Dear Friend of Bob Bruss:

It is a melancholy fact that valuable real estate attracts nuisance lawsuits. In the Cadam case, a trial judge threw out a million dollar jury verdict ruling that an HOA was not liable for a trivial defect in a sidewalk. In the Lewis Operating case, a summary judgment was awarded to a landlord ruling that a Release of Liability was enforceable as to the operation of a gym in the apartment project. In the Gravelin case, the court held that an independent contractor who fell off a roof could not sue the homeowner. Sadly, in the Wallman case, a landlord lost excess insurance coverage by not paying attention to his primary coverage.

Homeowners continue to litigate with their Homeowners Associations ("HOA"). In the Tesoro Del Valle case, the HOA was allowed to reasonably restrict solar energy systems. In the Salehi case, a homeowner who lost in a lawsuit against the HOA was liable for more than $250,000 in attorney fees.

Happy Reading,
Harold Justman

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Landlord Is Not Liable for Trivial Defect in Sidewalk

Barbara Cadam ("Tenant") leased a townhome at 2355 Westbury Way, Santa Maria ("Property") from the Somerset Gardens Townhouse HOA ("HOA"). The Property was managed by Goetz Manderley, a homeowners association management firm ("Property Manager"). The Property had a concrete sidewalk extending from the driveway to the front door. As the Tenant was walking on the concrete sidewalk, the gardener spoke to her and as she turned to look at him, her foot struck a sidewalk separation of seven-eighths inch between two segments of the sidewalk. The Tenant fell and required six surgeries for injuries to her hands, wrists, elbows and right knee. At trial, the jury awarded the Tenant $1,336,197 in damages against the HOA and Property Manager. The HOA and Property Manager made a motion for judgment notwithstanding the verdict ("JNOV"). The trial judge granted the JNOV, ruling that the sidewalk defect was a trivial defect.

THE DECISION: The Court of Appeal affirmed the trial judge's JNOV, holding that a property owner is not negligent for failing to repair a trivial defect in a sidewalk. Moreover, the Court of Appeal stated that a trivial defect in a sidewalk is no less trivial when it exists on a privately owned townhouse development.

WHY THIS DECISION IS IMPORTANT: This decision reminds trial judges that negligence law should create a standard of care which is not dependent on the whim of a jury. Mr. Justice Oliver Wendell Holmes stated that the greatest defect in the law of negligence is the routine submittal of negligence issues to a jury. As the Court of Appeal pointed out in this case, the allegedly defective sidewalk was privately owned by a landlord and the injured plaintiff was a 63 year old female tenant. One can imagine that a jury would be sympathetic to a little old lady who was injured by the condition of the landlord's Property. Both the trial judge and the Court of Appeal removed sympathy from the determination of the issue of negligence.

COMMENT: Holmes advocated that every lawyer should study political economics. As Holmes would have pointed out, a million dollar award in favor of a tenant, against a landlord, will cause the landlord to increase rents. Accordingly, the law needs to consider the economic costs associated with submitting all negligence claims to a jury.


Landlord’s Release Enforceable as to Operation of Gym

John Costahoude ("Tenant") rented an apartment from Lewis Operating Corporation ("Landlord"). The Landlord operated an exercise facility ("Gym") located in the apartment complex. The Tenant's lease provided, in substance, that the Tenant waived all claims against the Landlord arising from the use of the Gym, even if caused by the Landlord's negligence ("Release"). While the Tenant was using a treadmill in the Gym, a ball rolled under the treadmill causing it to buck the Tenant off. The Tenant sued the Landlord for his injuries. The trial court refused to grant the Landlord a summary judgment.

THE DECISION: The Court of Appeal reversed the trial judge and ordered that a judgment be entered in favor of the Landlord and against the Tenant, holding that the Landlord's duty to maintain a rental unit in a habitable condition does not prohibit a Release of Liability relating to the Landlord's duty to maintain amenities at the apartment building. The Court of Appeal pointed out that the law has been consistently enforcing releases in the context of recreational activities (the "No Duty For Sports Doctrine") and that the No Duty For Sports Doctrine has been consistently enforced in stand-alone gyms. Accordingly, the Court of Appeal ruled that a landlord who operates a gym in an apartment building should be treated under the law the same as a stand-alone gym.

WHY THIS DECISION IS IMPORTANT: This is the first decision of which I am aware where a court has held that a landlord may enforce a release consistent with the No Duty For Sports Doctrine.

COMMENT: It is a relief to see a court provide equality under the law to a landlord. Landlords are not popular in our society (I guess they are viewed as part of the 1% and tenants are viewed as part of the 99%). Nonetheless, when a landlord provides a gym to the tenants, they should be treated the same under the law as a non-landlord gym operator. Moreover, any reputable political economist will agree that the likely outcome of imposing liability on a landlord for operating a gym will be an increase in the rent charged to all tenants.

Lewis Operating Corp. v. Superior Court (2011) 200 Cal. App.4th 940
Homeowner Not Liable for Injuries to Independent Contractor

Raymond and Charlotte Coolidge ("Homeowner") contracted with DISH Network to replace an existing satellite dish on the roof of their home in Mendocino County ("Home"). DISH Network hired Linkus Enterprises to do the job. Linkus Enterprises sent Gary Gravelin ("Worker") to do the job. The Worker was either an employee of Linkus Enterprises or an independent contractor hired by Linkus Enterprises. The Worker went to the Home with an eight-foot ladder, having left his 24 foot extension ladder behind. The eight-foot ladder was too short to reach the roof of the Home. The Worker found a roof extension between the Home and the Home's carport which served as a rain shelter for anyone going from the carport to the Home. The Worker placed the eight-foot ladder against the roof extension, climbed the ladder and stepped off onto the roof extension. Because the Worker is six feet seven inches tall, weighed 225 pounds and was carrying equipment weighing 46 pounds, the roof extension collapsed. The Worker fell to the ground and suffered a vertebral compression fracture. The Worker sued the Homeowner for his injuries. The trial judge summarily granted a judgment for the Homeowner and against the Worker.

THE DECISION: The Court of Appeal affirmed the trial judge's summary judgment in favor of the Homeowner and against the Worker, holding that the general rule is that an independent contractor or employee of an independent contractor cannot sue a homeowner for injuries sustained at the home. The Court of Appeal also held that an exception to the general rule was inapplicable. The exception provides, in substance, that the homeowner can be liable if the homeowner knew or should have known of a concealed, hazardous condition at the home, the contractor did not know or could not know of the condition and that the homeowner failed to warn the contractor of the condition. The Worker had argued that the roof extension was added without a building permit and therefore was a concealed, hazardous condition. The Court of Appeal concluded that the exception did not apply because the Worker's expert witness could not identify a specific building code violation associated with the roof extension. Significantly, the Court of Appeal reasoned that the lack of a permit by itself was irrelevant.

WHY THIS DECISION IS IMPORTANT: This decision is a wake-up call for homeowners regarding the importance of hiring independent contractors for work around their homes. Homeowners need to know that if they hire an unlicensed contractor to do work on their homes, the law considers that unlicensed contractor to be the homeowners' employee. As a result, the unlicensed contractor can sue the homeowner for injuries caused by the condition of the home. Licensed contractors may cost more but they are worth it for the peace of mind.

COMMENT: The court's conclusion that the lack of a permit for the roof extension was not proof of a dangerous condition was a welcome application of common sense. The court properly focused on the condition of the roof extension and not the permit paperwork for the roof extension.

Landlord Has No Excess Liability Insurance Coverage

In 1994, Barry Wallman, Stan Wallman and Nancy Wallman ("Landlord") owned an apartment building at 1325 Ingraham Street in Los Angeles ("Property"). At that time, the Landlord had a liability insurance policy with Crusader Insurance Company ("Primary Insurer") providing coverage of $500,000 per occurrence for bodily injury arising out of ownership of the Property. Sadly, in 1994 a child fell from a third-story window at the Property and suffered a serious head injury. The Landlord sold the Property in 2001. In 2005, the Landlord obtained an umbrella liability policy from American Guarantee and Liability Insurance Company ("Umbrella Insurer") which provided for excess insurance coverage provided that there was in place a primary insurance policy of $1 million. In 2006, a lawsuit was filed against the Landlord on behalf of the injured child. In 2007, the injured child’s lawsuit was settled for $1 million with the Primary Insurer paying its policy limits of $500,000 and the Landlord paying $500,000. The Landlord then sued the Umbrella Insurer for coverage under its policy. The trial judge summarily entered judgment against the Landlord and in favor of the Umbrella Insurer.

THE DECISION: The Court of Appeal affirmed the summary judgment in favor of the Umbrella Insurer and against the Landlord. The Court of Appeal had several grounds for affirming the summary judgment. Suffice it to say that one of the grounds was that the Umbrella policy coverage only came into play if the loss exceeded $1 million. Inasmuch as the loss was $1 million, the excess insurance coverage was not triggered.

WHY THIS DECISION IS IMPORTANT: This case is a wake-up call to owners of rental properties regarding liability insurance coverage. Rental real property can be a valuable asset, but also an attractive target for a lawsuit. If an attorney obtains a judgment against a property owner, she can then record a judgment lien against the real property. Adequate and appropriate liability insurance is essential to preserving real property assets.

COMMENT: Reading a liability insurance policy can be difficult. But reading the one page declaration page to an insurance policy is a skill which must be learned by real property owners. A real property owner should know if the property is listed as an insured property, the amount of coverage and the policy period. Trust your insurance broker but verify what the declaration page states about your coverage.


HOA Can Reasonably Restrict Solar Energy Systems

Martin and Carolyn Griffin ("Homeowner") purchased a home at 29313 Hacienda Ranch Court ("Property") consisting of a 15,000 square foot lot and home. The Property is in a planned community and is subject to Covenants, Conditions and Restrictions (CC&Rs) which provide for an Architectural Control Committee ("Committee") and creates the Tesoro Del Valle Master Homeowners Association ("HOA"). The Homeowner applied to the Committee for the approval of the installation of 36 roof-mounted solar panels and 22 slope-mounted solar panels. The Committee denied the approval of the 22 slope-mounted solar panels due to soil draining concerns. The Homeowner installed the solar panels despite the Committee’s objection. The HOA sued the Homeowner seeking to force the removal of the 22 slope-mounted solar panels. The case was submitted to a jury during a ten day trial. The jury found that the objection to the slope-mounted solar panels was a reasonable restriction pursuant to the CC&Rs. The trial judge entered a judgment upon the jury verdict ordering the Homeowner to remove the 22 slope-mounted solar panels and awarding the HOA its attorney fees.

THE DECISION: The Court of Appeal affirmed the judgment, holding that Civil Code Section 714 ("714") permits an HOA to impose reasonable restrictions on solar energy systems. Accordingly, the jury’s finding that the HOA’s denial of the Homeowner’s application to install slope-mounted solar panels was reasonable and was consistent with 714.

WHY THIS DECISION IS IMPORTANT: This decision held that the determination of whether or not the restrictions in CC&Rs were reasonable is a question of fact for the jury. This decision will encourage more jury trials in disputes over the reasonableness of restrictions in CC&Rs.

COMMENT: Those real property owners who own homes subject to CC&Rs need to accept that they do not have absolute rights in their homes. An HOA can tell you what you can and cannot do with your home in many ways. Homeowners who fight this legal fact often lose and pay the HOA’s attorney fees.

Homeowner Liable for HOA Attorney Fees

Susan J. Salehi ("Homeowner") was a licensed California attorney in 2004 when she purchased a condominium unit in Surfside III ("Property"), a 309 unit condominium project in Port Hueneme. The Surfside III Condominium Owners Association ("HOA") manages the project and is required by the project's Covenants, Conditions and Restrictions ("CC&Rs") to maintain the common areas. In 2008, the Homeowner sued the HOA claiming, in part, that the HOA had failed to appropriately maintain the common areas. One week prior to the trial of the Homeowner's complaint, the building maintenance expert witness for the Homeowner ("Expert") developed a serious heart condition requiring surgery. Needless to say, the Expert would not be available for trial. The Homeowner dismissed her complaint regarding the alleged violation of the CC&Rs by the HOA. The HOA then filed a motion to recover approximately $250,000 in attorney fees. The trial judge denied the HOA's motion for attorney fees.

THE DECISION: The Court of Appeal reversed the trial judge and ordered that the HOA be awarded its attorney fees. The Court of Appeal held that the HOA was entitled to an award of reasonable attorney fees pursuant to Civil Code Section 1354 which provides, in substance, that in an action to enforce a HOA CC&Rs, the prevailing party shall be awarded reasonable attorney fees and costs. The Court of Appeal reasoned that in determining who is the "prevailing party" under Civil Code Section 1354, a trial judge should evaluate which party prevailed on a practical level. The Court of Appeal explained that the HOA was prepared to try the case on its merits, while the Homeowner was neither prepared to try the case nor prepared to demonstrate to the trial judge that her case had merit. A bald dismissal of the case one week prior to trial could not deprive the HOA of claiming to be the prevailing party.

WHY THIS DECISION IS IMPORTANT: It is rare when a trial judge in a civil action is reversed for abuse of discretion. This decision will help a prevailing party, in a dispute over CC&Rs, convince the trial judge to award attorney fees.

COMMENT: Homeowners who sue their own HOA for breach of the CC&Rs need to remember the old rule that if you shoot at the king you had better kill him. If a homeowner sues an HOA, the homeowner had better win. If the homeowner does not win, he or she will be paying a lot of attorney fees.

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, Bruss 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 was 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.