

BOSSO WILLIAMS

A PROFESSIONAL CORPORATION

LEGAL LINES

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WHAT'S NEW

We provide sound and practical legal advice for the challenges confronting our clients. Our depth of practice and breadth of experience assure our clients of a wide range of high-quality legal representation. We are committed to providing an excellent work product to our clients and to our community.

ROBERT E. BOSSO

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MICHELLE E. ANDERSON

EDWARD L. CHUN

JENNIFER J. GRAY

CHRISTOPHER C. KIRK

STEVEN D. PENROSE

TERESA V. REIN

- We are happy to announce that Jennifer J. Gray is now a shareholder of Bosso Williams. Jennifer leads our family law department and handles a broad spectrum of family law matters, including dissolution and custody. Jennifer has added Collaborative Family Law to her practice, and also offers her services as a mediator for family law disputes.

- We are also pleased to welcome Teresa V. Rein to our firm. Terry is an experienced real estate attorney, who joins attorneys Lloyd R. Williams and Charlene B. Attack, and paralegals Becky Doyle Gilstrom and Kathryn Johnson, in our real estate and land use department.

Terry received her Bachelor of Arts degree in 1979 from University of Arizona, and her law degree from University of Arizona College of Law in 1982. She enjoyed a long legal career in Stanislaus County. She was a deputy county counsel from 1987 through 1991, and thereafter was a contract attorney for the County, working primarily on real estate and major capital projects. She was also the City Attorney for the small town of Escalon.

Terry's most recent project for Stanislaus County was the construction of the Gallo Center for the Arts, a \$40 million performing arts center located in downtown Modesto. The County contributed \$15 million including the land, and a nonprofit corporation funded the balance of the project costs. Terry was involved in the project from its initial concept through substantial completion, which occurred in September 2007.

- To Our Estate Planning Clients: As we go to press, estate tax changes have not yet been enacted, but watch for changes in 2009. Also, the recent declines in real estate and stock values may present interesting opportunities for gifting to family members, and may signal a good time to review your estate plan. Please note that in 2009, the annual gift tax exclusion amount rises to \$13,000 per recipient.

UNDERSTANDING FDIC INSURANCE

In the first nine months of 2008, fourteen federally-insured banks failed, including Washington Mutual Bank, the largest United States bank failure ever. With American financial institutions in crisis, many clients are concerned about the safety of their money. This article is intended to provide some understanding of the protections in place in case your bank fails.

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The FDIC insures the deposits of all federally-chartered and most state-chartered banks. When a bank fails, the regulator transfers the assets to another bank, and the FDIC assumes operations and covers deposits up to the insurance limit set by federal law. The limit was recently raised, temporarily, to \$250,000 per depositor, with IRAs being insured separately from non-retirement accounts. Also, the FDIC has recently announced that it would guarantee, without limit, all non-interest bearing bank deposits through 2009. Brokerage accounts held at FDIC-insured banks and accounts held at credit unions are not FDIC-insured; however, many are insured by other federal agencies.

Separate Accounts When determining FDIC insurance limits, accounts are divided by type (separate, joint, trust). All accounts within each type are then aggregated to determine insurance limits. For example, Andrew's accounts at First Bank are a separate savings account, an interest-bearing business checking account for his sole proprietorship, and a joint interest-bearing checking account with his wife Bonnie. The amounts in the savings and business checking accounts would be added together for determining the amount to which Andrew's accounts are insured; however, his interest in the joint checking account would be considered separately.

Joint Accounts When deposits are held in joint accounts, a person's interests in all joint accounts at a bank are aggregated. If in addition to the account with Bonnie, Andrew has a joint savings account at First Bank with his brother Charles and sister Dina, the value of his 1/2 interest in the account with Bonnie will be added to the value of his 1/3 interest in the account with his siblings. As long as the sum of his interests in these accounts does not exceed \$250,000, Andrew's interests in the joint accounts are fully insured.

Trust Accounts Accounts held in trust for the benefit of another are insured according to two possible measurements, under an interim rule implemented in September 2008. For accounts under \$1,250,000 per owner-settlor, or with five or fewer beneficiaries, the account will be insured up to \$250,000 per beneficiary, without regard to each

beneficiary's interest. For accounts exceeding \$1,250,000 per owner-settlor and naming more than five beneficiaries, each beneficiary's interest in the account will be insured up to \$250,000. For example, Andrew and Bonnie have a trust account naming their children Ed, Fiona, and Gillian, Andrew's sister Dina, Bonnie's niece Helen, and the American Red Cross as beneficiaries. If the account holds less than \$2.5 million, the entire account will be insured, even if Dina, Ed, Fiona, Gillian and Helen get only \$1,000 and the American Red Cross gets \$2,495,000. If the account holds more than \$2,500,000 and the same allocations applied, the interests of the individuals would be fully insured, while the interest of the American Red Cross would only be partly insured. It should be noted that the interim rule is written with reference to the statutory insurance maximum; if Congress permits the insurance limit to return to \$100,000 (currently scheduled for the end of 2009), the threshold will be reduced to \$500,000 per owner-settlor.

Bank Mergers If banks merge, the FDIC will separately insure deposits attributable to each merged bank for six months from the date of merger. After six months, the rules of the previous paragraph apply. Note that a merger will not increase insurance levels if the amount on deposit with a merged bank exceeded insured limits prior to the merger.

Uninsured Amounts If a customer's deposits exceed the insurance limits, the FDIC will issue a receiver's certificate as proof of his claim. As the FDIC liquidates the failed bank's assets, it pays down the claims. Thus, it is possible for a depositor to get back some or all of the uninsured deposits, although it can take several years.

Safe Deposit Boxes The FDIC only insures deposits held by an insured bank, not the contents of safe deposit boxes. The FDIC generally arranges for the bank taking over operations of the failed bank to take physical possession of the bank branches, including the branches where safe deposit boxes are held. If no bank takes over the failed bank's location, the box holder will be instructed by the FDIC regarding removal of the contents.

By Christopher Kirk, Esq.

HOMEOWNERS' ASSOCIATIONS – DUTY TO MAINTAIN COMMON AREA

My neighborhood homeowners' association was having a hard time filling vacant board positions, so I decided (in a moment of weakness) to serve as a volunteer board member. Around the same time I offered to fill the vacancy, the California Court of Appeal, 2nd District, issued its decision in *Ritter & Ritter, Inc. v. the Churchill Condominium Association*, 166 Cal.App.4th 103, 82 Cal.Rptr.3d 389 (2008) in which the court discussed the duty of a board of directors of a homeowners' association ("Association") to maintain its common area. The case reminds us of the importance of staying on top of common area maintenance.

What is Common Area?

The common area of condominiums and subdivisions differ significantly. Common area in a condominium project usually includes the land, the structure, heating and air conditioning systems and utility systems, the roof, hallways and stairs, elevators and amenities such as swimming pools, tennis courts and parking area, exclusive of the owners' individual units.

In a subdivision where owners own their homes and the lots upon which they sit, the common area will often consist of streets (in gated communities), sidewalks, greenbelts, clubhouses, swimming pools, tennis courts, hiking trails, lighting, front gate facilities and perimeter fencing, exclusive of the owners' individual lots.

Common area is sometimes owned by the Association, such as a separate lot for a clubhouse. In other instances, common area is jointly owned by the owners of the Association, such as common area in a condominium building.

The Duty of Care of an Association

The *Ritter* court emphasizes that an Association has the duty to keep common area in a reasonably safe condition. Associations have the burden of reducing or avoiding risk. Liability may arise under several theories, including:

-- *Violation of Laws, Regulations or Codes.* An Association may be liable for its failure to comply with applicable statutes, administrative regulations, or building codes relating to the condition of the property, giving rise to a presumption of negligence.

--*Negligence.* An Association may be liable to a member who suffers injury or damages as a result of alleged negligence of the Association in failing to maintain common area adequately.

--*Breach of Contract.* An Association may be liable for breach of contract when the plaintiff is a member of the Association and the Association fails to comply with maintenance or safety provisions in the Association's governing documents.

--*Fraudulent Misrepresentation.* An Association may be liable for fraudulent misrepresentation arising out of its representations about the safety or condition of its common area.

The Individual Director's Duty of Care – "The Business Judgment Rule"

Generally, individual board members will not be subject to individual liability if the "business judgment rule" is followed. The Court in *Ritter* stated:

"Where a duly constituted community association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a developments common area, courts should defer to the board's authority and presumed expertise."

California also has a statutory "business judgment rule" for incorporated associations which provides that "no cause of action for damages shall arise against any volunteer director ... based upon any alleged failure to discharge the person's duties as a director" of a nonprofit organization if that person: (1) performs the duties of office in good faith; (2) performs the duties of office in a manner believed to be in the best interests of the corporation; and (3) performs the duties of office with such care, including reasonable inquiry, as an ordinary prudent person in a like position would use under similar circumstances (Corporations Code Section 7231.5(a)). The business judgment rule sets up a presumption that directors' decisions are based on sound business judgment. This presumption can be rebutted only by a factual showing of fraud, bad faith or gross overreaching.

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Arbitration & Mediation
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 Land Use & Water Law
 Probate & Trust Administration
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Under California Civil Code Section 1365.7(a), a volunteer officer or volunteer director of an “exclusively residential” nonprofit corporation or unincorporated association created for the purpose of managing an Association shall not be personally liable to any person who suffers injury, death, or property damage as a result of the negligent act or omission of a volunteer officer or volunteer director if all of the following criteria are met: (1) the act or omission was performed within the scope of the officer's or director's association duties; (2) the act or omission was performed in good faith; (3) the act or omission was not willful, wanton, or grossly negligent; (4) the association maintained general liability insurance and directors and officers insurance with limits of at least \$500,000 if the common interest development consists of 100 or fewer separate interests or at least \$1,000,000 if the common interest development consists of more than 100 separate interests.

If the common area is owned jointly by Association members (rather than by the Association), which

is common in condominium projects, Civil Code Section 1365.9 offers civil liability protection to owners/members of the Association if the Association maintains general liability insurance coverage with limits of at least \$2,000,000 if the common interest development consists of 100 or fewer separate interests; and at least \$3,000,000 if the common interest development consists of more than 100 separate interests.

The Importance of Reserves

In addition to imposing regular operating assessments, all residential Associations, regardless of size, are required to impose assessments to pay for common area maintenance. The first step is to prepare a reserve study. At least once every three years, an Association is required to conduct a “reasonably competent and diligent” visual inspection of the accessible areas of the major components that the Association is obligated to repair, replace, restore, or maintain. The study required must at a minimum include: (1) identification of the major components that the Association is obligated to repair, replace, restore, or maintain that have a remaining useful life of less than 30 years; (2) identification of the probable remaining useful life of the components; (3) an estimate of the cost of repair, replacement, restoration, or maintenance of the components; and (4) an estimate of the total annual contribution necessary to defray the cost to repair, replace, restore, or maintain the components, after subtracting total reserve funds as of the date of the study. An Association has the duty to impose regular and special assessments necessary to properly fund its reserves.

Follow-Up for Association Boards of Directors

To help you to stay on top of common area maintenance, we suggest that you (i) review your reserve account and impose appropriate assessments to ensure that funding is in place; (ii) be diligent in following the many requirements of the Davis-Stirling Common Interest Development Act (Civil Code Sections 1350 et seq), and (iii) review your insurance policies so that your Association is adequately protected. The end result may be an increase in your assessments, but in the long run, *Ritter* reminds us that Association boards have no alternative but to be diligent in maintaining their common area.

By Teresa Rein, Esq.