ACREL News

President's Message

Chicago and other parts of the country are dealing with massive snowfall accumulations and freezing temperatures. Despite the roadblocks imposed by winter, ACREL keeps on going.

Registration remains open for the Mid-Year meeting in Scottsdale, Arizona, which begins on Thursday, March 26, 2015. I encourage you to attend the meetings. In addition to the excellent educational programming, the meetings provide a forum for members of ACREL's substantive committees to meet and compare notes. The educational programming includes programs pertaining to the impact of immigration issues on real estate, coastal development obstacles, concession agreements in the context of public-private partnerships, construction contract issues, build-to-suit lease transactions, mortgage lending issues with mezzanine loans and preferred equity investments, finance terminology and metrics and multi-jurisdictional practice professional responsibility issues. The workshops provide deeper dives, in a more intimate setting, into some of those topics, as well as sessions regarding development pro-formas and construction bankruptcy issues. Our Fellows have diverse practices and the programming should provide substantive practical information across a wide gamut of practices. The Fellows who belong to the College have sophisticated practices and Fellows can get value by spending time chatting with other Fellows attending the meetings regarding what is going on in their practices, in the real estate business and in the business of law. This year's Mid-Year meeting also includes a reception, on the Saturday evening immediately before the regular Saturday night reception and dinner, for Fellows in the Classes of 2010-2014 to provide an opportunity for

continued on p. 2

IN THIS ISSUE

continued from p. 1

newish Fellows (and their registered guests) to get know each other better. Did I mention that the weather is warmer in Scottsdale than in many areas of the country? I urge you to register and to reserve your hotel rooms because room blocks can fill up. To register, you should go to the Scottsdale meeting materials on the College's website: http://www.acrel.org/Private/DrawMeetings.aspx?Action=GetDetails&MeetingID=30.

The Inside Counsel are coming . . . wait, they're here!

As you have probably noticed (you've nominated some, and watched others cross over from private practice), in the past few years ACREL has experienced considerable growth in its inside-counsel population. The College is enriched by their presence and their different perspectives on various fronts. To better serve this important component of our membership, and to take better advantage of what they have to offer to other Fellows and to the College, efforts are being made to bring some organization to them as a group (for those insiders who are interested, which many seem to be) and to offer time at ACREL meetings for them to meet without outside "interference." So, for the first time, at the upcoming Mid-Year meeting in Scottsdale, we have identified a time slot late Thursday afternoon for inside counsel who are there and interested, to gather together, where they can begin to get to know one another better and discuss issues of common interest. The time and meeting location for this meeting will be in the final Program distributed with the other materials that you pick-up when you register at the main ACREL desk (though, the final program time and location will likely be posted on the meeting webpage (you can use the same link that I provided earlier) shortly before the meetings begin.

On February 9, the Membership Selection Committee met in the Las Vegas offices of Holland & Hart LLP to consider a slate of 61 nominees, which is the largest number in quite some time (and larger than last year's 55 nominees). They will present their conclusions to the Board shortly. This Committee, chaired by Karen Dennison, spent an entire working day discussing candidates and spent the weeks before that reviewing candidates. But that is only a first step. We need to continue to seek new members as the College membership continues to age. Now is the time to help the Membership Development Committee to identify potential new Fellows (Tina Makoulian, Andy Lance and Greg Pierce are the chair, vice-chair and secretary, respectively, of that committee) to create a continuing list of prospective candidates for ACREL.

This may sound like a broken record (for those of you who may not remember them, records are a circular item that one places, under a needle, on a turntable and listens to music that is generated through speakers as the turntable spins the record under the needle), but we need to add new members so that ACREL can continue to thrive and provide the collegiality and benefits that mean so much to all of us. You may know someone who would be a perfect candidate right now or you may know someone who, with some assistance from the Member Development Committee can become a new Fellow. I urge you to think about someone you know or have worked with who has impressed you and consider whether that person would be a good choice for membership.

ACRELShares continues to be a useful tool for managing how the College works together. I hope many of you have taken up the challenge and started using it. All substantive committee officers have received ACRELShares training. An addi-

President's Message

continued from p. 2

tional ACRELShares training session for committee leaders has been scheduled for late Thursday afternoon (March 26) during the Mid-Year meeting in Scottsdale. I urge the College's committees and Fellows to experiment with ACRELShares' features. It will enhance the value that you get from the College. If you are Committee member, why not start a discussion using ACRELShares! on topics of interest to your Committee?
The substantive committees of the College are where much of the College's work gets done. If you haven't been actively involved with a substantive committee, consider getting involved. This year, Kathy Murphy, Michael Goodwin, Peter Aitelli and Rick Mallory have actively engaged the leaders of each of the substantive committees. They have had or are scheduling calls with the officers of each committee and are discussing not only possible future programs, but conference calls, ACRELive presentations and activities between meetings. In order to free-up time for events during the crowded face-to-face meeting in Scottsdale, substantive committee leaders will participate in an all-hands call on March 11 in which matters of interest to the committees will be discussed. This follows up on the success of similar meetings held in advance of last year's meetings in Kauai and Boston in which a leader from each committee described, for the benefit of all of the other committees' leaders, current projects. This allows for greater synergy among the various committees.

In addition to their work on providing programming for the Mid-Year and Annual meetings, the Programs Committee has developed a robust series of CLE programming including ACRELive programming available, at no cost, to ACREL Fellows. ACRELive programs are presorted by telephone and typically last one hour. Many Fellows invite other lawyers in their firms (and selected clients) to listen in on ACRELive programs.

Through February, two ACRELive Programs, "Changes to ISO Form Insurance Policies and where the Reauthorization of Terrorism Insurance Stands" and "Mixed Use Developments Cost Allocation and Operational Issues" were scheduled. Hopefully, you found time to listen in on one or both and will make time to listen to upcoming programming.

I would also like to thank our sponsors, whose sponsorship helps to defray the cost of publishing the ACREL Directory: Chicago Title Insurance Company, Commonwealth Land Title Insurance Company, Cushman & Wakefield, Inc., Fidelity National Title Insurance Company, First American Title Insurance Company, Jones Lang LaSalle, Newmark Grubb Knight Frank, and Stewart Title Guaranty Company.

Finally, consider organizing a local meeting of ACREL Fellows. Angela Christy, Chair of the Orientation and Integration Committee leads this effort. These local meetings are a great way to stay connected, especially between annual and mid-year meetings.

Thanks for making ACREL a great organization. If you have any ideas or suggestions regarding the College, let me know.

STAFF BOX

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

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ACREL Gathering in Houston!
(Third row, L-R: Vytas Petrulis, Marvin Katz, Kurt Nondorf, Marilyn Maloney and Paul Longstreth; Second row: Jeanne and Chuck Jacobus, Rick Spencer; First row: Sallie and Bob Wright, Marlene Nondorf)

Meetings Calendar

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

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

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

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

ACREL Gatherings!

Please consider holding an
ACREL event in your city.

Fellows who have attended these gatherings have been pleased with the opportunity to connect with their ACREL colleagues.
The event can be whatever you want it to be! You can have a speaker, discuss prospective members or just have lunch or a cocktail party.
Options range from brown bags at a law firm to cocktails at a local hotel.

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

The Interplay Between the "In for One In for All" or "Complete Defense" Rule and "Other Insurance" Clauses in Cases Involving Title Insurance and Other Insurance Claims

*by Janet M. Johnson, Schiff Hardin LLP**

Recently the Seventh Circuit Court of Appeals in Illinois addressed an unusual set of claims made under both a mortgage lender's title insurance policy and its general liability insurance policy in *Philadelphia Indemnity Insurance Company v. Chicago Title Insurance Company,* 771 F.3d 391 (7th Cir. 2014). While unusual because it involved the question of the respective duties of two different insurance companies to defend under two different types of insurance policies, this case is also instructive in interpreting the language found in most common title insurance policies with respect to a title insurance company's duty to defend its insured for claims insured against by the title insurance policy. Before dealing with the facts of the *Philadelphia* case, however, some background on recent title insurance claims cases addressing the duty of the title insurance company to defend its insured will be helpful, particularly because the law does vary somewhat by jurisdiction.

The Texas *Graham Mortgage Corp.* Case

In an unreported Federal District Court case, the Eastern District of Texas held Lawyers Title Insurance Corporation had a duty under Texas law to defend its insured on all claims in any case where a complaint included a potentially covered claim. *Lawyers Title Ins. Corp. v. Graham Mortgage Corp*., 2010 WL 2635074 at *5 (E.D. Tex. 2010). The Graham Mortgage case involved a claim by a seller that had financed a developer's purchase of a parcel of real estate. After the initial purchase money financing was provided by the seller, the buyer obtained three different development loans on the property and requested the seller subordinate its purchase money lien to the lien securing the development loans. The seller signed subordination agreements to the lien of the development loans made by Graham Mortgage, which obtained title insurance as to the priority of the lien securing its development loans from Lawyers Title Insurance Corporation ("Lawyers Title"). After the developer defaulted in its payments due to the seller, the seller filed a petition in state court alleging the seller's lien should have priority over the liens to the development lender because the subordination agreements had been procured by fraud. *Id*. at *1.

Graham Mortgage tendered the defense of the seller's claims to Lawyers Title, and Lawyers Title filed a declaratory action to determine whether it had a duty to defend Graham Mortgage. Lawyers Title argued it had no duty to defend Graham Mortgage because the underlying claims were either meritless or coverage was excluded under the exception for defects "created, suffered, assumed or agreed to by the insured." *Id*. at *2. The Federal District Court for the Eastern District of Texas held under Texas law Lawyers Title had a duty to defend its insured as long as there was some basis on which the policy would cover a claim, which was true in this case because it was not clear from the facts and pleadings before the court on First American's motion for summary judg-

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continued on p. 6

continued from p. 5

ment whether the insured participated in the alleged acts that the seller claimed fraudulently induced him to enter into the subordination agreements. *Id.* at *4.

The court's opinion spent very little time on the rationale for the Texas law, but quoted Allan D. Windt, *Insurance Claims and Disputes* §4:13 (5th ed. 2010) as stating:

> Courts rarely discuss the rationale behind the general rule requiring a "complete" defense. Two reasons, however, can be offered in support of that rule. First, ordinarily there is no reasonable means of prorating costs of defense between covered and non-covered items. Second, separate representation for covered and non-covered items is not feasible. *Id.* at *5.

As will be seen from the next case discussed, the rationale stated in this treatise appears to have influenced at least one other court that initially held the title insurance company owed a complete defense to its insured.

The Ohio *Little Italy* Case

Like the Federal District Court in the Eastern District of Texas, in an unreported Northern District of Ohio Federal District court case, *Little Italy Development, LLC v. Chicago Title Insurance Company*, 2011 WL 2532663 (N.D. Ohio), the court held the title insurance company had a duty to defend its insured on all claims asserted against the insured. The underlying case in *Little Italy* involved a claim against the insured property owner, Little Italy Development ("LID"). The plaintiff, Little Italy Preservation Partners, had sued LID over issues related to the right to use an easement over LID's property in a complaint that included 7 different claims. LID tendered the defense of the claims to Chicago Title Insurance Company ("Chicago Title") and Chicago Title agreed to defend only 1 of the 7 claims (the one being the allegation that a public prescriptive easement existed over a portion of LID's property). LID retained separate counsel to defend it against the remaining 6 claims[1]. The underlying lawsuit was settled and LID then sued Chicago Title seeking a declaratory judgment that Chicago Title had a duty to provide LID with a complete defense in the underlying litigation and alleging a breach of contract and bad faith on the part of Chicago Title. *Id.* at *1.

LID claimed Chicago Title owed it a complete defense under Ohio Supreme Court precedent, which requires an insurer to defend an insured with respect to all claims filed in a lawsuit as long as at least one claim is "arguably covered" (the so-called "in for one, in for all" or "complete defense" rule). Chicago Title responded that it did not have to defend against all of the claims because of the specific language in its policy under which it agreed to provide less than a complete defense, which modified the common law rule. *Id.* at *3. The language in the title insurance policy that Chicago Title relied upon was found in paragraph 4(a) of the Conditions and Stipulations, and is similar to most title insurance policies and the ALTA form. It read as follows:

> Upon request by the Insured and subject to the options contained in Section 6 of these Conditions and Stipulations, [Chicago Title], at its own cost and without unreasonable delay, shall provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, *but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy.* . . . [Chicago Title] will not pay any fees, costs or expenses incurred by the Insured in the defense of those causes of action which allege matters not insured against by this policy. *Id.* at *1 (emphasis added).

The court in *Little Italy* disagreed with Chicago Title's position because the Ohio Supreme Court opinion establishing the "in for one, in for all" precedent in the case of *City of Sharonville v. American*

continued on p. 7

continued from p. 6

Employers Ins. Co., 109 Ohio St. 3d 186, 846 N.E.2d 833 (Ohio 2006), had been issued without even citing any of the language in the insurance policy at issue in that case. The opinion acknowledged that the Ohio Supreme Court opinion was very broadly written, but because the policy language was not considered, the District Court concluded the decision reached by the Ohio Supreme Court that the insurance company was obligated to defend against all claims was a duty implied in law and was rooted in the public policy that it is not feasible to expect two different attorneys to represent an insured in one lawsuit and it would be time consuming and possibly futile to divide covered and non-covered claims. According to the *Little Italy* court, although the insurance company's duty to defend arises only when there is an agreement to defend in the policy, the law implies that duty to encompass a complete defense. *Id*. at *3.

The cases relied upon by the Ohio Federal District court in *Little Italy* were not title insurance claim cases, and while the court discussed an earlier 2010 decision issued by the lower court in the *Philadelphia* case,[2] the Ohio Federal District court was not persuaded by the *2010 Philadelphia* decision, which had held based solely on the pleadings, that Philadelphia Indemnity Insurance Company was not entitled to a decision in its favor (*i.e.*, that Chicago Title owed a duty to defend against all claims raised in the Philadelphia case as Philadelphia Indemnity Insurance Company contended). *Id.* at *5. At the time the *Little Italy* opinion was issued, the Northern Illinois District court had not made a decision on the merits of the various claims described in the *2010 Philadelphia* opinion. The Northern Illinois District Court later reversed its *2010 Philadelphia* decision in its *2012 Philadelphia* opinion[3] issued May 11, 2012. On various motions for summary judgment by the parties, the *2012 Philadelphia* court held that Chicago Title did, in fact, have a duty to defend its insured and could not contract around that duty. 871 F. Supp. at 754. As a result, the court in the *2012 Philadelphia* opinion concluded Philadelphia's insurance policy was excess to the title insurance policy issued by Chicago Title. *Id.* at 758. However, the court also determined the duty to defend did not extend to representation of the lender on affirmative defenses asserted by the plaintiff in the underlying litigation. *Id.* at 757.

Shortly after the *2012 Philadelphia* opinion was issued, the Northern District Court in Ohio vacated its opinion in the *Little Italy* case on an agreed motion by LID and Chicago Title and ordered a question be certified to the Ohio Supreme Court. The question was whether the Ohio Supreme Court *Sharonville* opinion and another earlier Ohio Supreme Court opinion, *Preferred Mutual Ins. Co. v. Thompson*, 23 Ohio St.3d 78, 491 N.E.2d 688 (Ohio 1986), "preclude contracting parties from contractually limiting the duty to defend in a title insurance policy." *Little Italy Development LLC v. Chicago Title Insurance Co.*, 2012 WL 7807916 (N.D. Ohio, June 15, 2012). Although the court ordered the parties to submit an agreed order certifying the question to the Ohio Supreme Court no later than July 1, 2012, as of the date this article was completed, no such agreed order seems to have been entered by the District Court and no case appears to have been docketed with the Ohio Supreme Court.

The Massachusetts *GMAC* Case

After the *Little Italy* case was initially decided, First American Title Insurance Company ("First American") became embroiled in litigation over the extent of its duty to defend an insured lender in a suit involving counterclaims by a property owner when the insured lender sought to foreclose the lien of its

[2] See *Philadelphia Indemnity Ins. Co. v. Chicago Title Insurance Co.*, 2010 WL 2757542 (N.D. Ill.) ("2010 Philadelphia").
[3] See *Philadelphia Indemnity Ins. Co. v. Chicago Title Insurance Co.*, 871 F. Supp. 744 (N.D. Ill. 2012) ("2012 Philadelphia").

continued on p. 8

continued from p. 7

mortgage.[4] The relevant provision in the title insurance policy issued by First American at issue in the case provided that:

> at its own cost and without unreasonable delay, [First American] shall provide for the defense of an insured in litigation in which a third party asserts a claim adverse to the title or interest as insured, *but only* as to those *stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy*. . . . [First American] will not pay any fees, costs or expenses incurred by the insured in the defense of those causes of action which allege matters not insured against by this policy. 2012 WL 669965 at *3 (emphasis added).

In *GMAC Mortgage, LLC v. First American Title Insurance Company*, 464 Mass. 733, 985 N.E.2d 823, 2013 WL 1319534 (Mass.), the Massachusetts Supreme Court dealt only with the two questions that had been certified to it by the Massachusetts Federal District Court. The first question was whether "when there is an overlap between one or more of the counts of the complaint and the terms of the standard title insurance policy, does the insurer have a duty to defend the insured against all claims in the action?" 985 N.E.2d at 825. On this question, the Massachusetts Supreme Court held there was no duty to defend because the "in for one, in for all" rule that applies to insurance companies in the context of commercial general liability insurance policies did not apply to a title insurance company under the ALTA form title insurance policy standard language. 985 N.E.2d at 828. The opinion spends a great deal of time discussing the fundamental differences between title insurance policies (directed at risks existing at the time the policy is issued and is focused on risk elimination with a single premium payment based on the value of the property) and general liability policies (directed at future risks and is focused on risk assumption and continuing premiums based on the risk of the occurrence of an insured event) in arriving at the conclusion that the "in for one, in for all" doctrine does not apply in the context of title insurance. *Id.* at 828-829.

The second question certified by the Federal District Court to the Massachusetts Supreme Court was "when a title insurance contract gives the insurer the right to engage in litigation to cure a defect covered by the policy, does an insurer initiating litigation have a duty to defend the insured against all *reasonably foreseeable counterclaims*?" 985 N.E.2d at 825 (emphasis in original). As to this second question, the *GMAC* court also held the title insurer's duty to defend did not extend to counterclaims raised in litigation where the title insurance company chose to cure the title defect through litigation as opposed to negotiation or settlement, except perhaps if the counterclaim raised by the other party in the underlying suit to determine title was compulsory. The Massachusetts Supreme Court did not decide whether a different rule should apply to compulsory counterclaims issue because the right of a defendant to raise counterclaims in a Land Court proceeding in Massachusetts, such as the claims raised in the underlying litigation in the *GMAC* case for monetary damages, are very limited. *Id.* at 830-831.

The underlying litigation involved a claim by an insured mortgagee under a loan title insurance policy issued to the mortgagee (GMAC) against First American seeking reimbursement for legal fees and costs spent in defending against the property owner's three claims against GMAC that were not covered by the title insurance policy (treated as counterclaims once the two proceedings were consolidated). GMAC

[4] The suit was originally filed by GMAC against First American in the Federal District Court in Massachusetts. The Federal District Court initially held First American was not obligated to pay for the defense of claims not covered by the policy, interpreting the policy "in accordance with its plain meaning" without applying the "general liability insurance 'in for one, in for all' rule." *GMAC Mortgage, LLC v. First American Title Insurance Company,* 2012 WL 669965 (D. Mass., Feb. 28, 2012) at *3. However, it then stayed its order and opted to certify the two questions addressed in the Supreme Court's opinion in the *GMAC* case to the Massachusetts Supreme Court because there was no controlling precedent in Massachusetts. *Id.* at *3-*4.

continued on p. 9

continued from p. 8

filed its suit against First American after the dispute between the property owner, GMAC and First American had been settled. The Federal District Court had already decided First American had no obligation to defend GMAC against the claims First American declined to defend, but had stayed the proceedings to wait for the Massachusetts Supreme Court to answer the certified questions. 2012 WL 66995 at *3.

The underlying litigation arose when GMAC sought to foreclose the lien of its mortgage on a residence, and the surviving spouse of the mortgagor objected to the validity of the mortgage. The surviving spouse claimed the mortgage was not enforceable against her interest in the residence, which was 100% because of the death of her spouse (who apparently by mistake was the only one who signed the refinancing mortgage to GMAC). Because the deed from her deceased spouse to himself and her as tenants by the entirety was recorded before the mortgage, the surviving spouse claimed her interest was free and clear of GMAC's mortgage. GMAC and First American claimed the deed was to have been recorded after the mortgage was recorded and it was purely an oversight that the deed was recorded first, although there was some evidence GMAC had intended for both spouses to sign the mortgage and only the husband was to have signed both the note and the mortgage. *Id.* at *1.

Apparently, GMAC tendered the claim to First American and First American filed suit in the Massachusetts Land Court to reform the deed or equitably subrogate the surviving spouse's interest to the GMAC mortgage. The surviving spouse then filed a separate claim in the Superior Court against GMAC (because she couldn't file her claims as counterclaims in Land Court) for intentional infliction of emotional distress and for unfair and deceptive conduct in pursuing the foreclosure, as well as recovery of mortgage payments made in error to GMAC. The cases were consolidated in the Superior Court and then removed by GMAC to the Federal District Court. First American defended GMAC on the deed reformation/equitable subrogation counts, and GMAC defended itself on the counterclaims. *Id.* at *2.

The *Little Italy* case involved only real estate title related claims, but the *GMAC* case involved both title insurance covered claims and non-title insurance related counterclaims. However, unlike the P*hiladelphia* case, only one type of insurance policy was involved – a title insurance company. In *Little Italy*, there were no claims unrelated to the legal rights of an easement holder. In *GMAC*, however, there were title-related claims (the right to reform a deed and equitable subrogation), and non-title insurance related claims (intentional infliction of emotional distress and unfair and deceptive conduct), but when First American refused to defend GMAC on the non-title insurance related counterclaims, GMAC defended itself on those claims without tendering the defense to another insurance carrier. 985 N.E.2d at 824-825.

The Earlier Illinois *Philadelphia* Opinions

As mentioned earlier, in the *Philadelphia* cases, unlike the *Graham Mortgage Corp.*, *Little Italy* and *GMAC* cases, there were two insurance companies involved; both a title insurance company that had insured the lien of the mortgage (Chicago Title), and a liability insurance carrier for the mortgagee under the insured mortgage (Philadelphia Indemnity Insurance Company). The *2012 Philadelphia* opinion was issued in a declaratory judgment action filed by Philadelphia Indemnity Insurance Company against Chicago Title. Philadelphia claimed in its declaratory judgment action that it had no duty to defend the mortgagee against the claims made in the underlying litigation (described below), unless and until the Chicago Title policy limits were exhausted by Chicago Title, because the title insurance policy was "other insurance" under the terms of Philadelphia's policy, which meant Philadelphia's policy was excess insurance that would apply only when Chicago Title's policy limits were exhausted. 871 F. Supp. at 747.

continued on p. 10

continued from p. 9

Chicago Title had agreed to defend the foreclosing mortgagee in the underlying lawsuit for claims made by a third party against the foreclosing mortgagee to quiet title based on the third party's claim that the mortgage was invalid due to allegedly forged signatures and a number of other reasons. At issue in the declaratory judgment action was whether Chicago Title was obligated to defend the insured mortgagee on other claims not covered by the title insurance policy, including claims for negligence, violation of the Illinois usury law, and various violations of the Illinois Consumer Fraud and Deceptive Business Practices Act under the language in its title insurance policy that limited coverage to specific causes of action. *Id.* at 751.

In all, 12 or 14 separate claims had been asserted against the lender in the underlying litigation, 6 or 7 of which were against the lender, as mortgagee. Of the 12 or 14 claims, Chicago Title agreed 4 or 5 of them were covered by the title insurance policy. Based on counting the claims alone (and without regard to the amount of time spent in defending against the various claims), Chicago Title had agreed to pay only 44% of the costs to defend the lawsuit. Chicago Title also claimed it had to contribute to the lender's defense costs only while those covered claims were pending in the underlying lawsuit. During the period of time after the covered claims were dismissed (albeit with leave to re-plead) and the time they were re-pled by the plaintiff, Chicago Title claimed it had no obligation to defend the lender. Finally, it claimed it had no duty to defend the lender when the plaintiff reasserted the same claims via counterclaims to various claims asserted against the plaintiff by the lender, even if these same claims were reasserted by the plaintiff solely for purposes of preserving the issue for an appeal. *Id.* at 748-750.

Despite the language in the title insurance policy, the District Court in the *2012 Philadelphia* case held that Chicago Title had an obligation to provide a complete defense to the mortgagee/lender against all claims in the underlying litigation where there was a lawsuit filed that included a cause of action covered by its policy. *Id.* at 756. However, the District Court in *2012 Philadelphia* also held that Chicago Title only had that obligation so long as at least one claim covered by the policy was pending in the underlying lawsuit, and it had no duty to defend against affirmative defenses asserted by the third party against the mortgagee/lender, but it did have an obligation to defend against counterclaims filed by the plaintiff in the underlying litigation while those counterclaims were pending. *Id.* at 756-758.

Because there was no case law in Illinois, the District Court relied on the unreported *Little Italy* opinion in which the court had held that Chicago Title (under the exact same policy language) was obligated to defend all causes of action even when the title insurance contract expressly limited the duty to defend to those causes of action that were covered by the title insurance policy. The District Court also found precedent in Illinois for requiring an insurance company (not in the context of a title insurance policy) to defend against expressly excluded claims and found the language at issue in the title policy "does not meaningfully distinguish the present case" from those other cases and determined Chicago Title could not "contract around the complete defense rule" under Illinois law. *Id.* at 752.

The Seventh Circuit *Philadelphia* Opinion

Chicago Title appealed the District Court decision, which led to the Seventh Circuit's opinion in the *Philadelphia* case. In its opinion, the Seventh Circuit called its decision a "question of first impression" in Illinois as to whether a title insurer may "contractually limit its duty to defend its insured to claims or causes of action specifically covered by its policy." 771 F.3d. at 393. Not only was the issue one of first impression in Illinois, it appears to be the only case in the country to date that addresses the "in for one, in for all" or "complete defense" doctrine in the context of the language in two different types of insurance policies – a title insurance policy and a general liability insurance

continued on p. 11

continued from p. 10

policy that covered the lender "for losses arising negligent acts, errors, or omissions in connection with its professional services" which provided it was "excess to other valid and collectible insurance." *Id.* at 395.

In reversing the District Court's decision in *2012 Philadelphia* that Chicago Title owed a complete defense to its insured of all claims asserted in the underlying litigation, the Seventh Circuit noted that the "Illinois Supreme Court had never applied complete-defense rule to title insurance; indeed, it has not applied the rule outside the context of general liability insurance." *Id.* at 394. The Seventh Circuit cited the *GMAC* case as the only state supreme court that had addressed the complete-defense rule in the context of title insurance, noted the *GMAC* court had held it did not apply, and concluded the Illinois Supreme Court was likely to agree. Id. As a result, it held the limited-defense language in Chicago Title's policy was enforceable, reversed the earlier District Court case, and remanded the case for entry of an order consistent with its opinion. *Id.* at 401. The Seventh Circuit also concluded, contrary to the District Court, that the policy language was limited to defense of "a claim adverse to the title or interest as insured" and a claim is not the same as an affirmative defense. *Id.* This essentially meant Philadelphia Indemnity Insurance Company had a duty to defend the lender in the underlying litigation as to the claims asserted that were potentially covered by its policy, although the Seventh Circuit opinion does not expressly address Philadelphia's specific duties.

There were many other issues in the underlying litigation in the *Philadelphia* case and there is an earlier unreported opinion denying Philadelphia's same argument on a motion on the pleadings (*see 2010 Philadelphia*), as well as a later order on the amount of fees Chicago Title owed the lender (*see 2012 Philadelphia*), but those opinions were carefully reviewed and summarized in the Seventh Circuit opinion and overruled by the Seventh Circuit in its opinion. The involvement of both a title insurance company and an errors and omissions/liability insurance company in the multiple *Philadelphia* cases appears to be the only set of cases to date that address the issue of how the "in for one, in for all" or "complete defense" doctrine applies where there is potential coverage under two different types of insurance policies for different types of claims. However, because there are many jurisdictions where the "in for one, in for all" or "complete-defense rule" has not yet been tested, the title insurance industry will undoubtedly be keeping a watchful eyes on any new cases in this area.

Counsel for the insured under a title insurance policy should also determine whether the law in the jurisdiction where the claim is filed allows an insured, if an insurer agrees to defend with a reservation of rights or only agrees to partially defend the insured, to engage separate counsel paid for by the insurance company to defend it. Illinois is such a state, which meant that Chicago Title and Philadelphia Indemnity Insurance Company's roles in the underlying litigation were to pay the costs incurred by the insured in defending itself against all of the claims, and neither insurance company actually engaged counsel to defend the insured in the underlying litigation. The opinions in the *Philadelphia* cases do not address this issue. ■

In Memoriam

John A. Gose, Seattle, WA
Alan Wayte, Pasadena, CA

Similar Cases, Opposite Results: Letters of Intent under *Falls Garden* and *Cochran*

*by Edward J. Levin, Gordon Feinblatt LLC**

The Maryland Court of Appeals (the highest court in Maryland) recently held that a letter of intent signed as part of settlement discussions between two parties who were litigating over the ownership and use of parking spaces was unambiguous and constituted an enforceable contract between them even though the lease that was to guide the relationship of the parties for 99 years had not been agreed upon. *Falls Garden Condo. Ass'n, Inc. v. Falls Homeowners Ass'n, Inc.*, filed Jan. 27, 2015.

In so doing, the court reached a contrary result from its decision in another case, *Cochran v. Norkunas*, 398 Md. 1, 919 A.2d 700 (2007).

Case summaries

Falls Garden Condominium Association Inc. ("Falls Garden") is an association of condominiums near Falls and Old Pimlico Roads in Baltimore County. It is adjacent to The Falls Homeowners Association Inc. ("The Falls"), which consists of 112 townhomes. For 23 years extending to 2008, Falls Garden thought it owned the 67 parking spaces between the two developments, but in 2009 it found out that it did not have title to the spaces. Falls Garden filed a complaint for declaratory judgment in the Circuit Court for Baltimore County requesting a determination that it owned 39 of the 67 spaces by adverse possession or that it held an easement over them by prescription or by necessity.

Before the trial date, the parties entered into settlement discussions that led to a "Letter of Intent." The Letter of Intent, signed by counsel to the parties, said the parties would enter into a lease with a term of 99 years for certain of the parking spaces, and The Falls sent a draft of such a lease to Falls Garden. Falls Garden did not accept the lease as drafted and contended the Letter of Intent was not enforceable.

The Falls moved to enforce the settlement agreement, including the Letter of Intent. After a hearing, the judge noted that even though the Letter of Intent did not state on its face whether the parties intended to be bound by it, it reflected the agreement that the parties reached. Therefore, the court granted the motion.

The Maryland Court of Special Appeals affirmed in 2013, finding the Letter of Intent was unambiguous and that "a reasonable observer would conclude the parties intended to be bound."

The Court of Appeals issued a writ of certiorari. In its published opinion in January 2015, it reached the same result as the lower courts as to the enforceability of the Letter of Intent.

In doing so, the court relied extensively on *Cochran* and on Joseph M. Perillo, Corbin on Contracts.

In *Cochran* the Court of Appeals held that a particular letter of intent signed by prospective seller and buyers of residential real estate was not enforceable. Despite this result, the *Cochran* court stated that a letter of intent can constitute an enforceable contract. Also, the court noted, the fact that a letter of

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This article appeared in the electronic edition of The Daily Record on February 10, 2015 at http://thedailyrecord.com/2015/02/10/edward-j-levin-similar-cases-opposite-results/ and in the print edition of February 11, 2015.

continued on p. 13

continued from p. 12

intent "explicitly contemplates future agreements does not make it unenforceable."

In *Cochran* the letter of intent was only several paragraphs long, but it included all the business terms of the transaction. It provided that the parties would sign the standard form Maryland Realtors contract. After the seller received the form contract and addenda to it, she had seller's remorse and decided not to proceed. The buyers sued for specific performance.

The Court of Appeals looked to Corbin, which sets forth the following four categories of letters of intent:

(1) the parties, or at least one of them, state that they do not intend to be bound;

(2) the parties highlight one or more points on which there has yet to be agreement;

(3) the parties express definite agreement on all necessary terms, but are silent on other provisions which are usually included in contracts; and

(4) situations like category (3) except that the parties state their intention that the letter of intent forms a binding contract.

Definite or indefinite?

The *Cochran* court stated that a contract has been made if it falls within either category (3) or (4). It held that, to form a contract the parties must have the intent to be bound and there must be definiteness of terms in a letter of intent.

In *Cochran*, the court determined that the parties did not show the requisite intent to be bound because the letter of intent referred to the form realtors contract in three places, and a reasonable person, therefore, would have understood that a formal contract was to follow the execution of the letter of intent.

When the court analyzed the Letter of Intent in *Falls Garden*, it considered the difference between Corbin's categories (2) and (3) to be whether the terms of the Letter of Intent were definite or indefinite. According to the court, this "informs the central question of whether there was an intent to be bound and, thus, mutual assent."

The court also found that a binding letter of intent must address all the material terms relating to the subject, citing *Peoples Drug Stores, Inc. v. Fenton Realty Corp*., 191 Md. 489 (1948), and Corbin. The opinion notes that, in *Falls Garden*, both the circuit court and the Court of Special Appeals agreed that the Letter of Intent included all of the material terms and that they were definite.

Falls Garden argued that the Letter of Intent was not enforceable because it clearly anticipated that there would be a lease, that the form of the lease had not been agreed upon, and that Falls Garden did not accept the form of lease that The Falls sent to it. Falls Garden noted five business points addressed in the lease with which it took issue.

The Court of Appeals, however, ruled that the Letter of Intent was inclusive and definite as to all material terms. It considered the Letter of Intent to be in Corbin's category (3), and therefore enforceable.

But — unlike the lower courts — the Court of Appeals declined to hold that the lease referred to in the Letter of Intent was enforceable. The court found the lease was merely a draft that was not agreed to by The Falls and that specific performance was not available to enforce it.

Analysis

How can the *Falls Garden* Letter of Intent be enforceable if the lease — which is to control the relationship of the parties for nearly a century — is not enforceable? What if each party refuses to budge from its positions on the five open points, or on any of them? They cannot walk away and say there is no deal: the Court of Appeals held that the Letter of Intent is an enforceable agreement, and the Letter of Intent unequivocally provides there will be a lease.

continued on p. 14

continued from p. 13

So, who decides on the provisions of the lease that are not explicitly set forth in the Letter of Intent? Will a stalemate trigger yet another round of litigation?

The Court of Appeals in both *Falls Garden* and *Cochran* cited Corbin for the proposition that "[i]f the document or contract that the parties agree to make is to contain any material term that is not already agreed on, no contract has yet been made; the so-called 'contract to make a contract' is not a contract at all." Doesn't the failure to have an agreed-upon lease make the Letter of Intent a "contract to make a contract"?

If the letter of intent in only one of the *Falls Garden* and *Cochran* cases were to be held to be enforceable, shouldn't it have been the one in *Cochran*? In each case, all material terms were specified in the applicable letter of intent. In each case, the applicable letter of intent stated that the parties would later sign another, more definite document.

The document to be signed later in *Falls Garden* was a commercial lease that was not a "shelf document" but had numerous provisions open to negotiation between the parties. Indeed, the Letter of Intent expressly stated that the lease would contain a number of other "usual and customary" provisions, and proceeded to identify a non-exclusive list of those provisions. The form of lease was not available to *Falls Garden* at the time the Letter of Intent was signed, unlike the standard Maryland Realtors form which is readily available through a broker.

The *Cochran* letter of intent repeatedly referred to the form Maryland Realtors contract, which is a standard form. There were no terms left to negotiate after the *Cochran* letter of intent was signed, and the seller never articulated any point that was not agreed to by the parties. She merely changed her mind about selling her house.

Practice pointer

Falls Garden and *Cochran* are two factually very similar cases that reached diametrically opposite results. To avoid being in a position where it is virtually undeterminable whether a court will find your letter of intent to be an enforceable contract, it is important to explicitly provide in the letter of intent if it is intended to be binding on the parties.

If the parties desire that they are both bound to the deal specified in the letter of credit once it is signed, the letter of intent should so state. If the parties do not want to be bound unless subsequent transaction documents are fully negotiated, executed and delivered, the letter of intent should contain such a provision.

Otherwise, the parties may find themselves in the murky netherworld between categories (2) or (3) of Corbin's analytical framework.

Here is suggested language that the parties could include in a letter of intent which should make their intentions clear:

"This is merely a letter of intent which sets forth some, but not all, of the terms of the subject transaction, and other material terms remain subject to negotiation. The parties agree that neither is bound by the provisions of this letter of intent. Each agrees that neither it nor the other party to this letter of intent will be legally or equitably bound unless and until they have both executed and delivered other documents. If and when that occurs, the parties will be bound by the provisions in those documents, and not by the terms of this letter of intent. Notwithstanding the foregoing, the parties intend that section __, which prohibits the parties to negotiate with third parties about the property for __ days, and section __, which requires the parties to keep the provisions of this letter of intent confidential, shall be binding upon execution of this letter of intent." ■

ACRELades

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Robyn Smyers and **Theodore Yi** were featured last month on *Law 360* as Minority Powerbrokers.

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John Gose

by Richard R. Goldberg

John Gose, one of ACREL's founders, a past President and the second Lane Award winner, passed away on January 2, 2015. John provided extraordinary leadership to our profession from the 1970s through the 1990s and remained active as a teacher and practitioner for many years thereafter. John was among the lawyers who set the tone for the present practice of real estate law.

John, among other things, was a past Chair of the Real Property, Probate and Trust Law Section of the American Bar Association, a founder and Past Chair of the Anglo-American Real Property Institute, Past President of the Pacific Real Estate Institute, adjunct professor at Seattle University Law School and an advisor to the Restatement of the Law - Property (Mortgages) for the American Law Institute.

Illustrating his ability to think out of his safe zone, John was appointed by the U.S. House of Representatives to the nine-member Bankruptcy Reform Commission and expanded his expertise, in his later years, to an insolvency practice. At the Commission he was active in all aspects of its deliberations and was an author of the Small Business and Single Asset Real Estate sections of the final report.

John also served his country in the Korean War, remained active in the Reserve, and retired as a Colonel. He served as President of the Marine Corps Reserve Officers Association.

The biographical information, impressive as it is, does not do justice to all of John's skills and accomplishments. One of John's finest attributes was his ability to mentor other lawyers. From the many lawyers at Preston Thorgrimson (later Shidler Gates & Ellis and ultimately K&L Gates, a goodly number of whom are members of the College, to those of us who crossed his path in his many professional organizations, John demonstrated his ability to identify good lawyers, recognize leadership potential and help the people he supported to achieve leadership positions as well as become better lawyers. He was instrumental in fostering the early days of the College and spark a tradition of leadership in the Presidents and Officers who followed him for a number of years after his term.

Most importantly, being John's friend was a special treat. I met John about 35 years ago and was one of a huge group of people he befriended and influenced. His skill at making people comfortable as well as his ability to enjoy himself and have others quickly join him made many College meetings an unforgettable opportunity. He really cared about the people who surrounded him and would go to any length to make them feel at home and important.

I have lost a good friend, as have many of us who have been his colleagues whether in his law firm or his organizations. He was unique in his professionalism, his gusto for work and play and his ability to permit everyone to achieve their goals with his incomparable guidance. ■