ACREL News

President's Message

The College's Naples, Florida Mid-Year Meeting was a success with excellent programs and attendance. With the new evaluation system put in place by David Gordon, we are receiving evaluations more quickly, leading to better planning for future program and meeting purposes.

The highlight of the meeting was the presentation of the Frederick S. Lane Award for the eighth time since 1993, to Wayne S. Hyatt. Wayne was recommended for the award by the Lane Award Committee chaired in 2012 by Mark Mehlman and the award was approved by the Board of the College. Ann Saegert, past President of the College, presented Wayne with the Lane Award and his remarks were typical of Wayne – modest, grateful and eloquent.

We welcome 18 new Fellows to the College as the Class of '13. The credentials of these new Fellows are excellent and Angela Christy and her Orientation and Integration Committee are at work "orienting and integrating" our new Fellows. Please welcome them to the College and encourage their participation.

The College sponsored a reception for ACREL Fellows at the ABA's RPTE Spring Symposium. Over 30 Fellows attended including new Fellows John Lovett and Charles Menges. Congratulations to ACREL Fellow Susan Talley who is the incoming Chair of that ABA Section. ACREL past President Kevin Shepherd was specially recognized at that meeting for his work on Gatekeeper Regulations. We add our congratulations and appreciation for Kevin's tireless efforts and for keeping the College's members up to date on this complex international regulatory initiative.

All of us were shocked and saddened by the Boston Marathon bombings. Thankfully, our Boston Fellows and families were all reported to be safe. While we do not know all the Fellows who were race participants, ACREL Fellow Tom Nealon was running again. Tom has raised over $1,250,000 for the American Liver Foundation running the Boston

continued on p. 2

IN THIS ISSUE

President's Message

continued from p.1

Marathon for 11 years including raising $250,000 this year alone. Tom did not finish the race due to the tragedy at the finish line but it was not for his lack of trying.

Our external programming conducted in conjunction with ALI CLE continues to successfully expand. Last month, the ACREL presentation on EB5 garnered a large audience and great reviews, as did the program on loan recourse earlier this year. The outstanding panel of Larry Dudek, David Kuney and Sam Levine presented an ACREL/ALI program on tenant bankruptcy issues on May 22. Michael Sklaroff, Steve Horowitz and Fred Strober presented panels on behalf of ACREL to the Counselors of Real Estate in New York on April 30, continuing an outreach effort with CRE started by Mark Mehlman several years ago.

The College continues to look for ways to continue its mission through cooperation with organizations of like mind. This effort helps both organizations and presents the extraordinary abilities and experiences of our Fellows to non-College audiences.

On an administrative note, the College's balance sheet and monthly financial statement are now posted on the ACREL website together with minutes of the monthly Executive Committee meeting.

In closing, I share a personal note. This year has demonstrated to me the enormous energy and commitment of so many of our Fellows. ACREL is a completely voluntary organization. Our participation should be, but may not always be, fully appreciated by our firms or companies, especially in difficult economic times. Nevertheless, our participation is extraordinarily strong with our committee members doing wonderful things. The energy and attendance at our meetings are high and the condition of the College is good. I ask each of you who reads this to look around the profession to identify distinguished real estate practitioners with 10 years or more experience. Please consider sharing their names with Toni Wise, who leads the active Member Development Committee. Nomination time for the Class of '14 will be upon us just after we gather in Vancouver to attend a program I know will be excellent.

STAFF BOX

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Meetings Calendar

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

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

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

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

Enforceability of Nonrecourse Carveout Provisions - Are There UCC Issues?*

by John C. Murray, First American Title Insurance Company, Chicago, IL © 2013

Introduction

Since the early 1990s, lenders have been qualifying and restricting nonrecourse provisions in commercial real-estate loans by making exceptions for certain acts by borrowers that are deemed to be within the borrower's control. In recent years, many lenders have expanded the scope of such "carveouts" to include risks of exposure to the property's economic deterioration or neglect. Some nonrecourse carveout provisions provide that the borrower is liable for the specific damages resulting from the violation or breach of a carveout, while others state that the entire loan becomes recourse to the borrower if any of (or certain of) the excepted acts occurs. In some cases the exceptions have virtually swallowed the rule; i.e., the clause is drafted so that the borrower has personal liability for virtually all defaults except the failure to pay the principal and interest due on the loan [1].

Until recently, there has been relatively little case law regarding the validity and enforceability of such carveouts, as these provisions have rarely been challenged by borrowers or guarantors. But in the current depressed commercial real estate market, with the commensurate increase in mortgage loan defaults (especially with respect to commercial mortgage-backed securities ("CMBS") loans, where the isolation, preservation and continuation of the income stream from the mortgaged property are especially important), more federal (including bankruptcy) and state court actions challenging the validity and enforceability of carveout provisions have been brought by borrowers and guarantors (mostly without success), and legislation has even been enacted in Michigan and Ohio to specifically address this issue and restrict the enforceability of certain types of carveout provisions[2]. A few cases have even dealt with specific Uniform Commercial Code ("UCC") issues in connection with the interpretation and enforceability of carveout language in commercial real-estate loan documents. These cases are discussed and analyzed below.

The *Heller v. Lee* Decision

In *Heller Financial, Inc. v. Lee*[3], the Illinois federal district court rejected a challenge to the enforceability of a specific exception to the nonrecourse provision in the note executed by the borrowers. The borrowers, Harry Lee ("Lee") and L. Joe VanWhy ("VanWhy"), along with others, formed a Florida limited partnership, Royal Plaza, Ltd. ("Royal Plaza"), to purchase the Hotel Royal Plaza ("Hotel") in Orlando, Florida. Madlee, Inc. ("Madlee"), a Florida corporation, served as the general partner of Royal Plaza. Royal Plaza and Maddlee obtained two loans to purchase the Hotel, one for approximately $34 million from Bankers Trust Company, and the other (the subject of the litigation in this case) from Heller Fi-

* Nothing contained in this Article is to be considered as the rendering of legal advice for specific matters, and readers are responsible for obtaining such advice from their own legal counsel. This Article is intended for educational and informational purposes only. The views and opinions expressed in this Article are solely those of the Author, and do not necessarily reflect the views, opinions, or policies of the Author's employer, First American Title Insurance Company.

[1] A few recent cases even held that the failure to pay principal and interest alone may trigger recourse liability under certain circumstances if the language in the nonrecourse and carveout provisions is so drafted and interpreted. *See 51382 Gratiot Avenue Holdings, LLC v. Chesterfield Development Co., LLC*, 835 F. Supp. 2d 384 (E.D. Mich., 2011); *Wells Fargo Bank, N.A. v. Cherryland Mall Limited Partnership, remanded to Court of Appeals for further proceedings*, 493 Mich. 859 (2012).

[2] The Michigan legislature passed a bipartisan bill, known as the Nonrecourse Mortgage Loan Act ("NMLA"), which was signed into law by the Governor of Michigan on March 29, 2012, and is codified at M.C.L.A. 445.1591-1594. The NMLA provides that any provision in the loan documents that does not comply with the prohibition against a post-closing solvency covenant from being used, directly or indirectly, as a nonrecourse carveout or as the basis for any claim or action against a borrower, guarantor or other surety is invalid and unenforceable. The NMLA is a direct result of the holdings in the *Chesterfield* and *Cherryland* cases, supra note 1, effectively making the deficiency judgments rendered in those cases unenforceable and overturning those rulings. The Governor of Ohio signed into law H.B. 479, known as the Legacy Trust Act ("LTA"), on December 20, 2012. The LTA contains provisions identical in almost all respects to the provisions of the NMLA, and these provisions are codified at O.R.C. §§ 1319.07-09 (2013). Sections 1319.07-.09 apply to the enforcement and interpretation of all nonrecourse loan documents in existence on, or entered into on or after, the effective date of March 27, 2013.

[3] 2002 WL 1888591 (N.D .Ill. Aug. 16, 2002).

continued on p. 4

Enforceability of Nonrecourse Carveout Provisions...

continued from p.3

nancial, Inc. ("Heller") for approximately $10 million ("Loan").

Lee, VanWhy, and Royal Plaza, Ltd. executed an Equity Loan Agreement ("Loan Agreement") and a Promissory Note ("Note") in connection with the Loan, which was essentially a mezzanine-financing transaction. Heller also obtained pledges of the general and limited partnership interests in Royal Plaza and perfected a security interest under Section 9 of the UCC in these "general intangibles" by properly filing UCC-1 financing statements[4].

The Note contained a nonrecourse provision, which provided that no maker would be personally liable to pay the Loan or to perform any obligation under the Loan documents, and that the holder of the Note would look solely to "the Assignments and any other collateral heretofore, now, or hereafter pledged by any party to secure the Loan." The Note further provided that notwithstanding the nonrecourse nature of the Note, each maker (except for one individual maker, Robert Ahnert) would be personally liable, jointly and severally, for repayment of the Loan "and all other obligations of Maker under the Loan Documents" in the event of any breach of certain covenants in the Loan Agreement "pertaining to transfers, assignments and pledges of interests and additional encumbrances in the Property, the Partnership or the Corporation."

One of the specific carveout covenants in the Note stated that each of the makers would "not [without the prior consent of the lender] . . . grant or permit the filing of any lien or encumbrance on the Project, the Collateral or the general partnership interest of the Corporation in the Partnership," other than those created by the senior loan documents and certain personal property leases; provided that Royal Plaza could contest the validity or amount of any asserted lien if it gave prior written notice to Heller, such contest stayed the enforcement of the contested lien, and the contested lien was bonded or insured over by the title insurance company or Royal Plaza posted security in a manner acceptable to Heller.

After the purchase of the Hotel by Royal Plaza, six liens (in the form of tax liens and mechanic's liens) were placed against the Hotel, none of which was consented to by Heller or of which Heller was notified, and none of which was bonded over or insured by the title insurance company. As a result of these liens, Heller declared a default under the Loan and informed Lee, VanWhy, Royal Plaza, and Madlee that the entire outstanding Note balance was due and payable and that a public sale of the equity interests (in accordance with UCC requirements) in Royal Plaza and Maddlee, which had been pledged to Heller as security for the Loan, would occur. The Hotel and part of the equity interests of Royal Plaza were subsequently sold (at which Heller bid the outstanding principal and interest due on the Loan) and the proceeds paid to Heller. Heller then filed the instant action, claiming that it had not received payment in full on the Note and that Lee and VanWhy were personally responsible for the deficiency.

Lee and VanWhy argued that they were not responsible for, and had no knowledge of, the liens placed against the Hotel because it had been managed "with the knowledge and agreement of Heller" by a separate management company unrelated to Royal Plaza. The court rejected this argument, stating that "Lee and VanWhy contracted with Heller for the loan and not [the manager]. Further, Lee and VanWhy cannot claim ignorance of the liens when they were a matter of public record."[5]

The court stated that under Illinois law (which all the parties agreed governed the loan transaction), a loan would be deemed to be nonrecourse where the borrower "is not personally liable for the debt upon default, but rather, the creditor's recourse is solely to repossess the property granted as security for the loan"[6]. Under this definition, the court ruled that the loan from Heller was a nonrecourse loan. However, the court noted that lenders commonly create cer-

[4] Section 9-102(a)(42) of the UCC states that:

> "General intangible" means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software.

[5] *Heller Financial, Inc. v. Lee, supra* note 3, 2002 WL 1888591 at *2, n. 2.

[6] *Id*. at *4 (citations omitted).

continued on p. 5

tain carveouts to nonrecourse provisions in loans to "provide the protection that lenders require, personal liability, to insure the incentive to repay the loan and maintain the viability of the loan."[7]

Heller contended that a violation of any of the carveouts stated in the Note, including the exception to nonrecourse for any lien placed on the Hotel, would cause Lee and VanWhy to become personally liable for the principal balance of the Loan. The court agreed, ruling that the carveout language was unambiguous and clearly provided for personal liability for violation of the enumerated exceptions to nonrecourse, including the placing of liens against the Hotel. The court noted that the carveouts had been negotiated and agreed to by all parties, as evidenced by the fact that one of the makers of the Note, Robert Ahnert, had exempted himself for any personal liability for violation of the carveouts. The court also agreed with Heller's assertion that because the Loan was secured by the equity interests of the entities that purchased the Hotel and not the Hotel itself, Heller was especially concerned about the operation of the Hotel because it directly affected the value of the collateral securing the Loan, i.e., Heller could not foreclose on the real property interest and the liens against the property were not truly "junior" to Heller's UCC security interest, and could in fact have devalued Heller's security interest.[8]

It certainly is hard to argue with the court's decision in *Heller v. Lee*, based on the facts of the case. However, the precedential value of this decision may be somewhat limited, at least with respect to the validity and enforceablity of carveouts to nonrecourse provisions in mortgage loan documents. As the court in *Heller v. Lee* stated:

> [T]he loan was secured by the equity interests of the entities that purchased the Hotel, and not by the Hotel property itself. This means Heller is concerned with the successful operation of the Hotel since it affects the value of the collateral that secured the loan. Any lien on the property compromises the equity interests of Royal Plaza and Madlee. Thus, the carve-out under [the nonrecourse section of the Note] is of the utmost importance in acquiring the loan and is known and agreed to by all the parties."[9]

With respect to the argument that carveouts from nonrecourse provisions are unenforceable liquidated-damages provisions, the court in *Heller v. Lee* stated that, at least in Illinois, "courts lean toward a construction that excludes the idea of liquidated damages and permits the parties to recover only damages actually sustained."[10] The carveout provision in the Note in *Heller v. Lee* provided that the makers of the Note (with the exception of Robert Ahnert) would become personally liable, jointly and severally, for the entire outstanding balance of the loan "and all other obligations of Maker under the Loan Documents" if any of the enumerated exceptions (including liens created against the Hotel) occurred. The six liens placed on the Hotel property were for an aggregate amount of approximately $820,000, and occurred over a five-month period of operation of the Hotel. Although the amount of the unpaid balance due on the Loan at the time of default is not stated in the court's opinion, the author's understanding is that it was almost the entire principal balance of approximately $10 million (the Loan was interest only).

The court noted that as a result of the violation of the covenant not to place liens against the property, there had been a public sale of both the Hotel and "the equity interest in Royal Plaza and Maddlee, which had been pledged to Heller as security for the Heller loan,"[11] Even though Heller received proceeds from the sale covering a portion of the debt, in the amount

[7] Id. at *5.
[8] As the court succinctly summarized, "[i]t is painfully clear that the nonrecourse loan from Heller to Royal Plaza and Madlee included carve-outs. Further, these carve-outs caused Lee and VanWhy to be personally liable. Lee and VanWhy acknowledged and agreed to this." *Id.*
[9] *Id.* at *4.
[10] *Heller v. Lee, supra* note 3, 2002 WL 1888591, at *5 (citations omitted).

continued on p. 6

continued from p.5

of approximately $5 million, it argued that its actual damages consisted of the remaining unpaid deficiency amount of approximately $5 million, which became due when the borrower failed to pay the approximately $820,000 due as the result of the liens recorded against the property, i.e., Heller had agreed not to seek personal liability for any deficiency only so long as none of the carveouts had been breached. Heller argued that it was entitled to the entire amount of the unpaid indebtedness. The court agreed, stating that:

> Heller, in filing this action, seeks the amount left on the loan at the time of the breach. This amount is the actual damages to Heller based on Lee and Van Why's breach. Since Section 11(b) [the nonrecourse carveout provision in the Note] involves actual damages it cannot be a liquidated damages provision.[12]

The *Blue Hills Office Park v. J.P.Morgan Chase Bank* Decision

In Blue Hills Office Park, LLC v. J.P. Morgan Chase Bank[13] -- which may be the first reported decision in which a court enforced carveouts in a nonrecourse securitized loan -- the federal district court in Massachusetts held that when the borrower, Blue Hills Office Park LLC, settled a zoning appeal for $2 million and failed to disclose the settlement to the lender or seek its consent (as required by the mortgage loan documents) and diverted the funds to itself, the borrower and the guarantors would be liable for the full amount of the $17.5 million loan, and not simply the restitution amount of $2 million. The high bidder at the lender's foreclosure sale, instituted after the borrower defaulted on its loan payments, was a single-purpose entity created by the lender, which later sold the property to a third party.

The court ruled that the settlement was part of the "mortgaged property," which, as described in the loan documents, included "Awards or payments . . . with respect to the Premises . . . for any . . . injury to or decrease in value of the Premises." The nonrecourse provision in the mortgage (which was carefully negotiated) specifically provided that if the borrower diverted funds from the mortgaged property that belonged to the lender, the borrower's and guarantors' liability would become recourse for the entire loan balance. The loan documents provided that certain other borrower acts and defaults, such as fraud, intentional physical waste, or removal and disposal of mortgaged property after default, would result only in limited liability of the mortgagor and guarantors for actual damages.

The borrowers and guarantors subsequently appealed from the judgment, but the appeal was dismissed and $17.25 million (98.5% of the judgment) was paid to the lender to settle the case. As Judge Young succinctly stated during the trial in this case, "don't mess around with the collateral . . . "[I]f you mess around with the collateral, that's when you'll be liable for the entire amount of the deficiency."

The court also found a second violation of the nonrecourse carveouts, i.e., the borrower had violated the single-member and single-purpose-entity requirements in the loan documents by commingling the $2 million settlement payment with monies of its member and by failing to maintain a participating independent director. Although the borrower had named as the "independent director" an individual who once worked as a paralegal or secretary at the borrower's law firm, the court stated that "it is clear that she did not participate

[11] *Id.* at *2.
[12] *Id.* at *5.
[13] 477 F. Supp.2d 366 (D. Mass. 2007).

continued on p. 7

in the management of Blue Hills in that capacity,"[14] and that she "was not involved in the discussions concerning the $2,000,000 settlement payment."[15] Therefore, the court held, the borrower had violated a specific mortgage covenant because it had failed to "cause there to be" an independent director and had failed to maintain its status as a single-purpose entity.

The court in *Blue Hills* summarily rejected the borrower's lender-liability claims, which alleged that the special servicer had wrongfully denied the borrower's request to access reserve accounts to make the loan payments and real estate tax payments, and that the lender had breached the "implied covenant of good faith and fair dealing" by failing to meet with the borrower in an effort to work out the loan. The court held that the lender was perfectly within its rights in failing to meet with the borrower after the occurrence of an acknowledged loan default and was under no obligation to transfer funds from special reserve accounts to make scheduled payments of principal and interest on the loan.

The court in *Blue Hills* endorsed an expansive definition of "mortgaged property," as broadly defined in the mortgage's granting clauses, to include non-real estate assets only indirectly related to the mortgaged real estate, i.e., a lawsuit brought by the borrower and its settlement proceeds. But this type of action also conceivably could be characterized, under somewhat similar circumstances, as a security interest in a tort claim under Article 9 of the UCC. Could there be a potential conflict? As one commentator has noted:

> I wonder whether under a different set of facts, the characterization of the settlement proceeds as "mortgaged property" might create a potential priority conflict with Article 9 of the UCC, which (under some circumstances) permits secured parties to take security interests in commercial tort claims. Suppose, for example, that a borrower's shopping center is injured because a neighboring entity is emitting unpleasant odors thus constituting a nuisance. If the borrower brings a suit against the neighbor on a nuisance theory, that tort recovery might belong to the Article 9 lender with a security interest in the borrower's commercial tort claims. At the same time, the same recovery might be characterizable as part of the "mortgaged property" belonging to the mortgage lender. (Even if there were a potential conflict, the best solution would be a timely intercreditor agreement between the two lenders.)[16]

The issue may well be the distinction between the grant of a security interest and the perfection of the security interest in the collateral. The granting clause in a mortgage may be sufficient for attachment as meeting the security-interest requirement of §9-203(b)(3)(A) of the UCC[17]. But the filing of a mortgage cannot perfect a security interest in personal property other than fixtures. For example, the granting clause in a mortgage could not define trucks located on the property as "mortgaged property," then try to perfect a security interest in certificated goods through recorda-

[14] *Blue Hills Office Park, LLC v. J.P. Morgan Chase Bank, supra* note 13, 477 F.Supp.2d at 383.
[15] *Id.*
[16] Prof. Dan Schechter, *Proceeds Resulting from Settlement of Zoning Appeal Are Part of Mortgaged Property and Belong to Mortgage Lender. [Blue Hills Office Park LLC vs. J.P. Morgan Chase Bank]*, 2007 COMM. FIN. NEWS 26 (April 2, 2007) (Comment). The author further states as follows:

> Note the interesting structure of this "nonrecourse" arrangement: as long as the borrower behaved properly, the loan would be nonrecourse. But if the borrower siphoned off money that should have gone to the lender, the guarantors' liability would revert to a "full recourse" status. It almost sounds punitive, but the structure should have served to focus the guarantors' attention and to encourage them to monitor the borrower's behavior more closely.

Id. at 26.
[17] Sec. 9-203(b)(3)(A) provides that a security interest is enforceable against the debtor and third parties with respect to the collateral if (1) value has been given; (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and (3) one of the following conditions is met: (A) the debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned; (B) the collateral is not a certificated security and is in the possession of the secured party under Section 9-313 pursuant to the debtor's security agreement; (C) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under Section 8-301 pursuant to the debtor's security agreement; or (D) the collateral is deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights, and the secured party has control under Section 9-104, 9-105, 9-106, or 9-107 pursuant to the debtor's security agreement.

continued on p. 8

continued from p.7

tion of the mortgage. The correct reasoning undoubtedly is that "mortgaged property" must ultimately be actual real property (or fixtures). A UCC filing clearly would be necessary where a mortgage loan is secured by equipment, personalty or contract rights. Although a mortgage that also constitutes a fixture filing will create and perfect a valid security interest in the fixtures, there is a chance that what the secured party believes are "fixtures" are in fact just equipment.

Section 9-102(a)(41) of the UCC (which defines fixtures) should be studied carefully[18]. If the described collateral is not in fact "fixtures," then a fixture filing -- or a mortgage that serves as a fixture filing -- will not perfect a security interest in the collateral. Comment 6 to UCC §9-503 states, in part:

> In some cases, it may be difficult to determine whether goods are or will become fixtures. Nothing in this Part prohibits the filing of a "precautionary" fixture filing, which would provide protection in the event goods are determined to be fixtures. The fact of filing should not be a factor in the determining whether goods are fixtures.

Therefore, when in doubt it may make sense for the secured party to take the conservative approach and also file a regular UCC financing statement in the "location" of the debtor[19], with a description of any collateral that may potentially be deemed to be personal property[20]. For example, insurance and condemnation proceeds (as opposed to fixtures, which are defined under applicable state law) with respect to real property that are payable in accordance with a specific provision in the mortgage, probably are not covered by the UCC. On the other hand, insurance and condemnation proceeds paid with respect to fixtures could be "proceeds" of the fixtures and therefore constitute covered UCC collateral under Article 9[21]. However, a standard mortgagee clause may give the lender a direct contractual right against the insurance company rather than a lien on money payable to the borrower. In that situation, the lender's right to receive the insurance proceeds probably is not a security interest that needs to be perfected under the UCC.

When the collateral is in fact a commercial tort claim, special rules apply: under § 9-108(e)(1) of the UCC, a description only by type of collateral defined in the UCC is not sufficient to identify a commercial tort claim, and, under § 9-204(b)(2), a security interest cannot attach to a commercial tort claim under an after-acquired property clause. The combined effect of these provisions is that a security interest cannot be created in a commercial tort claim that does not yet exist, and the security agreement must describe the claim with sufficient detail in order for a security interest to attach.[22]

Conclusion

The case law with respect to carveouts to nonrecourse loan provisions in commercial mortgage-loan documents, as well as the carveout language itself, continues to evolve. The trend is toward enforcement of such language by the courts, at least with respect

[18] Section 9-102(a)(41) of the UCC states that:
"Fixtures" means goods that have become so related to particular real property that an interest in them arises under real property law.
[19] The debtor's location, for purposes of perfection and priority under UCC Article 9, is defined in UCC 9-307(b), and depends on whether the debtor is an individual or an organization.
[20] Note that in the *Heller v. Lee* case, supra note 3, the lender obtained pledges of the general and limited partnership interests in the borrowing entity and perfected a UCC security interest in these "general intangibles" (as defined in UCC § 9-102(42)) by properly filing UCC-1 financing statements. When the borrower defaulted under the loan agreement (essentially a mezzanine loan), the lender conducted a public sale of the equity interests in accordance with UCC requirements.
[21] UCC §9-102(a)(12) defines "collateral," which includes "proceeds to which a security interest attaches." UCC §9-102(a)(12)(A).
[22] *See* Official Comment 5 to UCC § 9-108. Official Comment 5 provides that the description doesn't have to be specific -- it need not specify the amount of the claim, the theory on which it may be based, or the identity of the tortfeasor(s), for example -- but it should reasonably identify an existing claim. Official Comment 5 provides the following example of a sufficient description: "all tort claims arising out of the explosion of the debtor's factory." Official Comment 5 also states that

> Under [UCC §] 9-204, an after-acquired collateral clause in a security agreement will not reach future commercial tort claims. It follows that when an effective security agreement covering a commercial tort claim is entered into the claim already will exist.

continued on p. 9

Enforceability of Nonrecourse Carveout Provisions...

continued from p.8

to commercial mortgage-loan documents where such provisions are unambiguous and are negotiated and drafted by sophisticated and experienced counsel for borrowers and lenders. But as illustrated by the cases discussed above (as well as other recent cases), the carveout language generally will be strictly enforced and only to the extent specifically permitted and authorized by the loan documents (and may be subject to regulation by statute in certain states, as noted in this article). Specific UCC issues, which may not have been anticipated by the drafters of carveout language in nonrecourse provisions in commercial real-estate documents, also should be addressed by both lenders and borrowers as well as their respective counsel when the collateral for the loan includes pledges of the equity interest(s) in the borrowing entity or the loan is additionally secured by non-real estate assets only indirectly related to the mortgaged real property. ■

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.

ACRELades

David Gordon and **Anne Babineau** have both been named to the list of New Jersey Super Lawyers for 2013. David was listed in the Top 100 Lawyers for the 7th consecutive year and Anne was listed in the Top 50 Women for the 7th time.

Charles Trainor has been honored by Lambda Alpha with its Samuel J. Cullers Award, based upon lifetime achievement in commercial real estate law and his sustained leadership as Chair and Board Member of the Pacific Legal Foundation.

Got Programs?

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

Tips for Drafting for Effective Dispute Resolution Clauses

by Stanley P. Sklar, Dispute Resolution Services, Chicago, IL

1. The arbitration clause must be carefully prepared by the transactional lawyer and the litigation lawyer in cooperation with each other and should tailored for the particular type of dispute which is the subject of the contract. Even if the provider has no established rules for your "unique" dispute, do not be constrained to use the process - you can establish your own rules of procedure.

The ability to tailor-make a dispute resolution procedure for your particular transaction, and even select the specific panelists based upon expertise agreement at a time where conflict is absent cannot be underestimated.

2. A good arbitration clause should:

a. Be initiated by either party within a specific period of time.

b. Take into account joinder of all parties necessary to resolve the dispute. Obtaining the written comitment of all parties to participate in the arbitration process at the contract stage is critical. Usually it is too late to obtain a reluctant party participation at the dispute stage.

c. Establish standards for the selection of arbitrators with the expertise sought and provide for a replacement mechanism in the event a panelist resigns or be unable to serve his or her term for reasons beyond their control.

d. Provide for some limited pre-hearing discovery, but avoid "all discovery as may be permitted by the Civil Practice Act of the jurisdiction or the Federal Rules of Discovery."

e. Provide for authority to award attorneys fees and costs, but define what those costs are such as expert witness fees, consultants fees etc. Awards of attorney's fees to the prevailing party should define exactly what a prevailing party is. Query, if you recover only 50% of your claim are you a prevail ing party?

g. Designate the place of arbitration to avoid forum shopping or local prejudices.

h. Designate the provider and the rules governing the proceedings.

The Interview

by Joshua Stein, Joshua Stein PLLC, New York, NY

As I walked westward on 55th Street from Third Avenue in late 2010, soon after I had started my new law practice, I heard someone call my name. I looked to my right, down the ramp into a parking garage. I saw a woman who looked familiar walking out of the garage. I couldn't place her until she reminded me: "I'm Debbie Goldman. We were at Latham together."

We had both worked at Latham & Watkins in the late nineties. Richard Chadakoff and Jamie Hisiger, two of my partners at Latham, had enlisted Debbie to work with us as a temporary attorney while she pursued a Columbia MBA. They knew Debbie from their previous firm. I had seen or heard Debbie's name occasionally in the years since she worked at Latham. I sometimes wondered what she had done after business school.

So I asked: "What are you doing?" "Just this minute?" "Sure." She said she had driven into the city for an appointment with a legal headhunter, and she was walking to that appointment.

"Are you looking for a job?" I asked. The answer, obviously, was yes. We walked westward together, crossing Lexington.

Debbie had seen in the press that I had started my own law practice, limited to commercial real estate law, which was her practice area too. She had put off calling to congratulate me because she didn't think I'd remember who she was.

I did remember. Even though Debbie and I had never worked together on a transaction, Richard and Jamie had always described her as a good lawyer. I also remembered from our interactions at Latham that Debbie was a nice person, which was of equal or greater importance to me.

I asked Debbie if she'd like to forget about the headhunter and work with me. I wasn't ready to hire a full-time associate, but I wanted to hire an experienced lawyer to help part time as needed. Debbie could work in the office or at home or, subject to confidentiality concerns, anywhere else, because my entire law practice is online.

That turned out to be perfect for Debbie, given her family responsibilities and other things going on in her life, including managing real estate investments for herself and her family. By the time we reached Park Avenue, we had finished Debbie's interview. We agreed she would start work the next day as one of my first employees. She still works with me on the same basis we negotiated during our walk on 55th Street, and her terms of employment still include frequent visits to the office by Debbie's dog, Yaffa.

This small story teaches a few larger lessons, which I suppose some people may find obvious.

First, it's amazing what can happen if you get out of your house or apartment, and away from your computer screen. The city is full of people and an endless stream of random interactions. You never know who you will meet or what luck you'll find. That's one of many reasons the Internet and social media won't replace central business districts and in-person interactions.

Second, it pays to be nice. I had no experience with Debbie's legal work, beyond the good things Richard and Jamie had said, but I remembered I enjoyed my conversations with Debbie at Latham. Even though she had no long-term plans there, she was friendly with everyone. She didn't need to be, but fifteen years later it landed her a job.

Third, don't necessarily limit yourself to full-time candidates and the obvious hiring process. You can do quite well with people who aren't on the usual track but have great experience and people skills and can work part time for the benefit of all concerned.

continued on p. 12

The Interview

continued from p.11

Fourth, by embracing technology, you can make it easier to attract people like Debbie and integrate them into your organization. Using the state-of-the-art technology I've adopted for my practice, Debbie and I together closed one of the largest New York City real estate sales of 2012, a 50.1% interest in the St. Johns Center at 340 West Street, while she visited her parents in Florida and I visited mine in California. (Though Debbie and I did most of the work, we also had some help from other members of my team who stayed in town.)

Fifth, Debbie and I made one mistake: we did a lousy job of staying in touch with each other in the years after she left Latham. We should have done better.

We got lucky. ■

Vancouver!

October 24-27, 2013

Mark your calendars! Please join us for an enlightening and lively series of sessions at the Fall Meeting of the College in Vancouver, British Columbia, Canada on October 24-27, 2013. Entitled "Emerging Trends from a Dynamic Market: The Times They Are a-Changing," the nine hours of programs, coupled with numerous committee meetings, will provide Fellows with the opportunity to stay up-to-date on a wide array of topics affecting the practice of law in real estate. Just as importantly, it will provide the opportunity for collegial interaction.

We start on Thursday afternoon with the latest chapter of "The Big Deal." This time we learn about Target Corporation's acquisition of a portfolio of 175+ stores in Canada and what was involved in pulling together a massive acquisition project. Friday sessions include an introduction to how the Dodd-Frank Act will affect commercial real estate, a review of evolving demographics and market conditions in the United States, and discussions on health care financing, enterprise risk management and insurance clauses that actually work.

On Saturday, we will hear about trends in the restructuring of real estate joint ventures, will explore the use of agricultural land prior to its development, and have our annual business meeting. Roundtables will include those that cover in greater depth the topics raised in certain plenary sessions. In addition, standalone roundtables will include such topics as where the practice of law is headed, co-lending agreements, ILSA, data center leasing and hot issues in purchase agreements.

Look in your inbox shortly for announcements about registration.

Larry Bensignor, Meeting Leader

ACREL Members and Lawyer of the Year in Real Estate Law

by Albert D. Quentel, Miami, FL

Best Lawyers in America began naming a Lawyer of the Year in Real Estate Law in some legal markets in 2009. These attorneys are recognized annually, so 2013 is the fifth year that the appellation has been given.

Best Lawyers issued its first edition, in hardback, in 1983. The 2nd edition appeared in 1987. A 3rd edition was for 1989-1990, and the book was published biennially through the 11th edition, then annually beginning with the 12th edition in 2006. The 19th edition, for 2013, came out in November, 2012. There is no charge for being listed, or being named Lawyer of the Year.

Currently there are 137 listed practice areas in the United States. Real Estate Law has been one of these since the inception. The website, www.bestlawyers.com, says that nominations are open to anyone, and the primary sources are clients, other lawyers, and marketing teams. Ballots are distributed to currently listed Real Estate Law attorneys, in the candidates' geographic areas, with one question: "If you were unable to take a case yourself, how likely would you be to refer it to this nominee?" Voting attorneys are asked to use a numbered scale: 5 – would definitely refer a case; 4 – very likely to refer; 3 – might refer; 2 – not likely to refer; 1 – definitely would not refer; and DK – don't know the candidate. It is possible to use 0.5, so a candidate could for example receive a 4.5. Ballots also allow space for comments about each candidate.

Selection of Lawyer of the Year is a straightforward process. In the communities for which the designation is given, the candidate with the highest average of votes cast is the Lawyer of the Year, except that a person is not eligible two years in a row.

ACREL members who have been named Lawyer of the Year in Real Estate Law, the location for which they are designated, and the year(s) are as follows:

Adams, Alfred G.	Winston-Salem, NC	2011	Chun, Deborah Macer	Honolulu, HI	2010
Andersen, Mark A.	Kansas City, KS	2013	Clement, Rod	Jackson, MS	2011
Arnold, Dennis B.	Los Angeles, CA	2010	Curry, Robert M.	Dayton, OH	2009, 2011
Aron, Jerry E.	West Palm Beach, FL	2009	Dawson, Stephen E.	Detroit, MI	2013
Baker, David G.	Columbus, OH	2009	Dean, Michael A.	Oakland, CA	2012
Barrett, Michael A.	Seattle, WA	2012	Deems, Nyal David	Grand Rapids, MI	2011
Bartine, William D.	Des Moines, IA	2011	Dennison, Karen D.	Reno, NV	2009
Beeson, Christopher J.	Boise, ID	2009, 2013	Devaney, Michael J.	Greensboro, NC	2010
Beimdiek, Donald U.	St. Louis, MO	2009	DiGiovanni, Peter M.	Kansas City, MO	2011
Biesterfeld, Craig S.	St. Louis, MO	2012	DiPrinzio, Eugene A.	Wilmington, DE	2010
Binkow, Maurice S,	Detroit, MI	2010	Dockery, Michael S.	Billings, MT	2011
Block, Bruce T.	Milwaukee, WI	2009	Dollinger, Martin E.	Woodbridge, NJ	2013
Blyth, John E.	Pittsford, NY	2012	Donohue, P. Daniel	Sioux Falls, SD	2011
Boles, H. Hampton	Birmingham, AL	2013	Dow, Melvin A.	Houston, TX	2010
Bray, Wm. Terry	Austin, TX	2009	Dowd, Martin F.	Newark, NJ	2010
Brittain, David R.	Tampa, FL	2011	Duffy, Pamela S.	San Francisco, CA	2010
Bryson, Susan J.	New Haven, CT	2012	Dunlop, Fred H.	Houston, TX	2013
Buchenroth, Stephen R.	Columbus, OH	2010	Eatman, Louis P.	Los Angeles, CA	2009
Buckley, Mert Frederick	Wichita, KS	2011	Edwards, Charles L.	Chicago, IL	2010
Buckley, Michael E.	Las Vegas, NV	2010	Ellison, Thomas A.	Salt Lake City, UT	2009
Burton, John P.	Santa Fe, NM	2011	Ellman, Howard N.	San Francisco, CA	2012
Calvin, Charles D.	Denver, CO	2013	Erwin, K. Gregory	Houston, TX	2012
Cameron, Jr., John G.	Grand Rapids, MI	2009	Fala, Herman C.	Philadelphia, PA	2011
Cannada, Don B.	Jackson, MS	2010	Ferrell, Charles S.	Minneapolis, MN	2009
Carpenter, Willis V.	Denver, CO	2010	Finley, Joseph Michael	Minneapolis, MN	2012
Carr, William E.	Kansas City, MO	2009	Fischer, Rebecca A.	Denver, CO	2009
Carter, Don G.	Portland, OR	2013	Fishman, David H.	Baltimore, MD	2010

continued on p. 14

ACREL Members and Lawyer of the Year...

continued from p.13

Fishman, Robert A.	Boston, MA	2009
Frantze, David W.	Kansas City, MO	2012
Fries, Joseph M.	Washington, DC	2009
Gaillard, W. Foster	Charleston, SC	2009
Geiger, Roy S.	Newport Beach, CA	2009
Gisvold, Dean P.	Portland, OR	2011
Goldberg, Catherine T.	Albuquerque, NM	2013
Goldberg, Richard R.	Philadelphia, PA	2010
Gutmacher, Norman W.	Cleveland, OH	2012
Hailey, Jay	Austin, TX	2011
Hansen, Charles A.	Oakland, CA	2010
Harvey, Calvin R.	Pittsburgh, PA	2013
Hastie, John D.	Oklahoma City, OK	2009
Hatch, Michael W.	Milwaukee, WI	2010
Heaven, Jr. Lewis A.	Kansas City, KS	2010
Henderson, III, Thomas N.	Tampa, FL	2012
Hill, Frank D.	Oklahoma City, OK	2010
Hoffmeyer, William F.	Harrisburg, PA	2013
Hurley, Patrick W.	Albuquerque, NM	2012
Ishikawa, Jesse S.	Madison, WI	2009
Janik, Stephen T.	Portland, OR	2010
Jobeun, Larry A.	Omaha, NE	2012
Jordan, James B.	Atlanta, GA	2010
Joseph, III, Alfred S.	Louisville, KY	2010
Jubinsky, John	Honolulu, HI	2009
Kamin, Joshua M.	Atlanta, GA	2013
Karrell, Allan L.	Billings, MT	2012
Katz, M. Marvin	Houston, TX	2011
Korb, Philip B.	Philadelphia, PA	2013
Krapf, Robert J.	Wilmington, DE	2009, 2011
Kubicek, David W.	Cedar Rapids, IA	2012
Levin, Edward J.	Baltimore, MD	2012
Liburd, Ann C.	Anchorage, AK	2013
Lisman, Carl H.	Burlington, VT	2013
Little, Nancy R.	Richmond, VA	2010
Maak, Charles L.	Salt Lake City, UT	2010
Manchester, Susan A.	Manchester, NH	2013
Manulik, Mark A.	Portland, OR	2012
Martin, Timothy W.	Louisville, KY	2011
Matejka, Michael D.	Omaha, NE	2013
Matis, Nina B.	Chicago, IL	2013
Mechanic, Jonathan L.	New York, NY	2011
Melvin, Jr., Charles E.	Greensboro, NC	2012
Menzie, Edward G.	Columbia, SC	2012
Merriam, Dwight Haines	Hartford, CT	2010
Meyer, Harry G.	Buffalo, NY	2009
Miller, Charles F.	Kansas City, MO	2010
Miller, L. Edward	Boise, ID	2011
Moran, Patrick George	Chicago, IL	2011
Morrow, James F.	Tucson, AZ	2013
O'Bryan, Rory	Indianapolis, IN	2012
Oestreicher, Charles R.	Portland, ME	2009
Oland, Mark	Hartford, CT	2012
Oliver, Jr., Samuel T.	Raleigh, NC	2009
Page, Brian J.	Grand Rapids, MI	2012
Page, Thomas R.	Portland, OR	2009
Pape, Arthur E. ("Art")	Chicago, IL	2012
Patterson, John N.	Santa Fe, NM	2013
Pollak, Mark	Baltimore, MD	2013
Price, Charles P. III	Albuquerque, NM	2011
Quentel, Albert D.	Miami, FL	2012
Richmond, Jr., Joseph W	Charlottesville, VA	2011
Rosner, Richard A.	Cleveland, OH	2009
Rotch, Peter B.	Manchester, NH	2010
Rottenberg, Alan W.	Boston, MA	2013
Schroeder, William W.	Burlington, VT	2009
Scott, Malcolm H.	Eugene, OR	2013
Senn, Mark A.	Denver, CO	2012
Sher, Leopold Z.	New Orleans, LA	2011
Simmons, Robert W.	Charlotte, NC	2010
Smith, Wendell A.	Woodbridge, NJ	2011
Sproul, Curtis C.	Sacramento, CA	2012
Steiner, Beat U.	Denver, CO	2011
Stephenson, Mason W.	Atlanta, GA	2009
Stroup, II, Robert L.	Fargo, ND	2012
Talley, Susan G.	New Orleans, LA	2009
Theobald, James W.	Richmond, VA	2013
Thompson, Robert A.	San Francisco, CA	2009
Tohill, Jim B.	Jackson, MS	2012
Trainor, Charles W.	Sacramento, CA	2011
Truitt, Raymond G.	Baltimore, MD	2011
Tucker, Stefan F.	Washington, DC	2011
Tyler, Paul R.	Des Moines, IA	2009
Vincenti, Michael B.	Louisville, KY	2009
Walsh, William A., Jr.	Richmond, VA	2012
Weiner, Sanford A.	Houston, TX	2009
Weiss, Zeff A.	Indianapolis, IN	2010, 2013
Welborn, Caryl B.	San Francisco, CA	2011
Weller, Philip D.	Dallas, TX	2010
Wheaton, John R.	Minneapolis, MN	2011
Wheeler, Jr., James G.	St. Johnsbury, VT	2012
Williamson, Benton D.	Columbia, SC	2011
Wolf, Austin K.	Bridgeport, CT	2009
Zinn, Richard L.	Kansas City, KS	2011
Zucker, Jeffrey P.	Las Vegas, NV	2009

continued on p. 15

ACREL Members and Lawyer of the Year...

continued from p.14

ACREL members have been named Lawyer of the Year in Real Estate Law 153 times. Over the five years, there have been 492 selections by Best Lawyers. The number who are ACREL members is therefore about 31%. But the average is misleading. In eight cities, every Lawyer of the Year has been in ACREL, in two cities 80% have been in ACREL, in two cities 75% have been in ACREL, and in some other cities, none have been in ACREL. Some examples follow, showing certain cities, the number of times an ACREL member has been selected as Lawyer of the Year in Real Estate Law, and the number of years that designation has been given:

City	ACREL	LOYRE	City	ACREL	LOYRE
Denver, CO	5	5	New Orleans, LA	2	5
Portland, OR	5	5	Oakland, CA	2	5
Baltimore, MD	4	4	Philadelphia, PA	3	3
Chicago, IL	4	4	Santa Fe, NM	2	3
Houston, TX	4	5	St. Louis, MO	2	5
San Francisco, CA	4	5	Tampa, FL	2	5
Albuquerque, NM	3	4	Woodbridge, NJ	2	2
Atlanta, GA	3	3	Charleston, SC	1	5
Boise, ID	3	3	Charlotte, NC	1	5
Jackson, MS	3	4	Charlottesville, VA	1	3
Louisville, KY	3	5	Miami, FL	1	4
Salt Lake City, UT	3	5	New Haven, CT	1	3
Boston, MA	2	5	New York, NY	1	4
Cleveland, OH	2	4	Pittsburgh, PA	1	4
Dayton, OH	2	5	Seattle, WA	1	5
Detroit, MI	2	5	Tucson, AZ	1	5
Greensboro, NC	2	5	West Palm Beach, FL	1	5
Hartford, CT	2	5	Dallas, TX	0	4
Las Vegas, NV	2	5	Orlando, FL	0	5
Los Angeles, CA	2	5	Phoenix, AZ	0	5

ACREL's charter is to gather together lawyers distinguished for their skill, experience and high standards of professional and ethical conduct in the practice of real estate law. Who are the 339 Lawyers of the Year in Real Estate Law who are not in ACREL? Are Lawyers of the Year exceptional practitioners? If so, have these individuals been nominated to membership? If not, should they be? ■

Editor's Note:
ACREL members have been named Lawyer of the Year in other specialties. Please let us know if this is true for you. Special note: this article corrected 6/15/2013 to correct an omission from Best's original list.