the foreclosure action.[11] The plaintiff must move for such judgment within 90 days after the date of the consummation of the sale by the delivery of the referee's deed to the purchaser[12] at the foreclosure sale.

Generally, plaintiffs move for a deficiency judgment simultaneously with moving to confirm the sale, but the deficiency judgment motion does not enjoy the same flexibility as the confirmation motion.[13] Courts strictly enforce this 90-day period and uniformly treat it as a statute of limitations, beginning on the date that a properly executed deed is delivered, not when it is recorded.[14] Failure to serve the notice of motion within this period serves as a complete bar to the entry of a deficiency judgment.[15]

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7 *Aames Funding Corp. v. Houston*, 85 A.D.3d 1070, 926 N.Y.S.2d 639 (2nd Dept. 2011).
8 Part of the congressional response to the 2008 crisis.
9 One should not mistake the word "handbook" for implying anything less than the full force of law.
10 Real Property Actions and Proceedings Law § 1301.
11 *Steuben Trust Co. v. Buono,* 254 A.D.2d 803, 677 N.Y.S.2d 882 (4th Dept. 1998).
12 Real Property Actions and Proceedings Law § 1371.
13 *Seiden v. Chagnon*, 33 A.D.2d 951, 306 N.Y.S.2d 847 (3rd Dept. 1970).
14 *Cicero v. Aspen Hills II, LLC*, 85 A.D.3d 1411, 1412, 926 N.Y.S.2d 680, 682 (3rd Dept. 2011).
15 *Id.,* at 1412, at 682.

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In *Aurora Loan Services, LLC v. Lopa,*[16] the Second Department held that the equitable relief doctrine does not prevent a plaintiff in a foreclosure action from also requesting a deficiency judgment.

In *Aurora*, a lender brought suit to foreclose on a mortgage. The lender asked for deficiency judgment against the homeowner if the amount realized by the sale was less than the amount of the mortgage debt. The court reasoned that while a lender may not simultaneously pursue both a remedy at law and a remedy in equity, a prayer for deficiency judgment within the context of an actual mortgage foreclosure complaint does not constitute a separate action for money judgment. Looking to RPAPL § 1371(2), permitting a plaintiff in a foreclosure action to "make a motion in the action for leave to enter a deficiency judgment," the court allowed the prayer for deficiency judgment in the foreclosure complaint as incidental to the principal relief demanded.

Illiteracy No Defense

Although a tax foreclosure and not a mortgage foreclosure, Matter of City of Rochester (Duvall) shows the limits on the courts' extent of consideration and mercy, and its ruling applies not only to all species of foreclosures, but potentially to all species of New York litigation altogether. The Third Department clearly sympathized with petitioner-homeowner's situation as an illiterate, 91-year-old man who lost his home to tax foreclosure, but found that defendant's illiteracy was not a proper basis on which to attack foreclosure papers or their predicate notices.

In *Duvall*, the respondent, city of Rochester ("City"), sent notices of an outstanding tax bill and of an impending tax foreclosure action to the homeowner by ordinary mail. After receiving only a small portion of the payments from the homeowner over a two year period, the City sold the property and the homeowner was personally served with a 10-day notice to quit.

In determining whether the notice was reasonable, the majority took into account the status and conduct of the homeowner as well as the burden placed on the City in providing reasonable notice.[17] The Court determined that the City's actions in mailing the notice to the homeowner were reasonably calculated, under all the circumstances, to inform the homeowner of the impending foreclosure action and afford him an opportunity to present his objections.[18]

A two judge dissent, without going into detail, opined that the City was or should have been aware that the homeowner was illiterate, and his illiteracy was a significant circumstance or condition that weighed against a "reasonable calculation"[19] that the usual method of mailing the foreclosure notice would inform the homeowner of the foreclosure action. Consequently, the dissent concluded that the homeowner was not provided with adequate notice of the impending taking. The dissent further concluded that there were reasonable steps that the City could have taken to inform the homeowner of his tax delinquency but refused to set forth what those could have been. We note that a two justice dissent in the Appellate Division, under CPLR 5601, automatically entitles the appellant to an appeal as of right to the Court of Appeals. We wonder whether the

16 *Aurora Loan Services, LLC v. Lopa*, 88 A.D.3d 929, 932 N.Y.S.2d 496 (2nd Dept. 2011).
17 *Matter of Harner v. County of Tioga*, 5 N.Y.3d 136, 140, 800 N.Y.S.2d 112, 833 N.E.2d 255 (2005).
18 *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950).
19 *Weigner v. City of New York*, 852 F.2d 646, 650, *cert denied* 488 U.S. 1005, 109 S.Ct. 785, 102 L.Ed.2d 777 (1994).

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two dissenting justices were therefore setting up the matter so as to give nature enough time to moot the most serious considerations in the case. *Duvall*, not decided the way it was, not only in foreclosures, but in any kind of suit, anybody with any kind of inability to read English would seem automatically entitled to special considerations that would make litigation in New York impossible to pursue. The majority holding in *Duvall* therefore seems mandatory, two dissenters notwithstanding.

Due Process

In tax foreclosures, there are special considerations of due process attaching only because the government is seeking to seize property. In *Matter of Orange County Commissioner of Finance v. Helseth,*[20] the Court of Appeals held that the County was only obligated to give singular notice of the foreclosure action, as that was the underlying governmental action threatening the landowners' property interests. However, while it is generally a uniquely governmental function to lay and collect taxes, due process concerns also attach when a government is the lender and bringing a mortgage foreclosure.

The State may not deprive a person of property without due process of law, meaning giving notice "reasonably calculated, under all the circumstances," to inform the party whose rights are to be affected of the opportunity to appear and be heard.[21] Constitutional due process does not require that notice be given for each successive stage of the foreclosure proceedings.

In *Matter of Orange County Commission of Finance,* the landowners owned an unimproved piece of property, not their residence. When the landowners were informed that the County was sending their tax bills to this empty lot, they filed a change of address form with the County. Over a year later the landowners paid that year's real property taxes at the County Office, directly informing them of their then-current address. Despite these attempts to inform the County of their proper address, the landowners did not receive any additional real estate property tax bills or correspondence for the property.

The next year, the landowner's failed to pay taxes on the Property and the County commenced a tax lien foreclosure action. The County mailed the notice to the Property in conjunction with other forms of valid service.

Following a default judgment of foreclosure, the County sent the landowners a letter by certified mail, return receipt requested, to the Property's address informing the landowners that the County had acquired title to the Property. The letter further advised the landowners of a local law, which afforded them a release option, permitting them to repurchase the parcel through a release of the County's interest. This letter came back to the County as "unclaimed".

Since the release option was a discretionary, permissive remedy that was available to the landowners after the property's lawful foreclosure and conveyance to the County, the court found the landowner's

20 *Matter of Orange County Commission of Finance v. Helseth,* N.Y. Slip Op. 01324 (2012).
21 *Mullane*, at 314, at 657.

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property interest lawfully extinguished in spite of the sending of mail to an address the County had reason to know was bad.[22]

The Court of Appeals distinguished the US Supreme Court holding in *Jones v. Flowers,*[23] because in *Jones* the public tax sale was in lieu of a foreclosure proceeding and therefore, the public tax sale constituted a governmental taking that required due process.[24] The court held that *Jones* does not expand the municipality's obligations beyond the due process required for the actual tax lien foreclosure sale.

Conclusion

While in the past two years courts have shown themselves particularly solicitous of borrowers' rights in foreclosure proceedings, we see from this brief survey that the courts are far less solicitous of taxpayers' rights. At least when it comes to foreclosure, the courts appear far more willing to give leeway to the government than to banks. ■

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22 *Sheehan v. County of Suffolk*, 67 N.Y.2d 52, 59, 499 N.Y.S.2d 656, 490 N.E.2d 523 (1986).; RPTL § 1123(8).
23 *Jones v. Flowers,* 547 U.S. 220, 224, 126 S.Ct. 1708, 164 L.Ed.2d 415 (2006).
24 *See,* Bailey & Treiman, Despite 'Jones,' Ambiguities In Title Chain Can Be Cured, NYLJ June 10, 2009.

ACRELades

Michael M. Berger was named by Best Lawyers as "Los Angeles' Eminent Domain and Condemnation Law Lawyer of the Year" 2012.

Sara Dysart was elected to the Board of Directors of the State Bar of Texas.

Brad Molotsky was named a 2012 General Counsel of the Year finalist by NJBiz in the inaugural year of their General Counsel of the Year program, designed to honor New Jersey's standout General Counsels, Chief Legal Officers and corporate compliance professionals for the critical role they play in making their companies successful.

Patricia E. Salkin was named the first female dean of the Touro College Jacob D. Fuchsberg Law Center in New York. She begins her tenure as dean on August 1, 2012. ■

Building Information Modeling, Integrated Project Delivery, and Collaborative Contract Trends in the Construction Industry

by © Carl J. Circo, 2012, Professor and Associate Dean for Academic Affairs University of Arkansas School of Law; http://ssrn.com/author=622638

The construction industry is abuzz with talk of building information modeling (BIM) and integrated project delivery (IPD).[1] Each of these innovations is significant in its own right. Taken together, they have the potential to transform design and construction law and to revolutionize contracting practices.

This article provides an introduction to BIM and IPD, but it omits many of the important legal considerations presented by these developments. Much has already been written on the technical legal issues.[2] The debates spawned by that literature will continue for years to come. I offer this overview primarily to explore how significant BIM and IPD may be for lawyers who negotiate and review design and construction contracts. As you will see, I think the prospects are remarkable.

I. Building Information Modeling

BIM is a spectacularly potent application of digital design technology.[3] Unlike conventional computer-aided design and drafting (CADD) software, in BIM, the computer model uses data-packed objects capable of relating the attributes and functional characteristics of project details to one another. BIM technology can generate "a database of information about the objects that constitute the building" that "can be used by the designer not only to represent or display the design, but also to analyze its acoustical, thermal, or structural properties."[4]

BIM technology is also much more than design software. The model is useful to many other project participants in addition to the lead architect or engineer, and it offers more than design capability. It is being used for scheduling and pricing purposes. Moreover, it provides a powerful new tool for identifying potential design conflicts. While BIM is still a relatively new technology, significant empirical evidence confirms that BIM allows the design and construction teams to identify problems much earlier than conventional design and construction, thereby reducing cost and avoiding many delays. For that reason, BIM can dramatically improve overall efficiency.

1 *See, e.g.*, Howard W. Ashcraft, Jr., *Negotiating an Integrated Project Delivery Agreement*, Construction Law., Summer 2011, at 17 [hereinafter Ashcraft, IPD]; Joseph A. Cleves, Jr. & Richard G. Meyer, *No-Fault Construction's Time Has Arrived*, Construction Law., Summer 2011, at 6; John W. Ralls, *Integrated Project Delivery*, Construction Law., Summer 2011, at 3; Howard W. Ashcraft, *Building Information Modeling: A Framework for Collaboration*, Construction Law., Summer 2008, at 5 [hereinafter Ashcraft BIM]; Bruce R. Gerhardt, *The Context of the Evolution of Design and Electronic Tools*, Construction Law., Summer 2008, at 19; Timothy M. O'Brien, *Successfully Navigating Your Way Through the Electronically Managed Project*, Construction Law., Summer 2008, at 25; Charles M Sink, *Building Information Modeling*, Construction Law., Summer 2008, at 3.

2 *See, e.g.,* Travis W. Brown & Joe R. Basham, *Building Information Modeling*, *in* Shared Design 4-1, 4-17 through 4-33 (Michael T. Callahan ed., 2011) [hereinafter Shared Design]; Ashcraft BIM, *supra* note 1, at 9-14.

3 *See generally* Michael T. Callahan, *What is Shared Design? What is Delegated Design*, *in* Shared Design, *supra* note 2, at 1-1, 1-14 through 1-19.

4 *Id*. at 1-15.

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In contrast to a conventional set of plans and specifications, which is essentially static, a BIM model is dynamic. The objects in the model may be thought of as intelligent. An object recognizes how its own distinct characteristics relate to one another. And the model knows how information concerning one object or component relates to information about other objects and components, the project as a whole, and the construction process. For example, a wall exists in the model not as a set of lines, but as a computerized version of the actual wall being designed. If the design is altered to move a door, BIM technology can recognize how that change affects other components of the wall in which the door is located. It can also recognize what impact the change will have on other building features, such as structural load calculations, engineered connections, electrical and HVAC features, and shop-engineered details. In this way, the model functions as a simulated project that the participants can manipulate with relative ease.

Because a BIM model is a far more comprehensive and data-rich representation of the project, BIM technology makes it possible to incorporate a wide range of design and construction information into a single digital tool. Plans and specifications need not be sent physically or electronically as discrete pieces of the design; they can be incorporated into a comprehensive model that multiple parties can use. For project participants who are prepared to utilize BIM to its fullest, the technology allows unprecedented capacity to collaborate with one another through the model. They can include in a computerized model all of the design and construction details for the project, no matter whether those details come from the primary design team, from the contractor's pre-construction analysis, or from the major subcontractors, specialty designers, specialty trades, suppliers, or manufacturers. And if the parties agree to share control of a single model (a practice that raises some significant liability and intellectual property issues), many different project participants can input changes and other data into the model on a real-time basis.

As already mentioned, another extraordinary benefit of BIM technology is that it is not limited to three dimensions. It can extend to fourth and fifth dimensions—scheduling and budgeting information. With BIM, the participants can work together simultaneously to build the virtual project before actual construction begins. This ability increases the efficacy of value engineering, radically improves and speeds conflict or clash identification and resolution, and facilitates scheduling and constructability review. The model can also include life-cycle information that the project's owner or manager can use after the project has been constructed.

BIM has been in use for several years, but its full potential is only now being imagined. The technology's significance depends on how it is used. If the project architect maintains complete control of the model, the impact on the other participants may be modest. In other situations, the general contractor may use a BIM program for a project that is being designed conventionally, or two or more project participants may use the technology independently from one another. In each of these cases, BIM merely improves efficiency for isolated aspects of the design and construction process. The most effective and significant use of BIM occurs when multiple project participants collaborate using a single model.[5] Many in the industry believe that this more comprehensive application of BIM will soon

5 Brown & Basham, *supra* note 2, at 4-4.

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dominate the design and construction process, thereby intensifying the interdependent nature of the relationships among participants.

II. Integrated Project Delivery

For decades, the construction industry has been pursuing an elusive collaborative alternative to the traditional design-bid-build contracting structure.[6] Not only does the traditional arrangement theoretically maintain design and construction as entirely separate functions, but it also calls for a series of bilateral contracts to cover specialty design consultants and distinct construction trades. Under these circumstances, the highly individualistic and independent perspectives and competing economic incentives of those who participate in the design and construction of any project make full coordination and collaboration especially difficult. While many other considerations influence how project participants may structure their contractual arrangements, the industry as a whole longs for an approach that will incentivize better and more comprehensive cooperation and coordination and that will facilitate the efficient and congenial resolution of problems and disputes.

Over the past three or four decades, the industry has experimented with such alternatives as design-build, program management, construction management, partnering, and alliance agreements.[7] While each of these structures encourages and supports greater collaboration, none fundamentally changes the incentives for each participant to act primarily to maximize individual interests without much regard for the effect on the project as a whole.

Integrated project delivery (IPD) has recently emerged as a promising system for establishing truly collaborative contractual relationships among the participants in a construction project.[8] While the industry has not yet settled on a single understanding of IPD, several key features help to distinguish the method. One seasoned construction lawyer summarizes IPD as:

> a project delivery method under which the key project participants (at a minimum, the owner, designer, and contractor) are involved in the job from an early stage of design, work under a single contract signed or joined by all, jointly manage the job, and share risk and reward based on agreed performance objectives. Generally, on such projects, the key project participants broadly waive the right to make claims against each other.[9]

Note how significantly IPD departs from the conventional contractual structures that have been used in the industry for years. First, when a project adopts IPD, a single comprehensive contract or contractual structure applies to several key project participants. This is in marked contrast to the traditional approaches, which rely on a series of bilateral contracts. An IPD agreement may include not only the owner, the lead design professional, and the prime contractor, but also the principal consultants who make up the design team, along with major subcontractors. And the parties to the IPD contract manage critical aspects of the project jointly and agree to consistent terms on

6 *See generally* Ross J. Altman, *Project Delivery Systems*, *in* Construction Law 57-94 (William Allensworth et al. eds., 2009).

7 *See* Philip L. Bruner & Patrick J. O'Connor, Jr., 2 Bruner and O'Connor on Construction Law § 6:01 (discussing delivery systems in general), § 6:11 (program management); §§ 6:12-6:13 (construction management); § 6:15 (design-build); § 6:17 (partnering), & § 6:18 (alliance agreements) (Westlaw 2011), *available at* Westlaw BOCL.

8 *See* 2 Bruner & O'Connor, *supra* note 7, at §§ 6:18.10 – 6:18.90.

9 Ralls, *supra* note 1, at 3.

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certain selected issues of overriding concern, such as cost savings and loss sharing, liability caps, and a unified dispute resolution processes.

In its most power manifestation, IPD produces a set of functional and legal relationships in which all of the major players (1) begin working together during the earliest possible stages, (2) bind themselves to make certain key decisions collectively through a decision-making and project management structure in which each of them has a voice, (3) participate materially in the financial fate of the project by means of cost savings and cost overrun sharing provisions and incentive compensation systems tied to project goals, (4) substantially insulate one another from incurring liability to each other, and (5) bind themselves to a highly structured dispute resolution system that significantly reduces the prospect of litigation or arbitration.[10] This is indeed a new world order for the construction industry.

Under one version of IPD, the major project participants organize themselves into a single-purpose business entity (SPE) to manage the project. Among other things, this structure means that some decisions that traditionally have been made by individual project participants may be designated for collective decision-making by a representative managing group of the SPE. This organizational device "furthers the parties' collaborative undertaking as it requires them to carefully consider governance and financial incentive questions critical to Project success."[11] What is just as important is that, under the terms of the prototype arrangement, all members of the SPE will be bound by the collective decisions, and no member will be liable to any other member for actions taken in good faith in its capacity as a member of the SPE and in accordance with the IPD agreement. (Members will still be liable for obligations undertaken via separate agreements with the SPE for design and construction services.) Figuratively speaking, the parties to the IPD agreement get into the same boat, where they will float or sink together, with little hope of profiting individually unless all profit collectively.

In this way, IPD makes true joint venturers out of the key project participants who otherwise would be acting out of individual self-interest. The owner still invests the hard capital, but the other parties to the IPD agreement, instead of participating in the project solely for a contractual fee, invest their time and talents in the venture collectively. Together, they take the investment-style risk that, acting in concert, they will successfully complete the project on time and within budget. This may mean that the compensation payable to each of the major project participants will be subject to increase or decrease depending on whether or not the project as a whole achieves its performance, budgetary, and scheduling objectives.[12] Under one variation, a participant's entire profit, and even its ability to recover some of its costs, is at risk.

Similarly, all participants may benefit from consistent liability limitations enforceable against all other participants.

> IPD liability models often shield participants from liability arising from collective decision-making. Similarly, service providers,

10 *See generally* Cleves & Meyer, *supra* note 1, at 10-16.
11 Bruner & O'Connor, *supra* note 7, at § 6:18.80.
12 *See* Cleves & Meyer, *supra* note 1, at 12.

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> particularly those part of the collaborative team, agree to limit their rights of recovery against other team members, including the owner. Some models, like the Project Alliance, severely limit team members from seeking redress from one another.[13]

IPD also normally imposes a stepped and facilitated dispute resolution process binding on all of the major participants. Although the precise mechanism varies from one IPD version to another, the process may provide for decisions to be submitted to one or more project management or project governing bodies made up of representatives from each key participant, and it may vest final, binding authority in a panel composed of chief executive officers of the participants, together with a third-party neutral who may have been selected in advance.[14] If a dispute gets to the final stage, the process may give the third-party neutral authority to function as a facilitator who will proactively pursue a mutually agreed resolution and, if that fails, who will make the final, binding decision.[15]

When taken to such lengths, IPD is unlike any other project delivery system. The parties not only agree to work together for the success of the project, but they back up that commitment with an elaborate and relatively comprehensive set of incentives and controls intended to make real collaboration the only viable option. Leading advocates have even characterized IPD as no-fault construction.[16]

III. How are BIM and IPD Related?

At first blush, BIM and IPD might seem to be entirely distinct developments that simply happen to be emerging contemporaneously in the construction industry. Indeed, they do not even fit in the same category. BIM is a technology; IPD is a project delivery system.

On closer consideration, however, the symbiotic potential inherent in BIM and IPD becomes clear. IPD recognizes and seeks to capitalize on the increasingly interdependent nature of design and construction activities. BIM accelerates and intensifies that interdependence. Moreover, if BIM's powerful efficiencies guarantee its eventual dominance in the industry, it may generate a nearly irresistible demand for a new project delivery system that is more compatible with the complex network of relationships that BIM fosters among the key participants in the project.

The net result of the emergence of BIM and IPD may well be to transform the construction industry. BIM makes a technologically compelling case for extensive collaboration among all of the key project participants. IPD offers a contractual structure that incentivizes the participants to take full advantage of the highly collaborative process that BIM technology makes possible.

In discussing another important development in building design and construction, I previously argued that evolving practices have been moving in a distinctly collaborative

13 2 Bruner & O'Connor, *supra* note 7, at § 6:18.90 (footnote omitted).
14 *Id*.
15 *Id*.
16 *See* Cleves & Meyer, *supra* note 1.

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direction that may forecast a transformation in contractual relationships in the industry.

> Over the past few decades, several developments have caused design and construction practices to call increasingly for shared responsibility, coordination, and cooperation among multiple project participants who have traditionally operated independently from one another. Call this phenomenon the collaborative shift in contemporary design and construction. This collaborative shift represents a major contractual challenge for an industry with a tradition of fierce independence, legendary combativeness, and internecine disputes.[17]

BIM may supply the critical technological advance needed to encourage the construction industry as a whole to embrace the collaborative shift. As one commentator has quipped: "Collaborative projects can be executed without building information modeling (BIM)—but why would you?"[18] If BIM becomes the industry standard for project design and management, legally meaningful and pervasive collaboration may soon become the dominant factor defining contractual relationships in the industry.

And the dominance of a highly collaborative project delivery system could, in turn, revolutionize the practice of construction law. Litigation and adversarial arbitration may eventually play a much smaller role in the industry than they currently do. It goes too far to suggest that the collaborative shift threatens to make the construction litigator an endangered species.[19] But the construction bar may need to develop greater expertise in the law and practices applicable to cooperative ventures, limited liability business entities, and facilitated dispute resolution. Happily, this is familiar territory for ACREL fellows. ■

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17 Carl J. Circo, *Will Green Building Contracts Transform Construction and Design Law?*, 43 URBAN LAW. 483, 524 (2011). *See generally* Altman, *supra* note , at 85-89.

18 Ashcraft IPD, *supra* note 1, at 23.

19 *See* Allen L. Overcash, *Will the New Contract Forms for Integrated Project Delivery Make Conflict Obsolete? (Or Are We Still Lost in Our Contract Obsession?)*, J. AM. C. CONSTRUCTION LAW., Winter 2009, at 19.

Risk Allocation & Insurance in Real Estate Transactions: An Overview Regarding Sometimes Incompatible Bedfellows

*by David S. Gordon, Wilentz, Goldman & Spitzer, P.A., Woodbridge, NJ**

Introduction[1]

Lawyers and clients should understand the value of risk allocation and how insurance can play a critical, but sometimes seductively misleading, role in the process of contractual risk allocation. In real estate related transactions, there are two primary types of insurance: property insurance under which the insured is covered directly for damage to its property, and liability insurance under which the insured is defended and indemnified by the insurance carrier against claims of and liabilities to third parties. This article focuses on liability issues and how the parties can allocate risks to protect their respective economic expectations. It will discuss, first, indemnification provisions to allocate risk, including risk arising form a party's own negligence, and, second, contractual liability insurance coverage and additional insured liability insurance coverage under which the parties attempt to protect themselves from economic loss. These two constructs, indemnity and insurance, are powerful tools in the allocation of risk, but only if they are carefully crafted and coordinated.

Indemnification

An indemnification provision is a commonly used contractual method of allocating risk, one party (the indemnitor) assumes the responsibility to defend against and pay for claims of third parties. The purpose of such a provision is to protect a party, who may, or may not, have liability insurance coverage, against third party claims arising during, or as a result of, the contractual relationship, whether it is a lease, construction contract or subcontract, easement or other agreement regarding another contractual undertaking. An indemnity provision, by contractually allocating the responsibility for a risk, can effectively increase the amount of insurance available to respond to a claim and reduce claims experience which in turn can reduce insurance costs.[2] The indemnifying party (indemnitor) is always required to indemnify against the results of its own negligence and frequently against the negligence of the indemnified party as well. An agreement by an indemnitor to indemnify another (the indemnitee) against the results of the indemnitor's negligence is fairly straight forward. The ability to shift risk that

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1 This article focuses on New Jersey law but the principles and drafting concerns are of general application. However the statutes and caselaw of other jurisdictions may require that different language be employed.

2 Indemnification clauses must be crafted so as not to exceed the lawful scope or level of indemnification (see footnote 2). Attorneys may treat the indemnification and insurance provisions as "boilerplate" and be tempted to merely copy these provisions from a document used in a pervious transaction. These provisions, however, are far from standard and should always be analyzed anew. It is strongly suggested that they be reviewed by professional insurance or risk management personnel.

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is a result of the indemnitee's own negligence, however, in New Jersey, requires specific and explicit language in the indemnification clause.[3] New Jersey courts have repeatedly stated that indemnification again a party's own negligence will only be enforced where there is unequivocal language in the contract requiring that result. The cases of *Azurak v. Corporate Property Investors, Matilla v. N.C. Mall Associates,* and *Ramos v. Browning Ferris Industries of South Jersey, Inc.*[4] set the basic framework for the unequivocal language rule. In Ramos and Mantilla the Appellate Division and the Supreme Court established a bright line rule that a contract will not be construed to provide protection to the indemnitee against losses resulting from its own negligence unless such an intention is expressed in "unequivocal terms."[5] Stated another way, a court will not uphold an indemnification for a party's own negligence unless the contract contains an unequivocal expression of an intention to so indemnify.[6]

The cases following *Azurak, Mantilla,* and *Ramos* illustrate that that the language of the indemnification clause needs to be both specific and unambiguous to clearly convey the intent to indemnify against the party's own negligence. In *Englert v. Home Depot*[7] the parties entered into a contract containing an indemnification provision and conflicting indemnification language in a rider to the contract. The Appellate Division held that ambiguities within the indemnification provision, and inconsistencies between the contract and a rider to the contract, did not "demonstrate the required clear and unequivocal intention for Raimondo to be indemnified for its own share of negligence."[8]

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3 Where indemnification against the indemnitee's own negligence is concerned, some jurisdictions have specific statutory or case law prohibitions or specific language/notice requirements which must be met. In New Jersey indemnification against a party's sole negligence is unenforceable as against public policy in certain circumstances as provided in N.J.S.A. 2A:40A-1 (construction contracts) and N.J.S.A. 2A:40A-2 (contracts with architects, engineers or surveyors):

4 *Azurak v. Corporate Prop. Investors*, 175 *N.J.* 110 (2003); *Ramos v. Browning Ferris Indus. of S. Jersey, Inc.*, 103 *N.J.* 177 (1986); *Mantilla v. NC Mall Assocs.*, 167 *N.J.* 262 (2001).

5 *Ramos*, 103 *N.J.* at 191; *Mantilla*, 167 *N.J.* at 272.

6 *Azurak v. Corporate Prop. Investors*, 347 *N.J. Super*. 516 (App. Div. 2002).

7 389 *N.J. Super.* 44 (App. Div. 2006).

8 *Id.* at 48. ("The question before us is whether the language of the indemnification provision in the Raimondo-Weir contract meets the *Ramos-Mantilla-Azurak* standard, that is, 'whether it express[es] in unequivocal terms,' the intention for Weir to indemnify Raimondo for his own negligence." *Id.* at 53. Here, the "regardless of" language in Article 11 is inconsistent with Rider D. Rider D lacks both of the critical phrases that appear in Article 11 and does not satisfy the required unequivocal expression of intention to obligate Weir to full indemnify Raimondo for damages resulting from its own negligence. See Also Asbury Convention Hall, LLC, Asbury artners, LLC & Maxum Specialty Ins. Group v. U.S. Liab.Ins. Group, No. A-3010-10T1, 2012 N.J. Super. Unpub. LEXIS 629 (App. Div. Mrch 23, 2012), and Darcy v. N.J. Transit Rail Operations, Inc., No. 045970, 2007 U.S.Dist LEXIS 33989 a *5 (D.N.J. May 8, 2007).

For more cases dealing with indemnification clauses see: *Marsdale v. J.F. Creamer & Sons*, *2007 N.J. Super*, LEXIS 2772 (App. Div. 2007) (holding that *Mantilla* and *Azurak* did not preclude indemnification under facts of case. Moreover the indemnification agreement satisfied bright line test described in those cases); *Nagim v. N.J. Transit*, 369 *N.J. Super*, 103 (Law Div. 2003) (Unless specifically provided for in contractual language, an indemnitor cannot be held responsible to indemnify an indemnitee for the negligence of the indemnitee.); *Carpenter v. Jersey Shore Univ. Med. Ctr. & Meridian Health*, 2009 U.S. Dist. LEXIS 29838 (D.N.J. 2009) (Although indemnity contracts are usually interpreted in accordance with the rules governing the construction of contracts when the clause's meaning is ambiguous, it should be strictly construed against the indemnitee).

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Insurance Coverage

The following section will explore the interplay between an indemnification agreement and insurance requirements which may require the indemnitor to maintain contractual liability insurance coverage and/or to name the indemnitee as an insured[9] under indemnitor's liability insurance policy; both requirements intended to enhance the credit of the indemnitor. An Agreement of indemnification is worth no more than the financial strength and stability of the indemnitor which may change during the course, or following the completion, of the contract. Accordingly, to provide a "deep pocket" or credit enhancement, the parties frequently include requirements for insurance. This generally takes two forms: first, requiring the indemnitor to maintain a contractual liability endorsement to a liability insurance policy under which the insurer will cover the liability assumed by the indemnitor under the contract; and second, requiring the indemnitor to name the indemnitee as an additional insured on the indemnitor's liability insurance policy. While these are seemingly simple requirements, there are many issues associated with one or both.[10]

The most serious issue is that the only way to ascertain whether the coverage is actually in effect, and if it is maintained from year to year, if applicable, is to obtain, review and understand the terms of the indemnitor's insurance policy and the endorsements to the policy. The parties can not rely on a certificate of liability insurance because the certificate by its express terms "is issued as a matter of information only" and "confers no rights on the certificate holder" and further "does not amend, extend or alter" the terms of the policy."[11] The insurance certificate neither confers coverage nor confirms additional insured status. The terms of a liability insurance policy may allow certain categories of parties to be added as additional insured without an endorsement, but that is not the case with all policy forms. Also, the certificate of liability insurance specifically warns the certificate holder that an endorsement to the policy may be required to provide the desired additional insured coverage.[12] Additionally, the form of the endorsement providing the additional insured status may not be correct in the context of the contractual relationship. The Insurance Services Organization (ISO), which promulgates forms for use by the insurance

9 The correct term for this coverage is "Additional Insured." Care should be taken not to use the terms "Named Insured" or "Additional Named Insured."

10 For example, the date of completion of the contractual performance is not the date by which the indemnity and insurance are measured. Insurance Service Organization [known as ISO, this is an insurance industry enterprise that promulgates standard forms of policies, endorsements and other documentation, such as insurance certificates, for industry] standard liability policies are triggered only when there is an occurrence which may be after completion of the contract. When the indemnification includes post completion liabilities related to the indemnitor's completed operations, there is a special ISO endorsement that must be used and the endorsement must be carried forward to successive policies, if applicable. This underscores the need to engage knowledgeable insurance professionals in the drafting, review and monitoring of the indemnification and insurance provisions.

11 Until several years ago the for of certificate entitled *Evidence of Commercial Property Insurance* that was used in connection with first party property insurance coverage expressly stated that it "is evidence that [the policy] has been issued, is in full force and effect and conveys all rights and privileges afforded under the policy." Certificates as to commercial property insurance now carry the same disclaimers as do the certificates of liability insurance and the courts have uniformly held that the disclaimers are effective and really do mean what they say. *See, e.g.*, the unpublished Appellate Division opinion in *Porowski v. Rehm, et al*, No. A-4039-7T3, 2008 *N.J. Super*. LEXIS 2031., and cases cited therein.

12 Non-standard or "manuscript" policies may require both an additional insured endorsement and the issuance of a certificate of liability insurance to vest the additional insured with coverage.

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industry, has in excess of 35 different forms of additional insured endorsements. The parties (and counsel) are well advised engage an insurance consultant in the process of reviewing both the indemnity and insurance provisions of the agreement and the related insurance certificates and endorsements.[13]

Additional issues arise because virtually every liability policy and many additional insured endorsements have an "other insurance" provision which states, in this context, that if the indemnitee is named as an additional insured on the indemnitor's policy, but if the indemnitee has other insurance available to it, the insurance of the indemnitee will be primary and the additional insured coverage provided by the indemintor's will be secondary or excess. This would be contrary to the intention of the parties but can be overcome by careful drafting which specifies under what circumstances the indemnitor's policy is intended to provide primary coverage. The court will generally refer to the contract to determine if an additional insured will receive primary or excess coverage under an insurance agreement. For example, in *Englert* the court looked to the express terms of the contract to determine whether the defendant was the excess or primary insured.[14] The policy read, "this insurance is excess over… any other *primary* insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured." The policy provided one million dollars in liability coverage for each occurrence. Further, the contract specified that "With respect to the insurance afforded to Additional Insured… this insurance is excess over any valid and collectible insurance *unless* you have agreed in a written contract for this insurance to apply on a primary or contributory basis."

The requirement that the indemnitor provide insurance as financial security for the indemnification obligation, does not mean that the indemnitor's insurance company will necessarily agree to provide defense or coverage. The indemnitee is in no better position than the indemnitor with regard to a claim subject to the exclusions of the applicable insurance policy and the many defenses which may be raised by the insurance carrier. Unlike indemnification provisions, for example, the current forms of additional insured endorsement generally require that for the additional insured indemnitee to be covered there must be some negligence on the part of the indemnitor. Thus, if the parties have negotiated that the indemnitor will be responsible for the negligence of the indemnitee, the addition of the indemnitee as an additional insured may be illusory.

Wholly different rules of law apply to the construction of an indemnification agreement versus an insurance policy. New Jersey courts have adopted a "broad and liberal" view in construing ambiguities found in insurance policies in favor of the insured. In *Harrah's Atlantic v. Harleysville*,[15] the issue was whether the insurer was required to defend and indemnify Harrah's in a personal injury suit when Harrah's was an additional insured under a general liability policy issued to Harrah's tenant. The lease required tenant to purchase general liability insurance "in the name of and for the

13 As a practical matter it may not be realistic to request or expect copies of insurance policies but obtaining a copy of the endorsement is critical. Note, however, that endorsements can be long lead time items and require both specialized knowledge and monitoring (see footnotes 1 and 18).

14 389 *N.J. Super.* at 58.

15 *See generally Harrah's Atlantic v. Harleysville*, 288 *N.J. Super*. 152 (App. Div. 1996).

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benefit of" Harrah's. The lease also contained an indemnification clause in favor of Harrah's. The court found that the indemnification was too vague to be enforced but upheld the lease which required the additional insured coverage. Even though the lease provision was vague and subject to possible different interpretations, the court found that tenant's insurance company had the duty to defend Harrah's where the plaintiffs were injured when they left tenant's stores and walked to the parking lot. Thus Harrah's liability "arose out of the risk generated by [tenant's] business on the premises." It was unreasonable for the insurer to argue that it did not foresee such an accident arising in the course of "conduct by an invitee of [tenant]." Harrah's liability arose as a result of a breach of duty on tenant's part, and so the accident was in the "landscape of risk" that Harrah's could reasonably expect to be insured against.[16] As compared to the strict interpretation of indemnification clauses:

> The inquiry… is whether the occurrence which caused the injury, although not foreseen or expected, was in the contemplation of the parties to the insurance contract, a natural and reasonable incident or consequence of the use of the leased premises and, this, a risk against which they may reasonably expect those insured under the policy would be protected.[17]

While courts may be more liberal in construing an insurance policy, counsel must still be careful to clarify the intent of the contract. If the intent is unclear, the court may read an additional insurance obligation to name the indemnitee as an additional insured as co-extensive with the indemnity burden contractually assumed by indemnitor. In *Pennsville Shopping Ctr. Corp. v. American Motorists Ins. Co.*,[18] The Court held that where the lease, including an indemnification provision, expresses the intent of the parties, the insurer was not required to defend the indemnitee as an additional insured. The parties provided that tenant would indemnify landlord "from loss or liability for damages occurring on the demised premises except for those due to Landlord's negligence." Tenant also named landlord as an additional insured. The court distinguished this set of facts from *Harrah's* and *Franklin* because the parties expressly agreed that they were not responsible for the landlord's negligence. The court wrote that while the policies of insurance are to be construed in favor of the insured, "here the lease agreement . . . clarifies the [intent] of the parties in apportioning responsibility and providing for insurance coverage."

Conclusion

Shifting and allocating risk is an important part of real estate related agreements, yet lawyers, and perhaps clients, frequently exhibit a hostile or skeptical approach to risk allocation provisions. When examined in the

16 *Id*. at 158 (quoting *Weedo v. Stone-E-Brick, Inc. Co*., 275 *N.J. Super*. 335, 341 (App. Div. 1994).
17 *Franklin Mut. Ins. Co. v. Sec. Indem. Ins. Co*., 275 *N.J. Super*. 335, 341 (App. Div. 1994) (citations omitted).
18 315 *N.J. Super*. 519 (App. Div. 1998).

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light of the anticipated and accepted economics of a transaction, however, many if not most risk allocation structures are not unreasonable. Where the parties have already considered the cost of providing insurance, and the policy limits are at least adequate to the clients' needs, a well drafted risk allocation provision does nothing other than shift the financial burdens which may arise from an inured risk to the party (i.e. the insurance company) that charges a fee for accepting that risk. A clear, explicit agreement combining indemnification and insurance has the potential to save clients vast amounts of money but care must be taken in thinking about the available options and the different rules of interpretation when negotiating and drafting for risk allocation.[19] ■

19 For a discussion of indemnity and insurance issues in construction risk management, *see* Hickman, *Effective Contractual Risk Transfer in Construction*, in the Construction Risk Manager newsletter of International Risk Management Institute, Inc. (http://www.irmi.com/newsletters/#irmicrm).

Meetings Calendar

2012 Annual Meeting
October 18-21, 2012
Renaissance Chicago Downtown
Chicago, IL

2013 Mid-Year Meeting
March 14-17, 2013
Naples Grande
Naples, FL

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

2014 Mid-Year Meeting
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Grand Hyatt Kauai
Kauai, HI

2014 Annual Meeting
October 16-19, 2014
InterContinental Hotel
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