Dear Friend of Bob Bruss:

The Smith case reminds real estate agents and brokers that trying to help someone for free will only get you sued as a gratuitous agent. In Smith, a loan officer and a lender were sued for negligently acting as a mortgage broker.

The Gould and Avalon cases remind commercial landlords that they are not popular. In Gould, the court held that the landlord had waived the anti-waiver clause in the lease. In the Avalon case, the landlord lost because it put on cost of repairs evidence when diminution in value evidence was required.

In the Capon case, an exception to the Home Equity Sales Contract Act was narrowly construed. On the other hand, the court in the Pacific case held that a contractor's A license rendered him properly licensed for a job that required a C-12 license.

Finally, members of the Real Estate Education Center will enjoy teaching the Bonfigli case to their classes. In that case, the court held that a special power of attorney terminated when the person who held the special power of attorney and the option to buy the property assigned the special power of attorney, but not the option, to a third party.

Happy Reading,
Harold Justman

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Gratuitous Agent Found Liable as Mortgage Broker

Anthony Baden ("Loan Officer") was a loan officer for Home Loan Funding ("Lender"), a residential mortgage lender. In March of 2006, Tonya Smith ("Borrower") contacted the Loan Officer in order to obtain a home equity line of credit. The Loan Officer told her that he would shop around to get her the best loan. After contacting other lenders, the Loan Officer convinced the Borrower to refinance her home with a new first loan from the Lender. After the loan was funded, the Borrower found out that she could have qualified for a loan with a better interest rate with a different lender. The trial judge held that the Loan Officer and the Lender were acting as a mortgage broker as well as a lender. Accordingly, the trial judge found the Loan Officer and the Lender liable for $72,187.17, the discounted difference between the mortgage payments the Borrower will make for 30 years and the mortgage payments which the Borrower could have qualified for with a different lender.

THE DECISION: The Court of Appeal affirmed the trial judge's decision and found that an oral promise to shop for the best loan created an oral brokerage agreement. As a result, the Loan Officer and Lender were liable for breaching their fiduciary duty to obtain the best loan for the Borrower.

WHY THIS DECISION IS IMPORTANT: This case highlights the danger of being a gratuitous agent; that is, someone who tries to be helpful without charging compensation for the help. Most people naively believe that if you provide help for free, you can't get sued. The law is to the contrary. Good Samaritans are sued regularly.

COMMENT: Every year I testify as an expert witness in a jury trial in which a real estate agent who was trying to be helpful and not charging for the help gets sued for not doing a good job of helping. For example, the real estate agent who prepares an offer to buy a home for a buyer and then volunteers to find a loan for the buyer at no charge. Or the real estate agent who shows a buyer a home which is under construction by a contractor and then continues to act as a messenger between the contractor and buyer, even though the buyer doesn't buy the home but instead hires a lawyer to draft a joint venture agreement between the buyer and the contractor. Of course, the real estate agent did not receive a commission but did get sued when the lawyer's joint venture agreement resulted in the buyer being damaged.

What I have learned in my business is that you should get paid for your services. And if you are not getting paid you should not try to help people. There are too many in the world who will sue you for negligent help. On the other hand, if you wish to help people for free you should prepare to be a martyr.

Smith v. Home Loan Funding (2011) 192 Cal.App.4th 1331

Court Holds Landlord Waived Anti-Waiver Clause

Michael Gould ("Landlord") owns a commercial building which he leases to Corinthian Colleges ("Tenant"). On January 1, 2003, the Landlord and Tenant amended the lease to provide that the lease would terminate on November 30, 2009. The lease amendment also gave the Tenant the right to terminate the lease early, on November 30, 2005. To exercise the early termination right, the Tenant had to satisfy four conditions: (1) give written notice; (2) pay $136,500 upon delivery of the written notice; (3) terminate its operations on November 30, 2005; and (4) pay $136,500 on November 30, 2005. The Tenant strictly complied with steps 1, 2, and 3. However, on November 30, 2005 it delivered a check for only $120,057.10 with notice that it was applying $16,442.90 from its security deposit towards the balance of the termination fee. The Landlord kept the monies and sued for a declaration that the lease had not terminated and that the Tenant still owed rent through November 30, 2009. The Landlord supported his position by pointing to paragraph 4.3 of the lease which provides, in relevant part, as follows: "Acceptance of a payment which is less than the amount then due shall not be a waiver of Landlord's right..." (the "Anti-Waiver Clause"). The trial judge ruled in favor of the Tenant and declared the lease terminated.

THE DECISION: The Court of Appeal affirmed the trial judge's holding that the lease had terminated. Specifically, the Court of Appeal found that the Landlord's conduct had waived the Anti-Waiver Clause and the Landlord's acceptance of the partial termination payment had terminated the lease. Failing to find an appropriate legal principle applicable to the Court's holding, the Court of Appeal resorted to citing the colloquialism "too clever by half." Accordingly, the Court of Appeal chastened the Landlord for being too clever by half.
WHY THIS DECISION IS IMPORTANT: This is the first published decision of which I am aware that holds that an anti-waiver provision can be waived.

COMMENT: I think that the Court of Appeal was being too clever by half. And rather than resorting to a colloquialism to support the decision, I wish that the court had been clever enough to look to Shakespeare. Why not emulate Portia and declare that the Landlord can accept the Tenant’s termination of the lease or not; provided, however, that if the Landlord elects to treat the lease in full force and effect, then the Landlord has breached the Tenant’s right to quiet enjoyment by inducing the Tenant to vacate by not returning the partial termination payment. Accordingly, the Landlord’s election to not terminate the lease will result in the Landlord being liable for breach of the covenant of quiet enjoyment.

In any event, the astute reader should learn from this case that landlords are as popular with judges and juries as Shylock.


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**Landlord Can’t Recover Cost of Repairs without Terminating Lease**

Avalon Pacific-Santa Ana L.P. (“Landlord”) leased a parcel of real property to HD Supply Repair and Remodel LLC (“Tenant”) which intended to convert the office space into a retail store for Home Depot. In May of 2007, the Tenant commenced demolition and remodel work at the property. In August of 2007, the Tenant stopped work due to the drop off in demand for home building supplies. Vagrants began camping in the unfinished building. The city of Santa Ana commenced cleaning up the property and billing the Landlord for the costs. In April of 2008, the Landlord sued the Tenant for breach of the lease and waste. Nevertheless, the Tenant continued to pay the rent. At trial, the Landlord presented evidence of the cost to repair the property. The jury found in favor of the Landlord and the trial judge entered a judgment of $2,36 million against the Tenant.

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**THE DECISION:** The Court of Appeals reversed the judgment in favor of the Landlord and ordered entry of a judgment in favor of the Tenant. The Court of Appeals held that cost of repair damages for breach of maintenance and repair covenant in a lease are not recoverable if the lease has not been terminated. Citing, in part, Civil Code Section 1951.2(a) the Court of Appeals reasoned that a landlord must terminate the lease in order to recover cost of repair damages. Regarding the Landlord’s waste action, the Court of Appeals held the measure of damages for waste during the lease term is diminution in value of the Landlord’s reversion interest. Inasmuch as the Landlord failed to introduce evidence of diminution in value and only introduced evidence of cost of repair, the Court of Appeals held that the Landlord could not recover damages at all.

**WHY THIS DECISION IS IMPORTANT:** This case is a great summary of the different measure of damages for breach of a maintenance and repair covenant and waste by a tenant. In the future, landlords may wish to put an evidence of both measures of damages to be safe.

COMMENT: While this Landlord was popular with the jury, it was unpopular with the judges at the Court of Appeals. In my experience, landlords are not popular with the juries or judges; and being popular with both is really a long shot.


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**Home Equity Sales Contract Act Exception Narrowly Construed**

Daniel Capon (“Homeowner”) owned a home on Woodridge Road in Hillsborough, CA (“Property”). In October 2003, a notice of Trustee’s Sale was recorded, setting November 14, 2003 at 1:00 p.m. as the date and time of the foreclosure sale. Shortly before the foreclosure, Sidney Gladney (“Buyer”) approached the Homeowner in order to buy the property. On the morning of the foreclosure sale, the Homeowner agreed to sell the property to the Buyer for $150,000. The Homeowner signed a grant deed to Monopoly Game LLC (“Monopoly”), a company owned by the Buyer which bought and sold residential homes in foreclosure. Monopoly later sold the property for a profit of $306,880.48 (“Profit”). The Homeowner sued the Buyer for
violation of the Home Equity Sales Contract Act, Civil Code Section 1695 et. seq. ("1695"). The Homeowner also sued to quiet title to the property in his name, contending that the deed which he signed was void because it had been altered after he signed it. Specifically, the original deed did not contain a street address or other description of the property and referenced an incorrect parcel number. As a result, a new second page with the correct description of the property was attached to the deed after the Homeowner had signed it. By the time of trial, the Homeowner had reacquired title to the property. The trial judge found in favor of the Homeowner and entered a judgment for the Profit against the Buyer. However, the judge ruled that the Buyer had not violated 1695. Specifically, the trial judge found that the Buyer was exempt from liability under 1695 because the Buyer intended to use the property as a personal residence.

THE DECISION: The Court of Appeal reversed the trial judge’s holding that the Buyer was exempt from 1695. The Court of Appeal reasoned that because 1695 was designed to protect homeowners in foreclosures from overreaching speculators, the exceptions to 1695 should be narrowly construed. Accordingly, the Court of Appeal ruled that the personal residence exception to 1695 requires that the person who acquires title to a home in foreclosure and the person who will reside in the home must be the same person. As a result, when the Buyer had the home deeded to Monopoly he became subject to 1695. That means that the Homeowner can recover his attorney fees from the Buyer.

WHY THIS DECISION IS IMPORTANT: By narrowly construing the personal residence exception to 1695, this decision reinforces the legal protections for homeowners in foreclosures.

COMMENT: Buying homes in foreclosure has always been a risky business plan. It is not an investment strategy for amateurs.


Subcontractor Found To Be Properly Licensed

Bernard Bros. Inc. ("General Contractor") had a contract with the County of Ventura to construct a medical center. The County’s contract required that the contractor excavating the foundation had to have a C-12 contractor’s license. Pacific Cassion & Shoring, Inc. ("Subcontractor") subcontracted with the General Contractor to excavate the site for footings and grade beams. Eventually, the Subcontractor sued the General Contractor for $544,567 for work done pursuant to the subcontract. The trial judge held that the Subcontractor was not duly licensed for the work and entered judgment in favor of the General Contractor and against the Subcontractor.

THE DECISION: The Court of Appeals reversed the trial judge, holding that the Subcontractor’s class A license (“General Engineering Contractor”) duly licensed the Subcontractor for the job and that the Subcontractor’s lack of a C-12 license did not bar it from recovering payment for its services.

WHY THIS DECISION IS IMPORTANT: This decision holds the line against attempts to expand the Draconian effect of California’s contracting laws which bar unlicensed contractors from suing for payments for their work.

COMMENT: The legal opportunity to obtain construction services for free if the work is done by an unlicensed contractor tempts lawyers to see unlicensed contractors at every job site.

Special Power of Attorney Coupled with an Option Terminates Upon Assignment of the Option

Joseph and Helen Bonfigli ("Homeowner") owned six acres at 3945 Sebastopol Road in Santa Rosa which consisted of a back parcel of 4.72 acres with a home on it ("Home Site") and a front parcel on Sebastopol Road ("Road Site"). Alan Strachan is a developer ("Developer") who was developing a large residential and commercial project called Courtside Village ("Project"). In 1996, the Developer, on behalf of Courtside Village L.P., purchased the Home Site for $600,000.

In May 2000, the Developer, on behalf of Courtside Village LLC ("CVLLC"), acquired both an option on the Road Site and a special power of attorney to develop the Road Site. In June of 2000, the Developer caused CVLLC to assign the special power of attorney to the Developer's construction company, Courtside Construction Company LLC ("Construction LLC"). In October of 2002, Construction LLC used the special power of attorney to adjust the lot line for the Road Site and transfer .71 acres of the Road Site to the Developer's project.

When the Homeowner discovered the loss of the .71 acres, she sued for fraud and financial elder abuse. The trial judge ruled that the special power of attorney converted to a general power of attorney when the owner of the option, CVLLC, assigned the special power of attorney to Construction LLC. As a result of that ruling, a jury found in favor of the Developer.

THE DECISION: The Court of Appeal reversed the judgment and sent the case back for a retrial of the fraud and financial elder abuse claims. The Court of Appeal held that when a special power of attorney is coupled with an interest in real property, an option to buy said real property, that said power of attorney terminates when the option to buy is assigned by the holder of the option and power of attorney to another party. That is, a special power of attorney coupled with an interest in real property is only effective when the special power of attorney and the interest in real property are held by the same person.

WHY THIS DECISION IS IMPORTANT: This is the best example I have ever seen of the arcane legal concept of a power coupled with an interest in real property. Those readers who are members of the Real Estate Education Center will want to use this case in their real estate classes.

COMMENT: It is too bad the trial judge didn't pay closer attention to the testimony of the escrow officer who testified that, after the assignment of the option, she would have required a new power of attorney in the name of the new option holder. I have learned much from escrow officers in my real estate law career.

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 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 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.