Dear Friend of Bob Bruss:

Foreclosures continue to create litigation. In the Park case, a title company was found not liable for damages arising from a delay in the foreclosure sale. Also, a title company is not liable if real property is not marketable according to the Dollinger DeAnza case. Our final title case, First Bank, holds that the time of recording, not the time of indexing, determines the priority of liens. Landlords need to read the Kumar case in which the court used future rents to offset past rents due. The good news for landlords is that commercial exculpatory clauses are enforceable according to the Frittelli case. Finally, real property owners are not liable for freak accidents as described in the Gonzalez case.

Happy Reading,
Harold Justman

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Title Company Not Liable for Foreclosure Delay

Won Shil Park (“Seller”) sold real estate property in Fresno, California (“Property”) for $7.3 million, carrying back a note in the amount of $2.45 million secured by a second deed of trust against the property. The First American Title Company (“Title Company”) handled the escrow for the sale and prepared the purchase money note and second deed of trust. In September 2006, the Seller instructed the Title Company to commence foreclosure on the second deed of trust due to the buyer’s failure to pay the second. The Title Company scheduled a foreclosure sale for February 23, 2007. The Title Company was unable to complete the foreclosure in February 2007 because the Title Company had at close of escrow of the sale of the Property deeded the Property to a corporation but had individuals, and not the corporation, sign the deed of trust. That is, the record title holder had not encumbered the Property with a deed of trust.

The Title Company had the deed of trust reform and finally held a trustee’s sale in April 2008. At the foreclosure sale the Seller reacquired title to the Property by a full credit bid of the amount then due on the second note. The Seller sued the Title Company for damages arising from the delay in the foreclosure sale.

The trial judge summarily granted a judgment against the Seller and in favor of the Title Company, ruling that there was no evidence that there was a ready, willing and able buyer for the Property at the foreclosure sale in February of 2007.

THE DECISION: The Court of Appeal affirmed, holding that the Seller had not presented admissible evidence that there was a ready, willing and able buyer who would have purchased the Property but for the delay in the foreclosure resulting from the error in the deed of trust. The Court of Appeal reasoned that the Seller had failed to produce admissible evidence because the Seller had failed to produce any of the following: an executed contract with a buyer, an offer from a potential buyer, a lender’s preapproval letter for a potential buyer, a bank account statement for a potential buyer or a cashier’s check from a potential buyer.

WHY THIS DECISION IS IMPORTANT: As a practical matter, this case precludes a lender from recovering delay damages from a title company when its error causes a delay in a foreclosure sale because the evidentiary requirements will be hard to satisfy. That is, if few buyers will negotiate with a lender to buy real property which the lender does not have title to because the foreclosure sale hasn’t taken place yet.

COMMENT: It would probably be easier to prove that the lender had a buyer for the note conditioned upon a prompt foreclosure sale. I have negotiated the sale of notes to investors while the note holder was foreclosing on the real property.

Park v. First American Title Company (2011) 201 Cal. App.4th 1418

Unmarketability of Real Property Does Not Prove a Claim of Unmarketability of Title under Title Policy

In 1979, the property located at 1601 South DeAnza Boulevard, Cupertino, comprised seven separate parcels (“Property”). In 1984, the then-owner of the Property submitted an application to build an office building on the Property. The City of Cupertino granted a permit to build the office building, on the condition that the seven separate parcels be merged into the Property as one parcel. The office building was built and one of the original parcels (“Lot 7”) was used as an overflow parking lot. In 2004, Dollinger DeAnza Associates (“Buyer”) purchased the Property with the intent of selling Lot 7 for three million dollars to a homebuilder. The Buyer purchased an ALTA title insurance policy from Chicago Title Insurance Company (“Title Company”). The ALTA title insurance policy insured against loss sustained by reason of the unmarketability of title. The Buyer’s sale of Lot 7 to a homebuilder was cancelled when it was discovered that Lot 7 had been merged into the Property. The Title Company denied the Buyer’s claim for damages under the ALTA title policy. In the Buyer’s lawsuit against the Title Company, the trial judge summarily granted judgment for the Title Company.
THE DECISION: The Court of Appeal affirmed, holding that the legal definition of marketable title is separate and distinct from the market value of real property; one can hold marketable title to land while the land is unmarketable. As the Court of Appeal explained, one's title is unmarketable if a third person claims an interest in the real property. Accordingly, government restrictions on the sale or use of real property do not affect the title to real property. Such restrictions do not give a third party an interest in the real property under the law. Accordingly, the Title Company was legally entitled to deny the Buyer's claim under the title policy because the title to the real property was not unmarketable as defined by the title policy and the law.

WHY THIS DECISION IS IMPORTANT: This case is an excellent summary of the separate and distinct nature of the legal concepts of marketable title and marketability of real property.

COMMENT: Experienced real estate developers have often told me that the best way to find out whether property can be used or sold is to talk to the city zoning and planning officials, or better yet, hire a recently retired Director of Planning to investigate the marketability of the real property.


Time of Recording, Not Time of Indexing, Determines Priority of Liens

In August 2008, Kyung Ha Chung (“Borrower”) was approved for a loan with both First Bank and East West Bank with both loans to be secured by the same property in South Gate (“Property”). Each lender delivered its trust deed securing its loan to the recorder’s office on September 4, 2008, before 8:00 AM when the recorder’s office opens for business. Pursuant to the recorder’s business practices, all instruments deposited before 8:00 AM are time-stamped at the same time of 8:00 AM. The instruments are indexed at a later time. The recorder indexed the East West Bank deed of trust first and the First Bank deed of trust second. First Bank then sued, seeking a determination that its deed of trust had priority over East West Bank’s deed of trust. The trial judge ruled that the First Bank deed of trust and the East West Bank deed of trust shared equal priority.

THE DECISION: The Court of Appeal affirmed, holding that recording and indexing are separate functions and that priority is determined by the recording of an instrument. Accordingly, the First Bank deed of trust and the East West Bank deed of trust had equal priority because they were recorded at the same time, 8:00 AM.

WHY THIS DECISION IS IMPORTANT: This is the first decision of which I am aware that a court had to resolve a dispute between two deeds of trust which were recorded at the same time. Those readers who teach real estate law will want to include this case in their classes on recording.

COMMENT: Early in my practice as a real estate attorney, I went to the recorder’s office early in the morning to record an instrument. I discovered that all the instruments delivered by the title companies, and there were stacks of them, were going to be recorded before my one instrument. And all at the same time.

Rent from Replacement Tenant Offsets Lost Rent Claim against Defaulted Tenant

Parmanand Kumar ("Landlord") owned a shopping center at 19251 East Colima Road, Rowland Hills ("Property"). In June 1998, the Landlord leased a store on the Property to Alan Tsung Yu ("Tenant"). In November 2003, the Tenant defaulted on the rent payments. At that time, the lease term was set to end July 14, 2006. The Landlord filed an eviction action and evicted the Tenant. At the time of the eviction there was rent due in the amount of $14,174.86, based upon a monthly rent of $2,730.00. In September 2005, having previously released the Property to one tenant, the Landlord released the Property to a second tenant at a base rent of $4,425.00 per month. After the Tenant’s lease term expired in July 2006, the Landlord sued the Tenant for lost rent under the lease. The trial judge held that the mitigation rents collected from the two tenants, following the eviction, exceeded the Landlord’s lost rent damages under the Tenant’s lease. Accordingly, the trial judge awarded the Landlord nothing, declared the Tenant the prevailing party, and awarded the Tenant attorney’s fees of $35,390.48.

THE DECISION: The Court of Appeal affirmed, holding that the mitigation rents received reduced both the lost rent damages before the eviction, as well as the lost rent damages after the eviction. The Court of Appeal rejected the Landlord’s argument that rents due before the eviction could not be mitigated because the Tenant was in possession.

WHY THIS DECISION IS IMPORTANT: This is the first published decision of which I am aware that holds that the rents collected after a tenant vacates mitigate both the lost rents before the tenant vacates and the lost rents after the tenant vacates.

COMMENT: Representing landlords in litigation is not easy because many judges and juries in a close case will find for the tenant. Years ago, commercial landlords tried to replace the pejorative term “Landlord” with “Owner”. It didn’t catch on with the average person.

Kumar v. Yu (2011) 201 Cal.App.4th 1463

Commercial Landlord’s Exculpatory Clause Is Enforceable

350 North Canon Drive, LP ("Landlord") was the owner of a shopping center in Beverly Hills. In April 2006, Fritelli, Inc. ("Tenant") leased space in the shopping center for a gourmet donut shop. The lease was a standard form agreement styled as a net lease. The lease provided that the Tenant could have the quiet enjoyment of the leased premises ("Quiet Enjoyment"); the Tenant would obtain commercial general liability insurance for itself and the Landlord insuring against bodily injury claims ("Liability Insurance"); the Tenant would release the Landlord from negligence liability for injury to the Tenant’s business, resulting in a loss of income or profit ("Liability Release"); and a specific exemption releasing the Landlord from liability for damage arising from disruption of the Tenant’s business during remodeling of the shopping center ("Remodeling Release"). In September 2008, the Landlord commenced a remodel of the shopping center. The remodel involved erecting scaffolding along the front of the center’s facade and putting up temporary Tenant signage. Of course, the construction work generated noise and dirt. Also, the project was not completed on time. The Tenant sued the Landlord, asserting that the remodel completely destroyed the gourmet donut business. (An economist might point out that the collapse of the financial markets on Wall Street in October of 2008 didn’t help the Tenant’s business either.) The trial judge summarily granted judgment in favor of the Landlord and against the Tenant, ruling that the Remodeling Release barred any action against the Landlord.

THE DECISION: The Court of Appeal affirmed the trial judge, holding that all of the lease provisions, when read as a whole, including the Quiet Enjoyment, Liability Insurance, Liability Release, and Remodeling Release, supported the judgment against the Tenant. The Court of Appeal reasoned that commercial businesses are free to knowingly bargain for a release of liability from damages caused by their commercial conduct.

WHY THIS DECISION IS IMPORTANT: This is the most well-reasoned case that I have read, explaining why landlord exculpatory clauses should be enforceable and are not against public policy.
COMMENT: When I teach contract law, I point out that one of the foundational principles of contract law is that contracting parties should be able to negotiate limitations to their liability for damages. Such limitations encourage commerce. Few businesses would sign contracts with unlimited liability for damages. This is why buyers of real estate like liquidated damages provisions.

Frittelli, Inc. v. 350 North Canon Drive, LP (2011) 202 Cal.App.4th 35

**Court Finds No Duty To Burn Victim**

Tiffany Gonzalez ("Plaintiff") was 17 and driving her Ford Escort at a speed of 25 MPH on a two-lane residential road. Another driver tried to pass her on the right and the Plaintiff veered to her left, crossed the on-coming lane, hit an eight inch curb, jumped the curb, hit a wall and then hit a steel post protecting a gas meter which served 50 mobile homes. The gas meter was more than 11 feet from the street curb. Sadly, the meter broke and a fire ignited the Plaintiff’s car. The Plaintiff was burned over 80% of her body and died the next day after telling her father what had happened. A jury found Southern California Gas Company, the installer of the gas meter ("Gas Company"), negligent in the placement of the gas meter and a judgment of $800,000 was entered against the Gas Company for the wrongful death of the Plaintiff.

**THE DECISION:** The Court of Appeal reversed the jury verdict, holding that the Gas Company owed no duty of care to the plaintiff because it was not reasonably foreseeable that a vehicle going 25 MPH would veer off the street, jump an eight inch curb and then hit a gas meter more than 11 feet from the curb.

**WHY THIS DECISION IS IMPORTANT:** As the Court of Appeal reminded the trial judge that the existence of a legal duty to use reasonable care is a question of law for the judge, not the jury. Trial judges must learn that the duty doctrine is designed to curtail jury awards based upon sympathy.

COMMENT: No jury should be asked to set aside their sympathy in a burn injury case involving a child. The judge needs to keep those cases from a jury where appropriate.

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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.