Dear Friend of Bob Bruss:

The world is divided into creditors and debtors. This month they have found more to argue about than usual. The Holbert case clarifies what is or is not a finance charge in TILA and HOEPA cases. In the Fidelity National Title case, one court decided that when a debtor deeds a homesteaded house to a co-owner, there is no fraudulent conveyance if the debt is less than the homestead exemption. The other real property of a construction loan guarantor is subject to a writ of attachment in the United Central Bank case. The Kelly case awards attorneys fees to a landowner in a trespass case because the owner intended to raise horses on the property in the future. But in the Gorman case, an attorney cannot recover fees for the time he spends on his own case. Finally, the Paragon Real Estate Group of San Francisco case held that the selling broker has a right to file an indemnity cross-complaint against the listing broker.

Happy Reading,
Harold

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Borrower Loses TILA and HOEPA Case Against Lender

Carolyn Holbert ("Borrower") was an elderly widow living in a home in Citrus Heights ("Property"). Commencing in 2003, the Borrower began refinancing her property every year to take out cash from the property. In 2005, the Borrower was refinancing her home for the fourth time. California Real Estate Investments & Loans ("Mortgage Broker") was arranging a loan for the Borrower with Fremont Investment & Loan ("Lender"). As part of the refinancing, the Borrower was required to pay off a personal loan from Wells Fargo Bank ("Bank Loan") in the amount of $4,299.00 and a prepayment penalty on the existing loan ("Prepayment Penalty") in the amount of $4,528.80. In June of 2006, when the Borrower was unable to sell her home, she sued the Lender and Mortgage Broker for predatory lending. The Borrower obtained a default judgment against the Mortgage Broker. Regarding the Lender, the Borrower contended that the payoff of the Bank Loan and the payment of the Prepayment Penalty were "finance charges" which were not properly disclosed under the Truth in Lending Act ("TILA") and the Home Ownership and Equity Protection Act of 1994 ("HOEPA"). The Lender moved for summary judgment on the Borrower's complaint and the trial judge granted a summary judgment in favor of the Lender.

THE DECISION: The Court of Appeal affirmed the judgment against the Borrower, holding that: 1) the Bank Loan was not secured by the property and was not a finance charge relating to the Lender's mortgage; and 2) the Prepayment Penalty on the existing loan was not a finance charge related to the Lender's mortgage. Accordingly, the Lender did not violate the disclosure obligations of TILA and HOEPA.

WHY THIS DECISION IS IMPORTANT: The subprime mortgage crisis has spawned numerous lawsuits against lenders claiming violations of TILA and HOEPA. This case brings some clarity on the definition of finance charges for the purpose of disclosures pursuant to TILA and HOEPA. Hopefully, this case will result in the settlement of a significant number of cases.

COMMENT: I have been an expert witness in several TILA and HOEPA cases. While many lawyers claim that borrowers were the victims of predatory lending, there are many cases where borrowers who couldn't afford to stay in their homes were able to refinance their homes and live in them for several years due to lax lending standards of the subprime lenders. And many borrowers will not have to pay back the money which they borrowed. Who are the real victims?


Debtor's Deed to Co-owner of Homesteaded House Not a Fraudulent Conveyance

In 1996, a judgment was entered against Gordon Schroeder ("Debtor"). Years later, the Debtor and Toni Richardson ("Co-owner") purchased a home on North Brunswick in Fresno ("Home") and took title as joint tenants. Fidelity National Title ("Creditor") became the owner of the judgment and began collection efforts. On September 4, 2007, the Debtor recorded a grant deed conveying the Home to the Co-owner. On October 10, 2007, Fidelity recorded an abstract of the judgment in Fresno County. When the Creditor found out about the grant deed, it filed a complaint for, amongst other cause of action, fraudulent conveyance and resulting trust. At trial, the judge held that there had been no fraudulent conveyance of the Home because the Debtor's equity in the Home was less than his automatic homestead exemption of $50,000. The judge also found that no resulting trust could be imposed on one-half of the Home.

THE DECISION: The Court of Appeal affirmed the trial judge's decision that there was no fraudulent conveyance because there was no injury to the Creditor. The Court of Appeal rejected the Creditor's argument that the conveyance should be set aside so that the abstract of judgment would attach to the Home and the Creditor could wait for the Home to appreciate in value enough for the Creditor to recover some of its debt. The Court of Appeal reasoned that a deed of real property should not be set aside as a fraudulent conveyance based on pure speculation that there will be future appreciation of the real property. Regarding the resulting trust cause of action, the Court of Appeal remanded the case to make a determination as to whether or not the Debtor intended to make a gift of his equity to the Co-owner. The Court of Appeal pointed out that if a gift was intended, then the resulting trust cause of action would fail.
WHY THIS DECISION IS IMPORTANT: This decision disagrees with a 1992 case (Reddy v. Gonzalez, 8 Cal. App.4th 118) which held that a transfer of a home subject to an automatic homestead exemption was a fraudulent conveyance. Now we have a split of authorities on this critical issue. I call this result stare indecis. If a debtor is being sued by a creditor and wants to convey a home with equity less than the homestead exemption to his or her children, a lawyer cannot be certain whether or not the court will find a fraudulent conveyance.

COMMENT: I favor the decision in the Fidelity case. If a debtor is being sued by a creditor for an amount less than the homestead exemption and the equity in the home is less than the homestead exemption, then I am in favor of allowing the debtor to gift deed the home to his or her kids. I am sure that the kids will take better care of the home once they have a present equity in the home than a creditor who is merely hoping that the home will appreciate in the future so that someday the creditor's lien will have value. The current foreclosure crisis has shown that lenders who have liens against real property which exceed the property's value have little incentive to properly maintain the property.

Fidelity National Title Ins. v. Schroeder (2009) 179 Cal. App.4th 834

THE DECISION: The Court of Appeal reversed the trial judge and ordered the judge to conduct a new hearing without regard to C.C.P. 483.010. The Court of Appeal pointed out that C.C.P. 483.010's bar did not apply to the Bank's application for a writ of attachment because the claim against the Guarantor was based upon unsecured guaranties. That is, the guaranties were not secured by real property. The guaranties were separate and independent obligations from the obligations of the construction loan.

WHY THIS DECISION IS IMPORTANT: The trial judge plainly erred in his decision. A published decision pointing out this obvious error in legal logic will prevent another trial judge from making the same mistake.

COMMENT: How long will real estate owners ignore the wisdom and good advice which has been available for more than 2,000 years? Proverbs 11:15 advises that one should avoid being a guarantor. Of course, the current mortgage crisis was the result of borrowers ignoring the long standing advice that when buying a home, you should obtain a 30 year fixed rate mortgage which you can afford. Real estate investors who ignore the basic rules will be punished by the real estate market. Please act accordingly.


Writ of Attachment May Issue Against Real Property of Construction Loan Guarantor

United Central Bank ("Bank") made three construction loan secured by real property upon the condition that the borrower obtain a third party guaranty of the borrower's loans. Louisa Chang ("Guarantor") agreed to guarantee the three construction loans. Significantly, the Guarantor waived the right to require the Bank to first foreclose upon the real property security before suing on the guaranties in the event that the borrower defaulted. When the borrower defaulted, the Bank sued the Guarantor for breach of the guaranty agreements. The Bank also filed an application for a writ of attachment against the Guarantor's own real properties. The trial judge denied the writ of attachment application, reasoning that C.C.P. 483.010 barred the issuance of a writ of attachment. C.C.P. 483.010 provides, in effect, that an attachment may not issue where a claim is secured by real property.

Intent to Raise Horses Supports Award of Attorneys Fees in Trespass Action

Martin Kelly ("Landowner") purchased a 34-acre ranch located in Green Valley ("Ranch"). The Landowner lived at the Ranch with his family. The Ranch consisted of three houses, a garage, tack buildings, stud barns, hay barns and other buildings. The Ranch had a stream and approximately two hundred oak trees. In 1995, the Landowner retired when his son joined the army. The Landowner moved off the Ranch and rented out the houses. In June 2002, CB&I Constructors ("Contractor") was building water tanks approximately 15 miles from the Ranch. The Contractor's equipment sparked a fire that burned 20,000 acres, including the Ranch. More than one hundred oak trees were damaged. After the fire, heavy rains resulted in mudslides which gouged out a large gully on the Ranch.

The Landowner's experts estimated that to restore the Ranch would require that the barn be rebuilt, an erosion system be built, the stream be restored and that silt be
removed from the pastures; the estimated cost to restore was approximately $2.8 million. Moreover, the value of the damaged oak trees was estimated to be approximately $544,000.

The jury awarded the Landowner $2,629,810 to restore the Ranch, $375,000 for tree damage, $99,000 in lost rent and $543,000 for discomfort, annoyance and inconvenience. After the jury trial, the judge doubled the tree damage award pursuant to Civil Code Section 3346 and awarded the Landowner attorneys fees of $756,900 pursuant to Code of Civil Procedure Section 1021.9 ("1021.9").

THE DECISION: The Court of Appeal affirmed, in part, and reversed, in part, the judgment. The Court of Appeal held that the Landowner could not recover the $543,000 for discomfort, annoyance and inconvenience because he was not in immediate personal possession of the Ranch at the time of the fire; that is, he was not the occupant of the Ranch. The Court of Appeal affirmed the other damage awards. Specifically, the Court of Appeal affirmed the award of attorneys fees pursuant to 1021.9, which provides in relevant part as follows: "In any action to recover damages to...real property resulting from trespassing on lands...intended or used for the raising of livestock, the prevailing plaintiff shall be entitled to reasonable attorney's fees..." The Contractor's attorney had argued that at the time of the fire, the Ranch was not being used by the tenants to raise livestock. The Court of Appeal concluded, however, that the trial judge could rely on the Landowner's testimony that he had raised horses on the Ranch in the past and that before the fire he had intended to return to the Ranch to care for his son, who was now a disabled veteran, and raise horses on the Ranch again.

WHY THIS DECISION IS IMPORTANT: This is the first published decision of which I am aware which confirms that pursuant to 1021.9, the intent to raise livestock is sufficient to support an award of attorneys fees in a trespass action.

COMMENT: When I represent single family homeowners in urban areas who have suffered trespass damages, I inform them that generally they cannot recover their attorneys fees. The inability to recover attorneys fees often renders a lawsuit untenable. On the other hand, a right to recover attorneys fees under 1021.9 gives the real property owner the right to seek full recovery of any trespass damages. Clearly, raising livestock on your real property from time to time improves the real property owner's legal rights in a trespass lawsuit.


Attorney Homeowner Cannot Recover Money for His Time in the Litigation

John Gorman and Jennifer Cheng ("Homeowners") hired Tassajara Development Corporation ("Contractor") to build a home for them in Los Altos Hills. One of the Homeowners is an attorney and the founder and controlling officer of a law firm ("Attorney-Homeowner"). The Homeowners paid the Contractor approximately $1.5 million to build the home and then sued the Contractor for defective construction. A stipulated judgment in the approximate amount of $2.4 million was entered in favor of the Homeowners and against the Contractor. The Homeowners then requested more than $1.5 million for attorneys fees and costs. The trial judge awarded the Homeowners a little more than $0.5 million for attorneys fees and costs. The Homeowners appealed the award of fees and costs.

THE DECISION: The Court of Appeal reversed the trial judge and sent the case back for further hearings. To assist the trial judge with the further hearings, the Court of Appeal provided an exhaustive summary of the law regarding the recovery of attorneys fees. First, the Court of Appeal pointed out that the Attorney-Homeowner could not recover contractual attorneys fees for his own time. (The Attorney-Homeowner could recover the fees paid by his firm to the firm's other lawyers and paralegals.) Second, the Attorney-Homeowner could not recover his fees for representing the other Homeowner because they had a common interest in recovering damages to their home, which was a joint and indivisible interest. Finally, the Court of Appeal held that the Attorney-Homeowner could not avoid these limitations on contractual attorneys fees by seeking a tort recovery of fees under the doctrine of tort of another. Said doctrine provides that if the tort of another requires you to sue third parties, you may seek damages for loss of time and attorneys fees incurred in defending yourself. The Attorney-Homeowner contended that because of the negligence of the Contractor, the Homeowners were required to sue the subcontractors. Accordingly, the Homeowners contended that all of the fees of the Attorney-Homeowner should be recoverable. The Court of Appeal disagreed, ruling that the tort of another doctrine does not apply when the homeowner sues two or more defendants who jointly damaged the homeowner by their negligence.
WHY THIS DECISION IS IMPORTANT: To truly win a lawsuit you must recover your attorneys’ fees. This case is a great summary of what fees you can and cannot recover.

COMMENT: This is not the first time I have seen a homeowner pay a contractor $1.5 million to build a home and then sue for $2.5 million in damages for defective construction. These homeowners then brag to all their friends how they got the house for nothing, causing their friends to do the same thing. There are two types of contractors in the San Francisco Bay Area: those who have been sued and those who are going to get sued.


Court Must Allow Cross-Complaints for Equitable Indemnity

Karen Park (“Buyer”) purchased a home at 5 Oak Street in Berkeley (“Home”). The Buyer’s real estate broker was Paragon Real Estate Group of San Francisco (“Selling Broker”) and the listing broker was Peter Hansen & Co. (“Listing Broker”). After the close of escrow, the owners of the property adjacent to the Home sued the Buyer, claiming easement rights against the Home. The Buyer then sued the Selling Broker and the Listing Broker for allegedly failing to properly advise her regarding the potential easement claim. The Selling Broker filed a cross-complaint for equitable indemnity against the Listing Broker, seeking an apportionment of fault between the two brokers. The Listing Broker demurred to the cross-complaint, contending that because the Listing Broker and Selling Broker were co-defendants, an allocation of fault would take place at trial so that a cross-complaint was redundant. The trial judge agreed with the Listing Broker and dismissed the Selling Broker’s cross-complaint.

THE DECISION: The Court of Appeal reversed the trial judge and reinstated the cross-complaint for equitable indemnity. While the Court of Appeal acknowledged that at trial the jury could apportion fault between the brokers, the Court of Appeal pointed out that if the Buyer settled with the Listing Broker the morning of trial, the Listing Broker would be dismissed without any apportionment of fault. However, if the Selling Broker has on file a cross-complaint for equitable indemnity, the settling broker cannot be dismissed from the trial until the court conducts a hearing on whether or not the cross-complaint is barred by a good faith settlement.

WHY THIS DECISION IS IMPORTANT: Cross-complaints for equitable indemnity insure that all defendants are heard in the settlement discussions. A settling defendant needs the cooperation of the plaintiff and the other co-defendants in order to get out cleanly.

COMMENT: Many times the non-settling co-defendants will cooperate with one defendant’s settlement because at trial the settling defendant’s payment is a credit against the judgment for the remaining defendants.

Robert J. Bruss (1940–2007)

Robert J. Bruss was a real estate attorney and broker whose nationally syndicated advice columns earned him the nickname of the “Dear Abby of real estate.” During his life, Bob wrote as many as seven columns a week, including the “Real Estate Mailbag,” question and answer feature that was carried in more than 175 newspapers nationwide, including the Washington Post, the Los Angeles Times, and the New York Post. In addition to his columns, Bob Bruss produced two monthly newsletters, including this California Real Estate Law Newsletter. His book, “The Smart Investor’s Guide to Real Estate” (1981), has appeared in multiple editions.

In addition to his writing and an active career in real estate, Bob was an associate professor of real estate at College of San Mateo for 28 years. Following his death in 2007, publication of the Real Estate Law Newsletter was carried on by his estate and then transferred to the San Mateo County Community College District. The Newsletter is written and edited by Harold Justman. Bob’s longtime friend and personal real estate attorney of more than 25 years, who contributes his time to this project as a tribute to Bob’s work. Harold is a graduate of Stanford University and a colleague of Bob’s at Hastings’s Law School; he continues to teach the Legal Aspects of Real Estate Class, which he taught in partnership with Bob for many years, at College of San Mateo. The newsletter is published by the San Mateo County Community College District; proceeds benefit the Home Savings Incentive Fund for faculty and staff of the College District.