Dear Friend of Bob Bruss:

Poor documentation in a real estate contract or judgment can result in financial disaster. In the Duncan case, a real estate broker is going to trial because the written confirmation of the agency relationship was ambiguous. In the Portico Management case, a judgment against a trust was unenforceable for failing to name the trustee as a judgment debtor. Creditors will take heart from two bankruptcy cases. The Pioneer Construction case holds that a mechanic's lien can be recorded during a bankruptcy and the Lewow case permits a motion for attorney fees after the bankruptcy. Also, a creditor can enforce a personal guaranty before a foreclosure sale in the Gray 1 case.

Finally, a judge must take evidence in open court in a quiet title action in the Harbor Vista case.

Happy Reading,
Harold Justman

P.S. I will be speaking to the San Francisco Bar Association's Real Estate Section on July 11, 2012 on the subject of “Real Estate Standard of Care Expert Witnesses.” Please contact me at JustmanAssociates@gmail.com if you want more information on this program. I hope to see you there.

To become a new subscriber, mail a check in the amount of $79 payable to San Mateo County Community College District, to: CA Real Estate Law Newsletter, SMCCCD, 3401 CSM Drive, San Mateo, CA 94402-3651. Please include name and address to which the newsletter should be mailed.
**Broker’s Negligent Confirmation of Agency Relationships Leads to Jury Trial**

McCaffrey Development ("Developer") was developing a tract of land call the Treviso Custom Home Development ("Project"). McCaffrey Home Realty ("Broker"), which was affiliated by ownership with the Developer, was marketing the Project. David Duncan ("Buyer") purchased a lot in the Project for the purpose of building a custom home. At the time of the Buyer's purchase, the Project's Covenant, Conditions and Restrictions ("CC&R’s") provided that each home built in the Project must be at least 2,700 square feet in size. The Buyer's purchase agreement provided, in relevant part, as follows: "Agency Confirmation (California Civil Code section 2079.17). MCCAFFREY HOME REALTY IS THE AGENT OF [X] THE SELLER EXCLUSIVELY; OR [X] BOTH THE BUYER AND THE SELLER. IN ITS CAPACITY AS BOTH THE LISTING AGENT AND THE SELLING AGENT, MCCAFFREY HOME REALTY IS ACTING AS THE AGENT OF BOTH THE BUYER AND THE SELLER."

After the Buyer purchased the lot in the Project from the Developer, the Developer amended the CC&R’s to allow homes to be built in the Project with minimum sizes of 1,400 square feet. The Buyer sued the Developer and the Broker for fraud, contending that they misrepresented the Project as a custom home development and concealed that tract homes would be allowed to be built in the Project. The Buyer also contended that the Broker was in a fiduciary relationship with him and that he thought the Broker was acting as his agent. The trial court summarily entered judgment for the Broker and against the Buyer, on the breach of fiduciary duty action, ruling that the contract indicated that the Broker was acting as the agent of the Developer only.

**WHY THIS DECISION IS IMPORTANT:** This decision highlights how easy it is for a buyer in a real estate transaction to claim that a real estate broker was representing her and contend that the broker breached her fiduciary duties. More importantly, the decision highlights to brokers the critical importance of clearly documenting whom the broker is representing. A real estate broker should not inadvertently take on the duty of a fiduciary.

**COMMENT:** As an expert witness on the standard of care of real estate agents and brokers, I have testified in jury trials where a buyer of a real estate, who suffers a loss, seeks to blame a real estate broker claiming that the broker breached her fiduciary duties. Recently, I have testified in jury trials where the buyer claimed that the referring broker is liable for her losses. (A referring broker refers a buyer to another broker who represents the buyer in the transaction.) While the attorneys for buyers argue that a referring broker must perform all of the fiduciary duties that the broker representing the buyer must perform, juries have not seen it that way. The juries before whom I have testified are willing to accept that a referring broker, who receives a small referral fee, is not required to perform all of the fiduciary duties of a real estate broker. That is, you get what you pay for.

Judgment Against Trust Held Unenforceable for Failing to Name Trustees

Portico Management Group, LLC ("Buyer") contracted to buy a 102-unit apartment complex in Carnichael ("Property") from the Harrison Children's Trust ("The Trust"). An irrevocable trust established by Alan Harrison and Wei-Jen Harrison ("Trustees") for their children. The Trustees refused to complete the sale. The Buyer sued the Trustees for breach of contract. Pursuant to the terms of the purchase contract, the case was ordered to binding arbitration. The arbitrator held in favor of the Buyer in the amount of $1,621,453.80. However, the arbitrator ruled that the award should be against The Trust and not the Trustees. The Superior Court judge confirmed the award against The Trust and also declined to enter a judgment against the Trustees. The Buyer did not seek to correct the award on the judgment by appeal.

In the meantime, Kim and Lynn Harrison, the daughters of the Trustees ("Successor Trustees") were appointed successor trustees of The Trust. When the Buyer sought to levy on the judgment, the Successor Trustees objected contending that the judgment against The Trust was unenforceable because a trust is not an entity and cannot be a judgment debtor. The trial judge ruled that the Successor Trustees were not judgment debtors under the arbitration award as confirmed and that the judgment confirming the award against The Trust was unenforceable.

THE DECISION: The Court of Appeal reversed the trial judge’s ruling that the judgment against The Trust was unenforceable. The Court of Appeal reasoned that a trust cannot sue or be sued because it is merely a collection of assets. Moreover, legal title to The Trust assets is held by the Trustees. Accordingly, a claim against trust assets must be brought against the Trustees. The Court of Appeal concluded that the arbitrator had made a mistake and that the judgment confirming the arbitral award was a mistake. But the time to correct the arbitrator’s mistake had passed and the time to appeal the judgment confirming the award had passed. The Court of Appeal ruled that the arbitral award was final and binding even though it was wrong.

WHY THIS DECISION IS IMPORTANT: This case provides a summary of bankruptcy court decisions on the issue of mechanic's liens in California. Real property lawyers in California will no longer need to read bankruptcy cases but can just read this decision.

COMMENT: I find California Court of Appeals decisions easier to read than bankruptcy court decisions. Sometimes they are even more fun to read.

Mechanic's Lien Recorded During Bankruptcy is Enforceable

Oakridge Homes, LLC ("Debtor") hired Pioneer Construction, Inc. ("Contractor") to build homes on 19 lots on Old Stone Way in Stevenson Ranch, Los Angeles ("Property"). In June 2008, the Debtor filed for bankruptcy. On January 29, 2009, the Contractor recorded a mechanic's lien in the amount of $2,669,832.06 ("Mechanic's Lien"). On August 25, 2009, the Property was sold with the permission of the bankruptcy court at a trustee’s sale to Chen Tsou. On November 12, 2009, the Contractor filed a complaint to foreclose its Mechanic's Lien. The trial judge dismissed the complaint, ruling that the Mechanic’s Lien was void because it had been recorded during the bankruptcy and that the complaint was untimely because it was not filed within 90 days of the recordation of the Mechanic’s Lien.

THE DECISION: The Court of Appeal reversed, holding that a mechanic’s lien can be legally recorded during a bankruptcy and that the time to file a complaint to foreclose a mechanic’s lien is tolled during the bankruptcy. Accordingly, the Trustee had 90 days from the trustee’s sale to file the complaint to foreclose the Mechanic’s Lien.

WHY THIS DECISION IS IMPORTANT: This case provides a summary of bankruptcy court decisions on the issue of mechanic’s liens in California. Real property lawyers in California will no longer need to read bankruptcy cases but can just read this decision.

COMMENT: I find California Court of Appeals decisions easier to read than bankruptcy court decisions. Sometimes they are even more fun to read.

Motion for Attorney Fees after Bankruptcy Dismissal Untimely, but Still Granted

Paul Lewow ("Homeowner") sued his homeowners association, Surfside III Condominium Owners’ Association ("HOA") for failure to perform its duties. The Homeowner lost and a notice of judgment was entered in favor of the HOA on February 10, 2010. That same day, the Homeowner filed bankruptcy. Later on July 25, 2010, notice of the dismissal of the bankruptcy was mailed to the HOA. The HOA attorney thought that the HOA’s motion for attorney fees had to be filed within 60 days of the bankruptcy notice. Accordingly, the HOA motion for attorney fees of $292,205.50 was filed on August 26, 2010. The Homeowner opposed the motion for fees, contending that the bankruptcy rules gave the HOA only 30 days to file its motion and that, accordingly, the motion for fees was untimely. The trial judge granted the HOA’s motion for fees in the full amount of the request.

THE DECISION: The Court of Appeal affirmed the trial judge’s award of $292,205.50 for attorney fees in favor of the HOA and against the Homeowner. The Court of Appeal held that the applicable filing deadline was 30 days and that the motion was untimely but that there was good cause to extend the deadline and award the fees. The Court of Appeal reasoned that the issue of the deadline was complex and debatable.

WHY THIS DECISION IS IMPORTANT: Litigants who lose at trial may try to avoid or delay paying attorney fees to the winner by filing bankruptcy. This decision clears up a complex and debatable issue of when the motion for attorney fees must be filed by the winner.

COMMENT: Now that this issue has been cleared up, there may no longer be good cause to grant an untimely motion for fees. A careful attorney should consult an experienced bankruptcy attorney whenever the loser files bankruptcy.


Real Property Guaranty Agreement Held Fully Enforceable

In the summer of 2006, Sheldon Terrace, LLC ("Borrower") obtained a $17.7 million loan to build a real estate project. Sotiris Kolokotronis ("Guarantor") guaranteed the real property loan. By August 2008, the value of the real property had declined drastically. Gray1 CPB, LLC ("Lender") sued the Guarantor for the Borrower's debt. The Guarantor contended that the Lender should first foreclose against the real property pursuant to CCP 726 ("726"), the one form of action rule, and that the Guarantor should then be able to raise CCP 580d ("580d"), the anti-deficiency defense, to any action on the Borrower's debt. The trial judge summarily granted adjudication in favor of the Lender and against the Guarantor, holding that the Guarantor was liable for the Borrower's debt on the guaranty.

THE DECISION: The Court of Appeal affirmed the trial judge, holding that the courts cannot rewrite contracts when the economy suffers a severe downturn. (While the Court of Appeal did not mention the United States Constitution, its decision is consistent with the spirit of Article 1, Section 10 of the United States Constitution which provides, in part, that no state shall impair the obligation of contracts.) Having refused to rewrite the contract, the Court of Appeal then pointed out that the guaranty agreement signed by the Guarantor expressly waived the defenses of 726 and 580d. Accordingly, the Guarantor had no defense to the Lender's action.

WHY THIS DECISION IS IMPORTANT: This decision boldly takes a stand against the populist, emotional plea that debtors should be exonerated from their debts when economic downturns render their promises burdensome. As the Court of Appeal pointed out, the injustices occasioned by the financial crisis or the unethical conduct of those who may have profited from it, are not legal defenses to an action on a contract. (In fact, it was the habit of state politicians to pass debt relief laws in response to populist demands by debtors that caused the addition of Article 1, Section 10 to the United States Constitution.) All judges should remember that when they defend contract rights, they are defending the Constitution which they swore to uphold when they took the bench.

COMMENT: All reputable political economists agree that the rule of law upholds and supports business planning and investment. Absent the rule of law, an economy will underperform.

Defaulded Defendant Entitled to Evidentiary Hearing in Quiet Title Action

An owner of real property leased the ground to Harbor Vista, LLC ("Ground Lessee"), who built the Huntington Beach condominium complex ("Project") on the leased real property. The Ground Lessee then subleased the land under one of the units in the Project to Julie Nugent ("Homeowner") and sold her the unit which was above the subleased land. The Homeowner borrowed the money to buy her unit from Fieldstone Mortgage Company ("Lender") and gave the Lender a deed of trust on her unit. The Homeowner stopped paying ground rent to the Ground Lessee who accordingly evicted her. The Lender foreclosed upon the Homeowner's unit and bought the unit at the foreclosure sale. The Ground Lessee then sued the Lender in a quiet title action, contending that it owned the unit. The Lender failed to answer the quiet title complaint and its default was taken. The Lender then submitted to the judge declarations proving up its claim to title in the unit. The judge, without a hearing in open court, granted a judgment quieting title in the unit to the Lender.

THE DECISION: The Court of Appeal reversed the judgment and sent the case back for a hearing in open court with the Ground Lessee and the Lender in order to take evidence as to each party's claim to title. The Court of Appeal pointed out that CCP 764.010 ("764.010") states as follows: "The court shall not enter judgment by default but shall in all cases require evidence of plaintiff's title and hear such evidence as may be offered respecting the claims of any of the defendants." The Court of Appeal then explained that 764.010 was enacted in 1980 to help real property owners who were having problems obtaining title insurance. The quiet title action is an in rem action which binds all persons whether they have appeared in the action or not. The Court of Appeal held that a hearing in open court in which evidence would be taken would be consistent with an in rem judgment. The Court of Appeal further held that the Ground Lessee could appear at the hearing and introduce evidence despite the default entered against the Ground Lessee.

WHY THIS DECISION IS IMPORTANT: This case disagrees with a 2004 decision, Yeung v. Soos, and I think it is the better reasoned case. I trust that trial judges will provide hearings in open court in quiet title actions as required by this case.

COMMENT: I have often had escrow officers refer clients to me for quiet title actions in order to obtain title insurance. My practice has always been to present my case in open court to a judge with live testimony from my client. The hearing usually takes about ten minutes.

Harbour Vista, LLC. v. HSBC Mortgage Services Inc. (2011) 201 Cal.App.4th 1496
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 Justra, 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 classes at San Mateo Community College District. The Newsletter is distributed to more than 60,000 readers in California monthly.