

Real Property

The newsletter of the Illinois State Bar Association's Section on Real Estate Law

The Real Estate P.O.A.

BY MICHAEL J. MASLANKA

Many real estate attorneys have their clients sign powers of attorney for property to allow the attorneys to sign various real estate transaction documents for them. If this occurs, the attorney must be aware of some crucial points.

1. If the attorney uses an Illinois statutory short form power of attorney for property, or any similar form, it must be assured that the

power of attorney for property that is being used does not “revoke” all prior powers of attorney for property. That type of language is common in forms. Use of that language could totally turn the client’s estate plan on its head. If the attorney is only acting in a limited capacity, for specific purposes, then

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The Escrow Dilemma: Handling Earnest Money and Escrow Holdbacks

BY BOB FLOSS II

A practice focused on real estate often means having to walk a tight rope. The obligation to serve our clients’ best interests can be at odds with our relationship with realtors, lenders, and title companies. This balancing act can result in practitioners being placed in uncomfortable positions. With the recent and sudden decline in real estate brokerages holding earnest money, it is not uncommon for realtors to ask an attorney to hold earnest money. In spite of ample warnings that attorneys should not

act as escrowee, many have relented.

However, another issue that overlaps, but does not garner nearly enough attention, is the escrow holdback. We often find ourselves trouble shooting problems at the closing table that will allow us to close, while also protecting our client. I am certain almost every reader has found themselves conducting a late Friday afternoon closing with a last minute snag. The client looks upon you to find a solution so that they

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the power of attorney for property should say so and not include any language, whatsoever, about revoking prior powers of attorney for property. Additionally, the limited power of attorney being used for the real estate transaction should clearly state a start date and an end date, especially if it has to be recorded.

2. You should read the case of *In re Estate of Jackson*, 2022 IL App (1st) 211132. The opinion states that an agent under a statutory or non-statutory power of attorney

for property, has a fiduciary duty to the principal, which starts when the power of attorney for property is signed by the principal, unless there is some springing event which delays the effective date. Additionally, whether or not the power of attorney for property is a statutory power of attorney for property, the agent must provide an adequate accounting to the principal for any and all actions taken by the agent. ■

The Escrow Dilemma: Handling Earnest Money and Escrow Holdbacks

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do not have to cancel the movers or run into a rate lock expiration. Perhaps you are conducting a morning sale that is needed to fund the client's afternoon purchase and the final walk through goes awry. An escrow holdback becomes the easy solution for completing the transaction, while pushing an issue like possession or repairs to a later date. However, in practice, the escrow holdback becomes the burden of an attorney to hold in their IOLTA account. Very rarely is the escrow disbursed without issue. Worse yet, the attorney who represents one of the parties has been forced into a role of escrowee for an issue inherently in dispute between the parties.

At a recent continuing legal education program provided by the ISBA Real Estate Law Section, a comment was made regarding an interesting decision published by the IARDC on attorneys acting as escrowees. While we did not have time to discuss in depth during the program, the decision is a sobering reminder of the danger of attorney acting as escrowee. *In re LaCoulton Walls*, Commission No. 2019PR00079, dealt with an attorney holding earnest money for the sale of his clients' real estate. The buyers sent

notification that they were cancelling the contract. The sellers' attorney deemed the buyers in breach and disbursed funds to his clients and himself without authorization from the buyers.

The IARDC brought a complaint against the attorney for failing to safeguard funds belonging to a client or third party when he was aware of a dispute in violation of Rule 1.15(a) of the Illinois Rules of Professional Conduct. The complaint further alleged a violation of Rule 1.7(a) for acting as attorney and escrowee for the same transaction that would materially limit his duties. Lastly, it alleged a violation of Rule 8.4(c) for dishonesty, fraud, deceit, or misrepresentation for converting the funds to his own use when he had received a letter notifying him of dispute over the funds. The Hearing Board concluded that the attorney had a conflict of interest for representing a client and as acting as the escrowee. The Hearing Board also concluded that the attorney disbursed the funds held in escrow without authority.

The attorney appealed under a theory that may cause some real estate practitioners to cringe. He argued the use of the word "may"

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in Paragraph 26: Direction to Escrowee of the 7.0 contract created an ambiguity and should be interpreted as providing an escrowee with the discretion to choose one of the two methods provided, or elect a third option not identified. Paragraph 26 of the contract states that:

DIRECTION TO ESCROWEE: In every instance where this Contract shall be deemed null and void or if this Contract may be terminated by either Party, the following shall be deemed incorporated: “and Earnest Money refunded upon the joint written direction by the Parties to Escrowee or upon an entry of an order by a court of competent jurisdiction.”

In the event either Party has declared the Contract null and void or the transaction has failed to close as provided for in this Contract and if the Escrowee has not received joint written direction by the Parties or such court order, the Escrowee may elect to proceed as follows:

a) Escrowee shall give written Notice to the Parties as provided for in this Contract at least fourteen (14) days prior to the date of intended disbursement of Earnest Money indicating the manner in which Escrowee intends to disburse in the absence of any written objection. If no written objection is received by the date indicated in the Notice then Escrowee shall distribute the Earnest Money as indicated in the written Notice to the Parties. **If any Party objects in writing** to the intended disbursement of Earnest Money then Earnest Money shall be held until receipt of joint written direction from all Parties or until receipt of an order of a court of competent jurisdiction.

b) Escrowee may file a Suit for Interpleader and deposit any funds held into the Court for distribution after resolution of the dispute between Seller and Buyer by the Court. Escrowee may retain from the funds deposited with the Court the amount necessary to reimburse Escrowee for court costs and reasonable attorney’s fees incurred due to the filing of the Interpleader. If the amount held in escrow is inadequate to reimburse Escrowee for the costs and attorney’s fees, Buyer and Seller shall jointly and severally indemnify Escrowee for additional costs and fees incurred in filing the Interpleader action.

The IARDC Hearing Board rejected the interpretation of “may” as creating an option for counsel to create an additional option. However, the IARDC Review Board took the opposite position and agreed.

The Review Board believed the attorney to be acting in good faith that the buyer was in default and believed his client was entitled to disbursement. Ultimately, the use of “may” in the contract was the determining factor. The Review Board decision states the lack of mandatory words such as “shall” or “must” allowed the attorney to reasonably believe he had discretion to choose a third option. In a slap to the face to the contract drafting committees, the Review Board went on to state that “[t]here is no question that the wording of the escrow agreement in each contract is ambiguous and confusing, given the interchangeable use of ‘may’ and ‘shall’ in various provisions.” In the opinion of the Review Board, the attorney could not be held liable for contract language that failed to state in “clear and unequivocal terms” how to handle the escrow. At this point, some readers may need step away and count to ten because it goes further.

In the opinion of the Review Board, the contract contains several anomalies that resulted in an “undeniable ambiguity of the provision’s meaning.” A footnote provides an explanation that the ambiguity results from sub-paragraphs a) and b) drafted as complete sentences rather than as clauses that should be separated by the word “or.” The Review Board found that this major departure from normal contract drafting leaves it open to interpretation if one must choose between the two sub-paragraphs. The Review Board concluded by stating they would have agreed the attorney could be held liable for acting as escrowee had it not been for the ambiguous and poorly drafted contract. Unfortunately, the Illinois Supreme Court denied the petition by the IARDC to review the decision.

In review: Real estate practitioners should not rely upon the decision of the Review Board. The IARDC has consistently ruled an attorney cannot act as an advocate for their client while also serving the role as escrowee in a dispute. An escrowee must act impartially without asserting the rights of either party that can result in a direct conflict

with an attorney’s obligation as legal counsel. This point is contentious for many real estate attorneys that insist they can act impartially when holding and disbursing earnest money the same way a real estate brokerage can hold and disburse earnest money. The issue for attorneys is the same issue that has resulted in brokerages declining to hold earnest money because of the issues that arise for the escrowee when the parties cannot reach an agreement. It is possible for an attorney to hold earnest money for a client without issue. However, if a transaction turns sour and the parties cannot agree upon disbursement of earnest money, the attorney has placed themselves in a precarious position.

I turn your attention back to the issue of the escrow holdback at closing. An argument can be made for an attorney holding earnest money in good faith, but can the same be said for funds held aside for an issue that is inherently in dispute? The holdback is typically created at closing because a party failed to perform as agreed. At the moment the escrow is created, while the parties may agree upon creation of escrow, they certainly do not agree upon the disbursement of escrow. In the majority of escrow holdbacks I have encountered, the dispute grows instead of being resolved. Every time we accept an escrow holdback to help a client close on their home, we are exposing ourselves to liability.

Practice Solution: Utilizing the title company as earnest money escrowee should become standard. Additionally, real estate attorneys should discuss an escrow holdback with their title company. Most title companies can hold the escrow holdback under written direction of the parties for a fee of \$300 to \$350 split between both parties (although astute counsel may want to negotiate which party is responsible for the payment of the escrow fee into the holdback agreement).

The Sole Order Escrow: The case can be made for increased use of the Sole Order Escrow (SOE). Typically seen in commercial transactions, the SOE allows for deposit of earnest money by the buyer and the request for the return of earnest money by the buyer. The SOE helps avoid the problem of finding the seller and obtaining the seller’s signature authorizing the release of funds when the

buyer has properly cancelled the contract during the attorney review period. This does require the escrowee to determine if the due diligence period is still open, but this should be easy enough to determine via the contract and extension requests. I typically see the Strict Joint Order (SJO) used for earnest money, when buyers' counsel should be requesting a SOE.

Resolving Escrow Dispute: Despite the opinion of the IARDC Review Board, the 7.0 contract contains a very clear roadmap on how to handle earnest money in dispute. However, holdbacks have the unfortunate distinction of often being held hostage. Attorneys involved with enough holdbacks undoubtedly have experienced a party refusing to authorize disbursement from a possession escrow or repair escrow due to an item discovered at the property by the buyer now in possession. The buyer may have a legitimate claim against the seller, but do they have the right to withhold disbursement for an unrelated escrow? Conversely, is it acceptable for counsel to advise a client to withhold disbursement of escrow as a way to easily recover damages and prevent the cost of litigation?

The title company as escrowee has the advantage of being removed from the parties. The title company as escrowee must follow the instructions of the holdback agreement and cannot exceed the authority provided to the escrowee in the holdback agreement. In theory, a well-crafted escrow agreement should remove liability from the title company as escrowee that would otherwise burden either attorney. The title company as escrowee is limited to the instructions in the escrow agreement and will only operate on the written instructions.

Drafting a holdback agreement: The form escrow agreement provided by the title company generally should have the basic information covered. It should list the amount held, the transaction, that the funds will not be invested or commingled, limit the liability of the escrowee, and will specify that the escrowee will comply with a court order. In some cases, the document may provide interpleader authority of the escrowee to deposit funds with the court if the parties cannot reach an agreement. In

others, the escrowee is required to continue to collect funds from the holdback towards maintenance of the account until both sides reach an agreement.

The escrowee is bound by its role to follow the instructions of the parties, so should not a prudent attorney want an escrowee agreement that provides detailed instructions for the funds? I find the problem many practitioners encounter with an escrow is the ability for it to be manipulated. If a title company as escrowee is given instructions to disburse upon a given event and that event has been completed, is the title company then free to make a disbursement without further authorization? In contrast, if the escrow agreement allows for disbursement for nonperformance, is the escrowee then free to disburse upon failure of one of the parties to complete its task upon a given date?

Any practitioner that attempts to draft their own holdback agreement for the title company should be clear on the obligation of performance and provide damages for nonperformance. As a general rule and public policy, courts do not enforce liquidated damages that operate as a penalty for nonperformance. See *GK Dev., Inc. v. Iowa Malls Fin. Corp.*, 2013 IL App (1st) 112802 for a deep dive in interpreting an escrow holdback that contains a liquidated damages provision for nonperformance. The holdback should ascertain the actual cost should the performing party fail to perform and craft damages into the agreement that are reasonable at the time of drafting. A windfall disbursement from escrow for nonperformance, if unreasonable, unrelated to the actual damages, and meant to punish, may be unenforceable.

In summary, we as practitioners can be guilty of being set in our ways. We try to find solutions to best serve our clients. In the case of earnest money and escrow holdbacks, it would be advisable for all attorneys to cease accepting earnest money, but it should also be required that all attorneys cease accepting escrow holdbacks. The recent decision from the IARDC Review Board, in my opinion, was made in error and should serve as a reminder that attorneys are jeopardizing their law license by continuing to accept

escrow funds. The services of the title company as escrowee should be utilized through an SJO or SOE and again for any escrow holdback. ■

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A New Statutory Special Warranty Deed—and More

BY RICHARD F. BALES

Introduction

Special warranty deeds are different from general warranty deeds. With a special warranty deed, the grantor of the deed will warrant the title *only for that period of time when the grantor owned the land*. Compare a special warranty deed to a general warranty deed (765 ILCS 5/9) wherein the grantor warrants the title “all the way back.”

Public Act 102-937 amended 765 ILCS 5/8, which is the statute on special warranty deeds. Public Act 102-937 was effective January 1, 2023.

The changes to 765 ILCS 5/8 are significant. The statute now provides for two types of special warranty deeds.

The 765 ILCS 5/8(a) Special Warranty Deed

765 ILCS 5/8(a) states that a deed that uses the verbs, “grant, bargain, and sell” is a special warranty deed that automatically contains the following covenants, or warranties: a covenant that the grantor was the owner of the land; a covenant that the land is free from the grantor’s encumbrances; and a covenant of quiet enjoyment.¹

The 765 ILCS 5/8(b) Special Warranty Deed

765 ILCS 5/8(b) is a bit more complex. The words of conveyance of this second statutory special warranty deed are four verbs, not three. These words are “grants, bargains, sells, and conveys.”

In addition, section 8(b) indicates that the deed should be “substantially” in a prescribed form. The statutory language is:

The grantor (here insert the name or names and address of the grantor), for and in consideration of (here insert consideration), hereby grants, bargains, sells, and conveys to (the grantee) all of the following described land and the improvements thereon situated in

the County of ____ State of Illinois, legally described and known as follows: (insert legal description, common address, and permanent index number) together with all and singular the hereditaments and appurtenances thereto; to have and to hold the same, with the appurtenances thereto, forever, subject to the following matters: (insert known encumbrances).

Furthermore, the statute states that the deed should be dated, contain the signature(s) of the grantor(s), and have the typed or printed names of the grantor(s) below the signature(s).

A Section 8(b) special warranty deed automatically contains these covenants:

A covenant that the grantor was the owner of the land; a covenant that the land is free from the grantor’s encumbrances; and a covenant that “the grantor will warrant and defend the premises against the lawful claims and demands of all persons claiming through the grantor but none other.”

But Wait, There’s More: *Chicago Title Insurance Co. v. Aurora Loan Services, LLC* Special Warranty Deed

Perhaps a real estate attorney has an unusual transaction, and the attorney believes that the covenants in these two statutory deeds are not sufficient for the needs of the client. Perhaps the attorney wants a deed that includes *four* covenants: a covenant that the grantor was the owner of the land; a covenant that the land is free from the grantor’s encumbrances; a covenant of quiet enjoyment; and a covenant of defense. In that case, this attorney can take a page from the playbook of *Chicago Title Ins. Co. v. Aurora Loan Services, LLC*, 2013 IL App (1st) 123510.

In *Chicago Title v. Aurora Loan Services*, the special warranty deed at issue was not

a statutory deed. This deed was recorded in Cook County on March 11, 2010, as document 1007055039, and the words of conveyance were “remise, release, alien, and convey.” These four words are not the verbs of a statutory special warranty deed. Instead, it appears that this deed was a special warranty deed, not because of any statutory words of conveyance, as described in 765 ILCS 5/8(a), and not because of any statutory verbiage, as described in 765 ILCS 5/8(b), but, rather, because of the added covenants printed on the face of this deed:²

And the said party of the first part, for itself and its successors, does covenant, promise and agree, to and with said party of the second part, their heirs and assigns, that it has not done or suffered to be done, anything whereby the said premises hereby granted are, or may be, in any manner encumbered or charged, except as herein recited, and that the said premises, against all persons lawfully claiming, or to claim the same, by, through or under it, it will warrant and forever defend.

Conclusion

The real estate attorney now has three options when it comes to preparing—and accepting—special warranty deeds—two statutory deeds and a customized deed. Note that the Multi-Board Residential Real Estate Contract 7.0 does not require that the seller provide a general warranty deed. Instead, section 16 of this contract states merely that “Seller shall convey or cause to be conveyed to Buyer or Buyer’s designated grantee good and merchantable title to the Real Estate by recordable Warranty Deed.” Thus, it appears that all three of these special warranty deeds conform to the 7.0 Multi-Board Contract.³ ■

Proper Title, LLC, Naperville, IL

1. These covenants are called “warranties” in paragraph 2 of the Conditions of the 2006 ALTA owner’s title insurance policy.
2. A *Chicago Title v. Aurora Loan Services* form of customized special warranty deed will include words of conveyance.

What should those words be? “Remise, release, alien, and convey,” which are the verbs of the deed that is the subject of this appellate court decision, seem awkward and arcane. “Convey and specially warrant” might be appropriate, but the purist might argue that these words are either unnecessary or redundant. This type of special warranty deed is a special warranty deed, not because of particular words of conveyance, like the 765 ILCS 5/8(a) special warranty deed, but, rather, because of the unique covenants added to the face of the deed. This is evident in the *Chicago Title v. Aurora Loan*

Services decision, in which the court stated that “we find the special warranty made by Aurora defined the scope of its liability.” The purist might agree that “conveys and transfers” are acceptable words of conveyance for this type of special warranty deed.

3. For more information on special warranty deeds, see Philip J. Vacco’s article, “A Promise of Clear Title,” published in the March 2021 issue of the *Illinois Bar Journal*.

Local Governance of Rental Communities in Cook and Collar Counties Via RTLOs That Identify Rights and Protections of Tenants vs. Landlords

BY SHARON L. EISEMAN

Those readers who represent landlords or tenants in Chicago and/or the suburban Cook County area are no doubt familiar with those ordinances of the city and suburban Cook County that identify the rights and responsibilities of both populations in the realm of rental housing. Still, it may help to have an overview of those diverse yet interconnected rules, so I urge you to read on. Moreover, before any lawyer agrees to represent one or the other party in any dispute over a matter or matters arising from the tenancy of a person in a rental unit, it is critical to know the regulations currently in effect that apply to both parties in such a dispute, given that the Cook County ordinance (CC ordinance) became law on June 1, 2021—in the midst of the pandemic. In addition, since its enactment in the late 1980’s, the Chicago RTLO has undergone numerous updates so it is important to make sure that you have the most recent version ‘in hand’ when you need to review the regulations.

CC Ordinance

First, it is worth noting that the recently passed CC ordinance is posted not only on the Cook County website, but with the Cook County Commission on Human

Rights—notably under the heading: “Cook County Renters Rights and Landlord Protections”—where landlords, tenants, lawyers, and the general public will find the ordinance in full, as well as a brief summary of the ordinance; the parties that are covered; the respective rights and responsibilities for each side in rental transactions; and what actions are permissible for each side if the other allegedly fails to comply with the CC ordinance. That CC ordinance is also available for printing in multiple languages besides English, and a one-pager in Spanish that can be downloaded. Additionally, a video explaining, in simple terms, the rights/duties of renters vs. landlords is accessible, as is a section identified as “Know Your Rights Renter Resources.”

Specific sections are also highlighted, including, but not limited to:

- Sec. 42-804: WHAT CAN BE INCLUDED IN A LEASE?
- Sec. 42-806: WHAT CAN THE TENANT DO IF THE LANDLORD DOES NOT MAINTAIN THE UNIT?
- Sec. 42-806(D): WHAT CAN THE TENANT DO IF THE LANDLORD FAILS TO PROVIDE ESSENTIAL SERVICES (HEAT, RUNNING OR

HOT WATER, ELECTRICITY, etc.); and, of great interest to many,

- Sec. 42-808(B): CAN THE LANDLORD ACCESS A UNIT?

Regarding the CC ordinance, one might find it curious, or perhaps even a bit distressing, to see a number of quotes online from individuals “Speaking Up for Renter Rights,” including the Cook County commissioner who was the chief sponsor of the ordinance, a commissioner who was a co-sponsor of the CC ordinance, and several “Renter Advocates” from different advocacy organizations, along with more than 60 “Endorsers” of the CC ordinance, while no quotes from landlord supporters/support organizations appear on this official government site. This lopsided coverage—from my perspective of having no clients, or personal sympathies, on/for either side of the rental housing divide may suggest that the CC ordinance is weighted in favor of renters and against landlords. Even if so, this issue of potential imbalance might be fodder for discussion another day.

BACK TO THE LAW: The CC ordinance applies solely to suburban entities, *excepting Chicago, Evanston, and Mt. Prospect*, all of which have their own ordinances governing their local rental communities. Thus, for

those particular communities, one must rely upon their local ordinances regarding the rights and responsibilities for each side of the equation.

If you read through the CC ordinance, it may seem that its primary focus is to prohibit or diminish the number of lockouts by landlords. The taking of such an action by landlords understandably disrupts one of the most basic forms of a person's security, which being his, her, or their access to a private living space. To protect that right, landlords are prohibited from locking out a tenant without a court order, and CANNOT incorporate the following into any lease:

- A tenant's waiver of notice.
- A restriction of a tenant's right to a jury trial.

Moreover, the rights of a tenant under the CC ordinance focus on the most basic:

- A habitable unit.
- Access to essential services such as running water, including hot water, heat, gas, electricity, and appropriate plumbing.

It is also important to note what types of rental units are and are NOT covered by the CC ordinance. Those covered are a longer list and include subsidized units and mobile home units, but the list of exempted units includes mom and pop units, owner-occupied units with six units or less, and, understandably, spaces in school dorms, shelters, employee quarters, non-residential units, and owner-occupied co-ops.

Chicago RTLO

As for the Chicago RTLO, it was enacted in 1986, although various amendments have been passed by the city council over the years. The current version of the ordinance is enshrined in the city's Municipal Code, specifically in Chapters 5-12 of Title 5. From the outset, the city's Department of Housing has had oversight of the ordinance's purpose: to set forth the "rights and responsibilities of landlords and tenants," and the implementation of that broad purpose. Such oversight also includes the department's role as the recipient and processor of complaints brought to the department from both landlords and tenants.

Appropriately, the Chicago RTLO

provides for remedies for both sides in the leasing equation, and addresses certain remedies for resolving key issues in this rental relationship in a separate section that is connected to the Chicago RTLO and is part of the summary. Of additional note, the summary is prefaced by a page labeled: "**Chicago Rents Right: Good Tenants, Good Landlords, Great Neighborhoods!**" Clearly, the city has taken this opportunity to advertise what it deems as the city's appeal to renters, and also to those who decide to take on the role of a landlord providing rental units in a strong and desirable community.

It is no surprise that a predominant dictate in the list of rights and responsibilities is the requirement that any landlord provide a summary copy of the Chicago RTLO to prospective tenants and also attach said summary to each written lease agreement and lease renewal, as well as providing it to tenants with whom the landlord has an oral lease agreement.

In chapter 5-12 of the Chicago RTLO, many rational rights and remedies for violations by one or the other party are provided with clarity. Some of the more salient sections follow and seem to reflect a balanced perspective, acknowledging the rights and remedies for both parties in the particular circumstances.

- 5-12-060: Remedies for improper denial of landlord's access—wherein the landlord may seek injunctive relief to compel access or terminate the lease agreement, with the right to recover provable damages.
- 5-12-160: Prohibition on interruption of tenant occupancy by landlord -which includes a landlord making repeated (even lawful on their own) demands for entry which turn into harassment, in which situation, the tenant may seek injunctive relief or terminate the lease agreement and seek damages relevant to the claimed harassment. In this area, it is deemed harassment if the landlord's motivation for such demands is related to the tenant's complaints of code violations on the premises to a government agency, elected representative,

or public official, or if the tenant sought assistance from a community organization or news media to remedy a code violation or illegal landlord practice, or joins a tenants' union. For either of these first two sections, if the aggrieved party prevails, the court has authority to award attorney fees to that party.

- 5-12-095: Tenants' notification of foreclosure action—which mandates that the landlord must disclose to the tenant any notice of a foreclosure action against the property owner or the landlord within seven days of service of the complaint for foreclosure.

Rent Control Are There Any Restrictions on One of the Most Important Concerns in the Rental Community?

It should be noted that, despite the city's strong support of renters' rights, there is nothing in the Chicago RTLO restricting landlords on what they can charge prospective tenants for their rental units, or imposing limits on increases in rental amounts they can impose on current tenants. The same issue applies to landlords and tenants in all the other Cook County jurisdictions. The absence of such references is due in large part to the Illinois law which does address this issue. In 1997, the state passed the Rent Control Preemption Act (50 ILCS 825/5 and 825/10) that not only prohibits all units of local government from enacting, maintaining, or enforcing an ordinance or other restriction that controls the amount of rent charged for leasing "private residential or commercial property," but also makes it clear in a separate section that the preemption applies to home rule units of government. Accordingly, any home rule unit such as Chicago or any other municipality, as well as Cook County itself, cannot exercise its otherwise special and rather broad authority to override the prohibition in the Rent Control Preemption Act.

It is worth noting here that on January 10, 2023, Illinois House Rep. Will Guzzardi pre-filed HB1118, which seeks to Repeal the

Rent Control Preemption Act. However, on January 12, and despite it having a few co-sponsors, the bill was referred to the Rules Committee, which often means it is dying if not already dead, or simply unlikely to be considered by the Illinois House. To date, no further action has occurred on the bill.

Finally, I will conclude this lengthy treatise with the report that, as recently as July of 2020, the City of Chicago enacted

new legislation focused on tenants and identified as the Fair Notice Ordinance which appears under the label, in large and bold caps, **TENANTS-KNOW YOUR RIGHTS**. I have not researched the potential story behind this enactment, but given its focus on the situation where the landlord moves to terminate the tenant's lease, serves an eviction notice, or raises the rent, it may be related to a growth in landlord-tenant

issues provoked by the pandemic and its unfortunate effects seen as early as 2020, including loss of employment income for many renters, in turn leading to inability to pay rent. And the guessing, supported in part by data, could continue. Instead, I conclude here and invite you, the reader, to form your own assumptions. ■

This One Is Not a 'Taking' Says the Seventh Circuit

BY MICHAEL J. ROONEY

Last month's section newsletter included an article concerning proposed legislation that would result in state government in Illinois taking private property rights from its citizens without just compensation.¹ This article will review a recent case where the Seventh Circuit Court of Appeals affirmed a district court dismissal of a claim that the government (Village of Channahon) had "taken" plaintiffs' property rights when the village granted building permits for a residential development in a flood plain.² Though both cases involved rivers, the facts of the cases differed dramatically and this article suggests the seventh circuit made the correct decision and plainly set forth the constitutional limitations on the government, not on private citizens.

Plaintiffs alleged the village issued building permits for seven homes near the DuPage River, that all seven homes experienced flooded basements during high water events, and that the village violated the constitution either by issuing the permits without ensuring that the basements would remain dry or by failing to construct dikes to keep the water away. What the plaintiffs did **not** allege is that the village required them to build their homes where they were built or to dig basements to the depths that plaintiffs did.

The seventh circuit opinion notes that homeowners are responsible for their own

decisions. The constitution establishes the right to be free from governmental interference but does not compel the government to intervene to assist persons in distress. The court even agreed to assume, as plaintiffs alleged, that the village violated its own ordinance and a federal regulation by issuing building permits without requiring that the houses be built a few feet higher above the DuPage River. Nevertheless, the court held that the constitution does not entitle private parties to accurate enforcement of local, state, or federal law.

Although plaintiffs may have had tort claims against the developers or prior owners from whom they purchased their properties, such claims did not create a constitutional claim against the government. Plaintiffs also included a claim under the "takings" clause and cited cases in their favor. However, the court rejected that argument because the cases cited all involved situations where the government caused or contributed to the flooding. The lack of "government induced" flooding here caused the court to find there was no compensable government taking of private property rights.

As a confirmed subscriber to the theory: "that government is best which governs least," I believe the case was correctly decided. By now, the reader who practices real estate transactional law and reads new cases and legislation with a view towards

deciphering whether the new opinion or statute helps or hurts the lawyer and the client, should be wondering two things. First, how did this case even arise? Were all these plaintiffs able to pay cash for homes and none of them needed a "federally-related mortgage loan"?³ Or did they all borrow money from private lenders not covered by RESPA? Second, were they not represented by counsel or were their counsel all negligent?

We must ask what the hypothetically reasonable and competent counsel should do in representing such purchasers. Scary question, to say the least! When you represent a buyer, do you know the location of the subject property relative to risky locations like rivers or abandoned gas stations? Do you inquire of your clients whether any real estate agent raised any concerns to them? Let's face it, developers and builders are not likely to point out the risk of building too close to a river, because doing so could certainly torpedo the transaction! But, a 'buyers' agent' may be more likely to consider the risk of being too close to the river.

Forget the river and potential attendant flooding. What about other physical characteristics of a property that are warning signs to those of us who work in this area but are not even apparent to inexperienced home buyers? What about defects that are

either disclosed to the buyers by sellers or are discovered by home inspectors? Do you know (or care) what they are and how they are handled? You should.

Three years ago, a case was decided that should have frightened all real property practitioners and changed the nature of the practice.⁴ Articles were written, seminars were presented, engagement letters were rewritten, and lawyers confronted some thorny problems. The facts of the case involved water intrusion in a condo unit and a malpractice suit by the buyer. Although the buyer's appellate counsel made clearly erroneous statements of law and fact, the lawyer clearly missed the mark of competent counsel in not advising the client about how to handle the problem. The lawyer was accused of having a duty to discover the defect, but there is no such duty. The home inspector discovered the defect. The lawyer failed in explaining to the client the various options available to deal with the defect.

Does counsel for a buyer of real property have a duty to discover how close to a river the property is? Is it malpractice for the lawyer not to raise the issue of flooding? As we all know from law school, the answer is, it all depends on the facts. If you represent a buyer and a commitment for title insurance says the property is in a flood plain, I'd suggest a lawyer is negligent if the lawyer does not call that fact to the attention of the client and explain the client's options. Let's face it: an institutional lender will require flood insurance for its benefit. What about the client?

What does your engagement letter say about the physical condition of the premises? What do you tell the client you will or will not do with an inspection report? Do you tell the client to read such a report carefully and present you with any questions? Do you completely ignore the matter? How do we know?⁵ Do you have a copy of your engagement letter in your file? Is it signed by the client, acknowledging receipt of it?

At the risk of seeming to impose further duties on counsel for buyers, are you in the habit of at least plugging the property address into some search engine to see where the property is? All our phones and computers can tell us where the property

is within seconds. If you do not do it, do you at least advise the client to do it to be aware of the true lay of the land? Remember, inexperienced buyers are likely more worried about the color of the carpet and walls and general floor-plan and less concerned with legal or practical risks. That's why they retained your services: to give them advice about such matters. But to give the correct advice, you need to know certain facts in order to assess the risks. If you are not going to perform certain tasks, tell your clients that in the engagement letter.

Wow! I'll bet you didn't see that coming, did you? Let's review. If a municipality issues building permits in a flood zone, in violation of its own ordinances and federal regulations, and your client builds there and the house floods, there is no constitutional cause of action against the government unless it has somehow done something that compels the conclusion that the flooding was "government induced." It's not a "taking." No compensation is required from the government. Please review your office practices to make sure that there is no "taking" of damages from you for malpractice!■

1. ISBA Real Estate Law Section Newsletter, Vol. 68, No. 7, "It's Called a Taking: It Requires Just Compensation."

2. *Billie v. Vill. of Channahon*, 2023 WL 369418 (7th Cir. 2023).

3. To use RESPA terminology, requiring a lender to require the borrower to pay for flood insurance.

4. *Crawford v. Hayen*, 2020 IL App (1st) 200076.

5. In other words, what can you prove to the court when you defend the malpractice suit?

Practitioner Reminder: Publication of the Federal Reserve Board's Final Rule on LIBOR Benchmark Replacements

BY NICKY SONNTAG

The London Interbank Offered Rate (LIBOR) is being discontinued. LIBOR was used in consumer and business loans, bonds, securitizations, and nonfinancial corporate contracts as a benchmark interest rate in financial transactions. However, the volume of transactions using LIBOR declined, and LIBOR became susceptible to manipulation. The Federal Reserve Board explored alternatives to LIBOR by creating the Alternative Reference Rates Committee (ARRC). The ARRC selected the Secured Overnight Financing Rate (SOFR) as its preferred reference rate for financial contracts instead of LIBOR.

Publication of the USD LIBOR benchmarks stopped after December 31, 2021, for the one-week and two-month USD LIBOR settings, and will cease on the first London banking day after June 30, 2023 (2023 Deadline) for the often used overnight, one-month, three-month, six-month, and 12-month USD LIBOR settings (1-12 month settings).

The Federal Reserve Board adopted and published on Dec. 16, 2022 (effective February 27, 2023) a final rule implementing the Adjustable Interest Rate (LIBOR) Act (12 U.S.C. § 5801 et seq.). The final rule identifies benchmark replacement rates based on SOFR for contracts governed by US law that reference the 1-12 month settings and those contracts that lack provisions for the use of a replacement benchmark rate for LIBOR following the 2023 Deadline.

For the final rule that includes a detailed history of the issues with LIBOR and the SOFR replacement, see <https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20221216a1.pdf>.

For information from Fannie Mae to servicers regarding the benchmark

replacement rates for LIBOR, see <https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2023/01/Fannie-Mae-Svc-Notice-LIBOR-Replacement-01-25-23-003.pdf>.

For information from Freddie Mac to servicers regarding the benchmark replacement rates for LIBOR, see https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2023/01/Freddie-Mac-Bulletin_2023-2-1.pdf. ■